V. COMPETENCE, MALPRACTICE, AND CIVIL LIABILITY

A. COMPETENCE

When representing a client, a lawyer must act competently, i.e., with the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation. [ABA Model Rule 1.1]

1. Legal Knowledge and Skill

a. Factors in Determining Requisite Skill

In deciding whether a lawyer has the knowledge and skill required to handle a particular matter, the following factors should be considered:

1) The complexity and specialized nature of the matter;

2) The lawyer's general experience;

3) The lawyer's training and experience in the field in question;

4) The preparation and study the lawyer is able to give the matter; and

5) Whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field.

[ABA Model Rule 1.1, comment 1] Note that most matters do not require specialized skill and that every lawyer is capable of competence either through necessary study or association of another lawyer. Thus, a lack of legal knowledge or skill really means a failure to seek it. [Hazard & Hodes, §4.02]

b. Becoming Competent Through Preparation

It follows from the above that a lawyer may accept representation despite lacking competence in the field involved if the requisite competence can be achieved by reasonable preparation. This often comes into play when a lawyer is appointed as counsel for an unrepresented person. [ABA Model Rule 1.1, comment 4]

c. Emergency Situations

In an emergency, a lawyer may assist a client, even if the lawyer does not have the skill ordinarily required in the field in question, if referral to or consultation with another lawyer would be impractical. However, the assistance should not exceed what is reasonably necessary to meet the emergency. [ABA Model Rule 1.1, comment 3]

EXAMPLE

In the middle of the night, attorney A's neighbor calls him and asks what to do about her estranged husband who is drunkenly trying to get into her house, in violation of a court order. The neighbor's regular lawyer is unavailable, and A knows little or nothing about family law. In this emergency situation, A may advise the neighbor, but his advice should be limited to the emergency at hand.

2. Thoroughness and Preparation

To handle a matter competently, a lawyer must inquire into and analyze the facts and legal elements of the problem, applying the methods and procedures used by competent practitioners. Competence, of course, requires adequate preparation. [ABA Model Rule 1.1, comment 5]

3. Retaining Other Lawyers to Assist in the Matter

Sometimes a lawyer may gain competence in a matter by consulting with other lawyers. Before a lawyer retains or contracts with lawyers outside her firm to assist in the provision of legal services to the client, the lawyer: (1) must reasonably believe that the services of the outside lawyers will contribute to the competent and ethical representation of the client, and (2) "should ordinarily" obtain the client's informed consent. The reasonableness of the lawyer's decision to retain lawyers outside her firm will depend on factors such as the background of the nonfirm lawyers, the nature of the services assigned to the nonfirm lawyers, and the professional conduct rules in the jurisdictions in which the services will be performed. [ABA Model Rule 1.1, comment 6]

4. Maintaining Competence—Technology and Continuing Legal Education

Lawyers should keep abreast of changes in the law and its practice. As such, a lawyer should take steps to understand the benefits and risks associated with relevant technology. The lawyer also should engage in continuing legal education programs sponsored by the organized bar and must comply with all applicable continuing legal education requirements. [ABA Model Rule 1.1, comment 8]

B. DILIGENCE

A lawyer must act with ***reasonable diligence and promptness*** in representing a client. [ABA Model Rule 1.3]

1. Diligence Defined

A lawyer should pursue a matter on the client's behalf despite opposition, obstacles, and personal inconvenience, and may take whatever lawful and ethical measures are required to vindicate the client's cause. The lawyer should act with dedication and commitment to the client's interests and with ***zeal in advocacy*** on the client's behalf. [ABA Model Rule 1.3, comment 1]

a. Diligence Does Not Require Incivility

A lawyer should use good judgment in determining the means by which a matter is pursued, and the lawyer is not bound by Rule 1.3 to press every conceivable advantage. Moreover, the duty of diligence does not require the lawyer to be offensive or uncivil toward the adversary or other persons. [*Id.*]

b. Workload

A lawyer must control his workload so that each matter can be adequately handled. [ABA Model Rule 1.3, comment 2]

2. Promptness

Procrastination is perhaps the professional shortcoming most widely resented. Procrastination often has severe or devastating consequences to the client's interests, as when a court-ordered deadline is missed or the statute of limitations is permitted to run. Even when procrastination does not harm the client's substantive interests, it can cause the client needless anxiety and can undermine confidence in the lawyer's trustworthiness. A lawyer may, of course, agree to a reasonable postponement if it will not prejudice her client. [ABA Model Rule 1.3, comment 3]

