Educational Handouts/Resources

KMK Law Annual Legal Update Seminar
Thursday, December 8, 2022

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2022 KMK Law Legal Update
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OHIO LEGISLATIVE SERVICE COMMISSION

www.lsc.ohio.gov

Office of Research and Drafting

Legislative Budget Office

H.B. 126
134th General Assembly

Final Analysis

Click here for H.B. 126's Fiscal Note

Primary Sponsor: Rep. Merrin

Effective date: July 21, 2022

Mackenzie Damon, Attorney

SUMMARY

- Limits a political subdivision from filing a property tax valuation complaint against property it does not own, unless the property was sold within a certain timeframe and the sale price was at least 10% and $500,000 more than the auditor's current valuation.
- Requires the legislative authority of a political subdivision, before filing any property tax complaint, to pass a resolution authorizing the filing at a public meeting.
- Removes a requirement that school boards receive notice from a county board of revision (BOR) when certain property tax complaints are filed.
- Requires a BOR to dismiss an original complaint filed by a political subdivision within one year after the complaint is filed if the board does not render a decision by then.
- Prohibits a political subdivision that has filed a complaint or counter-complaint from appealing a BOR decision.
- Prohibits a property owner and a political subdivision from entering into a private payment agreement whereby the owner pays the political subdivision to dismiss, not file, or settle a complaint or counter-complaint.

DETAILED ANALYSIS

Limitations on property tax challenges

Filing of property tax complaints

The act imposes new limits on the filing of property tax complaints with a county BOR. Under the act, a political subdivision may file a BOR complaint challenging the tax valuation of property that it does not own only if the property was sold within certain time parameters and the sale price exceeded a certain threshold. In addition, before a political subdivision may file a valuation complaint or any other type of BOR complaint, the legislative authority must first adopt a resolution authorizing the filing.

Under continuing law, the following individuals or entities may initiate a property tax complaint: the property owner, the owner's spouse, or an agent of the owner or spouse; certain long-term tenants; and a school board, a county treasurer or prosecuting attorney, the mayor of a municipal corporation, or the board or legislative authority of a county, township, or municipal corporation. Before the act, there were few limits on the ability of any person or political subdivision to file a complaint with respect to property that the person or political subdivision did not own (except that, if a private citizen files a complaint, the citizen must own property somewhere in the same county or in a taxing district that has territory in that county). The act's new limitations do not apply to complaints that a person or political subdivision file with respect to their own property.

A complaint may challenge a property's value as assessed for tax purposes or its classification as residential/agricultural or commercial/industrial for "H.B. 920" tax reduction purposes, as agricultural property eligible for current agricultural use valuation (CAUV), or as nonbusiness property eligible for the 10% rollback. Complaints also may challenge recoupment charges imposed for conversion of CAUV land to nonagricultural use. Most property tax complaints challenge a property's assessed value.

Complaints are heard before the BOR, which is comprised of the county treasurer, the county auditor, and a county commissioner. Generally, a party may initiate a complaint with respect to a particular parcel only once in each three-year period between the reappraisal and assessment update years (the "interim period"), unless certain events have occurred in the meantime, such as the property having been sold.[1]

Sale requirement

The act requires that, before a political subdivision or other person may file a complaint with respect to property that the political subdivision or person does not own, the property must have been sold in an arm's length transaction in a year preceding the tax year for which the complaint is to be filed. In addition, the sale price must have been at least 10% and $500,000 more than the auditor's current valuation. The $500,000 threshold increases each year for inflation, beginning in tax year 2023.

For example, if a school board wishes to challenge the value of a property for tax year 2022, it may only do so if the property was sold in 2021 or earlier, it has not been sold since, and the auditor's valuation of the property for tax year 2022 is both 10% and $500,000 less than the sale price.[2]

Under continuing law, county auditors use the recent arm's length sale of the property as its fair market tax value, generally when the county undergoes a sexennial property reappraisal or triennial valuation update following the sale.

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[1] R.C. 5715.19 and 4503.06.

[2] R.C. 5715.19(A)(6)(a) and (J).

Approval of complaints

Under the act, before filing a property tax complaint against property it does not own, a legislative authority must, in addition to complying with the sale requirement, first adopt a resolution approving the filing at a public meeting. Similarly, before a mayor may file a complaint, the municipal legislative authority must first adopt such a resolution. The resolution must identify the parcel number and, if available in the county auditor's online records, the parcel's address; the name of an owner; the tax year for which the complaint will be filed; and the basis for the complaint (e.g., valuation, tax classification, CAUV status).

A single resolution must be confined to identifying a single parcel or multiple parcels having the same owner. The legislative authority may adopt one or more of these resolutions by a single vote, provided no other type of resolution addressing a different matter is adopted pursuant to that same vote; i.e., the measure could not be included in a "consent agenda."[3]

Notice of hearing

Before adopting the resolution, the legislative authority must send written notice by certified mail to one of the property owner's last known property tax-mailing address and, if different, to the property's street address. Alternatively, the notice may be sent to the owner by ordinary mail if it is also sent electronically to the owner. The notice must declare the intent of the legislative authority to adopt the resolution and state the proposed date of adoption and the basis for the complaint. The notice must be postmarked or, if electronic, sent at least seven days before the resolution is scheduled to be adopted.[4]

Complaint form

The act requires any property tax complaint form prescribed by a BOR or the Tax Commissioner to include a box that the person filing the form on behalf of a legislative authority or mayor must check to certify that the legislative authority or, in the case of a mayor, the municipal legislative authority, has adopted a resolution authorizing the complaint and properly provided notice of the resolution to the property owner. If the box is not checked, the BOR does not have jurisdiction over, and must dismiss the complaint.[5]

Counter-complaints

The act removes a requirement that school boards receive notice when certain property tax complaints are filed. Previously, if a complaint alleged a change in value of at least $50,000 in fair market value ($17,500 in taxable value), the county auditor was required to provide notice of that complaint to the school board within 30 days after the deadline to file complaints, generally March 31 of the following tax year. The school board could respond by

[3] R.C. 5715.19(A)(6)(b) and (7).

[4] R.C. 5715.19(A)(7).

[5] R.C. 5715.19(A)(7) and (8).

filing a counter-complaint within 30 days after receiving that notice defending the property's assessed value or alleging a different value.

Under the act, school boards will no longer receive notice when any property tax complaint is filed. A school board may still file counter-complaints, however, provided that the same monetary threshold is met, i.e., if the complaint alleges a change in value of at least $50,000 in fair market value. Since school boards will not receive notice of the complaint, the board must file the counter-complaint within 30 days after the original complaint was filed.

The act does not change the notice or filing requirements for property owners. Owners will still receive notice of an original complaint filed by another party, and may file a counter-complaint within 30 days after the owner receives that notice.[6]

Dismissal of BOR cases

Continuing law requires a BOR to render its decision on a property tax complaint within 180 days after (a) the last day that original complaints can be filed or (b) if a counter-complaint is filed, the date of that filing. However, if that deadline is not met, the board may continue the case until it is ultimately decided.

The act modifies this timeline for complaints filed by a legislative authority or a person that does not own the property subject to the complaint. Under the act, the board must dismiss any such complaint that is not decided within one year after it is filed. After that one-year period expires, the board cannot continue the case and loses jurisdiction to hear the complaint.[7]

Appeals of BOR decisions

Under prior law, if a BOR decided against a legislative authority's complaint or counter-complaint, the legislative authority could appeal the decision to the Board of Tax Appeals. The act prohibits the filing of such appeals, but it does not prohibit the legislative authority from becoming the opposing party in an appeal filed by a property owner or another party.[8]

Private payment agreements

The act prohibits a political subdivision from entering into a private payment agreement, i.e., an agreement in which a property owner or tenant, or a person acting on behalf of the owner or tenant, agrees to make one or more payments to the political subdivision in exchange for the legislative authority dismissing a complaint or counter-complaint, refraining from filing a complaint or counter-complaint, or settling a claim.

The act does not prohibit agreements in which the parties agree upon a new valuation for the property that is the subject of a complaint, as long as the new valuation is reflected on

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[6] R.C. 5715.19(B).

[7] R.C. 5715.19(C) and (D).

[8] R.C. 5717.01.

the tax list and the agreement does not require any payments. Nor does it nullify existing agreements entered into before July 21, 2022 – the act's effective date.[9]

Application date

The act's requirements apply to any complaint or counter-complaint filed for tax year 2022 or any later tax year.[10]

HISTORY

Action	Date
Introduced	02-16-21
Reported, H. Ways & Means	03-24-21
Passed House (62-31)	04-15-21
Reported, S. Ways & Means	12-08-21
Passed Senate (24-7)	12-15-21
House refused to concur in Senate amendments (0-90)	03-02-22
Senate requested conference committee	03-16-22
House acceded to request for conference committee	04-04-22
House agreed to conference committee report (61-35)	04-06-22
Senate agreed to conference committee report (24-8)	04-06-22

22-ANHB126EN-134/ks

[9] R.C. 5715.19(I); Section 3(B).

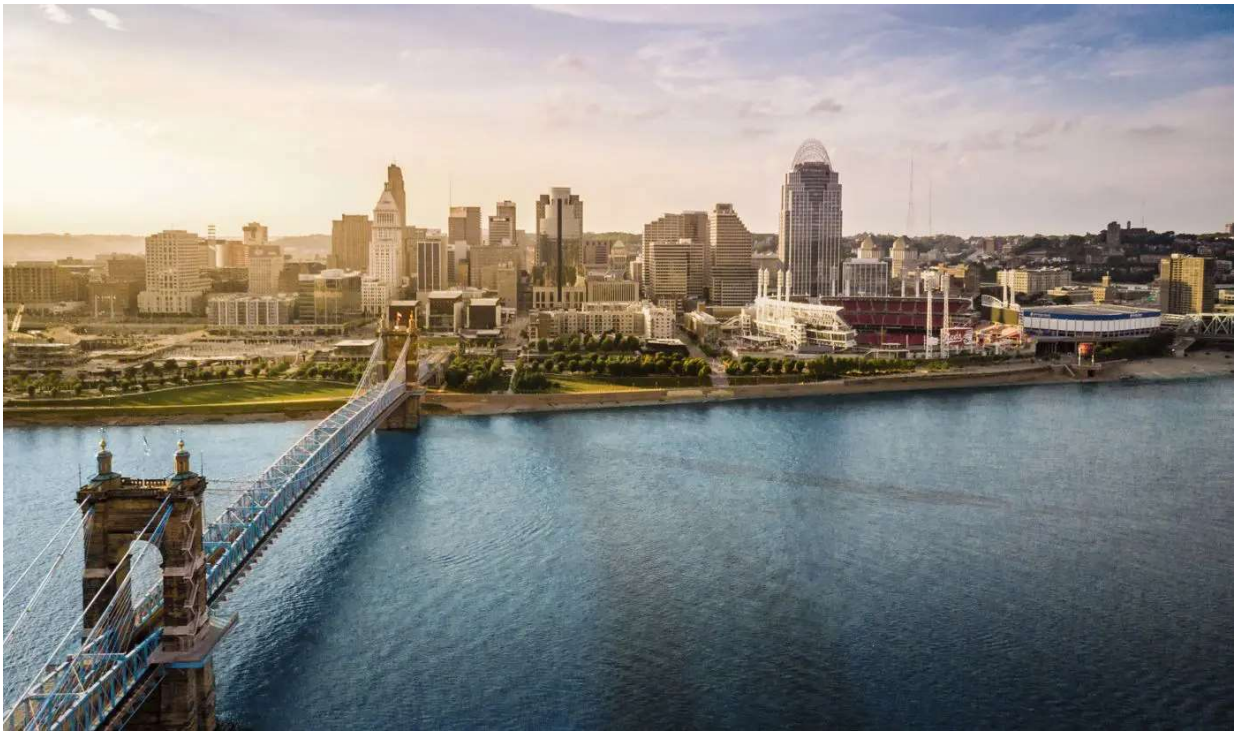
[10] Section 3(A).

← News

NEWS & PRESS RELEASES

Great American Life Announces Growth in Cincinnati

Posted By: REDI Cincinnati on March 28, 2022



CINCINNATI, OH – March 28, 2022 – Great American Life Insurance Company ("Great American Life"), an independent subsidiary of Massachusetts Mutual Life Insurance Company ("MassMutual"), today announces its intent to preserve more than 600 jobs and its plan to create an additional 150 jobs by the end of 2026. Additionally, the company plans to make an $8M facility investment as it builds out office space within the GE Global Operations Center in The Banks in downtown Cincinnati. The State of Ohio, JobsOhio, the City of Cincinnati and REDI Cincinnati provided support for the project. While the State of Ohio's Tax Credit Authority Board approved its support today, Cincinnati City Council must still review and vote on its official approval in the near future.

"Great American Life has a strong history in Ohio and the City of Cincinnati," said **Mark Muething**, President and Chief Operating Officer of Great American Life. "We appreciate the partnership with the State of Ohio, JobsOhio, the City of Cincinnati and REDI Cincinnati as we continue to grow our business in The Queen City, retaining and adding jobs, contributing to the local economy, and helping more people plan for a secure retirement."

Great American Life, a leading provider of annuities, became an independent subsidiary of MassMutual in May 2021 following MassMutual's acquisition of Great American Life and other subsidiaries and affiliated entities from American Financial Group, Inc. After being based in Ohio for nearly 30 years, Great American Life has made the decision to remain and grow in the city of Cincinnati and State of Ohio due in large part to the area's highly skilled workforce.

end of 2026 as the company capitalizes on opportunities under MassMutual's new ownership and continues to grow its business. The company also plans to invest $8M in building costs as it relocates a majority of its employees and operations to the GE Global Operations Center located at 191 Rosa Parks Street as well as a smaller secondary office within the *Enquirer* Building at 312 Elm Street. The company plans to finalize these leases following the City's formal approval of its support.

"The fact that Great American Life is choosing to remain in and expand in Cincinnati further strengthens Ohio's leadership in the financial services sector," said Ohio Governor **Mike DeWine**. "Ohio's ingenuity and global competitiveness are paving the way for companies like Great American Life to write the next chapter in their success stories."

"The news that an industry leader like Great American Life will continue growing in Cincinnati is a testament to Ohio's expertise, innovation, and talent, ensuring the financial services industry continues to thrive here," said **J.P. Nauseef**, JobsOhio president and CEO. "Keeping more than 600 jobs in Cincinnati and adding 150 new jobs is further evidence of Ohio's value proposition for companies looking to invest in long-term growth."

"Our City is committed to ensuring our economic environment attracts diverse young talent to move here and stay," said Cincinnati Mayor **Aftab Pureval**. "We are thrilled to see Great American Life building upon their leadership in our region, and we look forward to continued strong growth through collaboration with the State, JobsOhio and REDI."

"We are grateful to not only retain Great American Life's business in downtown Cincinnati but to also help them grow it here as well," said **Kimm Lauterbach**, president and CEO of REDI Cincinnati. "The Cincinnati region is home to 3,500 businesses and 57,000 employees in the financial services sector. Combining those resources with the affordable cost of doing business here demonstrates our region has the ecosystem in place for financial service companies to thrive. Thank you to the leadership of Great American Life, as well as Governor DeWine, JobsOhio, Cincinnati Mayor Aftab Pureval, the City of Cincinnati and our team at REDI for bringing this project to fruition."

About Great American Life Insurance Company

Great American Life Insurance Company®, a wholly owned subsidiary of MassMutual, offers traditional fixed, fixed-indexed and registered index-linked annuities in the retail, broker-dealer, financial institutions and registered investment advisor markets. Great American Life believes it pays to keep things simple. From products to services, the company strives to make things as easy as possible. It's part of a simple promise to customers: superior service and annuities that are easier to understand.

For more information, visit GAIGannuities.com.

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About REDI Cincinnati

The Regional Economic Development Initiative (REDI) Cincinnati is the first point-of-contact for companies locating or growing in the 16-county region at the heart of southwest Ohio, northern Kentucky, and southeast Indiana. REDI Cincinnati is supported by top business leaders and community partners and staffed by a team of economic development experts who are uniting the Cincinnati region to compete globally.

The future is bright, and we're building it, right now. Join us at REDICincinnati.com.

About JobsOhio

***JobsOhio** is a private nonprofit economic development corporation designed to drive job creation and new capital investment in Ohio through business attraction, retention and expansion. The organization also works to seed talent production in its targeted industries and to attract talent to Ohio through Find Your Ohio. JobsOhio works with six regional partners across Ohio: Dayton Development Coalition, Ohio Southeast Economic Development, One Columbus, REDI Cincinnati, Regional Growth Partnership and Team NEO. Learn more at www.jobsohio.com. Follow us on LinkedIn, Twitter and Facebook.*

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News & Resources

Work From Home - Beyond The Decision

Brandon Simmons
10.06.2022

In today's business world an employee's desire to work from home (WFH) seems to outweigh many historical HR policies. But if you have or will be considering economic incentives for an expansion, approach WFH with caution.

Let's face it, when it comes to managing the work from home surge it's not a one size fits all solution. This new WFH reality could result in sobering consequences for your business, such as clawback, non-compliance, or a reduction in incentives from state and local governments. Company commitments are required (jobs, payroll, capital investment), in exchange for financial incentives, but are all jobs created equal? There are several factors pertaining to WFH employees that you should consider.

In regard to WFH strategies what we know is that solutions not only look different from company to company but state to state and community to community as well. For three years this complex discussion has been at the center of talent retention/attraction and short-term/long-term investment decisions for business and government leaders. Naturally, there continues to be uncertainty regarding this topic by both parties. As a result, business leaders will need to look beyond the operational impact and be aware of the affects to existing and future financial incentive agreements.

The Challenge? Traditionally a company will commit to creating jobs, payroll, and capital investment over a period of time in exchange for financial incentives. To remain compliant the company must hit all of its commitments on schedule. Being deemed non-compliant can expose companies to paying back all or some portion of the incentive benefits they have received from that government entity. Historically economic development organizations have not qualified WFH employees for incentives or counted these jobs toward company commitments.

Tax revenue and disposable income are essential to the sustainability and growth of a community. Reducing operational costs while maintaining flexibility are essential to the sustainability and growth of a business. Understanding a community's vision and strategy as it relates to flexibility for employers regarding WFH will be important. This community strategy will likely serve as a base for all current and future discussions. My objective is not to conclusively solve this challenge, but to offer insight on how your company can be

affected by the WFH revolution **beyond** the internal affects to operations, culture and talent.

Where the Rubber Meets the Road

So, do you know how to interpret your WFH language within your incentive agreement? Are you compliant? Are you certain about what you are committing to? Do economic conditions matter in compliance? These are all questions you should seek answers to.

The pandemic igniting the WFH surge has disrupted all existing incentive agreements. As mentioned earlier, WFH employees traditionally have not qualified for financial incentives. Many existing agreements at local and some state levels are site specific. Meaning to remain compliant with commitments the employee must report physically to the site(s) captured within the agreement. However, some states over the past 2-3 years have amended legislation to accept WFH employees toward company commitments. For example, Ohio modified its existing Job Creation Tax Credit (OJCTC) in 2020 to allow WFH payroll to be eligible for the credit. The OJCTC is a refundable credit measured by a percentage of qualified payroll that is applied to the Commercial Activity Tax (succession to Ohio Corporate Income Tax). But at a local level despite a significant increase in remote work, many jurisdictions, especially urban cores have not disclosed their policies on existing or future agreements.

Mitigate Risk and Avoid Exposure

Many employers have adopted hiring programs regardless of residency but even the most flexible state and local jurisdictions require WFH employees to be residents to qualify for company commitments or to be eligible to receive benefits. Employee withholdings are typically the driver to qualify for incentives and compliance. But, requiring employees to be physically on site, regardless of withholdings, remains inconsistent across the country. Because not all jobs (employees), specifically WFH employees are qualified the same across jurisdictions, businesses must be certain to clearly understand each jurisdiction's policies and rules, prior to committing to metrics or reviewing agreements.

The state of Ohio via the **Ohio Rev. Code Ann. § 122.17 (A)(8)** defines a qualifying WFH employee as *"an employee who is a resident of this state and whose services are supervised from the employer's project location and performed primarily from a residence of the employee located in this state."* This particular qualifying definition speaks to residency, site supervision/reporting, and where time is most allocated. Understanding each component when interpreting legislation is important to reduce company exposure.

Because the increase of remote work aligned with the pandemic, many companies with existing incentives have leaned on language captured in most agreements speaking to performance being impacted by *market conditions*. This language can be subject to interpretation and is typically not tied to a specific duration, but in our experience, this has helped these discussions but only serves as a temporary resolution.

As you can imagine the inconsistency in language and frequency of change around WFH can require much due diligence. The reality is that this will be a moving target that both company and community will eventually figure out. As a resource, our team has much experience across multiple state borders managing this challenge as it continues to evolve.

If you have any questions regarding potential impacts to existing or future agreements please call us at 513.639.3971 or email kmkconsulting@kmklaw.com.

PROFESSIONALS

Brandon Simmons

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COMMISSION ON PROFESSIONALISM

PROFESSIONAL IDEALS

FOR OHIO LAWYERS AND JUDGES

On the Cover:

The *Words of Justice* grace the North Reflecting Pool at the Thomas J. Moyer Ohio Judicial Center. Carved from granite, the words – *Compassion*, *Equity*, *Honesty*, *Honor*, *Integrity*, *Justice*, *Peace*, *Reason*, *Truth*, and *Wisdom* – represent the foundational ideals of the judicial branch and are a reminder of the fundamental principles of justice.

THE SUPREME COURT *of* OHIO

PROFESSIONAL IDEALS
for Ohio Lawyers and Judges

OCTOBER 2021

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INTRODUCTION

The following pages contain A Lawyer's Creed, A Lawyer's Aspirational Ideals and A Judicial Creed, which were adopted by the Supreme Court of Ohio upon recommendation by the Supreme Court Commission on Professionalism. These statements encapsulate the ideals of professionalism for lawyers and judges.

Included in the professionalism ideals for lawyers and judges are integrity, the achievement and maintenance of competence, a commitment to a life of service, and the quest for justice for all. Professionalism requires lawyers and judges to remain mindful that their primary obligations are to the institutions of law and the betterment of society, rather than to the interests of their clients or themselves.

Also included in these materials is the Supreme Court Statement Regarding the Provision of pro bono Legal Services by Ohio Lawyers, which speaks to a lawyer's obligations to ensure equal access to justice and to serve the public good.

Finally, these contents feature Professionalism DOs & DON'Ts, which provide guidelines for professional behavior in various contexts of legal practice Attorneys and judges who adhere to and promote the best practices depicted in the Professionalism DOs & DON'Ts will elevate the level of professionalism in the practice of law.

FROM THE

STATEMENT ON PROFESSIONALISM

. . . As professionals we need to strive to meet lofty goals and ideals in order to achieve the highest standards of a learned profession. To this end, the Court issues A Lawyer's Creed and A Lawyer's Aspirational Ideals, which have been adopted and recommended for the Court's issuance by the Supreme Court Commission on Professionalism. In so doing, it is not the Court's intention to regulate or to provide additional bases for discipline, but rather to facilitate the promotion of professionalism among Ohio's lawyers, judges and legal educators. It is the Court's hope that these individuals, their professional associations, law firms and educational institutions will utilize the creed and the aspirational ideals as guidelines for this purpose.

ISSUED BY THE SUPREME COURT OF OHIO
FEBRUARY. 3, 1997

A LAWYER'S CREED

TO MY CLIENTS, I offer loyalty, confidentiality, competence, diligence and my best judgment. I shall represent you as I should want to be represented and be worthy of your trust. I shall counsel you with respect to alternative methods to resolve disputes. I shall endeavor to achieve your lawful objectives as expeditiously and economically as possible.

TO THE OPPOSING PARTIES AND THEIR COUNSEL, I offer fairness, integrity and civility. I shall not knowingly make misleading or untrue statements of fact or law. I shall endeavor to consult with and cooperate with you in scheduling meetings, depositions and hearings. I shall avoid excessive and abusive discovery. I shall attempt to resolve differences and, if we fail, I shall strive to make our dispute a dignified one.

TO THE COURTS AND OTHER TRIBUNALS, AND TO THOSE WHO ASSIST THEM, I offer respect, candor and courtesy. Where consistent with my client's interests, I shall communicate with opposing counsel in an effort to avoid or resolve litigation. I shall attempt to agree with other counsel on a voluntary exchange of information and on a plan for discovery. I shall do honor to the search for justice.

TO MY COLLEAGUES in the practice of law, I offer concern for your reputation and well-being. I shall extend to you the same courtesy, respect, candor and dignity that I expect to be extended to me.

TO THE PROFESSION, I offer assistance in keeping it a calling in the spirit of public service, and in promoting its understanding and an appreciation for it by the public. I recognize that my actions and demeanor reflect upon our system of justice and our profession, and I shall conduct myself accordingly.

TO THE PUBLIC AND OUR SYSTEM OF JUSTICE, I offer service. I shall devote some of my time and skills to community, governmental and other activities that promote the common good. I shall strive to improve the law and our legal system and to make the law and our legal system available to all.

A LAWYER'S ASPIRATIONAL IDEALS

AS TO CLIENTS, I SHALL ASPIRE:

a) To expeditious and economical achievement of all client objectives.

b) To fully informed client decision-making. I should:

   1) Counsel clients about all forms of dispute resolution
   2) Counsel clients about the value of cooperation as a means toward the productive resolution of disputes
   3) Maintain the sympathetic detachment that permits objective and independent advice to clients
   4) Communicate promptly and clearly with clients, and
   5) Reach clear agreements with clients concerning the nature of the representation.

c) To fair and equitable fee agreements. I should:

   1) Discuss alternative methods of charging fees with all clients
   2) Offer fee arrangements that reflect the true value of the services rendered
   3) Reach agreements respecting fees with clients as early in the relationship as possible
   4) Determine the amount of fees by consideration of many factors and not just time spent, and
   5) Provide written agreements as to all fee arrangements.

d) To comply with the obligations of confidentiality and the avoidance of conflicting loyalties in a manner designed to achieve fidelity to clients.

e) To achieve and maintain a high level of competence in my field or fields of practice.

AS TO OPPOSING PARTIES AND THEIR COUNSEL, I SHALL ASPIRE:

a) To cooperate with opposing counsel in a manner consistent with the competent representation of my client. I should:

   1) Notify opposing counsel in a timely fashion of any canceled appearance
   2) Grant reasonable requests for extensions or scheduling changes, and
   3) Consult with opposing counsel in the scheduling of appearances, meetings and depositions.

b) To treat opposing counsel in a manner consistent with his or her professional obligations and consistent with the dignity of the search for justice. I should:

   1) Not serve motions or pleadings in such a manner or at such a time as to preclude opportunity for a competent response
   2) Be courteous and civil in all communications
   3) Respond promptly to all requests by opposing counsel
   4) Avoid rudeness and other acts of disrespect in all meetings, including depositions and negotiations

5) Prepare documents that accurately reflect the agreement of all parties, and
6) Clearly identify all changes made in documents submitted by opposing counsel for review.

AS TO THE COURTS AND OTHER TRIBUNALS, AND TO THOSE WHO ASSIST THEM, I SHALL ASPIRE:

a) To represent my clients in a manner consistent with the proper functioning of a fair, efficient and humane system of justice. I should:

1) Avoid nonessential litigation and nonessential pleading in litigation
2) Explore the possibilities of settlement of all litigated matters
3) Seek noncoerced agreement between the parties on procedural and discovery matters
4) Avoid all delays not dictated by competent representation of a client
5) Prevent misuses of court time by verifying the availability of key participants for scheduled appearances before the court and by being punctual, and
6) Advise clients about the obligations of civility, courtesy, fairness, cooperation and other proper behavior expected of those who use our system of justice.

b) To model for others the respect due to our courts. I should:

1) Act with complete honesty
2) Know court rules and procedures
3) Give appropriate deference to court rulings
4) Avoid undue familiarity with members of the judiciary
5) Avoid unfounded, unsubstantiated, or unjustified public criticism of members of the judiciary
6) Show respect by attire and demeanor
7) Assist the judiciary in determining the applicable law, and
8) Give recognition to the judiciary's obligations of informed and impartial decision-making.

AS TO MY COLLEAGUES IN THE PRACTICE OF LAW, I SHALL ASPIRE:

a) To recognize and develop a professional interdependence for the benefit of our clients and the legal system

b) To defend you against unjust criticism, and

c) To offer you assistance with your personal and professional needs.

AS TO OUR PROFESSION, I SHALL ASPIRE:

a) To improve the practice of law. I should:

1) Assist in continuing legal education efforts
2) Assist in organized bar activities

3) Assist law schools in the education of our future lawyers, and
4) Assist the judiciary in achieving objectives of A Lawyer's Creed and these aspirational ideals.

b) To promote the understanding of and an appreciation for our profession by the public. I should:

1) Use appropriate opportunities, publicly and privately, to comment upon the roles of lawyers in society and government, as well as in our system of justice, and
2) Conduct myself always with an awareness that my actions and demeanor reflect upon our profession.

c) To devote some of my time and skills to community, governmental and other activities that promote the common good.

AS TO THE PUBLIC AND OUR SYSTEM OF JUSTICE, I SHALL ASPIRE:

a) To consider the effect of my conduct on the image of our system of justice, including the effect of advertising methods.

b) To help provide the pro bono representation that is necessary to make our system of justice available to all.

c) To support organizations that provide pro bono representation to indigent clients.

d) To promote equality for all persons.

e) To improve our laws and legal system, by for example:

1) Serving as a public official
2) Assisting in the education of the public concerning our laws and the legal system
3) Commenting publicly upon our laws
4) Using other appropriate methods of effecting positive change in our laws and the legal system.

STATEMENT REGARDING THE PROVISION OF PRO BONO LEGAL SERVICES BY OHIO LAWYERS

Each day, Ohioans require legal assistance to secure basic needs such as housing, education, employment, health care, and personal and family safety. Many persons of limited means are unable to afford such assistance, and legal aid programs must concentrate limited resources on those matters where the needs are most critical. The result is that many Ohioans who are facing significant legal problems do not have access to affordable legal services. These persons are forced to confront landlord-tenant issues, have questions involving employment rights, or seek protection against domestic violence without the assistance of a legal advocate.

In 1997, this Court issued a *Statement on Professionalism* that recognizes each lawyer's obligation to engage in activities that promote the common good, including the provision of and support for pro bono representation to indigent clients. In 2007, in the *Preamble to the Ohio Rules of Professional Conduct*, the Court reemphasized the importance of this obligation by stating:

> 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 those who because of economic or social barriers cannot afford or secure legal counsel.

Lawyers, law firms, bar associations, and legal services organizations, such as the Ohio Legal Assistance Foundation, have done and continue to do much to address unmet civil legal needs through the organization of, support for, and participation in pro bono legal services programs. Although these programs have increased both in number and scope in recent years, there remains an urgent need for more pro bono services.

This Court strongly encourages each Ohio lawyer to ensure access to justice for all Ohioans by participating in pro bono activities. There are pro bono programs available throughout Ohio that are sponsored by bar associations, legal aid programs, churches and civic associations. Many programs offer a variety of free legal services, while others concentrate on specific legal needs. Lawyers also may choose to participate in programs that focus on the needs of specific individuals such as senior citizens, the disabled, families of military personnel or immigrants.

The website, www.ohiolegalaid.org/pro-bono, contains a complete, searchable listing of pro bono programs and opportunities in Ohio. A lawyer may fulfill this professional commitment by providing legal counsel to charitable organizations that may not be able to afford to pay for legal services or by making a financial contribution to an organization that provides legal services to persons of limited means.

The Court recognizes that many Ohio lawyers honor their professional commitment by regularly providing pro bono legal services or financial support to pro bono programs. Moreover, the Court encourages lawyers to respond to this call by seeking to engage in new or additional pro bono opportunities. To document the efforts and commitment of the legal profession to ensure equal access to justice, the Court, in conjunction with the Ohio Legal Assistance Foundation, will develop a means by which Ohio lawyers may report voluntarily and anonymously their pro bono activities and financial support for legal aid programs.
The information regarding pro bono efforts will not only underscore the commitment of the legal profession to serving the public good but also will serve as a constant reminder to the bar of the importance of pro bono service.

ISSUED BY THE SUPREME COURT OF OHIO
SEPTEMBER 20, 2007

Visit ohiolegalhelp.org for more information.

FROM THE

STATEMENT ON PROFESSIONALISM

. . .In recognition of the unique standards of professionalism required of a judge or a lawyer acting in a judicial capacity, the Court issues A Judicial Creed upon the recommendation of the Supreme Court Commission on Professionalism. It is the Court's goal by adopting this creed to remind every judge and every lawyer acting in a judicial capacity of the high standards expected of each by the public whom they serve.

ISSUED BY THE SUPREME COURT OF OHIO
JULY 9, 2001

A JUDICIAL CREED

For the purpose of publicly stating my beliefs, convictions and aspirations as a member of the judiciary or as a lawyer acting in a judicial capacity in the state of Ohio:

I RE-AFFIRM my oath of office and acknowledge my obligations under the Canons of Judicial Ethics.

I RECOGNIZE my role as a guardian of our system of jurisprudence dedicated to equal justice under law for all persons.

I BELIEVE that my role requires scholarship, diligence, personal integrity and a dedication to the attainment of justice.

I KNOW that I must not only be fair but also give the appearance of being fair.

I RECOGNIZE that the dignity of my office requires the highest level of judicial demeanor.

I WILL treat all persons, including litigants, lawyers, witnesses, jurors, judicial colleagues and court staff with dignity and courtesy and insist that others do likewise.

I WILL strive to conduct my judicial responsibilities and obligations in a timely manner and will be respectful of others' time and schedules.

I WILL aspire every day to make the court I serve a model of justice and truth.

PROFESSIONALISM DOs AND DON'Ts

JUDICIAL PROFESSIONALISM

As the guardians of our legal system, judges are expected to establish and maintain the highest level of professionalism. The way in which judges manage their dockets, interact with counsel, and preside over their courtrooms sets a standard of professionalism for the attorneys who appear before them. Just as significantly, the words and actions of judges also shape the public's perception of the justice system. Being a judge requires diligence, personal integrity, and a dedication to the attainment of justice. With these principles in mind, the Supreme Court of Ohio Commission on Professionalism prepared this list of "DOs and DON'Ts" to guide judges in carrying out their responsibilities. 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 judges. The commission encourages all judges to employ these practices in their daily routines, and in so doing, make lawyers and litigants feel welcome in their courtrooms and assured that disputes will be resolved in an efficient, timely, and just manner.

JUDICIAL PROFESSIONALISM

DO | IN PRETRIAL MATTERS

- DO provide litigants, in advance of an initial pretrial hearing or case management conference, notice of specific procedures that you wish counsel to follow that may differ from those followed in other courtrooms (e.g., regarding voir dire, jury instructions, note taking by or questions from jurors, etc.).
- DO use a case management order with all pertinent deadlines for each case, including specific dates for the completion of fact and expert discovery and the filing of certain motions.
- DO be accessible to parties to resolve discovery disputes, either by telephone conference or court hearing.
- DO remember that counsels' awareness of your accessibility may have the effect of decreasing a need for your actual involvement or the likelihood of counsel filing motions to compel discovery.
- DO conduct final pretrial conferences yourself to the extent possible. If a conflict in your schedule arises, allow parties the opportunity to reschedule before delegating the responsibility to a staff attorney. Remember that the presence of the judge at the final pretrial conference often helps facilitate a settlement.

DO | IN SCHEDULING

- DO freely grant a motion to extend case deadlines if the extension will not adversely affect any date previously set or will not otherwise prejudice a party.
- DO be aware of attorneys' professional and personal schedules (including vacation time) before setting a court date or denying a timely motion for continuance.
- DO perform a proper triage in managing scheduling conflicts between cases.
- DO weigh the consequences, cost, and additional expenditure of time and resources that are likely to result from cancelling one proceeding and moving forward on another.
- DO tell attorneys that if they want to put something on the record, they will be permitted to do so, subject to the court's determination as to the appropriate time, place, and manner.
- DO treat parties, litigants, and others with respect and dignity and create an environment where all persons are treated fairly and believe that they have been fully heard.
- DO instruct the members of your staff to treat all court visitors with the same respect that they themselves would expect.
- DO be patient and temperate, especially under trying circumstances.

JUDICIAL PROFESSIONALISM

DO | IN CONDUCTING HEARINGS & TRIALS

- DO enforce standards in your courtroom consistent with Professionalism DOs and DON'Ts: Professionalism in the Courtroom and encourage attorneys to follow the other publications of the Supreme Court of Ohio Commission on Professionalism.
- DO take the bench promptly and begin hearings at the scheduled time. Alert parties of any delay or conflict with as much advance notice as possible.
- DO consider making reasonable accommodations for self-represented litigants, such as summarizing the nature of the proceedings and the presentation and admission of evidence, using commonly understood words, instead of legal jargon, briefly explaining the reasoning for rulings, and, where appropriate, referring them to available resources that may assist them.
- DO address all participants formally and consistently in court by using an appropriate title, such as Ms., Mr., Mrs., Counsel, Dr., Rev., etc.
- DO be aware of your mood and take necessary breaks to decompress so that you can render the next decision refreshed.
- DO make decisions after the conclusion of a bench trial in such a manner as will make the litigants feel that their arguments were fully considered.
- DO deliver the decision or sentence in a formal, dignified, and neutral tone.

DO | IN RULING ON MOTIONS

- DO prepare for motion hearings by reading all relevant memoranda of law in advance of the hearing.
- DO listen to and consider each party's position, and provide all parties with adequate opportunities to respond, before ruling.
- DO issue timely rulings once motions become ripe, remembering the collateral expense incurred, as well as the frustration attorneys and parties experience, when rulings are not made in a timely manner.
- DO what you believe to be the right thing and trust that, if it turns out that your ruling was wrong, the error will, in all likelihood, be corrected on review.

JUDICIAL PROFESSIONALISM

DO | IN OTHER ACTIVITIES

- DO bring to a lawyer's attention any instance of the lawyer exhibiting a lack of civility or professionalism.
- DO encourage lawyers to engage in pro bono service.
- DO consider providing law students the opportunity to intern or extern in your court, as well as participating in mentoring programs that guide new lawyers in their transition into practice.
- DO accept criticism, justified or unjustified, even though you may not, or should not, respond.
- DO remember that the public or private functions you attend may affect confidence in the judiciary.
- DO consider teaching at bar association and judicial association CLE functions, mock trials, the Law and Leadership Institute, classroom visits, and other educational activities.
- DO bear in mind that dialogue between the bench and bar promotes a strong legal community and a more effective judicial system and so participate actively in the activities and committees of your state and local bar associations, judicial conferences, and judicial associations.

JUDICIAL PROFESSIONALISM

DON'T

- DON'T hold attorneys or litigants accountable for events beyond their control.
- DON'T chastise, correct, or question attorneys in a demeaning manner, especially in front of their clients or the jury.
- DON'T take an overly familiar tone with any lawyer, litigant, or witness while in court and on the record. Recognize how your interactions may be perceived by adverse counsel, by parties, by jurors, or by spectators.
- DON'T threaten or disclose how you are leaning on a dispositive motion as a means of forcing a settlement.
- DON'T use the contempt power lightly.
- DON'T conduct a hearing, sentence a defendant, or render an important decision in a state of anger or depression.
- DON'T demean or mock a defendant at a criminal sentencing hearing or in any written opinion.
- DON'T permit profanity and expressions of vengeance from attorneys, victims, or witnesses to invade a formal sentencing proceeding.
- DON'T hesitate to ask for post-hearing briefs or proposed findings of fact or conclusions of law if you believe that these post-hearing submittals will be helpful or appropriate.
- DON'T be worried about whether you will be appealed or what a reviewing court may say.
- DON'T disparage any attorney or fellow judge in your private conversations.
- DON'T attend an event if your attendance could cause a reasonable person to question your later impartiality in a pending case.

PROFESSIONALISM DOs AND DON'Ts

WORKING WITH OPPOSING COUNSEL & OTHER LAWYERS

Under "A Lawyer's Creed" issued by the Supreme Court of Ohio in February 1997, Ohio lawyers pledge to offer fairness, integrity, and civility to opposing parties and their counsel. The Supreme Court of Ohio Commission on Professionalism prepared this list of "DOs and DON'Ts" to illustrate some of the ways lawyers can fulfill this pledge in their everyday communication with opposing counsel and other lawyers. In creating this list, it is not the commission's intention to regulate or to provide additional bases for discipline, but rather to facilitate the promotion of professionalism among Ohio's lawyers. By following these practices, lawyers will elevate the level of professionalism in their day-to-day interactions with other lawyers.

WORKING WITH OPPOSING COUNSEL & OTHER LAWYERS

DO

- DO maintain a courteous and cooperative working relationship with opposing counsel and other lawyers.
- DO avoid motions about minor issues that should be worked out informally.
- DO wait 24 hours before deciding to respond to an intemperate, untrue, or exasperating communication from another attorney.
- DO discuss discovery disputes with opposing counsel in person, by phone, or by email before sending a formal letter that stakes out your position.
- DO consult in advance with other attorneys to avoid scheduling conflicts.
- DO cooperate with other attorneys when you have obtained permission of the court to extend deadlines imposed by a court order.
- DO extend professional courtesies regarding procedural formalities and scheduling when your client will not suffer prejudice, DO be fair-minded with respect to requests for stipulations, and DO agree to stipulate to facts that are not in dispute if they will not adversely affect your client.
- DO respond in a timely fashion to communications from opposing counsel and other attorneys.
- DO keep your word.
- DO identify the changes you made from previous drafts when exchanging document drafts.
- DO promptly notify other counsel (and, where appropriate, the court or other persons who are affected) when hearings, depositions, meetings, or conferences must be cancelled or postponed.
- DO conclude a matter with a handshake or an exchange of courteous messages.
- DO require that persons under your supervision conduct themselves with courtesy and civility and that they adhere to these precepts when dealing with other attorneys and their staffs.

DON'T

- DON'T respond in kind when confronted with unprofessional behavior by another attorney.
- DON'T serve papers at a time or in a manner intended to inconvenience or take advantage of opposing counsel, such as late on a Friday afternoon, on the day preceding a holiday, or when you know counsel is absent or ill.
- DON'T be belligerent, insulting, or demeaning in your communications with other attorneys or their staff.
- DON'T use discovery as a means of harassment.
- DON'T publicly disparage another attorney, either during or after a case concludes.

PROFESSIONALISM DOs AND DON'Ts

LEGAL WRITING

A substantial part of the practice of most lawyers is conducted through the written word. Lawyers communicate with other attorneys, courts, and clients through writing. Writings introduce judges to the facts of a case, state the applicable law, and argue for a desired action or resolution to a legal dispute. The most effective legal writing is well-researched, clearly organized, logically sound, and professional in tone and appearance.

The Supreme Court of Ohio Commission on Professionalism has prepared this list of "DOs and DON'Ts" to guide lawyers in their professional writing. These points relate to many facets of attorney writing. 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. The list provides general categories of "DOs and DON'Ts" containing specific recommendations on form and content for specific types of writing.

LEGAL WRITING

DO

DO MAINTAIN PROPER FOCUS

- DO keep your purpose in mind while writing.
- DO tailor your writing to your primary audience, but be aware that others may read what you have written.

DO PROVIDE A CONSISTENT, COHERENT ARGUMENT

- DO research the applicable law thoroughly.
- DO investigate the facts diligently.
- DO plan and organize your writing.
- DO make sure that any legal theory you present is consistent with applicable law.
- DO use persuasive authority.
- DO state clearly what you are requesting in motions and briefs.

DO PRESENT AN HONEST, ACCURATE POSITION

- DO include all relevant facts.
- DO cite the record accurately.
- DO disclose relevant authority, including adverse controlling authority.
- DO update all cited authorities and exclude any reversed or overruled case.

DO ADOPT A CLEAR & PERSUASIVE STYLE

- DO put material facts in context.
- DO write in a professional and dignified manner.
- DO put citations at the end of a sentence.
- DO use pinpoint citations when they would be helpful.

DO PROVIDE APPROPRIATE SIGNPOSTS

- DO consider using headings and summaries.
- DO use transitions between sections that guide the reader from one argument to the next, especially in longer pieces of writing.

DO USE PRECISE ENGLISH GRAMMAR & CITATION FORM

- DO proofread for spelling and grammar.
- DO edit and redraft.
- DO cite cases and authorities accurately.
- DO use Ohio citation form (See Supreme Court of Ohio Writing Manual[1]).
- DO adhere to the applicable court's technical requirements and rules for submitting documents, such as, for example, any restrictions on fonts, margins, and document length.

LEGAL WRITING

DON'T

DON'T MAKE YOUR READER'S JOB MORE DIFFICULT

- Don't use jargon or confusing acronyms.
- Don't use boilerplate without tailoring to your specific argument or case.
- Don't use string citations, unless parenthetical explanations follow.
- Don't use lengthy quotations. Break up quoted language as necessary to simplify points.
- Don't put important information in footnotes.
- Don't overuse nominalizations, i.e., noun forms of verbs (e.g., "indication" instead of "indicate").
- Don't overuse the passive voice.

DON'T MAKE INAPPROPRIATE COMMENTS

- Don't make ad hominem attacks.
- Don't use hyperbole and sarcasm.
- Don't use overly emotional arguments. Rely on logic and reason.

DON'T MISCHARACTERIZE YOUR POSITION

- Don't misrepresent.
- Don't misquote.
- Don't rely on non-record facts.
- Don't plagiarize.
- Don't lie.

PROFESSIONALISM DOs AND DON'Ts

CONDUCT OF PROSECUTORS & DEFENSE ATTORNEYS

The integrity of our criminal justice system depends, in large part, upon the professionalism of the lawyers who prosecute criminal matters on behalf of the state and the defense attorneys who defend the accused. In a criminal matter, the rights of the victim, the protection of the public, and the liberty of the defendant are at stake. Considering the importance of these interests, perhaps nowhere in the practice of law is it more important for attorneys to act with professionalism and to serve our system of justice honorably. The Supreme Court of Ohio Commission on Professionalism, with the assistance of members of the Ohio Prosecuting Attorneys Association and the Ohio Association of Criminal Defense Lawyers, prepared this list of "DOs and DON'Ts" to guide attorneys who practice criminal law. In creating this list, the commission does not intend to regulate or provide additional bases for discipline, but rather to help promote professionalism among Ohio's lawyers.

CONDUCT OF PROSECUTORS & DEFENSE ATTORNEYS

DO | FOR PROSECUTORS

- DO remember your job is not to "win," but to help administer justice.
- DO go forward with a case only if you have a good-faith belief in the guilt of the defendant.
- DO remember that the power of the state is not personal to an individual prosecutor and that you should always use prosecutorial power judiciously, with personal humility.
- DO remain in control of your case and remember that you – not the police, not the investigator, and not the victim – are the person in charge, that your client is the government, and that your ultimate goal is the furtherance of justice.
- DO periodically and regularly review your case from the point of view of the defense. This practice will help you provide exculpatory evidence in a timely fashion.
- DO be realistic about the strengths and weaknesses of your case as it evolves and circumstances change. Be willing to adjust your position as justice requires.
- DO take any doubts about the sufficiency of the evidence supporting the government's case to your supervisor, and document the fact that you took that step.
- DO provide discovery in a timely manner. Have discovery materials ready within a reasonable period of time after request, and promptly inform defense counsel of delays.
- DO respond to communications from the victim and his or her family. Be attentive to their concerns and be mindful that they may not be familiar with court procedures or proceedings.

DON'T | FOR PROSECUTORS

- DON'T forget that your role is the obtainment of justice, which does not always mean a conviction.
- DON'T pursue a charge if the evidence is not there.
- DON'T be rude to defense counsel, who is simply advocating for his or her client.
- DON'T be vindictive or punitive to defendants who are exercising their rights. The mere filing of a motion to suppress, a request for search warrant affidavits, a discovery demand, or the exercise of a defendant's right to trial does not justify adding additional and unnecessary charges or recommending a harsher sentence.

CONDUCT OF PROSECUTORS & DEFENSE ATTORNEYS

DO | FOR DEFENSE ATTORNEYS

- DO advocate for your client, listen to your client, and treat your client with respect.
- DO advocate creatively, but reasonably. Remember that your credibility will affect this client and all of your clients, present and future.
- DO determine the type of fee agreement that is best for your client, i.e., hourly or flat fee. Do enter into a written fee agreement with your client as early as feasible.
- DO explain to your client, as early as feasible, your dual role as an adviser and as defender.
- DO respond to communications from the defendant's family, as long as the information sought is not protected by the attorney-client privilege. Be attentive to their concerns and be mindful that they may not be familiar with court procedures or proceedings.
- DO meet with your client regularly throughout the representation.
- DO contact the prosecutor with questions or concerns about discovery before filing a motion to compel or a motion for a continuance.
- DO promptly file a notice of appearance when taking over a case as retained counsel from appointed counsel, so that appointed counsel can file a motion to withdraw, and ask appointed counsel to provide you with all pleadings and all discovery materials and other case information he or she obtained.
- DO prepare accordingly when appearing in a court in which you haven't appeared before. Check the court's website, or with the court staff, and, if necessary, the judge, in order to familiarize yourself with local rules and the general practices of that court.

DON'T | FOR DEFENSE ATTORNEYS

- DON'T suggest to your client that you can get a certain result or make promises to your client that you may not be able to keep.
- DON'T represent that you have not received discovery materials from the prosecutor when such materials have been made available to you, or represent that you have not received a particular document when you have not asked the prosecutor for it.
- DON'T file motions that are frivolous, or file certain motions only because you believe that such motions are usually filed, or file last-minute motions with respect to matters about which you have long been aware.
- DON'T demean your client in conversations with the prosecutor and/or the judge.
- DON'T enter a plea agreement on your client's behalf without first investigating all areas of potential defense.
- DON'T ask for more time than is needed when requesting a continuance.
- DON'T request last-minute continuances as a trial tactic, especially in cases where witnesses have to travel.

CONDUCT OF PROSECUTORS & DEFENSE ATTORNEYS

DO | FOR PROSECUTORS & DEFENSE ATTORNEYS

- DO review and consistently follow the Supreme Court of Ohio's *Professionalism Dos* and *Don'ts* concerning *Professionalism in the Courtroom and Working with Opposing Counsel and Other Attorneys*.
- DO be respectful of the time and resources of opposing counsel. Where discrepancies in resources exist, be reasonable.
- DO prepare clients, witnesses, family, and friends for the courtroom by explaining the rules and procedures of court to them.
- DO use third parties when possible to interview witnesses. If you must personally interview a witness, especially a witness who is likely to be called to testify for the opposing side, have a third person present during the interview to avoid the possibility of your having to testify at trial as to what the interviewee actually said.
- DO know and follow the rules of evidence and rules of procedure.
- DO treat opposing counsel with the utmost professionalism, even if you disagree.

Prosecutors & defense attorneys are officers of the court and responsible for the administration of justice. Keeping this in mind, they must proceed at all times with the diligence, integrity, and courtesy such an important endeavor requires.

CONDUCT OF PROSECUTORS & DEFENSE ATTORNEYS

DON'T | FOR PROSECUTORS & DEFENSE ATTORNEYS

- DON'T make statements to the court or the media concerning the strength of your case prior to evaluating discovery materials.
- DON'T disparage or personally attack opposing counsel. Don't claim a prosecutor is "persecuting" your client. Don't treat a defense attorney as if he or she committed the alleged crime. Don't consider opposing counsel an enemy when opposing counsel is simply doing his or her respective job.
- DON'T improperly suggest a judge or opposing counsel has a political agenda or bias. Think carefully about how such statements may affect a client, a victim, or the public's perception of the quality of justice.
- DON'T refer to your own personal, political, or religious beliefs during a criminal proceeding.
- DON'T misrepresent your status by telling a witness that you "work with the court so you have to talk to me," allow your investigator to make such a representation, or discourage a witness from talking to opposing counsel.
- DON'T have ex parte communications with the judge about substantive issues or the merits of a case.
- DON'T use inappropriate body language to try to persuade a jury. Examples include: fist pumping after a favorable ruling from the judge, rolling eyes during a defendant's or witness's testimony, uttering audible sighs, putting your head down on a table, nodding your head in agreement, or shaking your head in disagreement during court proceedings.
- DON'T feign ignorance of rules of courts, rulings made by the judge, or of evidence that was disclosed to you. For example, during a trial or hearing, don't refer to evidence that has been excluded in limine or make comments about, or allude in questions to, evidence already held to be inadmissible.
- DON'T hide evidence or fail to disclose witnesses. Don't wait until the morning of trial to disclose witnesses or evidence.
- DON'T make unfair or derogatory references to opposing counsel during opening and closing statements. Trials are about facts and the arguments that fit them. Avoid any arguments or characterizations of opposing counsel's case that are not based on the evidence.
- DON'T allow clients, witnesses, victims, or their family or friends, to act inappropriately in the courtroom or near the courtroom.
- DON'T emulate bad behavior portrayed by lawyers in television shows or movies.

PROFESSIONALISM DOs AND DON'Ts

DEPOSITIONS

If there is one area of the practice of law that consistently gives rise to an inordinate number of complaints about lack of professionalism, it is the area of depositions. Depositions, of course, are an extremely important and valuable component of our adversary system, but, if abused and mishandled, they can engender unnecessary and costly strife that impedes and undercuts the entire process. To help correct this situation, the Commission on Professionalism is publishing the following guidelines, a set of deposition "DOs and DON'Ts." The commission believes that if lawyers follow these guidelines — which are consistent with, and to some extent provide specific amplification of, the Supreme Court's Statements on Professionalism — lawyers will be able to use depositions to advance the legitimate interests of their clients, while, at the same time, treating all participants in the process, including deponents and opposing counsel, with courtesy, civility, and respect. It is not the commission's intention to regulate or to suggest additional bases for discipline, but rather to facilitate the promotion of professionalism among Ohio's lawyers. In short, by adhering to these guidelines, lawyers will be acting as professionals and in the manner that the courts expect.

Therefore, as a lawyer who is scheduling, conducting or attending a deposition follow the do's and dont's on the following pages.

DEPOSITIONS

DO

- DO review the local rules of the jurisdiction where you are practicing before you begin.
- DO cooperate on scheduling. Rather than unilaterally sending out a notice of deposition, call opposing counsel first and cooperate on the selection of the date, time, and place. Then send out a notice reflecting the agreed upon date.
- If, after a deposition has been scheduled, a postponement is requested by the other side, do cooperate in the rescheduling unless the requested postponement would be one of those rare instances that would adversely affect your client's rights.
- DO arrive on time.
- DO be prepared, including having multiple copies of all pertinent documents available in the deposition room, so that the deposition can proceed efficiently and expeditiously.
- DO turn off all electronic devices for receiving calls and messages while the deposition is in progress.
- DO attempt to agree, either before or during the deposition, to a reasonable time limit for the deposition.
- DO treat other counsel and the deponent with courtesy and civility.
- DO go "off record" and confer with opposing counsel, privately and outside the deposition room, if you are having problems with respect to objections, the tone of the questions being asked or the form of the questions.
- DO recess the deposition and call the court for guidance if your off-the-record conversations with opposing counsel are not successful in resolving the "problem."
- If a witness is shown a document, do make sure that you have ample copies to distribute simultaneously to all counsel who are present.
- If a deponent asks to see a document upon which questions are being asked, do provide a copy to the deponent.
- DO inform your client in advance of the deposition (if the client plans to attend) that you will be conducting yourself at the deposition in accordance with these "dos and don'ts."

DEPOSITIONS

DON'T

- DON'T attempt to "beat your opponent to the punch" by scheduling a deposition for a date earlier than the date requested by your opponent for deposition(s) that he or she wants to take.
- DON'T coach the deponent during the deposition when he or she is being questioned by the other side.
- DON'T make speaking objections to questions or make statements that are intended to coach the deponent. Simply say "object" or "objection."
- DON'T make rude and degrading comments to, or ad hominen attacks on, deponent or opposing counsel, either when asking questions or objecting to questions.
- DON'T instruct a witness to refuse to answer a question unless the testimony sought is deemed by you to be privileged, work product, or self-incriminating, or if you believe the examination is being conducted in a manner as to unreasonably annoy or embarrass the deponent.
- DON'T take depositions for the purpose of harassing a witness or in order to burden an opponent with increased litigation expenses.
- DON'T overtly or covertly provide answers to questions asked of the witness.
- DON'T demand conferences or breaks while a question is pending, unless the purpose is to determine whether a privilege should be asserted.
- DON'T engage in conduct that would be inappropriate in the presence of a judge.

PROFESSIONALISM DOs AND DON'Ts

PROFESSIONALISM IN THE COURTROOM

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.

PROFESSIONALISM IN THE COURTROOM

DO

- DO be prepared for your participation in any court conference or proceeding.
- DO wear appropriate courtroom attire when appearing in court. If you are a male attorney, always wear a tie.
- DO advise your clients on how to dress appropriately for any scheduled court appearance.
- DO 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, do call the courtroom so those who are waiting are properly informed.
- DO turn your cell phone and all other electronic devices off or to silent mode before entering a courtroom.
- DO be courteous when addressing the judge and opposing counsel, both in the courtroom and in chambers.
- DO begin any argument on the record before the judge or jury, by saying, "May it please the court."
- DO stand whenever you address the judge in the courtroom.
- DO show all exhibits to opposing counsel before showing the exhibit to a witness.
- DO ask the judge's permission before approaching a witness during trial or before publishing an exhibit to the jury during an examination.
- DO speak clearly and enunciate when addressing the judge or a witness.
- DO agree to stipulate to facts that are not in dispute if they will not adversely affect your client.
- DO respect the private nature of a sidebar conference; avoid making statements or arguments at a level that may be overheard by the jury.
- DO inform the judge in advance of any delays in the scheduling of witnesses.
- DO treat court personnel with the same respect you would show the judge.
- DO be accurate when setting forth pertinent facts and pertinent rules of law.
- DO answer questions from the judge directly and forthrightly.
- DO bring to the judge's attention any possible ethics issues as soon as you become aware of them.
- DO 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, do be circumspect when summarizing testimony that contains profane words.

PROFESSIONALISM IN THE COURTROOM

DON'T

- DON'T make ad hominen attacks on opposing counsel or be sarcastic in either your oral arguments or written briefs.
- DON'T shout when making an objection in a court proceeding.
- DON'T 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.
- DON'T interrupt opposing counsel or the judge, no matter how strongly you disagree with what is being said.
- DON'T argue with the judge aor react negatively after the judge has ruled on an objection or other matter.
- DON'T tell the judge that he or she has committed a reversible error.
- DON'T tell the judge that another judge has ruled a different way without providing a copy of the other judge's written opinion.
- DON'T display anger in the courtroom.
- DON'T make facial objections during testimony or during arguments by opposing counsel.
- DON'T 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.
- DON'T lean or sit on the trial table, jury box, or any other furniture in the courtroom.
- DON'T move freely around the courtroom once a proceeding is underway without obtaining permission from the judge.
- DON'T 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.

PROFESSIONALISM DOs AND DON'Ts

VIDEOCONFERENCING

Although Zoom and other videoconferencing platforms existed before the COVID-19 pandemic, it was not until COVID-19 safety protocols became ubiquitous in courts and law offices that these platforms became everyday parts of most legal practitioners' lives. Because of its many benefits, it appears that videoconferencing is here to stay.

As in other areas, the legal profession's adjustment to videoconferencing was not without occasional missteps. One mistake that gained national attention, was a Texas lawyer who could not remove his cat filter during a hearing.

If a lawyer uses videoconferencing improperly, or without fully understanding the technology of the chosen platform, the lawyer can potentially violate the Ohio Rules of Professional Conduct, damage their reputation, or their employer's reputation, and create claims against the lawyer and/or the employer.

For these reasons, the Commission on Professionalism is publishing the following guidelines, a set of videoconferencing "Dos and Don'ts." The Commission believes that if lawyers follow these guidelines, they will enjoy all of the benefits of videoconferencing without running afoul of professional pitfalls.

It is not the Commission's intention to regulate or suggest additional bases for discipline, but rather to facilitate the promotion of professionalism among Ohio's lawyers. By adhering to these guidelines, lawyers will be acting as professionals.

VIDEOCONFERENCING

DO

- DO ensure that your internet connection is sufficient to allow you to connect to the videoconferencing platform and maintain a stable connection. Consider using a cable and a hardwired-internet connection instead of relying on a wireless-internet connection.
- DO familiarize yourself with the functionalities of the videoconferencing platform. Learn keyboard shortcuts, if any.
- DO connect early to ensure everything is working properly.
- DO a test run before the first time you use a videoconferencing platform for a meeting, court proceeding, client meeting, etc., to minimize the potential for technical difficulties at the time of your conference.
- DO have all materials you need, plan to refer to, or mark as exhibits ready and available.
- DO ensure all materials and exhibits that will be referenced during the videoconference are shared with participants before the conference. For a videoconference deposition, send exhibits to the participants, including the court reporter, at least a day before the deposition.
- DO change your videoconferencing platform's default settings so that you enter conferences with your microphone muted and your camera turned off. Consider adding your headshot to your profile, if possible, so your picture appears if you lose your video feed.
- DO remember to mute your microphone when others are speaking.
- DO treat all participants with courtesy and civility.
- DO mute your microphone, and remind your client to mute their microphone when you take breaks in a deposition or other meeting requiring client consultation. You and your client should physically move to another room, rather than using a virtual breakout room within the videoconferencing platform, before having any conversations during breaks.
- DO consider your audience when choosing attire. Dress as you would if you were having the meeting or proceeding in person. Avoid clothing with stripes or other patterns that cause a strobing effect on camera.
- DO consider using a laptop or desktop computer, rather than a cellphone or tablet, to ensure high-quality video and sound.
- DO position your device so your head and shoulders are visible, you are centered in the frame with some space above your head, and the camera is as close as possible to level with your eyes.
- DO make eye contact with the camera, not the images of the other participants.
- DO be conscious of your body language during a videoconference. Consider standing when addressing a court, tribunal, or witness, if you can do so without causing undue delay or distraction.

VIDEOCONFERENCING

DO, CONTINUED...

- DO notify others in your office that you will be unavailable during the videoconference to avoid interruptions and distractions. Consider putting a sign on the door informing others in the building that a videoconference is underway.
- DO choose a professional background.
- DO set up in a well-lit area. Avoid using a window as your background and having lights directly behind you. Consider positioning a ring light or similar device in front of you to provide better illumination.
- DO be mindful of confidentiality rules. Ensure that no client information is unintentionally visible during your videoconference session.
- DO ensure that your display name on the videoconferencing platform is appropriate and properly identifies you. Avoid using generic names (such as "Participant 1") or your email address. Include both your first and last name if you are before a tribunal or in a meeting with participants who do not know you.
- DO familiarize yourself with any tribunal rules or orders related to appearing before that tribunal through videoconferencing platforms.

VIDEOCONFERENCING

DON'T

- DON'T be late. Punctuality matters and is a show of respect to your fellow attendees and tribunal.
- DON'T choose a location that is uncomfortable or public.
- DON'T forget that any other attendee could be watching you at any time.
- DON'T keep other tabs open on your web browser, use an offensive or inappropriate device wallpaper, or allow your device to give pop-up notifications, if you are sharing your screen.
- DON'T make rude or degrading comments to any participant.
- DON'T wear clothing that matches, or is similar to, the color of your video background.
- DON'T forget to wear appropriate attire on your lower half. Although it is generally not visible, if you must stand or walk away for any reason, other participants can see your entire outfit.
- DON'T be less prepared than you would be for an in-person meeting or appearance before a tribunal.
- DON'T multitask. Your fellow attendees can tell.
- DON'T forget to check your setup – including the functioning of your audio and video, your background, the lighting, the appearance of your attire, and the documents on your desk – before joining the session.
- DON'T be interrupted by avoidable distractions. Before your session, turn off the ringer or alert tone (including any vibration feature) of your desk phone, cellphone, smart watch, and other devices, close programs (such as your email program) that send frequent alerts, and disable any visual-notification feature on your device.
- DON'T presume your audience is always with you. Periodically check to ensure that you and any critical participants (such as the judge) are still connected and streaming to the videoconference, and see if other participants have questions or comments.
- DON'T say something not meant for all participants until you ensure your microphone is muted. Don't leave your camera on if you need to attend to something other than the videoconference during the session, or there is a visible distraction in the room with you.
- DON'T forget to unmute when you are ready to speak or turn your camera on when you rejoin the session.
- DON'T interrupt or speak over other participants.

THE SUPREME COURT OF OHIO COMMISSION ON PROFESSIONALISM

The Supreme Court of Ohio created the Commission on Professionalism in September 1992. As stated in Gov.Bar R. XV, the commission's purpose is to promote professionalism among attorneys admitted to the practice of law in Ohio. The commission aspires to advance the highest standards of integrity and honor among members of the profession.

The 15-member commission includes five judges and two lay members appointed by the Supreme Court, six attorneys appointed by the Ohio Metropolitan Bar Association Consortium and Ohio State Bar Association, and two law school administrators or faculty. The duties of the commission include:

- Monitoring and coordinating professionalism efforts and activities in Ohio courts, bar associations and law schools, and in jurisdictions outside Ohio
- Promoting and sponsoring state and local activities that emphasize and enhance professionalism
- Developing educational materials and other information for use by judicial organizations, bar associations, law schools and other entities
- Assisting in the development of law school orientation programs and curricula, new lawyer training and continuing education programs
- Making recommendations to the Supreme Court, judicial organizations, bar associations, law schools and other entities on methods for enhancing professionalism
- Overseeing and administering a mentoring program for attorneys newly admitted to the practice of law in Ohio.

CURRENT AND PAST CHAIRS
OF THE COMMISSION ON PROFESSIONALISM

Emily C. Samlow, Esq., 2021

Denise Platfoot Lacey, Esq., 2020

Douglas R. Dennis Esq., 2019

Judge Richard L. Collins Jr., 2018

Mark Petrucci Esq., 2017

Judge Jeffrey Hooper, 2016

Mary Cibella Esq., 2015

Michael L. Robinson Esq., 2014

Marvin L. Karp Esq., 2013

Judge Michael P. Donnelly, 2012

Lee E. Belardo Esq., 2011

Professor Stephen R. Lazarus, 2009-2010

Monica A. Sansalone Esq., 2007-2008

Judge David Sunderman, 2005-2006

Barbara G. Watts, 2003-2004

Judge C. Ashley Pike, 2001-2002

John Stith, 1999-2000

Richard Ison, 1997-1998

Kathy Northern, 1995-1996

Richard Ison, 1992-1994

FOR MORE INFORMATION ABOUT
ATTORNEY PROFESSIONALISM OR THE
COMMISSION ON PROFESSIONALISM, CONTACT:

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THE SUPREME COURT *of* OHIO

PUBLISHED BY
The Supreme Court of Ohio
Commission on Professionalism

THE SUPREME COURT *of* OHIO

Guide for Counsel

Presenting Oral Arguments Before the Supreme Court of Ohio

The Supreme Court *of* Ohio

Maureen O'Connor
Chief Justice

Sharon L. Kennedy
Patrick F. Fischer
R. Patrick DeWine
Michael P. Donnelly
Melody J. Stewart
Jennifer Brunner
Justices

Stephanie E. Hess
Interim Administrative Director

This guide for counsel presenting oral argument is prepared by the clerk of the Supreme Court of Ohio, and is designed to assist attorneys preparing cases for argument before the Court. It is not a substitute for the Rules of Practice of the Supreme Court, which are available on the Court's website at www.supremecourt.ohio.gov under the clerk of the court's page.

WHO MAY ARGUE

Any attorney who plans to argue before the Supreme Court of Ohio must be on record as one of the attorneys for the party or amicus curiae that the attorney represents. If counsel is uncertain whether he or she has entered an appearance in the case, then counsel should check with the Office of the Clerk. Pursuant to Rule 2.01 of the Rules of Practice of the Supreme Court of Ohio, only attorneys licensed to practice in Ohio and attorneys admitted pro hac vice are permitted to orally argue a case.

An amicus curiae that has filed a brief in a case is not entitled to participate in oral argument without leave of the Court. Leave may be sought by motion. This should be done well in advance of oral argument, but in any event, no later than seven days before the argument.

Any questions counsel may have about oral argument or about other case-related matters should be directed to the Office of the Clerk at 614.387.9530.

PREPARATION

Counsel may find it helpful to attend a session of Court before the day scheduled for argument, or view a session on the Court's website. Oral arguments are usually held on Tuesdays and Wednesdays throughout the year, though the Court typically schedules fewer arguments during the summer months. The schedule of arguments is posted on the Court's website under the clerk of the court's page.

ARRIVING AT COURT

Between 8:30 and 8:45 a.m. on the day of argument, arguing counsel must report to the deputy clerk at the information desk outside the Courtroom on the first floor of the Thomas J. Moyer Ohio Judicial Center. Court convenes at 9 a.m. Counsel can verify the order of argument at that time, but should bear in mind that some cases conclude earlier than planned.

If counsel is sharing argument time, counsel must advise the deputy clerk about those arrangements and the amount of time that each attorney intends to present argument (see Managing Time, *infra*).

Counsel should advise the deputy clerk of any necessary accommodations that counsel or guests may need (e.g., a wheelchair or a hearing-assistance device). Court personnel can make suitable arrangements to meet the request.

After checking in, counsel may proceed to Room 103 or Room 105 (Attorney Waiting Room), or enter the Courtroom and wait for his or her case to be called. Counsel may use personal computers and other electronic equipment in the waiting room. A live audio feed from the Courtroom allows attorneys in the waiting room to hear Courtroom proceedings as they occur.

COURTROOM ETIQUETTE

Counsel should wear appropriate business attire befitting argument before the Court.

Counsel also should be aware that all arguments at the Court are televised live on the Ohio Channel, a cable channel supported by Ohio's public broadcasting stations, and are streamed live on the Court's website.

Personal computers and other electronic devices, may be used at counsel table. However, counsel should take steps to ensure that those devices do not create any visual or audio disturbance. Cellular phones must be turned off in the Courtroom, and audible alarms on wristwatches should be muted.

When it is time for counsel to present argument, he or she should proceed to counsel table. Counsel for the appellant should sit at the counsel table to the left of the bench as one faces the bench. Counsel for the appellee should sit at the counsel table to the right of the bench as one faces the bench.

Additional attorneys who are affiliated with counsel presenting argument also may be seated at each counsel table. Unless presenting argument, parties may not sit at counsel table.

While seated at counsel table, counsel should remove the visitor identification badge he or she was issued when entering the building. Upon leaving the table at the conclusion of argument, counsel should clip the badge to his or her clothing again until leaving the building.

When the chief justice calls upon counsel, he or she should proceed promptly to the attorney lectern. Once the chief justice has finished speaking, counsel may open with the usual acknowledgement: "Chief Justice _____ and may it please the court …."

Counsel should refer to the members of the Court this way: "Justice _____" or "Your Honor."

Counsel should avoid referring to an opinion of the Court by saying: "In Justice _____'s opinion." It is better to say: "In the Court's opinion, written by Justice _____."

Counsel should avoid emotional oration and loud, impassioned pleas. The Supreme Court is not a jury. A well-reasoned and logical presentation should be the goal of those presenting argument.

PRESENTING AN EFFECTIVE ORAL ARGUMENT

Counsel should assume that all of the justices have read the briefs filed in the case, including amicus curiae briefs. Ordinarily, counsel for the appellant need not recite the facts of the case before beginning argument. The facts are set out in the briefs and they have been read by the justices.

Argument should focus on the legal question or questions that the Court has agreed to review. Counsel should avoid deviating from them and avoid arguing about the facts.

Oral argument is a dynamic exchange of thoughts and information between counsel and the Court. To facilitate this exchange, counsel should refrain from reading argument from a prepared script.

In appropriate cases, counsel may suggest to the Court that bright-line rules should be adopted, and suggest what they should be. In many cases, the Court must craft a sound rule of law that not only will resolve the case, but also will guide judges and others in future cases.

Counsel should avoid using the "lingo" of a business or activity that is not widely understood. The Court may not be familiar with terms that are commonplace in a specialized area of practice. If necessary, counsel should explain unfamiliar terms so that the Court can more easily follow the argument and understand the points being made.

Counsel should be knowledgeable about what is and is not in the record in the case and should be familiar with the procedural history of the case. Justices frequently ask counsel if particular matters are in the record. It is helpful if counsel can provide the volume and page where the information is located.

Counsel should avoid making assertions about issues or facts not in the record. If counsel is asked a question that will require reference to matters not in the record, then counsel should begin his or her answer by so stating, and proceed to respond to the question, unless advised otherwise by the justice.

Unless counsel has complied with Supreme Court Practice Rule 17.08, which allows one to file a list of additional authorities before oral argument, counsel should refer during argument only to cases or other authorities that are listed in the merit or reply briefs.

If counsel quotes from a document verbatim (e.g., a statute or ordinance), he or she should tell the Court where the text of the document can be read (e.g., "page ___ of the appellant's brief").

Counsel should know his or her client's business. Justices may pose questions about how a product is made, how employees are hired, or how a relevant calculation was made. Counsel who anticipates those kinds of questions and comes prepared to answer them in clear and simple terms will help the Court better understand the case.

During argument, counsel should speak into the microphone so that his or her voice will be audible to the justices and to ensure a clear recording.

RESPONDING TO QUESTIONS

Counsel should expect questions from the Court and make every effort to answer the questions directly. If possible, counsel should first respond either "yes" or "no," and then expand on the answer. If counsel does not know the answer, an honest response is appreciated by the Court.

Counsel should avoid interrupting a justice when being addressed by the justice. Counsel should give full time and attention to the justice. If counsel is speaking when a justice interrupts, it is better to stop talking immediately and listen.

If a justice poses a hypothetical question, counsel should respond to the question in light of the facts stated in the question. Counsel should avoid saying, "But those are not the facts in this case." The justice posing the question is aware that there are different facts in the case, but wants and expects an answer to the hypothetical question. Counsel should attempt to answer the question, and, if necessary, may add an additional comment like: "However, the facts in this case are different," or "The facts in the hypothetical question are not the facts in this case."

A justice will often ask counsel: "Do any cases from this Court support your position?" Counsel should be careful to cite only those cases that support his or her position and avoid distorting the meaning of a precedent. If relying on a case that was announced by a plurality opinion, counsel should be sure to mention that there was no opinion of the Court in the case.

MANAGING TIME

Counsel is not required to use all of the time allotted for argument. If counsel has emphasized and clarified the argument in the briefs and answered all of the Court's questions, counsel may consider completing the argument before time has expired.

If counsel is sharing argument time pursuant to Supreme Court Practice Rules 17.05 and 17.06, counsel should inform the Court of the argument plan. For example, appellant's counsel might say: "I will address the Fourth Amendment issue, and counsel for the amicus will argue the Fifth Amendment issues." Counsel also should inform the deputy clerk of the intention to share time when checking in (see Arriving at Court, *supra*).

When counsel is sharing argument time with another attorney who represents a different party on the same side of the case, a red light will activate when the first attorney's time has expired. For example, assume that there are two appellants, and each is represented by a different attorney. If the first attorney on the appellant's side of the case has advised the deputy clerk that he or she will argue for five minutes, the red light will activate after five minutes have expired. That attorney must then sit down.

When the marshal activates the yellow light, counsel should be prepared to stop argument in two minutes. (The yellow light is used only for the last arguing attorney if two attorneys are sharing argument time.) The light signals that just two minutes remain of the *total* time allocated to your side of the case. (For example, if counsel has reserved three minutes for rebuttal, but the light comes on during the initial presentation of appellant's argument, counsel has already used one minute of rebuttal time.)

If counsel for the appellant has planned for rebuttal argument, counsel should tell the chief justice at the start of the argument how many minutes he or she intends to reserve for rebuttal.

During argument, counsel should not ask the chief justice how much time there is remaining. It is counsel's obligation to keep track of time. Time is displayed on a digital clock on the attorney lectern.

When the red light comes on, counsel should end argument immediately and either request the chief justice to permit the completion of a point or sit down. If counsel is answering a question from a justice, he or she may continue answering and respond to any additional questions from that justice or any other justice. In that situation, counsel need not worry that the red light is on. However, counsel should not continue argument after the red light comes on. Once the chief justice announces that "the case is submitted," counsel should promptly and quietly vacate the counsel tables in front of the bar.

The allotted time for argument is consumed quickly, especially when numerous questions come from the Court. Counsel should be prepared to skip over much of his or her planned argument and stress the strongest points.

COURTROOM PARTICIPANTS

The justices enter the Courtroom through an entrance behind the bench. They sit in order of seniority with the chief justice in the middle, and the others alternating from left to right, ending with the most junior justice on the far right as one faces the bench.

The marshal sits at a desk to the left side as one faces the bench. The marshal calls the Court to order, maintains decorum in the Courtroom, and times the oral presentations so that attorneys do not exceed their time limitations.

The attorneys scheduled to argue cases are seated at the tables facing the bench. The arguing attorney will stand behind the lectern immediately in front of the chief justice.

OPINIONS

The court may release an opinion at any time after an argument, though opinions usually are released to the parties, the public, and the news media on Tuesdays, Wednesdays, and Thursdays at 9 a.m.

Opinions typically are available on the Court's website as soon as they are announced.

The Courtroom

6	4	2	1	3	5	7

8

9 10

1. Chief Justice O'Connor
2. Justice Kennedy
3. Justice Fischer
4. Justice DeWine
5. Justice Donnelly
6. Justice Stewart
7. Justice Brunner
8. Attorney Lectern
9. Appellant Counsel Table
10. Appellee Counsel Table

DVM LOQVOR HORA FVGIT

An engraving above the south Courtroom door reminds counsel in Latin that time flies as they speak.

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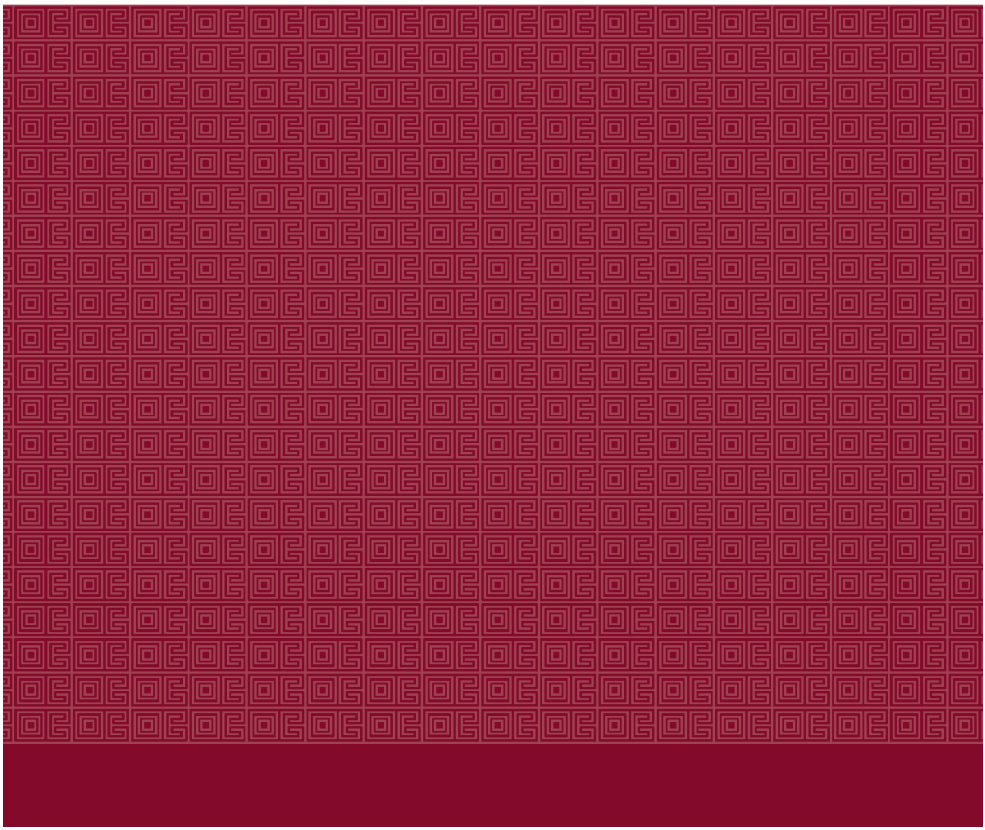

KMK LAW LEGAL UPDATE

Sample Sponsorship Agreements Provisions

Commercial Category / Competitor Definitions

Empower Field (Denver) Naming Rights Agreement

"Exclusive Category" means (i) retirement-related products and services (whether provided or marketed to individuals, employers, plan sponsors, financial professionals or others), including, without limitation, (A) retirement planning and strategy services, retail investment and financial advisory services, wealth management services, rollover and roll-in services, creation and integration of retirement benefit plans, retirement plan administration, retirement calculators and other retirement platform services, and (B) all 401(a), 401 (k), 403(b) and 457(b) plans and other employer-sponsored retirement plans, individual retirement accounts (IRAs), trust and custody services, annuities, donor advised fund services and all other retirement or long-term savings products and accounts, (ii) retail investment management services, including, without limitation, proprietary and non-proprietary investment products, investment management services and investment advice to individuals via taxable or non-taxable (e.g., IRA) accounts, (iii) retail brokerage services, and (iv) any Additional Category for which Empower acquires sponsorship rights in accordance with Section 4(g). For the avoidance of doubt, the term "Exclusive Category" does not include (x) credit cards, debit cards, branded credit cards, gift cards or other stored value cards or any services related thereto, including credit card processing services, (y) retail or commercial banking services, including, without limitation, automated teller or banking machines and services, retail and commercial banking and lending, savings and loans, credit unions, mortgages, personal and commercial loans and home equity lines of credit, certificates of deposit, checking, savings and money market accounts and direct and online banking services (clause (y), collectively, "Banking Services", and (z) health savings accounts, health-related savings products and insurance. The Parties acknowledge and agree that although the Exclusive Category includes wealth management services and long-term savings products and services as described above, any Person that as of the Effective Date possesses, or subsequently acquires, exclusive sponsorship rights from the Broncos Parties with respect to Banking Services may advertise or promote such Person's wealth management services and long-term savings products and accounts in conjunction with its promotion of its Banking Services, subject to compliance with the other provisions of this Agreement (e.g., no advertising or promotional activities with respect to any other products or services that are in the Exclusive Category).

"Category Competitor" means any Person (other than Empower) that either (i) by itself or in combination with any of its Affiliates is known primarily or exclusively as a distributer or provider of products or services in the Exclusive Category or (ii) operates under a brand name (including trademarks, trade names, and service marks that are generally recognized as identifying the brand) that is used by any Person described in the foregoing clause (i). The Parties acknowledge and agree that each of the entities set forth on Schedule 3 hereto is a Category Competitor as of the Effective Date; provided, that the Parties acknowledge that such list is solely for illustrative purposes and not comprehensive or exclusive and may change over time, including if any Person listed on Schedule 3 ceases to be a Category Competitor pursuant to this definition. Notwithstanding anything to the contrary in this definition, the term "Category Competitor" shall not include any separate division, business line, product line or subsidiary of any Person that is a Category Competitor so long as (A) such division, business line, product line or subsidiary (x) is not, and is not generally recognized as, a distributer or provider of products or services in the Exclusive Category and (y) does not operate under any brand name associated with, and is not Known to be owned or controlled by, any Primary Competitor, and (B) if such division, business line, product line or subsidiary displays any signage or conducts any advertising or other promotional activity at the Stadium, elsewhere on the Premises or otherwise in connection with the Team or the Stadium, such signage, advertising or

promotional activity shall clearly and prominently promote specific products or services that are outside the Exclusive Category and may not promote or otherwise reference any products or services that are in the Exclusive Category. If Empower notifies the MFSD that it objects to any such signage, advertising or promotional activity on the grounds that Empower reasonably believes, in the exercise of its good faith business judgment, that such signage, advertising or promotional activity does not sufficiently clearly and prominently provide specific products or services that are outside the Exclusive Category, then the MFSD shall modify such signage, advertising or promotional activity to address Empower's objection.

SCHEDULE 3
CATEGORY COMPETITORS

Retirement Services:
Fidelity
TIAA
Principal
Voya
Vanguard
Alight Solutions
Merrill, a Bank of America company
Transamerica Prudential
ADP
Nationwide (excluding the pre-existing NFL and Broncos Parties' Nationwide Walter Payton Man of the Year promotion, provided that the nature and scope of such promotion does not materially change after the Effective Date)
MassMutual
John Hancock
T Rowe Price

Retail Investment Services and Brokerage:
Fidelity
Charles Schwab
Vanguard
Betterment
Personal Capital
Wealthfront
Merrill, a Bank of America company
TIAA
Morgan Stanley
JP Morgan
UBS
TD Ameritrade
ETrade

Unavailable Benefits / Make Good Provisions

In the event that Team's compliance with any provision or provisions of this Agreement is prohibited, limited or otherwise restricted by applicable law or League Rules, or under the terms of any other agreement, or to the extent that it may become impossible or impracticable for Team to provide one or more benefits hereunder in accordance herewith ("Unavailable Benefits"), Team shall not be required to comply with such provision or provisions of this Agreement or otherwise provide such Unavailable Benefits and such noncompliance/failure shall not be deemed to be a breach of this Agreement by Team. However, with respect to any such Unavailable Benefit, the parties will consult in good faith regarding a substitute benefit having promotional value not materially less than that of the Unavailable Benefit (such value to be determined by good faith negotiation and agreement by the parties).