3. Completion of the Matter

Once a lawyer agrees to handle a matter for a client, the lawyer must see the matter through to completion (unless, of course, the lawyer is fired or is required or permitted to withdraw). If there is doubt about whether the lawyer-client relationship has come to an end, the lawyer should clarify it, preferably in writing. [ABA Model Rule 1.3, comment 4]

EXAMPLES

1) Over the past 15 years, attorney A has served as trademark counsel for Webb Corp., but in recent months the relationship has become somewhat strained. A is uncertain whether Webb Corp. wishes to continue to use her services. Today A read in a trademark newsletter that one of Webb's competitors is attempting to register a trademark that will seriously interfere with Webb's business. A should promptly call the matter to Webb's attention and ask Webb whether it wishes her to act on its behalf in this matter.

2) Client C hired lawyer L to defend her in a drunk driving case. At trial, C was convicted, and her driver's license was suspended. L is uncertain whether C expects him to do anything about an appeal. L must consult with C about the possibility of an appeal before relinquishing responsibility for the matter.

4. Existence of Lawyer-Client Relationship

A lawyer's obligation under the duties stated above, as with most of the lawyer's ethical duties, depends on whether there is a lawyer-client relationship. If there is any doubt, however, as to whether the lawyer-client relationship was either formed or terminated, the lawyer must either take affirmative steps to terminate the relationship or act with the required diligence. [Hazard & Hodes, §2.05]

5. Solo Practitioner's Duty to Plan for Death or Disability

The untimely death or disability of a solo practitioner can create havoc for

her clients. To prevent that, every solo practitioner should designate another competent lawyer who, upon the death or disability of the solo practitioner, would review the clients' files, notify the clients of the circumstances, and determine whether protective action is needed. [ABA Model Rule 1.3, comment 5]

C. SINGLE VIOLATION SUFFICIENT TO IMPOSE DISCIPLINE

Neither Rule 1.1 (competence) nor Rule 1.3 (diligence) requires a pattern of misconduct; a single incident is sufficient to impose professional discipline. Special circumstances should be considered when imposing the sanction, but not when determining whether there has been a violation. Even when the lawyer is in the midst of a personal crisis, he must take reasonable steps to put his cases on temporary hold, until he can give them his full attention. [Hazard & Hodes, §7.06, illus. 7.10]

EXAMPLE

Client Cathy came to lawyer Larry with a medical malpractice claim, the statute of limitations on which was due to run out within the week. Larry agreed to take the case and began drafting the complaint. Two days later, Larry's son was hit by a car. For several days, during which time the doctors performed several surgeries, they did not know whether the child would live or die. Larry did not leave his son's side during this critical time, and thus did not file Cathy's case within the statutory period. Cathy filed both a malpractice case and a disciplinary complaint against Larry. Larry is subject to discipline for lack of diligence in handling Cathy's case. The disciplinary authority will likely consider the circumstances in assessing a sanction, but they are irrelevant to the question of whether Larry breached his duty to Cathy. [*See* Hazard & Hodes, §7.06, illus. 7.10]

D. MALPRACTICE AND OTHER CIVIL LIABILITY

1. Relationship Between Disciplinary Matters and Malpractice Actions

Professional discipline is only one of the possible consequences of incompetent or neglected legal work. Another possible consequence is civil liability for legal malpractice. A malpractice action differs from a disciplinary matter in three ways: (1) in a malpractice action, the forum is a ***civil court***, not a disciplinary tribunal; (2) in a malpractice action, the attorney's adversary is an ***injured plaintiff***, not the state bar; and (3) the purpose of a malpractice action is to ***compensate*** the injured plaintiff, not to punish the attorney, and not to protect the public from future wrongs.

2. Ethics Violation as Evidence of Legal Malpractice

If a lawyer violates a legal ethics rule, does that automatically mean that she has also committed legal malpractice? If not, does it create a presumption that she has committed malpractice? The "Scope" section of the ABA Model

Rules answers "no" to both questions: the legal ethics rules are for disciplinary purposes. They are not designed to be a basis for civil liability, and a lawyer's breach of an ethics rule does not automatically or presumptively mean that the lawyer has committed malpractice. Courts do, however, regard an ethics violation as ***relevant evidence*** that the lawyer's conduct was below the appropriate standard of care. [*See* Fishman v. Brooks, 487 N.E.2d 1377 (Mass. 1986); *and see generally* Hazard & Hodes, §5.01]

3. Theories of Malpractice Liability

The plaintiff in a legal malpractice case can invoke a variety of legal theories. The choice of theories can be important because of differences in the statutes of limitation and measures of damages.

a. Intentional Tort

One theory is intentional tort. An attorney is liable (just as any nonprofessional would be) for fraud, misrepresentation, malicious prosecution, abuse of process, or misuse of funds.

b. Breach of Fiduciary Duties

A second theory is breach of fiduciary duties. An attorney acting as a fiduciary for the client owes the client all of the customary duties of a fiduciary, including loyalty, confidentiality, and honest dealing.

c. Breach of Contract

A third theory is breach of contract. For instance, an attorney may have breached a term of an express oral agreement with the client. If there is no express contract, a court may be willing to find an implied promise by the attorney to use ordinary skill and care to protect the client's interests.

d. Negligence

A fourth theory, by far the most common, is unintentional tort—i.e., simple negligence. [*See generally* Restatement §§48 - 54] Using this theory, the plaintiff must establish the routine elements of any negligence case: a duty of due care, a breach of that duty, legal causation, and damages. These elements are discussed separately in the paragraphs that follow.

1) Duty of Due Care

a) To Clients

An attorney owes a duty of due care to a client, but it is not always clear when a person becomes a client. [*Id.* §50] Courts are quick to find that an attorney-client relationship has been established if the attorney's neglect has misled the alleged client. [*See* Restatement §14]

EXAMPLE

C asked attorney A to represent him as plaintiff in a products liability case. A said she would have to check with her partners to make sure the case posed no conflict of interest, and A said that she would "get back to C one way or the other." A never checked with her partners, and she totally forgot C's case. The statute of limitations ran. A court could conclude that an attorney-client relationship had been established between A and C.

b) To Prospective Clients and Third Parties

If an attorney provides legal services during a consultation with a prospective client, the attorney must use reasonable care. [*See* Restatement §§51, 15] An attorney also owes a duty of due care to other nonclients in certain circumstances, including where: (1) the third party was ***intended to benefit*** by the attorney's rendition of legal services, or (2) the attorney ***invited the third person to rely*** on her opinion or legal services. [*See* Restatement §51]

EXAMPLES

1) C hired attorney A to draft a trust agreement naming B as beneficiary. A drafted the trust agreement negligently, making it subject to an unnecessary tax; the tax reduced the amount that B could receive from the trust. Because B was intended to benefit from A's services, and because the potential for harm to B should have been obvious, B has a good malpractice claim against A.

2) M hired lawyer L to bring a civil suit against D. As it turned out, M's claim against D had no sound factual basis, and L would have recognized that from the outset had L not been negligent. D incurred trouble and expense in defending the suit. D has no negligence claim against L because D was not intended to benefit from L's services and D was not any other type of protected nonclient.

3) X hired lawyer L to negotiate the sale of personal property to Y. The sales contract required L to give Y an opinion letter confirming the absence of liens on the property. After X assured L that there were no liens on the property, L decided not to conduct a search of the lien records. L transmitted the opinion letter to Y and the sale closed. Y later discovered that there was a lien on the property. Y has a malpractice claim against L because L invited Y to rely on the opinion letter.

c) Standard of Care

The standard of care for an attorney is the competence and diligence normally exercised by attorneys in similar circumstances. If an attorney represents to a client that he has greater competence (e.g., is a specialist) or will exercise greater diligence than that normally demonstrated by attorneys undertaking similar matters, he is held to that higher standard. [Restatement §52 and comment d]

2) Breach of Duty of Due Care

a) Errors of Judgment

An attorney is liable for negligence, but not everything that causes harm is negligence. An attorney is not liable for "mere errors in judgment" if the judgment was ***well-informed and reasonably made***.

EXAMPLES

1) Attorney A decided not to take the pretrial deposition of witness X. A's motive was to save litigation expenses for her client; further, it appeared that X's testimony would be peripheral and unimportant. At trial, X turned out to be a critical witness for the adversary. Even if A's failure to take X's deposition caused A's client to lose the case, A has not committed malpractice if her judgment was well-informed and reasonably exercised.