Should Team, due to public emergency or necessity, legal restrictions, labor disputes, strikes, boycotts, acts of God or similar reasons, including, but not limited to, mechanical breakdowns beyond the control and without the fault of Team, be unable to perform any of its obligations hereunder, it shall not be liable to Sponsor except to the extent of (i) providing suitable "make goods" approved by Sponsor and Team or (ii) allowing a pro rata rate reduction on Sponsor's payments under this Agreement. Sponsor agrees, if for any reason there are any changes to the benefits to be provided it at any time during the Term, then Team, on Sponsor's behalf, will use its best efforts to acquire similar make-good benefits as are mutually agreeable to Sponsor and Team. If Sponsor and Team are unable to agree mutually upon any such make-good benefits, then Team will promptly give Sponsor a pro rata credit (or, if necessary, a pro rata refund of fees already paid) for benefits not already provided hereunder.

Due to circumstances beyond the reasonable control of Team or Sponsor (including, without limitation, due to any Applicable Regulation), it may be impossible or impracticable to provide one or more Benefits (each an "Unavailable Benefit"). With respect to any Unavailable Benefit, Team and Sponsor shall consult regarding a substitute therefor, and following such consultation, Team may provide, in lieu of such Unavailable Benefit, a substitute promotional or other benefit having promotional value not materially less than that of the Unavailable Benefit. By doing so, Team will satisfy all obligations to provide the Unavailable Benefit.

The Parties hereby acknowledge and agree that certain of the Entitlements may become unavailable during periods of the Term, including without limitation, as the result of changes to the League Rules or applicable Laws. Except as otherwise expressly provided in this Agreement, if any individual Entitlement becomes unavailable during the Term, then the Team shall provide to the Sponsor, as its sole and exclusive remedy for any such unavailability during such period of unavailability, substitute advertising or promotional inventory or other benefits or consideration (in each case, related to the Stadium) of an equal or comparable value, as mutually agreed upon by the Parties in good faith ("Substitute Entitlements"). If the Team is unable to provide Substitute Entitlements of equal or comparable value during such period of unavailability, then the Parties shall attempt in good faith to agree upon additional mutually acceptable Substitute Entitlements to be provided to Sponsor during other periods during the Term. Alternatively, the Parties may mutually agree (each in its sole discretion) to extend some or all of the use of available Entitlements for additional periods to provide Sponsor advertising or promotional inventory or other benefits or consideration substantially equivalent to those that are unavailable during any given period. Notwithstanding anything to the contrary in this Section, no right, benefit, privilege or other Entitlement shall be deemed to be "unavailable" for purposes of this Section as a result of (A) any increase in the cost of obtaining, producing or providing such right, benefit, privilege or Entitlement, (B) the fact that it has become more difficult for the Team or any other Person to obtain, produce or provide such right, benefit, privilege or Entitlement, provided that it is still possible to obtain, produce or provide such right, benefit, privilege or Naming Rights Entitlement, or (C) such right, benefit, privilege or Entitlement having been granted or provided to any other Person.

In the event of any amendment, modification, supplement or other change in any League Rule, or any implementation or application of any League Rule, at any time during the Term the effect of which would be to (A) prohibit, prevent or materially impede Sponsor from receiving any of the Entitlements or any other rights, benefits or privileges contemplated to be provided to the Sponsor hereunder during or otherwise with respect to any games or League-organized events (including the League championship) or (B) otherwise reduce materially the value of the Entitlements or any other rights, benefits or privileges contemplated to be provided to the Sponsor hereunder and, for purposes of evaluating such reduction, without regard to the provisions of Section [X], the Parties shall negotiate in good faith appropriate equitable adjustments in the other Entitlements and/or an appropriate reduction in the amount of Fees payable by Sponsor hereunder. If the Parties are unable to agree on such appropriate equitable adjustments or an appropriate reduction in the Fees, then the arbitration provisions of Section [X] shall apply. Notwithstanding the foregoing, if any amendment, modification, supplement or other change to League Rules during the Term shall be sufficiently fundamental to constitute a frustration of purposes for which the Sponsor entered into this Agreement, the Sponsor shall have the right to terminate this Agreement upon thirty (30) days' prior written notice to the Team, in which event neither Party shall have any further obligation to the other or rights hereunder other than those that expressly survive termination.

Morals Clause / Reverse Morals Clauses Termination

Sponsor shall have the right to terminate this Agreement if the Team engages in illegal, indecent, immoral, harmful or scandalous behavior or activities that in Sponsor's good faith discretion, would reasonably and objectively damage the reputation or goodwill of Sponsor in such a manner that would have a material and adverse effect on their reputation or business interests by virtue of its association with the Team.

Player agrees that if Player should fail to conduct himself with due regard to public conventions or morals or if he shall do or commit any act or thing that shall tend to shock, insult or offend the public morals or decency , and Player's failure to conduct himself or from any such act or thing shall substantially impair (or if, in the judgment of a reasonable person, such failure would if widely publicized be reasonably likely to substantially impair) the commercial value of his name or endorsement, then Company shall have the right to terminate this Agreement by written notice to Player, after which date, Player will refrain from being a spokesperson for Company.

Sponsor shall have the right to immediately terminate this Agreement if Club, League, or Stadium commits any act or fails to commit any act which would reasonably and objectively bring such entity or Sponsor into disrepute, contempt, scandal. ridicule, or competitive disadvantage, or causes material harm to the reputation or business interests Sponsor.

Sponsor may terminate this Agreement immediately upon written notice to Team if, in Sponsor's sole discretion, the value of the sponsorship association for Sponsor is materially diminished, or such association may cause Sponsor harm to its reputation for any reason, including without limitation as a result of Team's or any of its officers', directors', or employees' engaging in, becoming the subject of a regulatory or law enforcement inquiry or action alleging conduct that is unlawful, unethical, or otherwise harmful to the reputation of the Team or the League.

Team on the one hand, and Sponsor on the other hand, shall have the right to terminate this Agreement in the event that the other party engages in illegal, indecent, immoral, harmful or scandalous behavior or activities that in the terminating party's good faith discretion would reasonably and objectively damage such party's reputation or goodwill in such a manner that would have a material and adverse effect on such party's reputation or business interests by virtue of its association with the other party ("Harmful Behavior"). A party seeking to terminate this Agreement pursuant to this Section must provide written notice to the other party within thirty (30) days of such party's knowledge of the Harmful Behavior (the "Harmful Behavior Notice"). The parties shall meet within five (5) days following receipt of the Harmful Behavior Notice. If ten (10) days after such meeting and discussion and taking into account the measures taken by the other party, or measures to be taken by the other party which may still be in progress, to address the situation, and such party still in good faith reasonably believes that there continues to be a material and adverse effect on such party's reputation or business interests by virtue of its continued association with the other party in the aftermath of the Harmful Behavior, then upon written request, such party may terminate this Agreement. Notwithstanding the foregoing, with respect to Harmful Behavior, under no circumstances may Sponsor terminate this Agreement if, in the event such Harmful Behavior involves only an individual non-executive employee in a personal matter, such individual's employment is terminated within five (5) days after the meeting between the parties. Notwithstanding anything to the contrary, Sponsor shall not have the right to invoke the forgoing termination option as a result of any action by the League, any other Team in the League, or any of their owners, employees, players or coaches.

OHIO RULES OF PROFESSIONAL CONDUCT

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

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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; REMOTE PRACTICE OF LAW

(a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.

(b) A lawyer who is not admitted to practice in this jurisdiction shall not do either of the following:

(1) except as authorized by these rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law;

(2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

(c) A lawyer who is admitted in another United States jurisdiction, is in good standing in the jurisdiction in which the lawyer is admitted, and regularly practices law may provide legal services on a temporary basis in this jurisdiction if one or more of the following apply:

(1) the services are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;

(2) the services are *reasonably* related to a pending or potential proceeding before a *tribunal* in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or *reasonably* expects to be so authorized;

(3) the services are *reasonably* related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are *reasonably* related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires *pro hac vice* admission;

(4) the lawyer engages in negotiations, investigations, or other nonlitigation activities that arise out of or are *reasonably* related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.

(d) A lawyer admitted and in good standing in another United States jurisdiction may provide legal services in this jurisdiction through an office or other systematic and continuous presence in any of the following circumstances:

(1) the lawyer is registered in compliance with Gov. Bar R. VI, Section 6 and is providing services to the employer or its organizational affiliates for which the permission of a *tribunal* to appear *pro hac vice* is not required;

(2) the lawyer is providing services that the lawyer is authorized to provide by federal or Ohio law;

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

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

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

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

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

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

Comment

[1] A lawyer may practice law only in a jurisdiction in which the lawyer is authorized to practice. A lawyer may be admitted to practice law in a jurisdiction on a regular basis or may be authorized by court rule or order or by law to practice for a limited purpose or on a restricted basis. Division (a) applies to unauthorized practice of law by a lawyer, whether through the lawyer's direct action or by the lawyer assisting another person. For example, a lawyer may not assist a person in practicing law in violation of the rules governing professional conduct in that person's jurisdiction.

[2] The definition of the practice of law is established by law and varies from one jurisdiction to another. Whatever the definition, limiting the practice of law to members of the bar protects the public against rendition of legal services by unqualified persons. This rule does not prohibit a lawyer from employing the services of paraprofessionals and delegating functions to them, so long as the lawyer supervises the delegated work and retains responsibility for their work. See Rule 5.3.

[3] A lawyer may provide professional advice and instruction to nonlawyers whose employment requires knowledge of the law; for example, claims adjusters, employees of financial or commercial institutions, social workers, accountants, and persons employed in government agencies. Lawyers also may assist independent nonlawyers, such as paraprofessionals, who are

authorized by the law of a jurisdiction to provide particular law-related services. In addition, a lawyer may counsel nonlawyers who wish to proceed *pro se*.

[4] Other than as authorized by law or this rule, a lawyer who is not admitted to practice generally in this jurisdiction violates division (b)(1) if the lawyer establishes an office or other systematic and continuous presence in this jurisdiction for the practice of law of this jurisdiction. Presence may be systematic and continuous even if the lawyer is not physically present here. For example, advertising in media specifically targeted to Ohio residents or initiating contact with Ohio residents for solicitation purposes could be viewed as a systematic and continuous presence. Such a lawyer must not hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction. See also Rules 7.1 and 7.5(b).

[5] There are occasions in which a lawyer admitted to practice in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction under circumstances that do not create an unreasonable risk to the interests of their clients, the public, or the courts. Division (c) identifies four such circumstances. The fact that conduct is not so identified does not imply that the conduct is or is not authorized. With the exception of divisions (d)(1) through (d)(4), this rule does not authorize a lawyer to establish an office or other systematic and continuous presence in this jurisdiction without being admitted to practice generally here.

[6] There is no single test to determine whether a lawyer's services are provided on a "temporary basis" in this jurisdiction, and may therefore be permissible under division (c). Services may be "temporary" even though the lawyer provides services in this jurisdiction on a recurring basis, or for an extended period of time, as when the lawyer is representing a client in a single lengthy negotiation or litigation.

[7] Divisions (c) and (d) apply to lawyers who are admitted to practice law in any United States jurisdiction, which includes the District of Columbia and any state, territory, or commonwealth of the United States. The word "admitted" in division (c) contemplates that the lawyer is authorized to practice in the jurisdiction in which the lawyer is admitted and excludes a lawyer who while technically admitted is not authorized to practice, because, for example, the lawyer is on inactive status.

[8] Division (c)(1) recognizes that the interests of clients and the public are protected if a lawyer admitted only in another jurisdiction associates with a lawyer licensed to practice in this jurisdiction. For this provision to apply, however, the lawyer admitted to practice in this jurisdiction must actively participate in and share responsibility for the representation of the client.

[9] After registering with the Supreme Court Office of Attorney Services pursuant to Gov. Bar R. XII, lawyers not admitted to practice generally in this jurisdiction may be authorized by order of a tribunal to appear *pro hac vice* before the tribunal. Under division (c)(2), a lawyer does not violate this rule when the lawyer appears before a tribunal pursuant to such authority. To the extent that a court rule or other law of this jurisdiction requires a lawyer who is not admitted to practice in this jurisdiction to obtain admission *pro hac vice* before appearing before a tribunal, this rule requires the lawyer to obtain that authority. "Tribunal" is defined in Gov. Bar R. XII,

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

[10] Division (c)(2) also provides that a lawyer rendering services in this jurisdiction on a temporary basis does not violate this rule when the lawyer engages in conduct in anticipation of a proceeding or hearing in a jurisdiction in which the lawyer is authorized to practice law or in which the lawyer reasonably expects to be admitted *pro hac vice*. Examples of such conduct include meetings with the client, interviews of potential witnesses, and the review of documents. Similarly, a lawyer admitted only in another jurisdiction may engage in conduct temporarily in this jurisdiction in connection with pending litigation in another jurisdiction in which the lawyer is or reasonably expects to be authorized to appear, including taking depositions in this jurisdiction.

[11] When a lawyer has been or reasonably expects to be admitted to appear before a tribunal, division (c)(2) also permits conduct by lawyers who are associated with that lawyer in the matter, but who do not expect to appear before the tribunal. For example, subordinate lawyers may conduct research, review documents, and attend meetings with witnesses in support of the lawyer responsible for the litigation.

[12] Division (c)(3) permits a lawyer admitted to practice law in another jurisdiction to perform services on a temporary basis in this jurisdiction if those services are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice. The lawyer, however, must obtain admission *pro hac vice* in the case of a court-annexed arbitration or mediation or otherwise if court rules or law so require.

[13] Division (c)(4) permits a lawyer admitted in another jurisdiction to provide certain legal services on a temporary basis in this jurisdiction that arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted but are not within divisions (c)(2) or (c)(3). These services include both legal services and services that nonlawyers may perform but that are considered the practice of law when performed by lawyers.

[14] Divisions (c)(3) and (c)(4) require that the services arise out of or be reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted. A variety of factors evidence such a relationship. The lawyer's client may have been previously represented by the lawyer, or may be resident in or have substantial contacts with the jurisdiction in which the lawyer is admitted. The matter, although involving other jurisdictions, may have a significant connection with that jurisdiction. In other cases, significant aspects of the lawyer's work might be conducted in that jurisdiction or a significant aspect of the matter may involve the law of that jurisdiction. The necessary relationship might arise when the client's activities or the legal issues involve multiple jurisdictions, such as when the officers of a multinational corporation survey potential business sites and seek the services of their lawyer in assessing the relative merits of each. In addition, the services may draw on the lawyer's recognized expertise developed through the regular practice of law on behalf of clients in matters involving a particular body of federal, nationally-uniform, foreign, or international law.

[15] Division (d) identifies four circumstances in which a lawyer who is admitted to practice in another United States jurisdiction and in good standing may establish an office or other systematic and continuous presence in this jurisdiction for the practice of law as well as provide legal services on a temporary basis. Except as provided in divisions (d)(1) through (d)(4), a lawyer who is admitted to practice law in another jurisdiction and who establishes an office or other systematic or continuous presence in this jurisdiction must become admitted to practice law generally in this jurisdiction.

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

[17] If a lawyer employed by a nongovernmental entity establishes an office or other systematic presence in this jurisdiction for the purpose of rendering legal services to the employer, division (d)(1) requires the lawyer to comply with the registration requirements set forth in Gov. Bar R. VI, Section 6.

[18] Division (d)(2) recognizes that a lawyer may provide legal services in a jurisdiction in which the lawyer is not licensed when authorized to do so by federal or Ohio law, which includes statute, court rule, executive regulation, or judicial precedent.

[19] A lawyer who practices law in this jurisdiction pursuant to divisions (c) or (d) or otherwise is subject to the disciplinary authority of this jurisdiction. See Rule 8.5(a).

[20] In some circumstances, a lawyer who practices law in this jurisdiction pursuant to divisions (c) or (d) may have to inform the client that the lawyer is not licensed to practice law in this jurisdiction. For example, that may be required when the representation occurs primarily in this jurisdiction and requires knowledge of the law of this jurisdiction. See Rule 1.4(b).

[21] Divisions (c) and (d) do not authorize communications advertising legal services in Ohio by lawyers who are admitted to practice in other jurisdictions. Whether and how lawyers may communicate the availability of their services in Ohio is governed by Rules 7.1 to 7.5.

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

Comparison to former Ohio Code of Professional Responsibility

No change in Ohio law or ethics rules is intended by adoption of Rule 5.5.

Rule 5.5(a) is analogous to DR 3-101.

Rules 5.5(b), (c), and (d) describe when a lawyer who is not admitted in Ohio may engage in activities within the scope of the practice of law in this state. The Ohio Code of Professional Responsibility contains no provisions comparable to these proposed rules; rather, the boundaries of permitted activities in Ohio by a lawyer admitted elsewhere are currently reflected in case law and the Supreme Court Rules for the Government of the Bar of Ohio.

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

Comparison to ABA Model Rules of Professional Conduct

Rule 5.5(d)(1) substitutes a reference to the corporate registration requirement of Gov. Bar R. VI, Section 3 for the more general language used in the Model Rule. Comment [16] is stricken and Comment [17] is modified to conform to the change in division (d)(1).

Comment [4] is modified to warn lawyers that advertising or solicitation of Ohio residents may be considered a "systematic and continuous" presence, as that term is used in division (b).

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

RULE 5.6: RESTRICTIONS ON RIGHT TO PRACTICE

A lawyer shall not participate in offering or making either of the following:

(a) a partnership, shareholders, operating, employment, or other similar type of agreement that restricts the right of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement;

(b) an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a claim or controversy.

Comment

[1] An agreement restricting the right of lawyers to practice after leaving a firm not only limits their professional autonomy but also limits the freedom of clients to choose a lawyer. Division (a) prohibits such agreements except for restrictions incident to provisions concerning retirement benefits for service with the firm.

[2] Division (b) prohibits a lawyer from agreeing not to represent other persons in connection with settling a claim or controversy.

[3] This rule does not apply to prohibit restrictions that may be included in the terms of the sale of a law practice pursuant to Rule 1.17.

Comparison to former Ohio Code of Professional Responsibility

Rule 5.6 is analogous to DR 2-108.

Rule 5.6(a) tracks DR 2-108(A) by prohibiting restrictive agreements, except in conjunction with payment of retirement benefits. Unlike DR 2-108(A), however, Rule 5.6(a) does not reference an exception in conjunction with a sale of a law practice, as that situation is addressed separately in Rule 1.17.

Rule 5.6(b) is substantially similar to DR 2-108(B), except that Rule 5.6(b) prohibits restrictive agreements in connection with settling "a claim or controversy." DR 2-108(B) uses the phrase "controversy or suit."

Comparison to ABA Model Rules of Professional Conduct

Rule 5.6(b) is modified to track current Ohio prohibitions relative to restrictive agreements. Specifically, Model Rule 5.6(b) prohibits restrictive agreements only in conjunction with the settlement of a "client controversy." The Ohio version of Rule 5.6(b) does not limit the prohibition in conjunction with settling a claim on behalf of a client but, instead, prohibits restrictive agreements in conjunction with any "claim or controversy."

RULE 5.7: RESPONSIBILITIES REGARDING LAW-RELATED SERVICES

(a) A lawyer shall be subject to the Ohio Rules of Professional Conduct with respect to the provision of law-related services, as defined in division (e) of this rule, if the law-related services are provided in either of the following circumstances:

(1) by the lawyer in circumstances that are not distinct from the lawyer's provision of legal services to clients;

(2) in other circumstances by an entity controlled or owned by the lawyer individually or with others, unless the lawyer takes *reasonable* measures to ensure that a person obtaining the law-related services *knows* that the services are not legal services and that the protections of the client-lawyer relationship do not exist.

(b) A lawyer who controls or owns an interest in a business that provides a law-related service shall not require any customer of that business to agree to legal representation by the lawyer as a condition of the engagement of that business. A lawyer who controls or owns an interest in a business that provides law-related services shall disclose the interest to a customer of that business, and the fact that the customer may obtain legal services elsewhere, before performing legal services for the customer.

(c) A lawyer who controls or owns an interest in a business that provides a law-related service shall not require the lawyer's client to agree to use that business as a condition of the engagement for legal services. A lawyer who controls or owns an interest in a business that provides a law-related service shall disclose the interest to the client, and the fact that the client may obtain the law-related services elsewhere, before providing the law-related services to the client.

(d) Limitations or obligations imposed by this rule on a lawyer shall apply to both of the following:

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

(2) every lawyer in a *firm* that controls or owns an interest in a business that provides a law-related service.

(e) The term "law-related services" denotes services that might *reasonably* be performed in conjunction with the provision of legal services and that are not prohibited as unauthorized practice of law when provided by a nonlawyer.

Comment

[1] When a lawyer performs law-related services, sometimes referred to as "ancillary business," or controls an organization that does so, there exists the potential for ethical problems. Principal among these is the possibility that the person for whom the law-related services are performed fails to understand that the services may not carry with them the protections normally afforded as part of the client-lawyer relationship. The recipient of the law-related services may expect, for example, that the protection of client confidences, prohibitions against representation of persons with conflicting interests, and obligations of a lawyer to maintain professional independence apply to the provision of law-related services when that may not be the case.

[2] Rule 5.7 applies to the provision of law-related services by a lawyer even when the lawyer does not provide any legal services to the person for whom the law-related services are performed and whether the law-related services are performed through a law firm or a separate entity. The rule identifies the circumstances in which all of the Ohio Rules of Professional Conduct apply to the provision of law-related services. Even when those circumstances do not exist, however, the conduct of a lawyer involved in the provision of law-related services is subject to those rules that apply generally to lawyer conduct, regardless of whether the conduct involves the provision of legal services. See, *e.g.,* Rule 8.4.

[3] When law-related services are provided by a lawyer under circumstances that are not distinct from the lawyer's provision of legal services to clients, the lawyer in providing the law-related services must adhere to the requirements of the Ohio Rules of Professional Conduct as provided in division (a)(1). Even when the law-related and legal services are provided in circumstances that are distinct from each other, for example through separate entities or different support staff within the law firm, the Ohio Rules of Professional Conduct apply to the lawyer as provided in division (a)(2) unless the lawyer takes reasonable measures to assure that the recipient of the law-related services knows that the services are not legal services and that the protections of the client-lawyer relationship do not apply.

[4] Law-related services also may be provided through an entity that is distinct from that through which the lawyer provides legal services. If the lawyer individually or with others has control of such an entity's operations or owns an interest in the entity, the rule requires the lawyer to take reasonable measures to assure that each person using the services of the entity knows that the services provided by the entity are not legal services and that the Ohio Rules of Professional Conduct that relate to the client-lawyer relationship do not apply. A lawyer's control of an entity extends to the ability to direct its operation. Whether a lawyer has control will depend upon the circumstances of the particular case.

[5] When a client-lawyer relationship exists with a person who is referred by a lawyer to a separate law-related service entity controlled by the lawyer, individually or with others, the lawyer must comply with Rule 1.8(a).

[6] In taking the reasonable measures referred to in division (a)(2) to assure that a person using law-related services understands the practical effect or significance of the inapplicability of the Ohio Rules of Professional Conduct, the lawyer should communicate to the

person receiving the law-related services, in a manner sufficient to ensure that the person understands the significance of the fact, that the relationship of the person to the business entity will not be a client-lawyer relationship. The communication should be made before entering into an agreement for provision of or providing law-related services and preferably should be in writing.

[7] The burden is upon the lawyer to show that the lawyer has taken reasonable measures under the circumstances to communicate the desired understanding.

[8] A lawyer should take special care to keep separate the provision of law-related and legal services to minimize the risk that the recipient will assume that the law-related services are legal services. The risk of such confusion is especially acute when the lawyer renders both types of services with respect to the same matter. Under some circumstances the legal and law-related services may be so closely entwined that they cannot be distinguished from each other, and the requirement of disclosure and consultation imposed by division (a)(2) of the rule cannot be met. In such a case a lawyer will be responsible for assuring that both the lawyer's conduct and, to the extent required by Rule 5.3, that of nonlawyer employees in the distinct entity that the lawyer controls complies in all respects with the Ohio Rules of Professional Conduct.

[9] A broad range of economic and other interests of clients may be served by lawyers' engaging in the delivery of law-related services. Examples of law-related services include providing title insurance, financial planning, accounting, trust services, real estate counseling, legislative lobbying, economic analysis, social work, psychological counseling, tax preparation, and patent, medical, or environmental consulting.

[10] When a lawyer is obliged to accord the recipients of such services the protections of those rules that apply to the client-lawyer relationship, the lawyer must take special care to heed the proscriptions of the rules addressing conflict of interest [Rules 1.7 to 1.11, especially Rules 1.7(a)(2) and 1.8(a), (b) and (f)], and scrupulously adhere to the requirements of Rule 1.6 relating to disclosure of confidential information. The promotion of the law-related services must also in all respects comply with Rules 7.1 to 7.3, dealing with advertising and solicitation. In that regard, lawyers should take special care to identify the obligations that may be imposed as a result of a jurisdiction's decisional law.

[11] When the full protections of all of the Ohio Rules of Professional Conduct do not apply to the provision of law-related services, principles of law external to the rules, for example, the law of principal and agent, govern the legal duties owed to those receiving the services. Those other legal principles may establish a different degree of protection for the recipient with respect to confidentiality of information, conflicts of interest and permissible business relationships with clients. See also Rule 8.4.

[12] Division (d) makes the prohibitions and disclosures imposed in divisions (b) and (c) applicable to all lawyers in a lawyer's firm where the lawyer knows that another lawyer in the firm controls or owns an interest in a business that provides law-related services, and every lawyer in a firm that controls or owns an interest in a business that provides law-related services.

Comparison to former Ohio Code of Professional Responsibility

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

Comparison to ABA Model Rules of Professional Conduct

Rule 5.7(a)(2) is expanded to include a lawyer who owns an interest in an entity, in addition to a lawyer who controls an entity.

Added to Rule 5.7 are divisions (b) and (c), which contain reciprocal prohibitions and disclosures when a lawyer controls or owns an interest in a business that provides law-related services. Specifically, division (b) prohibits a lawyer who controls or owns an interest in a business that provides a law-related service from requiring customers of the business to agree to legal representation by the lawyer as a condition of engagement of the law-related services. Additionally, prior to performing legal services for a customer of a business that provides law-related services, division (b) requires the lawyer to notify the customer that the customer may obtain legal services elsewhere.

Conversely, division (c) prohibits a lawyer who controls or owns an interest in a business that provides law-related services from requiring a client to use the services of the law-related business as a condition of the engagement for legal services. Additionally, a lawyer who controls or owns an interest in a business that provides law-related services must disclose the interest to the client, and the fact that the client may obtain the law-related services elsewhere, prior to providing the law-related services to the client.

Rule 5.7 also includes a new division (d), which makes the prohibitions and disclosures imposed in divisions (b) and (c) applicable to (1) all lawyers in a lawyer's firm who know about the lawyer's interest in a law-related business, and (2) all lawyers who work in a firm that controls or owns an interest in a business that provides a law-related service.

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

VI. PUBLIC SERVICE

RULE 6.1: VOLUNTARY PRO BONO PUBLICO SERVICE

Note

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

RULE 6.2: ACCEPTING APPOINTMENTS

A lawyer shall not seek to avoid appointment by a court to represent a person except for good cause, such as either of the following:

(a) representing the client is likely to result in violation of the Ohio Rules of Professional Conduct or other law;

(b) representing the client is likely to result in an unreasonable financial burden on the lawyer.

Comment

[1] A lawyer ordinarily is not obliged to accept a client whose character or cause the lawyer regards as repugnant. The lawyer's freedom to select clients is, however, qualified. All lawyers have a responsibility to assist in providing *pro bono publico* service. An individual lawyer fulfills this responsibility by accepting a fair share of unpopular matters or indigent or unpopular clients. A lawyer may also be subject to appointment by a court to serve unpopular clients or persons unable to afford legal services.

Appointed Counsel

[2] For good cause a lawyer may seek to decline an appointment to represent a person who cannot afford to retain counsel or whose cause is unpopular. Good cause exists if the lawyer could not handle the matter competently, see Rule 1.1, or if undertaking the representation would result in an improper conflict of interest, for example, when the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client. A lawyer may also seek to decline an appointment if acceptance would be unreasonably burdensome, for example, when it would impose a financial sacrifice so great as to be unjust.

[3] An appointed lawyer has the same obligations to the client as retained counsel, including the obligations of loyalty and confidentiality, and is subject to the same limitations on the client-lawyer relationship, such as the obligation to refrain from assisting the client in violation of the rules.

Comparison to former Ohio Code of Professional Responsibility

Rule 6.2 is similar to Ohio Code of Professional Responsibility EC 2-25 through EC 2-32, Acceptance and Retention of Employment, and, in particular, EC 2-28.

Comparison to ABA Model Rules of Professional Conduct

Stricken from Rule 6.2 is division (c) of the Model Rule, the substance of which is addressed in Rule 1.1, which mandates that a lawyer shall provide competent representation to a client. In addition, the word "court" is substituted for "tribunal" in the first line of the rule to reflect that the inherent authority to make appointments is limited to courts and does not extend to other bodies included within the Rule 1.0(o) definition of "tribunal."

RULE 6.3: MEMBERSHIP IN LEGAL SERVICES ORGANIZATION

Note

ABA Model Rule 6.3 is not adopted in Ohio. The substance of Model Rule 6.3 is addressed by other provisions of the Ohio Rules of Professional Conduct that address conflicts of interest, including Rule 1.7(a) [Conflicts of Interest: Current Clients].

RULE 6.4: LAW REFORM ACTIVITIES AFFECTING CLIENT INTERESTS

Note

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

RULE 6.5: NONPROFIT AND COURT-ANNEXED LIMITED LEGAL SERVICES PROGRAMS

(a) A lawyer who, under the auspices of a program sponsored by a nonprofit organization or court, provides short-term limited legal services to a client without expectation by either the lawyer or the client that the lawyer will provide continuing representation in the matter is subject to both of the following:

(1) Rules 1.7 and 1.9(a) only if the lawyer *knows* that the representation of the client involves a conflict of interest;

(2) Rule 1.10 only if the lawyer *knows* that another lawyer associated with the lawyer in a *law firm* is disqualified by Rule 1.7 or 1.9(a) with respect to the matter.

(b) Except as provided in division (a)(2) of this rule, Rule 1.10 is inapplicable to a representation governed by this rule.

Comment

[1] Legal services organizations, courts, and various nonprofit organizations have established programs through which lawyers provide short-term limited legal services—such as advice or the completion of legal forms—that will assist persons to address their legal problems without further representation by a lawyer. In these programs, such as legal-advice hotlines, advice-only clinics, or *pro se* counseling programs, a client-lawyer relationship is established, but there is no expectation that the lawyer's representation of the client will continue beyond the limited consultation. Such programs are normally operated under circumstances in which it is not feasible for a lawyer to systematically screen for conflicts of interest as is generally required before undertaking a representation. See *e.g.,* Rules 1.7, 1.9, and 1.10.

[2] A lawyer who provides short-term limited legal services pursuant to this rule must communicate with the client, preferably in writing, regarding the limited scope of the representation. See Rule 1.2(c). If a short-term limited representation would not be reasonable under the circumstances, the lawyer may offer advice to the client but must also advise the client of the need for further assistance of counsel. Except as provided in this rule, the Ohio Rules of Professional Conduct, including Rules 1.6 and 1.9(c), are applicable to the limited representation.

[3] Because a lawyer who is representing a client in the circumstances addressed by this rule ordinarily is not able to check systematically for conflicts of interest, division (a) requires compliance with Rules 1.7 or 1.9(a) only if the lawyer knows that the representation presents a conflict of interest for the lawyer, and with Rule 1.10 only if the lawyer knows that another lawyer in the lawyer's firm is disqualified by Rules 1.7 or 1.9(a) in the matter.

[4] Because the limited nature of the services significantly reduces the risk of conflicts of interest with other matters being handled by the lawyer's firm, division (b) provides that Rule 1.10 is inapplicable to a representation governed by this rule except as provided by division (a)(2).

Division (a)(2) requires the participating lawyer to comply with Rule 1.10 when the lawyer knows that the lawyer's firm is disqualified by Rules 1.7 or 1.9(a). By virtue of division (b), however, a lawyer's participation in a short-term limited legal services program will not preclude the lawyer's firm from undertaking or continuing the representation of a client with interests adverse to a client being represented under the program's auspices. Nor will the personal disqualification of a lawyer participating in the program be imputed to other lawyers participating in the program.

[5] If, after commencing a short-term limited representation in accordance with this rule, a lawyer undertakes to represent the client in the matter on an ongoing basis, Rules 1.7, 1.9(a), and 1.10 become applicable.

Comparison to former Ohio Code of Professional Responsibility

The Ohio Code of Professional Responsibility does not have a specifically comparable rule regarding short-term limited legal services for programs sponsored by a nonprofit organization or court. Rule 6.5 codifies an exception to the general conflict provisions of Rule 1.7 (formerly DR 5-105) in order to encourage lawyers in firms to participate in short-term legal service projects sponsored by courts or nonprofit organizations.

Comparison to ABA Model Rules of Professional Conduct

Rule 6.5 contains no substantive changes to the Model Rule.

VII. INFORMATION ABOUT LEGAL SERVICES

RULE 7.1: COMMUNICATIONS CONCERNING A LAWYER'S SERVICES

A lawyer shall not make or use a false, misleading, or nonverifiable communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law or omits a fact necessary to make the statement considered as a whole not materially misleading.

Comment

[1] This rule governs all communications about a lawyer's services, including advertising permitted by Rule 7.2. Whatever means are used to make known a lawyer's services, statements about them must be truthful.

[2] Truthful statements that are misleading are also prohibited by this rule. A truthful statement is misleading if it omits a fact necessary to make the lawyer's communication considered as a whole not materially misleading. A truthful statement is also misleading if there is a substantial likelihood that it will lead a reasonable person to formulate a specific conclusion about the lawyer or the lawyer's services for which there is no reasonable factual foundation.

[3] An advertisement that truthfully reports a lawyer's achievements on behalf of clients or former clients may be misleading if presented so as to lead a reasonable person to form an unjustified expectation that the same results could be obtained for other clients in similar matters without reference to the specific factual and legal circumstances of each client's case. Similarly, an unsubstantiated comparison of the lawyer's services or fees with the services or fees of other lawyers may be misleading if presented with such specificity as would lead a reasonable person to conclude that the comparison can be substantiated. The inclusion of an appropriate disclaimer or qualifying language may preclude a finding that a statement is likely to create unjustified expectations or otherwise mislead the public.

[4] Characterization of rates or fees chargeable by the lawyer or law firm such as "cut-rate," "lowest," "giveaway," "below cost," "discount," or "special" is misleading.

[5] See also Rule 8.4(e) for the prohibition against stating or implying an ability to influence improperly a government agency or official or to achieve results by means that violate the Ohio Rules of Professional Conduct or other law.

Comparison to former Ohio Code of Professional Responsibility

Rule 7.1 corresponds to DR 2-101. Rule 7.1 does not contain the prohibitions found in DR 2-101 on client testimonials or self-laudatory claims. However, the rule does retain the DR 2-101 prohibition on unverifiable claims.

In addition, Rule 7.1 contains none of the other directives found in DR 2-101(B), the definition of misleading found in DR 2-101(C) (see comment [2] of Rule 7.1), or the directives found in DR 2-101(D), (E), and (G).

For DR 2-101(F) and DR 2-101(H) see Rule 7.3.

Comparison to ABA Model Rules of Professional Conduct

Rule 7.1 is similar to Model Rule 7.1 except for the inclusion of a prohibition on the use of nonverifiable communications about the lawyer or the lawyer's services.

RULE 7.2: ADVERTISING AND RECOMMENDATION OF PROFESSIONAL EMPLOYMENT

(a) Subject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise services through *written*, recorded, or electronic communication, including public media.

(b) A lawyer shall not give anything of value to a person for recommending the lawyer's services except that a lawyer may pay any of the following:

(1) the *reasonable* costs of advertisements or communications permitted by this rule;

(2) the usual charges of a legal service plan;

(3) the usual charges for a nonprofit or lawyer referral service that complies with Rule XVI of the Supreme Court Rules for the Government of the Bar of Ohio;

(4) for a law practice in accordance with Rule 1.17.

(c) Any communication made pursuant to this rule shall include the name and office address of at least one lawyer or *law firm* responsible for its content.

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

Comment

[1] To assist the public in learning about and obtaining legal services, lawyers should be allowed to make known their services not only through reputation but also through organized information campaigns in the form of advertising. Advertising involves an active quest for clients, contrary to the tradition that a lawyer should not seek clientele. However, the public's need to know about legal services can be fulfilled in part through advertising. This need is particularly acute in the case of persons of moderate means who have not made extensive use of legal services. The interest in expanding public information about legal services ought to prevail over considerations of tradition. Nevertheless, advertising by lawyers entails the risk of practices that are misleading or overreaching.

[2] This rule permits public dissemination of information concerning a lawyer's name or firm name, address, email address, website, and telephone number; the kinds of services the lawyer will undertake; the basis on which the lawyer's fees are determined, including prices for specific services and payment and credit arrangements; a lawyer's foreign language ability; names

of references and, with their consent, names of clients regularly represented; and other information that might invite the attention of those seeking legal assistance.

[3] Questions of effectiveness and taste in advertising are matters of speculation and subjective judgment. Some jurisdictions have had extensive prohibitions against television and other forms of advertising, advertising going beyond specified facts about a lawyer, or "undignified" advertising. Television, the Internet, and other forms of electronic communication are among the most powerful media for getting information to the public, particularly persons of low and moderate income. Prohibiting television, Internet, or other forms of electronic advertising would impede the flow of information about legal services to many sectors of the public. Limiting the information that may be advertised has a similar effect and assumes that the bar can accurately forecast the kind of information that the public would regard as relevant. But see Rule 7.3(a) for the prohibition against solicitation through a real-time electronic exchange initiated by the lawyer.

[4] Neither this rule nor Rule 7.3 prohibits communications authorized by law, such as notice to members of a class in class action litigation.

Paying Others to Recommend a Lawyer

[5] Except as provided by these rules, lawyers are not permitted to give anything of value to another for recommending the lawyer's services or channeling professional work in a manner that violates Rule 7.3. A communication contains a recommendation if it endorses or vouches for a lawyer's credentials, abilities, competence, character, or other professional qualities. A reciprocal referral agreement between lawyers, or between a lawyer and a nonlawyer, is prohibited. *Cf.* Rule 1.5.

[5A] Division (b)(1) allows a lawyer to pay for advertising and communications permitted by this rule, including the costs of print directory listings, on-line directory listings, newspaper ads, television and radio airtime, domain-name registrations, sponsorship fees, Internet-based advertisements, and group advertising. A lawyer may compensate employees, agents, and vendors who are engaged to provide marketing or client-development services, such as publicists, public-relations personnel, business-development staff and website designers. Moreover, a lawyer may pay others for generating client leads, including Internet-based client leads, provided the lead generator does not recommend the lawyer, any payment to the lead generator is consistent with Rules 1.5 and 5.4, and the lead generator's communications are consistent with Rule 7.1. To comply with Rule 7.1, a lawyer shall not pay a lead generator that states, implies, or creates a reasonable impression that it is recommending the lawyer, is making the referral without payment from the lawyer, or has analyzed a person's legal problems when determining which lawyer should receive the referral. See Rules 5.3 and 8.4(a).

[6] A lawyer may pay the usual charges of a legal service plan or a nonprofit or qualified lawyer referral service. A legal service plan is a prepaid or group legal service plan or a similar delivery system that assists people who seek to secure legal representation. A lawyer referral service, on the other hand, is any organization that holds itself out to the public as a lawyer referral service. Such referral services are understood by the public to be consumer-oriented organizations that provide unbiased referrals to lawyers with appropriate experience in the subject matter of the representation and afford other client protections, such as complaint procedures or

malpractice insurance requirements. Consequently, this rule only permits a lawyer to pay the usual charges of a nonprofit or qualified lawyer referral service. A qualified lawyer referral service is one that is approved pursuant to Rule XVI of the Supreme Court Rules for the Government of the Bar of Ohio. Relative to fee sharing, see Rule 5.4(a)(5).

[7] A lawyer who accepts assignments or referrals from a legal service plan or referrals from a lawyer referral service must act reasonably to assure that the activities of the plan or service are compatible with the lawyer's professional obligations. See Rule 5.3. Legal service plans and lawyer referral services may communicate with the public, but such communication must be in conformity with these rules. Thus, advertising must not be false or misleading, as would be the case if the communications of a group advertising program or a group legal services plan would mislead the public to think that it was a lawyer referral service sponsored by a state agency or bar association. Nor could the lawyer allow in-person, telephonic, or real-time contacts that would violate Rule 7.3.

[8] [RESERVED]

Comparison to former Ohio Code of Professional Responsibility

Rule 7.2(a) directs attention to Rules 7.1 and 7.3, each of which includes or deletes language from the advertising and solicitation rules contained in DR 2-101 through DR 2-104.

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

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

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

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

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

Comparison to ABA Model Rules of Professional Conduct

Rule 7.2(b)(3) is modified to remove a reference to a qualified legal referral service and substitute a reference to the lawyer referral service provisions contained in Rule XVI of the Supreme Court Rules for the Government of the Bar of Ohio. Rule 7.2 does not include Model Rule 7.2(b)(4) and thus prohibits reciprocal referral agreements between two lawyers or between a lawyer and a nonlawyer professional. Rule 7.2(d) is added to incorporate the prohibition contained in DR 2-101(A)(2) relative to soliciting employment where the lawyer does not intend to participate in the matter but instead will refer the matter to other counsel.

RULE 7.3: SOLICITATION OF CLIENTS

(a) A lawyer shall not by in-person, live telephone, or real-time electronic contact solicit professional employment when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain, unless either of the following applies:

(1) the person contacted is a lawyer;

(2) the person contacted has a family, close personal, or prior professional relationship with the lawyer.

(b) A lawyer shall not solicit professional employment by *written*, recorded, or electronic communication or by in-person, telephone, or real-time electronic contact even when not otherwise prohibited by division (a), if any of the following applies:

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

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

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

(c) Unless the recipient of the communication is a person specified in division (a)(1) or (2) of this rule, every *written*, recorded, or electronic communication from a lawyer soliciting professional employment from anyone whom the lawyer *reasonably believes* to be in need of legal services in a particular matter shall comply with all of the following:

(1) Disclose accurately and fully the manner in which the lawyer or *law firm* became aware of the identity and specific legal need of the addressee;

(2) Disclaim or refrain from expressing any predetermined evaluation of the merits of the addressee's case;

(3) Conspicuously include in its text and on the outside envelope, if any, and at the beginning and ending of any recorded or electronic communication the recital - "ADVERTISING MATERIAL" or "ADVERTISEMENT ONLY."

(d) Prior to making a communication soliciting professional employment pursuant to division (c) of this rule to a party who has been named as a defendant in a civil action, a lawyer or *law firm* shall verify that the party has been served with notice of the action filed against that party. Service shall be verified by consulting the docket of the court in which the action was filed to determine whether mail, personal, or residence

service has been perfected or whether service by publication has been completed. Division (d) of this rule shall not apply to the solicitation of a debtor regarding representation of the debtor in a potential or actual bankruptcy action.

(e) If a communication soliciting professional employment from anyone is sent within thirty days of an accident or disaster that gives rise to a potential claim for personal injury or wrongful death, the following "Understanding Your Rights" shall be included with the communication.

UNDERSTANDING YOUR RIGHTS*

If you have been in an accident, or a family member has been injured or killed in a crash or some other incident, you have many important decisions to make. It is important for you to consider the following:

1. Make and keep records - If your situation involves a motor vehicle crash, regardless of who may be at fault, it is helpful to obtain a copy of the police report, learn the identity of any witnesses, and obtain photographs of the scene, vehicles, and any visible injuries. Keep copies of receipts of all your expenses and medical care related to the incident.

2. You do not have to sign anything - You may not want to give an interview or recorded statement without first consulting with an attorney, because the statement can be used against you. If you may be at fault or have been charged with a traffic or other offense, it may be advisable to consult an attorney right away. However, if you have insurance, your insurance policy probably requires you to cooperate with your insurance company and to provide a statement to the company. If you fail to cooperate with your insurance company, it may void your coverage.

3. Your interests versus interests of insurance company - Your interests and those of the other person's insurance company are in conflict. Your interests may also be in conflict with your own insurance company. Even if you are not sure who is at fault, you should contact your own insurance company and advise the company of the incident to protect your insurance coverage.

4. There is a time limit to file an insurance claim - Legal rights, including filing a lawsuit, are subject to time limits. You should ask what time limits apply to your claim. You may need to act immediately to protect your rights.

5. Get it in *writing* - You may want to request that any offer of settlement from anyone be put in *writing*, including a *written* explanation of the type of damages which they are willing to cover.

6. Legal assistance may be appropriate - You may consult with an attorney before you sign any document or release of claims. A release may cut off all future rights

against others, obligate you to repay past medical bills or disability benefits, or jeopardize future benefits. If your interests conflict with your own insurance company, you always have the right to discuss the matter with an attorney of your choice, which may be at your own expense.

7. How to find an attorney - If you need professional advice about a legal problem but do not know an attorney, you may wish to check with relatives, friends, neighbors, your employer, or co-workers who may be able to recommend an attorney. Your local bar association may have a lawyer referral service that can be found in the Yellow Pages or on the Internet.

8. Check a lawyer's qualifications - Before hiring any lawyer, you have the right to know the lawyer's background, training, and experience in dealing with cases similar to yours.

9. How much will it cost? - In deciding whether to hire a particular lawyer, you should discuss, and the lawyer's written fee agreement should reflect:

    a. How is the lawyer to be paid? If you already have a settlement offer, how will that affect a contingent fee arrangement?

    b. How are the expenses involved in your case, such as telephone calls, deposition costs, and fees for expert witnesses, to be paid? Will these costs be advanced by the lawyer or charged to you as they are incurred? Since you are obligated to pay all expenses even if you lose your case, how will payment be arranged?

    c. Who will handle your case? If the case goes to trial, who will be the trial attorney?

This information is not intended as a complete description of your legal rights, but as a checklist of some of the important issues you should consider.

***THE SUPREME COURT OF OHIO, WHICH GOVERNS THE CONDUCT OF LAWYERS IN THE STATE OF OHIO, NEITHER PROMOTES NOR PROHIBITS THE DIRECT SOLICITATION OF PERSONAL INJURY VICTIMS. THE COURT DOES REQUIRE THAT, IF SUCH A SOLICITATION IS MADE, IT MUST INCLUDE THE ABOVE DISCLOSURE.**

(f) Notwithstanding the prohibitions in division (a) of this rule, a lawyer may participate with a prepaid or group legal service plan operated by an organization not owned or directed by the lawyer that uses in-person or telephone contact to solicit memberships or subscriptions for the plan from persons who are not *known* to need legal services in a particular matter covered by the plan.

Comment

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

[2] There is a potential for abuse when a solicitation involves direct in-person, live telephone, or real-time electronic contact by a lawyer with someone known to need legal services. These forms of contact subject the person to the private importuning of the trained advocate in a direct interpersonal encounter. The person, who may already feel overwhelmed by the circumstances giving rise to the need for legal services, may find it difficult fully to evaluate all available alternatives with reasoned judgment and appropriate self-interest in the face of the lawyer's presence and insistence upon being retained immediately. The situation is fraught with the possibility of undue influence, intimidation, and over-reaching.

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

[4] The use of general advertising and written, recorded, or electronic communications to transmit information from lawyer to the public, rather than direct in-person, live telephone, or real-time electronic contact, will help to ensure that the information flows cleanly as well as freely. The contents of advertisements and communications permitted under Rule 7.2 can be permanently recorded so that they cannot be disputed and may be shared with others who know the lawyer. This potential for informal review is itself likely to help guard against statements and claims that might constitute false and misleading communications, in violation of Rule 7.1. The contents of direct in-person, live telephone, or real-time electronic contact can be disputed and may not be subject to third-party scrutiny. Consequently, they are much more likely to approach, and occasionally cross, the dividing line between accurate representations and those that are false and misleading.

[5] There is far less likelihood that a lawyer would engage in abusive practices against a former client, a person with whom the lawyer has close personal or family relationship, or in situations in which the lawyer is motivated by considerations other than the lawyer's pecuniary gain. Nor is there a serious potential for abuse when the person contacted is a lawyer. Consequently, the general prohibition in Rule 7.3(a) and the requirements of Rule 7.3(c) are not applicable in those situations. Also, division (a) is not intended to prohibit a lawyer from participating in constitutionally protected activities of public or charitable legal service

organizations or bona fide political, social, civic, fraternal, employee, or trade organizations whose purposes include providing or recommending legal services to members or beneficiaries.

[6] Even permitted forms of solicitation can be abused. Thus, any solicitation that contains information that is false or misleading within the meaning of Rule 7.1, that involves coercion, duress, or harassment within the meaning of Rule 7.3(b)(2), or that involves contact with someone who has made known to the lawyer a desire not to be solicited by the lawyer within the meaning of Rule 7.3(b)(1) is prohibited. Moreover, if after sending a letter or other communication as permitted by Rule 7.2 the lawyer receives no response, any further effort to communicate with the recipient may violate Rule 7.3(b).

[7] This rule is not intended to prohibit a lawyer from contacting representatives of organizations or groups that may be interested in establishing a group or prepaid legal plan for their members, insureds, beneficiaries, or other third parties for the purpose of informing such entities of the availability of and details concerning the plan or arrangement that the lawyer or lawyer's firm is willing to offer. This form of communication is not directed to people who are seeking legal services for themselves. Rather, it is usually addressed to an individual acting in a fiduciary capacity seeking a supplier of legal services for others who may, if they choose, become prospective clients of the lawyer. Under these circumstances, the activity that the lawyer undertakes in communicating with such representatives and the type of information transmitted to the individual are functionally similar to and serve the same purpose as advertising permitted under Rule 7.2.

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

[8A] The use of written, recorded, and electronic communications to solicit persons who have suffered personal injuries or the loss of a loved one can potentially be offensive. Nonetheless, it is recognized that such communications assist potential clients in not only making a meaningful determination about representation, but also can aid potential clients in recognizing issues that may be foreign to them. Accordingly, the information contained in division (e) must be communicated when the solicitation occurs within thirty days of an accident or disaster that gives rise to a potential claim for personal injury or wrongful death.

[9] Division (f) of this rule permits a lawyer to participate with an organization that uses personal contact to solicit members for its group or prepaid legal service plan, provided that the personal contact is not undertaken by any lawyer who would be a provider of legal services through the plan. The organization must not be owned or directed, whether as manager or otherwise, by any lawyer or law firm that participates in the plan. For example, division (f) would not permit a lawyer to create an organization controlled directly or indirectly by the lawyer and use the organization for the in-person or telephone solicitation of legal employment of the lawyer through memberships in the plan or otherwise. The communication permitted by these organizations also must not be directed to a person known to need legal services in a particular matter, but is to be designed to inform potential plan members generally of another means of

affordable legal services. Lawyers who participate in a legal service plan must reasonably ensure that the plan sponsors are in compliance with Rules 7.1, 7.2, and 7.3(b). See Rule 8.4(a).

Comparison to former Ohio Code of Professional Responsibility

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

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

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

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

Comparison to ABA Model Rules of Professional Conduct

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

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

- Division (d), regarding preservice solicitation of defendants in civil actions, has been inserted.

- Division (e), regarding direct solicitation requirements respecting solicitation of accident or disaster victims and their families, has been inserted.

Added to the rule is Comment [7A], which discusses the rationale for inclusion of the new division (e).

RULE 7.4: COMMUNICATION OF FIELDS OF PRACTICE AND SPECIALIZATION

(a) A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law or limits his or her practice to or concentrates in particular fields of law.

(b) A lawyer admitted to engage in patent practice before the United States Patent and Trademark Office may use the designation "Patent Attorney" or a *substantially* similar designation.

(c) A lawyer engaged in trademark practice may use the designation "Trademarks," "Trademark Attorney," or a *substantially* similar designation.

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

(e) A lawyer shall not state or imply that a lawyer is a specialist in a particular field of law, unless both of the following apply:

(1) the lawyer has been certified as a specialist by an organization approved by the Supreme Court Commission on Certification of Attorneys as Specialists;
(2) the name of the certifying organization is clearly identified in the communication.

Comment

[1] Division (a) of this rule permits a lawyer to indicate areas of practice in communications about the lawyer's services. If a lawyer practices only in certain fields, or will not accept matters except in a specified field or fields, the lawyer is permitted to so indicate.

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

[3] Division (e) permits a lawyer to state that the lawyer is a specialist in a field of law if such certification is granted by an organization approved by the Supreme Court Commission on Certification of Attorneys as Specialists. Certification signifies that an objective entity has recognized an advanced degree of knowledge and experience in the specialty area greater than is suggested by general licensure to practice law. Certifying organizations may be expected to apply standards of experience, knowledge, and proficiency to ensure that a lawyer's recognition as a specialist is meaningful and reliable. In order to ensure that consumers can obtain access to useful information about an organization granting certification, the name of the certifying organization must be included in any communication regarding the certification.

Comparison to former Ohio Code of Professional Responsibility

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

Comparison to ABA Model Rules of Professional Conduct

Rule 7.4(a) is modified to include the existing ability of a lawyer to indicate that the lawyer's practice is limited to or concentrates in particular fields of law. Division (c) is added from DR 2-105(A)(1) and the remaining divisions are relettered.

RULE 7.5: FIRM NAMES AND LETTERHEADS

(a) A lawyer shall not use a *firm* name, letterhead or other professional designation that violates Rule 7.1. A lawyer in private practice shall not practice under a name that is misleading as to the identity of the lawyer or lawyers practicing under the name, or a *firm* name containing surnames other than those of one or more of the lawyers in the *firm*, except that the name of a professional corporation or association, legal clinic, limited liability company, or limited liability partnership shall contain symbols indicating the nature of the organization as required by Gov. Bar R. III. If otherwise lawful, a *firm* may use as, or continue to include in, its name the surname of one or more deceased or retired members of the *firm* or of a predecessor *firm* in a continuing line of succession.

(b) A *law firm* with offices in more than one jurisdiction that lists attorneys associated with the *firm* shall indicate the jurisdictional limitations on those not licensed to practice in Ohio.

(c) The name of a lawyer holding a public office shall not be used in the name of a *law firm*, or in communications on its behalf, during any *substantial* period in which the lawyer is not actively and regularly practicing with the *firm*.

(d) Lawyers may state or imply that they practice in a partnership or other organization only when that is the fact.

Comment

[1] A firm may be designated by the names of all or some of its members or by the names of deceased members where there has been a continuing succession in the firm's identity. The letterhead of a law firm may give the names and dates of predecessor firms in a continuing line of succession. A lawyer or law firm may also be designated by a distinctive website address or comparable professional designation. The use of the surname of a deceased partner to designate law firms is a useful means of identification. However, it is misleading to use the name of a lawyer not associated with the firm or a predecessor of the firm or the name of a nonlawyer.

[2] With regard to division (d), lawyers sharing office facilities, but who are not in fact associated with each other in a law firm, may not denominate themselves as, for example, "Smith and Jones," for that title suggests that they are practicing law together in a firm. The use of a disclaimer such as "not a partnership" or "an association of sole practitioners" does not render the name or designation permissible.

[3] A lawyer may be designated "Of Counsel" if the lawyer has a continuing relationship with a lawyer or law firm, other than as a partner or associate.

[4] A legal clinic operated by one or more lawyers may be organized by the lawyer or lawyers for the purpose of providing standardized and multiple legal services. The name of the law office may include the phrase "legal clinic" or words of similar import. The name of any active lawyer in the clinic may be retained in the name of the legal clinic after the lawyer's death,

retirement, or inactivity because of age or disability, and the name must otherwise conform to other provisions of the Ohio Rules of Professional Conduct and the Supreme Court Rules for the Government of the Bar of Ohio. The legal clinic cannot be owned by, and profits or losses cannot be shared with, nonlawyers or lawyers who are not actively engaged in the practice of law in the organization.

Comparison to former Ohio Code of Professional Responsibility

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

The provisions of DR 2-102(E), which prohibits truthful statements about a lawyer's actual businesses and professions, are not included in Rule 7.5. The Rules of Professional Conduct should not preclude truthful statements about a lawyer's professional status, other business pursuits, or degrees.

DR 2-102(F) is an exception to DR 2-102(E) and is unnecessary in light of the decision to not retain DR 2-102(E).

Comment [3] is substantially the same as the Ohio provision on the "of counsel" designation.

Comment [4] addresses the restrictions of DR 2-102(G) relative to operating a "legal clinic" and using the designation "legal clinic."

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

Note

ABA Model Rule 7.6 is not adopted in Ohio. The substance of Model Rule 7.6 is addressed by provisions of the Ohio Ethics Law, particularly R.C. 102.03(F) and (G), and other criminal prohibitions relative to bribery and attempts to influence the conduct of elected officials. A lawyer or law firm that violates these statutory prohibitions would be in violation of other provisions of the Ohio Rules of Professional Conduct, such as Rule 8.4.

VIII. MAINTAINING THE INTEGRITY OF THE PROFESSION

RULE 8.1: BAR ADMISSION AND DISCIPLINARY MATTERS

In connection with a bar admission application or in connection with a disciplinary matter, a lawyer shall not do any of the following:

(a) *knowingly* make a false statement of material fact;

(b) in response to a demand for information from an admissions or disciplinary authority, fail to disclose a material fact or *knowingly* fail to respond, except that this rule does not require disclosure of information otherwise protected by Rule 1.6.

Comment

[1] The duty imposed by this rule applies to a lawyer's own admission or discipline as well as that of others. Thus, it is a separate professional offense for a lawyer to knowingly make a misrepresentation or omit a material fact in connection with a disciplinary investigation of the lawyer's own conduct. Rule I of the Supreme Court Rules for the Government of the Bar of Ohio addresses the obligations of applicants for admission to the bar.

[2] This rule is subject to the provisions of the Fifth Amendment of the United States Constitution and Article I, Section 10 of the Ohio Constitution. A person relying on such a provision in response to a question, however, should do so openly and not use the right of nondisclosure as a justification for failure to comply with this rule.

[3] A lawyer representing an applicant for admission to the bar, or representing a lawyer who is the subject of a disciplinary inquiry or proceeding, is governed by the rules applicable to the client-lawyer relationship, including Rule 1.6 and, in some cases, Rule 3.3.

Comparison to former Ohio Code of Professional Responsibility

Rule 8.1 is comparable to DR 1-101.

Comparison to ABA Model Rules of Professional Conduct

Rule 8.1 differs from Model Rule 8.1 in two respects.

Rule 8.1(a) is modified to strike the provision that would make the rule applicable to bar applicants. The constraints and obligations placed upon applicants for admission to the bar are more appropriately and distinctly addressed in Rule I of the Supreme Court Rules for the Government of the Bar of Ohio.

Rule 8.1(b) is modified for clarity. The clause, "fail to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter," is too unwieldy and creates a standard too difficult for explanation and comprehension. The elimination of that clause does not lessen the standard of candor expected of a lawyer in bar admission or disciplinary matters.

RULE 8.2: JUDICIAL OFFICIALS

(a) A lawyer shall not make a statement that the lawyer *knows* to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judicial officer, or candidate for election or appointment to judicial office.

(b) A lawyer who is a candidate for judicial office shall not violate the provisions of the Ohio Code of Judicial Conduct applicable to judicial candidates.

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

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

Comment

[1] Assessments by lawyers are relied on in evaluating the professional or personal fitness of persons being considered for election or appointment to judicial office. Expressing honest and candid opinions on such matters contributes to improving the administration of justice. Conversely, false statements by a lawyer can unfairly undermine public confidence in the administration of justice.

[2] [RESERVED]

[3] To maintain the fair and independent administration of justice, lawyers are encouraged to continue traditional efforts to defend judges and courts unjustly criticized.

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

Comparison to former Ohio Code of Professional Responsibility

Rule 8.2(a) is comparable to DR 8-102 and does not depart substantively from that rule. Rule 8.2(b) corresponds to DR 1-102(A)(1).

Comparison to ABA Model Rules of Professional Conduct

Rule 8.2(a) has been modified from the Model Rule to remove the phrase "public legal officers." Those officers are not included in DR 8-102, and disciplinary authorities should not be responsible for investigating statements made during campaigns for county attorney, attorney

general, or any other public legal position. The title of Rule 8.2 is modified to reflect this revision. Rule 8.2(b) is recast in terms of an express prohibition consistent with DR 1-102(A)(1).

RULE 8.3: REPORTING PROFESSIONAL MISCONDUCT

(a) A lawyer who possesses unprivileged knowledge of a violation of the Ohio Rules of Professional Conduct that raises a question as to any lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects, shall inform a disciplinary authority empowered to investigate or act upon such a violation.

(b) A lawyer who possesses unprivileged knowledge that a judge has committed a violation of the Ohio Rules of Professional Conduct or applicable rules of judicial conduct shall inform the appropriate authority.

(c) Any information obtained by a member of a committee or subcommittee of a bar association, or by a member, employee, or agent of a nonprofit corporation established by a bar association, designed to assist lawyers with substance abuse or mental health problems, provided the information was obtained while the member, employee, or agent was performing duties as a member, employee, or agent of the committee, subcommittee, or nonprofit corporation, shall be privileged for all purposes under this rule.

Comment

[1] Self-regulation of the legal profession requires that a member of the profession initiate disciplinary investigation when the lawyer knows of a violation of the Ohio Rules of Professional Conduct involving that lawyer or another lawyer. A lawyer has a similar obligation with respect to judicial misconduct. An apparently isolated violation may indicate a pattern of misconduct that only a disciplinary investigation can uncover. Reporting a violation is especially important where the victim is unlikely to discover the offense.

[2] A report about misconduct is not required where it would involve the disclosure of privileged information. However, a lawyer should encourage a client to consent to disclosure where it would not substantially prejudice the client's interests.

[3] [RESERVED]

[4] The duty to report professional misconduct does not apply to a lawyer retained to represent a lawyer whose professional conduct is in question. Such a situation is governed by the rules applicable to the client-lawyer relationship. See Rule 1.6.

[5] Information about a lawyer's or judge's misconduct or fitness may be received by a lawyer in the course of that lawyer's participation in an approved lawyers or judges assistance program. In that circumstance, providing for an exception to the reporting requirements of divisions (a) and (b) of this rule encourages lawyers and judges to seek treatment through such a program. Conversely, without such an exception, lawyers and judges may hesitate to seek assistance from these programs, which may then result in additional harm to their professional careers and additional injury to the welfare of clients and the public.

Comparison to former Ohio Code of Professional Responsibility

Rule 8.3 is comparable to DR 1-103 but differs in two respects. First, Rule 8.3 does not contain the strict reporting requirement of DR 1-103. DR 1-103 requires a lawyer to report all misconduct of which the lawyer has unprivileged knowledge. Rule 8.3 requires a lawyer to report misconduct only when the lawyer possesses unprivileged knowledge that raises a question as to any lawyer's honesty, trustworthiness, or fitness in other respects. Second, Rule 8.3 requires a lawyer to self-report.

Comparison to ABA Model Rules of Professional Conduct

Rule 8.3 is revised to comport more closely to DR 1-103. Division (a) is rewritten to require the self-reporting of disciplinary violations. In addition, the provisions of divisions (a) and (b) are broadened to require reporting of (1) any violation by a lawyer that raises a question regarding the lawyer's honesty, trustworthiness, or fitness, and (2) any ethical violation by a judge. In both provisions, language is included to limit the reporting requirement to circumstances where a lawyer's knowledge of a reportable violation is unprivileged.

Division (c), which deals with confidentiality of information regarding lawyers and judges participating in lawyers' assistance programs, has been strengthened to reflect Ohio's position that such information is not only confidential, but "shall be privileged for all purposes" under DR 1-103(C). The substance of DR 1-103(C) has been inserted in place of Model Rule 8.3(c).

In light of the substantive changes made in divisions (a) and (b), Comment [3] is no longer applicable and is stricken. Further, due to the substantive changes made to confidentiality of information regarding lawyers and judges participating in lawyers' assistance programs, the last sentence in Comment [5] has been stricken.

RULE 8.4: MISCONDUCT

It is professional misconduct for a lawyer to do any of the following:

(a) violate or attempt to violate the Ohio Rules of Professional Conduct, *knowingly* assist or induce another to do so, or do so through the acts of another;

(b) commit an *illegal* act that reflects adversely on the lawyer's honesty or trustworthiness;

(c) engage in conduct involving dishonesty, *fraud*, deceit, or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice;

(e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Ohio Rules of Professional Conduct or other law;

(f) *knowingly* assist a judge or judicial officer in conduct that is a violation of the Ohio Rules of Professional Conduct, the applicable rules of judicial conduct, or other law;

(g) engage, in a professional capacity, in conduct involving discrimination prohibited by law because of race, color, religion, age, gender, sexual orientation, national origin, marital status, or disability;

(h) engage in any other conduct that adversely reflects on the lawyer's fitness to practice law.

Comment

[1] Lawyers are subject to discipline when they violate or attempt to violate the Ohio Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another, as when they request or instruct an agent to do so on the lawyer's behalf. Division (a), however, does not prohibit a lawyer from advising a client concerning action the client is legally entitled to take.

[2] Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offenses carry no such implication. Traditionally, the distinction was drawn in terms of offenses involving "moral turpitude." That concept can be construed to include offenses concerning some matters of personal morality, such as adultery and comparable offenses, that have no specific connection to fitness for the practice of law. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, breach of trust, or serious interference with the administration of justice are

in that category. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.

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

[3] Division (g) does not apply to a lawyer's confidential communication to a client or preclude legitimate advocacy where race, color, religion, age, gender, sexual orientation, national origin, marital status, or disability is relevant to the proceeding where the advocacy is made.

[4] A lawyer may refuse to comply with an obligation imposed by law upon a good faith belief that no valid obligation exists. The provisions of Rule 1.2(d) concerning a good faith challenge to the validity, scope, meaning, or application of the law apply to challenges of legal regulation of the practice of law.

[5] Lawyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer's abuse of public office can suggest an inability to fulfill the professional role of lawyers. The same is true of abuse of positions of private trust such as trustee, executor, administrator, guardian, agent, and officer, director, or manager of a corporation or other organization.

Comparison to former Ohio Code of Professional Responsibility

Rule 8.4 is substantively comparable to DR 1-102 and 9-101(C).

Rule 8.4 removes the "moral turpitude" standard of DR 1-102(A)(3) and replaces it with Rule 8.4(b), which states that a lawyer engages in professional misconduct if the lawyer "commit[s] an illegal act that reflects adversely on the lawyer's honesty or trustworthiness."

Comparison to ABA Model Rules of Professional Conduct

Rule 8.4 is substantially similar to Model Rule 8.4 except for the additions of the anti-discrimination provisions of DR 1-102(B) and the fitness to practice provision of DR 1-102(A)(6). Comment [2A] is added to indicate that a lawyer's involvement in lawful covert activities is not a violation of Rule 8.4(c). The last sentence of DR 1-102(B) is inserted in place of Model Rule Comment [3].

RULE 8.5 DISCIPLINARY AUTHORITY; CHOICE OF LAW

(a) **Disciplinary Authority.** A lawyer admitted to practice in Ohio is subject to the disciplinary authority of Ohio, regardless of where the lawyer's conduct occurs. A lawyer not admitted in Ohio is also subject to the disciplinary authority of Ohio if the lawyer provides or offers to provide any legal services in Ohio. A lawyer may be subject to the disciplinary authority of both Ohio and another jurisdiction for the same conduct.

(b) **Choice of Law.** In any exercise of the disciplinary authority of Ohio, the rules of professional conduct to be applied shall be as follows:

(1) for conduct in connection with a matter pending before a *tribunal*, the rules of the jurisdiction in which the *tribunal* sits, unless the rules of the *tribunal* provide otherwise;

(2) for any other conduct, the rules of the jurisdiction in which the lawyer's conduct occurred, or, if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction shall be applied to the conduct. A lawyer shall not be subject to discipline if the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer *reasonably believes* the predominant effect of the lawyer's conduct will occur.

Comment

Disciplinary Authority

[1] It is longstanding law that the conduct of a lawyer admitted to practice in Ohio is subject to the disciplinary authority of Ohio. Extension of the disciplinary authority of Ohio to other lawyers who provide or offer to provide legal services in Ohio is for the protection of the citizens of Ohio. Reciprocal enforcement of a jurisdiction's disciplinary findings and sanctions will further advance the purposes of this rule. See Rule V, Section 20 of the Supreme Court Rules for the Government of the Bar of Ohio. A lawyer who is subject to the disciplinary authority of this jurisdiction under Rule 8.5(a) appoints an official to be designated by this Court to receive service of process in this jurisdiction. The fact that the lawyer is subject to the disciplinary authority of Ohio may be a factor in determining whether personal jurisdiction may be asserted over the lawyer for civil matters.

[1A] A lawyer admitted in another state, but not Ohio, may seek permission from a tribunal to appear *pro hac vice*. Effective January 1, 2011, out-of-state lawyers must register with the Supreme Court of Ohio Office of Attorney Services prior to being granted permission to appear *pro hac vice* by a tribunal. See Gov. Bar R. XII. Once *pro hac vice* status is extended, the tribunal retains the authority to revoke the status as part of its inherent power to regulate the practice before the tribunal and protect the integrity of its proceedings. Revocation of *pro hac vice* status and disciplinary proceedings are separate methods of addressing lawyer misconduct, and a lawyer may be subject to disciplinary proceedings for the same conduct that led to revocation of *pro hac vice* status.

Choice of Law

[2] A lawyer may be potentially subject to more than one set of rules of professional conduct that impose different obligations. The lawyer may be licensed to practice in more than one jurisdiction with differing rules, or may be admitted to practice before a particular court with rules that differ from those of the jurisdiction or jurisdictions in which the lawyer is licensed to practice. Additionally, the lawyer's conduct may involve significant contacts with more than one jurisdiction.

[3] Division (b) seeks to resolve such potential conflicts. Its premise is that minimizing conflicts between rules, as well as uncertainty about which rules are applicable, is in the best interest of both clients and the profession (as well as the bodies having authority to regulate the profession). Accordingly, it takes the approach of (i) providing that any particular conduct of a lawyer shall be subject to only one set of rules of professional conduct, (ii) making the determination of which set of rules applies to particular conduct as straightforward as possible, consistent with recognition of appropriate regulatory interests of relevant jurisdictions, and (iii) providing protection from discipline for lawyers who act reasonably in the face of uncertainty.

[4] Division (b)(1) provides that as to a lawyer's conduct relating to a proceeding pending before a tribunal, the lawyer shall be subject only to the rules of the jurisdiction in which the tribunal sits unless the rules of the tribunal, including its choice of law rule, provide otherwise. As to all other conduct, including conduct in anticipation of a proceeding not yet pending before a tribunal, division (b)(2) provides that a lawyer shall be subject to the rules of the jurisdiction in which the lawyer's conduct occurred, or, if the predominant effect of the conduct is in another jurisdiction, the rules of that jurisdiction shall be applied to the conduct. In the case of conduct in anticipation of a proceeding that is likely to be before a tribunal, the predominant effect of such conduct could be where the conduct occurred, where the tribunal sits or in another jurisdiction.

[5] When a lawyer's conduct involves significant contacts with more than one jurisdiction, it may not be clear whether the predominant effect of the lawyer's conduct will occur in a jurisdiction other than the one in which the conduct occurred. So long as the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect will occur, the lawyer shall not be subject to discipline under this rule. With respect to conflicts of interest and determining a lawyer's reasonable belief pursuant to division (b)(2), a written agreement between the lawyer and client that reasonably specifies a particular jurisdiction as within the scope of that division may be considered if the agreement was obtained with the client's informed consent, confirmed in the agreement.

[6] If two admitting jurisdictions were to proceed against a lawyer for the same conduct, they should, applying this rule, identify the same governing ethics rules. They should take all appropriate steps to see that they do apply the same rule to the same conduct, and in all events should avoid proceeding against a lawyer on the basis of two inconsistent rules.

[7] The choice of law provision applies to lawyers engaged in transnational practice, unless international law, treaties, or other agreements between competent regulatory authorities in the affected jurisdictions provide otherwise.

Comparison to former Ohio Code of Professional Responsibility

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

Comparison to ABA Model Rules of Professional Conduct

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

Form of Citation, Effective Date, Application

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

APPENDIX A

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

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

Ohio Rules of Professional Conduct	Ohio Code of Professional Responsibility or Other Law
Rule 1.1 Competence	DR 6-101(A)(1) & (2)
Rule 1.2 Scope of Representation and Allocation of Authority	
Rule 1.2(a)	DR 7-101(A)(1), EC 7-7, 7-8, 7-10
Rule 1.2(c)	None
Rule 1.2(d)	DR 7-102(A)(7); EC 7-4
Rule 1.2(e)	DR 7-105
Rule 1.3 Diligence	DR 6-101(A)(3), 7-101(A)(1)
Rule 1.4 Communication	
Rule 1.4(a) & (b)	EC 7-8, 9-2
Rule 1.4(c)	DR 1-104
Rule 1.5 Fees and Expenses	
Rule 1.5(a)	DR 2-106(A) & (B)
Rule 1.5(b)	EC 2-18
Rule 1.5(c)	EC 2-18; R.C. 4705.15
Rule 1.5(d)	DR 2-106(C); EC 2-19
Rule 1.5(e) & (f)	DR 2-107
Rule 1.6 Confidentiality	
Rule 1.6(a)	DR 4-101(A), (B), & (C)(1)
Rule 1.6(b)(1)	None
Rule 1.6(b)(2)	DR 4-101(C)(3)
Rule 1.6(b)(3)	DR 7-102(B)(1)
Rule 1.6(b)(4)	None
Rule 1.6(b)(5)	DR 4-101(C)(4)

Rule 1.6(b)(6)	DR 4-101(C)(2)
Rule 1.6(c)	None
Rule 1.7 Conflict of Interest: Current Clients	DR 5-101(A)(1), 5-105(A), (B), & (C)
Rule 1.8 Conflict of Interest: Current Clients: Specific Rules	
Rule 1.8(a)	DR 5-104(A); *Cincinnati Bar Assn v. Hartke* (1993), 67 Ohio St.3d 65
Rule 1.8(b)	DR 4-101(B)(2)
Rule 1.8(c)	DR 5-101(A)(2) & (3)
Rule 1.8(d)	DR 5-104(B)
Rule 1.8(e)	DR 5-103(B)
Rule 1.8(f)(1), (2), & (3)	DR 5-107(A) & (B)
Rule 1.8(f)(4)	None
Rule 1.8(g)	DR 5-106
Rule 1.8(h)	DR 6-102; *Disciplinary Counsel v. Clavner* (1997), 77 Ohio St.3d 431
Rule 1.8(i)	DR 5-103(A)
Rule 1.8(j)	*Cleveland Bar Assn v. Feneli* (1996), 86 Ohio St. 3d 102 & *Disciplinary Counsel v. Moore* (2004), 101 Ohio St.3d 261
Rule 1.8(k)	DR 5-105(D)
Rule 1.9 Duties to Former Clients	DR 4-101(B); *Kala v. Aluminum Smelting & Refining Co*. (1998), 81 Ohio St. 3d 1
Rule 1.10 Imputation of Conflicts of Interest: General Rule	DR 5-105(D); *Kala v. Aluminum Smelting & Refining Co*. (1998), 81 Ohio St. 3d 1
Rule 1.11 Special Conflicts of Interest for Former and Current Governmental Employees	DR 9-101(B)
Rule 1.12 Former Judge, Arbitrator, Mediator, or Other Third Party Neutral	DR 9-101(A) & (B); EC 5-21
Rule 1.13 Organization as Client	EC 5-19
Rule 1.14 Client With Diminished Capacity	EC 7-11 & 7-12

Rule 1.15 Safekeeping Property	
Rule 1.15(a)	DR 9-102
Rule 1.15(b)	DR 9-102(A)(1)
Rule 1.15(c)	DR 9-102(A)
Rule 1.15(d), (e), (f), & (g)	None
Rule 1.15(h)	DR 9-102(D) & (E)
Rule 1.16 Terminating Representation	
Rule 1.16(a)	DR 2-110(B)
Rule 1.16(b)	DR 2-110(A)(2), (C)(1), (C)(2), (C)(5), (C)(6), & (C)(7)
Rule 1.16(c)	DR 2-110(A)(1)
Rule 1.16(d)	DR 2-110(A)(2)
Rule 1.16(e)	DR 2-110(A)(3)
Rule 1.17 Sale of Law Practice	DR 2-111
Rule 1.18 Duties to Prospective Client	EC 4-1; *Cuyahoga Cty Bar Assn v. Hardiman* (2003), 100 Ohio St.3d 260
Rule 2.1 Advisor	EC 7-8
Rule 2.3 Evaluation for Use by Third Persons	None
Rule 2.4 Lawyer Serving as Arbitrator, Mediator, or Third-Party Neutral	EC 5-21
Rule 3.1 Meritorious Claims and Contentions	DR 7-102(A)(2); EC 7-25
Rule 3.3 Candor Toward the Tribunal	
Rule 3.3(a)	DR 7-102(A)(1), (4), & (5) & 7-106(B)(1)
Rule 3.3(b)	DR 7-102(B)
Rule 3.3(c)	DR 7-106(B)
Rule 3.3(d)	None
Rule 3.4 Fairness to Opposing Party and Counsel	
Rule 3.4(a)	DR 7-102(A)(8) & 7-109(A); EC 7-27

Rule 3.4(b)	DR 7-102(A)(6) & 7-109(C); EC 7-26 & 7-28
Rule 3.4(c)	DR 7-106(A)
Rule 3.4(d)	DR 7-106(C)(7); EC 7-25
Rule 3.4(e)	DR 7-106(C)(1) & (4); EC 7-24
Rule 3.4(g)	DR 7-109(B); EC 7-27
Rule 3.5 Impartiality and Decorum of the Tribunal	
Rule 3.5(a)	DR 7-106(C)(6), 7-108(A) & (B), & 7-110
Rule 3.5(b)	DR 7-108(G)
Rule 3.6 Trial Publicity	DR 7-107
Rule 3.7 Lawyer as Witness	DR 5-101(B) & 5-102
Rule 3.8 Special Responsibilities of Prosecutor	
Rule 3.8(a)	DR 7-103(A)
Rule 3.8(d)	DR 7-103(B), EC 7-13
Rule 3.8(e)	None
Rule 3.8(g)	None
Rule 3.9 Advocate in Nonadjudicative Proceedings	None
Rule 4.1 Truthfulness in Statements to Others	
Rule 4.1(a)	DR 7-102(A)(5)
Rule 4.1(b)	DR 7-102(A)(3) & 7-102(B)(1)
Rule 4.2 Communication with Person Represented by Counsel	DR 7-104(A)(1)
Rule 4.3 Dealing with Unrepresented Persons	DR 7-104(A)(2)
Rule 4.4 Respect for Rights of Third Persons	
Rule 4.4(a)	DR 7-102(A)(1), 7-106(C)(2), & 7-108(D) & (E)
Rule 4.4(b)	None

Rule 5.1 Responsibilities of Partners and Supervisory Lawyers	None
Rule 5.2 Responsibilities of a Subordinate Lawyer	None
Rule 5.3 Responsibilities Regarding Nonlawyer Assistants	DR 4-101(D); EC 4-2; *Disciplinary Counsel v. Ball* (1993), 67 Ohio St. 3d 401 & *Mahoning Cty. Bar Assn v. Lavelle* (2005), 107 Ohio St.3d 92
Rule 5.4 Professional Independence of a Lawyer	
Rule 5.4(a)	DR 3-102(A)
Rule 5.4(b)	DR 3-103
Rule 5.4(c)	DR 5-107(B)
Rule 5.4(d)	DR 5-107(C)
Rule 5.5 Unauthorized Practice of Law	
Rule 5.5(a)	DR 3-101
Rule 5.5(b)	None
Rule 5.5(c)	None
Rule 5.5(d)	None
Rule 5.6 Restrictions on Right to Practice	
Rule 5.6(a)	DR 2-108(A)
Rule 5.6(b)	DR 2-108(B)
Rule 5.7 Responsibilities Regarding Law-Related Services	None
Rule 6.2 Accepting Appointments	EC 2-25, 2-26, 2-27, 2-28, 2-29, 2-30, 2-31, & 2-32
Rule 6.5 Non-Profit and Court Annexed Limited Legal Service Programs	None
Rule 7.1 Communications Concerning a Lawyer's Services	DR 2-101

Rule 7.2 Advertising and Recommendation of Professional Employment	DR 2-101, 2-103, & 2-104(B)
Rule 7.3 Direct Contact with Prospective Clients	DR 2-104(A)
Rule 7.3(a)	DR 2-101(F)(1)
Rule 7.3(b)	None
Rule 7.3(c)	DR 2-101(F)(2)
Rule 7.3(d)	DR 2-101(F)(4)
Rule 7.3(e)	DR 2-101(H)
Rule 7.3(f)	DR 2-103(D)(4)
Rule 7.4 Communication of Fields of Practice and Specialization	DR 2-105
Rule 7.5 Firm Names and Letterheads	DR 2-102
Rule 8.1 Bar Admission and Disciplinary Matters	DR 1-101
Rule 8.2 Judicial Officials	
Rule 8.2(a)	DR 8-102
Rule 8.2(b)	DR 2-102(A)(1)
Rule 8.3 Reporting Professional Misconduct	DR 1-103
Rule 8.4 Misconduct	
Rule 8.4(a)	DR 1-102(A)(1) & (2)
Rule 8.4(b)	DR 1-102(A)(3)
Rule 8.4(c)	DR 1-102(A)(4)
Rule 8.4(d)	DR 1-102(A)(5)
Rule 8.4(e)	DR 1-102(A)(5) & 9-101(C)
Rule 8.4(f)	DR 1-102(A)(5)
Rule 8.4(g)	DR 1-102(B)
Rule 8.4(h)	DR 1-102(A)(6)
Rule 8.5 Disciplinary Authority, Choice of Law	None

APPENDIX B

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

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

Ohio Code of Professional Responsibility	Ohio Rules of Professional Conduct
CANON 1	
DR 1-101 Maintaining Integrity and Competence of the Legal Profession	Rule 8.1
DR 1-102 Misconduct	
DR 1-102(A)(1)	Rules 8.2(b) & 8.4(a)
DR 1-102(A)(2)	Rule 8.4(a)
DR 1-102(A)(3)	Rule 8.4(b)
DR 1-102(A)(4)	Rule 8.4(c)
DR 1-102(A)(5)	Rules 8.4(d), (e), & (f)
DR 1-102(A)(6)	Rule 8.4(h)
DR 1-102(B)	Rule 8.4(g)
DR 1-103 Disclosure of Information to Authorities	Rule 8.3
DR 1-104 Disclosure of Information to the Clients	Rule 1.4(c)
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)

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Persuading Quickly: Tips for Writing an Effective Appellate Brief

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PERSUADING QUICKLY: TIPS FOR WRITING AN EFFECTIVE APPELLATE BRIEF

Jane R. Roth* and Mani S. Walia**

We write this article to guide the brief-writing advocate on how to make her brief more effective. Because we are a judge and her former law clerk, we think that we know what we're talking about.

The main goal when writing a brief is to persuade the judge that the advocate's argument is the correct one to resolve the parties' dispute. This persuasion must be done *quickly* because judges read mountains of briefs every year. For instance, each year an appellate judge on the Third Circuit will participate in six court sittings. For each sitting, the Third Circuit judge will have, at most, two months to study all the briefs.[1] For the twelve-month period ending on September 30, 2009, almost 58,000 appeals were filed in the thirteen federal courts of appeals.[2] In the Third Circuit alone, 3750 appeals were filed,[3]

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1. *See* United States Court of Appeals for the Third Circuit, *Internal Operating Procedures of the United States Court of Appeals for the Third Circuit* 1.1 (2010) (providing that "[b]riefs and appendices are distributed sufficiently in advance to afford at least four (4) full weeks' study in chambers prior to the panel sitting").