2) In a surgical malpractice case, lawyer L failed to interview the operating room nurse, an obvious witness who might have knowledge of key facts. L's client lost the case because of the failure to prove a fact that the nurse's testimony could have supplied. When the client sued L for legal malpractice, L responded that he had made a "tactical judgment" not to interview the nurse. Holding L liable, the court noted that "there is nothing tactical about ignorance."

b) Knowledge of Law

An attorney is expected to know the ordinary, settled rules of law known to practitioners of ordinary competence and diligence. Furthermore, an attorney has a duty to go to the library to look up rules of law that he does not know. If the answer is there to be found through standard research techniques and sources, and if the attorney does not find it, he has breached the duty of due care. [*See*, *e.g.*, Aloy v.

Mash, 38 Cal. 3d 413 (1985)] Obviously, some issues of law are unsettled and debatable; if the attorney has done reasonable legal research, then he has fulfilled the duty of due care—even if he makes the wrong guess about how an unsettled issue will ultimately be resolved by the courts.

c) Calling in a Specialist

Some legal problems are uniquely within the competence of a legal specialist. It is a breach of the duty of due care for a general practitioner to attempt to handle such a problem if a reasonably prudent lawyer would have sent the client to a specialist.

EXAMPLE

Client C asked attorney A to help him obtain legal protection for a new manufacturing process that C had invented. A realized that he was totally ignorant about the law of patents and trade secrets, but he nevertheless tried to advise C. As a result, C lost his opportunity to apply for a United States patent on his invention. A breached the duty of due care by failing to send C to a patent attorney.

3) Legal Causation

As in any tort case, the plaintiff in a professional negligence case must prove that the defendant's conduct was the legal cause of the plaintiff's injury. That is, the injury would not have happened ***but for*** the defendant's negligence, and furthermore, that it is fair to hold the defendant liable for unexpected injuries or for expected injuries that happen in unexpected ways. [*See* Restatement §53]

EXAMPLES

1) P hired lawyer L to represent her in a suit against the federal government. L neglected P's case, and the statute of limitations ran. P then sued L for legal malpractice. In the malpractice case, P must prove that she had a good claim against the federal government. If P did not have a good claim in the first place, then L's negligence was not the legal cause of injury to P.

2) History professor H hired attorney A to defend her in a plagiarism case. H lost the case because of A's failure to prepare adequately. The loss broke H's mind and spirit; she became a hopeless alcoholic and was fired from her university position. If H files a legal malpractice suit against A, a court would probably conclude that H's loss of earning power was not legally caused by A's negligence.

4) Damages

The plaintiff in a professional negligence case must prove damages—e.g., the money paid out to discharge an adverse judgment, or the value of a lost cause of action. The plaintiff can recover for direct losses and also for losses that are indirect but foreseeable. [*Id.* §53]

EXAMPLE

Attorney A did the legal work for the acquiring corporation in a large merger transaction. A bungled the merger agreement; in consequence, the merger fell through, and A's client suffered large legal expenses in defending against suits brought by aggrieved shareholders. In a malpractice action, A's client can recover both the legal expenses and the profits lost due to the aborted merger, provided that it can prove its losses with reasonable certainty.

4. Civil Liability Other than Malpractice

In addition to malpractice liability, a lawyer may be liable to a client on other grounds, including breach of contract (e.g., by failing to comply with the fee agreement). A lawyer also may be liable to the client for breach of warranty if the lawyer promises a specific result, knowing that the result has material importance to the client. However, general predictions of success in the case will not result in liability because such results are clearly dependent on circumstances outside of the lawyer's control. [Restatement §55]

EXAMPLE

D is on trial for burglary and is represented by lawyer L. After closing arguments, L tells D, "The prosecution didn't prove a thing. I'm pretty sure you're going home with your family tonight." The jury convicts D and he is sentenced to prison. L is not liable for breach of warranty.

5. Liability for Negligence of Others

The ordinary principles of ***respondeat superior*** apply in suits for professional negligence. Thus, an attorney can be held liable for injuries caused by a negligent legal secretary, law clerk, paralegal, or employee associate when acting within the scope of employment. Furthermore, under general principles of partnership law, each partner in a general partnership is ***jointly and severally liable*** for the negligence of another partner committed in the ordinary course of the partnership business (i.e., any partner may be held personally liable for the entire judgment even if they had nothing to do with the negligent act). However, many law firms are set up as limited liability partnerships, limited liability companies, or similar entities. The law varies widely from state to state, but usually a partner of a

limited liability entity will be shielded from personal liability for the misconduct of others in the firm.