2. United States Courts, *Federal Court Management Statistics 2009*, http://www.uscourts.gov/cgi-bin/cmsa2008.pl (chart captioned "U.S. Court of Appeals—Judicial Caseload Profile—National Totals") (accessed Dec. 15, 2010; copy on file with Journal of Appellate Practice and Process).

3. United States Courts, *Federal Court Management Statistics 2009*, http://www.uscourts.gov/cgi-bin/cmsa2008.pl (chart captioned "U.S. Court of Appeals—Judicial

adding up to about 300,000 pages of briefs.[4] Indeed, Chief Judge Alex Kozinski of the Ninth Circuit estimates that he reads 3,500 pages of briefs per month.[5] Simply put, the appellate judge reads, writes, reads—and then repeats the cycle.

The furious pace of absorbing law in distinct areas for each sitting makes the life of an appellate judge similar to that of a law student, but with final exams *six* times a year. Advocates must therefore provide a concise, coherent brief that respects the judge's time constraints. They must appreciate the difference between their perspective and the judge's perspective: Advocates spend months researching and writing a brief, reading it multiple times during the editing process; the judge, by contrast, may read the brief only once. Because advocates usually view the process from their perspective, their briefs tend to be much longer than necessary. The Chief Justice himself has commented that almost every brief that he has encountered could have been shorter.[6] Chief Judge Kozinski made the point with asperity: "[W]hen judges see a lot of words they immediately think: LOSER, LOSER. You might as well write it in big bold letters on the cover of your brief."[7] If advocates understand that the brief will persuade quickly only if it is written for the judge's perspective, they will more easily absorb our suggestions.

Caseload Profile—Third Circuit") (accessed Dec. 15, 2010; copy on file with Journal of Appellate Practice and Process).

4. *See* United States Court of Appeals for the Third Circuit, *Font and Page Length Requirements for Filing Briefs*, http://www.ca3.uscourts.gov/Rules/briefsamplefonts.pdf (listing page limits for each of the appellant's and appellee's briefs) (accessed Dec. 16, 2010; copy on file with Journal of Appellate Practice and Process).

5. Andrew L. Frey & Roy T. Englert, Jr., *How to Write a Good Appellate Brief* (1996), http://www.appellate.net/articles/gdaplbrf799.asp (appearing in section captioned "Organization above All") (accessed Dec. 16, 2010; copy on file with Journal of Appellate Practice and Process).

6. LawProse, Interviews, Supreme Court, *Hon. John Roberts, Chief Justice of the United States*, Webcast (no individual date; general series date 2006–07), part 5 at 2:35–2:48 (available at http://www.lawprose.org/interviews/supreme_court.php) (recording the Chief Justice's comment that he has yet to put down a brief wishing that it had been longer and his further comment that most briefs would be better if they were shorter) (accessed Dec. 16, 2010; copy of main page on file with Journal of Appellate Practice and Process).

7. Antonin Scalia & Bryan A. Garner, *Making Your Case: The Art of Persuading Judges* 99 (Thomson/West 2008) (quoting Alex Kozinski, *The Wrong Stuff*, 1992 B.Y.U. L. Rev. 325, 327) (alterations in original).

This article will, we hope, demonstrate how to write a brief that persuades *quickly*—and we hope that we can *quickly* persuade the reader of the merits of our point of view. In its first two sections, our article offers suggestions for achieving the goal. Section one gives tips on improving five parts of a brief: facts, standard of review, argument, summary of argument, and issues presented. Section two provides important brief-writing tips. Finally, section three presents legal principles that advocates should consider while preparing every brief. These principles do not relate to brief-writing, but they are, we submit, principles that may enhance a brief.

I. IMPROVING SPECIFIC SECTIONS

A. Facts

Many advocates dump facts haphazardly into the facts section, without a strategy. Those briefs are thus impotent from the start; they cannot persuade quickly because they have failed to even capture the judge's attention.

You, as an advocate, must provide only legally relevant facts and a strategic number of additional facts that add to the human interest of the story you tell in this section.[8] The legally relevant facts are those that are necessary for application later, in the argument section, to the governing law. For example, in an appeal concerning whether a party complied with the statute of limitations, you should provide the date of injury and the date the action was filed. The facts that add to the human interest are those that forcefully capture the judge's attention and remind her of the real lives affected by the parties' legal controversy.

You should provide those two types of facts while keeping in mind four specific goals: seize the story, summarize the story in the first paragraph, embrace the ugly, and be honest.

1. Seize the Story.

This is accomplished by skillfully presenting both types of

8. *See* Bryan A. Garner, *The Winning Brief* 180 (2d ed. Oxford U. Press 2004) (suggesting that advocates provide only facts that are "necessary to understanding the issues" and that "add human interest").

facts so that your client is perceived in a positive light; the client is the protagonist in the parties' dispute. Being the protagonist alone, of course, will not win the case on appeal, but it is important. We suspect that many judges are more inclined to go the advocate's way in a close case if her client is viewed as the "good guy." You should persuade the judge that, if the court endorses your argument, the right party wins and justice is achieved.

One way to seize the story is to start the facts section with a crisp one-liner that frames the entire dispute from the advocate's perspective. The one-liner can easily begin with "This is a case about . . ." or "This case involves . . ." [9]

Consider, for example, two hypothetical introductions from a case involving California's Sexually Violent Predator Act (SVPA), which allows the California State Department of Mental Health to take custody for an indeterminate term of an individual adjudicated as a sexually violent predator.[10] The confinement of a person detained under the SVPA must be reviewed at least once a year to determine whether further detention is warranted.[11] Under the SVPA, detainees awaiting adjudication are civil detainees who must be offered detention separate from inmates.[12] The case of John Doe arose after hospital officials transported him to the county jail to receive his bi-annual assessment. Doe contended that jail officials failed to offer separate housing and detained him with inmates. We suggest the following as examples of effective factual introductions for each side:

> For John Doe: This case involves a civil detainee, John Doe, who was confined at a county jail, like a criminal convict, while he was awaiting mental-health adjudication.

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9. If the appellate court allows for a section before the factual recitation (perhaps a statement of the case), the advocate should consider including the story-seizing one-liner there. In either section, though, its purpose is the same.

10. Cal. Welfare & Instns. Code § 6604 (West 2006).

11. *Id.* at §6605(a).

12. *See* Cal. Penal Code § 4002(b) (West 2002) (stating that detainees must be offered "separate and secure housing" that does not impinge upon any privileges other than those necessary to protect inmates and staff).

> For Pope, Head Jail Official: This appeal considers whether a convicted sexual predator, whose confinement was evaluated consonant with governing law, can make a claim of improper confinement based on unverified affidavits.

These introductions would shape the way in which the judge views the rest of the facts section, with each party's opening funneling the facts and arguments to the legal issue that it found dispositive.

Another way to seize the story is to tactfully include a vivid fact that will stick with the judge during the decisionmaking process. This tool works well in cases in which the advocate's opponent is the more sympathetic party and the advocate strives only to close the sympathy disparity between the parties. Take, for example, a medical-malpractice case in which the decedent's family claimed that the decedent's death resulted from improper monitoring by the physician after weight-reduction surgery. It is difficult to seize the story outright in such a case because the harm that befell the victim is tragic. The defense's theory was that the decedent willfully failed to follow medical advice—that he lacked will power and self-discipline—and so the tragic result flowed from the decedent's failures, not from the doctor's negligence.

To draw attention to the decedent's obesity, the defendant's brief included this vivid fact: Because of his extreme obesity, the decedent was not physically capable of wiping himself after using the toilet. That description created a palpable image of the decedent as lacking in personal discipline, which worked to narrow the sympathy gap between the doctor and the decedent.

2. Summarize the Story First.

Always recap the entire story quickly in the first paragraph and then move into a chronological presentation beginning in the second paragraph. This roadmap will provide the judge with context, signaling which facts will be legally relevant. Think of it as providing the same function as scanning the inside flap of a book jacket before beginning to read the book.

Returning to the sexual predator, John Doe, after the one-sentence opening, Doe's advocate should finish the paragraph

with a summary, so that the first part of the presentation reads something like this:

> This case involves a civil detainee, John Doe, who was confined at a county jail, like a criminal convict, while he was awaiting mental-health adjudication. In January 2002, Doe was transferred from a hospital to the county jail for a determination of his mental health under the SVPA. Both the hospital and jail officials acted properly during the transfer. But from February 2002 until December 2002, jail officials forced Doe to be housed and treated with criminal convicts, in violation of the express language of the SVPA. During that time, he was treated just like a criminal convict: He was denied access to showers, exercise, telephone calls, religious services, and the library. He was released back to the mental hospital in December 2002. His 42 U.S.C. § 1983 claim involves the legally improper treatment during those eleven months.

Then, in the next paragraph, Doe's advocate would start at the chronological beginning of the story.

3. Embrace the Ugly.

You, as an advocate, should not let your opponent expose a weak fact. Instead, you should acknowledge and explain the weak facts of your case. If you do not, your credibility (and that of your arguments) will suffer. If possible, you should explain why the unpleasant fact is not legally relevant. Acknowledgement is better than the alternative: letting the opponent exploit the mistake by describing it in the worst possible way and branding the advocate as deceptive to boot.

The case of John Doe is again instructive. The advocate representing Doe must address the ugly: Doe was, after all, a sexually violent predator. After presenting this fact, however, the advocate should focus on the facts establishing the jail officials' improper confinement of a civil detainee. By embracing the unpleasant fact, the advocate has explained it on her terms and obviated her opponent's opportunity to vilify Doe.

4. Be Honest.

This mandate is a truism, yet lawyers (sadly) do not always follow it. Never—we repeat, never—make inaccurate

representations to a court. Your task in the brief is to persuade and you cannot do that if the judge does not believe you. The judge (or her crack law clerk) will discover the statement's falsity in the record and then view your entire brief under a cloud of suspicion.

B. Standard of Review

This is the section that can most often be improved because the standard of review may constrain the judge to the point that the standard dictates the decision. For instance, under an abuse-of-discretion standard, it does not matter if the judge believes that an advocate's argument is ultimately right. The advocate's argument, instead, is a legal winner (or a loser) if the lower court simply did not get it wrong enough. By contrast, a judge is unconstrained under a de novo standard, under which the appellate judge does not have to defer to the lower court's decision.[13]

To improve the standard-of-review section, then, you must first understand that the standard of review controls the argument. If there is any room for leeway, you must argue for the standard that best supports your argument. Too many advocates set out a standard of review without thinking critically about what they are doing. Even worse, an advocate may uncritically accept her opponent's characterization of it. Either course of action will undermine the advocate's chances of success in the appeal.

Next, you must develop your arguments, in the argument section, within that standard. A favorable standard of review is like the home stadium in a football game: It does not mean that the advocate is going to win, but that she is advantaged. The advocate must argue within the review standard's framework, be it abuse of discretion or de novo review.

For example in *In re W.R. Grace & Co.*,[14] the appellants contended that the bankruptcy court abused its discretion by not

13. *See e.g. Cybor Corp. v. FAS Techs.*, 138 F.3d 1448, 1464 (Fed. Cir. 1998) (en banc) (Mayer, C.J., & Newman, J., concurring in the judgment) (stating that "[w]e review the denial of a motion for judgment as a matter of law de novo by reapplying the same standard").

14. 316 Fed. Appx. 134 (3d Cir. 2009).

allowing them to conduct discovery and present evidence on their status as "known creditors."[15] But in the Third Circuit, an abuse of discretion occurs only if "there has been an interference with a substantial right" or the ruling "result[s] in fundamental unfairness in the trial of the case."[16] That standard is almost insurmountable; an advocate who asserts an argument prescribed by an abuse-of-discretion review must persuade the judge that the lower court was not merely wrong, but egregiously wrong, and that its result caused fundamental unfairness. The appellants in *W.R. Grace* failed to show such an egregiously wrong ruling and fundamentally unfair result in the trial court, instead pressing the court to enter what they perceived to be the right decision as if it were free to do so even in the absence of the required showing. And they lost.[17]

But the advocate representing the appellants in *W.R. Grace* could have introduced the argument in the following way:

> The bankruptcy court abused its discretion by limiting discovery. That is, its decision resulted in fundamental unfairness in the trial of the case. Admittedly, most discovery rulings do not constitute abuses of discretion, but the decision here violated that standard in three ways.

This might have given the court an opening, a chance to decide the case using a standard that favored the appellants' position.

C. Argument—Legal Science

Although the argument section of a brief comes after the issues presented and the summary of argument, the latter two sections cannot be written until the advocate is thoroughly familiar with the arguments she is making. The advocate must understand the issues that she will argue and the manner in which she will present them before she can competently describe the issues raised or summarize the argument. We therefore put this section before the sections on summary of

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15. *Id.* at 136–37.

16. *Public Loan Co. v. Fed. Deposit Ins. Corp.*, 803 F.2d 82, 86 (3d Cir. 1986) (internal quotation marks omitted).

17. *See W.R. Grace*, 316 Fed. Appx. at 137 (holding that "[t]he Bankruptcy Court did not err in disallowing claimants' claims as untimely, and the District Court did not err in affirming the Bankruptcy Court's decision").

argument and issues presented. You should do the same in writing your brief—block out your arguments before you attempt to summarize them or to finalize the issues presented.

A good argument section is a manual for the judge on how to decide the issue. The advocate should lay it out following the form that a judicial opinion will take; that is, the legal rule, an explanation of it, and then application. We will explain.

Each argument heading should represent the holding you want from the court in order to resolve that issue. For example, the heading for an argument in which an advocate contends that the lower court did not have subject-matter jurisdiction might read: "The District Court erred in resolving the merits because it did not have subject-matter jurisdiction." The advocate hopes that the judge will find this statement opportune and adopt it as the holding. This may seem straightforward, but many advocates fail to see it.

After developing the argument heading, you should provide a brief one-paragraph roadmap of that argument before turning to the subarguments. The roadmap outlines how the judge can reason to reach the proposed holding. For example:

> I. The District Court erred in resolving the merits because it did not have subject-matter jurisdiction.
>
> The District Court relied on 28 U.S.C. § 1332 as its basis for subject-matter jurisdiction. That section confers jurisdiction if two requirements are met. First, the parties must be completely diverse. *E.g.*, *Carden v. Arkoma Assocs.*, 494 U.S. 185, 187 (1990). Second, the plaintiff must seek, as the amount in controversy, at least $75,000. *E.g.*, *Kircher v. Putnam Funds Trust*, 547 U.S. 633, 643 n. 10 (2006). Here, neither requirement was satisfied. Accordingly, this Court should reverse; indeed, it can end its analysis after finding the first requirement unsatisfied.

Next, each sub-argument should explain and apply the steps of reasoning necessary to reach the proposed holding. Back to our example, here is an effective introduction for the sub-argument: "The first requirement—complete diversity between the parties—does not exist." Then, in the body of this

subsection, you must state the governing rule to measure complete diversity, provide an explanation of why that is the rule, and then apply it to the facts.

This process is legal science—a direct linear progression from rule to explanation to application. So for each argument you should (1) clearly identify the argument, *viz.*, the proposed holding, (2) state the steps of the argument in a roadmap, (3) clearly identify the sub-arguments, and (4) scientifically apply the rule to the relevant facts. Those are the elements of a legal-science argument; we will now explain the steps needed to produce it.

First, you must spend as much time as possible researching and understanding the case law. No matter how time-consuming and challenging, this step is indispensible. You should analyze the cases with the intent to distill a rule, not to present a case-by-case rehash. An advocate who gives research short shrift should not proceed to step two.

Second, distill the rule from the body of cases and state it clearly. If a rule is not evident from the cases, you should present an honest, clear extrapolation of what the rule seems to be and then an explanation of why the cases suggest that rule. Take, for example, the following issue: When does the stock-price test apply in securities cases involving § 10(b) of the 1933 Securities Act? You may find that the courts in your state or circuit have not explicitly stated a rule. You must then synthesize the cases and offer your view of when the court applies the test. Naturally, the less clear the court has been with stating a rule, the more explanation the advocate must present. For example:

> The stock-price test applies only when a plaintiff alleges an efficient market. Though the Court has not explicitly stated a rule triggering the stock-price test, it has applied the stock-price test only when a plaintiff alleges an efficient market. There are three relevant cases. [Provide brief explanations of those cases.] The rule that those cases establishes is this: A plaintiff can plead an efficient market to gain application of the stock-price test, or she can stay silent or plead an inefficient market and get the default test.

Third, apply that rule to your set of facts. Signpost your application section with "here" or "in this case" or something similar. For our example:

> Here, plaintiffs explicitly stated in their complaint that the stock traded on an efficient market. [Cite Record.] They are thus entitled to the stock-price test. The District Court erred in holding otherwise.

You can only scientifically apply the rule to the relevant facts if you have presented as clear a rule as possible along with its attendant explanation. If the three steps are done properly, you have taken the busy judge through the argument linearly, as if you were progressing through a scientific or mathematical formula.

The Chief Justice believes, in fact, that a brief is likely to be effective only if a layperson—or a lawyer with no expertise in the area of law at issue in the case—can understand it after reading it only once.[18] Sticking to the scientific approach allows the advocate to satisfy the Chief Justice's advice because the advocate's presentation starts with a clear rule distilled from cases, not a sprawling discussion of cases, and then moves to a brief explanation of the rule and culminates in a clear application of the rule to the facts. Furthermore, presenting the argument in this way allows the judge to evaluate the argument on the merits during her first read without wasting time figuring out what the argument is.

We finish this section with a few tips that, though bedrock tenets, deserve comment because some briefs are lacking. First, never misstate the law. This is a cardinal sin. You will lose credibility. Second, lead with the best argument; this will get the judge believing in your theory of the case quickly. Finally, limit the number of arguments. The advocate should eschew quantity in favor of presenting only the arguments that are viable.

D. Summary of Argument

Once the argument section is completed, the advocate can turn to the summary. The summary should be presented succinctly. If the judge can understand what the advocate is arguing from the summary of argument, the points presented in it will be reinforced when she reads the argument itself. The advocate cannot include every nuance of the argument in the

18. Chief Justice Interview, *supra* n. 6 (part 3 at 9:54–10:30).

summary, but it is important to include all important points and to acknowledge weaknesses if there are any.

The summary aids the judge because, when she knows where the argument is going, she can follow its development. The summary section should furnish a sharp exposition of rule and application. It is a taut presentation of legal science and is similar to the roadmap within the argument section. For example, consider this summary of argument for the appeal involving the stock-price test:

> The District Court erred in precluding plaintiffs from using the stock-price test to measure materiality for their §10(b) claim. The Third Circuit has only applied the stock-price test when plaintiffs allege an efficient market. A plaintiff can thus plead an efficient market to gain application of the stock-price test, or she can stay silent or plead an inefficient market and get the default test. Here, plaintiffs explicitly stated in their complaint that the stock traded on an efficient market.

E. Issues Presented

The advocate should limit the number of issues. We do not suggest a magic number, but we believe that a limited set of issues presenting only viable arguments is best. Our suggestion here corresponds directly to our suggestion about limiting the number of arguments. To do so, you should, during your research, narrow the possible list of arguments in light of their viability and the relative favorability of their concomitant standards of review.

Occasionally, an advocate will present ten or fifteen issues in her brief. This is an automatic warning flag that the advocate does not understand what the case is about or that she hopes to hide the weakness of the appeal under a flurry of words.

II. IMPORTANT WRITING TIPS

A. Remember that Judges Are Generalists.

Appellate judges are busy and are, for the most part, generalists. So if the advocate is a specialist, she should be

cognizant of that and explain the overall function of the doctrines or the statutory scheme at issue before diving into the details. She should avoid forcing the judge to trudge through hefty treatises to understand basic background principles and jargon.

For example, Judge Roth sat on a panel that analyzed an appellant's claim under the Individuals with Disabilities Education Act.[19] The Act prescribes a complicated statutory scheme, offering substantive and procedural protections to individuals who qualify. The Act, moreover, and the cases interpreting it, use acronyms for several terms—e.g., Individualized Education Plan (IEP); Free Appropriate Public Education (FAPE); and Evaluation Report (ER). Counsel for the parties were experts in this area of law and jumped straight into the specific provision in dispute without explaining the Act's overall function. They also littered their briefs with those acronyms. This was understandable given that they are experts in the field. Because the judge (and her clerk) were not as familiar with this area of law, though, they had to spend considerable time familiarizing themselves with the relevant statutory provisions and the acronyms commonly used in the field. Counsel could thus have improved their briefs' persuasiveness simply by explaining the relevant provisions of this statute and giving the court a guide to the acronyms.

B. Keep it Short.

We hope, by now, it is clear: Judges read lots of briefs every month, so you should keep your sentences and paragraphs short. You should measure every sentence of your brief to determine whether it advances your goal of persuading quickly. If the sentence does not, excise it. Whatever does not help, hurts.

C. Avoid Lengthy Quotes.

The advocate should avoid the electronic-database crutch of copying and pasting clunky quote after quote into the brief to provide background law. Presenting analysis that way hinders

19. 20 U.S.C. § 1400 *et seq.* (2007) (available at http://uscode.house.gov).

clarity and adds bulk, which slows reading. This relates to what we have said about researching and then synthesizing; the advocate should do the heavy lifting and provide the rule in a cogent way so that the judge can follow quickly.

You should also avoid string citations with quotations. Although this tactic appears to be employed more and more frequently, a more persuasive argument will set out the legal precepts in a discussion of the relevant law and then apply them to the case at hand. To promote the flow of the argument, the citations, supporting the points being made, can very effectively be put in footnotes.

D. Avoid Personal-Attack Arguments.

Do not personally attack opposing counsel; attack only their arguments. Stay above the fray. Attacking opposing counsel will result in the judge questioning the advocate's judgment and character, which distracts her focus from the brief. Moreover, if you are arguing that previous panel made an incorrect decision, you should refrain from labeling it as a "conservative" or "liberal" decision.

E. Be Readable.

Use understandable, clear language: Eschew legalese and Latin. Because you are aiming to make your argument persuasive after only one read by the judge, you should keep the language as readable as possible.

F. Humanize the Client.

If the client is a person, you should call him by name. If the client is a corporation, a city, or some other impersonal organization, you should not just call it X Company or the City of Y; you should, as much as possible, refer by name to the persons, managers, officers, or policemen involved in the action. Don't let the judge consider a party to be an impersonal institution. A lawsuit is about *people*. If your client is considered to be a *person*—or a group of people—you should be able to generate more sympathy for him or for them.

G. Choose Your Language Carefully.

Remember that the words you use to describe your client and the actions that brought about the lawsuit can influence the outcome. You should use the vocabulary that will portray your client in the best light and your opponent in the worst. Returning to John Doe, his attorney described his situation as that of a civil detainee confined like a criminal convict. The Head Jail Official described him as a sexual predator whose confinement was evaluated consonant with governing law. This choice of language leads the reader in the direction that each advocate wishes.

H. Use Timelines and Charts.

Particularly when an appeal involves complicated facts or complex legal issues, charts and diagrams clarify the picture for the judge. A timeline is helpful to establish a sequence of events when that is important. A chart can summarize vital points when the material is voluminous. A diagram of relevant parts of two documents can demonstrate the difference (or similarity) of language that the advocate deems crucial to the case. Helping the judge understand intricate or convoluted facts or legal points will give the advocate a better chance of convincing the judge that the advocate's position is the meritorious one. Indeed, judges are apt to think that the advocate is trying to hide something if the facts are difficult to understand.

I. Do Not Let Your Opponent Lead You Astray.

You should ask yourself the following questions as you review your opponent's brief: Are the issues really as stated by the other side? Is my opponent hiding a weak point in a haystack or directing the court's attention to a red herring?

You can determine the answers to these questions only by reviewing the case so thoroughly that you will know when the other side is misrepresenting facts or misstating a precedent. The advocate who skips detailed preparation may regrettably be led astray. If your opponent is attempting to obfuscate, you must

refrain from personal attacks but proceed patiently to present the law accurately.

For example, Judge Roth was recently on the panel in a case in which appellants' counsel attempted to persuade the court that the elements required in one type of securities case were also required in an entirely different area, even though binding case law explicitly acknowledged the difference between the two types of claims. Specifically, appellants' counsel argued that appellees had failed to adduce any evidence of reliance or causation and thus had failed to present a prima facie claim under section 11 of the Securities Act of 1933.[20] Appellants' briefs were well written and facially persuasive. Only upon careful review did it become evident that case law—both from the Supreme Court and from the Third Circuit—unambiguously impugned appellants' argument.[21] Section 11 claims do not require those elements. Appellees' response exemplified the proper reaction. They were not led astray by appellants' slick mischaracterization. Instead, they persuasively explained what the law actually was and how the court should apply it. Had they not carefully studied the claim at issue, they might have adopted appellants' characterization. Furthermore, appellees refrained from personal attacks; they stuck to attacking appellants' arguments. Appellants, of course, lost their appeal. At the same time, the lawyers who represented them lost credibility with the court.

III. LEGAL PRINCIPLES THAT THE ADVOCATE SHOULD CONSIDER

Taking advantage of every opportunity to include any of the following three principles will improve the substance of any brief.

A. Waiver

Many advocates would benefit from wielding this weapon

20. 15 U.S.C. § 77k (available at http://uscode.house.gov).

21. *See Herman & MacLean v. Huddleston*, 459 U.S. 375, 382 (1983); *In re Supreme Specialties, Inc. Secs. Litig.*, 438 F.3d 257, 269 (3d Cir. 2006).

in appropriate situations, which occur more often than you may believe. A party can waive its argument on appeal in either of two ways. First, a party can waive an argument if it has not been raised in the court below.[22] Second, a party can waive an argument by not arguing it in its opening brief.[23] To raise an issue, a party must "present it with sufficient specificity to allow the court to pass on it."[24] A party typically raises an issue before the district court in its pleadings or papers, so be on the lookout as you review the other side's papers for opportunities to argue waiver.

B. Harmless Error

This tool allows the advocate to concede error in the court below but argue that it was harmless. An error is harmless if it is "highly probable that [it] did not affect the outcome of the case."[25] If correcting the flaw in the lower court's proceeding would not change the decision, the appellate court will affirm. Remember that this doctrine applies in both criminal and civil appeals.[26]

C. Judicial Estoppel

This is the tool to use against a party arguing a different position on appeal. You can assert that your opponent is estopped from arguing that issue because a party cannot adopt

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22. *See e.g. DIRECTV Inc. v. Seijas*, 508 F.3d 123, 125 n. 1 (3d Cir. 2007) ("It is well established that arguments not raised before the District Court are waived on appeal."); *see also e.g. London v. Coopers & Lybrand*, 644 F.2d 811, 814 (9th Cir. 1981) ("It has long been the rule in this circuit that a plaintiff waives all causes of action alleged in the original complaint which are not alleged in the amended complaint.").

23. *See e.g. U.S. v. Hoffecker*, 530 F.3d 137, 159 (3d Cir. 2008) (citing *U.S. v. Pelullo*, 399 F.3d 197, 222 (3d Cir. 2005) (noting that "It is well settled that an appellant's failure to identify or argue an issue in his opening brief constitutes waiver of that issue on appeal")); *U.S. v. DeMichael*, 461 F.3d 414, 417 (3d Cir. 2006) (quoting *Laborers' Intl. Union of N. Am. v. Foster Wheeler Corp.*, 26 F.3d 375, 398 (3d Cir. 1994): "An issue is waived unless a party raises it in its opening brief, and for those purposes a passing reference to an issue will not suffice to bring that issue before this court.").

24. *See e.g. In re Teleglobe Commun. Corp.*, 493 F.3d 345, 376 (3d Cir. 2007).

25. *Becker v. ARCO Chemical Co.*, 207 F.3d 176, 180, 205 (3d Cir. 2000).

26. *See McQueeney v. Wilmington Trust Co.*, 779 F.2d 916, 927 (3d Cir. 1985) (listing "three compelling reasons that the standards should be the same").

conflicting positions during different stages of the same proceeding.[27] Similarly, you can argue, if relevant, that the other party is estopped from presenting an argument because it argued the converse in a different proceeding. For example, Roe cannot sue Wade, the Attorney General of Texas, seeking a declaratory judgment that the Texas criminal abortion statues are unconstitutional and then sue Smith, the attorney general of another state, asking for a ruling that will uphold the criminal abortion statues of that state.

IV. CONCLUSION

Writing an appellate brief can be a daunting experience. If you follow our suggestions, however, you will have a formula for persuading the judges quickly and thus increasing your chances of winning on appeal.

27. *See e.g. In re Teleglobe*, 493 F.3d 345, 377 ("Judicial estoppel prevents a party from 'playing fast and loose with the courts' by adopting conflicting positions in different legal proceedings (or different stages of the same proceeding)." (parenthesis in original) (citation omitted)).

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The Case Against Oral Argument: The Effects of Confirmation Bias on the Outcome of Selected Cases in the Seventh Circuit Court of Appeals

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Article

The Case Against Oral Argument

The Effects of Confirmation Bias on the Outcome of Selected Cases in the Seventh Circuit Court of Appeals

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I. Introduction

Scholars have long been divided over the role, function, and significance, if any, of oral argument in judicial decision-making.[1] Federal courts seem similarly divided, as some circuits routinely grant oral argument in almost every case, while others grant oral argument in only a small fraction of appeals. This divide should not be dismissed as merely an idiosyncratic debate or as a response to excessive workload, particularly when one considers that approximately 53,000 appeals were filed in federal courts of appeals in the year ending September 30, 2016.[2] Since the Supreme Court grants *certiorari* in only approximately eighty cases each year, federal courts of appeal essentially act as the final arbiters of many

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1 *See, e.g.*, Warren D. Wolfson, *Oral Argument: Does It Matter?* 35 IND. LAW REV. 451, 454 (2002). Wolfson concludes that oral arguments may have an effect, although probably only in five to ten percent of cases. In contrast, Spaeth and Segal suggest that oral argument matters very little because judges decide cases based on policy preferences and political leanings. JEFFREY SEGAL & HAROLD SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED 280, 430–35 (2002). Segal and Spaeth are widely credited with developing the attitudinal theory. *See* RYAN A. MALPHURS, RHETORIC AND DISCOURSE IN SUPREME COURT ORAL ARGUMENTS: SENSEMAKING IN JUDICIAL DECISIONS 28 (Routledge Press 2013), crediting Segal and Spaeth for the attitudinal model. *See also* Jeffrey A. Segal & Albert D. Cover, *Ideological Values and the Votes of Supreme Court Justices*, 83 AM. POL. SCI. REV. 557 (1989) (reviewing study providing support for attitudinal theory).

2 *See* federal courts management statistics 2016, http://www.uscourts.gov/sites/default/files/data_tables/Table2.02.pdf (last visited January 15, 2017). That number does not include data from the US Court of Appeals for the Federal Circuit. *See id.*

legal issues. That means that how the federal courts decide appeals, and the process through which they reach those decisions, including the granting or withholding of oral arguments, are important to the administration of justice.

Rule 34 of the Federal Rules of Appellate Procedure gives judges fairly broad discretion about whether to hear oral argument. The rule permits judges to dispense with oral argument if a panel of three judges who have examined the briefs and record unanimously agrees that oral argument is unnecessary because

> (C) the facts and legal arguments are adequately presented in the briefs and record, and the decisional process would not be significantly aided by oral argument.[3]

Some courts interpret this as indicating that oral argument ought to be the rule, rather than the exception,[4] others the reverse.[5] For courts that view the rule as requiring oral argument in the absence of a valid reason not to have it, this requirement places enormous pressure on judges, given the number of appeals that are filed. However, routinely hearing oral argument is an effective use of judicial resources only if oral argument really does make a difference to the outcome of cases by aiding the decision-making process and advancing the administration of justice.

Consider the divergent approach taken by two federal circuits in their interpretation of Rule 34(c). The Eleventh Circuit, one of the busiest federal circuits with more than 5,000 appeals filed in 2015,[6] hears oral argument in somewhere between ten and twenty percent (10-20%) of the

3 Rule 34(2) of Federal Rules of Appellate practice, https://www.law.cornell.edu/rules/frap/rule_34 (last visited Apr. 10, 2017) provides as follows:

> (2) *Standards.* Oral argument must be allowed in every case unless a panel of three judges who have examined the briefs and record unanimously agrees that oral argument is unnecessary for any of the following reasons:
> (A) the appeal is frivolous;
> (B) the dispositive issue or issues have been authoritatively decided; or
> (C) the facts and legal arguments are adequately presented in the briefs and record, and the decisional process would not be significantly aided by oral argument.

4 This is the approach taken by the Seventh Circuit Court of Appeals.

5 The Eleventh Circuit is an example of a circuit that hears oral argument in only approximately one fifth of the cases that come before it. This is a result not only of the sheer volume of cases that are filed but also the court's belief that in most cases the matter may be decided on the briefs. *See* Mike Skotnicki, *A Peek Inside the Chambers: How the Eleventh Circuit Court of Appeals Decides Cases*, BRIEFLY WRITING, Apr. 9, 2012, https://brieflywriting.com/2012/04/09/a-peek-inside-the-chambers-how-the-eleventh-circuit-court-of-appeals-decides-cases/ (last visited Apr.10, 2017).

6 *See* federal courts management statistics 2015, http://www.uscourts.gov/sites/default/files/data_tables/stfj_b7_1231.2015.pdf (last visited Jan. 15, 2017). Additionally, Judge Urbina of the Eleventh Circuit stated that it is the practice of the Court to hear oral arguments only in about 20% of the cases. *See* Skotnicki, *supra* note 5, at 2.

7 According to 2016 statistics provided by the United States Federal Courts of Appeals, in the Eleventh Circuit 92.3% of cases were disposed of based on the briefs. *See* http://www.uscourts.gov/sites/default/files/data_tables/jb_b10_0930.2016.pdf (last visited Apr. 10, 2017).

cases filed.[7] In contrast, the Seventh Circuit's practice is to hear oral argument in almost every case of the nearly 2,500 appeals[8] filed in that circuit, unless the parties do not request oral argument.[9] While the Eleventh Circuit certainly has a heavier case load, no one would suggest it takes its duties and responsibilities less seriously because it hears fewer oral arguments. This dichotomous approach by the two circuits raises the question, How important is oral argument to a fully considered resolution of a case? If it is useful or even essential, are circuits that do not routinely avail themselves of oral arguments shortchanging litigants? Or, if oral argument makes little to no difference in the eventual outcome, are circuits that routinely hear oral arguments using judicial resources effectively?

To determine the answer to those questions, we have to examine both what judges themselves say about how, if at all, oral argument may influence case outcomes and examine what actually occurs during oral argument. Scholars and judges routinely describe oral argument as a "conversation" between the bench and counsel[10] and a "conversation" among the judges on the bench.[11] Analyzing these "conversations" and then examining case outcomes in light of what took place at oral argument may provide us with insight about the role of oral argument in judicial decision-making.[12]

This article describes a study conducted on the oral-argument process at the Seventh Circuit Court of Appeals. The purpose of the study was to broadly analyze the "conversations" that took place during one hundred oral arguments in which any one or combination of three specific judges—Rovner, Posner, and Easterbrook—participated, in an attempt to discern whether particular characteristics of the oral questioning provided insight regarding case outcomes. Specifically, I analyzed whether the number of questions posed to each side was significant with respect to the case

8 *See id.*

9 Richard Posner, *Judicial Opinions and Appellate Advocacy in Federal Courts—One Judge's Views,* 51 DUQ. L. REV. 3, 8 (2013) ("My court allows oral argument in all cases in which both sides have counsel; most of these are civil cases but a substantial minority are criminal.")

10 RYAN C. BLACK, TIMOTHY R. JOHNSON, & JUSTIN WEDEKING, ORAL ARGUMENTS AND COALITION FORMATION ON THE U.S. SUPREME COURT—A DELIBERATE DIALOGUE 10 (2012). *See also* Talbot D'Alemberte, *Oral Argument: The Continuing Conversation,* 25 LITIGATION 12 (1999) wherein D'Alemberte cites a conversation with Justice Overton of the Florida Supreme Court in which Justice Overton told him, "[y]ou should think of your [oral] argument as the beginning of the judicial conference, and you are privileged to be there."

11 BLACK ET AL., *supra* note 10, at 85–86. *See also* LAWRENCE WRIGHTSMAN, ORAL ARGUMENTS BEFORE THE SUPREME COURT: AN EMPIRICAL APPROACH 40 (2008), in which the author cites Justice Kennedy describing oral argument as the "Court having a conversation with itself through the medium of attorneys."

12 I realize that discussions among judges at conferences that occur after oral argument, as well as the circulation of draft opinions are also extremely important factors, and I acknowledge this in part V of the article. However, there is little information available about these processes to consider their roles in the decision-making process.

outcome and whether the tone and content of the questions portended any particular outcome.[13] I then analyzed the decisions in each of those cases to determine if the outcome had been foreshadowed in the exchanges that took place between the bench and counsel during oral argument. I also researched whether any of the judges had previously expressed any strong opinions about the types of cases before them, and whether the expression of a previous opinion seemed to play any role in the ultimate decision.

The obvious problem in examining the data proffered by oral argument is that it is extremely difficult to intuit which way judges were leaning on a case prior to oral argument, and how, if at all, oral argument factored into the decision-making process, absent the unlikely event of judges choosing to tell us.[14] However, several political scientists have conducted studies on United States Supreme Court oral arguments and found that the side that is asked more questions during oral argument will likely lose the case.[15] The likelihood of that side's losing is further increased if the tone and content of the judges' questions evince skepticism or hostility towards that side.[16] This suggests that if a judge is skeptical about a particular side's arguments, she would have more questions for that side. A judge's skepticism may be evidenced by the tone, manner, or type of questions posed to the side that ultimately loses—specifically, when the judge poses questions in a hostile or adversarial way, connoted by word choice, tone, and affect.[17] Hence, all of these factors were examined in my study.

If one may intuit a judge's initial leanings on a case by the number, tone, and content of her questions,[18] one may then look to the outcome of the case and determine whether it was the expected outcome (i.e., the side that was asked more hostile questions lost) or contrary to expectations.[19]

13 As described in more detail in part IV *infra*, I evaluated the questions as neutral, hostile, or friendly. These evaluations were based on the judges' tone of voice, word choice, and the nature of the questions.

14 All of the judges in my study, as I discuss in part IV, have expressed some concern about the quality of the decisions of the Social Security Administration and immigration judges. Thus, they may be predisposed to regard decisions with some skepticism when petitions for review come before them.

15 Timothy R. Johnson, et al.; *Inquiring Minds Want to Know: Do Justices Tip Their Hands with Questions at Oral Argument in the U.S. Supreme Court?* 29 WASH. U. J.L & POL'Y 241, 259–60 (2009).

16 Sarah Levien Shullman, *The Illusions of Devil's Advocacy: How the Justices of the Supreme Court Foreshadow their Decisions during Oral Argument,* 6 J. APP. PRAC. & PROCESS 271–72 (2004).

17 *See* Johnson et al., *supra* note 15, at 259–60.

18 I realize that assessing tone is subjective. Moreover, a judge may evince a neutral tone in questioning and yet be hostile towards a particular position advanced by counsel (content hostile). In the study I had several raters listen to the questions posed in the oral arguments, and if we did not agree on the tone, it was coded as a neutral question.

19 Most judges, including the judges in this study, aver that oral argument changes their mind somewhere between 10% and 20% of the time. Thus we might expect the outcome of a case to deviate from the predicted outcome somewhere between 10% and 20% of the time. In this study, the number proved to be about 10% of the time.

If the outcome is not as predicted, one might infer that oral argument played a role in changing a judge's initial predisposition towards the case.[20]

This article will contend that despite judges' generally averring that they are open to changing their minds on cases during oral argument,[21] in practice they are predisposed not to do so because they often approach oral argument with a particular inclination regarding the outcome. This inclination may be based on legal precedent, procedural issues, bias, or any combination of those and additional unknown factors. I suggest that, rather than remain open to being persuaded during oral argument, judges often reinforce their initial predisposition by posing hostile questions to the side that they are predisposed against.[22] I argue here that the very tone, nature, and number of a judge's questions may subconsciously both reflect and reinforce that judge's bias. In other words, I posit that a judge's initial bias or leanings on a case may be confirmed by the type of questioning she initiates, which then effectively prevents the judge from changing her mind about the outcome of the case a process known as confirmation bias.[23] Because I infer that confirmation bias may result in oral argument's being used as a method of reinforcing initial bias, I suggest that oral argument may not be an effective use of judicial resources.

Part II of this article will describe and analyze the role of oral argument in judicial decision-making, primarily through canvassing studies done on Supreme Court oral arguments. Some of these studies suggest that oral argument is important in the decision-making process, while others suggest the converse.[24] I then discuss judges' views on oral argument and the potential ways in which interactions between the bench and counsel during oral argument may signal the outcome of a case. In

20 Of course a judge may be persuaded by her colleagues during the judicial conference, or in writing or reading the draft opinion. Some judges have observed that when drafting an opinion on occasion it just "won't write," which indicates a flaw in the judicial reasoning and causes them to change their mind. *See* ABA Council of Appellate Lawyers, *Justice Scalia at the AEJI Summit in New Orleans*, APP. ISSUES, Feb. 2013, at 4, http://www.americanbar.org/content/dam/aba/publications/appellate_issues/2013win_ai.authcheckdam.pdf. Justice Scalia noted in that interview that at least in the Supreme Court conferences, the justices do not try to persuade each other and that a justice very seldom changes his or her mind. *Id.* at 2.

20 Judge Myron Bright of the Eighth Circuit along with two of his colleagues conducted a study in which he found that oral argument changed his mind in 31% of the cases that came before him, his colleagues respectively changed their minds in 17% and 13% of the cases. Myron H. Bright, *The Power of the Spoken Word: In Defense of Oral Argument*, 72 IOWA L. REV. 35, 40 nn. 32–33 (1986).

22 I argue in part III *infra* that this is a form of "confirmation bias," a recognized psychological phenomenon. *See generally* Charles Lord, Lee Ross, & Mark Lepper, *Biased Assimilation and Attitude Polarization: The Effects of Prior Theories on Subsequently Considered Evidence*, 37 J. PERSONALITY & SOC. PSYCHOL. 2098 (1979).

23 Confirmation bias is a widely observed phenomenon whereby people seek out and interpret information that is consistent with their expectations. Ivan Hernandez & Jesse Lee Preston, *Disfluency Disrupts the Confirmation Bias*, 49 J. EXPERIMENTAL SOC. PSYCHOL. 178, 178 (2012).

24 Proponents of the attitudinal model like Segal and Spaeth, *supra* note 1, aver that most cases are decided on the basis of a judge's preexisting attitude and ideology, which would suggest that oral arguments are not that important. Additionally, according to an article in the ABA Journal, Justice Alito reportedly asserted that "oral arguments aren't all that important,

part III of this article, I describe the phenomenon of confirmation bias and suggest how it may play out in the type and numbers of questions posed to each side during oral argument. Part IV will describe the results of a study I conducted on a database of oral arguments before the Seventh Circuit Court of Appeals that generally reinforces the findings found in the Supreme Court studies. Part V then addresses the contentions that oral argument might nevertheless serve a valid role in making justice visible or refining judicial opinions, even if confirmation bias is found to play a role in oral argument itself. Parts VI and VII conclude the project by suggesting that oral argument may not be an effective use of judicial resources and that information sought by the bench during oral argument might better be obtained by means of written questions posed to the respective parties.

II. The Role and Function of Oral Argument in Judicial Decision-Making

Rule 34 presupposes that oral argument may play a crucial role in the decision-making process, particularly in close cases. Indeed, common wisdom suggests that oral argument helps judges decide cases.[25] Not everyone agrees with this seemingly obvious contention.[26] Some would assert that oral argument serves little purpose and that cases may more expeditiously be decided on the briefs.[27] Others argue that oral arguments are merely "window dressing" justice and that cases have already been decided or will be decided on ideological grounds.[28] Yet many judges themselves tell us that oral arguments serve to clear up points of confusion

despite a popular belief to the contrary." Debra Cassens Weiss, *Think Oral Arguments Are Important? Think Again, Justice Alito Says.* ABA JOURNAL May 17, 2011, http://www.abajournal.com/news/article/think_oral_arguments_are_ important_ think_again_alito_says/?from=widget (last visited Apr. 17, 2017).

25 *See generally* Cynthia Kelly Conlon & Julie M. Karaba, *May It Please the Court: Questions about Policy at Oral Argument,* 8 NW. J. LAW & SOC. POL'Y 89 (2012).

26 For example, Justice Alito suggested otherwise during a visit at St. Louis Law School, telling attendees that oral argument is unimportant. *See* Deb Peterson, *Supreme Court Justice Samuel Alito Speaks at St. Louis Law Day,* STL TODAY, May 16, 2011, htpp://www.stltoday.com/news/local/columns/ deb-peterson/article_873af5a6-8008-11e0-8324-001a4bcf6878.html. Also, note the example of the Oklahoma Supreme Court discussed in *infra* part II.A.2.

27 Judge Ruggero Aldisert of the Third Circuit Court of Appeals was a proponent of this approach, noting, "[T]he recent astronomical increase in appellate court caseloads emphasizes the importance of briefs and diminishes the grandness of oral arguments." Ruggero Aldisert, *Perspective From the Bench,* 75 MISS. L.J. 645, 648 (2006). Judge Urbina of the Eleventh Circuit also supports it with caveats, noting, "[I]n many cases, the helpfulness of oral argument is overrated. It can, however, make the difference in a close case . . . ." Joel F. Urbina, *From the Bench: Effective Oral Advocacy,* LITIGATION, Winter 1994, at 3, 4. *See also* Joe Cecil and Donna Stienstra, who argue that based on their study of four federal courts of appeals "judges generally agree that there are many cases in which oral argument will not inform the disposition of a case." JOE CECIL, DONNA STIENSTRA, DECIDING CASES WITHOUT ARGUMENT: AN EXAMINATION OF FOUR COURTS OF APPEALS 157 (Federal Judicial Center 1987).

28 Timothy R. Johnson, Paul J. Wahlbeck & James F. Spriggs II, *The Influence of Oral Arguments on the U.S. Supreme Court,* 100 AM. POL. SCI. REV. 99 (2006) (citing SEGAL & SPAETH, *supra* note 1, at 280).

and really can and do make a difference in the outcome of the case.[29] They contend that arguments made by counsel may sway them if they are undecided, or even cause them to change their minds.[30] I will explore each of these arguments, and go on to suggest that rather than using questions to clarify points of contention during oral argument, judges may be subconsciously questioning counsel so as to elicit confirmation of preexisting biases.

A. Oral Argument Serves No (or Little) Purpose

Several political scientists have long asserted that oral argument serves no valid purpose as judges essentially decide cases based on their own beliefs on the issues.[31] Segal and Spaeth christened this theory the "attitudinal model," and conducted several studies that indicate a strong correlation between a judge's ideological or political leanings and case outcomes.[32] This theory is more applicable to Supreme Court arguments than Courts of Appeals arguments, as the Supreme Court decides more politicized cases, and the selection of Supreme Court justices has become a hyperpoliticized process.[33]

1. Cases are Decided on the Basis of the Attitudinal Model

Segal and Spaeth discount the role of oral argument,[34] asserting that cases are often decided along ideological lines.[35] The evidence for this claim is based on studies conducted on Supreme Court oral arguments, [36] and thus might have less validity when applied to appellate-court

29 Justice Blackmun posited that oral arguments were helpful, adding that "many times confusion (in the brief) is clarified by what the lawyers have to say." Philippa Strum, *Change and Continuity on the Supreme Court: Conversations with Justice Harry Blackmun,* 34 U. RICH. L. REV. 285, 298 (2000).

30 Ruth Bader Ginsburg, *Remarks on Appellate Advocacy,* 50 S.C. L. REV. 567, 570 (1999).

31 *See generally* SEGAL & SPAETH, *supra* note 1. *See also* MALPHURS, *supra* note 1 (crediting Segal and Spaeth with developing the attitudinal theory).

32 *Id. See also* Segal & Cover, *supra* note 1.

33 In a 2016 speech, Chief Justice Roberts pointed out that Justice Scalia had been confirmed by a vote of 98 to 0, but the votes for "more[-]recent colleagues, all extremely well qualified for the court[,] . . . were . . . strictly on party lines for the last three of them, or close to it, and that doesn't make any sense. That suggests to me that the process is being used for something other than ensuring the qualifications of the nominees." Adam Liptak, *John Roberts Criticized Supreme Court Nomination Process Before There Was a Vacancy,* N.Y. TIMES Mar 21, 2016, https://www.nytimes.com/2016/03/22/us/politics/john-roberts-criticized-supreme-court-confirmation-process-before-there-was-a-vacancy.html?_r=0 (last visited Apr. 10, 2017). *See also* Richard A. Posner, *The Supreme Court Is a Political Court. Republicans' Actions Are Proof,* WASH. POST. Mar. 9, 2016.

34 SEGAL & SPAETH, *supra* note 1, at 430–35.

35 This attitudinal model is endorsed by other scholars. *See, e.g.,* THOMAS HANSFORD & JAMES SPRIGGS, THE POLITICS OF PRECEDENT ON THE U.S. SUPREME COURT (2006); VIRGINIA HETTINGER, STEFANIE LINDQUIST, & WENDY MARTINEK, JUDGING ON A COLLEGIAL COURT: INFLUENCES ON FEDERAL APPELLATE DECISION MAKING (2006); DAVID KLEIN, MAKING LAW IN THE UNITED STATES COURTS OF APPEALS 91 (2002).

36 *See, e.g.,* James C. Phillips & Edward L. Carter, *Oral Argument in the Early Roberts Court: A Qualitative and Quantitative Analysis of Individual Justice Behavior,* 11 J. APP. PRAC. & PROCESS 325 (2010); WRIGHTSMAN, *supra* note 11, at 132 *et seq.* describing the various studies that have been conducted on Supreme Court oral arguments.

arguments, for which fewer studies have been conducted.[37] Proponents of this position argue that a justice's vote on a case reflects that justice's values, emotions, attitude, and political leanings.[38] Wrightsman claims that "these attitudes and values serve as filters and cause the decision maker to pay more attention to those arguments supporting his or her bias, denigrating those arguments that do not."[39] In a Supreme Court that has become more divided among ideological lines, this argument holds some sway.[40] Songer and Link additionally point out that even critics of the attitudinal model have had to concede that "the ideological values and policy preferences of Supreme Court justices have a profound impact on their decisions in many cases."[41] This model may have less validity when applied to Courts of Appeals whose caseload may be less politically charged.

If a judge's ideology plays a deciding role in case outcomes, oral argument may then be of little value.[42] Though other scholars concur with that conclusion, their explanation of why this is so is based on reasons other than the attitudinal model.[43]

2. Oral Argument Is Not Important because Cases Are Decided on the Briefs

The Oklahoma Supreme Court appears to wholeheartedly endorse the view that the briefs determine the outcome of cases. In Oklahoma, oral argument is rarely granted, as Rule 1.9 requires parties to file a motion setting forth the "*exceptional* reason that oral argument is necessary."[44] Over a ten-year period, the Oklahoma Supreme Court decided over one thousand cases, all but twelve without oral argument.[45] Although this

37 Epstein, Landes, and Posner also point out that ninety-eight percent of decisions in federal appellate courts are unanimous. LEE EPSTEIN, WILLIAM M. LANDES, RICHARD A. POSNER, THE BEHAVIOR OF FEDERAL JUDGES 54 (2013). Thus I infer that it is more difficult to determine how or if ideology played a role in the decision-making process.

38 TIMOTHY R. JOHNSON, ORAL ARGUMENTS AND DECISION MAKING ON THE UNITED STATES SUPREME COURT, 13-17 (2004). *See also* Erwin Chemerinsky, *The Meaning of Bush v. Gore: Thoughts on Professor Amar's Analysis* 61 FLA. L. REV 969, 970 (2009) ("[F]irst, Justices have tremendous discretion in deciding constitutional cases; and second, how that discretion is exercised is frequently, if not inevitably, a product of the Justices' life experiences and ideology.")

39 WRIGHTSMAN, *supra* note 11, at 30.

40 *See generally* MICHAEL A. BAILEY & FORREST MALTZMAN, THE CONSTRAINED COURT: LAW, POLITICS, AND THE DECISIONS JUSTICES MAKE (2012). Bailey and Maltzman acknowledge that law in the form of precedent does matter, too, but that it is difficult to determine the precise roles played by judges' ideological and policy preferences from the role played by precedent. *Id.* at 47.

41 Donald Songer & Jessica Link, *Debunking the Myths Surrounding the Attitudinal Model of Supreme Court Decision Making* at *2 (Presentation to Annual Meeting of American Political Science Association, Sept. 2, 2010), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1644573 (internal quotation, citation omitted).

42 WRIGHTSMAN, *supra* note 11, at 33. For example, in the 2001 Supreme Court term, when deciding cases involving prisoners' rights, the three most conservative justices sided with the state on all but two occasions out of a possible twenty-four votes, the four liberals on the Court found in favor of the prisoners with twenty-eight of a possible thirty-two votes. *Id.* at 33–34.

43 *See* MALPHURS, *supra* note 1, at 28.

44 Okla. Sup. Ct. R. 1.9 (emphasis added).

approach has its critics,[46] the court largely continues this practice, although the Court of Criminal Appeals hears oral arguments in all death penalty cases.[47]

Other examples cited in support of the proposition that cases be decided on the briefs concern cases where a justice is not present for oral argument or even the judicial conferences, but nevertheless goes on to write the majority opinion in those cases. For example, Wrightsman noted that in 2004, then-Chief Justice Rehnquist missed oral arguments in forty-four cases because he was being treated for thyroid cancer.[48] Not only did he miss the oral arguments, he missed the conferences too.[49] Despite his absence from both arguments and conferences, Rehnquist assigned himself to write the opinions in four of those cases.[50]

Another example of the briefs' mattering more than oral argument may be seen in the approach taken by the California Supreme Court. The California Supreme Court does hear oral arguments on all cases unless waived by the parties, but often uses oral argument to "test" the limitations of a "calendar memorandum":[51] After reading the parties' briefs, the justices meet to discuss the case and formulate a draft opinion, which they then test out through the process of questioning during oral argument.[52] Obviously, the justices reach their tentative opinion based on the parties' briefs but are ostensibly open to having their minds changed, or at least, their opinions modified, by oral argument, if it appears there are shortcomings in their initial approach.

B. According to Judges, Oral Argument Can Make a Difference in a Small but Significant Number of Cases

Despite the suggestions made that oral arguments may not matter much in the final determination of a case, comments from judges themselves seem to suggest that they do, at least in the minds of some judges. For example, in 1981, the U.S. Supreme Court contemplated (at Justice Sandra Day O'Connor's suggestion) not hearing oral arguments in all of the cases, as it had accepted an unusually high number of cases that year.[53] Justice Powell had some misgivings, responding, "I could agree with

45 Joseph Thai & Andrew Coats, *The Case for Oral Argument in the Supreme Court of Oklahoma*, 61 OKLA. L. REV 695, 695 (2008).

46 *See generally id.*

47 Okla. Crim. App. R. 3.8.

48 WRIGHTSMAN, *supra* note 11, at 8.

49 *Id.*

50 *Id.* The cases were *Muehler v. Mena*, 544 U.S. 93 (2005), *Tenet v. Doe*, 544 U.S. 1 (2005), *Pace v. DiGuglielmo*, 544 U.S. 208 (2005), and *Van Orden v. Perry*, 545 U.S. 607 (2005). *Id.*

51 *See* THE SUPREME COURT OF CALIFORNIA 22, http://www.courts.ca.gov/documents/The_Supreme_Court_of_California_Booklet.pdf (last visited Apr. 10, 2017).

52 Interview with Justice Carol Corrigan, California Supreme Court, in at Notre Dame, Mar. 25, 2013 (on file with author).

53 WRIGHTSMAN, *supra* note 11, at 9.

[Justice O'Connor's] proposed change [but] my only concern is that we might abuse this privilege. I believe in the utility of oral argument, and also in the symbolism it portrays for the public."[54]

Other judges too, have spoken out regarding their belief that oral argument plays a valuable role in the decision-making process. For example, Chief Justice Rehnquist noted,

> Lawyers often ask me whether oral argument "really makes a difference." Often the question is asked with an undertone of skepticism, if not cynicism, intimating that the judges really have made up their minds before they ever come to the bench and oral argument is pretty much a formality. Speaking for myself, I think it does make a difference; in a significant minority of cases in which I have heard oral argument, I have left the bench feeling differently about a case than I did when I came to the bench. The change is seldom a full one-hundred-and-eighty-degree swing, and I find it is most likely to occur in cases involving areas of law with which I am least familiar.[55]

Rehnquist's point that oral argument may assist the judges particularly with regard to areas of law with which they are unfamiliar has been echoed by Judge Posner of the Seventh Circuit, who has pointed out that judges are generalists,[56] whereas the lawyers arguing a case have attained a specialized knowledge of the law and facts in that case and thus may be able to assist the bench. Even Justice Scalia, initially dismissing oral arguments as a "dog and pony show,"[57] later noted that "things can be put in perspective during oral arguments in a way that they can't in a written brief."[58]

Federal Circuit judges overall seem to endorse the view that oral arguments do matter, at least in a small but significant number of cases. Based on interviews conducted with judges by Bryan Garner, it seems clear that many judges believe that oral arguments may affect the outcome of cases.[59] Judges have also noted that occasionally a lawyer is a better

54 *Id.* at 9 (second alteration in original).

55 *Id.* at 39 (citation omitted).

56 RICHARD POSNER, REFLECTIONS ON JUDGING, 269 (2013). "In all likelihood he [the judge] is a generalist, lacking specialized knowledge of most of the fields of law that generate the cases that come before him. The advocate, in contrast, probably is a specialist . . . ."

57 WRIGHTSMAN, *supra* note 11, at 40 (citing DAVID M. O'BRIEN, STORM CENTER: THE SUPREME COURT IN AMERICAN POLITICS 260 (2000)).

58 *Id.*

59 *See* interviews by Bryan Garner with Supreme Court Justices and federal judges, http://www.lawprose.org/bryan-garner/garners-interviews/. Most judges reported that oral arguments may make a difference in the outcome of the cases in a small number of cases. *See id.*

"talker than writer," suggesting that on occasion oral argument may be more persuasive than briefs.[60]

The judges analyzed in the study conducted for this article also seem to believe that oral argument may change their minds on cases. Judge Rovner has noted that "oral argument can make a difference [in] the outcome of a case,"[61] and estimated that oral argument changed her mind in 15 to 20 percent of the cases she hears.[62]

Judge Posner also claimed that "although the average quality of oral arguments in federal court . . . is not high, the value of oral argument to judges is very high."[63] Judge Easterbrook similarly suggested that oral argument can make a difference in between 5 to 10 percent of cases.[64] He also avers that advocates may lose their case at oral argument by not responding appropriately to the judges' questions.[65]

The fact that judges seem to believe that oral argument can be significant may itself affect their behavior, in that they may treat it as significant and act accordingly. This phenomenon has been studied by sociologists, and is known as the "Thomas Theorem." [66] The theorem suggests that what lay people term "self-fulfilling prophecies" may have some foundation in science. As noted sociologists W.I. Thomas and Dorothy Swaine Thomas put it, "[I]f men define situations as real, they are real in their consequences."[67] Thus, if judges believe that they can be persuaded by oral argument, they may be more likely to take it seriously and ostensibly may be open to changing their minds about a case as a result of oral argument.

C. Reading the Tea Leaves: Oral Argument and the Signaling Function

Regardless of whether judges believe that oral argument might change their minds on a case, oral argument may perform various other important functions. Among these functions are providing a forum whereby counsel, interested parties, and their fellow judges on the bench

60 *See* WRIGHTSMAN, *supra* note 11, at 40–41 (citation omitted).

61 Kathleen Dillon Narko, *They Are Listening*, 22 CBA REC. 54, 54 (2008) (alteration in the original).

62 *Id.*

63 RICHARD A. POSNER, THE FEDERAL COURTS: CHALLENGE AND REFORM 160–61 (1999).

64 Interview by Bryan Garner with Judge Frank Easterbook, Seventh Circuit Court of Appeals (2011) at 4:39, http://vimeo.com/23818679.

65 *See generally id.* This opinion is also held by Justice Ginsburg who noted, "I have seen few victories snatched at oral argument from a total defeat the judges had anticipated on the basis of the briefs. But I have seen several potential winners become losers in whole or in part because of the clarification elicited at oral argument." Ginsburg, *supra* note 30, at 570.

66 *See* Robert K. Merton, *The Thomas Theorem and the Matthew Effect*, 74 SOC. FORCES 379, 379–80 (1995).

67 *Id.* at 380 (citation omitted).

may derive some insight into a particular judge's position on a case through the tone and tenor of that judge's questions. I refer to this as a signaling function. This is important because judges generally do not tell us which way they are leaning on a case before oral argument. It is thus impossible to show how, or if at all, oral arguments change judges' minds. We are left to surmise from a judge's questions the position she might intend to take and then subsequently look at the opinion to see which way the judge voted.

It is not surprising, therefore, that observing questions posed by particular judges during oral argument and speculating on the implications of those questions has spawned a cottage industry of court watchers, particularly in Supreme Court cases.[68] Though the speculation might seem unscientific, studies have shown that merely noting if more questions are posed to one side enables an observer to predict that the side posed the most questions will ultimately lose the case.[69] One's accuracy in predicting the outcome increases if one is able to denote that more hostile questions were posed to that side.[70]

The signals put out by a particular judge are not only available for the parties and court watchers to observe, but are also available to a judge's fellow judges. These signals may play a role in judicial efficiency in that they potentially shorten the time needed during the judicial conference to decide the case, as the rest of the panel may well be aware which way their colleagues are leaning by the signals they have put out.

1. Signaling to One's Colleagues on the Bench

It seems to come as no surprise to most judges that their colleagues on the bench tip their hands during argument. Former Chief Justice Rehnquist pointed out that "[t]he judges' questions, although nominally directed to the attorney arguing the case, may in fact be for the benefit of their colleagues."[71] Justice Kennedy concurred, noting that during oral argument "the Court is having a conversation with itself through the intermediary of the attorneys."[72]

68 *See, e.g.*, Jonathan Adler, *Things We Learned at Today's Oral Argument in* King v. Burwell, WASH. POST, Mar. 4 2015, https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/03/04/things-we-learned-at-todays-oral-argument-in-king-v-burwell/?utm_term=.7c697254e800 (last visited Jan. 27, 2017).

69 Ryan C. Black, et al.; *Emotions, Oral Arguments, and Supreme Court Decision Making,* 73 J. POL. 572, 572 (2011); EPSTEIN ET AL., *supra* note 37, at 316, acknowledging that "the losing party is indeed asked more questions."

70 *Id.*

71 WILLIAM H. REHNQUIST, THE SUPREME Court 244 (2001).

72 WRIGHTSMAN, *supra* note 11, at 40 (citing DAVID M. O'BRIEN, STORM CENTER: THE SUPREME COURT IN AMERICAN POLITICS 260 (2000)).

If a judge signals her position, the other judges may choose to signal back their concerns, or they may remain silent and raise any concerns during the judicial conference.[73]

Even if a judge disagrees with the signaled outcome, she will still have to weigh whether she will ultimately vote against her colleague(s) in conference. This is where the collegiality factor may come into play.[74] Will it affect one's relationships with one's peers if a particular judge disagrees or concurs? Is this worth sacrificing potential leisure time or other income-producing-activity time to author a dissent or concurrence?[75]

Signaling through oral argument may thus lead to judicial efficiency, shortening conference time because judges may go into conference knowing each other's positions on the cases. Posner notes that in conferences, judges "for the sake of collegiality often pull their punches when stating their view how a case should be decided."[76] However, the kinds of questions judges may ask during oral argument may also play an additional role—that of confirming the initial bias a judge may hold in respect of the argument advanced by one party.

2. Signaling and Foreshadowing the Outcome: Confirming Initial Bias

As noted, several studies conducted on Supreme Court cases have shown that the party asked the most questions during oral argument will typically end up on the losing side.[77] This is particularly true when the questions posed to that party are pointed or hostile.[78]

73 Johnson argues that there is clear evidence that Justice Powell listened to the questions of his colleagues and used them as a basis for forming coalitions for a majority opinion. TIMOTHY R. JOHNSON, ORAL ARGUMENTS AND DECISION MAKING ON THE UNITED STATES SUPREME COURT 126 (2004). One example of judges signaling to each other may be heard in the oral argument for *Brown v. EMA*, 546 U.S. 786 (2010), a case involving the sale of violent video games to minors. The recording is available at https://www.oyez.org/cases/2010/08-1448. At about the 12:30-minute mark, Justice Kennedy notes, "It seems to me all or at least the great majority of the questions today are designed to probe whether or not this statute is vague . . . and this indicates to me that the statute is vague." As for the judicial conferences, EPSTEIN ET AL., *supra* note 37, suggest that judicial conferences are "curiously stilted" with judges merely stating their position and casting their vote. The authors note that it is a "serious breach of etiquette to interrupt a judge when he has the floor" at 62. Posner also finds the conferences stilted, noting that "[o]nce a judge has indicated his vote in the case, even if tentatively, concern with saving face may induce him to adhere to the vote in the face of the arguments of the other judges, who moreover may be reluctant to press him to change his mind, feeling they'll offend him by doing so." Posner, *supra* note 56, at 129. It is thus difficult to intuit how much robust discussion takes place at the judicial conferences.

74 *See* Harry Edwards, *The Effects of Collegiality on Judicial Decision Making,* 151 U. PA. L. REV 1639, 1645 (2003) (arguing that "collegiality plays an important part in mitigating the role of partisan politics and personal ideology").

75 Judge Posner has devised an equation devoted to how a judge maximizes his time, positing that judges with permanent tenure might be influenced by the utility derived from judging, leisure time, reputation, and the desire to avoid reversal that may result in "go along voting." *See generally* Richard A. Posner, *What Do Judges and Justices Maximize? (The Same Things Everyone Else Does),* 3 SUP. CT. ECON. REV. 1 (1993). *See also* Joanna Shepherd, *Measuring Maximizing Judges: Empirical Legal Studies, Public Choice Theory, and Judicial Behavior,* 2011 U. ILL. L. REV. 1753.

76 RICHARD A. POSNER, REFLECTIONS ON JUDGING 129 (2013).

77 Lee Epstein, William M. Landes, and Richard A. Posner, *Inferring the Winning Party in the Supreme Court from the Pattern of Questioning at Oral Argument,* 39 J. LEGAL STUD. 433 (2010).

78 *See* Johnson et al., *supra* note 15, at 259–60.

Johnson and his colleagues have established that the party asked the most questions was more likely to lose the case.[79] They analyzed transcripts of all Supreme Court cases from 1979 to 1995, including 2,000 hours of argument and approximately 340,000 questions.[80] The researchers counted the number of questions posed to each side, and also the number of words in each question to determine if the justices asked the losing side longer questions.[81] They then used a multivariate analysis to determine whether there were correlations between a higher number of questions posed, the length of questions, and losing the case.[82] Johnson also factored in the ideological nature of the case and coded the justices based on ideological leanings.[83] The study also factored amicus briefs filed by the Solicitor General into the equation, as cases in which the Solicitor General's office files a brief tend to be decided in favor of the government.[84] The study confirmed what smaller studies had already suggested—the more questions a party was asked during oral argument, and the longer the questions, the more likely that party was to lose the case.[85] That result held true even when the researchers factored in other variables for why the justices might decide a case a particular way.[86]

Other studies have suggested that it is not just the number of questions posed to each side that matters, but rather it is the way in which those questions are posed that is significant, specifically whether the questions are hostile or friendly.[87] Ryan Black and his colleagues analyzed the word choice of the Supreme Court justices in oral arguments from 1979 to 2008.[88] Using the *Dictionary of Affect in Language* to gage the emotional content of the justices' words, they coded the words for affect to determine whether the linguistic behavior of justices telegraphed their views of the issue.[89] The researchers found that there was a strong correlation between words coded as unpleasant (reflecting strong emotional content) and a vote against the party to whom a justice used those words in questioning.[90]

79 *Id.* at 250.

80 *Id.*

81 *Id.* at 251–53.

82 *Id.* at 254.

83 *Id.* at 255.

84 *Id.*; *see also* R.C. Black and Ryan J. Owens, *Solicitor General Influence and Agenda Setting on the United States Supreme Court* (Mar. 10, 2010), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1568381 (last visited Apr. 1, 2017).

85 Lee Epstein et al., *supra* note 77, at 433 (finding "strong evidence" for the hypothesis that the losing side was asked more questions during Supreme Court oral arguments).

86 *See* Johnson et al., *supra* note 15, at 259–60.

87 Shullman, *supra* note 16, at 290.

88 *See* Black et al., *supra* note 69, at 574–75.

89 *Id.* at 575.

90 *Id.* at 576–77.

91 WRIGHTSMAN, *supra* note 11. Wrightsman and his collaborator, Jacqueline Austin, analyzed twenty-four cases from the Supreme Court's 2004 term and determined that the number of questions and their hostile content were good predictors of an adverse outcome. *Id.* at 140–41.

The idea that justices telegraph or tip their hands through the tone and number of questions has been confirmed by Lawrence Wrightsman,[91] Epstein, Landes, and Posner,[92] as well as by Sarah Shullman.[93] In examining the tone, nature (hostile vs. friendly), and number of the questions posed to each side by the justices, Shullman confirmed that the justices did indeed telegraph their positions on the issue by asking more questions and more hostile questions to the party who ultimately lost.[94] Shullman refers to this as "foreshadowing" because her research established that the form of questioning did indeed predict the justices' ultimate decision.[95]

From a psychological-theory perspective, there is nothing surprising in the finding that a side that is asked more hostile questions would end up losing. The theories of confirmation bias and belief perseverance may be at play here.[96] As noted, confirmation bias suggests that if one holds a particular view on an issue, then one tends to seek confirmation of, or evidence to support that belief.[97] Similarly, the theory of belief perseverance contends that individuals have "the tendency to cling to one's initial beliefs even after receiving new information that contradicts or disconfirms the basis of that belief."[98] These theories will be discussed more thoroughly below.

3. Framing Questions to Support Confirmation Bias or Belief Perseverance

Aside from signaling to one's fellow judges, the kinds of questions that a judge poses during oral argument may perform another role—that of eliciting answers that support one's inherent biases or beliefs about a particular case. Framing questions in a particular way may lead to answers being given that support the ruling that a judge ultimately wants to issue.

92 Epstein et al., *supra* note 77, at 433.

93 Shullman, *supra* note 16, at 290.

94 *See id.*

95 *See id.*

96 *See generally* Craig A. Anderson, *Belief Perseverance, in* 1 ENCYCLOPEDIA OF SOCIAL PSYCHOLOGY 109 (R.F. Baumeister & K.D. Vohs eds., 2007).

97 Judge Posner even acknowledges that this may be the case, noting, "My colleagues and I read the same briefs, hear the same oral arguments and sometimes react quite differently, either because of different priors, which can dominate . . . the probability one attaches to a decision one way or another after gathering evidence." Epstein et al., *supra* note 77, at 130. Elsewhere Posner has noted that "[t]he tools I am calling priors can in principle and sometimes in practice be overridden by evidence. But often they are impervious to evidence, being deeply embedded in what we are, and that is plainly true of judging . . . ." Richard A. Posner, *The Supreme Court is a Political Court. Republicans' Actions are Proof,* WASHINGTON POST, MAR. 9, 2016, https://www.washingtonpost.com/opinions/the-supreme-court-is-a-political-court-republicans-actions-are-proof/2016/03/09/4c851860-e142-11e5-8d98-4b3d9215ade1_story.html?utm_term=.a2dc260c4a0d (last visited Apr. 10, 2017).

98 *Id.* at 109.

A judge may do this, often subconsciously, as a way of justifying the outcome of a case. The process of framing questions so as to elicit evidence to support a particular outcome is part of a process termed "confirmation bias" by psychologists.[99] Moreover, it seems likely that in some cases, no matter what answer a judge might receive to her questions, she may persist in her belief about how the case should be decided—a form of "belief perseverance." I will describe these phenomena below and suggest that they may be responsible for the increased number and more hostile tone of questions asked to the losing side.

III. The Possible Roles of Confirmation Bias and Belief Perseverance in Oral Argument

Confirmation bias has been described by Nickerson as selectively gathering or giving undue weight to evidence that supports one's position and "neglecting to gather or discounting evidence that would tell against it."[100] The process may be subconscious and even unmotivated. It is a phenomenon that has been documented in multiple instances and circumstances over a long period of time.[101] Nickerson describes how people acting under the influence of confirmation bias "often tend to only or primarily seek information that will support their hypothesis or belief in a particular way."[102] This may explain why the phenomenon is sometimes referred to as "myside bias."[103] Even when confronted with arguments or evidence that run counter to their hypothesis, individuals who operate under confirmation bias tend to give greater weight to the information that supports their belief, discounting or seeking to explain away the counter information.[104]

This is not to say that judges who may act under the influence of confirmation bias do so because they have a vested interest in the outcome

99 Raymond S. Nickerson, *Confirmation Bias: A Ubiquitous Phenomenon in Many Guises*, 2 REV. GEN. PSYCHOL. 175, 175 (1998). I am not aware of any studies that have been done on confirmation bias in oral argument.

100 *Id.*

101 As far back as 1620, Francis Bacon posited, "The human understanding when it has once adopted an opinion (either as being the received opinion or as being agreeable to itself) draws all things else to support and agree with it. And though there be greater number and weight of instances to be found on the other side, yet these it either neglects or despises or else by some distinction sets aside and rejects; in order . . . that the authority of its former conclusion may remain inviolate." FRANCIS BACON, NOVUM ORGANUM Book I (1620) Aphorism XLVI, http://www.constitution.org/bacon/nov_org.htm (last visited Apr. 10, 2017).

102 Nickerson, *supra* note 99, at 177.

103 Jonathan Baron, *Myside Bias in Thinking about Abortion*, 7 J. THINKING & REASONING 221, 221 (1995).

104 Kuhn notes that even when presented with evidence that contradicts their theory, people suffering from confirmation bias either fail to acknowledge the contradictory evidence or distort it in some way. Deanna Kuhn, *Children and Adults as Intuitive Scientists*, 96 PSYCHOL. REV. 674, 677 (1989).

of the case. Studies have shown that the discounting of counterevidence and the seeking out of evidence to support one's position occurs even when individuals have no real stake in the truth value of their hypotheses (i.e. the outcome of the case).[105] The theory of confirmation bias thus provides another possible explanation, aside from the attitudinal model, as to why judges ask more questions of the losing side—it may be that they are seeking out information to support their innate hypothesis of the case, even though they may have no real stake in the outcome.

Moreover, it may be well founded for a judge to approach a case with a bias towards a particular side and that bias may not be indicative of any attitudinal or ideological bias on the part of the judge. It could merely be an indication that the judge is aware of relevant mandatory or persuasive precedent or policy and seeks confirmation whether the case before her falls within the parameters of that authority.

However, judges need to be conscious of potential bias, as a danger exists that judges may find what they are looking for when seeking to confirm an initial response.[106] Nickerson points out that

> [g]iven the existence of a taxonomy[,] . . . there is a tendency to view the world in terms of the categories it provides. One tends to fit what one sees into the taxonomic bins at hand. In accordance with the confirmation bias, people are more likely to look for, and find, confirmation of the adequacy of a taxonomy than to seek and discover evidence of its limitations.[107]

Nickerson refers to this process as "reification."[108] Reification occurs when we think the taxonomic bins we are putting things into are actual reality, and we interpret information in accordance with that view.[109] To my knowledge, no study has been conducted on appellate judges and confirmation bias, but if one considers precedent or the decision of the lower court as "taxonomic bins" into which appellate judges are trying to fit the law and facts of the case before them, it is not hard to imagine that judges would much rather find a case analogous to existing precedent or consistent with the decision of the lower court, than find that precedent should be distinguished and the lower court reversed.[110] An example of

105 Nickerson, *supra* note 99, at 176.

106 Posner refers to these biases as "priors" cautioning judges to be aware of their own priors, whether these be for the "police; for paramedics; for asylum seekers; for people with serious mental illnesses; and for marginal religious sects. He may have a range of antipathies as well . . . ." POSNER, *supra* note 56, at 129–30.

107 Nickerson, *supra* note 99, at 183–84.

108 *Id.*

109 *Id.*

110 Obviously the common law is predicated on the premise that judges will decide cases in accordance with precedent, but that still leaves judges with the choice of whether the case before them is analogous to precedent or may be distinguished. As Epstein, Landes, and Posner point out, judges may have another motivating factor in deciding that the case before them is analogous to precedent as they, like everyone else, seek to maximize their leisure time. *See* Epstein et al., *supra* note 37, at 42.

seeking a result that is consistent with one's hypothesis has been seen in juries. Studies have found that when jurors form a bias towards one side early on in the case, their final decision is likely to be consistent with that bias, and jurors are more likely to remember statements that support their initial leaning than those that contradict it.[111]

Moreover, once an individual has formed an early opinion on a subject, it is difficult to reverse that opinion. This is known as the primacy effect.[112] Thus, even though judges may tell us that they come to the bench willing to change their minds during oral argument, their initial leaning on a case may be difficult to overcome. Additionally, judges must surely be aware, even at a subconscious level, that the appellant's chances of prevailing on appeal are quite small. Thus if judges approach a case with an idea of how the case should be decided, are motivated to fit the case within the framework of existing precedent and affirm the lower court's decision, and know that that in most cases the appellant loses his or her appeal, the chances of overcoming one's initial bias and seeking out and accepting disconfirmatory evidence seem small.

Conceptualizing what occurs during oral argument through the lens of confirmation bias in one sense builds on, yet departs from, the attitudinal model described by Segal and Spaeth.[113] Pursuant to the attitudinal model, judges approach a case with a particular set of political beliefs or ideological biases. I argue that pursuant to the confirmation bias theory that I have described, judges often come to the bench with a particular belief or predisposition regarding how the case should be decided. That predisposition may not necessarily be based on political or ideological values but rather could be based on a number of other factors, including precedent, proceedings in the court below, a particular bias against a party, or prejudice on a particular issue. I argue further that confirmation bias may be at work in that judges may consciously or subconsciously frame their questions in such a way as to solicit answers designed to confirm these biases. Moreover, even if the answers a judge receives do not confirm the judge's original impression of the case, a judge may be more likely to disregard these disconfirmations and persevere in her original assessment of the case (a characteristic that denotes belief perseverance).

The effects of confirmation bias have been documented in various spheres of activity from medical diagnoses to jury situations.[114] Another

111 *Id.* at 185.

112 Sean Duffy & L. Elizabeth Crawford, *Primacy or Recency Effects in Forming Inductive Categories,* 36 MEMORY & COGNITION 567, 568 (2008).

113 *See generally* Segal and Spaeth, *supra* note 1, at 221 *et seq.*

114 HUGO MERCIER, DAN SPERBER, THE ENIGMA OF REASON 271 (2017).

example derived from a study conducted by Saul Kassim and his colleagues[115] provides an additional useful illustration of the theory. In Kassim's study, two groups of students designated to act as police interrogators were primed to believe that the suspects (also psychology students) they were about to interrogate were either guilty or innocent of a mock theft. The priming occurred when one group of interrogators (the guilty-expectation group) was told that four out of five people that they would interrogate were guilty of the crime. In contrast, the other group (the innocent-expectation group) was told that only one person of the five they would interrogate was guilty. Both groups were then told to select six questions from a list of questions provided by the experimenters. Unbeknownst to the participants, twelve of the twenty-four questions on the list had been coded as "guilt presumptive." Both groups were also required to select interrogation techniques from a list of techniques provided by the experimenters. Half of the techniques were coded as high in coerciveness, half as low in coerciveness. The authors' hypothesis was that a presumption of guilt would set into motion a more pressure-filled interrogation.[116] The hypothesis proved to be correct. The authors found that the group primed to expect guilt chose more guilt-presumptive questions, used more coercive techniques during interrogation, and were more likely to judge the suspects guilty than the innocent-presumptive group.[117]

Although one should be cautious about reading too much into this study, it might provide some insight into the behavior of at least some judges at oral argument in two meaningful ways. First, as suggested above, if a judge believes that oral argument is important and could affect her decision on a case, then she might be more likely to participate more fully and pay more attention to oral argument—this could be seen as akin to the Thomas Theorem. A converse example of this would be the behavior of Justice Thomas during oral argument: let us assume, as he himself has suggested, that he allegedly sees little value in oral argument because the judges have "made up their minds 99% of the time."[118] His behavior confirms this through his choice to not participate in oral argument by refraining from asking questions during argument.[119]

115 Saul M. Kassim, Christine C. Goldstein & Kenneth Savitsky, *Behavioral Confirmation in the Interrogation Room: On the Dangers of Presuming Guilt,* 27 L. & HUM. BEHAV. 187 (2003).

116 *See id.*

117 *Id.* at 199.

118 WRIGHTSMAN, *supra* note 11, at 25 (citation omitted).

119 According to David Karp, Justice Thomas does not let what occurs during oral argument affect his view of the case. As an example of this, Karp notes that in *Doggett v. United Sta*tes, Justice Thomas dissented, stating that the Constitution's guarantee of a speedy trial did not protect a defendant who had waited eight years for trial due to the prosecutor's delays. Yet,

The second way in which confirmation-bias and belief-perseverance theories might provide some insight into the behavior of judges during oral argument is in situations when a judge comes to the bench at oral argument with a predisposition as to how the case should be decided. This attitude, predisposition, or bias might influence the tone, types, and number of questions put to each party. It also might influence the manner in which a judge might ask those questions. Just as the group in Kassim's study was primed to believe in the guilt of the subjects they were interrogating, and therefore chose more guilt-presumptive questions and coercive interrogation techniques,[120] so too may judges who have a bias regarding an issue frame a question more hostilely to elicit an answer that conforms with their bias.

An example of this might be the kinds of questions posed by Judge Posner to Matthew Kairis, the attorney representing Notre Dame in *University of Notre Dame v. Sebelius*,[121] a case in which Notre Dame was seeking relief from being compelled to provide its employees with contraception, pursuant to the Affordable Care Act, or even formally fill out the forms that would exempt them from compliance with the Act. Kairis argued that Notre Dame's Catholic beliefs prohibited it from being complicit in providing contraceptives to its employees, as the use of artificial contraception is prohibited by the Catholic Church. Three years prior to hearing this case, in November 2010, Judge Posner wrote on his blog in a post entitled *Contraception and Catholicism*,[122] "It is always difficult to decide whether a religious tenet of a hierarchical religion, such as Roman Catholicism, reflects religious belief or institutional strategy." He went on to write, "The biggest problem that the Church faces in backing off its traditional condemnation of contraception is a potential loss of religious authority, which is no small matter in a hierarchical church."[123] Although Posner's post was directed at the then-pope's suggestion that use of condoms might be morally justified as a means of saving lives when a party was afflicted with HIV/AIDs, Judge Posner demonstrated some fairly strong views about the Catholic Church's position on contraception—as an authoritarian Church seeking to impose its views on its

during oral argument, Justice Thomas did not say a word to hint about his view of the case. Karp argues that by remaining silent during oral argument, Justice Thomas fails to air his positions to public debate. *See* David A. Karp, *Why Justice Thomas Should Speak at Oral Argument*, 61 FLOR. L. REV 611, 624 (2009) (internal citations omitted).

120 *See* Kassim, *supra* note 115, at 199.

121 743 F.3d 547 (2014), *cert. granted, vacated sub nom U. of Notre Dame v. Burwell*, 135 S. Ct. 1528 (2015), http://media.ca7.uscourts.gov/sound/2015/lj.13-3853.13-3853_04_22_2015.mp3 (last visited Apr. 10, 2017).

122 Richard Posner, *Contraception and Catholicism—Posner*, The Becker–Posner Blog (Nov. 28, 2010), http://www.becker-posner-blog.com/2010/11/contraception-and-catholicismposner.html.

123 *Id.*

followers. Posner's feelings on the subject seemed to manifest themselves in the tone and types of questions put by Posner to Kairis during the oral argument in the *Notre Dame* case.[124] These views and the manner in which Posner posed questions[125] to Kairis seem to indicate confirmation bias.

Consider this exchange between Posner and Kairis excerpted from the oral argument in the case:

> Posner: Is there some sanction that Notre Dame imposes on employees or students who use contraception?
> Kairis: No.
> Posner: Why not? This is a . . . well, let me ask you this. Is use of contraception a mortal sin or a venial sin?
> Kairis: Your Honor, I don't know the answer.
> Posner: Well, you should. It's a mortal sin if the person using contraception knows the Church forbids it. So, if Notre Dame is really serious about this, why doesn't it do anything about the violations, which apparently are widespread?
> Kairis: Notre Dame has no interest in vetoing or controlling other people's choices. Notre Dame has an interest in controlling its own choices.
> Posner: You're kidding. The Catholic Church is not interested in affecting other people's choices?[126]

Not surprisingly, Judge Posner ruled against Notre Dame in this case.[127] His previous designation of the Catholic Church as an authoritarian church afraid of losing its moral authority regarding the issue of contraception may indicate a form of confirmation bias on this issue as manifested in the content and tone of his questions to Kairis.

Confirmation bias also seems to be evident in cases before the Seventh Circuit involving appeals from a denial of social-security disability benefits or from a denial of political asylum.[128] In both of these kinds of

124 *See generally* the oral argument, note 121, *supra.*

125 Posner's irritation with Kairis's conduct was obvious throughout the argument. After being frequently interrupted by Kairis, at one point Posner told him to stop interrupting or Posner would not let him continue with his argument.

126 This exchange begins at the 32:25 minute mark in the oral argument. http://media.ca7.uscourts.gov/sound/2015/lj.13-3853.13-3853_04_22_2015.mp3 (last visited Apr. 10, 2014).

127 The issue is not with Posner's legal ruling in this case, but rather that the tone and content of his questions suggest that he had already made up his mind and was not going to use oral argument as an opportunity to be persuaded.

128 *See, e.g.*, JAYA RAMJI-NOGALES ET AL., REFUGEE ROULETTE: DISPARITIES IN ASYLUM ADJUDICATION AND PROPOSAL FOR REFORM 77 (2009), in which Ramji-Nogales suggests that the Seventh Circuit is often skeptical of the decisions made by immigration judges. Judge Posner seems to confirm this, noting, "immigration judges are heavily overworked, and the immigration bar is weak . . . . The federal courts of appeals . . . reverse these decisions at a very high rate, often because the immigration judges and the Justice Department's lawyers display an appalling ignorance of foreign countries . . . ." Posner, note 56, *supra* at 140–41.

cases, the Seventh Circuit's rate of reversal is far greater than, for example, the Eleventh or Fourth Circuits',[129] although the Seventh Circuit is clearly not alone in its criticism of immigration judges.[130] With regard to immigration appeals, Judges Posner and Rovner have spoken or written extremely disparagingly about the positions advanced by the Justice Department in some cases. For example, Judge Posner wrote in one opinion that "the adjudication of these [asylum] cases at the administrative level has fallen below the minimum standards of legal justice."[131] He has estimated that the Seventh Circuit reverses immigration-law judges' decisions thirty-four percent of the time.[132] The deferential standard of review that applies in these cases, namely substantial deference, should mean that reversals are relatively rare. In *Ahmad v. INS*,[133] the Seventh Circuit itself noted that under the substantial-deference standard, credibility determinations "should only be overturned under extraordinary circumstances[,]" yet that is not in fact the case.[134]

Judge Posner is not alone in his criticism of the government's arguments in many immigration cases. During one oral argument Judge Rovner remarked to Cindy Ferrier, the lawyer representing the government, "It is so cruel to send a lovely human being like you in here to be a messenger of such madness, such nonsense."[135] In yet another case, the court derided the immigration judge for "factual error, bootless speculation and errors of logic."[136] The court went on to note that "[t]hese have been common failings in recent decisions by immigration judges and the Board."[137] Not surprisingly, in oral arguments involving immigration cases

129 According to the U.S. Dept. of Justice Immigration Law Advisor's statistics for May, 2015, the Seventh Circuit had a 25% reversal rate for immigration claims for the months of January through May 2015; the Eighth Circuit had a zero percent reversal rate for that same period. *See* John Guendelsberger, *Circuit Court Decisions for May 2015*, 9 IMMIGR. L. ADVISOR 5, 5 (2015), http://www.justice.gov/sites/default/files/pages/attachments/2015/06/30/ilavol9no6.pdf. Moreover, Jaya Ramji-Nogales and her coauthors assert that an asylum seeker in the Seventh Circuit has an 1800% greater chance of receiving a remand in an asylum case than a person living in Virginia, Maryland, West Virginia, or the Carolinas. JAYA RAMJI-NOGALES ET AL., *supra* note 128, at 77.

130 Judge Fuentes of the Third Circuit strongly criticized the immigration judge in *Wang v. Attorney General*, noting, "We have stressed previously that '[a]s judicial officers [immigration judges] have a responsibility to function as neutral and impartial arbiters and must assiduously refrain from becoming advocates for either party.' Here, we find the immigration judge (IJ) failed that basic requirement." 423 F.3d. 260, 263 (3d Cir. 2005) (internal citation omitted).

131 Benslimane v. Gonzales, 430 F.3d 828, 830 (7th Cir. 2005).

132 Melissa Harris, *Chinese Legal Scholars Hear Words of Wisdom from Judge Richard Posner*, http://articles.chicagotribune.com/keyword/richard-posner/featured/2.

133 163 F.3d 457 (7th Cir. 1999).

134 *Id.* at 461.

135 Cited in Adam Liptak, *Courts Criticize Judges' Handling of Asylum Cases*, N.Y. TIMES, Dec. 26, 2005, http://www.nytimes.com/2005/12/26/us/courts-criticize-judges-handling-of-asylum-cases.html?_r=0

136 Pramantarev v. Gonzales, 454 F.3d 764, 765 (7th Cir. 2006).

137 *Id.*

in my study, substantially more hostile questions are directed at counsel for the Attorney General than the Appellant.[138]

Judge Easterbrook, who has a reputation as a textualist[139] and conservative jurist, is far more circumspect about expressing his opinions on any matter outside of court than Judge Posner.[140] Yet even he in *Banks v. Gonzales*[141] felt compelled to suggest that the immigration bureaucracy could well benefit from the use of country experts who could assist immigration judges and asylum officers in determining whether a claimant's version of events was plausible, given the political situation in a particular country.[142] The immigration process, as it currently stands, left Judge Easterbrook to bemoan "why . . . immigration officials so often stand silent at asylum hearings and leave the IJ to play the role of country specialist, a role for which an overworked lawyer who spends his life in the Midwest is so poorly suited?"[143]

Thus when one considers these prior expressions of opinion, it is difficult not to intuit that the judges may be skeptical about the government's position in an immigration appeal. Based on their past experiences with these agencies, the judges in my study seem primed to exhibit bias against the government.[144] This bias often manifests itself in the tone and content of questions posed to counsel representing these agencies. For example, in *Samirah v. Holder*,[145] after hearing counsel for the Attorney General's explanation of why the alien could not return to the U.S. to apply for an adjustment of status, Judge Posner postulated, "The law cannot be that ridiculous."[146] And, "Everything that you say makes the government's position more ridiculous."[147]

Judge Posner has been similarly critical of the Social Security Administration in reviewing denial of claims for social-security benefits. In several opinions he manifested open derision towards decisions of the

138 *See* study conducted on 100 cases before the Seventh Circuit on file with the author (hereinafter Venter study) described in part IV.B., *infra*

139 *See* John F. Manning, *Textualism and Legislative Intent,* 91 VA. L. REV. 419, 420 (2005).

140 There are countless examples of Judge Posner's lack of temperance with the BIA. For example in *Cecaj v. Gonzales* he noted, "Suppose you saw someone holding a jar, and you said, 'That's a nice jar,' and he smashed it to smithereens and said, 'No, it's not a jar.' That is what the immigration judge did."

440 F.3d 897, 899 (7th Cir. 2006).

141 Banks v. Gonzales, 453 F. 3d 449 (7th Cir. 2006).

142 *Id.* at 453.

143 *Id.* at 454.

144 *See* Venter study on file with the author.

145 627 F.3d 652 (2010).

146 Oral argument at 42:38, http://media.ca7.uscourts.gov/sound/2010/migrated.orig.08–1889_09_08_2010.mp3.

147 *Id.* at 42:28.

administrative law judges who deny appellants' claims. For example, in *Goins v. Calvin*,[148] in which the obese plaintiff had a Chiari I malformation (a condition where the part of the cerebellum and brain stem has been pushed into the spinal cord) along with a degenerative-disc condition, Posner described the administrative law judge's summary of the MRI as "barely intelligible mumbo jumbo."[149] He went on,

> If we thought the Social Security Administration and its lawyers had a sense of humor, we would think it a joke for its lawyer to have said in its brief that the administrative law judge "accommodated [the plaintiff's] obesity by providing that she could never [be required as part of her work duties to] climb ladders, ropes, or scaffolds, and could only occasionally climb ramps or stairs, balance, kneel, crawl, stoop, and/or crouch." . . . Does the SSA think that if only the plaintiff were thin, she could climb ropes? And that at her present weight and with her present symptoms she can, even occasionally, crawl, stoop, and crouch?[150]

Though it is true we should not assume that judges take the bench as blank slates in each case, we might expect that they have not prejudged the case; otherwise oral argument would be unnecessary. It would be naïve to suppose that judges approach each matter without some preconceived understanding about how the case should likely be decided, as they have read the briefs and relevant portions of the record, are familiar with the judicial precedent on point, and have likely read a bench memo on the case. Still, many of the questions analyzed in the study discussed below evidence some form of confirmation bias or belief perseverance, bringing into question the role and value of oral argument.

IV. The Study—Testing the Hypothesis of Whether Judges Display Confirmation Bias through the Number and Tone of Their Questions

A. The Judges in This Study

The three judges selected for this study, Rovner, Easterbrook, and Posner, were chosen for their similar length of experience on the bench, for their record of asking multiple questions in oral argument, and for the fact that they had all been appointed by presidents from the same political party.[151]

148 764 F.3d 677 (7th Cir. 2014).

149 *Id.* at 682.

150 *Id.*

151 The actual party was irrelevant, but I wanted to try and minimize ideological differences among judges in the study.

B. The Study—Parameters and Methodology

In this study I listened to one hundred randomly selected oral arguments from cases heard in 2007 to 2014, wherein at least one of the three judges listed above (the study judges) constituted a member of the panel. On several occasions two of the three study judges were on a panel. In those cases, the questions asked by each study judge were tallied as separate scores. I counted the number of questions asked of each side by each of the study judges, as well the total number of questions asked of each side by judges who were not included in the study (nonstudy judges). Questions asked by nonstudy judges were also included because these affect the number of questions that study judges are able to ask, or that they might want to ask (if for example, a question a study judge might have is asked by another judge). I also counted the number of questions asked by the study judges on rebuttal and the total number of questions asked by nonstudy judges on rebuttal. The database of one hundred cases comprised civil (45), criminal (29), and administrative agency (26) cases, which were all coded separately.

I also rated the tone and nature of the questions put to the attorneys for each side by the study judges to determine if they were hostile, neutral, or friendly in nature, or if they afforded evidence of confirmation bias. I discussed these criteria with my research assistants and had them verify my classification of questions by listening to the oral arguments and independently verifying the number of hostile, positive, and neutral questions.

To determine whether the questions were hostile in nature, I examined the word choice used by judges and listened to the tone of the question to determine whether it was positive, neutral or negative. I characterized as hostile questions those in which the judge's tone sounded angry (indicated by a raised voice or word choice like "idiotic" or a phrase that indicated annoyance or anger), those in which the judge impatiently interrupted counsel when counsel was attempting to answer a question, cases in which the judge asked rapid-fire questions barely affording counsel a chance to answer the question before being asked another, as well as those questions in which a judge sounded skeptical about counsel's position. An example of hostile questioning can be seen in the exchange that is described in part III, *supra*, between Judge Posner and Attorney Matthew Kairis, excerpted from the oral argument of *University of Notre Dame v. Sebelius*,[152] in which Posner's questions to Kairis were asked in a tone of cynicism and disbelief. All questions denoted as hostile were rated and verified by my two research assistants.

152 743 F.3d 547.

Judge Posner made it easy to characterize questions as hostile by his tone of voice (which becomes raised and louder) and his interactions with counsel (in which he often exhorts them to answer his questions more directly). For example, in *Stanojkova v. Holder,*[153] Judge Posner instructed counsel in a harsh tone to "[a]nswer yes or no, is that not clear?"[154] Moreover, after listening to multiple oral arguments, it became apparent with respect to Judge Posner that the phrase, "I don't understand . . ." or "I don't get it . . ." or "no, no, no, no," often prefaced a hostile question.[155] Judge Easterbrook's hostile questions were denoted by his tone of voice, which becomes louder, more forceful, harsh sounding, and impatient.[156] Judge Rovner's tone does not usually alter, even when asking a hostile question (which she is less prone to do), but the content of the question becomes more negative and her voice becomes slightly higher pitched, which seems to indicate incredulity.

Neutral questions were characterized by unemotional tone and neutral word choice. Examples of this type of question might be a question inquiring about facts from the record below, such as, "Did you represent the defendant at trial?"

I also coded questions that I saw as positive, i.e., that were designed to assist counsel in making a point favorable to the position that counsel wanted the court to adopt. Positive questions included those in which the judge appeared by tone, content or word choice to agree with or respond favorably to an argument advanced by counsel. An example of this type of question can be seen in the exchange in *Stanojkova v. Holder,*[157] a case involving an appeal from the denial of asylum to two ethnic Albanians from Macedonia.[158] The couple sought asylum, alleging persecution on the grounds of political opinion and ethnicity or race[159] after the police broke into their house and assaulted them. During the assault, the police forced the pregnant female appellant to completely disrobe. She was not raped, although she feared she would be. Their attorney argued that even though she had not been raped, forced disrobing still amounted to persecution.[160] The immigration judge and the Board of Immigration Appeals

153 645 F.3d 943 (7th Cir. 2011).

154 *See* http://media.ca7.uscourts.gov/sound/2011/migrated.orig.10-3327_06_14_2011.mp3 at 18:30.

155 An example of this can be heard in the *Notre Dame v. Sebelius* oral argument referenced *supra,* note 121.

156 For the record, Judge Posner has written that questioning during oral argument should be aggressive. *See* POSNER, *supra* note 56, at 129.

157 Stanojkova v. Holder, 645 F.3d 943 (7th Cir. 2011).

158 *Id.* at 944–45.

159 The mistreatment of ethnic Albanians by the Macedonian government has been documented since 1999. *See* REGIONAL AND ETHNIC CONFLICTS: PERSPECTIVES FROM THE FRONT LINES 10 (Judy Carter, et al., eds., 2009).

160 http://media.ca7.uscourts.gov/sound/2011/migrated.orig.10-3327_06_14_2011.mp3.

had found this act insufficient to constitute persecution.[161] The question below provides an example of a positive question posed by Judge Rovner to the appellants' counsel:

> Judge Rovner: Aren't there cases in which courts have found persecution based on a sexual assault which did not go beyond disrobing and groping?[162]
> Counsel: There are your Honor, and thank you for raising that.[163]

C. Findings

My findings were consistent with studies conducted on Supreme Court oral arguments, in that in ninety percent of the cases in my study, the side that was asked more questions lost. In some cases, the disparity between the number of questions asked of each side was stark. For example, Judge Posner asked the losing side an average of 11.3 questions with only 3.4 to the winning side (asking the losing side around three times as many questions). Judge Easterbrook asked the losing side seven questions and the winning side four on average, (almost twice as many questions to the losing side). Judge Rovner asked on average almost three times as many questions of the losing side by posing 10.4 questions to the losing side and 3.3 to the winning side.

Though traditionally the losing side is the appellant, as only between four and sixteen percent of appellants prevail on appeal,[164] in the study sample I looked at, the Seventh Circuit seems to reverse more cases on appeal than the national average, particularly administrative-law cases, in which the reversal rate was thirty-eight percent. Moreover, the pattern of the losing side being asked more questions was consistent, no matter whether the side that ultimately lost the case was the appellant or the appellee.

The number of questions posed by the study judges to the losing side was generally consistent with the number of questions posed by nonstudy judges to the losing side; i.e., both study and nonstudy judges asked on average almost twice as many questions to the losing side as they did to the winning side. There were ten cases in which this did not occur. One might speculate that the nonstudy judges had a difficult time getting an

161 Stanojkova v. Holder, 645 F.3d 943, 946 (7th Cir. 2011).

162 http://media.ca7.uscourts.gov/sound/2011/migrated.orig.10-3327_06_14_2011.mp3 at :58.

163 http://media.ca7.uscourts.gov/sound/2011/migrated.orig.10-3327_06_14_2011.mp3 at 1:03.

164 Theodore Eisenberg, *Appeal Rates and Outcomes in Tried and Nontried Cases: Further Exploration of Anti-Plaintiff Appellate Outcomes,* 1 J. EMPIRICAL LEGAL STUD. 659, 659 (2004). The author explains that there are different rates of success depending on whether it is the former plaintiff or defendant who is appealing. *Id.*

opportunity to ask questions in some of these cases because the study judges were relatively active questioners.

The exchanges between counsel on the losing side and the bench were also markedly more hostile with the tone of the judges, their choice of words, their tone, and their willingness to interrupt and disagree with a contention advanced by counsel being markedly more unfriendly to the side that ultimately lost the case. On average, the three study judges each asked three or four hostile questions per argument to the losing side and none to the winning side. The number of questions varied depending on whether the arguments were long or short arguments. In short arguments, each side is limited to ten minutes, while in long arguments each side generally gets twenty minutes or even more. The questions to the losing side also began much earlier in counsel's argument, commencing almost immediately after counsel approached the podium.

The judges also seemed to be framing the questions in such a way so as to obtain support for a preexisting premise or bias. In all of the cases where I saw evidence of confirmation bias, the side asked questions that suggested confirmation bias lost the appeal. For example, in *Baskin v. Bogan*,[165] a challenge to Wisconsin's statutory ban on same-sex marriage, Judge Posner asked counsel for the State of Wisconsin "why are all those obstacles thrown in the path of these people?"[166] And, "[s]o tradition *per se* is not a ground for continuing. So we have been doing this stupid thing for a hundred years or a thousand of years, we'll keep doing it because it is tradition. Don't you have to have some empirical or common sense reason justifying it?"[167] It should be noted that Posner had said in a June 2014 interview with Joel Cohen, prior to hearing oral argument in *Baskin–Wolf* that he was "much less reactionary than [he] used to be," noting that he had previously been opposed to same sex marriage but that "was still the dark ages regarding public opinion of homosexuality. Public opinion changed radically in the years since. My views have changed about a lot of things."[168]

Posner's obvious irritation with the Attorney Generals in the *Baskin–Wolf* cases,[169] and with counsel for Notre Dame in the *Notre Dame*

165 766 F.3d 648 (7th Cir. 2014) (hereinafter "Baskin–Wolf"). This case was consolidated with *Wolf v. Walker* because the two cases involved the same issue. Note that the phrase "stupid thing" foreshadows the outcome.

166 http://media.ca7.uscourts.gov/cgi-bin/rssExec.pl?Submit=Display&Path=Y2014/D09-04/C:14-2526:J:Posner:aut:T:fnOp:N:1412339:S:0 at 3:10.

167 *Id.* at 4:30.

168 Cohen's interview with Posner is available at Joel Cohen, *An interview with Judge Richard A. Posner*, ABA JOURNAL (Jul. 1, 2014, 10:20 AM CDT), http://www.abajournal.com/magazine/article/an_interview_with_judge_richard_a._posner/.

169 766 F.3d 648 (7th Cir. 2014).

case[170] due to their inability to answer his questions to his satisfaction, may also have influenced the judges in writing their opinions. Judges are only human and may become irritated or even enraged at counsel if the judges feel their questions are not being answered or counsel is being disingenuous. Counsel's behavior may make the tone of the opinion much more harsh, which in turn may influence the lower court or administrative law judge when they reconsider the matter. For example, in his written opinion on the *Baskin–Wolf* cases,[171] Judge Posner specifically referred to counsel's unpersuasive answers during oral argument. After reciting the Indiana Attorney General's response at oral argument to a question about whether Indiana's prohibition on same-sex marriage was about "successfully raising children," Judge Posner derided that argument in the opinion, concluding, "Heterosexuals get drunk and pregnant, producing unwanted children; their reward is to be allowed to marry. Homosexual couples do not produce unwanted children; their reward is to be denied the right to marry. Go figure."[172] It is unclear whether Judge Posner's comments were prompted by counsel's inability to proffer a reasonable justification for the state's ban on same-sex marriage or were based on Posner's "prior" belief that prejudice against homosexuals belongs in the "dark ages."[173] Judge Posner similarly referenced the inadequate answers of Wisconsin's Attorney General in his written opinion.

However, judicial experience, along with the further opportunities that judges have to consider the case during conference and the drafting process, mean that a judge's annoyance with counsel's behavior during oral argument would not generally translate into counsel's losing the case on that basis.[174] In the Supreme Court, for example, the poor performances of advocates does not seem to jeopardize their cases, despite the fact that Justice Ginsburg has suggested that one may lose one's case at oral argument.[175] There are several examples of an advocate performing particularly badly during oral argument but nevertheless going on to win the case. For example, the oral argument performance of Solicitor General

170 743 F.3d 547 (7th Cir. 2014).

171 766 F.3d at 662.

172 *Id.*

173 *See* Cohen, *supra* note 168.

174 Most judges are able to separate their annoyance at counsel from the merits of the case before them. An example of this can be seen in the opinion handed down in *United States v. Boyd*, 475 F.3d 875, 876–77 (7th Cir. 2007) where the court noted, "We are . . . distressed at the sloppiness with which the case has been handled by both sides . . . ."

175 Ruth Bader Ginsburg, *Remarks on Appellate Advocacy*, 50 S.C. L. REV. 567, 570 (1999), noting, "I have seen few victories snatched at oral argument from a total defeat . . . . But I have seen several potential winners become losers in whole or in part because of clarification elicited at argument." Justice Ginsburg is obviously referring to the argument and not to counsel's performance as an advocate. Specifically, an argument can lose a case if the lawyer can't explain the substantive answers to questions in a way that will help the Court come to a conclusion in the lawyer's client's favor.

Donald Verrilli in the *National Federation of Independent Business v. Sebelius,*[176] was widely panned by pundits, one of whom noted that he "[s]ound[ed] less like a world-class lawyer and more like a teenager giving an oral presentation for the first time."[177] Jeffrey Rosen derided him not for his "nervous" presentation but rather for his failure to offer a limiting principle despite being repeatedly pushed by the Court to do so.[178] In contrast, his opponent in that case, Paul Clement, who has been described as a "god" who gave "the argument of his life,"[179] lost; Verrilli won. Similarly in the recent case of *United States v. Rodriguez,*[180] Attorney O'Connor, in a nervous, stumbling, first time before the Supreme Court, won the case for Rodriguez, despite barely being able to articulate a complete sentence.[181] Though this gives one confidence that it is not the style of delivery that is important, it also calls into question the importance of oral argument in the decision-making process, if, in addition to eloquence not necessarily mattering very much, counsels' responses are not substantively helpful.

Given the findings that the losing side gets asked more questions and specifically more hostile questions, does oral argument really serve a purpose if the eventual outcome of a case has essentially already been decided and judges are using oral argument merely to confirm their existing biases? Because oral argument has been seen as an integral part of the appellate process, alternative justifications for it should be considered before calling for its elimination as a general practice in the Seventh Circuit.

V. The Functions of Oral Argument in the Administration of Justice

A. Oral Argument Serves a Formal Function of Epitomizing Justice Being Done

Although scholars are divided about the impact of oral argument on the final decisions of courts, most agree that oral arguments serve the role

176 567 U.S. 519 (2012).

177 Adam Serwer, *Obama's Supreme Court Disaster*, MOTHER JONES (Mar. 27, 2012, 3:00 PM), http://motherjones.com/mojo/2012/03/obamacare-supreme-court-disaster.

178 J. Lester Feder, *Did Verrilli Choke and Does it Really Matter?* POLITICO (Mar. 27, 2012, 06:37 PM EDT), http://www.politico.com/story/2012/03/did-verrilli-choke-and-does-it-really-matter-074559.

179 *Id.*

180 135 S. Ct. 1609 (2015).

181 The oral argument is available at: http://www.oyez.org/cases/2010-2019/2014/2014_13_9972. For commentary on counsel's performance *see* https://www.bloomberg.com/view/articles/2015-01-22/supreme-court-tries-to-define-a-traffic-stop (last visited Apr. 10, 2017).

of making justice visible.[182] Since neither the parties, their advocates, nor the public are privy to either the informal discussions about cases conducted among judges and their clerks, nor the formal conferencing that takes place among judges after hearing oral argument, the argument itself serves as a visual and aural encapsulation of how justice is done, particularly since the briefs are usually read only by the attorneys writing them, along with the judges and their clerks. The interactions between the judges and counsel and the specific questions asked during oral argument serve to draw attention to the judges' concerns on various issues and become part of the deliberative process of deciding cases by applying legal precedent to facts. One of the functions of oral argument, therefore, is to reinforce the notion of deliberative and process-oriented justice, since oral argument is ostensibly open to the parties and the general public. It is a visual manifestation of getting one's day in court.

Gregory Pingree argues that making the administration of justice visible through mechanisms like oral argument is crucial:

> Positive public perception of the judiciary's role in American political life is indispensable to the effectiveness of the judicial branch. Indeed, this collective perception is the very source of judicial legitimacy, the sine qua non of our common law system.[183]

This justification may carry some weight in cases involving important social issues like *Baskin–Wolf*.[184]

Whether this function holds up under closer observation is another question altogether. One might ask to whom justice is made visible during oral arguments, especially if one recalls that very few people are present for most oral arguments. In most cases, only the attorneys for each side are present; clients usually do not attend, although of course they may. The courtroom may also contain other attorneys waiting for their cases to be called, interested law students, or clerks. Most of those people do not need to see justice being done; they generally know enough about how the process works. Moreover, if an uninitiated person (e.g., a nonlawyer, interested member of the public) really wanted to see justice being done in appellate court, there are several obstacles to overcome. Finding out about

182 Proponents of the attitudinal approach contend that oral argument matters little because cases are decided on the basis of the judge's political inclinations. Compare those views with Thai and Coats, *supra* note 45, who argue that oral argument is symbolically important to see justice being done.

183 David R. Cleveland & Steven Wisotsky, *The Decline of Oral Argument in the Federal Courts of Appeals: A Modest Proposal for Reform*, 13 J. APP. PRAC. & PROCESS 119, 143 (2012) (quoting Gregory C. Pingree, *Where Lies the Emperor's Robe? An Inquiry into the Problem of Judicial Legitimacy*, 86 OR. L. REV. 1095, 1102 (2007)).

184 766 F.3d 648 (7th Cir. 2014).

the arguments, when they are scheduled, and then getting through security into the federal building are some of the many challenges. One must then find the courtroom and follow somewhat dense and technical legal arguments. The court then takes the matter under advisement, but the public and parties are not privy to the judges' discussions during the judicial conferences following the arguments. An interested individual must wait several months before the decision is released and then must decipher dense legal reasoning to unpack the gist of the opinion. Even then, many decisions are not necessarily published, and an individual would have to be relatively sophisticated to find the decision on the court's website and parse its nuances. Additionally, individuals have already had their day in court in the form of a trial below, so justice, per se, has already been made visible.

B. The Role of Oral Argument in Assisting Judges in Delineating Rules and Crafting Their Opinions

The role of oral argument in crafting the limits on a rule should not be underestimated. In multiple oral arguments judges ask counsel where the line should be drawn. For example, in the *Stanojkova* case both Judge Posner and Judge Woods asked both counsel for both parties to help them craft a test that defined what kinds of bad acts rise to the level of "persecution" that warranted a granting of asylum.[185] After reminding counsel about a prior asylum-appeal case in which the court held that being beaten with the butt of a gun and being threatened did not constitute persecution, Judge Posner asked, "What can we do to bring some coherence to our persecution jurisprudence?"[186] Judge Woods pursued this line of questioning, asking, "If you were writing our opinion and you got to the part that says—here's the law of persecution, this is when it is enough and this is when it isn't, and I think that's what Judge Posner was asking you to draft for us. What would you say?"[187] Unfortunately, counsel in this argument had no coherent response for the judges, telling the court that "unfortunately today I was prepared to argue about the law of sexual assault and persecution."[188] Although the court attempted to push her to define the concept of persecution more generally and challenged her argument that sexual assault should be treated differently from other forms of assault in finding persecution, counsel for the appellants did not

185 http://media.ca7.uscourts.gov/sound/2011/migrated.orig.10-3327_06_14_2011.mp3.

186 http://media.ca7.uscourts.gov/sound/2011/migrated.orig.10-3327_06_14_2011.mp3 at the 2.15 mark. I coded this as a neutral question.

187 *Id.* at 3:38.

188 *Id.* at 2:22.

offer the court much assistance in clarifying its general persecution jurisprudence, merely asserting that sexual assault was "different" but unable to articulate exactly how or why.[189]

Yet some judges contend that these types of exchanges with counsel during oral argument can make an opinion better. For example, Justice Burger noted that when he was on the New Jersey Supreme Court and that court did not hear oral argument routinely, "[t]he low quality of final judgments was traced directly to that practice. . . . Thus the New Jersey Supreme Court rule [now] requires oral argument of every case granted review."[190] The California Supreme Court also appears to endorse this approach.[191]

Additionally, scholars have called on the Oklahoma Supreme Court to grant oral argument, in part because they believe it will lead to better opinions. Andrew Coats, along with his coauthor, has urged the court to "require oral argument as a rule rather than allow it as a rare exception"[192] because it "tests, refines and furthers the deliberative process."[193] Thai and Coats argued that if the court were to take the time to hear oral argument, rather than waste the court's time, it could shorten the time needed to decide a case, as it constitutes a "Socratic method of procedure in getting at the real heart of an issue and in finding out where the truth lies."[194]

However, crafting a rule is something that judges themselves could do during conference without oral argument. Moreover, if judges wanted the parties' assistance on those particular matters, they could get it through written submissions rather than require counsel to present themselves in person to respond, often at great expense, for a procedure that routinely lasts ten minutes.[195] This would correspond more closely to the procedure generally followed by the European Court of Human Rights.[196] That court

189 While counsel's reluctance to engage in a broader discussion might have been a source of frustration to the judges on the bench in that case, it is counsel's ethical obligation to be a zealous advocate for her client, i.e., to argue that the sexual assault her client had suffered constituted persecution. The lawyer was not necessarily ethically obliged to help judges craft a broad rule that might benefit future litigants by clarifying a particular area of law. Arguably, the duty to improve the law, required by Paragraph 5 of the Preamble to the Model Rules of Professional Conduct, might encompass this situation. *See* Model Rules of Professional Conduct: Preamble & Scope, ABA CENTER FOR PROFESSIONAL RESPONSIBILITY, https://americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_preamble_scope.html.

190 WRIGHTSMAN, *supra* note 11, at 10.

191 *See* part II *supra*.

192 Thai et al., *supra* note 45, at 716.

193 *Id.*

194 *Id.* at 717.

195 I do acknowledge that, at its best, oral argument in the form of a conversation can help focus the court's attention on the heart of the issue and assist the court in crafting an appropriate response to the legal issue.

196 *See* Rule 64(2) of the Rules of Procedure of the European Court of Human Rights, http://www.echr.coe.int/Documents/Rules_Court_ENG.pdf.

affords counsel time for oral argument (referred to as submissions) uninterrupted by questions. However, judges may subsequently pose questions to counsel on the issues in the case, though the judges usually wait until the end of counsel's submissions to do so; they generally do not interrupt counsel.[197] Counsel may take some time to think about the answer to the judges' questions before responding. This procedure would seem to allow for a more thoughtful response than merely thinking on one's feet and responding with whatever comes to mind.[198]

Another option, albeit a highly impractical and expensive one, would be to follow the example of the United Kingdom Supreme Court, where counsel provide the court and their opponents with thick binders filled with case authority[199] and the court and counsel look at the exact language crafted in previous cases and discuss how it might apply in the case before the court. The obvious downside to this approach is that arguments may (and do) last days. The positive side is that the court releases its opinions very promptly, often within three weeks of hearing oral argument because the issues and authority have been canvassed so thoroughly during oral argument.

VI. Oral Argument: A Need for Reform and Possible Alternatives

Based on the evidence offered above, the answer to the question about how important oral argument is to the outcome of many cases would appear to be "not very." Oral arguments do not necessarily seem to be the best method of helping to refine opinions or even focusing the panel's attention on the true essence of a case. If one considers that oral arguments in the Seventh Circuit last only ten minutes per side on short-argument days, and that the court may hear as many as nine arguments in a row, it might be particularly difficult for a judge to focus his or her attention on the specifics of a case in that short amount of time, particularly after having listened to multiple previous arguments on potentially

197 *See* Rule 64(2) of the Rules of Procedure of the European Court of Human Rights, http://www.echr.coe.int/Documents/Rules_Court_ENG.pdf.

198 Of course, the argument could be made that counsel should anticipate the question during oral argument and be prepared to respond to it.

199 Rule 22(4) of the Supreme Court Rules provides that "The appellant and every respondent (and any intervener and advocate to the Court) must then sequentially exchange their respective written cases and file them, and every respondent (and any intervener and advocate to the Court) must for the purposes of Rule 23 provide copies of their respective written cases . . . ." Sup. Ct. R., https://www.supremecourt.uk/docs/uksc_rules_2009.pdf. Rule 24 provides, "The volumes of authorities that may be referred to during the hearing must be prepared in accordance with the relevant practice direction and the requisite number of copies of the volumes of authorities must be filed . . . ." Sup. Ct. R. 24 (U.K.), https://www.supremecourt.uk/docs/uksc_rules_2009.pdf.

completely different areas of the law. Moreover, as the study shows, oral arguments may be dominated by one particular judge who might have an axe to grind on an issue.

Additionally, oral arguments seem to only generally change judges' minds in a limited number of cases.[200] In many of the cases I studied, the tone, nature, content and number of the questions posed by the judges seemed to indicate the judge had already made up his or her mind on the matter, and it was going to be essentially impossible for counsel to change the judge's mind. Because confirmation bias appears to influence the tone and content of a judge's questions, oral argument seems to serve in many cases as a means of justifying a judge's initial decision on a case. This does not seem an effective use of a judge's time.

Moreover, oral arguments are only one step in the process of turning out a final opinion on the case. Even if oral arguments were to succeed in changing a judge's initial leanings on a case, it is not always clear that a judge's newfound view of the case would prevail. Judges vote on the case during judicial conferences, and if one then realized that one's other two colleagues felt differently about the case, a judge might change her mind once again at that point. Judges are also free to change their minds when writing an opinion or when drafts of opinions are circulated, and also might come to feel differently about a case during discussions with their clerks.[201]

Given that oral argument may serve little useful purpose in many cases, one must then consider the alternatives, particularly given the precedent-making function of courts of appeals. The role of a federal court of appeals like the Seventh Circuit is not only to decide the outcome of a particular appeal but to craft precedent for that circuit. This is a particularly important function given the small number of cases granted certiorari by the United States Supreme Court.[202] A court of appeals is thus very interested in how its decision should be crafted, as that decision essentially articulates a rule for similar cases. Based on the arguments I listened to, counsel were often unable to articulate a good response to that type of question. Moreover, counsel often seemed taken aback by some of the questions posed by the court and did not articulate effective responses

200 In my study the number appears to be about ten percent.

201 Judges acknowledge that sometime the opinion "just won't write." *See* Justice Scalia's comments to the ABA in *Appellate Issues* in Gaëtan Gerville–Réache, *Justice Scalia at the AJEI Summit in New Orleans*, APP. ISSUES 4 (2013), http://www.americanbar.org/content/dam/aba/publications/appellate_issues/2013win_ai.authcheckdam.pdf.

202 In 2014 the Court's caseload was the lightest it has ever been, at 71 cases. According to the 538 blog, there has been a downward trend in the number of cases the Court hears. *See The Supreme Court's Caseload is on Track to be the Lightest in Seventy Years*, https://fivethirtyeight.com/features/the-supreme-courts-caseload-is-on-track-to-be-the-lightest-in-70-years/ (last visited Apr. 13, 2017).

to questions that caught them off-guard. Judge Posner has noted that the quality of oral argument in federal lower courts and the Supreme Court is not good.[203] It might therefore be more effective to email counsel questions that the court would like addressed and give counsel a short time to respond in writing to those questions. It would also be more cost- and time-effective, as counsel would not have to attend argument in person. Similarly, judicial resources would be put to better use, as the judges could read counsel's responses to questions at a time when they are not tired. The Seventh Circuit routinely listens to up to nine arguments in a row on short-argument days, which has to be extremely tiring for judges. If they do not have counsel before them, judges may also be less likely to become annoyed or irritated at counsel and less likely to allow that annoyance to color their view of counsel's argument.[204]

VII. Conclusion

Although this is a small study, both in the number of cases and the number of judges examined, it seems to suggest that confirmation bias may be one of the factors at work in the types of questions that judges pose to counsel for litigants against whom they ultimately rule. Confirmation bias manifests itself in the number and tone of questions posed to a side that ultimately loses the case. Tuchman's theory that "all subsequent activity becomes an effort to justify it"[205] when confirmation bias is present seems to be born out often with respect to oral argument. Although Judge Posner believes that experience and temperament can help judges counteract their "priors,"[206] confirmation biases may be so entrenched that judges themselves may not realize they are present.

Courts should carefully consider the merits of an appeal before granting oral argument. Oral argument should be granted only for cases for which two judges are confident that oral argument could make a difference in the outcome, or for cases that are highly important to the public. On cases for which courts do decide to grant oral argument, judges should be mindful of their biases and their tone, and of the number and content of their questions so that they do not seek to reinforce already existing leanings.

203 *See* Posner, *supra* note 56, although he did concede that it can be helpful to judges.

204 It is difficult not to speculate, for example, about the role that Judge Posner's obvious annoyance with Matthew Kairis might have played in the outcome of the *University of Notre Dame v. Sebelius* case.

205 Cited in Nickerson, *supra* note 99, at 191.

206 "Although the average quality of oral argument in federal courts (including the Supreme Court) is not high, the value of oral argument to judges is very high." RICHARD A. POSNER, THE FEDERAL COURTS: CHALLENGE AND REFORM 160–61 (1999).

CHAPTER 3

Program of Legal Education

Standard 301. OBJECTIVES OF PROGRAM OF LEGAL EDUCATION

(a) A law school shall maintain a rigorous program of legal education that prepares its students, upon graduation, for admission to the bar and for effective, ethical, and responsible participation as members of the legal profession.

(b) A law school shall establish and publish learning outcomes designed to achieve these objectives.

Standard 302. LEARNING OUTCOMES

A law school shall establish learning outcomes that shall, at a minimum, include competency in the following:

(a) Knowledge and understanding of substantive and procedural law;

(b) Legal analysis and reasoning, legal research, problem-solving, and written and oral communication in the legal context;

(c) Exercise of proper professional and ethical responsibilities to clients and the legal system; and

(d) Other professional skills needed for competent and ethical participation as a member of the legal profession.

Interpretation 302-1

For the purposes of Standard 302(d), other professional skills are determined by the law school and may include skills such as, interviewing, counseling, negotiation, fact development and analysis, trial practice, document drafting, conflict resolution, organization and management of legal work, collaboration, cultural competency, and self-evaluation.

Interpretation 302-2

A law school may also identify any additional learning outcomes pertinent to its program of legal education.

Standard 303. CURRICULUM

(a) A law school shall offer a curriculum that requires each student to satisfactorily complete at least the following:

(1) one course of at least two credit hours in professional responsibility that includes substantial instruction in rules of professional conduct, and the values and responsibilities of the legal profession and its members;

(2) one writing experience in the first year and at least one additional writing experience after the first year, both of which are faculty supervised; and

(3) one or more experiential course(s) totaling at least six credit hours. An experiential course must be a simulation course, a law clinic, or a field placement, as defined in Standard 304.

(b) A law school shall provide substantial opportunities to students for:

(1) law clinics or field placement(s);

(2) student participation in pro bono legal services, including law-related public service activities; and

(3) the development of a professional identity.

(c) A law school shall provide education to law students on bias, cross-cultural competency, and racism:

(1) at the start of the program of legal education, and

(2) at least once again before graduation.

For students engaged in law clinics or field placements, the second educational occasion will take place before, concurrently with, or as part of their enrollment in clinical or field placement courses.

Interpretation 303-1

A law school may not permit a student to use a course to satisfy more than one requirement under this Standard. For example, a course that includes a writing experience used to satisfy the upper-class writing requirement [see 303(a)(2)] cannot be counted as one of the experiential courses required in Standard 303(a)(3). This does not preclude a law school from offering a course that may count either as an upper-class writing requirement [see 303(a)(2)] or as a simulation course [see 304(a) and 304(b)] provided the course meets all of the requirements of both types of courses and the law school permits a student to use the course to satisfy only one requirement under this Standard.

Interpretation 303-2

Factors to be considered in evaluating the rigor of a writing experience include the number and nature of writing projects assigned to students, the form and extent of individualized assessment of a student's written products, and the number of drafts that a student must produce for any writing experience.

Interpretation 303-3

Rule 6.1 of the ABA Model Rules of Professional Conduct encourages lawyers to provide pro bono legal services primarily to persons of limited means or to organizations that serve such persons. In addition, lawyers are encouraged to provide pro bono law-related public service. In meeting the requirement of Standard 303(b)(2), law schools are encouraged to promote opportunities for law student pro bono service that incorporate the priorities established in Model Rule 6.1. In addition, law schools are encouraged to promote opportunities for law students to provide over their law school career at least 50 hours of pro bono service that complies with Standard 303(b)(2). Pro bono and public service opportunities need not be structured to accomplish any of the outcomes required by Standard 302. Standard 303(b)(2) does not preclude the inclusion of credit-granting activities within a law school's overall program of law-related pro bono opportunities so long as law-related non-credit bearing initiatives are also part of that program.

Interpretation 303-4

Law-related public service activities include (i) helping groups or organizations seeking to secure or protect civil rights, civil liberties, or public rights; (ii) helping charitable, religious, civic, community, governmental, and educational organizations not able to afford legal representation; (iii) participating in activities providing information about justice, the law or the legal system to those who might not otherwise have such information; and (iv) engaging in activities to enhance the capacity of the law and legal institutions to do justice.

Interpretation 303-5

Professional identity focuses on what it means to be a lawyer and the special obligations lawyers have to their clients and society. The development of professional identity should involve an intentional exploration of the values, guiding principles, and well-being practices considered foundational to successful legal practice. Because developing a professional identity requires reflection and growth over time, students should have frequent opportunities for such development during each year of law school and in a variety of courses and co-curricular and professional development activities.

Interpretation 303-6

With respect to 303(a)(1), the importance of cross-cultural competency to professionally responsible representation and the obligation of lawyers to promote a justice system that provides equal access and eliminates bias, discrimination, and racism in the law should be among the values and responsibilities of the legal profession to which students are introduced.

Interpretation 303-7

Standard 303(c)'s requirement that law schools provide education on bias, cross-cultural competency, and racism may be satisfied by, among other things, the following:

(1) Orientation sessions for incoming students;

(2) Lectures on these topics;

(3) Courses incorporating these topics; or

(4) Other educational experiences incorporating these topics.

While law schools need not add a required upper-division course to satisfy this requirement, law schools must demonstrate that all law students are required to participate in a substantial activity designed to reinforce the skill of cultural competency and their obligation as future lawyers to work to eliminate racism in the legal profession.

Interpretation 303-8

Standard 303 does not prescribe the form or content of the education on bias, cross-cultural competency, and racism required by Standard 303(c).

Standard 304. EXPERIENTIAL COURSES: SIMULATION COURSES, LAW CLINICS, AND FIELD PLACEMENTS

(a) Experiential courses satisfying Standard 303(a) are simulation courses, law clinics, and field placements that must be primarily experiential in nature and must:

(1) integrate doctrine, theory, skills, and legal ethics, and engage students in performance of one or more of the professional skills identified in Standard 302;

(2) develop the concepts underlying the professional skills being taught;

(3) provide multiple opportunities for performance;

(4) provide opportunities for student performance, self-evaluation, and feedback from a faculty member, or, for a field placement, a site supervisor;

(5) provide a classroom instructional component; or, for a field placement, a classroom instructional component, regularly scheduled tutorials, or other means of ongoing, contemporaneous, faculty-guided reflection; and

(6) provide direct supervision of the student's performance by the faculty member; or, for a field placement, provide direct supervision of the student's performance by a faculty member or a site supervisor.

(b) A simulation course provides substantial experience not involving an actual client, that is reasonably similar to the experience of a lawyer advising or representing a client or engaging in other lawyering tasks in a set of facts and circumstances devised or adopted by a faculty member.

(c) A law clinic provides substantial lawyering experience that involves advising or representing one or more actual clients or serving as a third-party neutral.

(d) A field placement course provides substantial lawyering experience that (1) is reasonably similar to the experience of a lawyer advising or representing a client or engaging in other lawyering tasks in a setting outside a law clinic under the supervision of a licensed attorney or an individual otherwise qualified to supervise, and (2) includes the following:

(i) a written understanding among the student, faculty member, and a person in authority at the field placement that describes both (A) the substantial lawyering experience and opportunities for performance, feedback and self-evaluation; and (B) the respective roles

of faculty and any site supervisor in supervising the student and in assuring the educational quality of the experience for the student, including a clearly articulated method of evaluating the student's academic performance;

(ii) a method for selecting, training, evaluating and communicating with site supervisors, including regular contact between the faculty and site supervisors through in-person visits or other methods of communication that will assure the quality of the student educational experience. When appropriate, a school may use faculty members from other law schools to supervise or assist in the supervision or review of a field placement program;

(iii) evaluation of each student's educational achievement by a faculty member; and

(iv) sufficient control of the student experience to ensure that the requirements of the Standard are met. The law school must maintain records to document the steps taken to ensure compliance with the Standard, which shall include, but is not necessarily limited to, the written understandings described in Standard 304(d)(i).

(e) Credit granted for such a simulation, law clinic, or field placement course shall be commensurate with the time and effort required and the anticipated quality of the educational experience of the student.

(f) Each student in such a simulation, law clinic, or field placement course shall have successfully completed sufficient prerequisites or shall receive sufficient contemporaneous training to assure the quality of the student educational experience.

Interpretation 304-1

When appropriate, a school may use faculty members from other law schools to supervise or assist in the supervision or review of a field placement program.

Standard 305. OTHER ACADEMIC STUDY

(a) A law school may grant credit toward the J.D. degree for courses that involve student participation in studies or activities in a format that does not involve attendance at regularly scheduled class sessions, including, but not limited to, moot court, law review, and directed research.

(b) Credit granted for such a course shall be commensurate with the time and effort required and the anticipated quality of the educational experience of the student.

(c) Each student's educational achievement in such a course shall be evaluated by a faculty member.

Interpretation 305-1

To qualify as a writing experience under Standard 303, other academic study must also comply with the requirement set out in Standard 303(a)(2). To qualify as an experiential course under Standard 303, other academic study must also comply with the requirements set out in Standard 304.

Standard 306. DISTANCE EDUCATION

Distance Education law school courses for which credit is given towards the J.D. degree must provide regular and substantive interaction between the students and faculty teaching the course. Distance education credits may not be counted towards the J.D. degree if they exceed the credit hour limitations in Standard 311(e).

(a) Regular interaction between a student and a faculty member in a distance education course shall include:

(1) providing the opportunity for substantive interactions with the student on a predictable and scheduled basis commensurate with the length of time and the amount of content in the course as defined by Standard 310(b);

(2) monitoring the student's academic engagement and success; and

(3) ensuring that the faculty member is responsible for promptly and proactively engaging in substantive interaction with the student when needed on the basis of such monitoring, or upon request by the student.

(b) Substantive interaction in a distance education course requires engaging students in teaching, learning, and assessment, consistent with the content under discussion, and includes at least two of the following:

(1) providing direct instruction;

(2) assessing or providing feedback on a student's coursework;

(3) providing information or responding to questions about the content of a course; or

(4) facilitating a group discussion regarding the content of a course.

(c) Remote participation in a non-distance education course by a student as an accommodation provided under law (such as the Americans with Disabilities Act) or under exceptional circumstances shall not cause the course to count towards the distance education credit limits in Standard 311(e) for that student. The law school shall document all instances in which it permits a student's remote participation in a non-distance education course for which the credits will not be counted towards the credit hour limits in Standard 311(e).

Standard 307. STUDIES, ACTIVITIES, AND FIELD PLACEMENTS OUTSIDE THE UNITED STATES

(a) A law school may grant credit for study outside the United States that meets the requirements of the Criteria adopted by the Council.

(b) A law school may grant credit for field placements outside the United States that meet the requirements of Standard 304.

(c) A law school may grant up to two-thirds of the credits required for the J.D. degree for study outside the United States provided the credits are obtained in a program sponsored by an ABA-approved law school. Programs sponsored by an ABA-approved law school include programs held in accordance with the *Criteria for Programs Offered by ABA-Approved Law Schools in a location Outside the United States* and field placements outside the United States.

(d) A law school may grant up to a maximum of one-third of the credits required for the J.D. degree for any combination of 1) student participation in study outside the United States under the *Criteria for Accepting Credit for Student Study at a Foreign Institution* and 2) credit for courses completed at a law school outside the United States in accordance with Standard 505(c).

(e) Credit hours granted pursuant to subsections (b), (c) and (d) shall not in combination exceed two-thirds of the total credits required for the J.D. degree.

(f) A student participating in study outside the United States must have successfully completed sufficient prerequisites or must contemporaneously receive sufficient training to assure the quality of the student educational experience.

Interpretation 307-1

For purposes of Standard 307, a course including only a brief visit outside the United States is not considered "study outside the United States." A "brief visit" is one-third or less of the class time in a course that is offered and based primarily at the law school and approved through the school's regular curriculum approval process.

Standard 308. ACADEMIC STANDARDS

(a) A law school shall adopt, publish, and adhere to sound academic standards, including those for regular class attendance, good standing, academic integrity, graduation, and dismissal.

(b) A law school shall adopt, publish, and adhere to written due process policies with regard to taking any action that adversely affects the good standing or graduation of a student.

Standard 309. ACADEMIC ADVISING AND SUPPORT

(a) A law school shall provide academic advising for students that communicates effectively the school's academic standards and graduation requirements, and that provides guidance on course selection.

(b) A law school shall provide academic support designed to afford students a reasonable opportunity to complete the program of legal education, graduate, and become members of the legal profession.

Standard 310. DETERMINATION OF CREDIT HOURS FOR COURSEWORK

(a) A law school shall adopt, publish, and adhere to written policies and procedures for determining the credit hours that it awards for coursework.

(b) A "credit hour" is an amount of work that reasonably approximates:

(1) not less than one hour of classroom or direct faculty instruction and two hours of out-of-class student work per week for fifteen weeks, or the equivalent amount of work over a different amount of time; or

(2) at least an equivalent amount of work as required in subparagraph (1) of this definition for other academic activities as established by the institution, including simulation, field

placement, clinical, co-curricular, and other academic work leading to the award of credit hours.

Interpretation 310-1

Based on the fifty minutes of classroom or direct faculty instruction and two hours of out-of-class student work per week over the fifteen-week (or its equivalent) period required by the Standard, at least 42.5 hours of total in-class instruction and out-of-class student work is required per credit [15 x 50 minutes + 15 x 2 hours]. Time devoted to taking a required final examination may count toward the in-class time required, and time devoted to studying for a required final examination may count toward the out-of-class time required. However, merely scheduling a general "exam week" or "exam weeks" does not permit allocating "exam time" to every class. In order to count time spent studying for and taking a final examination, an exam of appropriate length must be required for the particular class.

Interpretation 310-2

A school may award credit hours for coursework that extends over any period of time, if the coursework entails no less than the minimum total amounts of classroom or direct faculty instruction and of out-of-class student work (42.5 hours) specified in Standard 310(b).

Standard 311. ACADEMIC PROGRAM AND ACADEMIC CALENDAR

(a) A law school shall require, as a condition for graduation, successful completion of a course of study of not fewer than 83 credit hours. At least 64 of these credit hours shall be in courses that require attendance in regularly scheduled classroom sessions or direct faculty instruction.

(b) A law school shall require that the course of study for the J.D. degree be completed no earlier than 24 months and, except in extraordinary circumstances, no later than 84 months after a student has commenced law study at the law school or a law school from which the school has accepted transfer credit.

(c) A law school shall not permit a student to be enrolled at any time in coursework for credit in the J.D. program that exceeds 20 percent of the total credit hours required by that school for graduation.

(d) Credit for a J.D. degree shall only be given for course work taken after the student has matriculated in a law school's J.D. program of study, except for credit that may be granted pursuant to Standard 505. A law school may not grant credit toward the J.D. degree for work taken in a pre-admission program.

(e) A law school that does not offer a J.D. degree via distance education under Standard 105(a)(12)(ii) may grant a student up to one-third of the credit hours required for the J.D. degree for Distance Education Courses; up to 10 of those credit hours may be granted during the first one-third of a student's program of legal education.

Interpretation 311-1

(a) In calculating the 64 credit hours of regularly scheduled classroom sessions or direct faculty instruction for the purpose of Standard 311(a), the credit hours may include:

(1) Credit hours earned by attendance in regularly scheduled classroom sessions or direct faculty instruction;

(2) Credit hours earned by participation in a simulation course or law clinic in compliance with Standard 304;

(3) Credit hours earned through distance education; and

(4) Credit hours earned by participation in law-related studies or activities in a country outside the United States in compliance with Standard 307.

(b) In calculating the 64 credit hours of regularly scheduled classroom sessions or direct faculty instruction for the purpose of Standard 311(a), the credit hours shall not include any other coursework, including, but not limited to:

(1) Credit hours earned through field placements in compliance with Standard 304 and other study outside of the classroom in compliance with Standard 305;

(2) Credit hours earned in another department, school, or college of the university with which the law school is affiliated, or at another institution of higher learning;

(3) Credit hours earned for participation in co-curricular activities such as law review, moot court, and trial competition; and

(4) Credit hours earned by participation in studies or activities in a country outside the United States in compliance with Standard 307 for studies or activities that are not law-related.

Interpretation 311-2

Whenever a student is permitted on the basis of extraordinary circumstances to exceed the 84-month program limitation in Standard 311(b), the law school shall place in the student's file a statement signed by an appropriate law school official explaining the extraordinary circumstances leading the law school to permit an exception to this limitation. Such extraordinary circumstances, for example, might include an interruption of a student's legal education because of an illness, family exigency, or military service.

Interpretation 311-3

If a law school grants credit for prior law study at a law school outside the United States as permitted under Standard 505(c), only the time commensurate with the amount of credit given counts toward the length of study requirements of Standard 311(b). For example, if a student has studied for three years at a law school outside the United States and is granted one year of credit toward the J.D. degree, the amount of time that counts toward the 84 month requirement is one year. The student has 72 months in which to complete law school in the United States.

Standard 312. REASONABLY COMPARABLE OPPORTUNITIES

A law school providing more than one enrollment or scheduling option shall ensure that all students have reasonably comparable opportunities for access to the law school's program of legal education, courses taught by full-time faculty, student services, co-curricular programs, and other educational benefits. Identical opportunities are not required.

Standard 313. DEGREE PROGRAMS IN ADDITION TO J.D.

A law school may not offer a degree program other than its J.D. degree program unless:

(a) the law school is fully approved;

(b) the Council has granted acquiescence in the program; and

(c) the degree program will not interfere with the ability of the law school to operate in compliance with the Standards and to carry out its program of legal education.

Interpretation 313-1

Acquiescence in a degree program other than the J.D. degree is not an approval of the program itself and, therefore, a school may not announce that the program is approved by the Council.

Standard 314. ASSESSMENT OF STUDENT LEARNING

A law school shall utilize both formative and summative assessment methods in its curriculum to measure and improve student learning and provide meaningful feedback to students.

Interpretation 314-1

Formative assessment methods are measurements at different points during a particular course or at different points over the span of a student's education that provide meaningful feedback to improve student learning. Summative assessment methods are measurements at the culmination of a particular course or at the culmination of any part of a student's legal education that measure the degree of student learning.

Interpretation 314-2

A law school need not apply multiple assessment methods in any particular course. Assessment methods are likely to be different from school to school. Law schools are not required by Standard 314 to use any particular assessment method.

Standard 315. EVALUATION OF PROGRAM OF LEGAL EDUCATION, LEARNING OUTCOMES, AND ASSESSMENT METHODS

The dean and the faculty of a law school shall conduct ongoing evaluation of the law school's program of legal education, learning outcomes, and assessment methods; and shall use the results of this evaluation to determine the degree of student attainment of competency in the learning outcomes and to make appropriate changes to improve the curriculum.

Interpretation 315-1

Examples of methods that may be used to measure the degree to which students have attained competency in the school's student learning outcomes include review of the records the law school maintains to measure individual student achievement pursuant to Standard 314; evaluation of student learning portfolios; student evaluation of the sufficiency of their education; student performance in capstone courses or other courses that appropriately assess a variety of skills and knowledge; bar exam passage rates; placement rates; surveys of attorneys, judges, and alumni; and assessment of student performance by judges, attorneys, or law professors from other schools. The methods used to measure the degree of student achievement of learning outcomes are likely to differ from school to school and law schools are not required by this standard to use any particular methods.

Standard 316. BAR PASSAGE

At least 75 percent of a law school's graduates in a calendar year who sat for a bar examination must have passed a bar examination administered within two years of their date of graduation.

Revised ABA Standards 303(b) and (c) and the Formation of a Lawyer's Professional Identity, Part 1: Understanding the New Requirements

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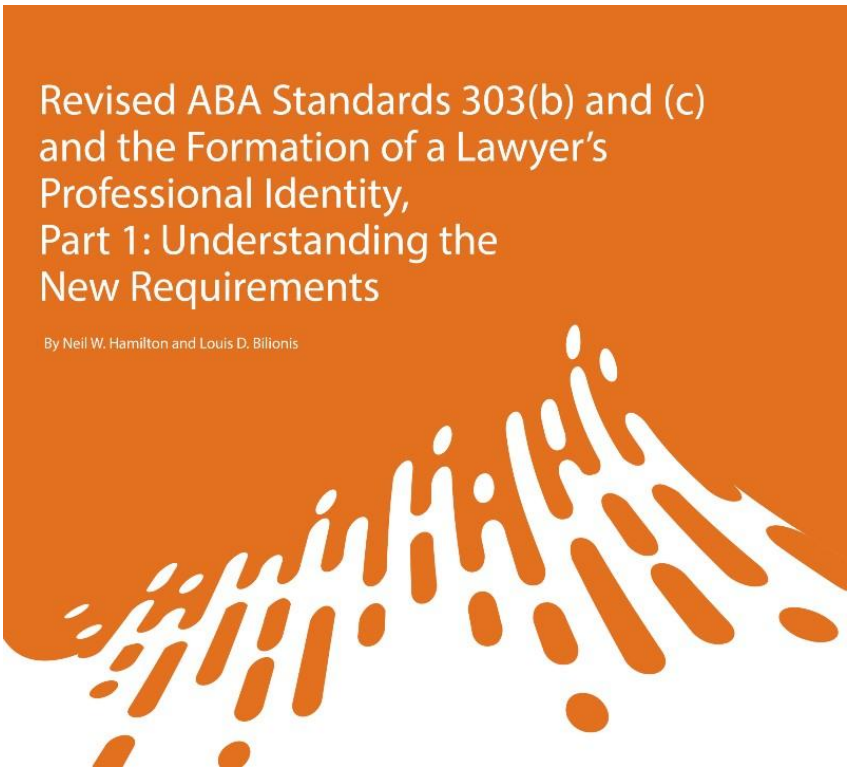


Editor's Note: This is the first article of a two-part series, with the **Part 2** appearing in the June 2022 edition of *NALP Bulletin+*.

Part 1 (see below): Examining Revisions to ABA Standards 303(b) and (c)

Section 1: Introduction

Section 2: Understanding the New Requirements

Part 2: Action Steps for Students, Schools, and the Legal Profession

Section 3: Why Are These Standard 303 Revisions an Opportunity to Benefit Students, Law Schools, and the Profession?
Section 4: Simple Action Steps to Realize These Benefits for Students and the School
Section 5: Conclusion

Part 3: Cross-Cultural Competency, Equal Access, and the Elimination of Bias, Discrimination, and Racism

Section 1: Examining ABA Standard 303 (c)
Section 2: The Values and Responsibilities of the Legal Profession and Its Members Should Include Cross-Cultural Competency, Equal Access, and the Elimination of Bias, Discrimination, and Racism
Section 3: The Work Ahead for Law Schools
Section 4: Getting Started – Four Opportunities and a Particular Challenge

Section 1: Introduction

The American Bar Association's revisions to accreditation Standard 303 present an opportunity to improve legal education to the benefit of law students, law schools, and the legal profession. Entrepreneurial schools will take advantage of the opportunity to differentiate their graduates and the school. Employers can lend support to help law schools build a more effective curriculum to foster each student's growth toward the full range of capacities and skills that legal employers and clients need.

The revisions add new requirements for a school's program of legal education. Standard 303(b) has been revised to add that "a law school shall provide substantial opportunities to students for … (3) the development of a professional identity." And a new subsection (c) has been added to Standard 303, providing that "[a] law school shall provide education to law students on bias, cross-cultural competency, and racism: (1) at the start of the program of legal education, and (2) at least once again before graduation." (See Resources: ABA.) There are new "Interpretations" that accompany the revisions to Standard 303, including two that provide guidance on the meaning of a professional identity and thereby illuminate the relationship between the revisions.

(1) **New Interpretation 303-5** states that "professional identity focuses on what it means to be a lawyer and the special obligations lawyers have to their clients and society. The development of a professional identity should involve an intentional exploration of the values, guiding principles, and well-being practices considered foundational to successful legal practice. Because developing a professional identity requires reflection and growth over time, students should have frequent opportunities during each year of law school and in a variety of courses and co-curricular and professional development activities."

(2) **New Interpretation 303-6** provides "the importance of cross-cultural competence to professionally responsible representation and the obligation of lawyers to promote a justice system that provides equal access and eliminates bias, discrimination, and racism in the law should be among the values and responsibilities of the legal profession to which students are introduced."

William Adams, the managing director of the ABA Section of Legal Education and Admissions to the Bar, recently commented that "[w]e are aware that some schools may choose (although not be required) to comply with the Standard 303 amendments by new courses or course changes. We are also aware that the course approval process takes time at most schools. We are therefore requiring schools to have a plan in place by the fall of 2022 as to how the school plans to comply with the Standard 303 amendments with full implementation of the plan by fall of 2023." (See Resources: Adams.)

As Section 3 of this article will explain in Part 2 appearing in the upcoming June 2022 edition, the revisions to Standard 303 offer a significant opportunity to benefit students, law schools, legal education, and the legal profession. While schools can achieve those benefits in diverse ways, there are some simple, immediate action steps that faculty and staff can undertake at the outset to make the process of change efficient and effective. Also in the upcoming June edition, Section 4 will outline those steps. Before exploring those matters, however, some important foundational concepts need to be addressed and developed. And so, in Section 2, we will begin by explaining the four components of a student's professional identity and defining the skill of reflection.

This article borrows ideas from a new open-access Cambridge University Press book that we have authored titled, *Law Student Professional Development and Formation: Bridging Law School, Student, and Employer Goals* (2022). The book offers a framework, guiding principles, and practical suggestions for bringing purposeful support of law student professional identity formation into the American law school.

Section 2: Understanding the New Requirements

A. What Is a Student's Professional Identity?

Interpretation 303-5 emphasizes that professional identity focuses on the special obligations that lawyers have to their clients and society, and should involve an intentional exploration of the values, guiding principles, and well-being practices considered foundational to successful legal practice. Interpretation 303-6 adds that the values and responsibilities of the legal profession include the importance of cross-cultural competence to professionally responsible representation and the obligation of lawyers to promote a justice system that provides equal access and eliminates bias, discrimination, and racism in the law.

It is necessary to define the special obligations lawyers have to their clients and society — the core values and guiding principles of the profession, including those noted in Interpretation 303-6, that are considered foundational to successful legal practice. In our new book, we synthesize the scholarship on lawyer professional identity and propose four fundamental goals (or learning outcomes) that capture these core values and guiding principles (see Resources: Learning Outcomes). A law school should help each student to understand, internalize, and demonstrate:

1. a deep responsibility and care orientation to others, especially the client,
2. ownership of continuous professional development toward excellence at the major competencies that clients, employers, and the legal system need,
3. well-being practices, and

4. client-centered relational skills, problem-solving, and good judgment that ground each student's responsibility to and care for the client (see Resources: Carnegie).

Each of these four fundamental goals or learning outcomes defining a student's professional identity merits further explanation.

Fundamental Goal 1: A deep responsibility and care orientation to others, especially the client

Have you ever experienced a healthcare team serving you (or a family member) as a patient and felt the team's deep responsibility to care for you? Educators in medicine and nursing and top healthcare organizations in the world like the Mayo Clinic and Johns Hopkins have been working for years to learn how effectively to acculturate new entrants into deep care for the patient in teams. Legal educators can learn from the experience of healthcare educators (see Resources: Holmboe and Englander).

Deep responsibility to and care for the client are the principal foundations for client trust in the individual lawyer and the profession itself (see Resources: Sullivan). Deep responsibility and care essentially entail a fiduciary disposition or fiduciary mindset, using "fiduciary" in the general meaning of founded on trustworthiness. Each law student and new lawyer must learn to internalize a responsibility to put the client's interests before the lawyer's self-interest.

The legal profession also holds out other fiduciary mindset values and guiding principles relating to trust in each lawyer. The Model Rules of Professional Conduct emphasize that a lawyer must, at the minimum, meet professional levels of competence, diligence, communication, fairness in billing, confidentiality, loyalty, and respect for others in the legal system (see Resources: Model Rules). Law School Professional Responsibility courses tend to focus on compliance with these rules and the law of lawyering generally. The Preamble to the Model Rules also sets forth aspirational core values and guiding principles. For example, the Preamble states in paragraph 7 that "[a] lawyer should strive to attain the highest level of skill, to improve the law and the legal profession, and to exemplify the legal profession's ideals of public service." The Preamble emphasizes that "a lawyer should seek improvement of the law, access to the legal system, the administration of justice, and the quality of the service rendered by the legal profession," and accentuates that:

> 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 (see Preamble, paragraph 6).

nterpretation 303-6 similarly emphasizes the important values of cross-cultural competence and the obligation of lawyers to promote a justice system that provides equal access and eliminates bias, discrimination, and racism in the law.

Another core value of the profession is the development of a lawyer's sensitive professional and moral judgment guided by personal conscience. The Model Rules contemplate that a lawyer will possess very broad discretion when exercising professional judgment to fulfill responsibilities to clients, the legal

system, and the quality of justice, and the rules also recognize that the lawyer has a personal interest in being an ethical person who makes a satisfactory living.

The Preamble acknowledges that “difficult ethical issues” can arise from these potentially conflicting responsibilities and interests. “Within the framework of these Rules,” the Preamble observes, “many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of *sensitive professional and moral judgment* guided by the basic principles underlying the Rules.” (See Preamble, paragraph 9.) The Preamble further notes that “a lawyer is also guided by personal conscience and the approbation of professional peers.” (See Preamble, paragraph 8.)

A last core value is the development of independent professional judgment and the skill of candid counsel to serve a client. The Model Rules recognize that clients face many difficult ethical issues and that a lawyer should provide “*independent professional judgment* and render candid advice” to help the client think through decisions that affect others (see Rule 2.1). The comments to Rule 2.1 note that “[a]dvice 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 … It is proper for a lawyer to refer to the relevant moral and ethical considerations in giving advice.” The lawyer is not imposing the lawyer’s morality on the client. Rather the “relevant moral and ethical considerations” upon which the lawyer is to draw and offer counsel — and therefore needs to comprehend — include the client’s own tradition of responsibility to and deep care for others.

The foregoing defines the elements of a law student’s and lawyer’s fiduciary mindset. A fiduciary mindset calls on each law student and lawyer to:

1. comply with the minimum standards of competency and ethical conduct set forth in the Rules of Professional Conduct,
2. foster in oneself and other lawyers the core values of:

- deeply caring for the client
- striving to attain the highest level of skill
- improving the law, providing pro bono service to the disadvantaged, and promoting a justice system that provides equal access and eliminates bias, discrimination, and racism in the law

3. develop and be guided by personal conscience — including the exercise of “sensitive professional and moral judgment” and the conduct of an “ethical person” — when deciding all the “difficult issues of professional discretion” that arise in the practice of law, and
4. develop independent professional judgment, including moral and ethical considerations, to help the client think through decisions that affect others.

Fundamental Goal 2: Ownership of continuous professional development toward excellence at the major competencies that clients, employers, and the legal system need

A student’s ownership of professional development toward excellence needs separate emphasis as a second foundational goal or learning outcome for a student’s professional identity. A new entrant to a profession must grow from being a passive student to being a pro-active professional with respect to professional development.

William Sullivan is the co-director of all five Carnegie Foundation for the Advancement of Teaching studies of higher education for the professions. Sullivan believes that the "chief formative challenge" is to help each student entering a profession to change from thinking like a student who learns and applies routine techniques to solve well-structured problems toward the acceptance and internalization of responsibility to others (particularly the person served) and for the student's own pro-active development toward excellence as a practitioner at all of the competencies of the profession (see Sullivan at xi, xv). Clients and patients need to trust that their lawyer or physician is dedicated above all else to care for them to the utmost of the professional's ability (see ix).

Similarly, in the Carnegie Foundation's study of medical education, *Educating Physicians,* the authors conclude that "[t]he physician we envision has, first and foremost, a deep sense of commitment and responsibility to patients, colleagues, institutions, society, and self, and an unfailing aspiration to perform better and serve with excellence. Such commitment and responsibility involve habitual searching for improvement in all domains ... and a willingness to invest the effort to strategize and enact such improvements." (See Resources: Cooke.)

There are several research approaches, sailing under different terminologies, that give insight into the challenge of helping each student to develop toward the later stages of an internalized commitment to continuous professional development. Self-directed learning and self-regulated learning (defined below) are among the most common terms used in higher education to speak of a student's growth to internalize a commitment to continuous professional development. Self-directed learning emerged from the adult learning literature whereas self-regulated learning developed primarily from the educational psychology literature (see Resources: Artino).

Although self-directed learning (SDL) and self-regulated learning (SRL) have developed from different literatures, the two areas of scholarship converge on the elements in **Table 1** (see Resources: Cleary).

Table 1: Synthesis of the Competencies Where Self-directed Learning (SDL) and Self-regulated Learning (SRL) Converge

A student should pro-actively:

1. diagnose and identify learning needs (SDL) or decide what to learn (SRL),
2. identify resources for learning that meets the student's needs (SDL) or plan how/when/where to learn (SRL),
3. identify goals (SDL) or set mastery goals (SRL),
4. implement the learning plan (SDL and SRL) but SRL goes deeper to include in the learning plan: (a) a cyclical feedback loop that allows the individual to gather information that is used to evaluate the effectiveness of their activities and respond to feedback; and (b) self-monitoring to keep track of and evaluate the individual's behavior, performance and progress, and
5. evaluate the learning process (SDL and SRL) but SRL goes deeper into determining the cause of the results and planning steps to improve in the future.

SDL also includes both the learner's commitment to a learning contract and the educator's role as a facilitator of learning and not primarily as a content source. Note that metacognition, or thinking about one's own thinking including the degree to which individuals monitor, control, and regulate their own cognitive activities, is another term in this family of concepts, but it is normally incorporated under the broader conceptualization of self-regulated learning.

Fundamental Goal 3: Well-being practices

Bar organizations and legal educators have recognized an elevated risk in the legal community for mental health and substance abuse disorders (see, e.g., *Path to Lawyer Well-Being*, at 7). These well-being issues lead to law students and lawyers who are functioning below their ability and suffering because of substance-use and mental-health disorders. Interpretation 303-5 spotlights well-being practices as part of a student's professional identity.

What is well-being? Lawrence Krieger and Kennon Sheldon analyze a robust branch of modern positive psychology self-determination theory (SDT) that provides an empirical framework to understand student well-being. They also outline the benefits to students, faculty, and staff of increasing student well-being. Krieger and Sheldon treat subjective well-being in their studies as the sum of (1) life satisfaction and (2) positive affect or mood (after subtracting negative affect). They utilize established instruments on each factor. Life satisfaction includes a personal (subjective) evaluation of objective circumstances such as one's work, health, home, relationships, possessions, income, and leisure opportunities. Positive and negative affects are purely subjective, straightforward experiences of "feeling good" or "feeling bad." (See Resources: Krieger and Sheldon-Data.)

What are the basic psychological needs that contribute to student well-being? SDT defines three basic psychological needs contributing to well-being: (1) autonomy (to feel in control of one's own goals and behaviors); (2) competence (to feel one has the needed skills, including physical and mental health skills, to be successful); and (3) relatedness (to experience a sense of belonging or attachment to other people). Note that the first two professional identity goals or learning outcomes that started this article (a deep responsibility and service orientation to others, especially the client, and ownership of continuous professional development toward excellence) reflect significant aspects of SDT's three basic psychological needs. Autonomy is considered the most important of the three basic psychological needs since people must have a well-defined sense of self and express their core values in daily life to function in a consistent way (see Resources: Krieger).

Fundamental Goal 4: Client-centered relational skills, problem-solving, and good judgment that ground each student's responsibility to and care for the client

Interpretation 305-5 emphasizes that the development of a professional identity should involve an intentional exploration of the values and guiding principles considered foundational to successful legal practice. While client-centered relational skills, problem solving, and good judgment are included in the concept of a fiduciary mindset discussed above, our experience suggests that the fiduciary mindset concept can be too abstract for a significant proportion of stakeholder groups like students and legal employers. These groups need a clearer bridge to the actual capacities and skills empirical research shows are foundational for successful legal practice. Client-centered relational skills, problem solving, and good judgment provide this bridge.

A growing number of empirical studies asking clients and legal employers about the competencies needed for successful legal practice support the conclusion that the six traditional technical competencies that law schools emphasize and which are set forth in **Table 2**, are necessary but not sufficient to meet client and legal employer needs in changing markets (see Resources: Hamilton-Competencies).

Table 2: Traditional Technical Competencies That Law Schools Emphasize

1. knowledge of doctrinal law in the basic subject areas,

2. legal analysis,

3. legal research,

4. written and oral communication in the legal context,

5. legal judgment, and

6. knowledge of the law-of-lawyering responsibilities to clients and the legal system (see Resources: Competencies).

The additional competencies that the empirical studies indicate clients and legal employers need from lawyers in changing markets are listed in **Table 3**.

Table 3: Additional Competencies Empirical Studies Indicate That Clients and Legal Employers Need

1. superior client focus and responsiveness to the client,

2. exceptional understanding of the client's context and business,

3. effective communication skills, including listening and knowing your audience,

4. client-centered creative problem-solving abilities and good professional judgment,

5. ownership over continuous professional development (taking initiative) of both the traditional technical competencies in Table 2, the client relationship competencies above, and the capacities and skills below,

6. teamwork and collaboration,

7. strong work ethic,

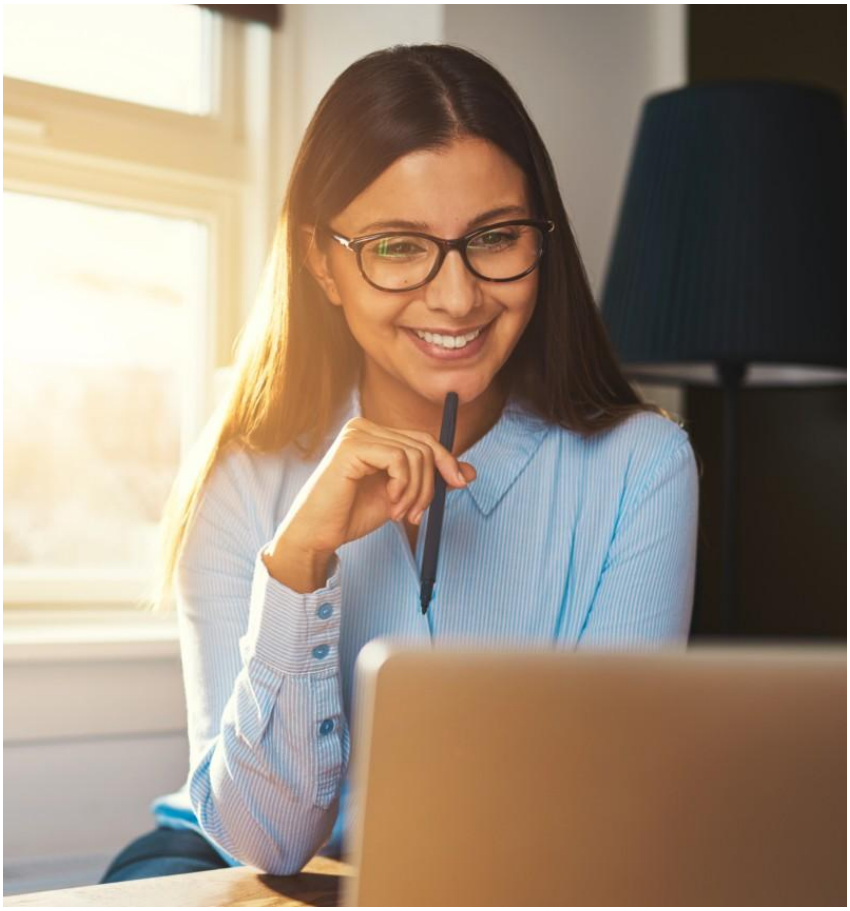
8. conscientiousness and attention to detail,

9. grit and resilience,

10. organization and management of legal work (project management), and

11. an entrepreneurial mindset to serve clients more effectively and efficiently in changing markets.

Interpretation 303-6 also specifically identifies cross-cultural competency as necessary for client-centered relationship skills, problem solving, and good judgment.



B. The Skill of Reflection Is Central to Each Student's Professional Identity

Interpretation 303-5 observes that "because developing a professional identity requires reflection and growth over time, students should have frequent opportunities [for reflection and growth] during each year of law school and in a variety of courses and co-curricular and professional development activities." Although the interpretation does not define "reflection," a helpful definition can be synthesized from medical education and earlier legal education scholarship.

The skill of reflection is an ongoing cycle of careful examination of specific thoughts, actions, and experiences from a student's own perspective and the perspective of others with a goal of informing and improving the student's insight and practice for future experiences (see Resources: Hamilton-

Professional Identity). A systematic review of the most cited medical education papers on reflection in the period 2008 to 2012 defined reflection as "the process of engaging the self in attentive, critical, exploratory, and iterative interactions with one's thoughts and actions, and their underlying conceptual frame, with a view to changing them." (See Resources: Nguyen et al.)

This conceptual model of reflection has two extrinsic elements and four core sub-competencies (see Resources: Fifth). The first extrinsic element is an experience that triggers a reflective thinking process. The second extrinsic element is the timing of the reflection. In the vast majority of definitions of reflection, the timing occurs after the experience, but these authors believe reflection should occur before, during, and after the experience (see Nguyen et al. at 1184).

The four core sub-competencies (or steps) of a reflective thinking process are: (1) to identify specific thoughts and actions the person is thinking about; (2) to think about the thoughts and actions attentively and critically, in an exploratory and iterative fashion; (3) to become aware of the conscious or unconscious conceptual framework(s) that underlie the person's thoughts and actions; and (4) to have a purpose of changing the self in terms of the person's conscious or unconscious conceptual framework (see Nguyen et al. at 1181–82. *See* Hamilton for a grading rubric applicable to reflection assignments). (We have added to our synthesized definition of reflection the qualification that examination should be undertaken from the student's perspective and the perspective of others.)

C. How Often Does the Curriculum Need to Engage Each Student with Respect to the Development of a Professional Identity?

Interpretation 303-5 requires frequent opportunities to reflect on professional identity during each year of law school and in a variety of courses and co-curricular and professional development opportunities. Standard 303(c) also requires a law school to provide training and education to law students on bias, cross-cultural competency, and racism at least at the start of the program of legal education and at least once more before graduation.

Neil W. Hamilton and Louis D. Bilionis are authors of Law Student Professional Development and Formation: Bridging Law School, Student, and Employer Goals *(2022). Drawing on empirical studies and research on education in various disciplines, the book details a framework, guiding principles, and practical suggestions for bringing purposeful support of law student professional identity formation into the American law school.*

Look for ***Part 2*** *of this article series in the June 2022 edition of* NALP Bulletin+ *focusing on action steps and the benefits for law students, law schools and the legal profession.*

Resources

ABA: See American Bar Association's Section of Legal Education and Admissions to the Bar, Report to the House of Delegates 4 (adopted Feb. 14, 2022).

Adams: See email from Professor Kendall Kerew to Neil Hamilton summarizing a communication from William Adams to the deans (Feb. 25, 2022; on file with the authors).

Learning Outcomes: "Learning outcomes" are defined as "clear and concise statements of knowledge that the students are expected to acquire, skills students are expected to develop, and values that they are expected to understand and integrate into their professional lives. The outcomes should identify the desired knowledge, skills, and values that a school believes that its students should master." American Bar Association Section of Legal Education and Admissions to the Bar, *Managing Director's Guidance Memo*, Standards 301, 302, 314 and 315 (June 2015), at 4.

Carnegie: The first, second, and fourth goals are the most common elements of the formation of a professional identity in all five of the Carnegie Foundation for the Advancement of Teaching's studies of education for the clergy (2007), lawyers (2007), engineers (2009), nurses (2010), and physicians (2010) based on many dozens of site visits at schools in each profession. *See* Neil Hamilton, *Fostering Professional Formation (Professionalism): Lessons from the Carnegie Foundation's Five Studies of Educating Professionals,* 45 Creighton L. Rev. 763, 765, 775 (2012). All five Carnegie studies emphasize that the most fundamental element of the formation of a professional identity is internalizing responsibility to the person being served (e.g., parishioner, client, patient). Four of the studies agree on two other foundational goals: (1) a commitment to growth toward excellence at all the competencies needed for the profession; and (2) good judgment/moral reasoning in the context of the interpersonal relationship with the person served. *Id.* at 775-76. An empirical study of lawyer professionalism award winners in Minnesota also found a common understanding among them that their professional formation and development included: (1) a deep responsibility to others, especially deep care for the client that builds trust; (2) ongoing reflection and career-long learning; and (3) counseling the client with candid and honest counsel and independent judgment. *See* Neil Hamilton & Verna Monson, *Ethical Professional Transformation: Themes from Interviews About Professionalism with Exemplary Lawyers,* 52 Santa Clara L. Rev. 921, 948-49, 957 (2012).

The third goal reflects recent major concerns of law schools and the profession. The Carnegie study of legal education was published in 2007. *See* William M. Sullivan, et al., *Educating Lawyers: Preparation for the Profession of Law* (2007). In the years since the publication of *Educating Lawyers*, and particularly in the last several years, there has been much greater awareness that the well-being of law students and lawyers is profoundly important to the legal profession and to the clients that lawyers serve. Illuminating sources on that development include Jerome M. Organ, David B. Jaffe and Katherine M. Bender, *Suffering in Silence: The Survey of Law Student Well-Being and the Reluctance of Law Students to Seek Help for Substance Use and Mental Health Concerns*, 66 J. Legal Educ. 116, 116-56 (Autumn 2016) (discussing the 2014 Survey of Law Student Well Being), and National Task Force on Lawyer Well-Being, *The Path to Lawyer Well-Being: Practical Recommendations for Positive Change* (2017).

Holmboe and Englander: See Eric Holmboe and Robert Englander, *What Can the Legal Profession Learn from the Medical Profession about the Next Steps,* 14 U. St. Thomas L.J. 345, 345-56 (2018); Neil Hamilton & Sarah Schaefer, *What Legal Education Can Learn from Medical Education About Competency-Based Learning Outcomes Including Those Related to Professional Formation and Professionalism,* 29 Geo. J. Legal Ethics 399, 399-438 (2016).

Sullivan: See, e.g., William M. Sullivan, *Foreword* to *Teaching Medical Professionalism: Supporting the Development of a Professional Identity* ix, xi, xv (Richard L. Cruess et al. eds., 2d ed. 2016).

Also see id. at ix; William Sullivan, *Align Preparation with Practice,* 85 N.Y. St. B.A. J. No. 7, Sept. 2013, at 41-43 (where Sullivan introduces the concept of fiduciary disposition).

Model Rules: See Model Rules of Professional Conduct, Rules 1.1, 1.3, 1.4, 1.5, 1.6, 1.7-1.13, and 4.4 (2022)

Cooke: See Molly Cooke et al., *Educating Physicians: A Call for Reform of Medical School and Residency 41* (2010).

Artino: See Anthony Artino, Jr. et al., *Self-regulated learning in healthcare profession education: theoretical perspectives and research methods,* in *Researching Medical Education* 155, 157 (Jennifer Cleland & Steven J. Durning, eds.) (2015).