6. Malpractice Insurance

Because legal malpractice actions have become commonplace, prudent lawyers carry ample malpractice insurance. A small number of states require lawyers to have malpractice insurance, but a growing number of states require lawyers to disclose their insured or uninsured status to the state bar, or, in a few states, directly to potential clients. [*See* ABA Journal 63 (May 2006)]

7. Settling Malpractice Claims

The law favors the amicable settlement of claims. Thus, a lawyer ***may*** settle a malpractice claim or potential claim made by an unrepresented client or a former client, but ***only if*** the lawyer first advises the client ***in writing*** to seek the advice of an independent lawyer about the settlement, and the lawyer gives the client a reasonable chance to obtain such advice. [ABA Model Rule 1.8(h)(2)]

EXAMPLE

Defendant D hired attorney A to defend him in a criminal case, and D gave A $5,000 as an advance against attorneys' fees yet to be earned. Shortly before trial, D became dissatisfied with A's work, fired her, and threatened to sue her for malpractice. A returned the unearned portion of the fee advance to D by a check that had an endorsement on the back purporting to release A from all liability for malpractice. A did not advise D to seek advice from an independent lawyer. A is subject to discipline. [*See, e.g.,* New York State Bar Op. 591 (1988)]

8. Prospective Waiver or Limit of Malpractice Liability

A lawyer must not make an agreement with a client that prospectively waives or limits the lawyer's liability for legal malpractice, except in the unlikely event that the client is independently represented in making the agreement. [ABA Model Rule 1.8(h)(1)] Note that unlike with settlements (above), the client must ***actually*** be represented by independent counsel; advising the client to seek representation is not sufficient.

EXAMPLE

Lawyer L requires his clients to sign a standard, preprinted retainer agreement that provides, in part, that the client cannot sue L for malpractice. L's clients are not independently represented in signing his retainer agreement. L is subject to discipline.

a. May Practice in a Limited Liability Entity

A lawyer may practice in a limited liability entity, provided that the lawyer remains personally liable to the client for her own malpractice,

and the entity complies with legal requirements for notice, insurance coverage, and the like. [ABA Model Rule 1.8, comment 17]

b. May Reasonably Limit Scope of Representation

A lawyer may enter into an agreement with his client that reasonably limits the scope of the lawyer's representation in accordance with ABA Model Rule 1.2. [*Id.*]

EXAMPLE

Client C is thinking of purchasing the worldwide distribution rights to a strain of pest-resistant rice. C asks lawyer L to find out whether any nation imposes trade restrictions on that kind of rice. L tells C that to research the laws of every nation could take as much as 300 hours and cost $60,000, but C said he could not afford that much enlightenment. C and L agreed that L would research as many nations as he could in 100 hours, starting with C's most likely markets. The agreement is proper.

c. May Arbitrate Legal Malpractice Claims

A lawyer may agree prospectively with a client to arbitrate all legal malpractice claims, provided that such an agreement is proper under local law and the client understands the scope and effect of the agreement. [*Id.*]

9. Reimbursement of Client

A lawyer who has breached a duty to his client with monetary effect ***cannot escape discipline*** by reimbursing the client for any loss. Thus, even if the lawyer pays the client back for any damage he caused, he is still subject to discipline.

VI. LITIGATION AND OTHER FORMS OF ADVOCACY

A. MERITORIOUS CLAIMS AND CONTENTIONS ONLY

1. Discipline for Asserting Frivolous Position

A lawyer is subject to discipline for bringing a frivolous proceeding, or for asserting a frivolous position in the defense of a proceeding. Likewise, a lawyer is subject to discipline for taking a frivolous position on an ***issue*** in a proceeding. A "frivolous" position is one that cannot be supported by a good faith argument under existing law ***and*** that cannot be supported by a good faith argument for changing the existing law. [ABA Model Rule 3.1; Restatement §110; *and see* Fed. R. Civ. P. 11—litigation sanctions for frivolous pleadings and motions] Note the following:

a. It is ***not*** frivolous to assert a position without first fully substantiating all the facts. [ABA Model Rule 3.1, comment 2]

b. It is ***not*** frivolous to assert a position knowing that vital evidence can be uncovered only through discovery proceedings. [*Id.*]

c. It is ***not*** frivolous to assert a position even though the lawyer believes that the position will not ultimately prevail. [*Id.*]

EXAMPLES

1) C purchased land bordering a government forest, hoping to obtain the necessary government approval to build a ski resort. When the government refused to grant the necessary approval, C hired lawyer L to sue the government for taking C's property without just compensation. L advised C that her legal position was contrary to the existing law, but L developed two tenable arguments for distinguishing C's case from the existing law. Even though L believed that his arguments were sound, he did not believe that they would ultimately prevail in the United States Supreme Court. L is not subject to discipline.