Cleary: See *id.* at p. 156-157; Timothy Cleary et. al., *Self-regulated learning in medical education,* in *Oxford Textbook of Medical Education* 466-67 (Kieran Walsh ed.) (2013). Clearly there is an overlap in the two concepts, and there is a need for cross-fertilization between the two literatures. Id. at 465, 470.

Krieger and Sheldon-Data: See Lawrence S. Krieger and Kennon M. Sheldon, *What Makes Lawyers Happy? A Data-Driven Prescription to Redefine Professional Success*, 83 Geo. Wash. L. Rev. 554, 564, 582-85 (2015).

Krieger: See Lawrence Krieger, *The Most Ethical of People, the Least Ethical of People: Proposing Self-Determination Theory to Measure Professional Character Formation,* 8 U. St. Thomas L.J. 168, 171 -72 (2011). SDT also identifies four intrinsic values that mirror the three basic psychological needs and lead to behaviors that fulfill the three basic needs and thus promote well-being. The four intrinsic values are: (1) self-understanding and growth (the importance of learning and personal growth); (2) intimacy with others (the importance of trusting close relationships with others); (3) helping others (improving others' lives, especially those in need); and (4) being in and building community (improving society).

Hamilton-Competencies*:* See Neil Hamilton, *The Gap Between the Foundational Competencies Clients and Legal Employers Need and the Learning Outcomes Law Schools Are Adopting,* 89 UMKC L. Rev. 559, 561-82 (2021).

Competencies: These are the competencies listed in 2021-2022 *Standards and Rules of Procedure for Approval of Law Schools, Standards 302 (a)-(c)*, American Bar Association Section of Legal Education and Admissions to the Bar.

Hamilton-Professional Identity: See Neil Hamilton, *The Foundational Skill of Reflection in the Formation of a Professional Identity*, 12 St. Mary's J. Legal Malpractice & Ethics (forthcoming 2022).

Nguyen et al.: See Quoc D. Nguyen et al., *What is Reflection? A Conceptual Analysis of Major Definitions and a Proposal for A Five-Component Model,* 48 Med. Educ. 1176, 1182 (2014).

Fifth: See id. at 1182. Nguyen et al. include a fifth core sub-competency called "having a view on the change itself" which picks up the continuing process of how an envisioned change can be changed further with a continuing process of reflection. *Id.* To keep the model proposed here simpler, this fifth sub-competency is not included.

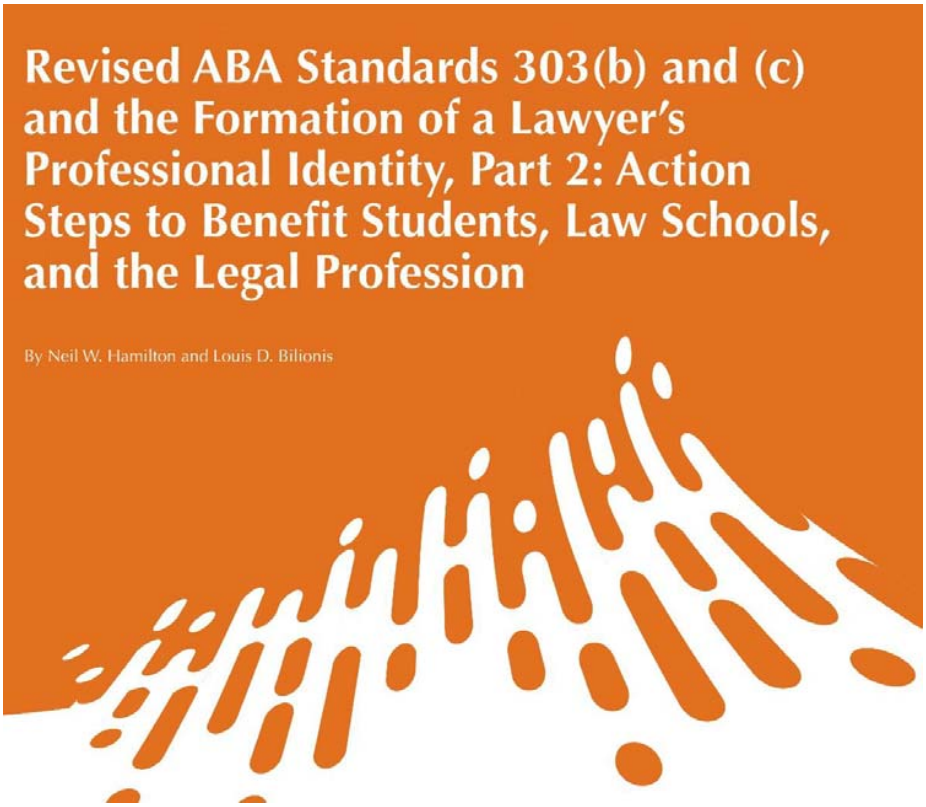
Neil W. Hamilton is the Thomas and Patricia Holloran Professor of Law and Co-Director of the Holloran Center for Ethical Leadership in the Professions at the University of St. Thomas (Minnesota) School of Law. He is the author of numerous books and articles, including ROADMAP: The Law Student's Guide to Preparing and Implementing a Successful Plan for Meaningful Employment (2d ed. ABA Books 2018), which received the American Bar Association's Gambrell Award for excellence in professionalism.

Louis D. Bilionis is Dean Emeritus and Droege Professor of Law at the University of Cincinnati College of Law and a Fellow at the Holloran Center. An experienced administrator, teacher, and scholar, he has focused on strategies for leading change in legal education, with particular attention to improved support for the law student's formation of professional identity.

Revised ABA Standards 303(b) and (c) and the Formation of a Lawyer's Professional Identity, Part 2: Action Steps to Benefit Students, Law Schools, and the Legal Profession

By Neil W. Hamilton and Louis D. Bilionis

From *PDQ* in *NALP Bulletin+*
June 2022 edition



Editor's Note: This is the second article of a two-part series, and **Part 1** appeared in the May 2022 edition of *NALP Bulletin+*.

Part 1: Examining Revisions to ABA Standards 303(b) and (c)

Section 3: Why Are These Standard 303 Revisions an Opportunity to Benefit Students, Law Schools, and the Profession?

The Standard 303 revisions create opportunities for students, schools, and the legal profession to achieve the following five benefits.

Benefit 1: More effective curriculum to foster each student's deep responsibility and service orientation to others, especially the client

In Part 1 of this article series, we asked you to think of a time when you (or a family member) felt a health team's deep responsibility and care as a patient. This is an intrinsic benefit that the legal profession and many legal educators want law graduates to similarly provide to clients and others in the legal system. Law graduates at later stages of internalization of deep responsibility to and care for others, especially the client, will strengthen client and public trust in the lawyer and the profession.

Extrinsic benefits like better post-graduation employment outcomes for the student and the school also may be expected. Growth to later stages of development on internalization of deep responsibility to and care for others, especially the client, is a foundational move that each new entrant to the profession must make, progressing from an earlier mindset of self-interest and low responsibility to others. This foundation of an internalized responsibility to and care for others supports many of the relational core values and skills in **Table 3** (as shown in Part 1 of this series) that empirical research indicates are foundational to successful legal practice:

- Superior client focus and responsiveness to the client
- Exceptional understanding of the client's context and business
- Effective communication skills, including listening and knowing your audience

- Client-centered creative problem-solving and good professional judgment
- Teamwork and collaboration
- An entrepreneurial mindset to serve clients more effectively and efficiently in changing markets

This foundation also supports development of the cross-cultural competency that Interpretation 303-6 has identified as necessary for client-centered relationship skills, problem solving, and good judgment.

If graduates are demonstrating later-stage development of the capacities and skills in **Table 3** that clients and legal employers need, students and law schools alike should benefit from better post-graduation employment outcomes. Student development to a later stage of internalizing deep responsibilities to and care for others also should fortify commitments to pro bono work and the promotion of a justice system that provides equal access and eliminates bias, discrimination, and racism.

Benefit 2: More effective curriculum to foster each student's ownership of continuous professional development toward excellence at the competencies that clients, legal employers, and the legal system need

Law students, faculty, staff, and administrators want to increase the probabilities of better academic performance, bar passage, and meaningful post-graduation employment for each student. Strong empirical data show that student growth toward the later stages of ownership of continuous professional development (as reflected in self-directed or self-regulated learning) enhances student academic performance (see Resources: Self-Regulated Learning), and that stronger student academic performance in turn correlates with higher probabilities of bar passage (see Resources: Bar Passage). It is reasonable that a student who has taken ownership over the student's own professional development and who can communicate this to potential employers will have better post-graduation employment outcomes.

Benefit 3: More effective curriculum to foster student well-being practices

Our earlier discussion noted the importance of autonomy as fundamental to well-being. Self-Determination Theory posits that there are positive outcomes for subordinates when organizational authorities support their autonomy by giving them (1) as much choice as possible, (2) a meaningful rationale to explain decisions, and (3) a sense that authorities are aware of and care about their point of view (see Resources: Krieger and Sheldon-Theory). These positive outcomes include (1) higher self-determined career motivation, (2) higher well-being, and (3) higher academic performance (see Krieger and Sheldon-Theory, p. 885).

Sheldon and Krieger's three-year longitudinal study of students at two law schools with very similar LSAT scores and undergraduate grade point averages compared student outcomes at the law school where students perceived stronger autonomy support with outcomes at the law school where students perceived weaker autonomy support. Students at the school with stronger autonomy support had higher well-being, better academic performance on grades, more self-determined motivation to pursue their legal careers, and better performance on the bar examination (see Krieger and Sheldon-Theory, pp. 893-894). Krieger and Sheldon followed up with surveys submitted from 7,865 practicing lawyers in four states (see Resources: Surveys). The responses from practicing lawyers affirmed that autonomy,

competence, and relatedness strongly predict respondents' well-being (see pp. 583 and 617). The practicing lawyers also affirmed that autonomy support from supervisors increased their well-being and self-determined motivation (see pp. 583 and 618).

Benefit 4: More effective curriculum to foster each student's client-centered relational skills, problem-solving, and good independent professional judgment that ground each student's responsibility to and care for the client

The empirical data summarized in **Table 3** indicate that legal employers and clients want law graduates who demonstrate later stages of client-centered relational skills, problem-solving, and good independent professional judgment. Law students who have evidence of later stage development of these competencies can increase their probability of meaningful post-graduation employment — a major benefit to the students and their law school as well.

Benefit 5. The skill of reflection

Recall the definition of reflection earlier in this article series: the skill of reflection is an ongoing cycle of careful examination of specific thoughts, actions, and experiences from a student's own perspective and the perspective of others with a goal of informing and improving the student's insight and practice for future experiences. The skill of reflection is learning from experience and doing better in the future. This is fundamental to professional development for both students and lawyers (see Resources: Hamilton-Professional Identity).

Section 4: Simple Action Steps to Realize These Benefits for Students and the School

What steps might a law school's faculty and staff take to realize the benefits that can come from effective implementation of the new requirements set out in amended Standard 303? A comprehensive set of detailed steps can be found in our new book, *Law Student Professional Development and Formation: Bridging Law School, Student, and Employer Goals*. Here, we highlight a few simple, immediate action steps that any school can and should undertake. They aim to position the law school

to address effectively and practically Interpretation 303-5's requirement that "[b]ecause developing a professional identity requires reflection and growth over time, students should have frequent opportunities for such development during each year of law school and in a variety of courses and co-curricular and professional development activities."

Step 1: Identify Stakeholders

The simplest **first step** is to identify the faculty and staff members who *already* are doing the most to foster student reflection in the formal curriculum or in coaching and mentoring students outside of the formal curriculum. Bring them together to discuss these Standard 303 accreditation changes and whether they see the changes as an opportunity to benefit the students and the school. A number of faculty in the experiential curriculum — including lawyering skills, clinic, and externship faculty and staff from career services and academic support — likely have been asking students to engage in reflection. Some doctrinal/podium faculty likely are interested in fostering student reflection too, and they should be affirmatively sought out. The simple step of bringing faculty and staff already fostering student reflection together and asking them to consider how to coordinate to help students grow to the next level of these four professional identity goals or learning outcomes and the related competencies will generate ideas and identify opportunities suitable to the school's circumstances, culture, and resources.

Once a school has a "coalition of the willing" of faculty and staff who see the Standard 303 changes as an opportunity to help students with the skill of reflection, there are many possible paths that could satisfy (and surpass) the accreditation requirements and pay dividends to students and the school. For example, the more than 60 schools that already have a required professional development curriculum in the 1L year (see Resources: 1L PD) might choose to build off that curriculum to create more reflection opportunities in the 2L and 3L years. Schools that have a public service requirement could add a reflection component to that requirement. The faculty teaching professional responsibility could choose to include modules on reflection into these professional identity learning outcomes.

Step 2: Empower the Willing

A **second simple step** is to empower the coalition of the willing to develop a multi-year plan, taking into account local conditions, to realize the benefits described earlier. This working group should inventory the reflection engagements currently in the curriculum and culture on the four foundational professional identity goals and learning outcomes — and then identify gaps and opportunities to coordinate and improve the curriculum. The coalition of the willing working group can consider 10 empirically-based principles to guide curriculum development relating to student professional identity that we develop in *Law Student Professional Development and Formation*.

Step 3: Go Where They Are

A **third simple step** is to "go where they are" — that is, fashioning curricular initiatives on professional identity formation with the interests, needs, and individual circumstances of students in clear, appreciative view. Students will buy-in if they see that these initiatives help them reach their own

personal goals. With buy-in comes student ownership of responsibility for personal professional development, and engagement and growth.

We have reasonably good data on the goals of both applicants to law schools and enrolled law students. The 2018 Association of American Law Schools (AALS) report, *Before the JD: Undergraduate Views on Law School*, is the first large-scale national study to examine what factors contribute to an undergraduate student's decision to go to law school (see Resources: AALS).

A synthesis of the AALS data indicates the most important goal of undergraduate students considering law school is meaningful post-graduation employment with the potential for career advancement that "fits" the passion, motivating interests, and strengths of the student and offers a service career that is helpful to others and involves some work/life balance. Achieving a high income is an additional key factor defining the meaningfulness of employment for about 30% of the students considering law school (see Resources: Income). A 2017 empirical study of enrolled 1L students in five law schools asked, "What are the professional goals you would like to achieve by six months after graduation?" The two most important goals were bar passage and meaningful employment, followed by sufficient income to meet loan obligations, a satisfactory living, and a trustworthy reputation (see Resources: Goals).

The law school's professional identity curriculum can be envisioned as a bridge that unites the students' goals of bar passage and meaningful post-graduation employment and the needs of clients, legal employers, and the legal system. Students who embrace that vision can buy into and engage in the curriculum more effectively. The law school can take two basic initiatives that will help students embrace that vision. Both initiatives draw on the school's capacity to communicate well and with appreciation of the student's perspective.

The first initiative is to help the student envision and comprehend the bridge. Faculty, staff, and the administration can assist the student to understand:

1. the full array of competencies that clients and legal employers want (this includes not only the traditional technical competencies in **Table 2** that all law schools emphasize, but also other competencies in **Table 3** including client-centered relational skills, problem solving, and good judgment and an entrepreneurial mindset to serve clients and legal employers in changing markets; and

2. the importance of a student pro-actively taking ownership of the student's own professional development, using both the formal curriculum and professional experiences outside of the formal curriculum, to develop toward the later stages of the competencies that are the student's strengths, and to have evidence of the student's later-stage development that legal employers will value.

The second initiative for the law school is to communicate to students, in language and with concepts that they understand, how most effectively to use the bridge that the law school's curriculum and culture create for each student. Our experience is that students are at different stages of development regarding (1) and (2) in initiative 1 above, and many students need substantially more help than might be expected to grow to understand the bridge and to become pro-active in using their time in law school to achieve their post-graduation goals.

Several factors appear to contribute to the difficulty. Many students want to be told what to do, a posture consistent with how they experienced their education before law school. As William Henderson has noted, law students expect to learn about their law school subjects in standard ways. The emphasis of the 1L year curriculum on cognitive competencies, moreover, means that students go relatively unexposed to the fact that the practice of law calls for a much broader array of competencies in **Table 3**

than the knowledge of legal doctrine and the performance of legal analysis (see Resources: Henderson). In our experience, nearly all students — including highly ranked students — need substantial help in framing an effective persuasive argument that their personal strengths meet a particular employer's needs (in the language of the employer) and that the student has evidence of this later stage development that the employer will value.

The law school's curriculum and culture, from orientation through the remaining three years, can be used more effectively to help each student see and use the bridge, meeting them where they individually are developmentally. One powerful step in this direction would be for as many faculty as possible from all roles and ranks, whether doctrinal/podium or experiential, to make transparent to students the entire map of competencies needed to practice law, and to make explicit what competencies the student is learning in the course or in a particular experience. Even when a faculty member does not personally focus on professional identity competencies in a course, the professor can still endorse their significance and underscore how those competencies are addressed elsewhere in the school's academic program. Such "cross-selling" is quite easy, especially if faculty are provided talking points.

Step 4: Extend the Bridge

A **fourth simple step** is to extend the "go where they are" philosophy to the legal employers that hire significant percentages of the school's students. The law school can build a bridge to legal employers too, helping them recognize that the law school's graduates are reaching later stages of development on the competencies that employers and clients need. For example, as a law school develops a curriculum and culture to foster each student's growth toward the later stages of development on the four professional identity goals and learning outcomes and the related competencies listed in **Table 3** that flow from them, the school's career services and public relations offices should be communicating to legal employers — in **Table 3** language the employers understand — how the school's graduates can demonstrate a much wider range of the competencies the employers need. Students will need education on how to communicate these strengths persuasively.

A perhaps less-obvious bridge to legal employers could focus on the fact that legal employers currently are dramatically increasing attention to diversity, equity, inclusion (DEI) and belonging initiatives. These initiatives drive at professional identity competencies discussed earlier. An entrepreneurial law school will educate the employers who hire the school's graduates about (1) the law school's efforts to foster each student's growth toward the later stages of these professional identity learning outcomes and the related competencies that employers need, and (2) how this broader understanding of the competencies needed to serve clients well (beyond just the standard cognitive competencies) will contribute to the legal employers' diversity. The law school can provide reliable evidence to the employers of each student's later stage development of these needed competencies (see Resources: Competencies). An entrepreneurial law school emphasizing the full range of competencies that legal employers need will give particular emphasis to DEI and belonging initiatives that help historically underserved students understand the entire range of needed competencies and to create and implement a plan to develop those competencies.

Section 5: Conclusion

Law schools focused on benefiting students, legal employers, clients, the legal system, and the law school itself will seize the opportunity presented by the revisions to Standard 303. The first steps to take are simple. All law schools are already providing significant experiences for students to develop a professional identity, but these experiences can be far more beneficial if they are coordinated and if students are encouraged to reflect on them and their impact on the student's development as a professional. The simple steps of bringing the faculty and staff already fostering student reflection together and asking them to consider how to coordinate to help students grow to the next level of the four professional identity learning outcomes and their related competencies will generate substantial benefits for all stakeholders.

Neil W. Hamilton and Louis D. Bilionis are authors of Law Student Professional Development and Formation: Bridging Law School, Student, and Employer Goals *(2022). Drawing on empirical studies and research on education in various disciplines, the book details a framework, guiding principles, and practical suggestions for bringing purposeful support of law student professional identity formation into the American law school.*

Resources

Self-Regulated Learning: "Research has amassed overwhelming evidence that self-regulated learning enhances student performance and achievement in courses and course units." Linda Nilson, *Creating Self-Regulated Learners 10-11* (2013). "It has been shown that self-regulated learning is one of the best predictors of academic performance" and "self-regulated learners are more effective learners." Susanna Lucieer et al., *Self-Regulated Learning and Academic Performance in Medical Education,* 38 Med. Teach. 585, 586 (2016). Self-regulated activity "has consistently been found to be related to student achievement." Renee Jansen et al., *Self-Regulated Learning Partially Mediates the Effect of Self-Regulated Learning Interventions on Achievement in Higher Education: A Meta-Analysis,* 28 Educ. Research Rev. 1, 2 (2019). "Students who were willing to reflect and make changes in their learning strategies and who selected active strategies that inherently involved regulating their learning were more likely to have academic success." Jennifer Gundlach & Jessica Santangelo, *Teaching and Assessing Metacognition in Law School,* 69 J. Legal Educ. 156, 180 (2019).

Bar Passage: *See* Linda F. Wightman, Law School Admission Counsel, *LSAC National Longitudinal Bar Passage Study 37* (1998); Douglas Rush and Hisako Matsuo, *Does Law School Curriculum Affect Bar Examination Passage? An Empirical Analysis of Factors Related to Bar Examination Passage During the Years 2001 Through 2006 at a Midwestern Law School*, 57 J. Legal Educ. 224, 232-33 (2007); Katherine A. Austin, Catherine Martin Christopher, and Darby Dickerson, *Will I Pass the Bar Exam?: Predicting Student Success Using LSAT Scores and Law School Performance*, 45 Hofstra L. Rev. 253, 266-68 (2017).

Sheldon and Krieger-Theory: See Kennon M. Sheldon and Lawrence S. Krieger, *Understanding the Negative Effects of Legal Education on Law Students: A Longitudinal Test of Self-Determination Theory*, 33 Personality and Social Psych. Bull. 883, 884 (June 2007).

Surveys: The 7,865 lawyers who responded constituted a 12.7% response rate to the surveys sent out. See Krieger and Sheldon at 570.

Hamilton-Professional Identity: See Neil Hamilton, *The Foundational Skill of Reflection in the Formation of a Professional Identity*, 12 St. Mary's J. Legal Malpractice & Ethics (forthcoming 2022).

1L PD: See Jerome Organ, *Common Threads Across Increasingly Common Required First-Year Courses/Programs Focused on Professional Development*, *PD Quarterly*, 20, 21 (Feb. 2020).

AALS: Association of American Law Schools, *Before the JD: Undergraduate Views on Law School* (2018).

Income: Of the undergraduate students considering law school, 31% responded that the potential to earn a lot of money was an important characteristic in selecting a law career and 31% responded that "there are high-paying jobs in the field" was an extremely important or important criterion for selecting the specific law schools to which they applied.

Goals: See Larry O. Natt Gantt, II and Benjamin V. Madison, III, *Self-Directedness and Professional Formation: Connecting Two Critical Concepts in Legal Education*, 14 U. St. Thomas L.J. 498, 503–04 (2018).

Henderson: See William D. Henderson, *A Blueprint for Change*, 40 Pepp. L. Rev. 461, 505 (2013).

Competencies: See Institute for the Advancement of the American Legal System, *Foundations Hiring Guide: Cut Through Bias, Hire and Retain the Best Lawyers* 9-10 (2021). A broader understanding of the full array of competencies that clients want will lead to hiring new associates with more diversity.

*See **Part 1** of this article series in the May 2022 edition of* Bulletin+. *Neil W. Hamilton and Louis D. Bilionis are authors of* Law Student Professional Development and Formation: Bridging Law School, Student, and Employer Goals *(2022). Drawing on empirical studies and research on education in various disciplines, the book details a framework, guiding principles, and practical suggestions for bringing purposeful support of law student professional identity formation into the American law school.*

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Corporate Transparency Act Update—FinCEN Issues Final Rule

BY **KENNETH P. KREIDER, ALLISON A. WESTFALL** ON 10.5.2022

On September 29, 2022, the Financial Crimes Enforcement Network ("FinCEN") issued the highly anticipated final rule, *Beneficial Ownership Information Reporting Requirements* (the "Final Rule"), implementing the beneficial ownership disclosure requirements of the Corporate Transparency Act (the "CTA"). The CTA drastically expands current beneficial ownership reporting obligations in order to combat the illicit use of shell companies and to shift the burden of identifying beneficial owners of such companies from financial institutions to the government itself.

Under the Final Rule, certain entities will be required to disclose identifying and beneficial ownership information to the U.S. federal government. The Final Rule will take effect on January 1, 2024 and offers a one-year grace period for entities created or registered prior to the effective date. Reporting companies created or registered on or after January 1, 2024 will have 30 days to file their initial reports.

The Final Rule describes who must file a beneficial ownership information report, what information must be reported and when a report is due. The Final Rule is the first of three rulemakings that FinCEN plans to implement related to the CTA. FinCEN will separately address through future rulemaking (i) the requirements for entities to develop protocols for access to, and the sharing of, reported beneficial ownership information, and (ii) amending the Customer Due Diligence ("CDD") Rule applicable to financial institutions to account for the new requirements of the CTA.

Who Must File a Report?

The Final Rule will require a "reporting company" to file a report with FinCEN including the information covered below. A "reporting company" is defined as follows:

- A "domestic reporting company" means an entity that is (i) a corporation, (ii) a limited liability company, or (iii) created by the filing of a document with a secretary of state or any similar office under the law of a state or Indian tribe.
- A "foreign reporting company" means an entity that is (i) a corporation, limited liability company, or other entity, (ii) formed under the laws of a foreign country, and (iii) registered to do business in any state or tribal jurisdiction by the filing of a document with a secretary of

state or any similar office under the law of a state or Indian tribe.

The Final Rule includes categories of exempt companies, which include entities that are already generally subject to substantial federal and state regulation under which beneficial ownership information may be known, including public reporting companies, majority-owned subsidiaries of a public reporting company, banks and credit unions, tax-exempt entities, broker-dealers and other similar entities. Also exempt are large operating companies that (1) employ more than 20 full-time employees in the United States, (2) have an operating presence at a physical office within the United States, and (3) filed a federal income tax or return in the United States for the previous year reporting more than $5 million in gross receipts or sales. Certain inactive entities are also exempt provided they were in existence on or before January 1, 2020 and meet other requirements of the rule.

Whose Information Must be Disclosed?

The Final Rule requires reporting companies to disclose information concerning (i) the beneficial owners and (ii) company applications of the reporting companies.

Beneficial Owners

The term "beneficial owner" is defined as "any individual who, directly or indirectly, *either* exercises substantial control over such reporting company or owns or controls at least 25% of the ownership interest of such reporting company." Limited exceptions exist including minor children (provided that the beneficial ownership information of a parent or legal guardian is reported), employees (excluding senior officers), and creditors (whose sole interest in a reporting company is as a creditor).

The Final Rule has taken a broad approach to "ownership interest" to include both equity and other types of interest, such as capital or profit interests, convertible instruments, warrants, and other options or privileges that enable an individual to acquire equity or capital in a reporting company. For "substantial control," there are three prongs that determine if an individual has substantial control: (i) if the individual serves as a senior officer of the reporting company; (ii) if the individual has authority regarding the appointment or removal of any senior officer or dominant majority of the board (or similar body) of the reporting company; and/or (iii) if the individual exercises substantial influence, direction of, or decision over important matters of a reporting company. Reporting companies are required to disclose *all* individuals with "substantial control" and at least one beneficial owner must be disclosed who has "substantial control" regardless of whether they satisfy the ownership prong.

Company Applicants

The Final Rule defines a "company applicant" as follows:

- For *domestic reporting companies*, the individual who directly files the document that creates a domestic reporting company, as well as the individual who is primarily responsible for directing or controlling such filing; and

- For *foreign reporting companies*, the individual who directly files the document that first registers a foreign reporting company, as well as the individual who is primarily responsible for directing or controlling such filing.

The Final Rule requires the reporting of beneficial ownership information for company applicants only for reporting companies created or registered on or after the effective date of the rule (January 1, 2024). These newly created or registered entities will be required to report company applicant information but will not be required to update it as with the beneficial owner information.

What Information Must be Disclosed?

Reporting Companies: Initial reports to FinCEN must include the following information about the reporting company:

- Full legal name and any trade names;
- Address of principal place of business and primarily location;
- Jurisdiction of formation; and
- Taxpayer identification number

Beneficial Owners & Company Applicants: Initial reports to FinCEN must include the following information about each beneficial owner and company applicant:

- Full legal name;
- Date of birth;
- Current residential address (except for company applicants who form or register an entity in the course of the company applicant's business);
- Unique identifying number for a non-expired U.S. passport, state I.D. or state driver's license; and
- Image of the document showing the unique identifying number.

The CTA requires reporting companies to file their initial report within 30 days of formation (for entities formed on or after January 1, 2024) and no later than January 1, 2025 for reporting companies formed prior to such date. The Final Rule also requires reporting companies to file updated information and correct any inaccurate information within 30 days of such change or inaccuracy.

What are the Penalties?

The Final Rule provides for civil and criminal penalties for the willful failure to provide accurate

beneficial ownership information to FinCEN. Civil penalties include up to $500 for each day a violation continues or has not been remedied and a criminal penalty of up to $10,000 in fines and/or up to two years imprisonment. Notably, the Final Rule provides for the possibility of individual liability for reporting violations. Individuals involved in the reporting process can be held liable if they willfully cause false or fraudulent information to be filed, if they willfully direct or control another person not to file a report when required, or if they are in substantial control of a reporting company when it fails to report complete or updated beneficial ownership information.

Conclusion

The Final Rules broadly expand the number of entities subject to U.S. federal regulation with respect to beneficial ownership information. The practical result of the Final Rules is that virtually any company created or registered in the United States that is not already subject to federal or state regulation or otherwise required to disclose its beneficial owners to the government, must now do so. In light of the scope of this rule, its retroactive effect for companies formed prior to the effective date, and the penalties, reporting companies should identify the relevant timeframe within which they must comply and begin to compile the required beneficial owner information and prepare the initial reports.

Tags: Corporate Law

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Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC

United States Court of Appeals for the Ninth Circuit
September 22, 2021, Argued and Submitted En Banc, Pasadena, California; April 8, 2022, Filed
No. 19-56514

Reporter

31 F.4th 651 *; 2022 U.S. App. LEXIS 9455 **

OLEAN WHOLESALE GROCERY COOPERATIVE, INC., BEVERLY YOUNGBLOOD, PACIFIC GROSERVICE, INC., DBA Pitco Foods, CAPITOL HILL SUPERMARKET, LOUISE ANN DAVIS MATTHEWS, JAMES WALNUM, COLIN MOORE, JENNIFER A. NELSON, ELIZABETH DAVIS-BERG, LAURA CHILDS; NANCY STILLER; BONNIE VANDERLAAN; KRISTIN MILLICAN; TREPCO IMPORTS AND DISTRIBUTION, LTD.; JINKYOUNG MOON; COREY NORRIS; CLARISSA SIMON; AMBER SARTORI; NIGEL WARREN; AMY JOSEPH; MICHAEL JUETTEN; CARLA LOWN; TRUYEN TON-VUONG, AKA David Ton; A-1 DINER; DWAYNE KENNEDY; RICK MUSGRAVE; DUTCH VILLAGE RESTAURANT; LISA BURR; LARRY DEMONACO; MICHAEL BUFF; ELLEN PINTO; ROBBY REED; BLAIR HYSNI; DENNIS YELVINGTON; KATHY DURAND GORE; THOMAS E. WILLOUGHBY III; ROBERT FRAGOSO; SAMUEL SEIDENBURG; JANELLE ALBARELLO; MICHAEL COFFEY; JASON WILSON; JADE CANTERBURY; NAY ALIDAD; GALYNA ANDRUSYSHYN; ROBERT BENJAMIN; BARBARA BUENNING; DANIELLE GREENBERG; SHERYL HALEY; LISA HALL; TYA HUGHES; MARISSA JACOBUS; GABRIELLE KURDT; ERICA PRUESS; SETH SALENGER; HAROLD STAFFORD; CARL LESHER; SARAH METIVIER SCHADT; GREG STEARNS; KARREN FABIAN; MELISSA BOWMAN; VIVEK DRAVID; JODY COOPER; DANIELLE JOHNSON; HERBERT H. KLIEGERMAN; BETH MILLINER; LIZA MILLINER; JEFFREY POTVIN; STEPHANIE GIPSON; BARBARA LYBARGER; SCOTT A. CALDWELL; RAMON RUIZ; THYME CAFE & MARKET, INC.; HARVESTERS ENTERPRISES, LLC; AFFILIATED FOODS, INC.; PIGGLY WIGGLY ALABAMA DISTRIBUTING CO., INC.; ELIZABETH TWITCHELL; TINA GRANT; JOHN TRENT; BRIAN LEVY; LOUISE ADAMS; MARC BLUMSTEIN; JESSICA BREITBACH; SALLY CRNKOVICH; PAUL BERGER; STERLING KING; EVELYN OLIVE;

BARBARA BLUMSTEIN; MARY HUDSON; DIANA MEY; ASSOCIATED GROCERS OF NEW ENGLAND, INC.; NORTH CENTRAL DISTRIBUTORS, LLC; CASHWA DISTRIBUTING CO. OF KEARNEY, INC.; URM STORES, INC.; WESTERN FAMILY FOODS, INC.; ASSOCIATED FOOD STORES, INC.; GIANT EAGLE, INC.; MCLANE COMPANY, INC.; MEADOWBROOK MEAT COMPANY, INC.; ASSOCIATED GROCERS, INC.; BILO HOLDING, LLC; WINNDIXIE STORES, INC.; JANEY MACHIN; DEBRA L. DAMSKE; KEN DUNLAP; BARBARA E. OLSON; JOHN PEYCHAL; VIRGINIA RAKIPI; ADAM BUEHRENS; CASEY CHRISTENSEN; SCOTT DENNIS; BRIAN DEPPERSCHMIDT; AMY E. WATERMAN; CENTRAL GROCERS, INC.; ASSOCIATED GROCERS OF FLORIDA, INC.; BENJAMIN FOODS LLC; ALBERTSONS COMPANIES LLC; H.E. BUTT GROCERY COMPANY; HYVEE, INC.; THE KROGER CO.; LESGO PERSONAL CHEF LLC; KATHY VANGEMERT; EDY YEE; SUNDE DANIELS; CHRISTOPHER TODD; PUBLIX SUPER MARKETS, INC.; WAKEFERN FOOD CORP.; ROBERT SKAFF; WEGMANS FOOD MARKETS, INC.; JULIE WIESE; MEIJER DISTRIBUTION, INC.; DANIEL ZWIRLEIN; MEIJER, INC.; SUPERVALU INC.; JOHN GROSS & COMPANY; SUPER STORE INDUSTRIES; W LEE FLOWERS & CO INC.; FAMILY DOLLAR SERVICES, LLC; AMY JACKSON; FAMILY DOLLAR STORES, INC.; KATHERINE MCMAHON; DOLLAR TREE DISTRIBUTION, INC.; JONATHAN RIZZO; GREENBRIER INTERNATIONAL, INC.; JOELYNA A. SAN AGUSTIN; ALEX LEE, INC.; REBECCA LEE SIMOENS; BIG Y FOODS, INC.; DAVID TON; KVAT FOOD STORES, INC., DBA Food City; AFFILIATED FOODS MIDWEST COOPERATIVE, INC.; MERCHANTS DISTRIBUTORS, LLC; BROOKSHIRE BROTHERS, INC.; SCHNUCK MARKETS, INC.; BROOKSHIRE GROCERY COMPANY; KMART CORPORATION; CERTCO, INC.; RUSHIN GOLD, LLC, DBA The Gold Rush; UNIFIED GROCERS, INC.; TARGET CORPORATION; SIMON-HINDI, LLC; Fareway Stores, Inc.; Moran Foods, LLC, DBA Save-A-Lot; WOODMAN'S FOOD MARKET, INC.; DOLLAR GENERAL CORPORATION; SAM'S EAST, INC.; DOLGENCORP, LLC; SAM'S WEST, INC.; KRASDALE FOODS, INC.; WALMART STORES EAST, LLC; CVS PHARMACY, INC.; WALMART STORES EAST, LP; BASHAS' INC.; WAL-MART STORES TEXAS, LLC; MARC GLASSMAN, INC.; WAL-MART STORES, INC.; 99 CENTS ONLY STORES; JESSICA

BARTLING; AHOLD U.S.A., INC.; GAY BIRNBAUM; DELHAIZE AMERICA, LLC; SALLY BREDBERG; ASSOCIATED WHOLESALE GROCERS, INC.; KIM CRAIG; MAQUOKETA CARE CENTER; GLORIA EMERY; ERBERT & GERBERT'S, INC.; ANA GABRIELA FELIX GARCIA; JANET MACHEN; JOHN FRICK; PAINTED PLATE CATERING; KATHLEEN GARNER; ROBERT ETTEN; ANDREW GORMAN; GROUCHO'S DELI OF FIVE POINTS, LLC; EDGARDO GUTIERREZ; GROUCHO'S DELI OF RALEIGH; ZENDA JOHNSTON; SANDEE'S CATERING; STEVEN KRATKY; CONFETTI'S ICE CREAM SHOPPE; KATHY LINGNOFSKI; END PAYER PLAINTIFFS; LAURA MONTOYA; KIRSTEN PECK; JOHN PELS; VALERIE PETERS; ELIZABETH PERRON; AUDRA RICKMAN; ERICA C. RODRIGUEZ, Plaintiffs-Appellees, and JESSICA DECKER, JOSEPH A. LANGSTON, SANDRA POWERS, GRAND SUPERCENTER, INC., THE CHEROKEE NATION, US FOODS, INC., SYSCO CORPORATION, GLADYS, LLC, SPARTANNASH COMPANY, BRYAN ANTHONY REO, Plaintiffs, v. BUMBLE BEE FOODS LLC; STARKIST CO.; DONGWON INDUSTRIES CO., LTD., Defendants-Appellants, and KING OSCAR, INC.; THAI UNION FROZEN PRODUCTS PCL; DEL MONTE FOODS COMPANY; TRI MARINE INTERNATIONAL, INC.; DONGWON ENTERPRISES; DEL MONTE CORP.; CHRISTOPHER D. LISCHEWSKI; LION CAPITAL (AMERICAS), INC.; BIG CATCH CAYMAN LP, AKA Lion/Big Catch Cayman LP; FRANCIS T ENTERPRISES; GLOWFISCH HOSPITALITY; THAI UNION NORTH AMERICA, INC., Defendants.

Subsequent History: US Supreme Court certiorari denied by Starkist Co. v. Grocery, 2022 U.S. LEXIS 4977 (U.S., Nov. 14, 2022)

Prior History: [1]** Appeal from the United States District Court for the Southern District of California. D.C. No. 3:15-md-02670-DMS-MDD. Dana M. Sabraw, Chief District Judge, Presiding.

Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC, 993 F.3d 774, 2021 U.S. App. LEXIS 9880, 2021 WL 1257845 (9th Cir. Cal., Apr. 6, 2021)

In re Packaged Seafood Prods. Antitrust Litig., 332 F.R.D. 308, 2019 U.S. Dist. LEXIS 127054, 2019 WL 3429174 (S.D. Cal., July 30, 2019)

Disposition: AFFIRMED.

Summary:

SUMMARY[*]

Antitrust / Class Certification

The en banc court filed an opinion affirming the district court's order certifying three subclasses of tuna purchasers who alleged that the suppliers violated federal and state antitrust laws. The en banc court held that the district court did not abuse its discretion in concluding that the purchasers' statistical regression model, along with other expert evidence, was capable of showing that a price-fixing conspiracy caused class-wide antitrust impact, thus satisfying one of the prerequisites for bringing a class action under Federal Rule of Civil Procedure 23(b)(3).

To take advantage of Rule 23's procedure for aggregating claims, plaintiffs must make two showings. First, under Rule 23(a), they must establish that "there are questions of law or fact common to the class," as well as demonstrate numerosity, typicality, and adequacy of representation. Second, the plaintiffs must show that the class fits into one of three categories under Rule 23(b). To qualify for the third category, Rule 23(b)(3) the district court must find that "questions of law or fact **[**2]** common to class members predominate over any questions affecting only individual members."

Joining other circuits, the en banc court held that plaintiffs must prove by a preponderance of the evidence the facts necessary to carry the burden of establishing that the prerequisites of Rule 23 are satisfied. The en banc court held that to prove a common question of law or fact that relates to a central issue in an antitrust class action, plaintiffs must establish that essential

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[*] This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

elements of the cause of action, such as the existence of an antitrust violation or antitrust impact, are capable of being established through a common body of evidence, applicable to the whole class.

The en banc court held that in making the determinations necessary to find that the prerequisites of Rule 23(b)(3) are satisfied, the district court may weigh conflicting expert testimony and resolve expert disputes. In determining whether the "common question" prerequisite is met, the district court is limited to resolving whether the evidence establishes that a common question is *capable* of class-wide resolution, not whether the evidence in fact establishes that plaintiffs would win at trial. The district court must also resolve disputes **[**3]** about historical facts if necessary to determine whether the plaintiffs' evidence is capable of resolving a common issue central to the plaintiffs' claims. Therefore, the district court cannot decline certification merely because it considers plaintiffs' evidence relating to the common question to be unpersuasive and unlikely to succeed in carrying the plaintiffs' burden of proof on that issue. Nor can a district court decline to certify a class that will require determination of some individualized questions at trial, so long as such questions do not predominate over the common questions.

The en banc court held that when individualized questions relate to the injury status of class members, Rule 23(b)(3) requires that the court determine whether individualized inquiries about such matters would predominate over common questions. Therefore, the en banc court rejected the argument that Rule 23 does not permit the certification of a class that potentially includes more than a de minimis number of uninjured class members.

Beginning with the "DPP" class of direct purchasers of the tuna suppliers' products, such as nationwide retailers and regional grocery stores, the panel held that in order to prevail on their **[**4]** antitrust claim, the DPP class was required to prove that the tuna suppliers engaged in a conspiracy (an antitrust violation), which resulted in antitrust impact in the form of higher prices paid by each member of the class, which in turn led to measurable damages. The question whether each member of the DPP class suffered antitrust impact was central to the

validity of each of the DPP claims. The central questions on appeal were whether the expert evidence presented by the DPPs was capable of resolving this issue "in one stroke," and whether this common question predominated over any individualized inquiry.

The en banc court concluded that the district court did not abuse its discretion in certifying the class. The DPPs relied on the expert testimony and report of Dr. Russell Mangum, whose findings about the tuna market and tuna suppliers' collusive behavior, pricing correlation test, regression model, and robustness checks confirmed his theory that the price-fixing conspiracy resulted in substantial price impacts, and that the impact was common to the DPPs during the collusion period. The en banc court concluded that the district court did not make any legal or factual error when, **[**5]** in considering whether the DPPs' evidence was capable of establishing antitrust impact for the class as a whole, the district court reviewed Dr. Mangum's expert testimony and report, the rebuttal testimony and report by Dr. John Johnson, and Dr. Mangum's reply, and then addressed the parties' disputes. The district court thus properly concluded that Dr. Mangum's pooled regression model, along with other evidence, was capable of answering the question whether there was antitrust impact due to the collusion on a class-wide basis, thus satisfying this prerequisite of Rule 23(b)(3).

The en banc court held that the district court did not abuse its discretion in determining that the evidence presented by the DPPs proved: (1) that the element of antitrust impact was capable of being established class-wide through common proof, and (2) that this common question predominated over individual questions. The en banc court rejected any categorical argument that a pooled regression model cannot control for variables relating to the individual differences among class members. The en banc court also rejected the argument that, in this case, the model's output could not plausibly serve as common evidence for all **[**6]** class members given the individual differences among those class members. The en banc court held that the district court did not err by failing to resolve a dispute between the parties as to whether 28 percent of the class did not suffer antitrust impact. Rather, the district court fulfilled its obligation to resolve the disputes raised by the parties in order to satisfy itself that the evidence proves the

prerequisites for Rule 23(b)(3), which was that the evidence was capable of showing that the DPPs suffered antitrust impact on a class-wide basis.

The en banc court held that the district court also did not abuse its discretion in determining that the evidence presented by the "CFP" class of indirect purchasers of bulk-sized tuna products and the "EPP" class of individual end purchasers was capable of proving the element of antitrust impact under California's Cartwright Act, thus satisfying the prerequisites of Rule 23(b)(3).

Dissenting, Judge Lee, joined by Judge Kleinfeld, wrote that the majority opinion allowed the district court to certify a class, even though potentially about one out of three class members suffered no injury. Judge Lee wrote that if defendants' econometrician expert was correct that almost **[**7]** a third of the class members may not have suffered injury, then plaintiffs did not show the predominance of common issues under Rule 23(b). He wrote that because class action cases almost always settle once a court certifies a class, a district court must serve as a gatekeeper to resolve key issues implicating Rule 23 requirements, including whether too many putative class members suffered no injury, at the class certification stage. Further, the majority's rejection of a de minimis rule, under which the number of uninjured class members should be de minimis, created a circuit split.

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Jonathan F. Cohn, Joshua J. Fougere, and Jacquelyn E. Fradette, Sidley Austin LLP, Washington, D.C., for Amicus Curiae Consumer Healthcare Products Association.

Judges: Before: Andrew J. Kleinfeld, Sidney R. Thomas, Susan P. Graber, William A. Fletcher, Ronald M. Gould, Richard A. Paez, Consuelo M. Callahan, **[**10]** Sandra S. Ikuta, Paul J. Watford, Michelle T. Friedland and Kenneth K. Lee, Circuit Judges. Opinion by Judge Ikuta; Dissent by Judge Lee.

Opinion by: Sandra S. Ikuta

Opinion

[*661] IKUTA, Circuit Judge:

The primary suppliers of packaged tuna in the United States appeal the district court's order certifying three classes of tuna purchasers who allege the suppliers violated federal and state antitrust laws. The main issue on appeal is whether the purchasers' statistical regression model, along with other expert evidence, is capable of showing that a price-fixing conspiracy caused class-wide antitrust impact, thus satisfying one of the prerequisites for bringing a class action under Rule 23(b)(3) of the Federal Rules of Civil Procedure. Because the district court did not abuse its discretion in concluding that Rule 23(b)(3) was satisfied, we affirm.

I

Bumble Bee,[1] StarKist, and Chicken of the Sea (COSI), and their parent companies are the largest suppliers of packaged tuna in the United States (referred to collectively as the "Tuna Suppliers"). Their products include packaged tuna sold to direct purchasers like Costco and Walmart, and food-service-size tuna products sold to various distributors for resale. Together, the Tuna Suppliers sell over 80 percent of the packaged tuna in the **[**11]** country.

[1] As a result of Appellant Bumble Bee Foods LLC's bankruptcy proceeding, appellate proceedings against Bumble Bee Foods have been held in abeyance due to the automatic stay imposed by 11 U.S.C. § 362. Dkt. No. 51.

In late 2015, the United States Department of Justice (DOJ) opened an investigation into the packaged tuna industry for violations of federal antitrust law. The DOJ investigation uncovered evidence of a price-fixing scheme among the Tuna Suppliers, which led the DOJ to enter multiple indictments alleging a criminal conspiracy to fix prices of canned tuna for the period from approximately November 2011 **[*662]** through December 2013. Bumble Bee, StarKist, and three tuna industry executives pleaded guilty to the conspiracy. Bumble Bee's former CEO was convicted by a jury of a conspiracy to fix prices.[2] COSI cooperated with the DOJ and admitted to price fixing in exchange for leniency.

A number of purchasers of the Tuna Suppliers' products (referred to collectively as the "Tuna Purchasers") filed putative class actions against the Tuna Suppliers alleging violations of various federal and state antitrust laws. The Tuna Purchasers alleged that the Tuna Suppliers engaged in a conspiracy from November 2010 through at least December 31, 2016 to fix prices of **[**12]** tuna, along with other collusive activities in furtherance of the price-fixing conspiracy. The Tuna Purchasers alleged that they were damaged by the conspiracy because they paid supra-competitive prices for the Tuna Suppliers' products.[3]

The Tuna Purchasers' actions were consolidated in a multidistrict litigation pretrial proceeding in the Southern District of California. The Tuna Purchasers consist of three putative subclasses: (i) direct purchasers of the Tuna Suppliers' products, such as nationwide retailers and regional grocery stores, who purchased packaged tuna between June 1, 2011 and July 1, 2015 (the "DPPs"); (ii) indirect purchasers of the Tuna Suppliers' products who bought bulk-sized tuna products between June 2011 and December 2016 for prepared food or resale (the "CFPs"); and

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[2] Plea Agreement, *United States v. Bumble Bee Foods LLC*, No. 3:17-cr-00249-EMC (N.D. Cal. Aug. 2, 2017), ECF No. 32; Plea Agreement, *United States v. Worsham*, No. 3:16-cr-00535-EMC (N.D. Cal. Mar. 15, 2017), ECF No. 14; Plea Agreement, *United States v. Cameron*, No. 3:16-cr-00501-EMC (N.D. Cal. Jan. 25, 2017), ECF No. 18; Plea Agreement, *United States v. Hodge*, No. 3:17-cr-00297-EMC (N.D. Cal. June 28, 2017), ECF No. 13; Plea Agreement, *United States v. StarKist Co.*, No. 3:18-cr-00513-EMC (N.D. Cal. Nov. 14, 2018), ECF No. 24.

[3] Supra-competitive prices are those prices elevated "above competitive levels" by a market participant who "exercise[s] [its] market power" to do so. ABA Section of Antitrust Law, *Econometrics: Legal, Practical, and Technical Issues* 252 (2d ed. 2014) ("*Econometrics*").

(iii) individual end purchasers who bought the Tuna Suppliers' products between June 1, 2011 and July 1, 2015 for personal consumption (the "EPPs").

In 2018, the Tuna Purchasers moved to certify the three subclasses under Rule 23 of the Federal Rules of Civil Procedure to proceed as a class action. *See* Fed. R. Civ. P. 23(a), (b)(3). To demonstrate class-wide antitrust impact, each subclass proffered evidence **[**13]** from a different economist, each of whom employed substantially similar methodologies, to show that each member of the subclasses had paid an overcharge caused by the Tuna Suppliers' conspiracy. The Tuna Suppliers contested this expert evidence through their own economists. The district court held a three-day evidentiary hearing on the certification motion, and heard substantial testimony from each expert witness. In July 2019, the district court certified all three subclasses.

The Tuna Suppliers timely appealed, and a panel of this court vacated the district court's order and remanded. *See Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC*, 993 F.3d 774, 794 (9th Cir. 2021), *reh'g en banc granted*, 5 F.4th 950 (9th Cir. 2021). We took the case en banc to consider whether the district court erred in finding that each subclass satisfied the requirement that "questions of law or fact common to class members predominate over any questions affecting only individual members." Fed. R. Civ. P. 23(b)(3).

We have jurisdiction under 28 U.S.C. § 1292(e) and Rule 23(f) of the Federal Rules of Civil Procedure. **[*663]** We review the decision to certify a class and "any particular underlying Rule 23 determination involving a discretionary determination" for an abuse of discretion. *Yokoyama v. Midland Nat'l Life Ins. Co.*, 594 F.3d 1087, 1091 (9th Cir. 2010). We review the district court's determination of underlying legal questions de novo, *id.*, and its determination of underlying factual questions **[**14]** for clear error, *see Ruiz Torres v. Mercer Canyons Inc.*, 835 F.3d 1125, 1132 (9th Cir. 2016). The Supreme Court has indicated that a court's determination regarding what a statistical regression model may prove or is capable of proving is not a question of fact, even though there may be disputed issues of fact raised by "the data contained within an econometric model." *Comcast Corp. v. Behrend*, 569 U.S. 27, 36 n.5, 133 S. Ct. 1426, 185 L.

Ed. 2d 515 (2013). Accordingly, we review the district court's determination that a statistical regression model, along with other expert evidence, is capable of showing class-wide impact, thus satisfying one of the prerequisites of Rule 23(b)(3) of the Federal Rules of Civil Procedure, for an abuse of discretion. *See Yokoyama*, 594 F.3d at 1091.

II

A

Rule 23 provides a procedural mechanism for "a federal court to adjudicate claims of multiple parties at once, instead of in separate suits." *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 408, 130 S. Ct. 1431, 176 L. Ed. 2d 311 (2010). As a claims-aggregating device, Rule 23 "leaves the parties' legal rights and duties intact and the rules of decision unchanged," *id.*, and it does not affect the substance of the claims or plaintiffs' burden of proof, *see* 28 U.S.C. § 2072(b).

To take advantage of Rule 23's procedure for aggregating claims, plaintiffs must make two showings. First, the plaintiffs must establish "there are questions of law or fact common to the class," as well as demonstrate numerosity, typicality and adequacy of representation.[4] Fed. R. Civ. P. 23(a). A common question "must **[**15]** be 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." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350, 131 S. Ct. 2541, 180 L. Ed. 2d 374 (2011). By contrast, an individual question is one where members of a proposed class will need to present evidence that varies

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[4] Rule 23(a) provides:

> Prerequisites. One or more members of a class may sue or be sued as representative parties on behalf of all members only if:
>
> (1) the class is so numerous that joinder of all members is impracticable;
>
> (2) there are questions of law or fact common to the class;
>
> (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
>
> (4) the representative parties will fairly and adequately protect the interests of the class.

from member to member. *See Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 453, 136 S. Ct. 1036, 194 L. Ed. 2d 124 (2016).

Second, the plaintiffs must show that the class fits into one of three categories. *See* Fed. R. Civ. P. 23(b). To qualify for the third category, Rule 23(b)(3), the district court must find that "the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods **[*664]** for fairly and efficiently adjudicating **[**16]** the controversy." Fed. R. Civ. P. 23(b)(3).[5] "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." *Tyson Foods*, 577 U.S. at 453 (cleaned up). The requirements of Rule 23(b)(3) overlap with the requirements of Rule 23(a): the plaintiffs must prove that there are "questions of law or fact common to class members" that can be determined in one stroke, *see Wal-Mart*, 564 U.S. at 349, in order to prove that such common questions predominate over individualized ones, *see Tyson Foods*, 577 U.S. at 453-54. Therefore, courts must consider cases examining both subsections in performing a Rule 23(b)(3) analysis.

B

Before it can certify a class, a district court must be "satisfied, after a rigorous analysis, that the prerequisites" of both Rule 23(a) and 23(b)(3) have been satisfied. *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 161, 102 S. Ct. 2364, 72 L. Ed. 2d 740 (1982); *Comcast*, 569 U.S. at 35. "[P]laintiffs wishing to proceed through a class action must actually *prove*—not simply plead—that their proposed class satisfies **[**17]** each requirement of Rule 23, including (if applicable) the predominance requirement of Rule 23(b)(3)," and must carry their burden of proof "before class certification." *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 275-76, 134 S. Ct. 2398, 189 L. Ed. 2d 339 (2014).

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[5] Rule 23(b)(3) provides in pertinent part:

> A class action may be maintained if Rule 23(a) is satisfied and if . . . (3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.

We have not yet prescribed the plaintiffs' burden for proving that the prerequisites of Rule 23 are satisfied. In the absence of direction from Congress or the Constitution, it is up to the court to prescribe the burden of proof. *See Herman & MacLean v. Huddleston*, 459 U.S. 375, 389-90, 103 S. Ct. 683, 74 L. Ed. 2d 548 (1983). To do so, we must consider both the allocation of "the risk of error between the litigants" and "the relative importance attached to the ultimate decision." *Id.* at 389 (quoting *Addington v. Texas*, 441 U.S. 418, 423, 99 S. Ct. 1804, 60 L. Ed. 2d 323 (1979)). The preponderance of the evidence standard allows both parties to "share the risk of error in roughly equal fashion," *id.* at 390 (quoting *Addington*, 421 U.S. at 423), while "[a]ny other standard expresses a preference for one side's interests," *id.* Therefore, the preponderance of the evidence standard is "generally applicable in civil actions." *Id.* By contrast, the Court has "required proof by clear and convincing evidence where particularly important individual interests or rights are at stake," such as termination of parental rights or involuntary commitment proceedings. *Id.* at 389.

Applying this test here, the balance of interests in this case favors prescribing the preponderance of the **[**18]** evidence standard. The Supreme Court has made clear that Rule 23 is consistent with the Rules Enabling Act and does not "abridge, enlarge or modify any substantive right." *Shady Grove*, 559 U.S. at 406-07 (citing 28 U.S.C. § 2072(b)). Rule 23 does not "change plaintiffs' separate entitlements to relief nor abridge defendants' **[*665]** rights" and, instead, alters "only how the claims are processed." *Id.* at 408. Therefore, the Supreme Court has concluded that the authorization of class actions is substantively neutral, even though it may expose defendants to the imposition of aggregate liability. *Id.* Because the application of Rule 23 to certify a class does not alter the defendants' rights or interests in a substantive way, there is no basis for applying a heightened standard of proof beyond the traditional preponderance standard. We therefore join our sister circuits in concluding that plaintiffs must prove the facts necessary to carry the burden of establishing that the prerequisites of Rule 23 are satisfied by a preponderance of the evidence.[6]

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[6] *See In re Lamictal Direct Purchaser Antitrust Litig.*, 957 F.3d 184, 191 (3d Cir. 2020); *In re Nexium Antitrust Litig.*, 777 F.3d 9, 27 (1st Cir. 2015); *Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802, 811 (7th Cir. 2012); *Alaska Elec. Pension Fund v.*

In carrying the burden of proving facts necessary for certifying a class under Rule 23(b)(3), plaintiffs may use any admissible evidence. *See Tyson Foods*, 577 U.S. at 454-55 (explaining that admissibility of evidence at certification must meet all the usual requirements of admissibility and citing **[**19]** to Rules 401, 403, and 702 of the Federal Rules of Evidence). Plaintiffs frequently offer expert evidence, including statistical evidence or class-wide averages, to prove that they meet the prerequisites of Rule 23(b)(3). *See id.* at 455. Where, as here, a defendant did not raise a *Daubert* challenge to the expert evidence before the district court,[7] the defendant forfeits the ability to argue on appeal that the evidence was inadmissible, but may still argue that the evidence is not capable of answering a common question on a class-wide basis. *See Comcast*, 569 U.S. at 32 n.4; *Tyson Foods*, 577 U.S. at 458-59.

In order for the plaintiffs to carry their burden of proving that a common question predominates, they must show that the common question relates to a central issue in the plaintiffs' claim. *See Wal-Mart*, 564 U.S. at 349-50. Therefore, "[c]onsidering whether 'questions of law or fact common to class members 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) (quoting Fed. R. Civ. P. 23(b)(3)).

The claims at issue here are violations of section 1 of the Sherman Antitrust Act, 15 U.S.C. § 15, and California's Cartwright Act, Cal. Bus. & Prof. Code §§ 16700 *et seq.*[8] The elements of a claim **[*666]** for such antitrust action are (i) the existence of an antitrust violation; (ii) "antitrust injury" or "impact" flowing from that violation (i.e., the conspiracy); and (iii) measurable

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Flowserve Corp., 572 F.3d 221, 228 (5th Cir. 2009); *Teamsters Loc. 445 Freight Div. Pension Fund v. Bombardier Inc.*, 546 F.3d 196, 202 (2d Cir. 2008).

[7] In a class proceeding, defendants may challenge the reliability of an expert's evidence under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), and Rule 702 of the Federal Rules of Evidence. *See Tyson Foods*, 577 U.S. at 459; *see also Comcast*, 569 U.S. at 32 n.4.

[8] The DPPs claim a violation of the Sherman Act, while the CFPs and the EPPs allege violations of California's antitrust law, the Cartwright Act, Cal. Bus. & Prof. Code, § 16700 *et seq.* The elements of a Cartwright Act claim are "(1) the formation and operation of the conspiracy, (2) the wrongful act or acts done pursuant thereto, and (3) the damage resulting from such act or acts." *Marsh v. Anesthesia Servs. Med. Grp., Inc.*, 200 Cal. App. 4th 480, 132 Cal. Rptr. 3d 660, 670-71 (Cal. Ct. App. 2011) (cleaned up). Because the analysis of a claim under the Cartwright Act "mirrors the analysis under federal [antitrust] law," we do not consider the Cartwright Act claims separately from the federal antitrust claims. *County of Tuolumne v. Sonora Cmty. Hosp.*, 236 F.3d 1148, 1160 (9th Cir. 2001).

damages. *See Big Bear Lodging Ass'n v. Snow Summit, Inc.*, 182 F.3d 1096, 1101-02 (9th Cir. 1999); *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 311 (3d Cir. 2008), *as amended* (Jan. 16, 2009) (citing 15 U.S.C. § 15). "Antitrust **[**20]** injury" is "injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977). Damages are measured only after each plaintiff has demonstrated that the defendant's conduct caused the plaintiff to suffer an antitrust injury. *See In re Hydrogen Peroxide*, 552 F.3d at 311.

Therefore, to prove there is a common question of law or fact that relates to a central issue in an antitrust class action, plaintiffs must establish that "essential elements of the cause of action," such as the existence of an antitrust violation or antitrust impact, are capable of being established through a common body of evidence, applicable to the whole class. *Id.* (cleaned up). Here, the Tuna Purchasers claim that they can establish the existence of antitrust impact through common proof.

C

In making the determinations necessary to find that the prerequisites of Rule 23(b)(3) are satisfied, the district court must proceed "just as the judge would resolve a dispute about any other threshold prerequisite for continuing a lawsuit." *In re Initial Pub. Offerings Sec. Litig.*, 471 F.3d 24, 42 (2d Cir. 2006), *decision clarified on denial of reh'g*, 483 F.3d 70 (2d Cir. 2007). This means that the court must make a "rigorous assessment of the available evidence and the method or methods by which plaintiffs propose **[**21]** to use the [class-wide] evidence to prove" the common question in one stroke. *In re Hydrogen Peroxide*, 552 F.3d at 312. In addition, the court must find that this common question (i.e., the "common, aggregation-enabling" issue) predominates over individual issues. *Tyson Foods*, 577 U.S. at 453. The determination whether expert evidence is capable of resolving a class-wide question in one stroke may include "[w]eighing conflicting expert testimony" and "[r]esolving expert disputes," *In re Hydrogen Peroxide*, 552 F.3d at 323-24, where necessary to ensure that Rule 23(b)(3)'s requirements are

met and the "common, aggregation-enabling" issue predominates over individual issues, *Tyson Foods*, 577 U.S. at 453.[9]

In determining whether the "common question" prerequisite is met, a **[*667]** district court is limited to resolving whether the evidence establishes that a common question is *capable* of class-wide resolution, not whether the evidence in fact establishes that plaintiffs would win at trial. While such an analysis may "entail some overlap with the merits of the plaintiff's underlying claim," *Wal-Mart*, 564 U.S. at 351, the "[m]erits questions may be considered [only] to the extent [] that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied," *Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 568 U.S. 455, 466, 133 S. Ct. 1184, 185 L. Ed. 2d 308 (2013); *see also Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 983 n.8 (9th Cir. 2011). "Rule 23 grants courts no license to engage in free-ranging merits **[**22]** inquiries at the certification stage." *Amgen*, 568 U.S. at 466.

A district court must also resolve disputes about historical facts if necessary to determine whether the plaintiffs' evidence is capable of resolving a common issue central to the plaintiffs' claims.[10] For instance, in a case in which a nationwide class of plaintiff employees alleged nationwide discrimination by their employer, we held that a district court had to resolve factual disputes at certification regarding whether decisions regarding promotions were made at the local level or by upper management. *See Ellis*, 657 F.3d at 983-84 & n.7. We reasoned that if

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[9] Not all expert evidence is capable of resolving a class-wide issue in one stroke. *Cf.* Dissent at 70-71. Courts have frequently found that expert evidence, while otherwise admissible under *Daubert*, was inadequate to satisfy the prerequisites of Rule 23. For instance, a class did not meet the prerequisites of Rule 23 where the expert evidence was inadequate to prove an element of the claim for the entire class, *see Wal-Mart*, 564 U.S. at 354, 356, 359 (holding that class members failed to establish existence of common question with respect to Title VII claims because they "provide[d] no convincing proof of a company-wide discriminatory pay and promotion policy"); where the damages evidence was not consistent with the plaintiffs' theory of liability, *see Comcast*, 569 U.S. at 35 (holding that at the class certification stage, "any model supporting a plaintiff's damages case must be consistent with its liability case"); where the evidence contained unsupported assumptions, *see In re New Motor Vehicles Canadian Exp. Antitrust Litig.*, 522 F.3d 6, 29 (1st Cir. 2008) (criticizing the unsupported assumption that, absent the defendants' anti-competitive conduct, there would have been an influx of cars from Canada to United States sufficient to substantially decrease national prices); or where the evidence demonstrated nonsensical results such as false positives, i.e., injury to class members who could not logically have been injured by a defendant's conduct, *see In re Rail Freight Fuel Surcharge Antitrust Litig.-MDL No. 1869* (*Rail Freight I*), 725 F.3d 244, 252-55 , 406 U.S. App. D.C. 371(D.C. Cir. 2013) (vacating a certification order where the plaintiffs' expert evidence predicted that certain plaintiffs had been injured by a price-fixing conspiracy even though they operated under fixed-price contracts and were not exposed to overcharges caused by the conspiracy).

[10] The district court's findings at the certification stage "do not bind the fact-finder on the merits." *In re Hydrogen Peroxide*, 552 F.3d at 318.

such decisions were made only at the local level, plaintiffs "would face an exceedingly difficult challenge in proving that there are questions of fact and law common to the *nationwide* class." *Id.* at 983-84. Nevertheless, the district court was not required to resolve factual disputes regarding ultimate issues on the merits, such as "whether women were in fact discriminated against" or whether the defendant "does in fact have a culture of gender stereotyping and paternalism." *Id.* at 983; *see also id.* at 983 n.8. Resolving such issues would "put the cart before the horse" by requiring plaintiffs to show at certification that they will prevail on the **[**23]** merits. *Amgen*, 568 U.S. at 460.

Therefore, a district court cannot decline certification merely because it considers plaintiffs' evidence relating to the common question to be unpersuasive and unlikely to succeed in carrying the plaintiffs' burden of proof on that issue. *See id.* at 459-60. Rather, *Tyson Foods* established the rule that if "each class member could have relied on [the plaintiffs' evidence] to establish liability if he or she had brought an individual action," and the evidence "could have sustained a reasonable jury finding" on the merits of a common question, *Tyson Foods*, 577 U.S. at 455, then a district court may conclude that the plaintiffs have carried their burden of satisfying the Rule 23(b)(3) requirements as to that common question of law or fact.[11] **[*668]** In *Tyson Foods*, for instance, the Court held that if the class members had pursued individual lawsuits, each could have relied on the expert evidence purporting to show how long it took to don and doff protective equipment. *Tyson Foods*, 577 U.S. at 456-57. Accordingly, the Court concluded that such expert evidence was capable of answering a common question for the entire class in one stroke, and could reasonably sustain a jury verdict in favor of the plaintiffs, even though a jury could still decide that the evidence was not persuasive. *Id.* at 459-60; *see*

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[11] *Senne v. Kansas City Royals Baseball Corp.* referenced *Tyson Foods*'s rule that a district court may deny the use of admissible expert evidence to meet the requirements of Rule 23(b)(3) only if "'no reasonable juror' could find it probative of whether an element of liability was met," and then stated in passing that "*Tyson* expressly cautioned that this rule should be read narrowly and not assumed to apply outside of the wage and hour context." 934 F.3d 918, 947 & n.27 (9th Cir. 2019) (citing *Tyson Foods*, 577 U.S. at 459-60). But *Tyson Foods* contains no such limitation; rather, it declined to adopt "broad and categorical rules governing the use of representative and statistical evidence in class actions," and indicated that district courts should evaluate the sufficiency of plaintiffs' evidence on a case-by-case basis, depending on the purpose for which the expert evidence is being introduced and the underlying cause of action. 577 U.S. at 459-60. Accordingly, we disapprove this dictum in *Senne*, 934 F.3d at 947 n.27.

also ***[**24]*** *id.* at 457 (explaining that the question whether the expert's "study was unrepresentative or inaccurate" was "itself common to the claims made by all class members"). The rule that the evidence need merely be capable of resolving a common question on a class-wide basis holds true whether the common question concerns an element of plaintiffs' claim, *see Amgen*, 568 U.S. at 468-69 (materiality in a Rule 10b-5 action), or a fact that must be determined to establish liability, *see Tyson Foods*, 577 U.S. at 450 (time spent donning and doffing protective equipment per week).

Nor can a district court decline to certify a class that will require determination of some individualized questions at trial, so long as such questions do not predominate over the common questions. *See* Fed. R. Civ. P. 23(b)(3). "When one or more of the central issues in the action are common to the class and can be said to predominate, the action may be considered proper under Rule 23(b)(3) even though other important matters will have to be tried separately, such as damages or some affirmative defenses peculiar to some individual class members." *Tyson Foods*, 577 U.S. at 453 (internal quotation marks omitted). Thus, *Halliburton* concluded that so long as plaintiffs could show that their evidence is capable of proving the prerequisites **[**25]** for invoking the presumption of reliance (a key element in a securities class action) on a class-wide basis, the fact that the defendants would have the opportunity at trial to rebut that presumption as to some of the plaintiffs did not raise individualized questions sufficient to defeat predominance. 573 U.S. at 276. "That the defendant might attempt to pick off the occasional class member here or there through individualized rebuttal does not cause individual questions to predominate." *Id.*

When individualized questions relate to the injury status of class members, Rule 23(b)(3) requires that the court determine whether individualized inquiries about such matters would predominate over common questions. *See Cordoba v. DIRECTV, LLC*, 942 F.3d 1259, 1277 (11th Cir. 2019).[12] In an analogous context, we **[*669]** have held that a district court is not

[12] Because the Supreme Court has clarified that "[e]very class member must have Article III standing in order to recover individual damages," *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2208, 210 L. Ed. 2d 568 (2021), Rule 23 also requires a

precluded from certifying a class even if plaintiffs may have to prove individualized damages at trial, a conclusion implicitly based on the determination that such individualized issues do not predominate over common ones. *Vaquero v. Ashley Furniture Indus., Inc.*, 824 F.3d 1150, 1155 (9th Cir. 2016); *see also Pulaski & Middleman, LLC v. Google, Inc.*, 802 F.3d 979, 988 (9th Cir. 2015); *In re Urethane*, 768 F.3d 1245, 1255 (10th Cir. 2014) ("The presence of individualized damages issues" does not preclude a court from certifying a class because "[c]lass-wide proof is not required for all issues").

Therefore, we reject the dissent's argument **[**26]** that Rule 23 does not permit the certification of a class that potentially includes more than a de minimis number of uninjured class members. Dissent at 77. This position is inconsistent with Rule 23(b)(3), which requires only that the district court determine after rigorous analysis whether the common question predominates over any individual questions, including individualized questions about injury or entitlement to damages. *See* Fed. R. Civ. P. 23(b)(3).[13]

A district court is in the best position to determine whether individualized questions, including those regarding class members' injury, "will overwhelm common ones and render class certification inappropriate under Rule 23(b)(3)." *Halliburton*, 573 U.S. at 276; *see also Ruiz Torres*, 835 F.3d at 1137 (stating that "the district court is well situated to winnow out" a fortuitously non-injured subset of class members). We "uphold a district court's determination

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district court to determine whether individualized inquiries into this standing issue would predominate over common questions, *see Cordoba*, 942 F.3d at 1277.

[13] The dissent focuses on policy reasons why district courts should refrain from certifying classes that may include more than a de minimis number of uninjured class members. Dissent at 64, 75, 77-78. But we are bound to apply Rule 23(b)(3) as written, regardless of policy preferences. And contrary to the dissent's assertion, our conclusion that courts must apply Rule 23(b)(3) on a case-by-case basis, rather than rely on a per se rule that a class cannot be certified if it includes more than a de minimis number of uninjured class members, is consistent with the approach taken by our sister circuits. Dissent at 78. Neither of the two cases cited by the dissent, *In re Rail Freight Fuel Surcharge Antitrust Litig.-MDL No. 1869* (*Rail Freight II*), 934 F.3d 619, 443 U.S. App. D.C. (D.C. Cir. 2019) and *In re Asacol Antitrust Litig.*, 907 F.3d 42 (1st Cir. 2018), adopted a per se rule. Rather, based on the particular facts of the cases before them, our sister circuits held that Rule 23(b)(3)'s predominance requirement is not satisfied when the need to identify uninjured class members "will predominate and render an adjudication unmanageable." *In re Asacol Antitrust Litig.*, 907 F.3d at 53-54; *see also Rail Freight II*, 934 F.3d at 625 (holding that a district court did not abuse its discretion in denying class certification where the plaintiffs "proposed no further way—short of full-blown, individual trials" to determine the common question of whether class members were injured).

that falls within a broad range of permissible conclusions." *Hung Lam v. City of San Jose*, 869 F.3d 1077, 1084 (9th Cir. 2017) (quoting *Kode v. Carlson*, 596 F.3d 608, 612 (9th Cir. 2010)).[14]

[*670] III

We now turn to the Tuna Suppliers' arguments and consider them in light of this legal framework. We begin with the DPP class, which is the focus of the Tuna Suppliers' arguments. In order to prevail on their antitrust claim, the DPP class must prove that the Tuna Suppliers engaged **[**27]** in a conspiracy (an antitrust violation), which resulted in antitrust impact in the form of higher prices paid by each member of the class, which in turn led to measurable damages. The question whether each member of the DPP class suffered antitrust impact "is central to the validity of each one of the [DPP] claims." *Wal-Mart*, 564 U.S. at 350. The central questions on appeal are whether the expert evidence presented by the DPPs is capable of resolving this issue "in one stroke," *id.*, and whether this common question predominates over any individualized inquiry. We conclude that the district court did not abuse its discretion in certifying the class.

A

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[14] Nevertheless, a court must consider whether the possible presence of uninjured class members means that the class definition is fatally overbroad. When "a class is defined so broadly as to include a great number of members who for some reason could not have been harmed by the defendant's allegedly unlawful conduct, the class is defined too broadly to permit certification." *Messner*, 669 F.3d at 824; *see also Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 596 (9th Cir. 2012) (holding that the class definition in a false advertising action was fatally overbroad where many members learned that the advertising was misleading before purchase or had never been exposed to the allegedly misleading advertisements); *In re Asacol*, 907 F.3d at 55-58 (holding that the class did not meet Rule 23(b)(3) requirements because the plaintiffs' evidence showed that thousands of plaintiffs who were loyal to brand-name drugs would not have purchased the generic drugs that were the subject of the price-fixing conspiracy). In such a case, the court may redefine the overbroad class to include only those members who can rely on the same body of common evidence to establish the common issue. *See, e.g.*, *Mazza*, 666 F.3d at 596 (holding that false advertising "class must be defined in such a way as to include only members who were exposed to advertising that is alleged to be materially misleading"). A court may not, however, create a "fail safe" class that is defined to include only those individuals who were injured by the allegedly unlawful conduct. *See Ruiz Torres*, 835 F.3d at 1138 n.7 (internal quotation marks omitted). "Such a class definition is improper because a class member either wins or, by virtue of losing, is defined out of the class and is therefore not bound by the judgment." *Messner*, 669 F.3d at 825. But, ultimately, the problem of a potentially "over-inclusive" class "can and often should be solved by refining the class definition rather than by flatly denying class certification on that basis." *Id.*

The centerpiece of the DPPs' claim that each member of the class suffered antitrust impact is economist Dr. Russell Mangum's expert testimony and report. According to his testimony and report, Dr. Mangum reviewed a comprehensive range of available information to develop an understanding of the nature of the market at issue and the details of the Tuna Suppliers' price-fixing conspiracy. That information included court filings, the Tuna Suppliers' guilty pleas, discovery materials such as the Tuna Suppliers' business records concerning their sales of packaged tuna, **[**28]** deposition testimony, publicly available information regarding the tuna industry, and data regarding supply and demand factors that affect the manufacture, sale and consumption of packaged tuna such as raw material prices and details about customer preferences.

After examining the economic structure of the tuna market and the available record evidence concerning the Tuna Suppliers' behavior, Dr. Mangum determined that the packaged tuna market was conducive to price-fixing, given the Tuna Suppliers' dominance in the market, the attendant barriers to entry for competitors, the Tuna Suppliers' use of price lists for their products, and other characteristics of the packaged tuna industry. According to Dr. Mangum, these findings supported a baseline economic theory that the Tuna Suppliers' collusive behavior would affect the DPPs on a class-wide basis. Dr. Mangum then used a number of different econometric tools to evaluate whether quantitative **[*671]** evidence supported this theory.[15]

Dr. Mangum first performed a pricing correlation test, which demonstrated that the prices of the Tuna Suppliers' products moved up or down together regardless of product or customer type, and thus supported **[**29]** the proposition that the Tuna Suppliers' collusion had a common, supra-competitive impact on their prices. Based on this evidence, Dr. Mangum concluded that the Tuna Suppliers' collusion would result in higher prices that would affect direct purchasers on a class-wide basis, which was consistent with his original theory. This finding is also consistent with "the prevailing [economic] view [that] price-fixing affects all market participants, creating an

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[15] Econometrics is "the application of statistical methods to economic data . . . to draw inferences about economic relationships from observed data on market outcomes [i.e., price], even when those outcome are the result of complex interactions among numerous economic forces." *Econometrics* at 1.

inference of class-wide impact even when prices are individually negotiated." *In re Urethane*, 768 F.3d at 1254.

To further explore whether the DPPs were subject to an overcharge caused by the price-fixing conspiracy (rather than by other variables that could affect prices) on a class-wide basis, Dr. Mangum constructed a statistical model using a multiple regression analysis. Regression analyses are used to determine "the relationship between an unknown [dependent] variable [such as price] and one or more independent variables [e.g., transaction characteristics, and supply and demand factors] that are thought to impact the dependent variable." *Id.* at 1260 (quotation marks omitted) (citing Michael J. Saks, et al., *Reference Manual on Scientific Evidence* 179, 181 (2d ed. 2000)). **[**30]** If a regression model uses "appropriate independent [or explanatory] variables," it can test and isolate the extent to which the actual prices paid by plaintiffs are higher because of a defendant's collusive behavior. *Id.* Assuming Dr. Mangum's regression model met this standard, it could provide further evidence that the DPPs were impacted by the Tuna Suppliers' collusion on a class-wide basis.

In simple terms, Dr. Mangum first aggregated (or "pooled") the actual tuna sale transaction data for the Tuna Suppliers' sales to the DPPs during both the alleged conspiracy period and during benchmark periods before and after the conspiracy. Dr. Mangum then identified a number of variables (referred to as independent or explanatory variables) that could affect the price of tuna, including product characteristics, input costs, customer type, and variables related to consumer preference and demand, such as disposable income, seasonal effects, and geography. The model then isolated (or "controlled for") the effect of these explanatory variables on the prices paid by DPPs, which allowed the model to isolate the effect that the conspiracy by itself had on the prices paid by DPPs. When all the tuna **[**31]** sale transactions were aggregated, and the explanatory variables (other than the price-fixing conspiracy) were controlled for, the model showed that the DPPs paid 10.28 percent more for tuna during the conspiracy period than they did during the benchmark periods. Dr. Mangum labeled this 10.28 percent as the "overcharge," meaning the common amount paid by the DPPs resulting from the collusive behavior alone. This

result was statistically significant, meaning that there was a less than five percent chance that the higher prices during the price-fixing conspiracy was a product of chance. Thus, by isolating the common overcharge amount, Dr. Mangum's regression model was further confirmation of his theory that **[*672]** the Tuna Suppliers' collusion had a class-wide effect.[16]

Dr. Mangum performed several tests (which he referred to as "robustness checks") to confirm that his regression model was an appropriate tool to be used by the entire DPP class to show common impact. These tests were used to confirm the reliability of the model, and, according to Dr. Mangum, the test results supported his ultimate conclusion that the model could be used to show class-wide injury. First, Dr. Mangum changed the model **[**32]** to evaluate the overcharge specific to each individual defendant. The results showed that prices were still elevated above competitive levels during the collusion period. Second, Dr. Mangum changed the model to evaluate the overcharge specific to certain products with different characteristics, such as fish type and package type. These tests showed that each type of product tested was impacted to a similar degree. Third, Dr. Mangum changed the model to evaluate the overcharge based on customer types.[17] This test showed that there were large, statistically significant overcharges for every customer type. These robustness checks confirmed Dr. Mangum's theory that the DPPs paid an overcharge during the conspiracy period. Finally, Dr. Mangum used the output of the pooled regression model to predict the but-for prices (i.e., what the price of tuna during the conspiracy period would have been without the overcharge caused by the conspiracy), and compared these predicted but-for prices to the actual prices paid by the DPP class. This comparison showed that 94.5 percent of the purchasers had at least one purchase above the predicted but-for price, which again provided further evidence that the **[**33]** conspiracy had a

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[16] The dissent argues that Dr. Mangum's opinion is not persuasive because large retailers have bargaining power and can extract price discounts, promotional credits, and rebates. Dissent at 72-73. As the dissent concedes, Dissent at 73 & n. 5, Dr. Mangum took these issues into account (to the extent that the Tuna Suppliers provided relevant data). After doing so, Dr. Mangum ran the regression model using both gross and net prices and determined that his regression model continued to produce a statistically significant overcharge. Dr. Mangum therefore reasoned that discounts and promotions did not affect his pooled model or his conclusion of class-wide impact. Although the dissent argues that (in the dissent's view) Dr. Mangum did not consider price discounts, promotional credits, and rebates "adequately," Dissent at 73 & n. 5, the persuasiveness of Dr. Mangum's analysis is not at issue at this phase of the proceeding.

[17] Direct purchasers were grouped into categories called customer types, which included Retail, Club, Special Market, Food Service, Mass Merchandise, Discount, and e-Commerce.

common impact on all or nearly all the members of the DPP class.[18] Dr. Mangum therefore concluded that his aggregated regression model provided econometric evidence that the conspiracy resulted in higher prices paid by all or nearly all DPPs. According to Dr. Mangum, the results were strong evidence **[*673]** of common, class-wide antitrust impact.[19]

In sum, Dr. Mangum's findings about the tuna market and the Tuna Suppliers' collusive behavior, his pricing correlation test, his regression model, and his robustness checks all confirmed his theory that the conspiracy resulted in substantial price impacts, and that the impact was common to the DPPs during the collusion period.

B

The Tuna Suppliers attacked Dr. Mangum's expert report on multiple fronts, but primarily relied on their rebuttal expert, economist Dr. John Johnson, who made multiple criticisms of Dr. Mangum's methodology. The essence of Dr. Johnson's critique was that it was not statistically appropriate to use a pooled regression model for transactions in the tuna market, given the multiple individualized differences among class members, such as disparities in negotiating tactics and bargaining power. **[**34]** Dr. Mangum's use of pooled data, Dr. Johnson alleged, masked these individual differences among class members. Thus, Dr. Johnson claimed, Dr. Mangum's conclusion that the conspiracy had a class-wide impact based on a uniform overcharge did not reflect the real world.

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[18] According to Dr. Mangum, the purpose of this robustness test was to demonstrate that his regression model was sound. Contrary to the dissent's assertion, Dissent at 66, Dr. Mangum did not "suggest" that 5.5 percent of the class were uninjured. Rather, Dr. Mangum concluded that each class member was injured by supra-competitive prices, and used a different methodology for calculating damages for each member of the class. *See infra* at n.19. The Tuna Suppliers do not develop the argument that the results of this robustness test preclude certification of the class as currently defined. Therefore, we do not address this issue here. *See United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1578, 206 L. Ed. 2d 866 (2020); *see also Tyson Foods*, 577 U.S. at 460 (declining to reach a similar issue).

[19] Although the regression model primarily served as evidence of class-wide antitrust impact, Dr. Mangum used the overcharge derived from the regression model to estimate class-wide damages. This estimate was developed by multiplying the overcharge estimate of 10.28 percent by the appropriate sales volume for the defendants, adjusted by several pertinent factors. Dr. Mangum used the same method to estimate damages for each of the class representatives identified in the complaint. The Tuna Suppliers do not challenge Dr. Mangum's damages methodology. Thus, the dissent's contention that the court has created a "sweeping rule that gives a free pass to the intractable problem of highly individualized damages analyses" misses the mark. Dissent at 74.

Dr. Johnson supported this allegation on several grounds. First, Dr. Johnson claimed that a statistical tool called a Chow test[20] shows that the data relating to tuna transactions should not be pooled due to individual differences in each purchaser's transactions. Second, Dr. Johnson criticized Dr. Mangum's calculation that 94.5 percent of DPPs whose transactional data were included in the model had at least one purchase at a price above the predicted but-for price. According to Dr. Johnson, this calculation was misleading because it was premised on what Dr. Johnson characterized as the faulty assumption that all direct purchasers paid the same 10.28 percent overcharge throughout the proposed class period. Instead, Dr. Johnson performed his own test of Dr. Mangum's model. As part of this test, Dr. Johnson changed the model to evaluate overcharge based on each individual customer. According to Dr. Johnson, the test showed **[**35]** that of the 604 direct purchasers who bought from the Tuna Suppliers during the proposed class period, the model did not estimate a positive and statistically significant overcharge (attributable to the conspiracy) for 169 direct purchasers (or 28 percent). Therefore, Dr. Johnson argued that the plaintiffs could not rely on the model to demonstrate class-wide impact of the conspiracy.[21]

[*674] Dr. Johnson made several additional critiques in arguing that Dr. Mangum's model was not capable of demonstrating class-wide impact. First, Dr. Johnson argued that Dr. Mangum's model showed false positives. According to Dr. Johnson, an application of Dr. Mangum's regression model showed that several DPP class members had paid an overcharge when they purchased tuna products from non-defendants, i.e., tuna suppliers who had not participated in the conspiracy. Second, Dr. Johnson attacked the reliability of Dr. Mangum's model because Dr. Mangum's model selected time periods that did not precisely match the class periods in the DPPs' complaint. Finally, Dr. Johnson criticized Dr. Mangum's use of a cost index (a calculated

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[20] A Chow test is a statistical test designed to "determine whether it is appropriate to pool potential subgroups when estimating the average effect of the alleged conspiracy." *Econometrics* at 358.

[21] Dr. Johnson's test attempted to show that Dr. Mangum's model was flawed because 169 direct purchasers could not rely on the model to show antitrust impact due to the fact (as Dr. Mangum subsequently explained) that some purchasers had no or too few transactions during the pre-collusion benchmark period to generate statistically significant results. Contrary to the dissent's claim, Dissent at 66, Dr. Johnson did not show that 28 percent of the class potentially suffered no injury. *See infra* Section IV.B.

measure of costs for all the Tuna Suppliers) as one of the explanatory variables **[**36]** in his model, rather than using actual accounting cost data. According to Dr. Johnson, the use of a cost index inappropriately assumed that the Tuna Suppliers' costs responded in a like way to supply and demand factors.

In rebuttal, Dr. Mangum rejected Dr. Johnson's premise that a pooled, aggregated model was inappropriate to use in this case. Dr. Mangum explained that his technique was a well-known and well-accepted method for examining antitrust impact in markets with individualized differences among purchasers. According to Dr. Mangum, both of the bases for Dr. Johnson's challenges to the use of a pooled regression model failed. First, Dr. Mangum claimed that a Chow test should not be used in the manner employed by Dr. Johnson in his report. According to Dr. Mangum, Dr. Johnson's Chow test was "designed to fail," meaning that in this context, the test results would always show that the data relating to tuna transactions should not be pooled. Second, Dr. Mangum asserted that the record contained insufficient transaction data for Dr. Johnson's test of the regression model to yield meaningful results. For example, Dr. Mangum acknowledged that the model, as changed by Dr. Johnson to **[**37]** consider purchasers on an individual basis, could not estimate a positive and statistically significant overcharge for 169 direct purchasers. But according to Dr. Mangum, *no* regression model could yield a statistically significant estimate for many of those 169 direct purchasers on such an individual purchaser-by-purchaser basis, because 61 of those purchasers did not make any purchases during the benchmark periods, and many of the other purchasers had not undertaken a sufficient number of transactions during either the benchmark periods or collusion period to yield statistically significant results. And logically, Dr. Mangum asserted, given the evidence that the defendants were able to inflate prices generally through the conspiracy, that the tuna market was susceptible to collusion, and that the model showed a robust, statistically significant impact of the price-fixing scheme on the tuna market, even the DPP class members for whom Dr. Johnson's test did not yield a positive, statistically significant overcharge should be able to rely on the pooled regression model as evidence of impact. Therefore, according to Dr. Mangum, Dr.

Johnson erred in concluding that the regression model **[**38]** had no relevance for that 28 percent of class members.

Dr. Mangum also rebutted Dr. Johnson's additional critiques. With respect to Dr. Johnson's claim that the regression model yielded false positives, Dr. Mangum explained that overcharges imposed by non-defendant tuna suppliers (who were **[*675]** not part of the conspiracy) were not false positives but were caused by the "umbrella effect." This term refers to an economic observation that when many suppliers engage in a conspiracy to raise prices, non-conspirators may raise their prices to supra-competitive levels because of the conspirator's dominant market power. *See* ABA Section of Antitrust Law, *Proving Antitrust Damages: Legal & Economic Issues* 226 (2d ed. 2010). Dr. Mangum also argued that Dr. Johnson's claim of false positives was based on an erroneous analysis of the tuna market. According to Dr. Mangum, Dr. Johnson incorrectly claimed that two of the individual DPPs (Sysco and U.S. Foods) purchased tuna from non-defendant suppliers because both of those class members actually purchased tuna that was produced by the Tuna Suppliers and merely sold through a middleman. Dr. Mangum defended his selection of time periods relating to the model, **[**39]** claiming he narrowed the class period based on his analysis of the evidence in the case. Finally, Dr. Mangum rejected Dr. Johnson's critique of his use of cost indexes. Dr. Mangum asserted that costs indexes were statistically superior to using individual cost accounting data. He noted that one of the robustness tests he performed on the data showed that using defendant-specific cost structures confirmed the results of the pooled model. And he asserted that it was preferable to use his cost index for determining competitive market prices based on market supply and demand conditions, rather than relying on cost data derived from the Tuna Suppliers' individual approaches to cost accounting.

C

In considering whether the DPPs' evidence was capable of establishing antitrust impact for the class as a whole, the district court reviewed Dr. Mangum's expert testimony and report, the

rebuttal testimony and report by Dr. Johnson, and Dr. Mangum's reply, and then addressed the parties' disputes. In doing so, the district court did not make any legal or factual error.

First, the district court considered Dr. Johnson's argument that Dr. Mangum's pooled regression model masked differences between purchasers, **[**40]** and that when the overcharge is determined for individual DPP class members the model did not show a positive, statistically significant impact for some 28 percent of the class. After reviewing each of the experts' analyses, the district court credited Dr. Mangum's rebuttal of Dr. Johnson's critique. Even if the model (when modified by Dr. Johnson to evaluate individual purchasers) did not yield a positive, statistically significant overcharge for some purchasers who had no or too few transactions during the pre-collusion benchmark period, the district court concluded that those purchasers could still rely on the pooled regression model as evidence of the conspiracy's impact on similarly situated class members. The court further noted that other evidence in the record, including the guilty pleas and market characteristics, showed that class members suffered a common impact.

The district court also considered Dr. Johnson's argument that the Chow test showed that Dr. Mangum's model cannot be applied to all defendants. The court acknowledged that failure of a statistical test used to determine whether a regression is appropriate should be taken seriously, and could lead a court to reject **[**41]** the model at the class certification stage as not capable of providing class-wide proof. But it also noted that most regressions models will fail one or more tests if enough are run, even if the model itself is statistically sound. Because there was a rational basis **[*676]** for Dr. Mangum's use of the pooled regression model to demonstrate class-wide impact, the court concluded the failure of the Chow test did not require the court to reject the model.

The district court rejected Dr. Johnson's additional arguments. With respect to Dr. Johnson's claim that the false positives in Dr. Mangum's model rendered the model unreliable, the court credited Dr. Mangum's explanation that the false positives could be explained by the umbrella effect and that Dr. Johnson had erroneously concluded that some tuna was supplied by non-

defendants when in fact the tuna was supplied by defendants. The district court also addressed the dispute over Dr. Mangum's selection of the time period for the class, and concluded that Dr. Mangum's narrowing of the time frame bolstered the reliability of the model. Finally, the district court rejected Dr. Johnson's critique of Dr. Mangum's use of a cost index, rather than actual **[**42]** accounting cost data. The court credited Dr. Mangum's explanation as to why the use of such an index provided more reliable results than actual cost accounting data, and concluded that his use of a cost index did not undermine the reliability of his methodology or model.

After resolving each dispute between the experts, the district court acknowledged that the defendants' critique of Dr. Mangum's model could be persuasive to a jury at trial. But the district court recognized that at this stage of the proceedings, its task was to determine whether Dr. Mangum's evidence was capable of showing class-wide impact, not to reach a conclusion on the merits of the DPPs' claims. After weighing the evidence put forth by the DPPs, including the regression model, the correlation tests, the record evidence and the guilty pleas and admissions entered in this case, the district court concluded there was sufficient evidence to show common questions predominated as to common impact. Therefore, it ruled that this prerequisite to Rule 23(b)(3) was met.

We conclude that the district court did not abuse its discretion in reaching this conclusion. The court conducted a rigorous analysis of the expert evidence presented **[**43]** by the parties. The district court did not err legally or factually in concluding that Dr. Mangum's pooled regression model, along with other evidence, is capable of answering the question whether there was antitrust impact due to the collusion on a class-wide basis, thus satisfying this prerequisite of Rule 23(b)(3).

IV

We now turn to the Tuna Suppliers' claims that the district court abused its discretion in determining that the evidence presented by the DPPs proved: (1) that the element of antitrust

impact is capable of being established class-wide through common proof, and (2) that this common question predominates over individual questions.[22]

A

The Tuna Suppliers' main argument is that the district court abused its discretion in determining that Dr. Mangum's model **[*677]** is capable of proving common impact for all class members. According to the Tuna Suppliers, Dr. Mangum's evidence is not a permissible method of proving class-wide liability because the regression model uses "averaging assumptions," meaning that the model assumes that all DPPs were overcharged by the same uniform percentage (10.28 percent). These averaging assumptions, according to the Tuna Suppliers, "paper over" individualized differences **[**44]** among class members. Because the tuna market is characterized by individualized negotiations and different bargaining power among the purchasers, the Tuna Suppliers claim it is fundamentally impossible to show common proof of injury. To support this argument, the Tuna Suppliers note that the DPPs who pursued their antitrust claims individually did not rely on a pooled regression model but used actual cost data and claimed an individualized overcharge rate. Given the nature of the tuna market, the Tuna Suppliers conclude, Dr. Mangum's model cannot meet the prerequisites of Rule 23(b)(3).

To the extent that the Tuna Suppliers argue that pooled regression models involve improper "averaging assumptions" and therefore are inherently unreliable when used to analyze complex markets, we disagree. In antitrust cases, regression models have been widely accepted as a generally reliable econometric technique to control for the effects of the differences among class members and isolate the impact of the alleged antitrust violations on the prices paid by class members.[23] *See, e.g., Econometrics* at 1. Further, *Tyson Foods* rejected any categorical

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[22] The Tuna Suppliers do not challenge the district court's gatekeeping function under *Daubert*, to ensure that Dr. Mangum's evidence was not "statistically inadequate or based on implausible assumptions." *Tyson Foods*, 577 U.S. at 459. And contrary to the dissent's argument, Dissent at 69, the district court did not merely determine that Dr. Mangum's evidence was admissible under *Daubert*. Rather, it subjected the evidence to a rigorous examination with full consideration of Dr. Johnson's critique. Therefore, the dissent's assertion that the district court committed the same error as the district court in *Ellis* is misplaced. Dissent at 68-69.

exclusion of representative[24] or statistical evidence. 577 U.S. at 459-60. Therefore, any categorical **[**45]** argument that a pooled regression model cannot control for variables relating to the individualized differences among class members must be rejected.

To the extent the Tuna Suppliers and the dissent raise the more focused argument that, in this case, the model's output (estimating that the Tuna Suppliers' conspiracy resulted in a 10.28 percent overcharge for the entire class) cannot plausibly serve as common evidence for all class members given the individualized differences among those class members, we again disagree.[25] It is not implausible to conclude that a conspiracy could have a **[*678]** class-wide impact, "even when the market involves diversity in products, marketing, and prices," especially "where, as here, there is evidence that the conspiracy artificially inflated the baseline for price negotiations." *In re Urethane*, 768 F.3d at 1254-55. As the Tenth Circuit explained, a district court could reasonably conclude "that price-fixing would have affected the entire market, raising the baseline prices for all buyers." *Id.* at 1255. In other words, it is both logical and plausible that the conspiracy could have raised the baseline prices for all members of the class by roughly ten percent. The district court did not **[**46]** abuse its discretion in so concluding.

The dissent argues that Dr. Mangum's expert opinion "flies against common sense and empirical evidence," because large retailers like Walmart likely would have used their bargaining power to negotiate lower prices, and thus may not have paid higher prices because of the Tuna Suppliers' collusion. Dissent at 72. But the district court is not free to prefer its own views about

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[23] *See, e.g., Kleen Prods. LLC v. Int'l Paper Co.*, 831 F.3d 919, 929 (7th Cir. 2016); *In re Urethane*, 768 F.3d at 1263; *Cordes & Co. Fin. Servs. v. A.G. Edwards & Sons, Inc.*, 502 F.3d 91, 97, 107 (2d Cir. 2007); *Hemmings v. Tidyman's Inc.*, 285 F.3d 1174, 1188-89 (9th Cir. 2002); *In re Linerboard Antitrust Litig.*, 305 F.3d 145, 153 (3d Cir. 2002).

[24] Although the Tuna Suppliers refer to Dr. Mangum's regression model as "representative evidence," that term is imprecise. As explained in *Tyson Foods*, representative evidence generally refers to a sample that represents the class as a whole. *See* 577 U.S. at 454-55. Thus, *Tyson Foods* concluded that each individual in a class could rely on exemplars of persons donning and doffing protective equipment to prove the amount of time each spent donning and doffing; this sample was claimed to be representative of all members of the class. *See id.* By contrast, a regression model analyzes available data to determine the degree to which a known variable, such as collusion, affected an unknown variable, such as price, while eliminating the effect of other variables.

[25] To the extent the Tuna Suppliers challenged the model's inputs, the district court considered and rejected Dr. Johnson's critique that some of the model's inputs (i.e., the use of a cost index and Dr. Mangum's selection of time periods) rendered the model incapable of demonstrating class-wide impact. *Cf. In re Lamictal*, 957 F.3d at 194 (holding that the district court abused its discretion in certifying class because it failed to scrutinize each expert's data).

the economics of the tuna market over the statistical evidence submitted by the plaintiffs, and here the regression model controlled for the variables identified by the dissent. Indeed, Dr. Mangum provided an individualized overcharge estimate for Walmart when he changed the model to evaluate the overcharge based on customer types. This test showed that Walmart paid statistically significant overcharges because of the conspiracy. Provided that the evidence is admissible and, after rigorous review, determined to be capable of establishing antitrust impact on a class-wide basis, it is for the jury, not the court, to decide the persuasiveness of Dr. Mangum's evidence in light of "common sense and empirical evidence."

The Tuna Suppliers rely on *In re New Motor Vehicles Canadian Export Antitrust Litigation*, 522 F.3d 6 (1st Cir. 2008), for the proposition that a market **[**47]** involving individualized negotiations is inherently incompatible with common impact. This reliance is misplaced.[26] In *New Motor Vehicles*, plaintiffs raised a "novel and complex" theory of how consumers were injured by defendants' alleged horizontal conspiracy to discourage imports of lower-cost cars from Canada into the United States. *Id.* at 27. Plaintiffs' theory proceeded in two steps: (1) "but for the defendants' illegal stifling of competition," manufacturers would have set lower prices to compete with Canadian imports; and (2) because the manufacturers did not do so, consumers paid higher retail prices. *Id.* The First Circuit rejected this theory because plaintiffs failed to demonstrate they had an approach for proving either step. For the first step, plaintiffs had not shown how they would establish that but for the horizontal conspiracy, enough lower-priced Canadian cars would flood into the American market so as to cause manufacturers to decrease their prices. *Id.* As for the second step, the plaintiffs had not proved their damages model was capable of showing "which consumers were impacted by the alleged antitrust violation and which were not." *Id.* at 28. In this regard, the plaintiffs relied on an inference **[**48]** that "any upward pressure on national pricing would necessarily raise the prices actually paid by individual consumers." *Id.* at 29. But the First Circuit rejected this inference because "[t]oo many

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[26] As a threshold matter, the First Circuit held in *New Motor Vehicles* that the district court lacked federal jurisdiction over the plaintiffs' claims, but went on to provide its thoughts on certification of the class in the event the district court exercised its discretion to exert supplemental jurisdiction over the state damages claims. 522 F.3d at 17.

factors play into an individual negotiation to allow an assumption—*at least without further theoretical development*—that any price increase or **[*679]** decrease will always have the same magnitude of effect on the final price paid." *Id.* at 29 (emphasis added). The court contrasted the plaintiffs' unsupported inference with cases allowing "a presumption of class-wide impact in price-fixing cases when 'the price structure in the industry is such that nationwide the conspiratorially affected prices at the wholesale level fluctuated within a range which, though different in different regions, was higher in all regions than the range which would have existed in all regions under competitive conditions.'" *Id.* (quoting *In re Linerboard Antitrust Litig.*, 305 F.3d 145, 151 (3d Cir. 2002)). Despite rejecting the plaintiffs' theory at an early stage of the case, the court did not rule out certification of a class but instead concluded that "more work remained to be done in the building of plaintiffs' damages model and the filling out of all steps of plaintiffs' theory of impact." *Id.*

As this **[**49]** explanation of the case makes clear, *New Motor Vehicles*' analysis is not applicable here. First, the DPPs' price-fixing theory is not "novel" or "complex." *Id.* at 27. Rather than adopting a theory requiring multiple speculative steps, the DPPs have a simple one-step theory: the Tuna Suppliers conspired to raise tuna prices, resulting in higher prices for all buyers. Second, while the plaintiffs in *New Motor Vehicles* had not provided a thorough explanation or developed a model showing how they would establish their theory, *id.* at 29, the DPPs have already offered well-developed expert testimony and regression modeling supporting common impact. The other cases relied on by the Tuna Suppliers are equally inapposite. *See, e.g., Blades v. Monsanto Co.*, 400 F.3d 562, 572 (8th Cir. 2005) (affirming denial of class certification because evidence of a conspiracy to raise prices, without more, could not demonstrate impact across highly localized and highly individualized markets for hundreds of seed varieties, and the plaintiffs had not offered a common method of showing injury); *Robinson v. Tex. Auto. Dealers Ass'n*, 387 F.3d 416, 423 (5th Cir. 2004) (reversing class certification where the plaintiffs lacked a plausible theory of how the challenged conduct had consistently affected purchase prices).

The Tuna Suppliers also argue that because the individual **[**50]** plaintiffs pursuing their own antitrust claims showed overcharges both above and below the overcharge indicated by Dr. Mangum's model, a uniform 10.28 percent overcharge is implausible. We also reject this argument, because it improperly conflates the question whether evidence is capable of proving an issue on a class-wide basis with the question whether the evidence is persuasive. A lack of persuasiveness is not fatal at certification. *See Amgen*, 568 U.S. at 459-60. For purposes of determining whether each member of the DPP class can rely on the model to prove antitrust impact, it is irrelevant whether actual sales data shows a specific class member was overcharged by more or less than 10.28 percent. Rather, the question is whether each member of the class can rely on Dr. Mangum's model to show antitrust impact of any amount. The district court did not abuse its discretion in finding that each member could. While individualized differences among the overcharges imposed on each purchaser may require a court to determine *damages* on an individualized basis, *see supra* Section III.C, such a task would not undermine the regression model's ability to provide evidence of common *impact*. Accordingly, we reject the **[**51]** Tuna Suppliers' argument that the regression model could not sustain liability in individual proceedings. Rather, "each class member could have relied on [the model] to establish liability if he or she had brought an individual action." *See Tyson* ***[*680]*** *Foods*, 577 U.S. at 455. We therefore conclude that the district court did not err legally or factually in concluding that Dr. Mangum's pooled regression model does not fail on any of the grounds raised by the Tuna Suppliers.[27]

B

The Tuna Suppliers and the dissent next contend that the district court erred by failing to resolve a dispute between the parties as to whether 28 percent of the class did not suffer antitrust impact. Instead of resolving the dispute between the parties' experts, the Tuna Suppliers claim, the district court improperly shifted the critical inquiry to the jury. In other words, the Tuna

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[27] The Tuna Suppliers do not "specifically and distinctly" raise the argument that the district court abused its discretion in resolving challenges to the inputs to the model which were raised below, such as Dr. Mangum's choice of benchmark period and use of cost indexes, so that argument is deemed forfeited on appeal. *United States v. Kama*, 394 F.3d 1236, 1238 (9th Cir. 2005).

Suppliers argue that to satisfy Rule 23(b)(3)'s predominance requirement, plaintiffs must prove that all or nearly all class members were *in fact injured* by the alleged conspiracy, i.e., suffered antitrust impact.[28]

In raising this argument, the Tuna Suppliers focus on Dr. Johnson's critique of Dr. Mangum's model, which stated that when he tested Dr. Mangum's model by changing it to **[**52]** evaluate the overcharge specific to each individual member of the DPP class, the test showed that 28 percent of the DPPs could not rely on the model to show an overcharge attributable to the conspiracy. According to the Tuna Suppliers, this evidence indicated that 28 percent of the DPP class did not suffer antitrust impact. And in district court, the Tuna Suppliers argued that "28% of a class—nearly one-third—far exceeds the *de minimis* number of uninjured class members that some courts have permitted in certifying a class." Therefore, the Tuna Suppliers argue that the class should not have been certified. Further, the Tuna Suppliers argue that the existence of a large number of uninjured class members raises a question as to whether the class has Article III standing. The Tuna Suppliers contend that because the class cannot be certified (and there are Article III issues) if Dr. Johnson's analysis is correct, the district court abused its discretion in failing to resolve the dispute regarding whether Dr. Johnson's conclusions about Dr. Mangum's model were correct.

We disagree. First, the Tuna Suppliers and the dissent mischaracterize the import of Dr. Johnson's critique. Dr. Johnson **[**53]** did not make a factual finding that 28 percent of the DPP class or 169 class members were uninjured. Instead, Dr. Johnson's test was aimed at undermining confidence in Dr. Mangum's pooled regression model, because class members with no or limited transactions during the benchmark period could not rely on the model to show that they suffered overcharges. At most, this critique supports the more attenuated argument that Dr. Mangum's model is unreliable, or would be unpersuasive to a jury. But the district court considered and resolved this methodological dispute between the experts in favor of Dr.

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[28] Because the Tuna Suppliers' primary argument on appeal is that the DPPs failed to prove class-wide antitrust impact, we understand the Tuna Suppliers' reference to injury as referring to antitrust impact, an element of the class antitrust claims, not that the class members would not be able to prove that they suffered monetary damages.

Mangum by crediting his rebuttal that even class members with limited transactions during the class period can rely on the pooled regression **[*681]** model as evidence of impact on similarly situated class members. In other words, the district court determined that Dr. Mangum's pooled regression model was *capable* of showing that the DPP class members suffered antitrust impact on a class-wide basis, *notwithstanding* Dr. Johnson's critique. This was all that was necessary at the certification stage. The DPP class did not have to "first establish that it will win the fray" in order to gain certification **[**54]** under Rule 23(b)(3). *Amgen*, 568 U.S. at 460. Nor is this a case such as *Ellis*, in which the court had to resolve a dispute regarding an issue of historical fact in order to determine whether the challenged discriminatory conduct could affect a class as a whole. *See* 657 F.3d at 983. There is no factual dispute that the Tuna Suppliers engaged in a price-fixing scheme affecting the entire packaged tuna industry nation-wide.

The district court's conclusion that the Tuna Suppliers could present Dr. Johnson's critique at trial did not improperly shift the burden of determining whether the Rule 23(b)(3) prerequisites were met to the jury.[29] *See Amgen*, 568 U.S. at 459-60, 466. The district court fulfilled its obligation to resolve the disputes raised by the parties in order to satisfy itself that the evidence proves the prerequisites for Rule 23(b)(3), which is that the evidence was capable of showing that the DPPs suffered antitrust impact on a class-wide basis. "Reasonable minds may differ as to whether the [overcharge Dr. Mangum] calculated is probative" as to all purchasers in the class, but that is a question of persuasiveness for the jury once the evidence is sufficient to satisfy Rule 23. *See Tyson Foods*, 577 U.S. at 459.

Neither Dr. Mangum's pooled regression model nor Dr. Johnson's critique required individualized inquiries into **[**55]** the class members' injuries. If the jury found that Dr. Mangum's model was reliable, then the DPPs would have succeeded in showing antitrust impact

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[29] The Tuna Suppliers do not "specifically and distinctly" develop the argument that the district court failed to resolve the parties' dispute as to whether the evidence generated false positives. *Kama*, 394 F.3d at 1238. In any event, as explained above, Dr. Mangum rebutted these critiques by reference to the umbrella effect, and by claiming that Dr. Johnson's analysis was itself flawed because Dr. Johnson thought DPP class members had purchased non-defendant tuna, when they actually purchased tuna supplied by defendants. The district court did not abuse its discretion in resolving this issue by crediting Dr. Mangum's rebuttal.

on a class-wide basis, an element of their antitrust claim. On the other hand, if the jury were persuaded by Dr. Johnson's critique, the jury could conclude that the DPPs had failed to prove antitrust impact on a class-wide basis.[30] In neither case would the litigation raise individualized questions regarding which members of the DPP class had suffered an injury. Although such issues would have to be addressed at the damages stage, the dissent's argument that the district court here erred by failing to determine whether questions of individualized damages predominate, Dissent at 74, misses the mark. As noted above, the Tuna Suppliers have not argued that the complexity of damages calculations would defeat predominance here, and as previously explained, there is no per se rule that a district court is precluded from certifying a class if plaintiffs may have to prove **[*682]** individualized damages at trial.[31]

We need not consider the Tuna Suppliers' argument that the possible presence of a large number of uninjured class members raises an Article **[**56]** III issue, because the Tuna Purchasers have demonstrated that all class members have standing here.[32] A plaintiff is required to establish the elements necessary to prove standing "with the manner and degree of evidence required at the successive stages of the litigation." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992). Here, the district court concluded that the

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[30] Although Dr. Johnson argued that Dr. Mangum's pooled regression model was unreliable and so could not sustain a jury finding of antitrust injury to the entire DPP class, the evidence adduced at trial may nevertheless sustain a jury finding of antitrust injury to all or part of the class.

[31] In any event, Dr. Mangum's proposal for calculating damages is a straightforward process of applying the class-wide overcharge to the Tuna Purchasers' net sales records. *See supra* n.19. That proposal does not give rise to a concern about individualized mini-trials to determine each class member's damage award. "That the defendant might attempt to pick off the occasional class member here or there through individualized rebuttal does not cause individual questions to predominate." *Halliburton*, 573 U.S. at 276.

[32] The Supreme Court expressly held open the question "whether every class member must demonstrate standing before a court certifies a class." *TransUnion*, 141 S.Ct. at 2208 n.4 (emphasis omitted). Outside the class action context, the Supreme Court has held that each plaintiff must demonstrate Article III standing in order to seek additional money damages and, therefore, a litigant must demonstrate Article III standing in order to intervene as a matter of right. *Town of Chester v. Laroe Ests., Inc.*, 137 S.Ct. 1645, 1651, 198 L. Ed. 2d 64 (2017). But the Supreme Court has long recognized that in cases seeking injunctive or declaratory relief, only one plaintiff need demonstrate standing to satisfy Article III. *See, e.g., Baggett v. Bullitt*, 377 U.S. 360, 366 n.5, 84 S. Ct. 1316, 12 L. Ed. 2d 377 (1964); *Rumsfeld v. F. for Acad. & Institutional Rts., Inc.*, 547 U.S. 47, 52 n.2, 126 S. Ct. 1297, 164 L. Ed. 2d 156 (2006); *Horne v. Flores*, 557 U.S. 433, 446-47, 129 S. Ct. 2579, 174 L. Ed. 2d 406 (2009). We have likewise applied this rule where a class sought injunctive or equitable relief. *See Bates v. United Parcel Serv., Inc.*, 511 F.3d 974, 985 (9th Cir. 2007) (en banc). We therefore overrule the statement in *Mazza* that "no class may be certified that contains members lacking Article III standing," 666 F.3d at 594, which does not apply when a court is certifying a class seeking injunctive or other equitable relief. We do not overrule *Mazza* as to any other holding which remain good law.

DPPs' evidence was capable of establishing antitrust impact on a class-wide basis. Because antitrust impact—i.e., that the Tuna Suppliers' collusion had a common, supra-competitive impact on a class-wide basis—is sufficient to show an injury-in-fact traceable to the defendants and redressable by a favorable ruling, the Tuna Purchasers have adequately demonstrated Article III standing at the class certification stage for all class members, whether or not that was required. *See TransUnion*, 141 S.Ct. at 2208 n.4.

Accordingly, we affirm the district court's certification of the DPP class.

V

We next turn to the Tuna Suppliers' arguments that the district court abused its discretion in determining that the evidence presented by the CFPs and EPPs was capable of proving the element of antitrust impact under California's Cartwright Act, thus satisfying the prerequisites of Rule 23(b)(3).

A

The CFP subclass includes individuals **[**57]** and commercial entities who purchased bulk sized packaged tuna (packages of 40 ounces or more) from six companies (direct purchasers) which had purchased the tuna from the Tuna Suppliers. The CFPs' theory of antitrust impact proceeds in two steps. First, the CFPs claim that the Tuna Suppliers' conspiracy resulted in the direct **[*683]** purchasers paying an overcharge. Second, the CFPs claim that the overcharge was passed on from the direct purchasers to the CFPs.

The CFPs supported this theory with the expert testimony and report of economist Dr. Michael Williams, who employed a methodology substantially similar to that employed by Dr. Mangum. Dr. Williams first conducted a regression analysis to determine the overcharge the CFPs' suppliers (i.e., the six direct purchasers) incurred because of the Tuna Suppliers' collusion. Like Dr. Mangum's analysis, Dr. Williams's regression analysis controlled for the effect of other variables that affected price in order to isolate the effect of the Tuna Suppliers' collusion. Dr.

Williams concluded that COSI overcharged the CFPs' direct purchasers by 16.6 percent, StarKist by 18.2 percent, and Bumble Bee by 15.3 percent.

Next, Dr. Williams performed a separate **[**58]** regression analysis to determine if those overcharges passed through to the CFPs, and determined that the direct purchasers passed through 92 to 113 percent of their overcharge to the CFPs. Dr. Williams then performed two tests to verify that his estimates applied class-wide, both of which confirmed his theory.

To rebut Dr. Williams's analysis, the Tuna Suppliers relied on a critique by economist Dr. Linda Haider. Dr. Haider asserted that Dr. Williams erroneously assumed that all CFPs paid a common overcharge and that the same overcharge was passed through to the individual CFPs. Dr. Haider also contended that some of the CFP class members, such as food preparers and distributors, were not impacted because they could have passed through their overcharges to other purchasers downstream. Finally, Dr. Haider claimed that Dr. Williams's model was unreliable because it failed to account for non-defendant tuna purchased by the CFPs' direct purchasers.

The district court reviewed Dr. Williams's report and testimony as well as Dr. Haider's critiques, and after resolving the parties' disputes, concluded that Dr. Williams's methodology was valid and capable of resolving the antitrust impact issue **[**59]** in a single stroke, even though the Tuna Suppliers could raise the same critiques at trial to persuade the jury.

On appeal, the Tuna Suppliers argue that the district court abused its discretion in concluding that Dr. Williams's methodology satisfied Rule 23(b)(3)'s requirement of common proof of antitrust impact, because Dr. Williams erred in assuming that all direct purchasers were overcharged by the same percentage and that each class member was subject to the same pass-through rate. We disagree. As explained in Section IV, *supra*, a district court does not abuse its discretion in concluding that a regression model such as the one used by Dr. Williams may be *capable* of showing class-wide antitrust impact, provided that the district court considers factors that may undercut the model's reliability (such as unsupported assumptions, erroneous inputs, or nonsensical outputs such as false positives) and resolves disputes raised by the

parties. The district court did so in this case, and therefore did not abuse its discretion in concluding that Dr. Williams's methodology was reliable and capable of showing class-wide impact.

We also reject the Tuna Suppliers' argument based on Dr. Haider's contention **[**60]** that some CFP class members may have passed on their overcharges to downstream purchasers. Dr. Haider claimed that the CFPs' ability to prove common impact was problematic because the impact of overcharges on class members who **[*684]** passed on their overcharges would be different from the impact on members who did not pass on such overcharges. The district court did not abuse its discretion in rejecting this argument on the ground that the Tuna Suppliers had not shown that determining whether or not those class members had passed overcharges down the distribution chain would overwhelm the common issues and require an individualized analysis. Therefore, the district court could reasonably conclude that the common question of antitrust impact predominated over individualized questions concerning a passed-on overcharge.

B

The EPP subclass contains individual consumers who purchased the Tuna Suppliers' products for personal consumption. Thus, like the CFPs, the EPPs are indirect purchasers whose theory of antitrust impact depends on two separate overcharges: first, an overcharge by the Tuna Suppliers to the direct purchasers (i.e., retail stores), and then an overcharge passed on to the EPPs. To **[**61]** carry their burden of showing they could establish class-wide overcharges through common proof, the EPPs offered the testimony of economist Dr. David Sunding, who employed a methodology substantially similar to that employed by Dr. Mangum and Dr. Williams.

Like Drs. Mangum and Williams, Dr. Sunding first conducted a regression analysis to isolate the impact of the collusion on the direct purchasers, which he concluded was an 8.1 percent overcharge from COSI, 4.5 percent from StarKist, and 9.4 percent from Bumble Bee. He then determined that the overcharges passed through to the EPP class members ranged from 65.3 to

135 percent with an estimated pass-through rate of 100 percent for the entire class. Dr. Sunding provided qualitative, quantitative and anecdotal evidence to support his assumption of a pass through rate for the entire class, including an examination of retail scanner data and the Tuna Suppliers' internal records.

Dr. Haider critiqued Dr. Sunding's methodology and findings on many of the same grounds as she criticized Dr. Williams's model and conclusions. She also made the additional criticisms that Dr. Sunding's methodology produced absurd results because it showed prices **[**62]** that made no economic sense, and that his model ignored, and therefore failed to control for, important factors like loss-leader and focal point pricing. The district court analyzed the evidence and the experts' disputes, and concluded that Dr. Sunding's report and testimony were capable of showing antitrust impact common to the class, for the same reasons explained in the court's analysis of Dr. Mangum's and Dr. Williams's models. The district court determined that Dr. Haider's additional critiques were based either on a misreading of Dr. Sunding's report, or her own miscalculations.

On appeal, the Tuna Suppliers argue only that Dr. Sunding's model and testimony was not capable of proving common impact for all class members because of its use of "averaging assumptions." This argument fails for the reasons explained above. *See supra* Section IV.A. Thus, the district court properly considered and rejected Dr. Haider's arguments, and determined that Dr. Sunding's methodology was capable of proving antitrust impact on a class-wide basis. That is enough to satisfy Rule 23(b)(3).

VI

In a complex market such as the one at issue here, where different purchasers with different bargaining power purchased a **[**63]** range of products at different prices from different suppliers, commentators have raised reasonable questions whether statistical models are capable of resolving the issue of antitrust impact with common **[*685]** proof. *See, e.g.*, Michelle M. Burtis & Darwin V. Neher, *Correlation and Regression Analysis in Antitrust Class Certification*, 77 Antitrust L.J. 495, 518 (2011). But such statistical models and other evidence

have been accepted as probative in a range of litigation contexts, and the Supreme Court has made clear that the permissibility of statistical evidence "turns not on the form a proceeding takes—be it a class or individual action—but on the degree to which the evidence is reliable in proving or disproving the elements of the relevant cause of action." *Tyson Foods*, 577 U.S. at 455. Here the district court did not abuse its discretion in rigorously analyzing such statistical evidence, determining that it was not flawed in a manner that would make it incapable of providing class-wide proof, *see supra* Section III.C, concluding that the evidence was sufficient to sustain a jury verdict on the question of antitrust impact for the entire class, and preserving the defendants' ability to challenge the persuasiveness of such evidence at trial. We therefore **[**64]** affirm the district court's decision to certify the Tuna Purchasers' three subclasses under Rule 23(b)(3). Nevertheless, the Tuna Suppliers will have the opportunity to convince a jury that not all class members were overcharged due to their collusion.

AFFIRMED.

Dissent by: Kenneth K. Lee

Dissent

LEE, Circuit Judge, with whom KLEINFELD, Circuit Judge, joins, dissenting:

Over the past two decades, plaintiffs have notched over $103 *billion* in settlements from securities class actions alone.[1] If we include other types of class actions—wage and hour, consumer lawsuits, antitrust disputes, and many others—that settlement amount almost certainly swells up by tens of billions of dollars more. These settlement sums are staggering because class action cases rarely go to trial. If trials these days are rare, class action trials are almost extinct.[2] And it is no wonder why class actions settle so often: If a court certifies a class,

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[1] *See* Securities Class Action Settlements—2019 Review and Analysis, Harvard Law School Forum on Corporate Governance, available at https://corpgov.law.harvard.edu/2020/03/11/securities-class-action-settlements-2019-review-and-analysis/ (last visited Oct. 21, 2021).

the potential liability at trial becomes enormous, maybe even catastrophic, forcing companies to settle even if they have meritorious defenses.

That is why the Supreme Court has urged lower courts to "rigorous[ly]" scrutinize whether plaintiffs have met class certification requirements. *See* ***[**65]*** *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 351, 131 S. Ct. 2541, 180 L. Ed. 2d 374 (2011). The majority opinion, however, allows the district court to certify a class, even though potentially about one out of three class members suffered no injury. But if defendants' econometrician expert is correct that almost a third of the class members may not have suffered injury, plaintiffs have not shown the predominance of common issues under Rule 23(b).

The district court acknowledged the dueling experts' differing opinions on this crucial question but held that it would leave that issue for another day—at trial—because it involves a merits issue that a jury should decide. *See In re Packaged* ***[*686]*** *Seafood Prods. Antitrust Litig.*, 332 F.R.D. 308, 325-28 (S.D. Cal. 2019). But as a practical matter, that day will likely never come to pass because class action cases almost always settle once a court certifies a class. A district court thus must serve as a gatekeeper to resolve key issues implicating Rule 23 requirements—including whether too many putative class members suffered no injury—at the class certification stage. *See Med. & Chiropractic Clinic, Inc. v. Oppenheim*, 981 F.3d 983, 992 (11th Cir. 2020) ("Rule 23 makes clear that the district court in which a class action is filed operates as a gatekeeper").

Punting this key question until later amounts to handing victory to plaintiffs because this case will likely settle without the court ever deciding that issue. The refusal **[**66]** to address this key dispute now is akin to the NFL declining to review a critical and close call fumble during the waning minutes of the game unless and until the game reaches overtime (which, of course, will likely never occur if it does not decide the disputed call). Such a practice is neither fair nor true to the rule.

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[2] *See, e.g.*, Securities Class Action Filings, 2020 Year in Review, Cornerstone Research, at 18, available at https://www.cornerstone.com/Publications/Reports/Securities-Class-Action-Filings-2020-Year-in-Review (last visited Oct. 21, 2021) (noting only 11 securities class action cases tried to verdict in the past quarter century and only one tried since 2014).

I thus respectfully dissent.

* * * *

The U.S. Department of Justice's investigation revealed that the three largest domestic producers of packaged tuna colluded to try to inflate the prices of their products. This class action lawsuit soon followed the criminal indictment. Among the plaintiffs include the direct purchasers of the tuna products, ranging from multibillion dollar chain retailers to small mom-and-pop stores. Not surprisingly, some plaintiffs (such as Walmart) wield substantial negotiating leverage: They can demand lower prices or extract additional promotional credits or rebates that defray the offered price. In contrast, an owner of a bodega likely cannot demand even an audience with the tuna producers, let alone ask for lower prices or more promotional credits.

Despite the varying negotiating power among the plaintiffs, their expert, Dr. Russell Mangum **[**67]** III, concluded that the tuna producers overcharged the direct purchasers by an average of 10.28%. He also suggested that about 5.5% of the class may not have suffered an injury because of this price-fixing. In contrast, the defendants' expert, Dr. John Johnson, offered an analysis showing that potentially about 28% of the class members suffered no injury.

Faced with this gaping difference between the two experts' conclusions, the district court acknowledged that Dr. Johnson's "criticisms are serious." *In re Packaged Seafood*, 332 F.R.D. at 328. But it held that this question should be left for trial because Dr. Mangum's method was reliable under *Daubert* and "*capable* of showing" class-wide impact. *Id.* The majority agrees with the district court, ruling that a class can be certified—even if potentially one out of three members suffered no injury—because Plaintiffs' expert offered a method "capable" of measuring class-wide impact and the district court can winnow out those uninjured members later at trial. But the majority opinion conflicts with Rule 23's text, common sense, and precedent from other circuits.

I. The district court did not "rigorously" scrutinize the dueling experts' opinions about uninjured class members.

While around **[**68]** 10,000 class action lawsuits are filed annually[3] , class actions are **[*687]** "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) (quoting *Califano v. Yamasaki*, 442 U.S. 682, 700-01, 99 S. Ct. 2545, 61 L. Ed. 2d 176 (1979)). Rule 23 thus establishes stringent requirements for certifying a class.

Among the Rule 23 requirements, the plaintiff must show that "questions of law or fact common to class members predominate over any questions affecting only individual members." Fed. R. Civ. 23(b)(3). The word "common" means "belonging to or shared . . . by all members of a group," while "predominate" means "to hold advantage in numbers or quantity."[4] Rule 23(b)(3) thus requires that questions of law or fact be shared by all or substantially all members of the class.

The Supreme Court has also reminded us that Rule 23 does not establish a "mere pleading standard." *Wal-Mart*, 564 U.S. at 350. Rather, plaintiffs must prove by a preponderance of the evidence that they have met the Rule 23 requirements. *See id.*; Maj. Op. at 22-23. Rule 23 imposes a requirement on the trial court, too. A trial court can certify a class only after engaging in a "rigorous analysis" and determining that the plaintiff has satisfied Rule 23. *Wal-Mart*, 564 U.S. at 351. And in conducting that "rigorous analysis," **[**69]** trial courts "[f]requently" must assess "the merits of the plaintiff's underlying claim" because the issues are often intertwined. *Id.*

Rule 23's "rigorous analysis" is different from "reliable" or "relevant." *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 982-84 (9th Cir. 2011). A trial court must do more than just consider one

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[3] *Class Actions 2021*, Lexology, Jonathan D. Polkes and David J. Lender, eds., at 91 (2021).

[4] "Common" and "predominance," *Merriam-Webster* Dictionary, available at *www.merriam-webster.com/dictionary* (last checked on Oct. 21, 2021).

side's expert opinion as "reliable" and then kick the can down the road until trial. Rather, it must dig into the weeds and decide the battle of dueling experts if their dispute implicates Rule 23 requirements.

Here, the two experts' contentions centered on Rule 23(b)(3)'s predominance requirement—whether it has been met if the defendants' expert concludes that potentially a significant number of putative class members were uninjured. Plaintiffs' expert argued that only about one out of twenty class members likely did not suffer an injury, while defendants' expert maintained it was potentially more than one out of four. The district court held that the plaintiffs' expert's opinion passed muster under *Daubert* but admitted that the defendants' expert offered "serious" criticism, too. The district court admirably analyzed this difficult issue but ultimately did not resolve it, ruling that a jury should decide it at trial.

Despite the detailed analysis of the **[**70]** district court, I believe it abused its discretion in committing the same error that we cautioned against in *Costco*. There, the two dueling experts offered contrasting opinions on whether Costco's alleged discrimination was regional or nationwide, which touched upon Rule 23(a)'s commonality requirement (*i.e.*, whether all the putative class members nationwide suffered discrimination). The trial court held the plaintiffs' expert was reliable under *Daubert*, and declined to decide which experts' opinion should prevail at the class certification stage. It then certified a class and ruled that this "battle of the experts" issue could be decided at trial because Costco's criticisms of the expert report "attack the weight of the evidence and not its admissibility." *Id.* at 982 (quoting district court opinion).

[*688] But because that dispute implicated Rule 23(a)'s commonality requirement, we reversed the district court's certification order and directed it to address it at the class certification stage. As we put it, the trial court "confused" the *Daubert* standard's "reliable" requirement with the "rigorous analysis" standard for Rule 23. *Id.* at 982 ("Instead of judging the persuasiveness of the evidence presented, the district court seemed to end its **[**71]** analysis of the plaintiffs' evidence after determining such evidence was merely admissible."). Rather than "examining the merits [of the dispute between experts] to decide this issue," the trial court "merely concluded

that, because both Plaintiffs' and Costco's evidence was admissible, a finding of commonality was appropriate." *Id.* at 984. That was error.

And that is exactly what happened here. The district court found plaintiffs' expert to be reliable under *Daubert*, but it also conceded that the defendants' expert offered a "serious" critique of plaintiffs' expert opinion. The district court ultimately held that resolving this "battle of the experts" was a merits issue. But the dispute over the number of uninjured class members overlaps with Rule 23(b)(3)'s predominance requirement as well as Rule 23(a)'s lower threshold commonality requirement. Simply put, a plaintiff cannot prove that common issues predominate if one out of three putative class members suffered no harm. *Cf. Mazza v. Am. Honda Motor Co., Inc.*, 666 F.3d 581, 596 (9th Cir. 2012) ("[T]he relevant class must be defined in such a way as to include only members who were [harmed by being] exposed to advertising that is alleged to be materially misleading."). If a large number of class members "in fact suffered no injury," **[**72]** identifying those class members "will predominate." *In re Asacol Antitrust Litig.*, 907 F.3d 42, 53-54 (1st Cir. 2018). Thus, the district court had to "examin[e] the merits" of this dispute between the experts, and not "merely conclude[] that" both expert reports are reliable and admissible. *Costco*, 657 F.3d at 984.

The majority holds that Dr. Mangum's estimate of a 10.2% "average" price inflation meets Rule 23's requirements because it shows a method "capable" of showing common antitrust impact. The majority appears to distinguish between (i) cases in which the class members "*logically*" could not have been harmed (because, for example, they were never exposed to the misleading advertisement) or there is insufficient evidence to support commonality, and (ii) cases like this one in which an expert holds that many class members *in reality* may not have suffered any harm, even if they theoretically could have. Maj. Op. 26, n.9. In the former scenario, the majority says that a class cannot be certified because logically there cannot be commonality under Rule 23; in the latter case, the majority appears to argue that it is a merits issue because a jury will need to assess the persuasiveness of the expert's opinion.

I believe that creates a false distinction. Nothing in our decision in *Costco* or **[**73]** the Supreme Court's opinion in *Wal-mart* creates such a difference. If the evidence presented implicates Rule 23—as it does here—then the district court must decide whether the plaintiffs have "prove[n] that there are *in fact* . . . common questions of law or fact," even if it means assessing the persuasiveness of the expert opinions. *Wal-mart*, 564 U.S. at 350-51 (emphasis in original). In *Costco*, we chastised the district court for not "judging the persuasiveness of the evidence presented" and "end[ing] its analysis of the plaintiffs' evidence after determining such evidence was merely admissible." 657 F.3d at 982. If we had to refrain from deciding the persuasiveness of an expert opinion **[*689]** used to show commonality, a plaintiff could prevail on class certification by merely offering a well-written and plausible expert opinion. *See West v. Prudential Sec., Inc.*, 282 F.3d 935, 938 (7th Cir. 2002) (failure to resolve dueling experts "amounts to a delegation of judicial power to the plaintiffs, who can obtain class certification just by hiring a competent expert").

Admittedly, resolving a battle of dueling experts over highly technical issues may seem like a difficult job for a court. But that tough task is likely even more difficult and daunting for jurors. In the end, a "district judge may not duck hard questions **[**74]** by observing that each side has some support . . . Tough questions must be faced and squarely decided, if necessary by holding evidentiary hearings and choosing between competing perspectives." *Id.* After reviewing the evidence, a district court must make findings of fact necessary for determining whether Rule 23's requirements have been met.

And here, the expert opinion offered by Plaintiffs to show commonality (though admissible) is not persuasive. The majority contends that the expert's model is capable of measuring class-wide impact through an "averaging assumption" of 10.2% price inflation from the price-fixing conspiracy. Put another way, the model assumes that almost all class members suffered an injury because the price-fixing would elevate the list price of tuna for everyone, even if individual class members ultimately paid different prices for the tuna. But the expert's assumption flies against common sense and empirical evidence. Powerful retailers (like Walmart) are not passive

or ill-informed consumers; they will not sit still when faced with a price increase. They will fiercely negotiate the list price down, or more likely, demand promotional credits or rebates that offset any **[**75]** price increase. *See* R. Pandey, et al., *Factors Influencing Organization Success: A Case Study of Walmart*, International Journal of Tourism & Hospitality in Asia Pasific, Vol. 4, No. 2, June 2021. *See also* Gary Rivlin, *Rigged: Supermarket Shelves for Sale*, Center for Science in the Public Interest, September 2016, available at cspinet.org/Rigged (last visited January 4, 2021).

Major retailers wield significant power over manufacturing and food companies because they represent the major channel to distribute the food products. If a major retail chain refuses to carry a company's product after a pricing dispute, it can significantly affect that company's bottom line. As one case study put it, "Walmart has huge bargaining power since . . . it is one of the largest distributors for manufacturing [sic]. For instance, 17% of the total sales of P&G and 38.7% of the total sales of CCA Industries rely on Walmart stores. Without Walmart, these businesses would be unable to operate." Pandey, *supra* page 10, at 120.

Large retailers can also extract rebate or promotional concessions from the companies by threatening to place their products at the bottom of the shelves or less-visited aisles where consumers **[**76]** are less likely to notice them. All told, large retailers use this power to "collect more than $50 billion a year in trade fees and discounts from food and beverage companies." Rivlin, *supra* page 10, at ii. And "[f]ood manufacturers pay these fees . . . because they have no choice. The stores are the gatekeepers." *Id.* at 21.

None of this is to say that Wal-Mart and other retailers achieved those price discounts and promotional credits or rebates here. We simply do not know because Plaintiffs' expert did not adequately consider **[*690]** it.[5] The only way we can find out if Wal-Mart and other major retailers suffered any injury (and if so, how much) would be if we conducted highly individualized

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[5] The majority cites the deposition testimony of Plaintiffs' expert to argue that he considered promotional credits and rebates. Maj. Op. 36, n.16. But the expert added the caveat that he did so only in instances that he "could reliably" calculate the data. He then conceded that he did not include "discount or promotional information" with much of the data but said that "I have done all that I could." He ultimately concluded that he could measure damages by relying on the average 10.2% "overcharge" analysis in his expert report.

analyses of each class member. But that would defeat the commonality requirement under Rule 23.

The majority seemingly waves away this difference in negotiating power between the class members by relying on our oft-quoted language that the "need for individualized findings as to amount of damages does not defeat class certification." Maj. Op. 30 (citing *Vaquero v. Ashley Furniture Indus., Inc.*, 824 F.3d 1150, 1155 (9th Cir. 2016)*; Pulaski & Middleman, LLC v. Google, Inc.*, 802 F.3d 979, 988 (9th Cir. 2015)).

I believe our court has misconstrued that often-quoted language to create a sweeping rule that gives a free pass to the intractable problem of highly individualized **[**77]** damages analyses. And such a rule also conflicts with the Supreme Court's holding that a class action must be capable of being resolved in "one stroke." *Wal-mart*, 564 U.S. at 350; *see also Comcast*, 569 U.S. at 35 (requiring a "rigorous analysis" to confirm that the damages model is "consistent with its liability case").

We first stated that the "amount of damages is invariably an individual question and does not defeat class action treatment" in *Blackie v. Barrack*, 524 F.2d 891, 905 (9th Cir. 1975). That was a securities fraud class action, and we recognized that "computing individual damages will be virtually a *mechanical task*" because "the amount of price inflation during the period can be charted." *Id.* (emphasis added). Put another way, damages can be easily calculated because it is a plug-and-play exercise: Look at the number of shares bought by each shareholder and the price of the share that day, and compare it to the price inflation caused by the misrepresentation. While each class member may have individualized damages, the damages can be easily calculated for the entire class in "one stroke." *See Wal-mart*, 564 U.S. at 350.

Since *Barrack*, we have applied that concept mostly in employment and wage-and-hour cases. *See, e.g., Vaquero*, 824 F.3d at 1152 (suing for payment for unpaid hours on non-sales work); *Levya v. Medline Indus. Inc.*, 716 F.3d 510, 514 (9th Cir. 2013) (class action based on wage **[**78]** and hour claims in which defendant's "computerized payroll and time-keeping database would enable the court to accurately calculate damages"). Wage-and-hour cases

present another mechanical application scenario: a class administrator can easily look at the employer's payroll records and calculate the number of hours or wages that each employee was underpaid. At times, however, we have quoted that language without determining whether damages could be calculated mechanically or if the court would have to engage in individualized mini-trials for damages. *See, e.g., Yokoyama v. Midland Nat. Life Ins. Co.*, 594 F.3d 1087, 1094 (9th Cir. 2010) (stating that individualized damages do not defeat class certification in case involving misleading statements in annuities promotional materials).

[*691] But here, it will not be a "mechanical task" to calculate the damages for each class member. *Blackie*, 524 F.2d at 905. The district court will need to conduct individualized mini-trials to determine whether each class member suffered an injury, and if so, what the damages are for each member. That would upend Rule 23's commonality requirement. The majority opinion notes that commonality may still be met, even if a defendant "might attempt to pick off the occasional class member here or there." Maj. Op. 56, n. **[**79]** 31 (citing *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 276, 134 S. Ct. 2398, 189 L. Ed. 2d 339 (2014)). But our case does not involve a "pick off" of a few uninjured class members, but rather a massive grab bag of class members—perhaps almost a third of the class—who may not have suffered any harm. The district court thus will have to engage in individualized mini-trials to figure out who suffered an injury.

Finally, the majority suggests that an oversized class with unharmed class members does not pose a practical problem if a method can separate the uninjured from the injured at trial. No harm, no foul, the majority implies. But that cannot be so if a large number of class members (certainly, a third) suffered no injuries. Suppose that 80% of the putative class members suffered no harm. Could a district court still certify a class just because it could later winnow out the 80% who were uninjured? Would Rule 23(b)'s predominance of common issues be met even if only 20% of the putative members belong in the class? By definition, a class with 80% uninjured members cannot present a predominance of common issues because they have nothing in common with the remaining sliver of injured members.

If we allow a court to certify a class in which a large number of putative class members have **[**80]** suffered no injury, we will allow plaintiffs to weaponize Rule 23 to impose an in terrorem effect on defendants. The "[c]ertification of the class is often, if not usually, the prelude to a substantial settlement by the defendant because the costs and risks of litigating further are so high." *Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 568 U.S. 455, 485, 133 S. Ct. 1184, 185 L. Ed. 2d 308 (2013) (Scalia, J., dissenting). Indeed, "when damages allegedly owed to tens of thousands of potential claimants are aggregated and decided at once, the risk of an error will often become unacceptable. Faced with even a small chance of devastating loss, defendants will be pressured into settling questionable claims." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350, 131 S. Ct. 1740, 179 L. Ed. 2d 742 (2011).

So if a court certifies a class with many uninjured class members, it dramatically expands the potential exposure and artificially jacks up the stakes. It matters little that the uninjured class members can be separated at trial because with "the stakes so large . . . settlement becomes almost inevitable—and at a price that reflects the risk of a catastrophic judgment as much as, if not more than, the actual merit of the claims." *In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1016 (7th Cir. 2002). The opportunity at trial to jettison uninjured members from the certified class is a phantom solution because defendants will have little choice but to settle before **[**81]** then.

II. The majority's rejection of a *de minimis* rule creates a circuit split.

I believe the majority also errs in rejecting a *de minimis* rule. To be sure, a plaintiff need not show that every single putative class member has suffered an injury. But the number of uninjured class members should be *de minimis*—based on Rule 23's language, common sense, and precedent from other circuits.

[*692] First, as noted above, the words "common" and "predominate" in Rule 23(b)(3) suggest that the class should include only (or mostly only) people who have suffered an injury. If one-

third—or half or two-thirds—of the class members suffered no injury, it follows that "common" issues would not "predominate," as required under the text of Rule 23, because those uninjured class members have little in common with those who have been harmed. In short, Rule 23 allows a *de minimis* number of uninjured members but no more.

Second, allowing more than a *de minimis* number of uninjured class members tilts the playing field in favor of plaintiffs. By expressly rejecting a *de minimis* rule, the majority's opinion will invite plaintiffs to concoct oversized classes stuffed with uninjured class members—with little fear of having their class certification bids **[**82]** being denied for lack of "predominance" or "commonality." And in creating these grossly oversized classes, plaintiffs will inflate the potential liability (and ratchet up the attorney's fees based in part on that amount) to extract a settlement, even if the merits of their claims are questionable.

Finally, the majority opinion needlessly creates a split with other circuits that have endorsed a *de minimis* rule. The D.C. Circuit, for example, suggested that "5% to 6% constitutes the outer limits of a *de minimis* number." *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 934 F.3d 619, 624-25, 443 U.S. App. D.C. 86 (D.C. Cir. 2019) (cleaned up). The district court had found that the class of 16,065 members (12.7% of whom were uninjured) failed to meet the predominance requirement because more than a "*de minimis*" number were uninjured. *Id.* at 623-24. The D.C. Circuit on appeal affirmed, ruling that the plaintiffs' model "even if sufficiently reliable, does not prove classwide injury." *Id.* at 623. Put another way, "even assuming the model can reliably show injury and causation for 87.3 percent of the class, that still leaves the plaintiffs with no common proof of those essential elements of liability for the remaining 12.7 percent." *Id.* at 623-24

Likewise, the First Circuit suggested that "around 10%" of uninjured class members marks **[**83]** the *de minimis* border. *See In re Asacol*, 907 F.3d at 47, 51-58. The First Circuit was perhaps willing to look past "a very small absolute number of class members" who have suffered no injury because they "might be picked off in a manageable, individualized process at

or before trial." *Id.* at 53. But if "there are apparently thousands who in fact suffered no injury . . . [t]he need to identify those individuals will predominate." *Id.* at 53-54.

* * * *

While this case centers on the narrow issue of price-fixing of canned tuna, its implications extend beyond to a wide sea of class action cases. I fear that today's decision will unleash a tidal wave of monstrously oversized classes designed to pressure and extract settlements.

I respectfully dissent.

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Allen v. Ollie's Bargain Outlet, Inc.

United States Court of Appeals for the Third Circuit

March 15, 2022, Argued; June 24, 2022, Filed

No. 21-2121

Reporter

37 F.4th 890 *; 2022 U.S. App. LEXIS 17409 **

IRMA ALLEN; BARTLEY MICHAEL MULLEN, Jr., Individually and on behalf of all others similarly situated v. OLLIE'S BARGAIN OUTLET, INC., Appellant

Prior History: **[**1]** On Appeal from the United States District Court for the Western District of Pennsylvania. (D.C. Civil No. 2-19-cv-00281). District Judge: Honorable William S. Stickman, IV.

Allen v. Ollie's Bargain Outlet, Inc., 2021 U.S. Dist. LEXIS 58420, 2021 WL 1152981 (W.D. Pa., Mar. 26, 2021)

Counsel: For Appellant: Richard L. Etter [ARGUED], Ogletree Deakins, Pittsburgh, PA; David L. Schenberg, Ogletree Deakins, St. Louis, MO.

For Appellees: R. Bruce Carlson, Carlson Brown, Sewickley, PA; Gary F. Lynch, Elizabeth Pollock-Avery, Kelly K. Iverson, Jamisen A. Etzel [ARGUED], Nicholas Colella, Lynch Carpenter, Pittsburgh, PA.

Judges: Before: JORDAN, KRAUSE, and PORTER, Circuit Judges. PORTER, Circuit Judge, concurring.

Opinion by: PORTER

Opinion

[*892] OPINION OF THE COURT

PORTER, *Circuit Judge*.

Irma Allen and Bartley Mullen are disabled and need wheelchairs to move about. Hoping to find "Good Stuff Cheap," they went shopping at two different bargain stores owned by Ollie's Bargain Outlet, Inc. ("Ollie's"). But once inside Ollie's, they encountered an obstacle course: pillars, clothing racks, and boxes blocked their way. Dissatisfied with their shopping experiences, they filed a putative class action against Ollie's under Title III of the Americans with Disabilities Act ("ADA"). They seek permission to sue on behalf of every similarly disabled individual **[**2]** who shops at any Ollie's store in the United States and has or will encounter interior access barriers. The District Court certified the proposed class. We will vacate and remand. The District Court abused its discretion by certifying an overly broad class based on inadequate evidence of numerosity and commonality.

I

A

Ollie's owns and operates over four hundred retail stores across twenty-nine **[*893]** states.[1] Allen and Mullen visited two different Ollie's stores in Monaca and New Castle, Pennsylvania. There, they encountered obstacles blocking their path of travel, including inventory on the floor, clothing racks placed too close together, boxes, pallets, and structural pillars. Pictures taken later at these stores show aisles similarly narrowed by inventory carts, pallets, columns, boxes, or goods on the floor. Suspecting a pattern, Allen and Mullen's lawyers hired investigators to take photographs and measure aisle width at several Ollie's stores in Pennsylvania. After this preliminary investigation, Allen and Mullen sued Ollie's under Title III of the ADA.

B

Title III of the ADA prohibits retailers like Ollie's from discriminating "on the basis of disability in the full and equal enjoyment **[**3]** of the goods, services, facilities, privileges, advantages, or accommodations" they offer to the public. 42 U.S.C. § 12182(a). This general prohibition has several specific definitions that extend disability discrimination beyond disparate treatment or

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[1] Ollie's Bargain Outlet Holdings, Inc., 2021 Annual Report (Form 10-K) at 1 ("We have grown to 431 stores in 29 states as of January 29, 2022.").

invidious discrimination. Plaintiffs focus their complaint and argument on three specific definitions of Title III discrimination. We discuss these for background.

First, Title III discrimination includes "a failure to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford" goods, services, and the like to "individuals with disabilities." *Id.* § 12182(b)(2)(A)(ii). "To comply with this command, an individualized inquiry must be made to determine whether a specific modification for a particular person's disability would be reasonable under the circumstances as well as necessary for that person . . . ." *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 688, 121 S. Ct. 1879, 149 L. Ed. 2d 904 (2001).

Second, Title III discrimination includes "a failure to remove architectural barriers . . . in existing facilities, . . . where such removal is readily achievable." 42 U.S.C. § 12182(b)(2)(A)(iv). The Department of Justice gives the term "architectural barriers" a broad scope. For example, shelves, tables, chairs, vending machines, display racks, **[**4]** and furniture are treated as "architectural." 28 C.F.R. § 36.304(b)(3), (4). Architectural barriers must be removed only when "readily achievable," a standard that "means easily accomplishable and able to be carried out without much difficulty or expense." 42 U.S.C. § 12181(9).

Third, facilities built or altered after the ADA's effective dates must be "readily accessible to and usable by" the disabled. 42 U.S.C. § 12183(a); 28 C.F.R. §§ 36.401(a)(1), 402(a)(1). To be readily accessible, a facility must comply with the standards for accessible design. 28 C.F.R. § 36.406. Under section 403.5.1 of the most recent 2010 standards, aisles must generally be at least thirty-six inches wide, but can measure as little as thirty-two inches wide for short distances. 36 C.F.R. pt. 1191, app. D. Department of Justice rules require facilities to maintain accessible aisles "in operable working condition." 28 C.F.R. § 36.211(a).

Plaintiffs' "core contention" is that "Ollie's deliberately directs the placement of merchandise within aisles," causing a corporate-wide failure to maintain accessible aisles. Appellees' Br. 28. Under plaintiffs' theory, retail stores fail to maintain accessible aisles "in operable working condition" if they intentionally and recurringly block **[*894]** them with movable objects, a

position supported by Ninth Circuit precedent. *See Chapman v. Pier 1 Imports (U.S.) Inc.*, 779 F.3d 1001, 1009 (9th Cir. 2015) (retail **[**5]** store violated ADA when it had a pattern of obstructing aisles with objects like "step ladders"). Plaintiffs claim that Ollie's failure to modify its corporate policies to prevent this alleged merchandising practice is discriminatory, and they also suggest that some or all merchandising goods count as "architectural" barriers that must be removed.

C

After completing targeted discovery, plaintiffs moved to certify the following class under Federal Rule of Civil Procedure 23(b)(2):

> All persons with qualified mobility disabilities who have attempted, or will attempt, to access the interior of any store owned or operated by [Ollie's] within the United States and have, or will have, experienced access barriers in interior paths of travel.

App. 171. Before proceeding as a class under Rule 23(b)(2), plaintiffs had to satisfy Federal Rule of Civil Procedure 23(a). Under Rule 23(a), they had to "demonstrate, first, that '(1) the class is so numerous that joinder of all members is impracticable; '(2) there are questions of law or fact common to the class; '(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and '(4) the representative parties will fairly and adequately protect the interests of the class.'" *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 345, 131 S. Ct. 2541, 180 L. Ed. 2d 374 (2011) (quoting Fed. R. Civ. P. 23(a)). To satisfy Rule 23(b)(2), plaintiffs **[**6]** then had to show that Ollie's "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." *Id.* at 345-46 (quoting Fed. R. Civ. P. 23(b)(2)).

Before the District Court, Plaintiffs argued that joinder of class members was impracticable given the size of the class. They introduced three strands of evidence to support this assertion. First, data from the U.S Census Bureau's 2018 American Community Survey, estimating the number of people with ambulatory disabilities—meaning serious difficulty walking or climbing stairs—for each zip code with an Ollie's store. Second, twelve emails received by Ollie's customer service

over three years from or on behalf of patrons that use wheelchairs or have a mobility disability. Third, a declaration stating that over seven days, sixteen persons using wheelchairs or scooters were recorded by video at the two Ollie's locations where Allen and Mullen shopped.

Plaintiffs at first argued there were common questions based on Ollie's alleged failure to adopt ADA-specific standard operating procedures and employee training practices. In their reply brief, plaintiffs urged **[**7]** a narrower commonality argument, one they now press on appeal. They asserted that Ollie's "employees" have a common "practice" of "placing merchandise displays and stock in locations that block or limit accessibility," and they attributed this alleged practice to Ollie's corporate "merchandise stocking and display practices." App. 901-02. To support this commonality argument, plaintiffs cited allegations in their complaint, Allen's and Mullen's depositions, and photographs of Pennsylvania stores showing a "pattern and practice of path of travel obstructions." App. 901 n.8, 902 n.9.

D

The District Court certified the proposed class. The District Court agreed **[*895]** with plaintiffs that joinder of all class members would be impracticable. *Allen v. Ollie's Bargain Outlet, Inc.*, No. 2:19-CV-281, 2021 U.S. Dist. LEXIS 58420, 2021 WL 1152981, at *6 (W.D. Pa. Mar. 26, 2021). Adding Allen and Mullen, the twelve customer emails, and the sixteen individuals observed in two stores over seven days, the District Court concluded that plaintiffs "have concretely shown that thirty people with potential mobility disabilities are customers of Ollie's stores." *Id.* In the District Court's judgment, the circumstantial evidence of thirty potentially disabled patrons, together with the community survey estimates, was enough. *Id.* As the District **[**8]** Court put it, "[t]he statistical evidence presented already indicates that there is a good chance that the proposed class is numerous, and any speculation accompanying the statistical data alone is overcome by the addition of the concrete, case-specific evidence of written complaints and video footage." *Id.* 2021 U.S. Dist. LEXIS 58420, [WL] at *6 (citation omitted). Ollie's objected to the use of the customer complaints as inadmissible hearsay, but the District Court overruled the

objection, holding that non-expert evidence like the customer complaints need not be admissible to certify a class. *Id.* 2021 U.S. Dist. LEXIS 58420, [WL] at *5 n.5.

The District Court also held the proposed class presented common questions. It relied on a syllogism. First, "Ollie's policies are uniform and company-wide." *Id.* 2021 U.S. Dist. LEXIS 58420, [WL] at *7. Second, "[i]f Ollie's policies and procedures do, in fact, cause access barriers to unlawfully restrict individuals with disabilities from obtaining their desired goods, then proposed members who endured violations have suffered the same injury, the resolution of which will resolve a central issue in one fell stroke." *Id.* "As a result," the District Court held, "Plaintiffs have satisfied their burden of showing by a preponderance of the evidence that there are questions of law **[**9]** or fact common to the proposed class." *Id.* After finding the remaining requirements of Rule 23(a) were met, the District Court held that the proposed class satisfied Rule 23(b)(2) because "[a]n injunction requiring the removal of the existing access barriers, and the modification of Ollie's policies to prevent the use of access barriers restricting disabled individuals' use and enjoyment of Ollie's goods would provide appropriate relief to the proposed class." *Id.* 2021 U.S. Dist. LEXIS 58420, [WL] at *8.

This appeal followed.

II

The District Court had subject-matter jurisdiction under 28 U.S.C. § 1331. We have appellate jurisdiction under Rule 23(f) and 28 U.S.C. § 1292(e). *Mielo v. Steak'n Shake Operations, Inc.*, 897 F.3d 467, 473-74 (3d Cir. 2018). If the case proceeds to summary judgment or trial, the result may be different, but Allen and Mullen have adequately alleged Article III standing at this stage. *Id.* at 478-82.

We review a class certification order for abuse of discretion, which occurs if the trial court's decision rests on a clearly erroneous finding of fact, an errant conclusion of law, or an improper application of law to fact. *Marcus v. BMW of N. Am., LLC*, 687 F.3d 583, 590 (3d Cir. 2012). We

review questions of law, including whether the trial court applied the correct legal standard, de novo. *Steak'n Shake*, 897 F.3d at 474.

III

A

Under Rule 23, the proposed class must be "so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). This "rule prevents putative class representatives **[**10]** and their counsel, when joinder can be easily accomplished, from unnecessarily depriving members of **[*896]** a small class of their right to a day in court to adjudicate their own claims." *Marcus*, 687 F.3d at 594-95. As with every Rule 23 requirement, plaintiffs must show the class is numerous enough by a preponderance of the evidence. *Steak'n Shake*, 897 F.3d at 483-84. We presume joinder is impracticable when the potential number of class members exceeds forty. *Id.* at 486. This is a guidepost: showing the number of class members exceeds forty is neither necessary nor always sufficient. *Marcus*, 687 F.3d at 595. "The text" of Rule 23(a)(1) is "conspicuously devoid of any numerical minimum required for class certification." *In re Modafinil Antitrust Litig.*, 837 F.3d 238, 249 (3d Cir. 2016). But while a class of forty-one does not automatically satisfy Rule 23(a)(1), a putative class that size faces a relaxed burden under our precedent. By contrast, the "inquiry into impracticability should be particularly rigorous when the putative class consists of fewer than forty members." *Id.* at 250.

In recent opinions, we have given the numerosity requirement "real teeth." *Steak'n Shake*, 897 F.3d at 484. When plaintiffs cannot directly identify class members, they "must show sufficient circumstantial evidence specific to the products, problems, parties, and geographic areas actually covered by the class definition to allow a district **[**11]** court to make a factual finding. Only then may the court rely on 'common sense' to forgo precise calculations and exact numbers." *Marcus*, 687 F.3d at 596. And "where a putative class is some subset of a larger pool, the trial court may not infer numerosity from the number in the larger pool alone." *Hayes v. Wal-Mart Stores, Inc.*, 725 F.3d 349, 358 (3d Cir. 2013). In *Steak'n Shake*, for example, census data showing "there are between 14.9 million to 20.9 million persons with mobility disabilities

who live in the United States" was not enough to show numerosity under Rule 23(a)(1). 897 F.3d at 486. Applying these principles, we conclude the District Court abused its discretion when it found that plaintiffs had met their numerosity burden.

1

Plaintiffs argue that the 2018 American Community Survey estimates of persons with mobility disabilities would alone allow us to affirm the District Court's numerosity finding. But these survey estimates prove little. The survey measures anyone who reports serious difficulty walking or climbing steps. Plaintiffs acknowledge that the more relevant number of disabled persons—individuals needing wheelchairs— is about an order of magnitude lower, and they ask us to extrapolate more accurate regional numbers from different *national* census estimates. The national census study they **[**12]** cite estimates that persons needing wheelchairs are a small fraction of the population that has severe difficulty walking or climbing stairs. *See* Mathew W. Brault, U.S. Census Bureau, *Americans with Disabilities: 2010*, P70-131, Table A-1, 17 (July 2012) (8.3% of the U.S. population fifteen and older has a severe mobility disability, but only 1.5% uses a wheelchair), https://perma.cc/5V96-H5DS. But extrapolating the relevant number across every region would be hazardous speculation. "Trained experts commonly extrapolate from existing data." *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146, 118 S. Ct. 512, 139 L. Ed. 2d 508 (1997). Generalist Article III judges typically do not.

Regional population statistics like the survey are in any event insufficient. The District Court was right "that a district court's finding premised almost exclusively on statistical data is not enough to satisfy numerosity—something more is required." *Ollie's*, 2021 U.S. Dist. LEXIS 58420, 2021 WL 1152981, at *6. *Steak'n Shake* rejected reliance on statistical data **[*897]** documenting the number of disabled people not because it was national in scope, but because it did not allow us to "determine—rather than speculate about—the portion of those disabled individuals who have actually patronized a relevant Steak'n Shake restaurant, let alone the portion who have experienced or will **[**13]** experience an ADA violation at one of those restaurants." 897 F.3d at 486. The same remains true for regional population statistics. Regional estimates of a disabled

population showing proximity to a store may be more probative of disabled customers than national ones, depending on the quality and reliability of the study's statistical methods and practices, but they alone do not support a finding that a class is numerous. Consider Ollie's store in Monaca, Pennsylvania. The survey suggests there are about one thousand persons with mobility disabilities living in the same zip code. Plaintiffs would extrapolate that about a tenth of these residents, or one hundred Monaca residents, need wheelchairs to move about. Even if that extrapolation is accurate, however, we would still be left with no basis to determine what portion of those one hundred wheelchair-bound residents of Monaca are customers of Ollie's, let alone what portion have suffered a common ADA injury. We cannot infer numerosity from this large pool of residents.

The "something more" required by *Steak'n Shake* is concrete evidence of class members who have patronized a public accommodation and have suffered or will likely suffer common ADA injuries. We **[**14]** reject plaintiffs' argument that the community survey estimates alone are enough to carry their burden of proof.

We next turn to the other two strands of non-statistical evidence the District Court thought set this case apart from *Steak'n Shake*. While this evidence is probative, after examining all the evidence, we are still left with head-scratching speculation, insufficient to support a factual finding.

a.

The first strand of non-statistical evidence is plaintiffs' declaration stating that over seven days, sixteen persons using wheelchairs or scooters were recorded by video at the two Ollie's locations where Allen and Mullen shopped.[2] We agree that this declaration is "probative of the number of potentially disabled individuals visiting Ollie's stores." *Ollie's*, 2021 U.S. Dist. LEXIS

[2] Ollie's does not challenge the admissibility of this declaration, and for good reason. When a class certification "motion relies on facts outside the record," Federal Rule of Civil Procedure 43(c) allows trial courts to "hear the matter on affidavits." And the Judicial Code permits declarations instead of affidavits. 28 U.S.C. § 1746. Regardless of whether the Federal Rules of Evidence govern, the declaration was properly before the District Court.

58420, 2021 WL 1152981, at *5 n.6. But it is not enough to satisfy plaintiffs' burden of proof on numerosity, even considered alongside the community survey of disabled residents.

For one, the declaration does not allow us to determine what portion of disabled residents shop at Ollie's. Plaintiffs ask us to extrapolate customer numbers from a limited video sample of two stores over seven days, arguing the video footage suggests more than three hundred wheelchair-using customers shop **[**15]** at Ollie's every day. But that extrapolation rests on speculation, not a reasonable inference. The video, for starters, does not allow us to determine what portion of those wheelchair-using customers are disabled. To be disabled, the customers would need to have **[*898]** "a physical or mental impairment that substantially limits one or more major life activities," including "walking." 42 U.S.C. § 12102(1)(A), (2)(A). At least some wheelchair- or scooter-using customers may not qualify. *Cf. Richardson v. Chicago Transit Auth.*, 926 F.3d 881, 884 (7th Cir. 2019) (holding extreme obesity does not qualify as a physical impairment if it is not the result of a physiological disorder or condition). To be sure, we agree the District Court does not need to "determine as a matter of law that each of the sixteen individuals seen using a wheelchair are mobility disabled under the ADA before considering the photographs." *Ollie's*, 2021 U.S. Dist. LEXIS 58420, 2021 WL 1152981, at *5 n.6. In this case, the District Court used common sense to infer that at least some of the customers using wheelchairs are likely disabled. *Id.* We cannot say that common-sense inference was an abuse of discretion. It is fair to infer that at least some of the wheelchair-using customers are likely disabled under the ADA. Even if we accept the District Court's conclusion, however, the number **[**16]** of disabled customers observed in the video could range from zero to sixteen. Some evidence buttressing a correlation between the wheelchair-using and ADA-disabled populations would significantly strengthen this evidence.

Still, even assuming all sixteen customers were likely disabled and that none of them were repeat visitors, we have no basis to assume that the rate of wheelchair-using customers observed in the video footage sample is representative of Ollie's stores. Before we can extrapolate the limited sample across four hundred stores, our precedent requires at least some

evidence supporting a factual finding that disabled customers visit Ollie's "in roughly equal proportions" to the rate observed in the video. *Marcus*, 687 F.3d at 596. Otherwise, we remain in the realm of speculation, not common-sense inferences. And even if the declaration allowed us to determine the pool of wheelchair-bound Ollie's customers, the declaration still does not allow us to "determine—rather than speculate about—the portion of those disabled individuals who . . . have experienced or will experience an ADA violation at one of those" stores. *Steak'n Shake*, 897 F.3d at 486. The declaration does not suggest that the wheelchair-using customers observed in **[**17]** the video suffered an ADA violation in common with the class. At best, the declaration is evidence of the general pool of wheelchair-using Ollie's customers, not the more relevant subset of wheelchair-bound customers who have suffered common ADA injuries. The District Court appears to have assumed that evidence of injured customers was unnecessary to support numerosity. *See Ollie's*, 2021 U.S. Dist. LEXIS 58420, 2021 WL 1152981, at *6 n.7. If so, that was error. Evidence establishing the subset of injured customers, not just the general pool of wheelchair-using customers who shop at Ollie's, is necessary to support a finding that a class is likely numerous enough. *See Marcus*, 687 F.3d at 595. The putative class consists of persons with mobility disabilities who encountered or will encounter inaccessible aisles at an Ollie's store. There may well be millions of wheelchair-bound Ollie's customers across all twenty-nine states, but if none of them suffered or will likely suffer similar class injuries, they are not class members and do not support a finding of numerosity.

b.

The District Court also relied on what it characterized as "the written complaints of twelve individuals complaining, in one way or another, of various barriers adversely affecting the navigation of individuals **[**18]** who are wheelchair-bound." *Ollie's*, 2021 U.S. Dist. LEXIS 58420, 2021 WL 1152981, at *5. Unlike the community survey or the video, at least some of these **[*899]** customer complaints support the existence of putative class members with common ADA injuries. But there are far too few complaints, and not all of them support the District Court's finding.

At the outset, we note the parties dispute whether the customer complaints are admissible as evidence. Ollie's argues that the Federal Rules of Evidence apply during the class certification stage, and that the customer complaints are inadmissible hearsay. Plaintiffs respond that "fact" testimony—as opposed to expert opinion—need not be admissible to support class certification. The District Court agreed with plaintiffs, holding the Federal Rules of Evidence are inapplicable to nonexpert evidence used to certify a class. *Ollie's*, 2021 U.S. Dist. LEXIS 58420, 2021 WL 1152981, at *5 n.5. We decline to decide this question. For even assuming—and it is only an assumption—that the Federal Rules of Evidence do not govern the admissibility of the customer complaints, the record still would not establish numerosity.[3]

To begin, at least one of the twelve customer complaints does not support membership in the putative class. The relevant email says:

> Please pass this on to the management **[**19]** at the Columbus, GA store. My husband and I recently visited this store for the first time, and we were very impressed. My husband is a paraplegic, and uses a wheelchair while shopping. There were very few places he could not get into, and every employee he encountered asked if he needed help. The aisles were clear, and the merchandise was—for the most part—easy for him to reach. When we asked for help, it was given cheerfully and quickly. We enjoyed the experience, and plan to become regular customers. The employees of this store went above and beyond, and I just wanted you to know.

App. 711. The class definition is limited to disabled individuals who have experienced access barriers in interior access aisles. This disabled customer reportedly experienced clear aisles at his local Ollie's store in Georgia, so he is not a potential class member. The District Court clearly erred by relying on this email as evidence of a potential class member.

There may be others. Ollie's argues that other customer complaints, closely read, similarly do not support the existence of class members. For example, Ollie's argues that the District Court should have excluded two customer complaints made outside **[**20]** of Pennsylvania's two-year

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[3] Ollie's has preserved this argument and may raise it again on remand.

statute of limitations for personal injury claims. The District Court never considered these arguments. On remand, the District Court should determine whether the remaining complaints support the existence of putative class members. To do so, the District Court must be able to infer from the complaints that an Ollie's customer with a mobility disability suffered or will suffer a common ADA injury that falls within the putative class definition. Otherwise, the District Court cannot rely on the customer complaints to determine the existence of putative class members.

In any event, even assuming all eleven remaining customer complaints support a finding that there are at least eleven putative class members, and considering the declaration and the statistical evidence together, as the District Court did, we still find the evidence far too speculative. To recap, the community survey tells us nothing concrete about the portion of disabled residents who shop at Ollie's stores. The declaration tells us nothing about what portion of disabled customers suffered **[*900]** common ADA injuries, and little about what number of disabled residents shop at Ollie's. And the customer **[**21]** complaints are few. Eleven complaints over almost four years of company operations are hardly evidence of a sizable class. The customer complaints overall give us little reason to conclude that judicial economy supports depriving the apparently small number of complainants of their day in court by aggregating their individual claims in a classwide suit.

In short, after considering the record evidence, we have proof of a class that consists of Allen, Mullen, and at most eleven others. To establish numerosity, plaintiffs must do more to prove the existence of actual class members. *See In re Modafinil Antitrust Litig.*, 837 F.3d at 250 (suggesting a class of twenty or less would be too small to justify a class action). If plaintiffs cannot carry the burden on numerosity, Allen and Mullen may always seek relief individually.

3

While "the number of class members is the starting point," trial courts should weigh other factors relevant to the practicability of joinder under Rule 23(a)(1), including "judicial economy, the claimants' ability and motivation to litigate as joined plaintiffs, the financial resources of class members, the geographic dispersion of class members, the ability to identify future claimants,

and whether the claims are for injunctive **[**22]** relief or for damages." *In re Modafinil Antitrust Litig.*, 837 F.3d at 250, 253. Plaintiffs argue that factors other than the numerosity of the class also support the District Court's finding that joinder of class members would be impracticable. That may well be. But the District Court never exercised its broad discretion to consider these other Rule 23(a)(1) factors, and we are a court of review, so we decline to weigh these factors for the first time on appeal. On remand, however, the District Court remains free to consider plaintiffs' arguments and decide whether joinder would be impracticable based on all the relevant factors. We do not decide whether plaintiffs may show that joinder would be impracticable on this record. We hold only that the numerosity evidence considered alone is not enough to satisfy Rule 23(a)(1).

B

A class may be certified only if "there are questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). "Commonality requires the plaintiff to demonstrate that the class members have suffered the same injury. This does not mean merely that they have all suffered a violation of the same provision of law." *Dukes*, 564 U.S. at 349-50 (citation and quotation marks omitted). Instead, the claims "must depend upon a common contention." *Id.* at 350. "That common contention, moreover, must be of such **[**23]** 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.* This test ensures that the "claims can productively be litigated at once." *Id.* When deciding whether the class raises a common question, "the court cannot be bashful. It must resolve all factual or legal disputes relevant to class certification, even if they overlap with the merits—including disputes touching on elements of the cause of action." *Marcus*, 687 F.3d at 591 (quotation marks omitted).

The District Court abused its discretion when finding commonality for two reasons. First, it misapplied the relevant standards and certified a geographically overbroad class. Second, as we explained **[*901]** in *Steak 'n Shake*, a broad term like "access barriers" does not give rise to a common injury under the ADA.

1

The District Court found commonality satisfied for a class consisting of all Ollie's stores in the United States. The District Court reasoned that "[i]f Ollie's policies and procedures do, in fact, cause access barriers to unlawfully restrict individuals with disabilities from obtaining their desired goods, then proposed members **[**24]** who endured violations have suffered the same injury, the resolution of which will resolve a central issue in one fell stroke." *Ollie's*, 2021 U.S. Dist. LEXIS 58420, 2021 WL 1152981, at *7. "As a result," the District Court concluded, "Plaintiffs have satisfied their burden of showing by a preponderance of the evidence that there are questions of law or fact common to the proposed class." *Id.* The conclusion does not follow from the premise.

Before certifying the proposed class, the District Court must answer the very question it asked: whether plaintiffs have significant proof that Ollie's corporate policies, procedures, or practices *in fact* cause discrimination by stores nationwide. Posing a hypothetical common question is not enough to satisfy plaintiffs' burden of proof. There must be evidence the class proceeding will likely "produce a common answer." *Dukes*, 564 U.S. at 352. By failing to answer the commonality question, the District Court deferred plaintiffs' need to show commonality.

The District Court's legal error is not harmless. Our review of the record shows that commonality is not met by a preponderance of the evidence for this nationwide class. It is not enough that Ollie's has corporate policies and that some or all stores in Pennsylvania pay inadequate **[**25]** attention to aisle accessibility. Stitching together a corporate-wide class requires more.

"Rule 23 requires more than allegations, initial evidence, or a threshold showing. It requires a showing that each of the Rule 23 requirements has been met by a preponderance of the evidence at the time of class certification." *Ferreras v. Am. Airlines, Inc.*, 946 F.3d 178, 184 (3d Cir. 2019). When proceeding on a corporate-wide basis, the Supreme Court has required proof of a policy or practice of discrimination *before* certifying a corporate-wide class. *Dukes*, 564 U.S. at 353. Without a corporate-wide policy that causes discrimination (including disparate impacts when relevant, as under Title VII), a plaintiff must have significant proof of a common mode of

exercising discretion that "pervades the entire company," not just stores in some states or regions of the country. *Rodriguez v. Nat'l City Bank*, 726 F.3d 372, 383-85 (3d Cir. 2013) (quoting *Dukes*, 564 U.S. at 356). There is no significant proof of either here.

Like any large retailer, Ollie's has several corporate policies governing its stores. These include visual store standards governing the placement and marketing of goods, general safety, loss prevention, and maintenance policies, and a "Yes, I Can" program, requiring stores to retrieve goods for patrons that have trouble accessing them. Ollie's specifically requires stores **[**26]** to ensure wheelchairs can pass easily through aisles. So as in *Dukes*, Ollie's "announced policy forbids" the discriminatory conduct alleged by the class—inaccessible interior aisles. *Dukes*, 564 U.S. at 353. Ollie's, to be sure, allows local stores discretion when maintaining adequate paths of travel for wheelchairs. But that kind of discretionary decision-making "is just the opposite of a uniform . . . practice that would provide **[*902]** the commonality needed for a class action." *Id.* at 355. As the Supreme Court said in *Dukes*, allowing stores discretion is "a very common and presumptively reasonable way of doing business." *Id.* It is not evidence of a common corporate-wide injury.

On appeal, plaintiffs focus on Ollie's visual store standards. They argue that the standards emphasize placing as much stock as possible on the sales floor. For example, they point out that photographs in the visual standards illustrate items stacked to the side of aisles as well as tight placement of clothing racks. Plaintiffs stress in their briefing that Ollie's visual store standards are "a plausible explanation," a "plausible causal connection," or "a plausible, direct cause of the proliferation of allegedly discriminatory barriers." Appellees' Br. 15, **[**27]** 27. Perhaps. But plaintiffs must do more than assert a plausible causal explanation at this stage. They must show that the visual store standards are more likely than not a common cause of a failure to maintain accessible aisles across Ollie's stores in the United States.

They have not met that burden. There is no proof that the visual standards cause inaccessible aisles across all Ollie's stores nationwide. The investigative record is limited to stores in Pennsylvania. On this record, we do not know whether the visual standards "may have resulted

in" discrimination "in some regions . . . but not at all in others." *Rodriguez*, 726 F.3d at 385. Proceeding on a corporate-wide basis against a corporation with over four hundred stores in twenty-nine states requires more than plausible allegations backed by Pennsylvania-only evidence.

The only evidence from outside Pennsylvania is less than a dozen customer emails reporting inaccessible aisles.[4] Setting aside the potential inadmissibility of the emails, *Dukes* rejected "anecdotal evidence" as "too weak" to support a common practice. *Dukes*, 564 U.S. at 358. *Dukes* involved 120 employee affidavits, signed under penalty of perjury, sharing stories of employment discrimination by Wal-Mart supervisors. ***[**28]*** *Id.* The Supreme Court said these affidavits proved nothing: "More than half of these reports are concentrated in only 6 States (Alabama, California, Florida, Missouri, Texas, and Wisconsin); half of all States have only one or two anecdotes; and 14 States have no anecdotes about Wal-Mart's operations at all." *Id.* The anecdotal evidence here is far weaker than in *Dukes*. Less than a dozen email anecdotes over four years, from a corporation with over four hundred stores in twenty-nine states and thousands of employees exercising discretion, "prove nothing at all." *Id.* at 358 n.9.

The District Court abused its discretion by certifying a corporate-wide class on this record. We leave it to the District Court to decide whether a geographically narrower class limited to some or all Ollie's stores in Pennsylvania would satisfy the commonality requirement.

2

The District Court also abused its discretion when finding commonality for a separate reason. The District Court certified a class embracing all persons with qualified mobility disabilities who have "experienced access barriers in interior paths of travel." *Ollie's*, 2021 U.S. Dist. LEXIS 58420, 2021 WL 1152981, at *8-9. That class definition conflicts with our decision in *Steak 'n Shake*. A class that **[*903]** includes any and all access barriers **[**29]** is overbroad.

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[4] As we noted earlier, at least one customer reportedly experienced clear aisles. Another customer complained about the same store in Monaca, Pennsylvania, that plaintiff Mullen visited.

In *Steak 'n Shake*, the trial court certified a class consisting of persons with qualified disabilities who "encountered accessibility barriers at any Steak 'n Shake restaurant." 897 F.3d at 487-88. We reversed the trial court's commonality finding for two independent reasons.

First, the class representatives' alleged injuries were based on excessively steep parking slopes, but the class was not limited to restaurant patrons who suffered an injury in a parking lot. *Id.* at 489-90. Second, and more relevant here, even if the class definition were limited to parking facilities, we observed, "the wide variety of [ADA] regulations . . . reveal that there are still various types of ADA violations that could occur specifically in a parking facility." *Id.* at 490. Access barriers could include excessively steep parking lots but could also include inadequate signs. *Id.* "The wide variety of potential ADA violations captured in the broad class definition," we held, meant that the claims could not be litigated together all at once. *Id.*

The class definition here similarly applies to any "access barriers." *Ollie's*, 2021 U.S. Dist. LEXIS 58420, 2021 WL 1152981, at *9. Plaintiffs argue that *Steak 'n Shake* is distinguishable because the class is limited to access barriers in interior paths of travel, not every part **[**30]** of a store, but that entirely ignores our second reason for finding no commonality. In *Steak 'n Shake*, we warned against the broad term "accessibility barriers," as it sweeps in a broad array of potential claims with little in common. The same is true here. Some "access barriers" are fixtures, like pillars, fixed tables, or aisle shelves. There is no evidence those types of fixed barriers result from any common policy or employee practice. Plaintiffs have not shown that Ollie's has any centralized blueprint or policy that requires stores to build narrow aisles or place pillars, tables, and shelving in the middle of the way. *Cf. Colorado Cross Disability Coal. v. Abercrombie & Fitch Co.*, 765 F.3d 1205, 1216-17 (10th Cir. 2014) (porch design common to all 231 stores involved raised common question). Without evidence of a centralized store blueprint, we cannot say claims against those types of access barriers in interior paths of travel can be productively litigated together.

On appeal, plaintiffs focus their argument on movable barriers like merchandising, clothing racks, inventory carts, and the like. Plaintiffs mainly argue that Ollie's stores violate their

obligation to maintain 36-inch-wide accessible aisles by recurringly placing merchandising in the way. But that is not the class the District **[**31]** Court certified. At plaintiffs' request, the District Court certified a class that applies to any kind of access barrier in interior paths of travel, not just merchandising wares blocking accessible aisles. We cannot cure the overbreadth of the class definition on appeal. We leave it to the District Court to decide whether a narrower class limited to particular merchandising wares or particular merchandising display practices blocking interior aisles could satisfy the commonality requirement.

* * *

Plaintiffs have failed to clear the first two hurdles of Rule 23(a). We will vacate and remand. We need not decide whether the remaining requirements of Rule 23 were satisfied. On remand, however, the District Court should clarify what classwide legal theory or theories of liability plaintiffs are pursuing and determine whether each is suitable for classwide proof and common relief. As we have explained, trial courts must include in the certification order or opinion "(1) a readily discernible, clear, and precise statement of **[*904]** the parameters defining the class or classes to be certified, and (2) a readily discernible, clear, and complete list of the claims, issues or defenses to be treated on a class basis." **[**32]** *Steak 'n Shake*, 897 F.3d at 488 n.21. Trial courts must then "determine what elements plaintiffs would have to prove under that theory to reach a finding of liability and relief, and then assess whether this proof can be made within the parameters of Rule 23." *Hohider v. United Parcel Serv., Inc.*, 574 F.3d 169, 197 (3d Cir. 2009). And under Rule 23(b)(2), the provision under which plaintiffs here seek class certification, trial courts must explain how classwide relief would be appropriate for each legal injury. "Rule 23(b)(2) applies only when a single injunction or declaratory judgment would provide relief to each member of the class. It does not authorize class certification when each individual class member would be entitled to a *different* injunction or declaratory judgment against the defendant." *Dukes*, 564 U.S. at 360.

There are significant cohesion concerns with some of the theories of classwide relief advocated by plaintiffs. For example, to the extent plaintiffs seek removal of "architectural barriers" in Ollie's

existing facilities, liability turns on a variety of individualized factors, including "the nature and cost of" the steps needed to remove each barrier. 42 U.S.C. § 12181(9)(A). Common proof and common relief relevant to that theory may prove elusive. On remand, the District Court must address these differing ADA standards and rules to determine **[**33]** whether common proof and common relief would be available for each distinct claim raised by the putative class.

Concur by: PORTER

Concur

PORTER, *Circuit Judge*, concurring.

Today, we sidestep one of the principal legal issues raised by this appeal: whether the Federal Rules of Evidence apply to fact evidence introduced in support of class certification. Respectfully, I see no reason to duck the question. The issue is properly presented and adequately briefed. The District Court may still need to answer this question on remand. And courts are divided. By our indecision, we prolong needless uncertainty in an important area of the law, and we undermine the uniformity required by the Federal Rules of Evidence. I would prefer to end any lingering uncertainty now, by holding that statutory text and precedent require applying the Federal Rules of Evidence before certifying a class under Rule 23.

I

As the Supreme Court has emphasized, "Rule 23 does not set forth a mere pleading standard. A party seeking class certification must affirmatively demonstrate his compliance with the Rule—that is, he must be prepared to prove that there are *in fact* sufficiently numerous parties, common questions of law or fact, etc." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350, 131 S. Ct. 2541, 180 L. Ed. 2d 374 (2011). "This calls for **[**34]** a rigorous analysis that usually requires courts to make factual findings and legal conclusions that overlap the underlying merits of the suit." *Mielo v. Steak 'n Shake Operations, Inc.*, 897 F.3d 467, 482 (3d Cir. 2018).

In *Blood Reagents*, we held rigorous analysis means "that a plaintiff cannot rely on challenged expert testimony . . . to demonstrate conformity with Rule 23 unless the plaintiff also demonstrates, and the trial court finds, that the expert testimony satisfies the standard set out in *Daubert*." *In re Blood Reagents Antitrust Litig.*, 783 F.3d 183, 187 (3d Cir. 2015). We rejected the trial court's acceptance of evidence that "could evolve" into admissible form later. *Id.* at 186. *Daubert*, of course, **[*905]** is based on Federal Rule of Evidence 702. *See Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 589-92, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993). So, under *Blood Reagents*, expert evidence used to certify a class action must be admissible under Federal Rule of Evidence 702.

We have never addressed whether fact evidence, rather than expert opinion, must likewise be admissible. The District Court rejected Ollie's hearsay objection to the customer service emails by holding that non-expert evidence used to certify a class need not be admissible. *See Allen v. Ollie's Bargain Outlet, Inc.*, No. 2:19-CV-281, 2021 WL 1152981, at *5 n.5 (W.D. Pa. Mar. 26, 2021). That conclusion conflicts with the Federal Rules of Evidence.

The Federal Rules of Evidence are an exercise of legislative authority, so we read the rules "as we would any statute." *Daubert*, 509 U.S. at 587. "The specific courts and proceedings to which the **[**35]** rules apply, along with exceptions, are set out in Rule 1101." Fed. R. Evid. 101(a). Rule 1101 says that the rules apply to "United States district courts" and in "civil cases and proceedings." Fed. R. Evid. 1101(a), (b). That means all civil cases and proceedings unless an exception applies.

Rule 1101 makes three exceptions, but as the Seventh Circuit has noted, Rule 23 proceedings are "not among the proceedings excepted." *Mars Steel Corp. v. Cont'l Bank N.A.*, 880 F.2d 928, 938 (7th Cir. 1989) (en banc) (holding that Rule 23(e) fairness hearings are not exempt). The first two exceptions apply to determinations "on a preliminary question of fact governing admissibility" and "grand-jury proceedings," so they are irrelevant. Fed. R. Evid. 1101(d)(1), (2). A third and broader exception applies to "miscellaneous proceedings such as: extradition or rendition; issuing an arrest warrant, criminal summons, or search warrant; a preliminary

examination in a criminal case; sentencing; granting or revoking probation or supervised release; and considering whether to release on bail or otherwise." Fed. R. Evid. 1101(d)(3). No civil proceedings are listed in the miscellaneous-proceedings exception.

While the list is not exclusive, in context, the miscellaneous-proceedings exception is best read as limited to closely analogous collateral proceedings, like hearings to transfer a juvenile delinquent for prosecution **[**36]** as an adult. *See Gov't of Virgin Islands in Interest of A.M.*, 34 F.3d 153, 161-62, 30 V.I. 442 (3d Cir. 1994) (allowing hearsay in a juvenile transfer hearing because the hearing was analogous to a preliminary examination in a criminal case). Otherwise, the exception would swallow the rule. Even if the exception may be extended to some ordinary civil proceedings, class certification proceedings are not closely analogous to any of the listed "miscellaneous proceedings," so context suggests they do not fall under this exception, much like Rule 23(e) hearings. The conclusion is clear: Class certification proceedings are not exempt from the rules of evidence. *See Anderson Living Tr. v. WPX Energy Prod., LLC*, 306 F.R.D. 312, 378 n.39 (D.N.M. 2015) ("The similarity of a class certification hearing to a trial suggests that a class certification hearing is not a 'miscellaneous proceeding such as' a hearing on sentencing, extradition, preliminary examination, probation violation, or setting bail.").

Our decision in *Blood Reagents*, moreover, prevents us from dispensing with the Federal Rules of Evidence. The District Court distinguished *Blood Reagents* as involving expert evidence. *Ollie's*, 2021 U.S. Dist. LEXIS 58420, 2021 WL 1152981, at *5 n.5. But for purposes of this question there is no principled basis for distinguishing between fact and expert evidence. Nothing in the rules of evidence **[*906]** allows us to selectively apply them. On the contrary, Federal Rule of Evidence 1101 says that "[t]hese **[**37]** rules"—meaning *all* rules, including hearsay rules—apply to civil proceedings generally. Fed. R. Evid. 1101(a), (b).

No hearsay exception applies to Rule 23 proceedings either. Hearsay is generally inadmissible unless allowed by rules adopted by the Supreme Court or statute. Fed. R. Evid. 802. Several rules of civil procedure permit proof by affidavit instead of live testimony, allowing modest exceptions to the hearsay rule. *See, e.g.*, Fed. R. Civ. P. 4(*l*), 32(a)(1)(B), 65(b). One general

exception is Federal Rule of Civil Procedure 43(c). That rule allows affidavits "[w]hen a motion relies on facts outside the record." Fed. R. Civ. P. 43(c); *see also* 28 U.S.C. § 1746 (permitting the use of declarations instead). But while Federal Rule of Civil Procedure 43(c) allows considerable flexibility in avoiding the live testimony required by the hearsay rule, it does not allow simply attaching hearsay—like the customer complaints—to a motion. That is what happened here.

In short, "simple logic indicates," and statutory text confirms, that Rule 23 is not satisfied when the "evidence proffered would not be admissible as proof of anything." *Behrend v. Comcast Corp.*, 655 F.3d 182, 215 n.18 (3d Cir. 2011) (Jordan, J., concurring in the judgment and dissenting in part), *rev'd*, 569 U.S. 27, 133 S. Ct. 1426, 185 L. Ed. 2d 515 (2013). Rigorous analysis and statutory text demand nothing less than admissible evidence at the time of certification.

II

Overlooking Federal Rule of Evidence 1101, several circuits have held that the rules of evidence do **[**38]** not apply to class certification proceedings. The first circuit to openly adopt this approach was the Eighth Circuit. *See In re Zurn Pex Plumbing Prod. Liab. Litig.*, 644 F.3d 604, 611-14 (8th Cir. 2011). In *Zurn*, the Eighth Circuit affirmed a trial court's watered-down *Daubert* analysis, rejecting the defendants' argument that evidence under Rule 23 must "ultimately be admissible at trial." *Id.* at 611. Judge Gruender dissented. *Id.* at 626-30. The Ninth Circuit followed some years later. In the Ninth Circuit, "[i]nadmissibility alone is not a proper basis to reject evidence submitted in support of class certification." *Sali v. Corona Reg'l Med. Ctr.*, 909 F.3d 996, 1004 (9th Cir. 2018).[1] A trial court "may consider whether the plaintiff's proof is, or will likely lead to, admissible evidence." *Id.* at 1006. "But admissibility must not be dispositive. Instead, an inquiry into the evidence's ultimate admissibility should go to the weight that evidence is given at the class certification stage." *Id.* The Sixth Circuit has recently joined in part.

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[1] *But see Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571, 639-40 (9th Cir. 2010) (Ikuta, J., dissenting) (arguing that inadmissible expert testimony cannot be used to meet Rule 23), *rev'd*, 564 U.S. 338, 131 S. Ct. 2541, 180 L. Ed. 2d 374 (2011).

It has held, "as have the Eighth and Ninth Circuits, that . . . 'evidentiary proof' need not amount to admissible evidence, at least with respect to nonexpert evidence." *Lyngaas v. Curaden AG*, 992 F.3d 412, 428-29 (6th Cir. 2021).

Several circuits disagree with some or all of this. The First Circuit has rejected inadmissible hearsay evidence to support standing for class members, reasoning **[**39]** that "class certification provides no occasion for jettisoning the rules of evidence and procedure, the Seventh Amendment, or the dictate of the Rules Enabling Act." *In re Asacol Antitrust Litig.*, 907 F.3d 42, 53 (1st Cir. 2018). That same logic would require **[*907]** applying the Federal Rules of Evidence to support class certification. The Fifth Circuit has held that "findings must be made based on adequate admissible evidence to justify class certification." *Unger v. Amedisys Inc.*, 401 F.3d 316, 319 (5th Cir. 2005).[2] At least two circuits have held, as we did in *Blood Reagents*, that expert testimony must be admissible under *Daubert* at the class certification stage. *See Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802, 812-13 (7th Cir. 2012); *Prantil v. Arkema Inc.*, 986 F.3d 570, 575-76 (5th Cir. 2021) ("[I]f an expert's opinion would not be admissible at trial, it should not pave the way for certifying a proposed class.").

I agree with the First and Fifth Circuits: Evidence used to certify a class must be admissible. The Sixth, Eighth, and Ninth Circuits overlook Federal Rule of Evidence 1101 and the rigorous analysis required by precedent. The various arguments they marshal in support of dispensing with the rules of evidence are unpersuasive. I will address each argument in turn.

A

First, these circuits point to Rule 23(c)'s requirement that class actions be certified at "an early practicable time after a person sues or issued as a class representative." *Sali*, 909 F.3d at 1004 (quoting Fed. R. Civ. P. 23(c)(1)(A)). The need for speed, these courts reason, weighs against applying **[**40]** the Federal Rules of Evidence. That is unpersuasive. This rule was amended in

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[2] The Sixth Circuit dismissed *Unger*'s admissibility requirement as dictum. *Lyngaas v. Curaden AG*, 992 F.3d 412, 430 (6th Cir. 2021). But the Fifth Circuit has relied on *Unger* to require admissible evidence. *Prantil v. Arkema Inc.*, 986 F.3d 570, 575-76 & n.18 (5th Cir. 2021).

2003 to abrogate the certify-first-ask-questions-later practice followed in some circuits. *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 318-19 (3d Cir. 2008). Before 2003, Rule 23 said the class must be certified "as soon as practicable after commencement of an action." *Id.* at 318. The change to "an early practicable time" was meant to encourage rigorous compliance with the requirements of Rule 23 *before* certifying a class. *Id.* Under the current rule, "class certifications are no longer conditional," so a trial court "should delay certifying a class until it is satisfied that all Rule 23 requirements have been met." *Zurn*, 644 F.3d at 629 (Gruender, J., dissenting). Requiring that evidence be admissible does not conflict with this open-ended rule. If anything, the 2003 amendment suggests trial courts should not defer admissibility rulings relevant to certification until trial. *See, e.g., Sali*, 909 F.3d at 1006 (deferring admissibility in tension with 2003 amendment).

B

Second, these circuits assert that an order certifying a class is merely "tentative" and "preliminary," as "[a]n order that grants or denies class certification may be altered or amended before final judgment." *Id.* at 1004 (quoting Fed. R. Civ. P. 23(c)(1)(C)). Because class certification orders are not technically final, **[**41]** "common sense," they say, suggests "the formal strictures of trial" should not apply at the certification stage, including the Federal Rules of Evidence. *Id.* Otherwise, they argue, class certification proceedings would turn into evidentiary shooting matches. *Id.* For legal support, these circuits lean on the Supreme Court's statement that in class proceedings, "a preliminary determination of the merits may result in substantial prejudice to a defendant, since of necessity [a class proceeding] is not accompanied **[*908]** by the traditional rules and procedures applicable to civil trials." *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 178, 94 S. Ct. 2140, 40 L. Ed. 2d 732 (1974), *quoted in Zurn*, 644 F.3d at 613-14. There are many problems with this line of argument.

For one, that snippet of *Eisen* preceded the 2003 amendments to Rule 23 and has since been repudiated as dictum. The relevant part of *Eisen* held only that class representatives could not shift the cost of providing class-member notice to defendants by showing the class was likely to

prevail on the merits. *Eisen*, 417 U.S. at 177-78. In *Dukes*, the Supreme Court said that *Eisen*'s general warning against preliminary determinations of the merits is "the purest dictum and is contradicted by our other cases." 564 U.S. at 351 n.6. *Eisen*'s related statement about "traditional rules and procedures" is dictum too. For good measure, **[**42]** *Dukes* also expressed "doubt" at the trial court's conclusion that *Daubert* did not apply when certifying a class. *Id.* at 354. One could even say that "the Supreme Court has expressed disapproval of the position taken by" the Sixth, Eighth, and Ninth Circuits. *Zurn*, 644 F.3d at 627 (Gruender, J., dissenting); *see also Behrend*, 655 F.3d at 215 n.18 (Jordan, J., concurring in the judgment and dissenting in part) (noting that "it is implicit" in *Dukes* that *Daubert* applies). But even if it has not, after the 2003 amendments and *Dukes, Eisen*'s cryptic dictum about "traditional rules and procedures" does not support dispensing with the rules of evidence.

For another, Rule 23 certification orders are not "tentative" in any practical sense. Trial courts cannot make "tentative" Rule 23 findings. "When courts harbor doubt as to whether a plaintiff has carried her burden under Rule 23, the class should not be certified." *Steak 'n Shake*, 897 F.3d at 483. Under our precedent, "it is no longer accurate—however true it might have been in the past—that class certification hearings are preliminary or conditional in the sense that a judge is going to go back and reconsider his or her class certification order." Linda S. Mullenix, *Putting Proponents to Their Proof: Evidentiary Rules at Class Certification*, 82 Geo. Wash. L. Rev. 606, 636 (2014). "Although a judge subsequently **[**43]** may revise a class certification order, this practice has become extremely rare." *Id.* at 637. In all but exceptional cases, an order certifying a class will be the trial court's final word on the matter.

For similar reasons, the rhetoric about evidentiary shooting matches is also behind the times. Class certification proceedings are *already* evidentiary shooting matches, sometimes requiring extensive evidentiary hearings. *Id.* at 639-41. The question is whether the shooting match will be played according to the uniform rules enacted by Congress, no rules at all, or only the rules judges really like. The correct answer is the rules enacted by Congress.

Characterizing Rule 23 orders certifying a class action as "tentative" and "preliminary," moreover, trivializes the consequences of certifying a class. "As a practical matter, the certification decision is typically a game-changer, often the whole ballgame, for plaintiffs and plaintiffs' counsel." *Marcus v. BMW of N. Am., LLC*, 687 F.3d 583, 591 n.2. Rule 23(b)(2) class certifications compel unnamed persons to join a lawsuit they do not control, litigated by lawyers they did not choose, where a judgment binds them, win or lose. *Cooper v. Fed. Reserve Bank of Richmond*, 467 U.S. 867, 874, 104 S. Ct. 2794, 81 L. Ed. 2d 718 (1984); *Dukes*, 564 U.S. at 362. Defendants also face significant practical consequences. Once a class is certified, **[*909]** the risk of "devastating **[**44]** loss" often leads to "in terrorem" class settlements even for "questionable claims." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350, 131 S. Ct. 1740, 179 L. Ed. 2d 742 (2011); *see also Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 445 n.3, 130 S. Ct. 1431, 176 L. Ed. 2d 311 (2010) (Ginsburg, J., dissenting) ("A court's decision to certify a class . . . places pressure on the defendant to settle even unmeritorious claims."); *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 165 (3d Cir. 2001) ("[C]ertifying the class may place unwarranted or hydraulic pressure to settle on defendants."). And plaintiffs, too, may be denied meaningful redress if defendants are allowed to defeat class actions by larding the record with inadmissible hearsay, unauthenticated records, or unreliable opinion evidence. The search for truth encouraged by the Federal Rules of Evidence cuts both ways.

C

The Eighth Circuit has also suggested that because class certification findings are made by a judge, not a jury, there is less reason to apply *Daubert* rigorously, and presumably other rules of evidence too. *Zurn*, 644 F.3d at 613. But this distinction finds no support in the Federal Rules of Evidence or our caselaw. The Federal Rules of Evidence require applying *Daubert* faithfully in bench trials too. *UGI Sunbury LLC v. A Permanent Easement for 1.7575 Acres*, 949 F.3d 825, 832-33 (3d Cir. 2020). Some rules of evidence, to be sure, expressly reference jury trials and do not apply to bench trials. Rule 403, for example, allows a trial court to "exclude relevant evidence if its probative value is substantially **[**45]** outweighed by a danger of . . . misleading

the jury." Fed. R. Evid. 403. That rule is irrelevant in a bench trial. But hearsay is generally inadmissible no matter who the trier of fact happens to be. Fed. R. Evid. 802. So, as with *Daubert*, there is no "bench trial" exception to hearsay.

* * *

Reasonable minds may disagree over the wisdom or practicality of applying the Federal Rules of Evidence, or hearsay rules specifically, in Rule 23 certification proceedings. But those policy judgments are for the Supreme Court and Congress to make. *See* 28 U.S.C. § 2072(a). We must apply the rules of evidence faithfully within their proper scope. That scope includes Rule 23 proceedings.

Search documents in this case: Search

No. 22-289

Title:	**The National Association of Realtors, et al., Petitioners** **v.** **The PLS.com, LLC.**
Docketed:	September 27, 2022
Linked with 22A28	
Lower Ct:	United States Court of Appeals for the Ninth Circuit
Case Numbers:	(21-55164)
Decision Date:	April 26, 2022

DATE	PROCEEDINGS AND ORDERS
Jul 11 2022	Application (22A28) to extend the time to file a petition for a writ of certiorari from July 25, 2022 to September 23, 2022, submitted to Justice Kagan. **Main Document** **Proof of Service**
Jul 14 2022	Application (22A28) granted by Justice Kagan extending the time to file until September 23, 2022.
Sep 23 2022	Petition for a writ of certiorari filed. (Response due October 27, 2022) **Petition** **Proof of Service** **Certificate of Word Count**
Sep 30 2022	Waiver of right of respondent PLS.com, LLC to respond filed. **Main Document**
Oct 05 2022	DISTRIBUTED for Conference of 10/28/2022.
Oct 17 2022	Response Requested. (Due November 16, 2022)

Oct 24 2022	Motion to extend the time to file a response from November 16, 2022 to December 16, 2022, submitted to The Clerk. **Main Document**
Oct 25 2022	Motion to extend the time to file a response is granted and the time is extended to and including December 16, 2022.

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Party name: The PLS.COM, LLC		

Search documents in this case: Search

No. 22-148

Title:	**Jack Daniel's Properties, Inc., Petitioner** **v.** **VIP Products LLC**
Docketed:	August 17, 2022
Lower Ct:	United States Court of Appeals for the Ninth Circuit
Case Numbers:	(21-16969)
Decision Date:	March 18, 2022
Rehearing Denied:	May 10, 2022
Questions Presented	

DATE	PROCEEDINGS AND ORDERS
Aug 05 2022	Petition for a writ of certiorari filed. (Response due September 16, 2022) **Petition** **Appendix** **Certificate of Word Count** **Proof of Service**
Sep 08 2022	Motion to extend the time to file a response from September 16, 2022 to October 17, 2022, submitted to The Clerk. **Main Document** **Proof of Service**
Sep 09 2022	Motion to extend the time to file a response is granted and the time is extended to and including October 17, 2022.
Sep 16 2022	Brief amicus curiae of American Intellectual Property Law Association filed. **Main Document** **Proof of Service** **Certificate of Word Count**
Sep 16 2022	Brief amicus curiae of Campbell Soup Company filed.

	Main Document **Proof of Service** **Certificate of Word Count**
Sep 16 2022	Brief amicus curiae of Constellation Brands, Inc. filed. **Main Document** **Proof of Service** **Certificate of Word Count**
Sep 16 2022	Brief amici curiae of American Craft Spirits Association, et al. filed. **Main Document** **Proof of Service** **Certificate of Word Count**
Sep 16 2022	Brief amicus curiae of the International Trademark Association filed. **Main Document** **Proof of Service** **Certificate of Word Count**
Sep 16 2022	Brief amicus curiae of Levi Strauss & Co. and Patagonia Inc. filed. **Main Document** **Proof of Service** **Certificate of Word Count**
Oct 17 2022	Brief of respondent VIP Products LLC in opposition filed. **Main Document** **Proof of Service** **Certificate of Word Count**
Nov 01 2022	Reply of petitioner Jack Daniel's Properties, Inc. filed. (Distributed) **Main Document** **Proof of Service** **Certificate of Word Count**
Nov 02 2022	DISTRIBUTED for Conference of 11/18/2022.
Nov 21 2022	Petition GRANTED.
Nov 28 2022	Motion of Jack Daniel's Properties, Inc. for an extension of time submitted. **Main Document**

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COX,REMAND,TERMED

United States District Court
Northern District of Illinois - CM/ECF NextGen 1.6.3 (Chicago)
CIVIL DOCKET FOR CASE #: 1:19-cv-03083

Rogers v. BNSF Railway Company
Assigned to: Honorable Matthew F. Kennelly
Demand: $75,000
Case in other court: Cook County Circuit Court, Chancery Division, 2019-CH-04393
Cause: 28:1332 Diversity-Personal Injury

Date Filed: 05/07/2019
Date Terminated: 10/12/2022
Jury Demand: Both
Nature of Suit: 360 P.I.: Other
Jurisdiction: Diversity

Plaintiff

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individually, and on behalf of similarly situated individuals

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TERMINATED: 10/16/2021

Date Filed	#	Docket Text
05/07/2019	1	NOTICE of Removal from Cook County Circuit Court, Chancery Division, case number (2019-CH-04393) filed by BNSF Railway Company Filing fee $ 400, receipt number 0752-15798766. (Attachments: # 1 Exhibit A)(Herrington, Elizabeth) (Entered: 05/07/2019)
05/07/2019	2	CIVIL Cover Sheet (Herrington, Elizabeth) (Entered: 05/07/2019)
05/07/2019		CASE ASSIGNED to the Honorable Matthew F. Kennelly. Designated as Magistrate Judge the Honorable Susan E. Cox. Case assignment: Random assignment. (jjr,) (Entered: 05/07/2019)
05/07/2019	3	ATTORNEY Appearance for Defendant BNSF Railway Company by Elizabeth Brooke Herrington (Herrington, Elizabeth) (Entered: 05/07/2019)
05/07/2019	4	ATTORNEY Appearance for Defendant BNSF Railway Company by Alex David Berger (Berger, Alex) (Entered: 05/07/2019)
05/07/2019	5	ATTORNEY Appearance for Defendant BNSF Railway Company by Tyler Zachary Zmick (Zmick, Tyler) (Entered: 05/07/2019)
05/07/2019	6	MOTION by Defendant BNSF Railway Company for extension of time *to respond to Complaint (UNOPPOSED)* (Berger, Alex) (Entered: 05/07/2019)
05/07/2019	7	NOTICE of Motion by Alex David Berger for presentment of extension of time 6 before Honorable Matthew F. Kennelly on 5/14/2019 at 09:30 AM. (Berger, Alex) (Entered: 05/07/2019)

05/08/2019	8	E-MAILED notice of removal letter to David Louis Gerbie (las,) (Entered: 05/08/2019)
05/13/2019	9	MINUTE entry before the Honorable Matthew F. Kennelly: Defendant's unopposed motion for extension of time 6 is granted; response to complaint is to be filed by 6/13/2019. (mk) (Entered: 05/13/2019)
05/24/2019	10	MINUTE entry before the Honorable Matthew F. Kennelly: Initial status hearing is set to 9:00 a.m. on 6/27/2019 before Judge Kennelly, in Chambers, Room 2188. Parties are to review and comply with Judge Kennelly's standing initial order, which may be found on his web page, located at http://www.ilnd.uscourts.gov/_assets/_documents/_forms/_JUDGES/KENNELLY/INIT-ORD.htm. Counsel for plaintiff(s) are ordered to cause a copy of this order to be delivered forthwith to each defendant who has not yet appeared by counsel in the same manner that summons has been or is being served on each defendant. (mk) (Entered: 05/24/2019)
06/10/2019	11	NOTIFICATION of Affiliates pursuant to Local Rule 3.2 by BNSF Railway Company (Herrington, Elizabeth) (Entered: 06/10/2019)
06/13/2019	12	MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM by Defendant BNSF Railway Company (Herrington, Elizabeth) (Entered: 06/13/2019)
06/13/2019	13	MEMORANDUM by BNSF Railway Company in support of Motion to Dismiss for Failure to State a Claim 12 (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C) (Herrington, Elizabeth) (Entered: 06/13/2019)
06/13/2019	14	NOTICE of Motion by Elizabeth Brooke Herrington for presentment of Motion to Dismiss for Failure to State a Claim 12 before Honorable Matthew F. Kennelly on 6/19/2019 at 09:30 AM. (Herrington, Elizabeth) (Entered: 06/13/2019)
06/19/2019	15	MINUTE entry before the Honorable Matthew F. Kennelly: Motion hearing held on 6/19/2019. Responses to motion to dismiss 12 due by 7/24/2019; replies due by 8/14/2019. Mailed notice. (pjg,) (Entered: 06/19/2019)
06/24/2019	16	ATTORNEY Appearance for Plaintiff Richard Rogers by Jad Sheikali (Sheikali, Jad) (Entered: 06/24/2019)
06/26/2019	17	MINUTE entry before the Honorable Matthew F. Kennelly: At the Court's instance, the status hearing set for 6/27/2019 is vacated and reset to 8/1/2019 at 9:30 AM. (mk) (Entered: 06/26/2019)
07/12/2019	18	AMENDED complaint by Richard Rogers against BNSF Railway Company (Gerbie, David) (Entered: 07/12/2019)
07/26/2019	19	MOTION by Defendant BNSF Railway Company to dismiss (Herrington, Elizabeth) (Entered: 07/26/2019)
07/26/2019	20	MEMORANDUM by BNSF Railway Company in support of motion to dismiss 19 *First Amended Complaint* (Herrington, Elizabeth) (Entered: 07/26/2019)
07/26/2019	21	NOTICE of Motion by Elizabeth Brooke Herrington for presentment of motion to dismiss 19 before Honorable Matthew F. Kennelly on 8/1/2019 at 09:30 AM. (Herrington, Elizabeth) (Entered: 07/26/2019)
07/26/2019	22	EXHIBIT by Defendant BNSF Railway Company regarding memorandum in support of motion 20 (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C)(Herrington, Elizabeth) (Entered: 07/26/2019)
08/01/2019	23	MINUTE entry before the Honorable Matthew F. Kennelly: Status hearing and motion hearing held on 8/1/2019. Motion to Dismiss 12 is terminated as moot. Plaintiff to

		respond to motion to dismiss amended complaint 19 due by 8/29/2019; reply due by 9/12/2019. Status hearing is set for 10/10/2019 at 9:30 a.m. Mailed notice. (pjg,) (Entered: 08/01/2019)
08/29/2019	24	MOTION by Plaintiff Richard Rogers for leave to file *UNOPPOSED Motion For Leave To File Brief In Excess Of Fifteen Pages* (Gerbie, David) (Entered: 08/29/2019)
08/29/2019	25	NOTICE of Motion by David Louis Gerbie for presentment of motion for leave to file 24 before Honorable Matthew F. Kennelly on 9/5/2019 at 09:30 AM. (Gerbie, David) (Entered: 08/29/2019)
08/29/2019	26	MEMORANDUM by Richard Rogers in Opposition to motion to dismiss 19 (Gerbie, David) (Entered: 08/29/2019)
09/04/2019	27	MINUTE entry before the Honorable Matthew F. Kennelly: Plaintiff's unopposed mo for leave to file a 20 page response brief 24 is granted. (mk) (Entered: 09/04/2019)
09/12/2019	28	REPLY by BNSF Railway Company to MOTION by Defendant BNSF Railway Company to dismiss 19 *First Amended Class Action Complaint* (Herrington, Elizabeth) (Entered: 09/12/2019)
09/18/2019	29	NOTICE by Richard Rogers re memorandum in opposition to motion 26 *Notice of Supplemental Authority* (Gerbie, David) (Entered: 09/18/2019)
10/10/2019	30	MINUTE entry before the Honorable Matthew F. Kennelly: Status hearing held on 10/10/2019 and continued to 10/31/2019 at 9:30 a.m. Mailed notice. (mma,) (Entered: 10/10/2019)
10/31/2019	31	MEMORANDUM OPINION AND ORDER signed by the Honorable Matthew F. Kennelly on 10/31/2019: For the reasons stated in the accompanying Memorandum Opinion and Order, the Court denies defendant's motion to dismiss [dkt. no. 19]. (mk) (Entered: 10/31/2019)
10/31/2019	32	MINUTE entry before the Honorable Matthew F. Kennelly: Status hearing held on 10/31/2019. Defendant's motion to dismiss 19 is denied. Defendant is directed to file their answer to the complaint by 11/21/2019. Status hearing is set for 11/25/2019 at 9:00 a.m. Parties are to discuss a discovery schedule before the next hearing. Mailed notice. (mma,) (Entered: 11/01/2019)
11/14/2019	33	MOTION by Defendant BNSF Railway Company for extension of time to file answer *to First Amended Complaint [Unopposed]* (Herrington, Elizabeth) (Entered: 11/14/2019)
11/14/2019	34	NOTICE of Motion by Elizabeth Brooke Herrington for presentment of motion for extension of time to file answer 33 before Honorable Matthew F. Kennelly on 11/19/2019 at 09:30 AM. (Herrington, Elizabeth) (Entered: 11/14/2019)
11/18/2019	35	MINUTE entry before the Honorable Matthew F. Kennelly: Defendant's unopposed motion for extension of time 33 is granted; due date for response to complaint is extended to 12/5/2019. The case remains set for a status hearing on 11/25/2019 as previously ordered, and counsel are to be fully prepared to proceed with the status hearing at that time. (mk) (Entered: 11/18/2019)
11/25/2019	36	MINUTE entry before the Honorable Matthew F. Kennelly: Rule 16(b) status hearing held on 11/25/2019 with attorneys for both sides. Revised proposed schedule, including a deadline for moving for class certification, is to be filed by way of a joint status report due by 11/27/2019. Status hearing is set for 12/2/2019 at 9:30 a.m. Mailed notice. (mma,) (Entered: 11/25/2019)
11/27/2019	37	STATUS Report *Joint Proposed Discovery Schedule* by Richard Rogers (Gerbie, David)

		(Entered: 11/27/2019)
12/02/2019	38	MINUTE entry before the Honorable Matthew F. Kennelly: Status hearing held on 12/2/2019. Rule 26(a)(1) disclosures are due by 12/20/2019. Deadline for amending pleadings and adding parties is 5/29/2020. Fact discovery ordered closed by 8/28/2020. Plaintiff's Rule 26(a)(2) disclosures are due by 9/30/2020; defendants are due by 11/13/2020. Plaintiff's deadline to file motion for class certification is 12/16/2020. Status hearing is set for 2/10/2020 at 9:30 a.m. Mailed notice. (mma,) (Entered: 12/02/2019)
12/05/2019	39	*Defendant BNSF Railway Company's* ANSWER to amended complaint by BNSF Railway Company (Attachments: # 1 Exhibit 1)(Herrington, Elizabeth) (Entered: 12/05/2019)
12/05/2019	40	SEALED EXHIBIT by Defendant BNSF Railway Company regarding answer to amended complaint 39 (Herrington, Elizabeth) (Entered: 12/05/2019)
12/05/2019	41	MOTION by Defendant BNSF Railway Company to seal *Exhibit 1 to Answer to Plaintiff's First Amended Complaint* (Herrington, Elizabeth) (Entered: 12/05/2019)
12/05/2019	42	NOTICE of Motion by Elizabeth Brooke Herrington for presentment of motion to seal 41 before Honorable Matthew F. Kennelly on 12/12/2019 at 09:30 AM. (Herrington, Elizabeth) (Entered: 12/05/2019)
12/07/2019	43	MINUTE entry before the Honorable Matthew F. Kennelly: Motion to leave to file exhibit A to defendant's answer under seal 41 is granted. (mk) (Entered: 12/07/2019)
01/24/2020	44	MOTION by Defendant BNSF Railway Company to Enter Agreed Confidentiality Order *(JOINT)* (Berger, Alex) (Entered: 01/24/2020)
01/24/2020	45	NOTICE of Motion by Alex David Berger for presentment of motion for miscellaneous relief 44 before Honorable Matthew F. Kennelly on 1/29/2020 at 09:30 AM. (Berger, Alex) (Entered: 01/24/2020)
01/24/2020	46	EXHIBIT by Defendant BNSF Railway Company *[Proposed] Agreed Confidentiality Order* regarding MOTION by Defendant BNSF Railway Company to Enter Agreed Confidentiality Order *(JOINT)* 44 (Berger, Alex) (Entered: 01/24/2020)
01/25/2020	47	AGREED CONFIDENTIALITY ORDER signed by the Honorable Matthew F. Kennelly on 1/25/2020: Joint motion to enter agreed confidentiality order is granted. (mk) (Entered: 01/25/2020)
02/07/2020	48	MINUTE entry before the Honorable Matthew F. Kennelly: At the Court's instance, the status hearing set for 9:30 AM on 2/10/2020 is advanced to 9:15 AM on that date. It will be held in chambers (Room 2188). (mk) (Entered: 02/07/2020)
02/10/2020	49	MINUTE entry before the Honorable Matthew F. Kennelly: Rule 16(b) status hearing held on 2/10/2020 with attorneys for both sides. Status hearing is continued to 3/10/2020 at 9:00 a.m. Mailed notice. (mma,) (Entered: 02/10/2020)
02/10/2020	50	MINUTE entry before the Honorable Matthew F. Kennelly: Corrected Minute Entry 49 . Rule 16(b) status hearing held on 2/10/2020 with attorneys for both sides. The status hearing set for 3/10/2020 is vacated and reset to 3/18/2020 at 9:00 a.m. Mailed notice. (mma,) (Entered: 02/10/2020)
03/14/2020	51	MINUTE entry before the Honorable Matthew F. Kennelly: At the Court's instance, the status hearing set for 3/17/2020 is converted to a telephone status hearing at the time previously set. Counsel are to use the following call-in number: 888-684-8852, conference code 746-1053. Counsel should be on the line at the time their status hearing is set to begin but should wait for their case to be called before identifying themselves,

		because attorneys in other cases will be calling into the same call-in number for statuses in their cases. In addition, counsel should keep their phones on mute until their case is called. (mk) (Entered: 03/14/2020)
03/14/2020	52	MINUTE entry before the Honorable Matthew F. Kennelly: The order just entered is corrected to read as follows. At the Court's instance, the status hearing set for **3/18/2020** is converted to a telephone status hearing at the time previously set. Counsel are to use the following call-in number: 888-684-8852, conference code 746-1053. Counsel should be on the line at the time their status hearing is set to begin but should wait for their case to be called before identifying themselves, because attorneys in other cases will be calling into the same call-in number for statuses in their cases. In addition, counsel should keep their phones on mute until their case is called. (mk) (Entered: 03/14/2020)
03/16/2020	53	MINUTE entry before the Honorable Matthew F. Kennelly: Per General Order 20-00 the status hearing set for 3/18/2020 is vacated. The Court will set a new status hearing at a future date. Mailed notice. (mma,) (Entered: 03/16/2020)
03/16/2020	54	ORDER Amended General Order 20-0012 IN RE: CORONAVIRUS COVID-19 PUBLIC EMERGENCY Signed by the Chief Judge Rebecca R. Pallmeyer on March 16, 2020. All open cases are impacted by this Amended General Order. See attached Order for guidance.Signed by the Honorable Rebecca R. Pallmeyer on 3/16/2020: Mailed notice. (td,) (Entered: 03/18/2020)
03/20/2020	55	MOTION by Attorney Jad Sheikali to withdraw as attorney for Richard Rogers. No party information provided (Gerbie, David) (Entered: 03/20/2020)
03/20/2020	56	NOTICE of Motion by David Louis Gerbie for presentment of motion to withdraw as attorney 55 before Honorable Matthew F. Kennelly on 4/21/2020 at 09:30 AM. (Gerbie, David) (Entered: 03/20/2020)
03/30/2020	57	ORDER Seconded Amended General Order 20-0012 IN RE: CORONAVIRUS COVID-19 PUBLIC EMERGENCY Signed by the Chief Judge Rebecca R. Pallmeyer on March 30, 2020. All open cases are impacted by this Second Amended General Order. Amended General Order 20-0012, entered on March 17, 2020, and General Order 20-0014, entered on March 20, 2020, are vacated and superseded by this Second Amended General. See attached Order for guidance.Signed by the Honorable Rebecca R. Pallmeyer on 3/30/2020: Mailed notice. (docket3,) (Entered: 03/31/2020)
04/05/2020	58	MINUTE entry before the Honorable Matthew F. Kennelly: Motion of attorney Jad Sheikali to withdraw 55 is granted. The case is set for a status hearing on 5/26/2020 at 9:30 AM. By 4/27/2020, the parties are to file a joint status report including the following information: (1) the outcome of their mediation and a report regarding any other discussions regarding settlement; (2) a detailed description of the status of discovery, including what has been done and what (in detail) remains to be done; and (3) any other matters the parties wish to bring to the Court's attention. This deadline is not affected by General Order 20-0012, as amended, or by any other similar general orders entered hereafter. (mk) (Entered: 04/05/2020)
04/24/2020	60	ORDER Third Amended General Order 20-0012 IN RE: CORONAVIRUS COVID-19 PUBLIC EMERGENCY Signed by the Chief Judge Rebecca R. Pallmeyer on April 24, 2020. All open cases are impacted by this Third Amended General Order. Parties are must carefully review all obligations under this Order, including the requirement listed in paragraph number 5 to file a joint written status report in most civil cases. See attached Order. Signed by the Honorable Rebecca R. Pallmeyer on 4/24/2020: Mailed notice. (docket5,) (Entered: 04/27/2020)
04/27/2020	59	STATUS Report *Joint Status Report* by Richard Rogers (Gerbie, David) (Entered:

		04/27/2020)
05/13/2020	61	ATTORNEY Appearance for Plaintiff Richard Rogers by Brendan James Duffner (Duffner, Brendan) (Entered: 05/13/2020)
05/22/2020	62	MINUTE entry before the Honorable Matthew F. Kennelly: At the Court's instance, the status hearing set for 5/26/2020 is vacated and reset to 8/5/2020 at 9:30 AM. The previously set discovery and pretrial deadlines are reset as follows but are not further affected by any General Orders entered to date or hereafter: fact discovery is to be completed by 11/13/2020; Rule 26(a)(2) disclosures are due by 12/14/2020 for plaintiff and 1/29/2021 for defendant; 3/1/2021. A further joint status report regarding discovery and settlement is to be filed by 7/20/2020. (mk) (Entered: 05/22/2020)
05/26/2020	63	ORDER ORDER Fourth Amended General Order 20-0012 IN RE: CORONAVIRUS COVID-19 PUBLIC EMERGENCY Signed by the Chief Judge Rebecca R. Pallmeyer May 26, 2020. This Order does not extend or modify any deadlines set in civil cases. For non-emergency motions, no motion may be noticed for presentment on a date earlier than July 15, 2020. See attached Order. Signed by the Honorable Rebecca R. Pallmeyer on 5/26/2020: Mailed notice. (docket6,) (Entered: 05/26/2020)
05/28/2020	64	MINUTE entry before the Honorable Matthew F. Kennelly: At the Court's instance, the status hearing set for 5/26/2020 is vacated and reset to 8/5/2020 at 9:30 AM. The previously set discovery and pretrial deadlines are reset as follows but are not further affected by any General Orders entered to date or hereafter: fact discovery is to be completed by 11/13/2020; Rule 26(a)(2) disclosures are due by 12/14/2020 for plaintiff and 1/29/2021 for defendant; and expert discovery is to be completed by 3/1/2021. A further joint status report regarding discovery and settlement is to be filed by 7/20/2020. Mailed notice. (mma,) (Entered: 05/28/2020)
07/10/2020	65	ORDER Fifth Amended General Order 20-0012 IN RE: CORONAVIRUS COVID-19 PUBLIC EMERGENCY Signed by the Chief Judge Rebecca R. Pallmeyer on July 10, 2020. This Order does not extend or modify any deadlines set in civil cases. No motions may be noticed for in-person presentment; the presiding judge will notify parties of the need, if any, for a hearing by electronic means or in-court proceeding. See attached Order. Signed by the Honorable Rebecca R. Pallmeyer on 7/10/2020: Mailed notice. (Clerk5, Docket) (Entered: 07/10/2020)
07/20/2020	66	STATUS Report *Joint Status Report* by Richard Rogers (Gerbie, David) (Entered: 07/20/2020)
08/02/2020	67	MINUTE entry before the Honorable Matthew F. Kennelly: The Court has reviewed the parties' joint status report. At the Court's instance, the status hearing set for 8/5/2020 is vacated and reset to 10/5/2020 at 9:10 AM, by telephone using call-in number 888-684-8852, access code 746-1053. Counsel should wait for the case to be called before announcing themselves. The status report does not reflect the amount of progress in discovery that the Court would have expected given the 11/30/2020 fact discovery cutoff date. With this in mind, the Court directs that written discovery is to be completed by 9/14/2020. A further joint status report, including identification of expected persons to be deposed and dates or date ranges for each, is to be filed by 9/28/2020. (mk) (Entered: 08/02/2020)
09/28/2020	68	STATUS Report *JOINT* by Richard Rogers (Duffner, Brendan) (Entered: 09/28/2020)
09/29/2020	69	MINUTE entry before the Honorable Matthew F. Kennelly: The Court has reviewed the parties' joint status report and observes that the parties (largely or perhaps entirely plaintiff) have continued to conduct written discovery beyond the Court-ordered deadline of 9/14/2021 without seeking court approval. Regardless, the request for a three or

		nearly-three month extension of the fact discovery deadline is not supported given the absence of sufficient diligence in the months since the deadlines were set, until after the Court began pushing. For this reason, the Court extends the deadlines only as follows and states that this is a final extension, at least with respect to the fact discovery deadline. Fact discovery is to be completed by 12/31/2020; Rule 26(a)(2) disclosures are due by 2/4/2021 by plaintiff and 3/4/2021 by defendant; expert discovery to be completed and motion for class certification to be filed by 4/8/2021. The parties should assume that all depositions will have to be taken by remote means and should plan accordingly. Telephone status hearing set for 10/5/2021 is vacated and reset to 11/24/2020 at 9:00 AM, using call-in number 888-685-8852, access code 746-1053. Counsel should wait for the case to be called before announcing themselves. (mk) (Entered: 09/29/2020)
11/20/2020	70	MOTION by Defendant BNSF Railway Company to stay *proceedings* (Attachments: Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Exhibit D, # 5 Exhibit E)(Herrington, Elizabeth) (Entered: 11/20/2020)
11/24/2020	71	MINUTE entry before the Honorable Matthew F. Kennelly: Telephonic status hearing held on 11/24/2020. Plaintiff's counsel did not appear for the hearing. Defendant's motion to stay 70 is denied for the reasons stated on the record. A telephonic status hearing is set for 1/27/2021 at 8:45 a.m. The following call in number will be used for the hearing: 888-684-8852, access code 746-1053.The parties are directed to file a joint status report by 1/20/2021. Mailed notice. (mma,) (Entered: 11/24/2020)
12/18/2020	72	MOTION by Plaintiff Richard Rogers for discovery *JOINT Motion to Complete Oral Discovery* (Duffner, Brendan) (Entered: 12/18/2020)
12/19/2020	73	MINUTE entry before the Honorable Matthew F. Kennelly: Joint motion for leave to take certain fact depositions after the fact discovery cutoff date but by 1/27/2021 72 is granted. (mk) (Entered: 12/19/2020)
01/20/2021	74	STATUS Report *Joint Status Report* by Richard Rogers (Duffner, Brendan) (Entered: 01/20/2021)
01/27/2021	75	MINUTE entry before the Honorable Matthew F. Kennelly: Telephonic status hearing held on 1/27/2021 and continued to 2/4/2021 at 9:35 a.m. The following call-in number will be used for the hearing: 888-684-8852 conference code 746-1053. Mailed notice. (mma,) (Entered: 01/27/2021)
01/29/2021	76	TRANSCRIPT OF PROCEEDINGS held on November 24, 2020 before the Honorable Matthew F. Kennelly. Order Number: 39652. Court Reporter Contact Information: Carolyn Cox, Carolyn_Cox@ilnd.uscourts.gov. <P>IMPORTANT: The transcript may be viewed at the court's public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through the Court Reporter/Transcriber or PACER. For further information on the redaction process, see the Court's web site at www.ilnd.uscourts.gov under Quick Links select Policy Regarding the Availability of Transcripts of Court Proceedings.</P> Redaction Request due 2/19/2021. Redacted Transcript Deadline set for 3/1/2021. Release of Transcript Restriction set for 4/29/2021. (Cox, Carolyn) (Entered: 01/29/2021)
02/04/2021	77	MINUTE entry before the Honorable Matthew F. Kennelly: Telephonic status hearing held on 2/4/2021. The parties reported on the status of the mediation. The discovery schedule is extended as follows: The plaintiff's Rule 26(a)(2) disclosures are to be made by 3/4/2021. The defendant's Rule 26(a)(2) disclosures are to be made by 4/8/2021. Expert discovery is to be completed by 5/20/2021. The motion for class certification is to be filed by 5/20/2021. A telephonic status hearing is set for 5/26/2021 at 9:00 a.m. The following call-in number will be used for the hearing: 888-684-8852 conference code 746-1053. Mailed notice. (mma,) (Entered: 02/04/2021)

02/24/2021	78	MOTION by Plaintiff Richard Rogers to stay *Joint Motion to Stay Pending Mediation* (Gerbie, David) (Entered: 02/24/2021)
02/25/2021	79	MINUTE entry before the Honorable Matthew F. Kennelly: Joint motion to stay 78 is granted to the following extent. The existing deadlines are extended as follows based on the parties' representation that they will participate in mediation on 4/7/2021. Plaintiff's Rule 26(a)(2) disclosures are to be made by 5/7/2021; defendant's Rule 26(a)(2) disclosures are to be made by 6/7/2021; expert discovery is to be completed by 7/12/2021; and plaintiff's motion for class certification is to be filed by 7/12/2021. (mk) (Entered: 02/25/2021)
05/26/2021	80	MINUTE entry before the Honorable Matthew F. Kennelly: Telephonic status hearing held on 5/26/2021. Plaintiff's counsel did not appear for the hearing. A telephonic status hearing is set for 7/19/2021 at 9:10 a.m. The following call-in number will be used: 888-684-8852, conference code 746-1053. Mailed notice. (mma,) (Entered: 05/26/2021)
05/26/2021	81	Letter by Richard Rogers (Gerbie, David) (Entered: 05/26/2021)
05/27/2021	82	NOTICE by Elizabeth Brooke Herrington of Change of Address (Herrington, Elizabeth) (Entered: 05/27/2021)
06/29/2021	83	MOTION by Plaintiff Richard Rogers for extension of time *Joint Motion to Extend Deadlines* (Gerbie, David) (Entered: 06/29/2021)
06/30/2021	84	MINUTE entry before the Honorable Matthew F. Kennelly: Joint motion to extend deadlines 83 is granted. The deadline for completing expert depositions and the deadline for plaintiff to file a motion for class certification are both extended to 8/17/2021. These deadlines will not be extended again for any reason. The telephonic status hearing set for 7/19/2021 is vacated and reset to 8/25/2021 at 8:00 a.m. The following call-in number will be used: 888-684-8852, conference code 746-1053. Counsel should wait for the case to be called before announcing themselves. (mk) (Entered: 06/30/2021)
08/11/2021	85	MOTION by Plaintiff Richard Rogers to remand (Attachments: # 1 Exhibit A)(Duffner, Brendan) (Entered: 08/11/2021)
08/12/2021	86	MINUTE entry before the Honorable Matthew F. Kennelly: Response to plaintiff's motion to remand 85 is to be filed by 8/19/2021. Motion hearing is set for the status hearing previously set for 8/25/2021 at 8:55 AM (not 8:00 AM as incorrectly stated in the entry of 6/30/2021 84 . (mk) (Entered: 08/12/2021)
08/16/2021	87	MOTION by Plaintiff Richard Rogers for leave to file *exhibits under seal* (Gerbie, David) (Entered: 08/16/2021)
08/17/2021	88	MINUTE entry before the Honorable Matthew F. Kennelly: Plaintiff's motion for leave to file class certification exhibits under seal 87 is granted. Plaintiff is directed to file a complete version of his motion/memorandum, including all exhibits, under seal, and a redacted version in the public record. (mk) (Entered: 08/17/2021)
08/17/2021	89	MOTION by Plaintiff Richard Rogers for leave to file excess pages *UNOPPOSED Motion For Leave To File Brief In Excess Of Fifteen Pages* (Gerbie, David) (Entered: 08/17/2021)
08/17/2021	90	MOTION by Plaintiff Richard Rogers to certify class (Attachments: # 1 Exhibit A (under seal), # 2 Exhibit B (under seal), # 3 Exhibit C (under seal), # 4 Exhibit D (under seal), # 5 Exhibit E (under seal), # 6 Exhibit F, # 7 Exhibit G (under seal), # 8 Exhibit H (under seal), # 9 Exhibit I, # 10 Exhibit J, # 11 Exhibit K)(Gerbie, David) (Entered: 08/17/2021)
08/17/2021	91	SEALED DOCUMENT by Plaintiff Richard Rogers *Plaintiff's Motion for Class Certification and Complete Unredacted Exhibits* (Attachments: # 1 Exhibit A, # 2 Exhibit

		B, # 3 Exhibit C, # 4 Exhibit D, # 5 Exhibit E, # 6 Exhibit F, # 7 Exhibit G, # 8 Exhibit H, # 9 Exhibit I, # 10 Exhibit J, # 11 Exhibit K)(Gerbie, David) (Entered: 08/17/2021)
08/18/2021	92	MINUTE entry before the Honorable Matthew F. Kennelly: Plaintiff's motion for leave to file a 26-page class certification brief 89 is granted. (mk) (Entered: 08/18/2021)
08/19/2021	93	MEMORANDUM by BNSF Railway Company in Opposition to motion to remand 85 (Attachments: # 1 Exhibit A)(Herrington, Elizabeth) (Entered: 08/19/2021)
08/23/2021	94	MOTION by Plaintiff Richard Rogers for leave to file *Motion For Leave to File Instanter Reply In Support of Motion to Remand* (Attachments: # 1 Exhibit A)(Gerbie, David) (Entered: 08/23/2021)
08/24/2021	95	MINUTE entry before the Honorable Matthew F. Kennelly: Motion for leave to file r... 94 is granted. Plaintiff should now file the reply as a separate docket entry. (mk) (Entered: 08/24/2021)
08/24/2021	96	REPLY by Richard Rogers to memorandum in opposition to motion 93 , MOTION by Plaintiff Richard Rogers to remand 85 *Reply in Support of Motion to Remand* (Attachments: # 1 Exhibit 1)(Gerbie, David) (Entered: 08/24/2021)
08/25/2021	97	MINUTE entry before the Honorable Matthew F. Kennelly: Telephonic status hearing held on 8/25/2021. Plaintiff's motion to remand 85 is granted for the reasons stated on the record. Plaintiff's claim under Section 15A of the Illinois Biometric Privacy Act is severed and is remanded to the Circuit Court of Cook County. Defendant's response to the motion for class certification 90 is due 10/8/2021; plaintiff's reply is due 11/5/2021. A telephonic status hearing is set for 11/22/2021 at 8:50 a.m. The following call-in number will be used for the hearing: 888-684-8852, access code 746-1053. Mailed notice. (mma,) (Entered: 08/25/2021)
09/03/2021	98	MOTION by Plaintiff Richard Rogers for leave to file *Second Amended Complaint* (Attachments: # 1 Exhibit A)(Gerbie, David) (Entered: 09/03/2021)
09/04/2021	99	MINUTE entry before the Honorable Matthew F. Kennelly: Any objection to plaintiff's motion for leave to file a second amended complaint is to be filed by 9/9/2021. Motion is set for hearing by telephone on 9/10/2021 at 9:40 AM, using call-in number 888-684-8852, access code 746-1053. Counsel should wait for the case to be called before announcing themselves. (mk) (Entered: 09/04/2021)
09/09/2021	100	RESPONSE by Defendant BNSF Railway Company to motion for leave to file 98 *Second Amended Complaint* (Berger, Alex) (Entered: 09/09/2021)
09/09/2021	101	REMAND with certified copy of order dated 8/25/2021 severing and remanding Plaintiff's claim under Section 15A of the Illinois Biometric Privacy Act and letter to Circuit Court of Cook County via email. (exr,) (Entered: 09/09/2021)
09/10/2021	102	MINUTE entry before the Honorable Matthew F. Kennelly: Plaintiff's motion for leave to file a second amended complaint 98 is granted. Plaintiff should now file the second amended complaint as a separate docket entry. The motion hearing set for this morning is vacated. (mk) (Entered: 09/10/2021)
09/10/2021	103	*Second* AMENDED complaint by Richard Rogers against BNSF Railway Company (Gerbie, David) (Entered: 09/10/2021)
09/15/2021	104	MOTION by Defendant BNSF Railway Company for leave to file excess pages *(UNOPPOSED)* (Berger, Alex) (Entered: 09/15/2021)
09/16/2021	105	MINUTE entry before the Honorable Matthew F. Kennelly: Defendant's motion for leave to file excess pages 104 is granted in part. Defendant's opening summary judgment

		memorandum may be up to 25 pages long. Plaintiff's memorandum in support of his response and anticipated cross motion for summary motion may likewise be up to 25 pages long. Defendant's combined reply/response brief and plaintiff's reply brief on his cross motion are limited to 15 pages. (mk) (Entered: 09/16/2021)
09/16/2021	106	MOTION by Defendant BNSF Railway Company to seal *certain exhibits to BNSF's Statement of Material Facts* (Herrington, Elizabeth) (Entered: 09/16/2021)
09/16/2021	107	MOTION by Defendant BNSF Railway Company for summary judgment *[Public Version]* (Attachments: # 1 Memorandum in Support, # 2 L.R. 56.1(a)(2) Statement of Material Facts, # 3 Index of Exhibits, # 4 Exhibit 1 Public Version, # 5 Exhibit 2 Public Version, # 6 Exhibit 3 Public Version, # 7 Exhibit 4 Public Version, # 8 Exhibit 5 Public Version, # 9 Exhibit 6 Public Version, # 10 Exhibit 7 Public Version, # 11 Exhibit 8 Public Version, # 12 Exhibit 9 Public Version, # 13 Exhibit 10 Public Version, # 14 Exhibit 11 Public Version, # 15 Exhibit 12 Public Version, # 16 Exhibit 13 Public Version, # 17 Exhibit 14 Public Version, # 18 Exhibit 15 Public Version, # 19 Exhibit 16 Public Version)(Herrington, Elizabeth) (Entered: 09/16/2021)
09/16/2021	108	SEALED MOTION by Defendant BNSF Railway Company *for Summary Judgment [Sealed Version]* (Attachments: # 1 Memorandum in Support, # 2 Statement of Facts, # 3 Index of Exhibits, # 4 Exhibit 1, # 5 Exhibit 2 Sealed, # 6 Exhibit 3 Sealed, # 7 Exhibit 4 Sealed, # 8 Exhibit 5 Sealed, # 9 Exhibit 6 Sealed, # 10 Exhibit 7 Sealed, # 11 Exhibit 8 Sealed, # 12 Exhibit 9 Sealed, # 13 Exhibit 10 Sealed, # 14 Exhibit 11 Sealed, # 15 Exhibit 12 Sealed, # 16 Exhibit 13 Sealed, # 17 Exhibit 14 Sealed, # 18 Exhibit 15 Sealed, # 19 Exhibit 16 Sealed)(Herrington, Elizabeth) (Entered: 09/16/2021)
09/17/2021	109	MINUTE entry before the Honorable Matthew F. Kennelly: Defendant's motion for leave to file exhibits under seal 106 is granted. Defendant must file a complete and unredacted set of its exhibits under seal and a redacted version in the public record. (mk) (Entered: 09/17/2021)
09/24/2021	110	MOTION by Defendant BNSF Railway Company to seal *Exhibit 1 to Answer to Second Amended Complaint* (Herrington, Elizabeth) (Entered: 09/24/2021)
09/24/2021	111	ANSWER to amended complaint *and Affirmative Defenses [Public Version]* by BNSF Railway Company (Attachments: # 1 Exhibit 1 [Public Version])(Herrington, Elizabeth) (Entered: 09/24/2021)
09/24/2021	112	SEALED DOCUMENT by Defendant BNSF Railway Company *[Sealed Version of D.I. 111 - Answer to Amended Complaint]* (Attachments: # 1 Exhibit 1 [SEALED]) (Herrington, Elizabeth) (Entered: 09/24/2021)
09/25/2021	113	MINUTE entry before the Honorable Matthew F. Kennelly: Motion to file exhibit under seal 110 is granted. Defendant is directed to file a complete version of its answer and all exhibits under seal and a redacted version in the public record. (mk) (Entered: 09/25/2021)
09/29/2021	114	MINUTE entry before the Honorable Matthew F. Kennelly: Plaintiff's response to the defendant's motion for summary judgment 107 108 is to be filed by 10/28/2021; defendant's reply is to be filed by 11/23/2021. Mailed notice. (mma,) (Entered: 09/29/2021)
10/08/2021	115	MOTION by Defendant BNSF Railway Company to seal *Exhibits* (Herrington, Elizabeth) (Entered: 10/08/2021)
10/08/2021	116	MEMORANDUM by BNSF Railway Company in Opposition to motion to certify class, 90 *[Public Version]* (Attachments: # 1 Exhibit 1, # 2 Exhibit 2)(Herrington, Elizabeth) (Entered: 10/08/2021)

10/08/2021	117	SEALED RESPONSE by BNSF Railway Company to MOTION by Plaintiff Richard Rogers to certify class 90 *[Sealed Version]* (Attachments: # 1 Exhibit 1 [SEALED], # 2 Exhibit 2 SEALED)(Herrington, Elizabeth) (Entered: 10/08/2021)
10/09/2021	118	MINUTE entry before the Honorable Matthew F. Kennelly: Defendant's motion for leave to file certain exhibits under seal 115 is granted. Defendant is directed to file a complete version of its submission, including all exhibits, under seal, and a redacted version in the public record. (mk) (Entered: 10/09/2021)
10/15/2021	119	MOTION by Attorney Tyler Z. Zmick to withdraw as attorney for BNSF Railway Company. No party information provided (Zmick, Tyler) (Entered: 10/15/2021)
10/16/2021	120	MINUTE entry before the Honorable Matthew F. Kennelly: Motion to withdraw appearance of attorney Tyler Zmick is granted. (mk) (Entered: 10/16/2021)
10/19/2021	121	MOTION by Defendant BNSF Railway Company to stay *[Renewed Motion to Stay]* (Attachments: # 1 Exhibit A)(Herrington, Elizabeth) (Entered: 10/19/2021)
10/24/2021	122	MINUTE entry before the Honorable Matthew F. Kennelly: The case is set for a telephonic hearing on 11/3/2021 at 9:20 AM, using call-in number 888-684-8852, access code 746-1053. Counsel should wait for the case to be called before announcing themselves. Counsel should be prepared to address defendant's renewed motion to stay. (mk) (Entered: 10/24/2021)
10/26/2021	123	MOTION by Plaintiff Richard Rogers for extension of time to file response/reply as to Sealed motion,, 108 , motion for summary judgment,,, 107 *Unopposed Motion to Extend Briefing Schedule* (Gerbie, David) (Entered: 10/26/2021)
10/27/2021	124	MINUTE entry before the Honorable Matthew F. Kennelly: Plaintiff's unopposed motion for extension of time 123 is granted. Due date for plaintiff's response to motion for summary judgment is extended to 11/11/2021. Due date for reply to response is extended to 12/16/2021. (mk) (Entered: 10/27/2021)
11/03/2021	125	MINUTE entry before the Honorable Matthew F. Kennelly: Telephonic motion hearing held on 11/3/2021. Plaintiff's response to the motion to the renewed motion to stay 121 is due 11/17/2021; defendant's reply is due 11/24/2021. A telephonic status and possible ruling on the motion hearings are set for 12/7/2021 at 8:40 a.m. The following call-in number will be used for the hearing: 888-684-8852 conference code 746-1053. Mailed notice. (mma,) (Entered: 11/03/2021)
11/05/2021	126	REPLY by Richard Rogers to MOTION by Plaintiff Richard Rogers to certify class 90 , sealed response 117 , memorandum in opposition to motion 116 *Plaintiff's Reply In Support Of Motion For Class Certification* (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C)(Gerbie, David) (Entered: 11/05/2021)
11/11/2021	127	MOTION by Plaintiff Richard Rogers for leave to file *Motion for Leave to File Documents Under Seal* (Gerbie, David) (Entered: 11/11/2021)
11/11/2021	128	MEMORANDUM by Richard Rogers in Opposition to Sealed motion,, 108 , motion for summary judgment,,, 107 , motion for leave to file 127 *Plaintiff's Response in Opposition to Defendant's Motion for Summary Judgement* (Attachments: # 1 Declaration, # 2 Plaintiff's L.R. 56.1 Response to Defendant's Statement of Material Facts and L.R. 56.1(b)(3)(c) Statement of Additional Material Facts in Opposition to Defendant's Motion for Summary Judgement, # 3 Index of Exhibits, # 4 1, # 5 2, # 6 3, # 7 4, # 8 5, # 9 6, # 10 7, # 11 8, # 12 9, # 13 10, # 14 11, # 15 12, # 16 13, # 17 14, # 18 15, # 19 16, # 20 17, # 21 18, # 22 19, # 23 20, # 24 21, # 25 22, # 26 Exhibit A)(Gerbie, David) (Entered: 11/11/2021)
11/11/2021	129	SEALED RESPONSE by Richard Rogers to SEALED MOTION by Defendant BNSF

		Railway Company *for Summary Judgment [Sealed Version]* 108 , MOTION by Defendant BNSF Railway Company for summary judgment *[Public Version]* 107 , MOTION by Plaintiff Richard Rogers for leave to file *Motion for Leave to File Documents Under Seal* 127 *Plaintiff's Response in Opposition to Defendant's Motion for Summary Judgement (Under Seal)* (Attachments: # 1 Declaration, # 2 Plaintiff's L.R. 56.1 Response to Defendant's Statement of Material Facts and L.R. 56.1(b)(3)(c) Statement of Additional Material Facts in Opposition Defendant's Motion for Summary Judgement, # 3 Index of Exhibits, # 4 1, # 5 2, # 6 3, # 7 4, # 8 5, # 9 6, # 10 7, # 11 8, # 12 9, # 13 10, # 14 11, # 15 12, # 16 13, # 17 14, # 18 15, # 19 16, # 20 17, # 21 18, # 22 19, # 23 20, # 24 21, # 25 22, # 26 A)(Gerbie, David) (Entered: 11/12/2021)
11/12/2021	130	MINUTE entry before the Honorable Matthew F. Kennelly: Motion for leave to file document under seal 127 is granted. Plaintiff is directed to file a complete version of submission, including all exhibits, under seal, and a redacted version in the public rec (mk) (Entered: 11/12/2021)
11/17/2021	131	RESPONSE by Richard Rogersin Opposition to MOTION by Defendant BNSF Railway Company to stay *[Renewed Motion to Stay]* 121 *Plaintiff's Response in Opposition to Defendant's Renewed Motion to Stay* (Attachments: # 1 Exhibit A)(Duffner, Brendan) (Entered: 11/17/2021)
11/24/2021	132	REPLY by BNSF Railway Company to MOTION by Defendant BNSF Railway Company to stay *[Renewed Motion to Stay]* 121 (Herrington, Elizabeth) (Entered: 11/24/2021)
12/02/2021	133	MINUTE entry before the Honorable Matthew F. Kennelly: At the Court's instance, the telephonic status and possible ruling on a motion hearing set for 8:40 a.m. on 12/7/2021 is pushed back to 9:40 a.m. on that date. The following call-in number will be used for the hearing: 888-684-8852 conference code 746-1053. Mailed notice. (mma,) (Entered: 12/02/2021)
12/07/2021	134	MINUTE entry before the Honorable Matthew F. Kennelly: Telephonic ruling on the motion hearing held on 12/7/2021. Defendant's motion to stay 121 is granted. The case is stayed for 60 days. A telephonic status hearing is set for 2/2/2022 at 9:00 a.m. The following call-in number will be used for the hearing: 888-684-8852 conference code 746-1053. Mailed notice. (mma,) (Entered: 12/07/2021)
02/02/2022	135	MINUTE entry before the Honorable Matthew F. Kennelly: Telephonic status hearing held on 2/2/2022. The stay previously imposed is lifted. The defendant has until 2/23/2022 to file a reply on the summary judgment motion. The Court will set another status hearing once it rules on the pending motions. Mailed notice. (mma,) (Entered: 02/02/2022)
02/18/2022	136	MOTION by Defendant BNSF Railway Company for leave to file excess pages *(UNOPPOSED)* (Berger, Alex) (Entered: 02/18/2022)
02/19/2022	137	MINUTE entry before the Honorable Matthew F. Kennelly: Defendant's unopposed motion for leave to file a 20 page reply brief 136 is granted. (mk) (Entered: 02/19/2022)
02/23/2022	138	MOTION by Defendant BNSF Railway Company to seal (Herrington, Elizabeth) (Entered: 02/23/2022)
02/23/2022	139	REPLY by Defendant BNSF Railway Company to motion for summary judgment,,, 107 *[Public Version]* (Attachments: # 1 Response to Statement of Additional Material Facts Public Version, # 2 Exhibit 1 Public Version, # 3 Exhibit 2 Public Version)(Herrington, Elizabeth) (Entered: 02/23/2022)
02/23/2022	140	SEALED REPLY by BNSF Railway Company to MOTION by Defendant BNSF

		Railway Company for summary judgment *[Public Version]* 107 *[Sealed]* (Attachments: # 1 Response to Statement of Additional Material Facts Sealed, # 2 Exhibit 1 Sealed, # 3 Exhibit 2 Sealed)(Herrington, Elizabeth) (Entered: 02/23/2022)
02/24/2022	141	MINUTE entry before the Honorable Matthew F. Kennelly: Defendant's motion to file reply under seal 138 is granted. Defendant has already filed a redacted version in the public record. (mk) (Entered: 02/24/2022)
03/15/2022	142	MEMORANDUM OPINION AND ORDER signed by the Honorable Matthew F. Kennelly on 3/15/2022: For the reasons stated in the accompanying Memorandum Opinion and Order, the Court denies the defendant's motion for summary judgment [dkt. no. 107]. (mk) (Entered: 03/15/2022)
03/22/2022	143	MEMORANDUM OPINION AND ORDER signed by the Honorable Matthew F. Kennelly on 3/22/2022: For the reasons stated in the accompanying Memorandum Opinion and Order, the Court grants the plaintiff's motion for class certification [dkt. no. 90]. The Court certifies the following class under Rule 23(b)(3): All individuals whose fingerprint information was registered using an Auto-Gate System at one of BNSF's four Illinois facilities at any time between April 4, 2014 and January 25, 2020. The Court also appoints the following attorneys as class counsel: Myles McGuire, Evan M. Meyers, David L. Gerbie, and Brendan Duffner of McGuire Law, P.C. The case is set for a telephonic status hearing on April 1, 2022 at 8:15 a.m. for the purpose of setting a trial date and discussing the possibility of settlement. (mk) (Entered: 03/22/2022)
04/01/2022	144	MINUTE entry before the Honorable Matthew F. Kennelly: Telephonic status hearing held on 4/1/2022. Jury trial is set for 9/19/2022 at 9:30 a.m. The parties are to file a joint status report that shall provide an update regarding the mediation by 4/22/2022. A telephonic status hearing is set for 6/9/2022 at 9:00 a.m. The following call-in number will be used for the hearing: 888-684-8852, access code 746-1053. Mailed notice. (mma,) (Entered: 04/01/2022)
04/11/2022	145	CERTIFIED USCA ORDER dated 4/11/2022 22-8003 IT IS ORDERED that the petition for permission to appeal pursuant to Federal Rule of Civil Procedure 23(f) is DENIED. (nsf,) (Entered: 04/11/2022)
04/22/2022	146	STATUS Report *Joint Status Report* by Richard Rogers (Gerbie, David) (Entered: 04/22/2022)
04/26/2022	147	MOTION by Defendant BNSF Railway Company for leave to appeal *[Motion for Certification of Interlocutory Appeal under 28 U.S.C. Section 1292(b) and Motion to Stay]* (Herrington, Elizabeth) (Entered: 04/26/2022)
05/02/2022	148	MOTION by Attorney Alex D. Berger to withdraw as attorney for BNSF Railway Company. No party information provided (Berger, Alex) (Entered: 05/02/2022)
05/13/2022	149	ATTORNEY Appearance for Defendant BNSF Railway Company by Gregory Thomas Fouts (Fouts, Gregory) (Entered: 05/13/2022)
05/17/2022	150	MINUTE entry before the Honorable Matthew F. Kennelly: Motion to withdraw appearance of attorney Alex Berger 148 is granted. (mk) (Entered: 05/17/2022)
05/20/2022	151	ATTORNEY Appearance for Defendant BNSF Railway Company by Tinos Diamantatos (Diamantatos, Tinos) (Entered: 05/20/2022)
05/20/2022	152	ATTORNEY Appearance for Defendant BNSF Railway Company by Alborz Hassani (Hassani, Alborz) (Entered: 05/20/2022)
06/06/2022	153	MINUTE entry before the Honorable Matthew F. Kennelly: At the Court's instance, the telephonic status hearing set for 9:00 AM on 6/9/2022 is advanced to 8:50 AM on that

		date (this is a time change only). The following call-in number will be used for the hearing: 888-684-8852, access code 746-1053. (mk) (Entered: 06/06/2022)
06/09/2022	154	MINUTE entry before the Honorable Matthew F. Kennelly: Telephonic status hearing held on 6/9/2022. Pretrial conference is set for 9/8/2022 at 3:00 p.m. The pretrial conference will be held in person. The jury trial logistical meeting is to take place immediately afterward the pretrial conference. The final pretrial order is due 8/25/2022. The notice plan to the class is to be given to Judge Kennelly's chambers by 12:00 p.m. on 6/13/2022. A telephonic status hearing is set for 6/15/2022 at 8:15 a.m. The following call-in number will be used for the hearing: 888-684-8852, access code 746-1053. Persons granted remote access to proceedings are reminded of the general prohibition against photographing, recording, and rebroadcasting of court proceedings. Violation of these prohibitions may result in sanctions, including removal of court issued media credentials, restricted entry to future hearings, denial of entry to future hearings, or ar other sanctions deemed necessary by the Court. Mailed notice. (mma,) (Entered: 06/09/2022)
06/10/2022	155	MOTION by Plaintiff Richard Rogers *UNOPPOSED Motion for Approval of Class Notice Plan* (Attachments: # 1 Exhibit A, # 2 Exhibit B)(Gerbie, David) (Entered: 06/10/2022)
06/11/2022	156	MINUTE entry before the Honorable Matthew F. Kennelly: Plaintiff's unopposed motion to approve class notice plan 155 is granted; the Court also approves the proposed class notice, with one exception: the opt-out deadline is too late given the trial date and is to be advanced to no later than 8/29/2022 unless there is a reason under the law that this cannot be done (in which case the parties are to immediately file a joint report with the Court explaining why). The parties are directed to immediately implement the class notice plan. The revised class notice should be filed on the docket for purposes of the record. The telephonic status hearing set for 6/15/2022 is vacated and reset to 7/13/2022 at 9:15 a.m. The following call-in number will be used for the hearing: 888-684-8852, access code 746-1053. A further joint status report addressing the transmission of class notice (and any other matters any party wishes to bring to the Court's attention) is to be filed on 7/6/2022. (mk) (Entered: 06/11/2022)
06/13/2022	157	Revised Class Notice by Richard Rogers (Gerbie, David) (Entered: 06/13/2022)
06/21/2022	158	MEMORANDUM OPINION AND ORDER signed by the Honorable Matthew F. Kennelly on 6/21/2022: For the reasons stated in the accompanying Memorandum Opinion and Order, the Court denies the defendant's motion to certify an interlocutory appeal under 28 U.S.C. § 1292(b) [dkt. no. 147]. (mk) (Entered: 06/21/2022)
07/06/2022	159	STATUS Report *Joint Status Report* by Richard Rogers (Gerbie, David) (Entered: 07/06/2022)
07/07/2022	160	MINUTE entry before the Honorable Matthew F. Kennelly: The Court has reviewed the parties' joint status report and advises that it may be required to move the trial date in this case by a short period to account for the fact that it had to move the trial date in a relatively old and often-reset criminal case (US v Ferguson, 18-cr-734), to the same trial date as this case because one of the attorneys in that case is also an attorney in a long criminal case pending before another judge of this Court that was moved in a way that interfered with the 8/29/2022 trial date previously set for the Ferguson case. The Court will discuss a potential new trial date with counsel at the upcoming status hearing. (mk) (Entered: 07/07/2022)
07/11/2022	161	ATTORNEY Appearance for Plaintiff Richard Rogers by Evan M Meyers (Meyers, Evan) (Entered: 07/11/2022)

07/13/2022	162	MINUTE entry before the Honorable Matthew F. Kennelly: Telephonic status hearing held on 7/13/2022. Jury trial set for 9/19/2022 is vacated and reset to 10/3/2022 at 9:15 a.m. The pretrial conference set for 9/8/2022 is vacated and reset to 9/6/2022 at 2:00 p.m. A telephonic status hearing is set for 8/15/2022 at 9:00 a.m. Jonathan Loevy and Michael Kanovitz are granted leave to file their appearance. The following call-in number will be used for the hearing: 888-684-8852, conference code 746-1053. Persons granted remote access to proceedings are reminded of the general prohibition against photographing, recording, and rebroadcasting of court proceedings. Violation of these prohibitions may result in sanctions, including removal of court issued media credentials, restricted entry to future hearings, denial of entry to future hearings, or any other sanctions deemed necessary by the Court. Mailed notice. (mma,) (Entered: 07/13/2022)
07/22/2022	163	ATTORNEY Appearance for Plaintiff Richard Rogers by Michael I Kanovitz (Kanovitz, Michael) (Entered: 07/22/2022)
07/22/2022	164	ATTORNEY Appearance for Plaintiff Richard Rogers by Jonathan I. Loevy (Loevy, Jonathan) (Entered: 07/22/2022)
08/14/2022	165	MINUTE entry before the Honorable Matthew F. Kennelly: The telephonic status hearing set for 9:00 AM on 8/15/2022 is advanced to 8:55 AM on that date. The call-in number remains as previously identified. (mk) (Entered: 08/14/2022)
08/15/2022	166	MINUTE entry before the Honorable Matthew F. Kennelly: Telephonic status hearing held on 8/15/2022. Deadline for motions in limine is extended to 8/25/2022. Deadline for responses is extended to 9/5/2022. Pretrial conference set for 9/6/2022 at 2:00 p.m. 162 is going to be held in person. Mailed notice. (mma,) (Entered: 08/15/2022)
08/16/2022	167	ATTORNEY Appearance for Defendant BNSF Railway Company by Benjamin Kabe (Kabe, Benjamin) (Entered: 08/16/2022)
08/19/2022	168	MOTION for Leave to Appear Pro Hac Vice Filing fee $ 150, receipt number AILNDC-19761344. (Chapla, Claire) (Entered: 08/19/2022)
08/20/2022	169	MINUTE entry before the Honorable Matthew F. Kennelly: Motion of Claire Chapla to appear pro hac vice 168 is granted. (mk) (Entered: 08/20/2022)
08/23/2022	170	ATTORNEY Appearance for Defendant BNSF Railway Company by Andrew S. Tulumello (Tulumello, Andrew) (Entered: 08/23/2022)
08/25/2022	171	MOTION for Leave to Appear Pro Hac Vice Filing fee $ 150, receipt number AILNDC-19778596. (Niles-Weed, Robert) (Entered: 08/25/2022)
08/25/2022	172	MINUTE entry before the Honorable Matthew F. Kennelly: This order correct docket entry 166 which contained a scrivener's error. Telephonic status hearing held on 8/15/2022. Deadline for motions in limine is extended to 8/25/2022. Deadline for responses is extended to 9/1/2022. Pretrial conference set for 9/6/2022 at 2:00 p.m. 162 is going to be held in person.Mailed notice. (mma,) (Entered: 08/25/2022)
08/25/2022	173	MOTION by Defendant BNSF Railway Companyin limine *(Omnibus Motion in Limine)* (Herrington, Elizabeth) (Entered: 08/25/2022)
08/25/2022	174	MOTION by Defendant BNSF Railway Company to strike *Undisclosed Witnesses* (Attachments: # 1 Exhibit A)(Herrington, Elizabeth) (Entered: 08/25/2022)
08/25/2022	175	MOTION by Defendant BNSF Railway Company to strike *Plaintiff's Expert From Offering Undisclosed Expert Opinions at Trial* (Herrington, Elizabeth) (Entered: 08/25/2022)
08/25/2022	176	MOTION by Defendant BNSF Railway Company to stay *proceedings* (Herrington,

		Elizabeth) (Entered: 08/25/2022)
08/25/2022	177	Final Pretrial Order by Richard Rogers (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Exhibit D, # 5 Exhibit E, # 6 Exhibit F, # 7 Exhibit G, # 8 Exhibit H, # 9 Exhibit I)(Gerbie, David) (Entered: 08/25/2022)
08/26/2022	178	MOTION by Plaintiff Richard Rogersin limine *Plaintiffs' Omnibus Motion In Limine* (Attachments: # 1 Exhibit 1, # 2 Exhibit 2, # 3 Exhibit 3, # 4 Exhibit 4, # 5 Exhibit 5, # 6 Exhibit 6, # 7 Exhibit 7, # 8 Exhibit 8, # 9 Exhibit 9, # 10 Exhibit 10)(Duffner, Brendan) (Entered: 08/26/2022)
08/26/2022	179	MINUTE entry before the Honorable Matthew F. Kennelly: Motion of Robert Niles-Weed to appear pro hac vice 171 is granted. (mk) (Entered: 08/26/2022)
09/01/2022	180	RESPONSE by BNSF Railway Companyin Opposition to MOTION by Plaintiff Richard Rogersin limine *Plaintiffs' Omnibus Motion In Limine* 178 (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Exhibit D)(Herrington, Elizabeth) (Entered: 09/01/2022)
09/01/2022	181	RESPONSE by Richard Rogersin Opposition to MOTION by Defendant BNSF Railway Company to stay *proceedings* 176 *Plaintiff's Response in Opposition to Defendant's Motion to Stay* (Gerbie, David) (Entered: 09/01/2022)
09/01/2022	182	MOTION by Plaintiff Richard Rogers for leave to file *documents under seal* (Duffner, Brendan) (Entered: 09/01/2022)
09/01/2022	183	RESPONSE by Richard Rogersin Opposition to MOTION by Defendant BNSF Railway Companyin limine *(Omnibus Motion in Limine)* 173 *Plaintiffs' Response in Opposition to Defendant's Omnibus Motion in Limine* (Gerbie, David) (Entered: 09/01/2022)
09/01/2022	184	RESPONSE by Plaintiff Richard Rogers to motion to strike 175 , motion to strike 174 *Plaintiffs' Combined Response To Defendant's Motion To Bar Certain Testimony By Plaintiffs' Expert And Defendant's Motion To Bar Certain Witnesses* (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Exhibit D, # 5 Exhibit E, # 6 Exhibit F, # 7 Exhibit G, # 8 Exhibit H)(Duffner, Brendan) (Entered: 09/01/2022)
09/01/2022	185	SEALED RESPONSE *Plaintiffs' Sealed Combined Response To Defendant's Motion To Bar Certain Testimony By Plaintiffs' Expert And Defendant's Motion To Bar Certain Witnesses* (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Exhibit D, # 5 Exhibit E, # 6 Exhibit F, # 7 Exhibit G, # 8 Exhibit H)(Duffner, Brendan) (Entered: 09/02/2022)
09/02/2022	186	MINUTE entry before the Honorable Matthew F. Kennelly: The Court grants plaintiff's motion for leave to file certain materials under seal 182 . The Court highly doubts that any of this material is appropriately filed outside of the public record, but it needs to facilitate the prompt filing of this material given the upcoming pretrial conference. Plaintiff is directed to file a complete version of the submission--including all exhibits--under seal and a redacted version in the public record. (mk) (Entered: 09/02/2022)
09/02/2022	187	MINUTE entry before the Honorable Matthew F. Kennelly: Plaintiff's counsel is directed to deliver to Judge Kennelly's chambers by no later than 3:30 PM today a USB drive containing the entirety of docket no. 178 (plaintiff's motions in limine and supporting exhibits), as a single PDF file with each exhibit bookmarked. The combined file exceeds 30 MB in size and thus is too large for the Court to download from CMECF without downloading each attachment separately. (mk) (Entered: 09/02/2022)
09/05/2022	188	MINUTE entry before the Honorable Matthew F. Kennelly: The Court was advised earlier this evening that the Dirksen Courthouse will be closed on Tuesday, September 6 due to "an operational issue." For this reason, the in-person pretrial conference in this case set for September 6 is converted to a video pretrial conference, to be held at the

		same time previously scheduled (2:00 PM Central Time). The courtroom deputy clerk will send out a video invitation to one or two counsel for each side, who may distribute the invitation to others on their respective teams who plan to attend the pretrial conference. The Court also advises that it appears that this case will be assigned a trial start date of Tuesday, October 4. Counsel should plan accordingly. (mk) (Entered: 09/05/2022)
09/06/2022	189	MINUTE entry before the Honorable Matthew F. Kennelly: Video pretrial conference scheduled for September 6, 2022 at 2:00 p.m. Members of the public and media will be able to call in to listen to this hearing. The call-in number is (650) 479-3207 and the call-in ID is 23142535309##. Counsel of record will receive an email invitation prior to the start of the video hearing with instructions to join the video conference. Persons granted remote access to proceedings are reminded of the general prohibition against photographing, recording, and rebroadcasting of court proceedings. Violation of these prohibitions may result in sanctions, including removal of court issued media credentials, restricted entry to future hearings, denial of entry to future hearings, or any other sanctions deemed necessary by the Court. Mailed notice. (mma,) (Entered: 09/06/2022)
09/06/2022	190	MINUTE entry before the Honorable Matthew F. Kennelly: Pretrial conference held by video on 9/6/2022. Oral argument heard and rulings made on the record regarding the motions in limine. The Court will enter a separate order regarding the rulings on the motions in limine. By no later than 5:00 p.m. on 9/12/2022, the parties are to directed to file any argument regarding the vicarious liability and the document is to be no more than 10 pages. Defendants are granted leave to take depositions of 2 class members by 9/14/2022 and the depositions are to be no longer than 90 minutes. A trial logistical meeting is set for 9/8/2022 at 10:30 a.m. in Courtroom 2103. A telephonic status hearing is set for 9/19/2022 at 9:45 a.m. The following call-in number will be used for the hearing: 888-684-8852, access code 746-1053. Persons granted remote access to proceedings are reminded of the general prohibition against photographing, recording, and rebroadcasting of court proceedings. Violation of these prohibitions may result in sanctions, including removal of court issued media credentials, restricted entry to future hearings, denial of entry to future hearings, or any other sanctions deemed necessary by the Court. Mailed notice. (mma,) (Entered: 09/07/2022)
09/07/2022	191	MINUTE entry before the Honorable Matthew F. Kennelly: Defendant's renewed motion to stay 176 is denied. (mk) (Entered: 09/07/2022)
09/07/2022	192	MINUTE entry before the Honorable Matthew F. Kennelly: This order correct docket entry 190 which contained a typographical error. Pretrial conference held by video on 9/6/2022. Oral argument heard and rulings made on the record regarding the motions in limine. As more fully explained on the record: (1) Plaintiff's motions in limine 1, 2, and 5 are granted; plaintiff's motions in limine 3 and 7 are denied; plaintiff's motion in limine 4 is denied without prejudice to an a Rule 50 motion made at an appropriate time during the trial; and plaintiff's motion in limine 6 is denied in part to the extend stated on the record. (2) Defendant's motion in limine 1 is taken under advisement; defendant's motions in limine 2, 3 and 4 are granted in part and denied in part as described on the record; defendant's motions in limine 5, 6, 7, 12, and 13 are denied; and defendant's motion in limine 8, 11, and 14 are denied without prejudice to objections at an appropriate point during the trial. By no later than 5:00 p.m. on 9/12/2022, each side is to file a supplemental memorandum of no more than 10 pages the issues discussed during the hearing regarding defendant's motion in limine 1 (vicarious liability). On defendants' motion to strike undisclosed witnesses 174 : (a) with regard to Remprex witnesses ruling is deferred pending discussions by the parties regarding the foundation for admission of Remprex records; (b) plaintiff may call Lynda Parillo to testify; and (c) plaintiff may call no more than 2 unnamed class members (including the one who is a class representative

		in the related state court case); (d) defendants are granted leave to take depositions of no more than 90 minutes each of the 2 class members so identified. Defendant's motion to strike expert 175 is granted as to testimony by expert witness Caruso regarding the total number of "biometric captures" and is otherwise denied as discussed more fully on the record. A trial logistical meeting is set for 9/8/2022 at 10:30 a.m. in Courtroom 2103. A telephonic status hearing is set for 9/19/2022 at 9:45 a.m. The following call-in number will be used for the hearing: 888-684-8852, access code 746-1053. Persons granted remote access to proceedings are reminded of the general prohibition against photographing, recording, and rebroadcasting of court proceedings. Violation of these prohibitions may result in sanctions, including removal of court issued media credentials, restricted entry to future hearings, denial of entry to future hearings, or any other sanctions deemed necessary by the Court. Mailed notice. (mma,) (Entered: 09/07/2022)
09/11/2022	193	MINUTE entry before the Honorable Matthew F. Kennelly: As the Court has previou advised the parties, the jury trial date of 10/3/2022 is vacated and reset to 10/4/2022 at 9:00 AM. The Court intends to issue an order setting trial time limits. (mk) (Entered: 09/11/2022)
09/12/2022	194	MEMORANDUM by BNSF Railway Company *[Supplemental Brief on Vicarious Liability Issues]* (Herrington, Elizabeth) (Entered: 09/12/2022)
09/12/2022	195	MEMORANDUM by Richard Rogers *Supplemental Response in Opposition to Defendant's First Motion in Limine* (Kanovitz, Michael) (Entered: 09/12/2022)
09/15/2022	196	MINUTE entry before the Honorable Matthew F. Kennelly: At the Court's instance, the telephonic status hearing set for 9:45 AM on 9/19/2022 is advanced to 9:20 AM on that same date. (mk) (Entered: 09/15/2022)
09/15/2022	197	MINUTE entry before the Honorable Matthew F. Kennelly: The Court has reviewed the parties' supplemental submissions on the so-called "vicarious liability" issue and needs to hear further argument. It therefore vacates the telephonic status hearing set for the morning of 9/19/2022 and sets the matter for a video hearing relating to this issue on 9/19/2022 at 1:45 PM. The courtroom deputy clerk will send out a video invitation in advance of the hearing. The Court does not expect the hearing to take more than 20-30 minutes. (mk) (Entered: 09/15/2022)
09/15/2022	198	MINUTE entry before the Honorable Matthew F. Kennelly: Video hearing set for 9/19/2022 at 1:45 PM. (mk) (Entered: 09/15/2022)
09/19/2022	199	MINUTE entry before the Honorable Matthew F. Kennelly: Video status hearing held on 9/19/2022. Oral argument heard pertaining to the "vicarious liability" issue. The matter is taken under advisement. Mailed notice. (mma,) (Entered: 09/19/2022)
09/21/2022	200	ORDER REGARDING TRIAL TIME LIMITS, signed by the Honorable Matthew F. Kennelly on 9/21/2022. (mk) (Entered: 09/21/2022)
09/26/2022	201	MEMORANDUM OPINION AND ORDER ON DEFENDANT'S MOTION IN LIMINE 1, signed by the Honorable Matthew F. Kennelly on 9/26/2022. (mk) (Entered: 09/26/2022)
09/29/2022	202	MINUTE entry before the Honorable Matthew F. Kennelly: The Court sets this case for a settlement conference on 9/30/2022 at 3:00 PM. The conference should be attended by trial counsel as well as a corporate representative of the defendant (which may be in-house counsel if that person has settlement authority). The settlement conference will be conducted by video conference. Judge Kennelly's courtroom deputy clerk will send a video invitation to two attorneys per side who may circulate it among their respective teams as necessary. Mailed notice. (mma,) (Entered: 09/29/2022)

09/30/2022	203	MINUTE entry before the Honorable Matthew F. Kennelly: Settlement conference held. Settlement does not appear to be possible at this time. Case held for trial on 10/4/2022 at 9:00 AM in Courtroom 2103. (mk) (Entered: 09/30/2022)
10/01/2022	204	ORDER ALLOWING COUNSEL TO BRING CERTAIN MATERIALS TO COURT, signed by the Honorable Matthew F. Kennelly on 10/1/2022. (mk) (Entered: 10/01/2022)
10/03/2022	205	ATTORNEY Appearance for Plaintiff Richard Rogers by Gianna Gizzi (Gizzi, Gianna) (Entered: 10/03/2022)
10/03/2022	206	Exhibit List *[Defendant's Revised Objections to Plaintiff's Exhibit List]* by BNSF Railway Company. (Attachments: # 1 Exhibit A)(Herrington, Elizabeth) (Entered: 10/03/2022)
10/03/2022	207	OBJECTIONS *to Preliminary Jury Instructions* (Attachments: # 1 Appendix A) (Herrington, Elizabeth) (Entered: 10/03/2022)
10/04/2022	208	MINUTE entry before the Honorable Matthew F. Kennelly: Jury trial begun on 10/4/2022. Voir dire held. Evidence entered. Jury trial is continued to 10/6/2022 at 9:00 a.m. Mailed notice. (mma,) (Entered: 10/04/2022)
10/06/2022	209	MINUTE entry before the Honorable Matthew F. Kennelly: Jury trial held on 10/6/2022. Evidence entered. Defendant's 403 objection is overruled. Defendant's oral motion to reconsider the ruling on the 403 objection is denied as to the reasons stated more fully on the record. Jury trial continued to 10/7/2022 at 9:00 a.m. Mailed notice. (mma,) (Entered: 10/06/2022)
10/07/2022	210	Defendant's Deposition Designations by BNSF Railway Company (Attachments: # 1 Exhibit A)(Herrington, Elizabeth) (Entered: 10/07/2022)
10/07/2022	211	MINUTE entry before the Honorable Matthew F. Kennelly: Jury trial held on 10/7/2022. Evidence entered. Jury trial is continued to 10/11/2022 at 9:00 a.m. Mailed notice. (mma,) (Entered: 10/07/2022)
10/07/2022	212	MOTION by Defendant BNSF Railway Company for judgment *as a Matter of Law* (Herrington, Elizabeth) (Entered: 10/07/2022)
10/08/2022	213	MINUTE entry before the Honorable Matthew F. Kennelly: The Court has reviewed the testimony designated from the deposition of Carlos Reyes. The only objection is an objection to lack of foundation for the testimony at page 123:24 through page 124:2. The objection is sustained. (mk) (Entered: 10/08/2022)
10/10/2022	214	OBJECTIONS *to Final Jury Instructions* (Herrington, Elizabeth) (Entered: 10/10/2022)
10/10/2022	215	MOTION by Defendant BNSF Railway Company to Preclude Argument on the "Total Number" of Finger Scans (Herrington, Elizabeth) (Entered: 10/10/2022)
10/11/2022	216	MOTION by Defendant BNSF Railway Company to seal *Certain Exhibits to BNSF'S Offer of Proof* (Herrington, Elizabeth) (Entered: 10/11/2022)
10/11/2022	217	Offer of Proof by BNSF Railway Company *[Public Version]* (Attachments: # 1 Exhibit 1, # 2 Exhibit 2, # 3 Exhibit 3, # 4 Exhibit 4, # 5 Exhibit 5, # 6 Exhibit 6)(Herrington, Elizabeth) (Entered: 10/11/2022)
10/11/2022	218	SEALED DOCUMENT by Defendant BNSF Railway Company -- *Offer of Proof [Sealed Version]* (Attachments: # 1 Exhibit 1, # 2 Exhibit 2, # 3 Exhibit 3, # 4 Exhibit 4, # 5 Exhibit 5, # 6 Exhibit 6)(Herrington, Elizabeth) (Entered: 10/11/2022)
10/11/2022	219	MINUTE entry before the Honorable Matthew F. Kennelly: Jury trial held on 10/11/2022. Evidence entered. Jury trial continued to 10/12/2022 at 9:00 a.m. The defendant's motion

		to seal certain exhibits to BNSF's Offer of Proof 216 is denied as to the reasons stated on the record. Mailed notice. (mma,) (Entered: 10/11/2022)
10/12/2022	220	MOTION by Plaintiff Richard Rogers for reconsideration (Attachments: # 1 Exhibit 1, # 2 Exhibit 2, # 3 Exhibit 3, # 4 Exhibit 4, # 5 Exhibit 5, # 6 Exhibit 6)(Kanovitz, Michael) (Entered: 10/12/2022)
10/12/2022	221	JURY Instructions. (mma,) (Entered: 10/12/2022)
10/12/2022	222	JURY Note. (mma,) (Entered: 10/12/2022)
10/12/2022	223	MINUTE entry before the Honorable Matthew F. Kennelly: Jury trial held. Plaintiff's motion for reconsideration 220 and defendant's motion for judgment as matter of law 212 are both denied as to the reasons stated more fully on the record. Deliberations begin. Jury returns a verdict. The jury has found that the defendant committed 45,600 reckle or intentional violations of the Biometric Information Privacy Act. The Court therefore directs the Clerk to enter judgment in favor of the plaintiff class and against the defendants in the amount of $228,000,000. Class counsel are directed to file a written proposal for distribution by no later than 10/21/2022. The case is set for a telephonic status hearing on 10/26/2022 at 9:15 AM. The following call-in number will be used for the hearing: 888-684-8852, access code 746-1053. The Court also remains willing to re-initiate settlement discussions. Civil case terminated. Mailed notice. (mma,) (Entered: 10/12/2022)
10/12/2022	224	JURY Verdict entered in favor of Plaintiff class and against BNSF Railway. (Mailed Notice) (RESTRICTED) (mma,) (Entered: 10/12/2022)
10/12/2022	225	ENTERED JUDGMENT. Mailed notice. (mma,) (Entered: 10/12/2022)
10/19/2022	226	TRANSCRIPT OF PROCEEDINGS held on May 26, 2021 before the Honorable Matthew F. Kennelly. Order Number: 40869. Court Reporter Contact Information: Carolyn Cox, Carolyn_Cox@ilnd.uscourts.gov. IMPORTANT: The transcript may be viewed at the court's public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through the Court Reporter/Transcriber or PACER. For further information on the redaction process, see the Court's web site at www.ilnd.uscourts.gov under Quick Links select Policy Regarding the Availability of Transcripts of Court Proceedings. Redaction Request due 11/9/2022. Redacted Transcript Deadline set for 11/21/2022. Release of Transcript Restriction set for 1/17/2023. (Cox, Carolyn) (Entered: 10/19/2022)
10/19/2022	227	TRANSCRIPT OF PROCEEDINGS held on August 25, 2021 before the Honorable Matthew F. Kennelly. Order Number: 41480. Court Reporter Contact Information: Carolyn Cox, Carolyn_Cox@ilnd.uscourts.gov. IMPORTANT: The transcript may be viewed at the court's public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through the Court Reporter/Transcriber or PACER. For further information on the redaction process, see the Court's web site at www.ilnd.uscourts.gov under Quick Links select Policy Regarding the Availability of Transcripts of Court Proceedings. Redaction Request due 11/9/2022. Redacted Transcript Deadline set for 11/21/2022. Release of Transcript Restriction set for 1/17/2023. (Cox, Carolyn) (Entered: 10/19/2022)
10/19/2022	228	TRANSCRIPT OF PROCEEDINGS held on February 2, 2021 before the Honorable

		Matthew F. Kennelly. Order Number: 42981. Court Reporter Contact Information: Carolyn Cox, Carolyn_Cox@ilnd.uscourts.gov. IMPORTANT: The transcript may be viewed at the court's public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through the Court Reporter/Transcriber or PACER. For further information on the redaction process, see the Court's web site at www.ilnd.uscourts.gov under Quick Links select Policy Regarding the Availability of Transcripts of Court Proceedings. Redaction Request due 11/9/2022. Redacted Transcript Deadline set for 11/21/2022. Release of Transcript Restriction set for 1/17/2023. (Cox, Carolyn) (Entered: 10/19/2022)
10/19/2022	229	TRANSCRIPT OF PROCEEDINGS held on September 6, 2022 before the Honorabl Matthew F. Kennelly. Order Number: 44071, 44072. Court Reporter Contact Information: Carolyn Cox, Carolyn_Cox@ilnd.uscourts.gov. IMPORTANT: The transcript may be viewed at the court's public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through the Court Reporter/Transcriber or PACER. For further information on the redaction process, see the Court's web site at www.ilnd.uscourts.gov under Quick Links select Policy Regarding the Availability of Transcripts of Court Proceedings. Redaction Request due 11/9/2022. Redacted Transcript Deadline set for 11/21/2022. Release of Transcript Restriction set for 1/17/2023. (Cox, Carolyn) (Entered: 10/19/2022)
10/21/2022	230	Proposal for Distribution by Richard Rogers (Attachments: # 1 Exhibit A)(Gerbie, David) (Entered: 10/21/2022)
10/26/2022	231	MINUTE entry before the Honorable Matthew F. Kennelly: Telephonic status hearing held on 10/26/2022. Video settlement conference is set for 11/29/2022 at 10:30 a.m. The Court will send out the video conference invitation a few days in advance of the hearing. The defendant's response to the distribution plan is due 11/9/2022. The Local Rule deadlines regarding fee petitions are stayed. Mailed notice. (mma,) (Entered: 10/26/2022)
11/07/2022	232	MOTION by Defendant BNSF Railway Company to Approve Bond and Stay Enforcement of Judgment (Attachments: # 1 Exhibit Ex. A- Supersedeas Bond) (Herrington, Elizabeth) (Entered: 11/07/2022)
11/09/2022	233	MINUTE entry before the Honorable Matthew F. Kennelly: Plaintiffs are directed to file by 11/16/2022 one of the following: any objection to defendant's motion to approve bond and stay enforcement, or a statement that they have no objection. (mk) (Entered: 11/09/2022)
11/09/2022	234	RESPONSE by Defendant BNSF Railway Company to other 230 *Plaintiff's Proposal for Distribution of Judgment* (Herrington, Elizabeth) (Entered: 11/09/2022)
11/09/2022	235	MOTION by Defendant BNSF Railway Company [Renewed Motion for Judgment as a Matter of Law and Motion for a New Trial or to Alter or Amend Judgment and Incorporated Memorandum of Law] (Herrington, Elizabeth) (Entered: 11/09/2022)
11/09/2022	236	MOTION by Plaintiff Richard RogersPLAINTIFFS' RULE 59 MOTION TO AMEND JUDGMENT (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Exhibit D, # 5 Exhibit E)(Loevy, Jonathan) (Entered: 11/09/2022)
11/16/2022	237	RESPONSE by Richard Rogers to MOTION by Defendant BNSF Railway Company to

		Approve Bond and Stay Enforcement of Judgment 232 (Attachments: # 1 Exhibit A, # 2 Exhibit B)(Loevy, Jonathan) (Entered: 11/16/2022)
11/29/2022	238	MINUTE entry before the Honorable Matthew F. Kennelly: Continued video settlement conference held. Defendant is directed to respond to plaintiff's settlement proposal by 12/9/2022. Plaintiff is directed to reply to the response by 12/16/2022. All three letters are to be provided to Judge Kennelly's proposed order e-mail address by 12/20/2022. Continued video settlement conference is set for 12/23/2022 at 9:30 AM. Counsel should promptly advise Judge Kennelly's courtroom deputy clerk if it would be preferable to start the conference earlier in the day on 12/23/2023 due to travel or other scheduling issues. The Clerk will send a video invitation several days in advance. Each party's response to the opposing party's post-trial motion is to be filed by 1/13/2023; replies are to be filed by 1/27/2023. Mailed notice. (mma,) (Entered: 11/29/2022)

PACER Service Center

Transaction Receipt

11/30/2022 15:33:17

PACER Login:	km2734	**Client Code:**	Legal Update - MHS
Description:	Docket Report	**Search Criteria:**	1:19-cv-03083
Billable Pages:	22	**Cost:**	2.20

In re Kronos Customer Data Sec. Breach Litig.

Judicial Panel On Multidistrict Litigation

August 3, 2022, Filed

MDL No. 3039

Reporter

2022 U.S. Dist. LEXIS 139325 *; __ F.Supp.3d __; 2022 WL 3138680

IN RE: KRONOS CUSTOMER DATA SECURITY BREACH LITIGATION

Judges: [*1] Karen K. Caldwell, Chair.

Opinion by: Karen K. Caldwell

Opinion

ORDER DENYING TRANSFER

Before the Panel:[*] Plaintiffs in the constituent action pending in the District of Massachusetts move under 28 U.S.C. § 1407 to centralize this litigation in the District of Massachusetts. This litigation consists of five actions—three pending in the Northern District of California, one pending in the District of Massachusetts, and one pending in the Western District of Pennsylvania—as listed on Schedule A.[1] Defendants UKG, Inc. and its subsidiary Kronos Incorporated (together, Kronos) oppose centralization, as do plaintiffs in the actions pending in the Northern District of California and the Western District of Pennsylvania. Plaintiffs in the potentially-related actions support centralization in the District of Massachusetts.

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[*] Judge Roger T. Benitez took no part in the decision of this matter.

Additionally, one or more Panel members who could be members of the putative classes in this litigation have renounced their participation in these classes and have participated in this decision.

[1] The Panel has been notified that seven potentially-related actions are pending in the District of Massachusetts.

On the basis of the papers filed and the hearing session held, we conclude that centralization is not necessary for the convenience of the parties and witnesses or to further the just and efficient conduct of this litigation. These putative class actions arise from a data security breach of Kronos' cloud-based time and attendance systems and workforce management software applications in December 2021. The breach is **[*2]** alleged to have caused an outage of Kronos' payroll system and compromised the personally identifiable information of the employees of their clients. The actions thus will share some common factual questions, including how the Kronos data breach occurred, what security measures were in place at the time of the breach, and what steps Kronos took in response to the breach. There are only five actions on the motion, however, three of which are consolidated in the same district before the same judge. Though there are now seven potentially-related actions, they all are pending in the same district before the same judge.

We have emphasized that "centralization under Section 1407 should be the last solution after considered review of all other options." *In re Best Buy Co., Inc., Cal. Song-Beverly Credit Card Act Litig.*, 804 F. Supp. 2d 1376, 1378 (J.P.M.L. 2011). These options include voluntary cooperation and coordination among the parties and the involved courts to avoid duplicative discovery or inconsistent rulings. *See, e.g., In re Gerber Probiotic Prods. Mktg. & Sales Practices Litig.*, 899 F. Supp. 2d 1378, 1379 (J.P.M.L. 2012); *In re Eli Lilly & Co. (Cephalexin Monohydrate) Patent Litig.*, 446 F. Supp. 242, 244 (J.P.M.L. 1978); *see also* Manual for Complex Litigation, Fourth, § 20.14 (2004). In the circumstances presented here, informal coordination among the small number of parties and involved courts appears eminently feasible. Indeed, the voluntary coordination efforts of the parties to the Northern District **[*3]** of California cases already have resulted in consolidation in that court. Of the remaining nine actions, eight are related before a single judge in the District of Massachusetts, and seven of those were filed by common counsel.

Furthermore, while the actions all share factual questions regarding the circumstances of the data breach, some also include wage and hour claims against Kronos and plaintiffs' employers.

These claims will involve factual issues unique to each employer and how each handled the payroll system outage. With a relatively small number of actions, the addition of such individualized facts and unique additional defendants would complicate the management of a coordinated proceeding.

Finally, plaintiffs in actions outside the District of Massachusetts and common defendants oppose centralization. We have found persuasive that "of all responding parties, those who would be most affected by centralization ... do not believe that centralization would be beneficial." *In re Student—Athlete Name & Likeness Litig.*, 763 F. Supp. 2d 1379 (J.P.M.L. 2011). *See also In re Sorin 3T Heater-Cooler Sys. Prods. Liab. Litig.*, 273 F. Supp. 3d 1357, 1358 (J.P.M.L. 2017) ("Critically, not a single party to any of the six actions pending outside the District of South Carolina supports centralization.").

IT IS THEREFORE ORDERED that the motion for centralization of these **[*4]** actions is denied.

PANEL ON MULTIDISTRICT LITIGATION

/s/ Karen K. Caldwell

Karen K. Caldwell

Chair

SCHEDULE A

Northern District of California

MULLER, ET AL. v. UKG INC., C.A. No. 3:22-00346

VILLANUEVA v. UKG, INC., C.A. No. 3:22-01789

BENTE v. UKG, INC., C.A. No. 3:22-02554

District of Massachusetts

PALLOTTA, ET AL. v. UNIVERSITY OF MASSACHUSETTS MEMORIAL

MEDICAL CENTER, ET AL., C.A. No. 4:22-10361

Western District of Pennsylvania

KROECK v. WEST PENN ALLEGHENY HEALTH SYSTEM, INC., ET AL.,

C.A. No. 2:22-00066

End of Document

In re Blackbaud, Inc., Litig.

United States District Court for the District of South Carolina, Columbia Division

June 28, 2022, Decided; June 28, 2022, Filed

Case No. 3:20-mn-02972-JFA; MDL No. 2972

Reporter

2022 U.S. Dist. LEXIS 114984 *; 2022 WL 2314714

IN RE: BLACKBAUD, INC., CUSTOMER DATA SECURITY BREACH LITIGATION

Prior History: In re Blackbaud, Inc., 509 F. Supp. 3d 1362, 2020 U.S. Dist. LEXIS 236057 (J.P.M.L., Dec. 15, 2020)

Counsel: [*1] For Plaintiffs' Lead Counsel, Plaintiff: Amy E Keller, LEAD ATTORNEY, DiCello Levitt Gutzler LLC, Chicago, IL; Harper Todd Segui, LEAD ATTORNEY, Milberg Coleman Bryson Phillips Grossman PLLC, Mount Pleasant, SC; Krysta Kauble Pachman, LEAD ATTORNEY, Susman Godfrey LLP, Los Angeles, CA; Marlon E Kimpson, LEAD ATTORNEY, Motley Rice, Mt Pleasant, SC.

For Plaintiffs' Liaison Counsel, Plaintiff: Frank Burton Ulmer, LEAD ATTORNEY, McCulley McCluer PLLC, Charleston, SC.

For Plaintiffs' Steering Committee, Plaintiff: Desiree Cummings, LEAD ATTORNEY, PRO HAC VICE, Robbins Geller Rudman and Dowd LLP, New York, NY; Douglas J McNamara, LEAD ATTORNEY, Cohen Milstein Sellers and Toll PLLC, Washington, DC; Gretchen Freeman Cappio, LEAD ATTORNEY, Keller Rohrback LLP, Seattle, WA; Howard Theodore Longman, LEAD ATTORNEY, Longman Law PC, Livingston, NJ; Kelly K Iverson, LEAD ATTORNEY, PRO HAC VICE, Lynch Carpenter LLP, Pittsburgh, PA; Melissa R. Emert, LEAD ATTORNEY, Kantrowitz, Goldhamer & Graifman, P.C., NY, Chestnut Ridge, NY; Melissa S Weiner, LEAD ATTORNEY, Pearson Simon and Warshaw LLP, Minneapolis, MN.

For Blackbaud Inc, Co-Lead Counsel, Defendant: Amy Pritchard Williams, LEAD ATTORNEY, PRO HAC VICE, **[*2]** Joshua D Davey, LEAD ATTORNEY, Troutman Pepper Hamilton

Sanders LLP, Charlotte, NC; Angelo Anthony Stio, III, LEAD ATTORNEY, Pepper Hamilton LLP (Princeton), Princeton, NJ; Ashley L Taylor, Jr, LEAD ATTORNEY, PRO HAC VICE, Harrison Scott Kelly, PRO HAC VICE, Troutman Sanders LLP, Richmond, VA; Celeste Tiller Jones, LEAD ATTORNEY, Burr and Forman LLP-Cola, Columbia, SC; Cindy D Hanson, LEAD ATTORNEY, Troutman Pepper Hamilton Sanders LLP, Atlanta, GA; David Neal Anthony, Timothy J St George, LEAD ATTORNEYS, Troutman Pepper Hamilton Sanders LLP, Richmond, VA; J Rutledge Young, III, LEAD ATTORNEY, Duffy and Young LLC, Charleston, SC; James Keith Gilliam, LEAD ATTORNEY, Burr and Forman LLP, Myrtle Beach, SC; Ronald Irvin Raether, Jr., LEAD ATTORNEY, Troutman Pepper Hamilton Sanders LLP, Irvine, CA; Tambry L Bradford, LEAD ATTORNEY, Troutman Pepper Hamilton Sanders LLP, Los Angeles, CA; Jessica R Lohr, PRO HAC VICE, Troutman Pepper Hamilton Sanders LLP, San Diego, CA; Melissa Anne Chuderewicz, PRO HAC VICE, Troutman Pepper Hamilton Sanders LLP, Princeton, NJ; Syed Mohsin Reza, PRO HAC VICE, Troutman Pepper Hamilton Sanders LLP, Washington, DC.

For The President and Fellows of Harvard College, **[*3]** a Massachusetts not-for-profit corporation, Interested Party: Lindsay C Harrison, LEAD ATTORNEY, Jenner and Block, Washington, DC; Nicholas C Larson, LEAD ATTORNEY, Murphy, Pearson, Bradley & Feeney, Seattle, WA; Kate T Spelman, Jenner & Block LLP, Los Angeles, CA.

For Bank Street College of Education, a New York not-for-profit corporation, Interested Party: Donald Guthrie, LEAD ATTORNEY, Patterson Buchanan Fobes & Leitch, Seattle, WA; Jessica Lorraine Copeland, LEAD ATTORNEY, PRO HAC VICE, Bond Schoeneck and King PLLC, Avant Building, Buffalo, NY.

For Allina Health System, Interested Party: Aram V. Desteian, LEAD ATTORNEY, Bassford Remele, Minneapolis, MN; Mark R Bradford, LEAD ATTORNEY, Bassford Remele PA, Minneapolis, MN.

For Enloe Medical Center, Interested Party: James Francis Monagle, LEAD ATTORNEY, Mullen Coughlin LLC, Cedar Knolls, NJ.

For Community Medical Centers, Interested Party: Teresa Carey Chow, LEAD ATTORNEY, Baker & Hostetler LLP, Los Angeles, CA.

For Judge Sleet, Mediator: Gregory M Sleet, LEAD ATTORNEY, JAMS, Philadelphia, PA.

Judges: Joseph F. Anderson, Jr., United States District Judge.

Opinion by: Joseph F. Anderson, Jr.

Opinion

ORDER AND OPINION

THIS DOCUMENT RELATES TO: ALL ACTIONS:

This matter **[*4]** is before the court on motions by both Plaintiffs and Defendant to have the court determine which state's common law principles will apply to the substantive claims asserted in this case. (ECF Nos. 252-255). Specifically, Plaintiffs seek to have South Carolina law applied to the common law claims of negligence, negligence per se, and invasion of privacy; meanwhile, Blackbaud moves to have the law of each state where a respective plaintiff is domiciled to apply to those specific common law claims. *Id.* This matter has been fully briefed and is ripe for review.

I. FACTUAL BACKGROUND

Blackbaud, Inc., a cloud-based services provider, is a publicly traded company incorporated in Delaware and headquartered in Charleston, South Carolina. (ECF No. 77 at ¶ ¶ 419, 424). The company provides data collection and maintenance software solutions for administration, fundraising, marketing, and analytics for "social good entities."[1] *Id.* at ¶¶ 4, 430. Blackbaud's

[1] The social good entities include cultural organizations, foundations, educational institutions, faith communities, and healthcare organizations (hereinafter, "Social Good Entities"). *Id.*

services include collecting and storing personally identifiable information and personal health information ("Personal Information" or "PI") about the Social Good Entities' donors, students, congregants, and patients. *Id.* at ¶¶ 2, 429.

Plaintiffs **[*5]** represent a putative class of individuals whose Personal Information was provided to Blackbaud's customers (the Social Good Entities) and managed by Blackbaud. *Id.* at ¶ 12. Plaintiffs are not Blackbaud's direct customers, but the patrons of the Social Good Entities that are direct customers of Blackbaud. (ECF Nos. 92-1 & 109). Plaintiffs allege that cybercriminals orchestrated a ransomware style data breach attack from February 7, 2020 to May 20, 2020. (ECF No. 77 at ¶ 25). Blackbaud ultimately paid the ransom in exchange for a commitment that any data previously accessed by the cybercriminals be permanently destroyed. (ECF Nos. 77 at ¶ 20; 138 at ¶ 499; & 92-1). Plaintiffs allege that Blackbaud's security program was inadequate and that the security risks associated with the Personal Information went unmitigated, allowing the cybercriminals to gain access. (ECF No. 77 at ¶ 439). During the subsequent discovery, Blackbaud stated that its domestic data centers are located in Massachusetts, Texas, California, and New Jersey. (ECF No. 254 at 3). Blackbaud further contends, apparently without contradictions, that the servers which house the Plaintiffs data—and the initial point of entry **[*6]** for the ransomware attack—are physically located in Massachusetts. *Id.* at 3-4.

II. PROCEDURAL BACKGROUND

Prior to the instant motion, both Parties asserted choice of law arguments within the context of Blackbaud's motion to dismiss. (ECF Nos. 124-1 & 142-1). Both parties have agreed that South Carolina choice of law principles apply in this action. (ECF No. 93). Thus, "[u]nder traditional South Carolina choice of law principles, the substantive law governing a tort action is determined by the *lex loci delicti*, the law of the state in which the [alleged] injury occurred." *Boone v. Boone*, 345 S.C. 8, 13, 546 S.E.2d 191, 193 (2001).

In briefing Blackbaud's prior motion to dismiss, Blackbaud and Plaintiffs argued their respective positions on the place of injury. Blackbaud argued that the law of the state where a Plaintiff resides should apply to that specific Plaintiff's common law tort claims. (ECF No. 124-1 at 7-8). In response, Plaintiffs moved that South Carolina law should be applied based on Blackbaud's decisions related to "security measures" and "all of Plaintiffs' tort claims arise out of Blackbaud's failure to implement security measures to protect Plaintiffs' Personal Information." (ECF No. 142-1 at 4-5).

In contravention of both parties' **[*7]** stated arguments, the court[2] held that "the original point of intrusion—that is how the data breach began in the first instance," was the critical fact under the *lex loci delicti* analysis per South Carolina choice of law principles. (ECF No. 160 at 7). This court found that South Carolina law, as the law of the forum, was proper at the time because the place of the breach could not be determined based on the limited amount of discovery and "South Carolina was the only Blackbaud location specifically enumerated in the record." *Id.* Notably, the court stated in that order that applying South Carolina law at this stage in the litigation[3] and for the purpose of that specific motion, was proper and supported by the policy behind the *lex loci delicti* choice of law analysis.[4] *Id.* at 7-9. However, the court made clear that additional facts learned in discovery might alter this analysis. *Id.* at 7.

Plaintiffs and Blackbaud agreed that additional briefing on choice of law was appropriate and agreed to brief the issue in advance of substantive motions practice after conducting more

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[2] This was originally assigned to Judge Michelle Childs, who ruled upon the motion to dismiss. The case was then reassigned to the undersigned district judge by the judicial panel on Multidistrict litigation from upon Judge Childs' elevation to the Court of Appeals.

[3] *See Advanced Comm. Credit Int'l (ACI) Ltd. V. Citisculpt, LLC*, No. 6:17-cv-AMQ, 2018 WL 2149296, at *4 n.1 (D.S.C. May 10, 2018) (explaining that its choice of law finding was "not intended to serve as a final determination of choice of law issues for all purposes" in the case if different facts developed during discovery).

[4] "The long-time traditional reasons and arguments advanced for following, adopting, or adhering to the *lex loci* rule have been that it is relatively easy to apply, furnishes certainty and predictability of outcome (thus aiding litigants, lawyers, and insurers in assessing rights, liabilities, defenses, and damages), and, in addition is symmetrical—all persons injured, etc., in a single incident will have their rights adjusted by the same law."

1 American Law of Torts § 2:9 (1970).

discovery. (ECF No. 228). The parties have filed **[*8]** their respective motions and responses on the choice of law analysis for the common law tort claims.

III. LEGAL STANDARD

The parties have stipulated to the application of South Carolina choice of law principles. (ECF No. 93). The court previously held that Plaintiffs common law claims for negligence, negligence per se, and invasion of privacy could proceed after Blackbaud moved to dismiss. (ECF No. 253-1 (citing ECF No. 160)). For tort claims, South Carolina uses the *lex loci delicti* analysis of the First Restatement of Conflict of Laws.[5] "The *lex loci* doctrine is derived from the vested-rights approach which holds that a plaintiff's cause of action 'owes its creation to the law of the jurisdiction where the injury occurred and depends for its existence and extent solely on such law.'" *Trahan v. E.R. Squibb & Sons, Inc.*, 567 F. Supp. 505, 508 (M.D. Tenn. 1983) (quoting *Winters v. Maxey*, 481 S.W.2d 755, 756 (Tenn. 1972)). Under the traditional or "vested-rights" approach, "the cause of action was considered to be created in the state of the tort, and the capacity to sue or immunity or defense was considered part and parcel of those rights." 29 A.L.R.3d 603 (1970). Thus, under the traditional *lex loci delicti* test, the court applies the First Restatement's reasoning where "the place of the harm is defined as 'the state where the last **[*9]** event necessary to make an actor liable for an alleged tort takes place.'" *Wells v. Liddy*, 186 F.3d 505, 521 (4th Cir. 1999) (quoting RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 377 (1934)).

The acts and events necessary to constitute a tort is a question of law that varies depending on the state. Restatement (First) of Conflict of Laws § 377 cmt. 1 (AM. L. INST. 1934). Applying the agreed upon South Carolina choice of law rules, the place of wrong is the location where the injury occurred, which is not necessarily the domicile of the plaintiff. *Rogers v. Lee*, 414 S.C. 225, 234, 777 S.E.2d 402, 407 (S.C. Ct. App. 2015). Further, South Carolina law provides "*lex*

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[5] The goals of this approach are to "reduce forum shopping and increase predictability and uniformity" of result. *See* Yasamine J. Christopherson, *Conflicted About Conflicts? A simple Introduction to Conflicts of Law*, 21 S.C. LAW. 30, Sept. 2009, at 31.

loci delicti is determined by the state in which *the injury occurred*, not where the results of the injury were felt or where the damages manifested themselves." *Id.* at 231, 777 S.E.2d at 405. Therefore, the last event necessary for the tort to be a cognizable claim was the injury suffered by the Plaintiffs. Accordingly, the court must discern in which state the last act necessary to bring the claim occurred, *i.e.* the injury, and not where Plaintiffs may have felt the results of the injury or where the damages were manifested.

IV. DISCUSSION

As stated above, the main question presented in the choice of law briefing is where did the last act necessary for Blackbaud to potentially be liable for the common **[*10]** law tort claims occur? Determining where the last act necessary to identify that place of wrong is dependent on the elements of the specific tort at issue. *Cockrum v. Donald J. Trump for President, Inc.*, 365 F. Supp. 3d 652, 667 (E.D. Va. 2019). The torts claimed here include negligence, negligence per se, and invasion of privacy. The elements of negligence are duty, breach, causation, and damages. *Savannah Bank, N.A. v. Stalliard*, 400 S.C. 246, 251, 734 S.E.2d 161, 163-64 (2012). The last element necessary for a cognizable claim is damage to the plaintiff. *See Bank of Louisiana v. Marriott Int'l, Inc.*, 438 F. Supp. 3d 433, 443 (D. Md. 2020).

Plaintiffs have alleged that they "have been harmed and incurred damages as a result of the compromise of their PI in the data breach." (ECF No. 77 at ¶ 555). Plaintiffs assert they have suffered injuries arising from Blackbaud's negligence in the form of risk extortion (*id.* at ¶560), unauthorized disclosure of their PI to cybercriminals (*id.* at ¶ 563), loss of value in their PI (*id.* at ¶ 564), risk of future identity theft or fraud (*id.* ¶ at 566), and out-of-pocket mitigation expenses (*id.* at ¶¶568-70).

The damages from these claims stem from the same event—when the Plaintiffs' PI was exposed.[6] The initial damage occurred from the alleged risk of identity theft and the

[6] Here, all three common law tort claims (negligence, negligence per se, and invasion of privacy) all depend on the point of intrusion as the last act necessary for potential liability. *See Cockrum v. Donald J. Trump for President, Inc.*, 365 F. Supp. 3d

corresponding diminished value as a result of the cybercriminals' intrusion into Blackbaud's servers. The actual identity theft, **[*11]** emotional distress, and time and/or money spent to mitigate the harm all flow from the initial injury — the exposure of Plaintiffs' PI. Plaintiffs' alleged injury and the last event necessary for Blackbaud to be potentially liable in tort, was the cybercriminals' breach into the PI data servers. Thus, the court must determine where the data breach occurred.

Plaintiffs filed their motion on choice of law making the same argument that they made in the previous motion, that South Carolina law should apply as that is where Blackbaud's executives made the decisions which allowed improper access to the data. (ECF Nos. 252 & 253). Similarly, Blackbaud submitted the same argument in support of the position that each Plaintiffs' home state should apply as to the common law claims because the Plaintiffs' damages were felt in their respective home states. (ECF Nos. 254 & 255). Both sides also made a secondary and alternative argument that should the court find the primary choice of law suggestion was unfounded, then Massachusetts law would be appropriate. (ECF Nos. 253 & 254). Those arguments rest on the notion that Massachusetts was the state where the last act necessary took place because **[*12]** that is where the data servers were housed. *Id.* In continuity with the court's previous ruling and reasoning on the matter, Massachusetts law will apply as that is where the data breach occurred.[7]

Both Plaintiffs and Blackbaud maintain their respective positions that South Carolina or each Plaintiffs' state of residence should apply (respectively) to the common law tort claims. Neither parties' primary argument is persuasive. First, Plaintiffs suggest that South Carolina law should apply as that is where the cybersecurity related decisions were made. However, new discovery has illuminated the fact that the servers were located in Massachusetts and not South Carolina. Although some, if not most, of the decisions regarding the security were made in South Carolina

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652, 668-69 (E.D. VA 2019)(where the last act necessary for an invasion of privacy claim is the exposure of a plaintiff's personal information.).

[7] Although the court used South Carolina law in the previous choice of law analysis, that was done based on the limited discovery the parties had conducted at the time and for purposes of that motion. (ECF No. 160). The court noted the decision was made with the reservation that the "point of intrusion" factor was the nexus for the correctly applied law and that may change the state law to be applied once more discovery commenced. (ECF No. 160 at 7).

by South Carolina based executives, that does not change the fact that the PI was stored on servers in Massachusetts.

Plaintiffs still contend that the last act necessary for Blackbaud to be liable in tort were the decisions it made regarding cybersecurity. That contention rests on the allegation that Blackbaud made the cybersecurity decisions from its headquarters in South Carolina. However, Blackbaud's decisions related to cybersecurity **[*13]** alone would not be the last act necessary for Blackbaud to potentially be liable. Those alleged decisions made in South Carolina may have contributed to the breach, but they were not the last act necessary to establish the cause of action. For Blackbaud to potentially be liable the cybercriminals would still need to breach the data servers. Plaintiffs' conclusion as to the law to be applied is incorrect because more events were required after Blackbaud made the cybersecurity decisions.

The cybercriminals intruded upon the information space by breaching the data servers located in Massachusetts, not in South Carolina. South Carolina's tort laws are not the proper choice upon which these common law claims should be litigated, because the point of intrusion, which ultimately caused Plaintiffs' damages, was in Massachusetts. Therefore, Massachusetts law will apply to the common law tort claims.

Likewise, Blackbaud's opinion that each Plaintiffs' state of residence should be the applicable law in which to litigate the common law tort claims also misses the mark. As the court previously stated in this order, South Carolina's choice of law rules dictate that where an injury occurs, not where **[*14]** the result of the injury is felt or discovered, is the proper standard to determine the last act necessary to complete the tort. Here, although Plaintiffs respective home states span the country, and many may have never been to the Northeast, the last act necessary for Blackbaud to be potentially liable occurred in Massachusetts once the cybercriminals breached the servers that housed the Personal Information.

The court finds that the last act necessary in which Blackbaud could potentially be liable for the common law claims of negligence, negligence per se, and invasion of privacy occurred in the

state in which the servers were located. Accordingly, the court will apply Massachusetts law regarding the claims for negligence, negligence per se, and invasion of privacy.

V. CONCLUSION

For the foregoing reasons, the court will apply Massachusetts law to the negligence, negligence per se, and invasion of privacy claims.

IT IS SO ORDERED.

June 28, 2022

Columbia, South Carolina

/s/ Joseph F. Anderson

Joseph F. Anderson, Jr.

United States District Judge

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Rose v. Target Stores

United States District Court for the Western District of Tennessee, Western Division
March 28, 2022, Decided; March 28, 2022, Filed
No. 2:20-cv-02205-MSN-cgc

Reporter

2022 U.S. Dist. LEXIS 55357 *; 2022 WL 906051

SYLVIA ROSE, Plaintiff, v. TARGET STORES, a division of TARGET CORPORATION, Defendant.

Counsel: [*1] For Sylvia Rose, Plaintiff: Bruce D. Brooke, LEAD ATTORNEY, FARGARSON & BROOKE, Memphis, TN; Dustin Lepkowicz, Memphis, TN.

For Target Stores, Target Corporation, Defendants: S. Newton Anderson, LEAD ATTORNEY, Cameron M. Watson, SPICER RUDSTROM PLLC-Memphis, Memphis, TN.

Judges: MARK S. NORRIS, UNITED STATES DISTRICT JUDGE.

Opinion by: MARK S. NORRIS

Opinion

JURY TRIAL DEMAND

ORDER GRANTING DEFENDANT'S MOTION IN LIMINE TO EXCLUDE ANY ALLEGATIONS OF SPOLIATION OF DOCUMENTS RELATED TO PRIOR FALLS

Before the Court is Defendant Target Stores' Motion and Incorporated Memorandum of Law to Exclude any Allegations of Spoliation of Documents as Related to Prior Falls on Defendant's Premises, filed on March 23, 2022. (ECF No. 67) ("Motion"). Plaintiff filed her Response on March 25, 2022. (ECF No. 68.) For the following reasons, the Motion is **GRANTED**.

PROCEDURAL HISTORY

The instant Motion requires the Court to decide whether a discovery dispute over materials allegedly sought and withheld in Interrogatory Number 10 warrants an adverse inference instruction on spoliation. To properly frame this issue, a brief history of the parties' discovery is warranted.[1] Plaintiff served her First Set of Interrogatories and Request for Production **[*2]** of Documents to Defendant on via email and U.S. Mail on February 12, 2021. (ECF No. 18 at PageID 60.) Defendant provided its responses on March 18, 2021, (ECF No. 67-1), and Plaintiff deposed Defendant's witnesses Barry Grieve and Crystal Townsend (Target employees) on March 24, 2021. (Id.) The interrogatory at issue in the Motion, Interrogatory Number 10,[2] and especially Defendant's response to it, has been reproduced below:

> **INTERROGATORY NO**. 10: State the identity, including name and last known address, of each person who claims to have slipped and fallen, or tripped and fallen, on the Defendant's premises at any time within the five (5) years immediately prior to the occurrence identified in the Plaintiff's Complaint where this accident allegedly occurred. For each such person, state:
>
> a. Whether any documents exist regarding each such other occurrence, and if so, identify each such document with reasonable particularity, and identify the custodian of same;
>
> b. the date of each such other occurrence;
>
> c. the location on the premises of each such other occurrence;
>
> d. identity of the substance, matter or thing which was slipped on or tripped over.

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[1] This narrow summary has been produced to adjudicate the Motion only and must not be read to exceed the scope of the litigants' arguments respecting the same.

[2] Plaintiff also argues that Interrogatories Number 11, 5, and 4 make similar requests. Defendant provided the same responses to those interrogatories: "Please see Answer to Interrogatory No. 10." (ECF No. 68 at 1480-81.) For the sake of economy, the Court will focus its analysis on Defendant's Answer to Interrogatory Number 10—really, the crux of this dispute— without reproducing in long form the three other interrogatories that Plaintiff references. Plaintiff's first set of interrogatories, and Defendant's answers to them, may be accessed in the Exhibit attached to the Motion. (ECF No. 67-1.)

> **ANSWER**: Objection. This interrogatory is overbroad, **[*3]** burdensome, ambiguous, irrelevant, seeks proprietary and/or otherwise confidential and protected information, and seeks information that is not proportional to the needs of the case. Further, the interrogatory is not limited in scope of time and/or subject matter relevant to this case. Subject to and without waiving this objection, Defendant is aware of one other similar occurrence within three years prior to Plaintiff's incident where an individual stated he/she "tripped on sidewalk step" on or about March 19, 2017.

(ECF No. 68 at PageID 1478-79.) Plaintiff alleges that Defendant knowingly withheld and destroyed a source document, likely something akin to a prior incident report, quoted above in its answer to Interrogatory Number 10, which warrants an adverse inference jury instruction on spoliation. (Id. at PageID 1480.) Defendant contends that Plaintiff has failed to satisfy the legal standard required for such an instruction and should have pursued this issue earlier, if at all, with a motion to compel filed before discovery closed. (ECF No. 67 at PageID 1448, 1452.)

LEGAL STANDARD

"Spoliation is the intentional destruction of evidence that is presumed to be unfavorable to the party **[*4]** responsible for the destruction." *McDaniel v. Transcender, LLC*, 119 F. App'x 774, 782 (6th Cir. 2005). Courts in this circuit apply federal law to determine whether spoliation sanctions should be issued. *Adkins v. Wolever*, 554 F.3d 650, 652-53 (6th Cir. 2009). The Sixth Circuit has adopted the Second Circuit's three-prong test in this regard—the same test cited by both parties in the present litigation:

> [A] a party seeking an adverse inference instruction based on the destruction of evidence must establish (1) that the party having control over the evidence had an obligation to preserve it at the time it was destroyed; (2) that the records were destroyed "with a culpable state of mind"; and (3) that the destroyed evidence was "relevant" to the party's claim or defense such that a reasonable trier of fact could find that it would support that claim or defense.

Beaven v. United States Dep't of Justice, 622 F.3d 540, 553 (6th Cir. 2010) (quoting *Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d 99, 107 (2d Cir. 2002)); *see, e.g., Automated Solutions Corp. v. Paragon Data Sys., Inc.*, 756 F.3d 504, 513 (6th Cir. 2014) (applying Beaven). The second Beaven prong carries unique importance because "[a]dverse-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 [that] party," whereas "[i]nformation lost through negligence may have been favorable to either party, including the party **[*5]** 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." *United States v. Woodley*, No. 15-cr-20007, 2016 U.S. Dist. LEXIS 51281, 2016 WL 1553583, at *5 (E.D. Mich. 2016) (quoting Fed. R. Civ. P. 37(e)(2) 2015 Advisory Comm. Note) (emphasis added).

An adverse inference "is an inference that the party fears producing the evidence; and this fear is some evidence that the circumstance or document or witness, if brought, would have exposed facts unfavorable to the party." *Flagg v. City of Detroit*, 715 F.3d 165, 177 (6th Cir. 2013). "Thus, an adverse inference for evidence spoliation is appropriate if the Defendant[] 'knew the evidence was relevant to some issue at trial and . . . [its] conduct resulted in its loss or destruction.'" *Beaven*, 622 F.3d at 553 (quoting *Hodge v. Wal-Mart Stores, Inc.*, 360 F.3d 446, 450 (4th Cir. 2004); *see Vodusek v. Bayliner Marine Corp.*, 71 F.3d 148, 156 (4th Cir. 1995). Consequently, the analysis "depends on the alleged spoliator's mental state regarding any obligation to preserve evidence and the subsequent destruction." *Id.*

To address questions about electronic discovery, federal courts turn to Federal Rule of Civil Procedure 37(e):

> **FAILURE TO PRESERVE ELECTRONICALLY STORED INFORMATION**. If electronically stored information 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 **[*6]** 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.

Fed. R. Civ. P. 37(e). "Significantly, subsection (e)(1) does not contain an 'intent' requirement . . . . Under subsection (e)(2), however, before certain sanctions are imposed, the court 'must find that the party that caused the loss acted with the intent to deprive another party of the information's use in the litigation.'" *Yoe v. Crescent Sock Co.*, Case No. 1:15-cv-3-SKL, 2017 U.S. Dist. LEXIS 187900, 2017 WL 5479932, at *21 (E.D. Tenn. 2017). "Rule 37(e)(2)'s 'intent standard is stringent and does not parallel other discovery standards.'" *Culhane v. Wal-Mart Supercenter*, 364 F. Supp. 3d 768, 773 (E.D. Mich. 2019) (quoting *Moody v. CSX Transportation, Inc.*, 271 F. Supp. 3d 410, 431 (W.D.N.Y. 2017). "A party seeking sanctions under Rule 37(e)(2) must show that the spoliating party had 'intent' to deprive [the moving party] of the information's use." *Franklin v. Shelby Cnty. Bd. of Educ.*, No. 2:20-cv-02812-JPM-tmp, 2021 U.S. Dist. LEXIS 224827, 2021 WL 5449005, at *29 (W.D. Tenn. 2021) "A showing of negligence or even gross negligence will not do the trick." *Applebaum v. Target Corp.*, 831 F.3d 740, 745 (6th Cir. 2016) (citing Fed. R. Civ. P. 37(e), 2015 Advisory Comm. Note).

DISCUSSION

The Motion presents two sub-issues **[*7]** that demand targeted analysis: first, whether Plaintiff has satisfied her legal burden under the Federal Rules of Civil Procedure and, second, whether

she satisfied all three Beaven prongs to warrant an adverse inference instruction.[3] (ECF No. 67 at PageID 1450-51.)

A. Plaintiff's Burden

Defendant argues that Plaintiff has failed to satisfy her burden under the Federal Rules of Civil Procedure and all three Beaven prongs. (ECF No. 67 at PageID 1449-50.) Regarding electronic discovery under Federal Rule of Civil Procedure 37(e), Defendant contends that Plaintiff has: (a) failed to show it suffered any prejudice and (b) that the document(s) in question were in fact lost. (*Id.*) Applying Beaven, Defendant contends that Plaintiff failed to show: (a) Defendant had (and breached) an obligation to preserve the record(s) at issue; (b) the record(s) were destroyed with, (c), a culpable state of mind; and (d) the relevance of the record(s) sought. (*Id.*) As to Fed. R. Civ. P. 37(e), Plaintiff responds that, while uncertain whether her sought documents constituted electronically stored information,[4] any "[e]vidence of a prior trip or fall goes directly to notice" and indicates Defendant could have reasonably foreseen her unfortunate tumble. (ECF **[*8]** No. 68 at PageID 1484.) The fact that such evidence invokes a "key element of Plaintiff's claims against Defendant" could be, at least according to Plaintiff, enough to satisfy Fed. R. Civ. P. 37(e)(1). (*Id.*) Next, Plaintiff asserts that she "was unable to follow up on" the slip and fall mentioned in Defendant's Answer to Interrogatory Number 10 because "Defendant did not indicate that any documents were being withheld." (*Id.*) Turning to Beaven, Plaintiff argues: (a) a party with control over the must have an obligation to preserve it at the time it was destroyed;" (b) Defendant knowingly destroyed the record; and (c) a prior incident report would be relevant to whether Defendant had notice about its allegedly dangerous curb. (*Id.* at PageID 1485-87.)

1. Rule 37(e) Analysis.

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[3] The parties also discuss the timing of this Motion and spoliation argument that Plaintiff hinted at in the parties' joint pretrial order. The Court will address the timing issue throughout its analysis, but for a snapshot synopsis, *see infra* note 9

[4] Plaintiff develops her argument that the documents are likely electronically stored and physically maintained based on Ms. Crystal Townsend's deposition transcript, in which Ms. Townsend stated that incident reports are "done electronically on the computer and then we mail a paper copy in." (ECF No. 68 at PageID 1483.)

The Court begins with a Rule 37(e) analysis because whether the sought report would be most properly discoverable in either or both its electronic and physical formats remains unclear. Here, while true that Plaintiff does not have a burden to show prejudice under Rule 37(e) as per the 2015 Advisory Committee Notes on the same, she still has not satisfied Rule 37(e)(1). Specifically, Plaintiff has failed to show that Defendant "failed to take reasonable steps to preserve" and archive **[*9]** the prior incident report for an event that allegedly occurred several years before this litigation began. Fed. R. Civ. P. 37(e). Indeed, the Sixth Circuit has clearly stated that, "Target's failure to document events that might prove relevant to unforeseen litigation and to retain those records indefinitely does not amount to spoliation." *Applebaum*, 831 F.3d at 745. The prior incident referenced by Defendant in its Answer to Interrogatory Number 10 may also have questionable relevance because it involved someone who "tripped on *sidewalk* step," whereas here Plaintiff tripped over a *curb*—and these locations may be different.[5] Furthermore, Plaintiff has not established that the prior incident report she seeks has been lost. She asks the Court to infer from deposition transcripts for Mr. Barry Grieve and Ms. Townsend that because these employees could not remember or did not know about prior slip and fall cases on Defendant's premises that any incident reports must have been lost. (ECF No. 68 at PageID 1484-85.) Such an inference would require the Court to invent a reason for why (or whether) these employees had a memory lapse and such speculation would be inappropriate. Indeed, perhaps equally compelling is the explanation that fallible **[*10]** people are all too frequently fraught with fickle memories.[6] Either way, the Court lacks sufficient information to confidently make any such factual assumption.[7]

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[5] Plaintiff seems to blur this distinction in her filing when she paraphrases Defendant's Answer as "someone tripped over the sidewalk/curb." (ECF No. 68 at PageID 1484.) However, Defendant did not in fact write "sidewalk/curb" and this characterization is at the very least misleading and at most spotlights the very distinction it appears to mar.

[6] Both depositions reflect that Mr. Grieve and Ms. Townsend, especially the latter, expressed some reservation about providing inaccurate deposition testimony. (ECF Nos. 68-1, 68-2.) Another consideration could be that the deponents elected not to provide information about a report or incident that they could not recall simply to err on the side of cautious accuracy. The Court can find no reason why it should take their lack of recollection, the *absence* of an assertion, to affirmatively conclude the report in question was in fact lost.

[7] Plaintiff also argues that it did not investigate the prior incident earlier because "Defendant[] did not indicate that any documents were being withheld, and therefore Plaintiff was unable to follow up on that aspect." (ECF No. 68 at PageID 1484.) But Defendant's position is that it did not withhold *relevant* information. (ECF No. 67 at PageID 1449.) Spoliation sanctions do not attach to parties that fail to produce relevant evidence. *See Ross v. Am. Red Cross*, 567 F. App'x 296, 301-02 (6th Cir 2014)

For Plaintiff to prevail under Rule 37(e)(2), the Court *must* find that Defendant intentionally deprived her of the ability to use a prior incident report during litigation. Fed. R. Civ. P. 37(e)(2); Yoe, 2017 U.S. Dist. LEXIS 187900, 2017 WL 5479932, at *21. The section of Plaintiff's Response that addresses Fed. R. Civ. P. 37 altogether omits mention of Rule 37(e)(2) and its intent requirement. (*See* ECF No. 68 at PageID 1484.) Consequently, and as will be further explored in the subsequent *Beaven* analysis, Plaintiff has failed to articulate sufficient facts to that suggest Defendant *intentionally* withheld relevant information from her and, absent such facts, Plaintiff cannot prevail under Rule 37(e)(2)'s stringent standard. *See Culhane*, 364 F. Supp. 3d at 773 (quoting *Moody*, 271 F. Supp. 3d at 431) ("Rule 37(e)(2)'s 'intent standard is stringent and does not parallel other discovery standards.'") Therefore, Plaintiff has failed to make her case under Rule 37(e) for an adverse inference instruction on spoliation.[8]

2. Beaven Analysis.

The first prong requires Plaintiff to show that Defendant, as the party with control over the evidence, had an obligation to preserve any prior incident report at the time **[*11]** it was allegedly destroyed. Plaintiff argues that Defendant's "answers to the interrogatories. . . did not indicate that a responsive document was being withheld[] but did evidence one had existed . . . which means that Plaintiff has no option but to conclude the record has been destroyed . . . ." (ECF No. 68 at PageID 1485-86.) However, Defendant hotly contests the "responsiveness"—essentially, the relevance—of the document Plaintiff presently seeks because it "[in]disputably would have been created 22 months prior to Plaintiff's incident." (ECF No. 67 at PageID 1486). Put differently, whereas Plaintiff's premise is that the information sought *is relevant*, Defendant's premise is that the document *is not relevant*. And a party need not produce information it considers to be irrelevant during discovery, *see Adkins*, 554 F.3d at 652-53 (spoliation sanctions

(quoting *Adkins*, 554 F.3d at 652-53) ("Because failures to produce relevant evidence fall along a continuum of fault—ranging from innocence through the degrees of negligence to intentionality, the severity of a sanction may, depending on the circumstances of the case, correspond to the party's fault.")

[8] The Court notes Plaintiff's four reasons noted on PageID 1485 about her "diligent investigation." (ECF No. 68 at PageID 1485.) However, accepting these reasons as true and the Court has no reason to doubt them, Plaintiff should have considered filing a motion to compel after she "requested any document and/or incident report relating to previous falls" and as soon as "Target indicated knowledge of at least one prior fall." (*Id.*) However, as will be elucidated later in this Order, the *appropriate time* to address this issue would have been *during discovery* and not in the parties' joint pretrial order just days before trial.

only attach to failures to produce relevant evidence), absent a court order on a motion to compel that affirms the sought information's relevance. At this juncture however, on the eve of trial, the Court is *wholly unprepared* to make a relevancy determination about information in a document that may or may not exist.

Next, Plaintiff explains she did not file a **[*12]** motion to compel before the close of discovery because Defendant failed to "properly indicate" to her that it intended to withhold a relevant document and therefore deprived her of notice. (ECF No. 68 at PageID 1486.) However, had Defendant made this "indication" to Plaintiff, it would undermine its own position by conceding the document's relevancy. That Defendant's refusal to prompt Plaintiff to file a motion to compel somehow warrants Plaintiff's failure to file the same is plain silly. Moreover, the Court can comfortably find Plaintiff had sufficient notice about the incident.[9] Therefore, Plaintiff has failed to make her spoliation case under the first *Beaven* prong.

Turning to the second prong, Plaintiff's one-paragraph argument that Defendant destroyed the evidence with a culpable state of mind lacks merit.[10] Simply put, Plaintiff has not alleged sufficient facts to warrant a finding that Defendant acted with a culpable mental state when it refused to produce a document that it contends is not relevant. One alternative, of course, could be that Defendant simply overlooked the document. However, to **[*13]** find for Plaintiff, the Court must comfortably discern *not just* that Defendant had a "culpable mental state of mind," Beaven, 622 F.3d at 553, *but also* that its culpable "conduct *resulted in* [the document's] loss or destruction." Hodge, 360 F.3d at 450. And "[w]here the spoliator has no notice of pending litigation, the destruction of evidence does not point to consciousness of a weak case." *Joostberns v. United Parcel Servs., Inc.*, 166 F. App'x 783, 797 (6th Cir. 2006). Here, the Court cannot know what it does not know, specifically whether Defendant: (a) had a culpable mental

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[9] Based on Plaintiff's Response, Plaintiff knew that "Target had possession of the source document" because it "was able to quote from it to answer [I]nterogatory No. 10 but elected not to produce it." (ECF No. 68 at PageID 1486.) Why Plaintiff did not file a motion to compel upon this realization, or at least confer with opposing counsel about this "source document", *especially as to an issue supposedly important enough to litigate on the Friday before trial*, is quite perplexing.

[10] At this point, the Motion could be granted on the preceding analyses because Plaintiff has failed one of the required Beaven prongs. However, this Court prefers the "belt and suspenders" approach to drafting Orders and will not curb its analysis to sidestep completeness.

state that (b) *resulted in* (caused) destruction of evidence once (c) it became aware of pending litigation. The Court declines to make these three perceived logical leaps and therefore concludes Plaintiff has failed to satisfy the third *Beaven* prong.

The third prong brings the Court full circle: back to relevancy. While mindful that *Beaven* only requires the party seeking a spoliation sanction (or, as here, merely an instruction) to "ma[ke] some showing indicating that the destroyed evidence would have been relevant to the contested issue," *Beaven*, 622 F.3d at 554 (quoting *Kronisch v. United States*, 150 F.3d 112, 127 (2d Cir. 1998), the Court notes that a finding for Plaintiff on this prong would not rescue her spoliation argument because it failed as to prongs one and two. Moreover, and as discussed earlier, the Court lacks **[*14]** sufficient information to make a relevancy determination on an issue that—candidly—would have been better explored if at all, during discovery. The Court declines to make a relevancy finding.

CONCLUSION

For the foregoing reasons, the Motion is **GRANTED**. Therefore, Plaintiff is not entitled to an adverse inference instruction and this matter will proceed to trial today, March 28, 2022 before the undersigned.

IT IS SO ORDERED this 28th day of March, 2022.

/s/ Mark Norris

MARK S. NORRIS

UNITED STATES DISTRICT JUDGE

Fast v. Godaddy.Com LLC

United States District Court for the District of Arizona

March 28, 2022, Decided; March 28, 2022, Filed

No. CV-20-01448-PHX-DGC

Reporter

2022 U.S. Dist. LEXIS 55591 *; 2022 WL 901380

Kristin Fast, Plaintiff, v. GoDaddy.com LLC, et al., Defendants.

Prior History: Fast v. GoDaddy.com LLC, 340 F.R.D. 326, 2022 U.S. Dist. LEXIS 19857, 2022 WL 325708 (D. Ariz., Feb. 3, 2022)

Counsel: [*1] For Kristin Fast, Plaintiff: Christopher Robert Houk, LEAD ATTORNEY, Houk Law Firm PLLC, Tempe, AZ.

For GoDaddy.com LLC, a foreign limited liability company, Thyagi Lakshmanan, Revathi Thyagarajan, Defendants: Benjamin John Naylor, LEAD ATTORNEY, Catherine Christine Burns, Burns Barton LLP, Phoenix, AZ.

Judges: David G. Campbell, Senior United States District Judge.

Opinion by: David G. Campbell

Opinion

ORDER

Plaintiff Kristin Fast has moved to dismiss this case with prejudice under Rule 41(a)(2) of the Federal Rules of Civil Procedure. Doc. 123. Defendants do not oppose dismissal with prejudice, but argue that the Court should, as a condition of dismissal, require Plaintiff to pay some of the discovery sanctions previously assessed against her in this case. Doc. 124. The Court heard oral arguments on this issue on March 25, 2022.

I. Background.

In February 2018, while Plaintiff was employed by Defendant GoDaddy, she injured her knee in a skiing accident and underwent surgery. Plaintiff alleges that she was pressured to return to work prematurely following her surgery and, as a result, developed complex regional pain syndrome, a debilitating physical condition. Plaintiff's job later was eliminated, and she alleges that GoDaddy retained male employees with less technical **[*2]** skill despite its assertion that she was terminated for lacking technical skill. Plaintiff asserts claims for sex and disability discrimination and Family Medical Leave Act retaliation.

After the time for fact and expert discovery in this case had closed, Defendants claimed that Plaintiff had knowingly deleted relevant information from her electronic devices and accounts and had failed to produce other relevant information in a timely fashion. They sought sanctions under Rule 37(e) for spoliation of electronically stored information ("ESI") and sanctions under Rule 37(c)(1) for failure to produce relevant information.

The parties filed more than 70 pages of briefing and more than 1,500 pages of exhibits (Docs. 93, 96, 101, 113, 115), and the Court held two hearings (Docs. 86, 105). The Court ultimately found that Plaintiff had knowingly destroyed and withheld relevant evidence: "Plaintiff's troubling actions . . . are not mere minor oversights, as her counsel suggests. They are serious violations of Plaintiff's duty to preserve ESI and her obligations under the Federal Rules of Civil Procedure." Doc. 116 at 39. Among other sanctions, the Court held that Defendants were entitled to an adverse inference jury instruction at trial, to **[*3]** conduct a forensic examination of Plaintiff's digital devices, and to engage in limited additional discovery. *Id.* at 40-41. The Court also held that Plaintiff should reimburse Defendants for costs caused by her breach of discovery obligations:

> The Court will require Plaintiff to pay some, and perhaps all, of Defendants' attorneys' fees and costs associated with preparing for and litigating the motion for sanctions (Doc. 93), the hearing on December 16, 2021, the supplemental briefing ordered by the Court (including,

> potentially, Defendants' retention of a forensic evidence expert in connection with the supplemental briefing), and further discovery ordered by the Court in relation to this motion. The amount of fees and costs will be determined after trial, when the Court can evaluate them in light of the ultimate outcome of this case.

Doc. 116 at 40.

Following entry of this order, Plaintiff fired her attorney and talked with Defendants and the Court about the possibility of dismissing her case. When Plaintiff and Defendants could not agree on terms for dismissal, Plaintiff filed the motion for voluntary dismissal with prejudice under Rule 41(a)(2). Doc. 123. Defendants ask the Court to require Plaintiff **[*4]** to pay their taxable costs and some portion of the fees they incurred litigating her preservation and discovery violations. Doc. 124 at 1. Defendants assert that they have incurred more than $115,000 in attorneys' fees and costs litigating these issues. *Id.* at 4. They do not ask the Court to award fees for their non-spoliation-related defense of this case.

Plaintiff's motion to dismiss consists of 55 single-spaced pages and more than 330 pages of exhibits. *See* Doc. 123. She spends most of her motion re-arguing the Court's spoliation ruling, asserting that the loss of evidence was not due to knowing conduct on her part but rather to her now-terminated lawyer's misguidance, her severe medical conditions, and alleged bullying by defense counsel. *Id.*

The Court will not reconsider its spoliation ruling. The parties briefed that issue extensively and the Court held two hearings before entering a 41-page order addressing Plaintiff's conduct in detail. Doc. 116. The Court offered the parties an evidentiary hearing and no party requested one (Doc. 116 at 1 n.1), and Plaintiff did not file a motion for reconsideration of the Court's ruling within the time required by the Court's local rules. ***[*5]*** *See* LRCiv 7.2(g)(2) (motion for reconsideration must be filed within 14 days of the ruling to be reconsidered). The Court instead will decide whether Plaintiff should now be required to pay some of the previously-imposed monetary sanctions as a condition of dismissing her case with prejudice.

II. Legal Standards.

"Except as provided in Rule 41(a)(1), an action may be dismissed at the plaintiff's request only by court order, on terms that the court considers proper." Fed. R. Civ. P. 41(a)(2). Because dismissal under Rule 41(a)(1) is no longer available in this case, Plaintiff may dismiss her case only with the Court's permission and upon such terms as the Court deems appropriate at this stage of the litigation.

Plaintiffs who seek to dismiss their case *without* prejudice often are required to pay some or all of the fees incurred by the opposing party. *See* 1 S. Gensler & L. Mulligan, Federal Rules of Civil Procedure, Rules and Commentary, Rule 41 at 1258 (2021) ("The most common condition [for dismissals without prejudice] is to require the plaintiff to compensate the defendant for costs and attorneys' fees incurred in that suit.") (citing cases).

Dismissals *with* prejudice are approached differently. Courts usually hold that such dismissals — which foreclose plaintiffs **[*6]** from reasserting dismissed claims — should not be accompanied by an order to pay the opposing party's fees and costs. *See Colombrito v. Kelly*, 764 F.2d 122, 133-34 (2d Cir. 1985) ("[W]hen a lawsuit is voluntarily dismissed with prejudice under Fed. R. Civ. P. 41(a)(2), attorneys' fees have almost never been awarded."); *Cauley v. Wilson*, 754 F.2d 769, 771 (7th Cir. 1985) ("Fees are not awarded [under Rule 41(a)(2)] when a plaintiff obtains a dismissal with prejudice because the defendant cannot be made to defend again.") (internal quotation marks omitted); *Smoot v. Fox*, 353 F.2d 830, 833 (6th Cir. 1965) (holding that attorneys' fees are not proper under Rule 41(a)(2) where the dismissal is with prejudice).

More recent cases have recognized an exception to this rule. As the Third Circuit has explained:

> [C]ourts have often recognized the same general principle that the District Court recognized in this case: although attorneys' fees and costs may be frequently awarded when dismissal is without prejudice, attorneys' fees and costs are not typically appropriate when dismissal is with prejudice. Importantly, however, these cases do not hold that fees can never be awarded in light of extraordinary circumstances. Indeed, courts have held that awarding

> attorneys' fees and costs as a term of a Rule 41(a)(2) dismissal may be appropriate where such fees and costs were unnecessarily incurred.

Carroll v. E One Inc., 893 F.3d 139, 147 (3d Cir. 2018); *see also AeroTech, Inc. v. Estes*, 110 F.3d 1523, 1528 (10th Cir. 1997) (recognizing **[*7]** that fees and costs may be imposed for a dismissal with prejudice in "exceptional circumstances"); Gensler, *supra*, at 1257 ("When the plaintiff seeks dismissal with prejudice, courts generally should not require payment of attorney's fees as a condition [of] dismissal because the defendant is not confronted with the risk of repeat litigation, although such a condition might be appropriate in exceptional circumstances."). The Court accordingly must decide whether this case presents exceptional circumstances.[1]

If a court orders the payment of fees and costs as a condition of voluntary dismissal under Rule 41(a)(2), it generally must give the plaintiff a choice to either accept the conditions and dismiss the case, or withdraw the request for dismissal and proceed with the litigation. *See Paysys Int'l, Inc. v. Atos IT Servs. Ltd.*, 901 F.3d 105, 108 (2d Cir. 2018) ("[I]t has become commonly accepted that the plaintiff has an option not to go forward with a [Rule 41(a)(2)] dismissal if the conditions specified by the court seem too onerous.") (quotation marks and brackets omitted; discussing dismissal with prejudice); *Lau v. Glendora Unified Sch. Dist.*, 792 F.2d 929, 930 (9th Cir. 1986) ("[T]he voluntary dismissal cannot take effect until a court order has been entered and the terms and conditions imposed by the court are complied with. This grants to the plaintiff the option to **[*8]** refuse the voluntary dismissal if the conditions imposed are too onerous.") (discussing dismissal without prejudice); Gensler, *supra*, at 1259 ("The court must give the plaintiff notice of what the conditions will be and an opportunity to withdraw the motion.").

III. Discussion.

The Court concludes that Plaintiff's request to dismiss this case with prejudice should be granted only if she pays a portion of the fees and costs incurred by Defendants in litigating her discovery

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[1] The Court has found no Ninth Circuit case adopting or rejecting the "exceptional circumstances" rule. The Court finds it appropriate in the circumstances of this case for reasons explained below.

violations. Although the phrase "exceptional circumstances" has not been clearly defined in the context of Rule 41(a)(2) dismissals with prejudice, the Third Circuit found them to exist when "fees and costs were unnecessarily incurred." *Carroll*, 893 F.3d at 147. The court provided an example of such circumstances: "a litigant's failure to perform a meaningful pre-suit investigation, coupled with a litigant's repeated practice of bringing claims and dismissing them with prejudice after inflicting substantial costs on the opposing party and the judicial system." *Id.* at 149. At least one other case provides the same example. *See AeroTech*, 110 F.3d at 1528.

The rationale for the distinction between dismissals with and without prejudice and for the "exceptional circumstances" rule seems to be as follows: When a plaintiff **[*9]** dismisses a case without prejudice and may sue the defendant again on the same claims, the costs incurred by the defendant in the litigation have not bought it peace and may well be incurred again in a second suit. The defendant should be reimbursed for fees and costs it remains at risk of incurring again. When a case is dismissed with prejudice, however, the claims cannot be reasserted. The defendant has achieved peace, is not at risk of incurring the fees and costs a second time, and, consistent with the American rule, should not recover the fees and costs required to defeat the lawsuit.[2]

But when the lawsuit to be dismissed with prejudice required the defendant to pay costs and fees that were wholly unnecessary to defeat the case — costs and fees that should not have been incurred in the normal course of litigation — the dismissing plaintiff should be required to reimburse the defendant for the unnecessary costs it imposed. Such a rule is not easily applied because distinguishing between necessary and unnecessary defense costs can be very difficult. But by limiting the rule to "exceptional circumstances" - circumstances where it is clear the lawsuit caused the defendant to incur costs **[*10]** that should not have been required in the normal course of litigation — cases like *Carroll* provide a workable rule that seeks to ameliorate

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[2] The American rule provides that "[e]ach litigant pays his own attorney's fees, win or lose, unless a statute or contract provides otherwise." *Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242, 252-253, 130 S. Ct. 2149, 176 L. Ed. 2d 998 (2010) (internal quotation marks omitted).

the unfairness of a plaintiff imposing plainly unnecessary litigation expenses and then simply walking away from the lawsuit.

In this case, Plaintiff's violation of her preservation and disclosure obligations required Defendants to incur wholly unnecessary costs and fees. Had Plaintiff complied with her discovery obligations, Defendants' extensive investigation and briefing would not have been necessary. *See* Doc. 116. The Court accordingly concludes that exceptional circumstances exist and that Plaintiff should be required to pay some of the monetary sanctions it previously imposed. *Id.* at 40.

The Court also recognizes, however, that Plaintiff is facing serious medical conditions and must help care for her family and aging parents. Defendant GoDaddy is a large and successful company, and the Court assumes it has indemnified individual Defendant Lakshmanan for his litigation costs. Balancing these equitable factors, the Court concludes that Plaintiff should be required, as a condition of her dismissal with prejudice, to pay $10,000 in sanctions previously **[*11]** awarded. This amount is less than Defendants have incurred, but it is a sizeable amount for an individual plaintiff to pay and a sufficient amount to recognize the preservation and discovery violations in this case and to vindicate the interests protected by the preservation and discovery rules.[3]

IT IS ORDERED:

1. Plaintiff's motion to dismiss this case with prejudice (Doc. 123) will be granted upon her payment to Defendant of $10,000 in sanctions previously imposed by the Court. If Plaintiff elects not to pay the sanctions, she may withdraw her motion to dismiss and this case will continue as outlined in the Court's spoliation order. *See* Doc. 116 at 40-41. All sanctions awarded in that order will remain in place.

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[3] If Plaintiff elects to proceed with voluntary dismissal and pay the $10,000 ordered, the Court will not permit Defendants to recover additional taxable costs or attorneys' fees from Plaintiff. Plaintiff expressed concern during the hearing on March 25 that Defendants would sue her once this action has concluded, but defense counsel stated on the record that Defendants will not sue Plaintiff. The Court has relied on this assurance in entering this order.

2. Plaintiff shall, within 14 days of this order, notify Defendants and the Court whether she will pay the sanctions assessed in this order and proceed with her voluntary dismissal, or whether she instead elects to proceed with this litigation.

Dated this 28th day of March, 2022.

/s/ David G. Campbell

David G. Campbell

Senior United States District Judge

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