2) An attorney may advise a client to take a tax position if the attorney believes that the position has a "realistic possibility of success if the matter is litigated." The attorney need not be convinced that the position will ultimately prevail. But when advising a client about a debatable tax position, the attorney must warn the client about possible penalties and other adverse legal consequences. [ABA Formal Op. 85-352 (1985)]

2. Defending in Criminal Proceedings

Despite the general rule against taking frivolous positions, the lawyer for the defendant in a criminal case (or for the respondent in a proceeding that could result in incarceration) may conduct the defense so that the prosecutor must prove every necessary element of the crime. [ABA Model Rule 3.1; Restatement §110(2)]

EXAMPLE

Attorney A agrees to defend D in a kidnapping case. From the facts related in confidence by D, A concludes that D is clearly guilty as charged. If D nevertheless wishes to plead not guilty, A will not be subject to discipline for putting the prosecution to its proofs and requiring every element of the case to be proven beyond a reasonable doubt.

B. DUTY TO EXPEDITE LITIGATION

1. Reasonable Efforts to Expedite Litigation

A lawyer must make reasonable efforts to expedite litigation, consistent with the interests of the client. [ABA Model Rule 3.2] A lawyer may occasionally

ask for a postponement for personal reasons, but he should not make a habit of it. [*See* ABA Model Rule 3.2, comment 1]

2. Interests of the Client

The duty to expedite does not require the lawyer to take actions that would harm the client's legitimate interests. [*See* ABA Model Rule 3.2] However, realizing ***financial or other benefit*** from otherwise improper delay is ***not*** a legitimate interest. [ABA Model Rule 3.2, comment 1]

EXAMPLE

Client C lost her case at trial, and a judgment for $500,000 was entered against her. C's obligation to pay the judgment was stayed pending appeal. C instructed her lawyer to appeal the case and to drag out the appeal as long as possible, pointing out that she could earn an 11% return on the $500,000 while the appeal was pending. C's lawyer obtained every possible extension of time and delayed the appeal as long as he could. Ultimately, the appellate court affirmed the judgment below. C's lawyer is subject to discipline for causing delay.

C. DUTY OF CANDOR TO THE TRIBUNAL

1. Candor About Applicable Law

An attorney must be candid with the court about the ***law*** that applies to the case.

a. False Statements of Law

An attorney is subject to discipline for knowingly making a false statement of law to the court or for failing to correct a previously made false statement of material law. [ABA Model Rule 3.3(a)(1)]

EXAMPLES

1) During oral argument, attorney A cited the court to an intermediate appeals court opinion, knowing that the opinion had later been reversed by the state's highest court. A is subject to discipline.

2) In a memorandum of points and authorities, attorney B cited an obscure case for a proposition, knowing that the case held precisely the opposite. B is subject to discipline.

b. Failing to Disclose Controlling Authority

An attorney is subject to discipline for knowingly failing to disclose to the court a legal authority in the ***controlling jurisdiction*** that is ***directly adverse*** to the client's position and that has not been disclosed by the opposing counsel. [ABA Model Rule 3.3(a)(2); Restatement §111(2); *and*

see Jorgenson v. Volusia County, 846 F.2d 1350 (11th Cir. 1988)—Rule 11 sanctions imposed for failure to cite adverse authority] The attorney is, of course, free to argue that the cited authority is not sound or should not be followed.

EXAMPLES

1) Lawyer L is representing client C in a diversity of citizenship case pending in the United States District Court for the District of Nevada. Under the *Erie* doctrine, Nevada law (including Nevada's choice of law rules) governs on issues of substance. In the case at hand, Nevada's choice of law rules make the controlling law that of the state of New York. L's adversary fails to call the court's attention to a New York Court of Appeals case that is directly contrary to the position taken by L's client. L must cite the case to the court.

2) Under the facts given in the example above, L would have no duty to cite the court to a directly adverse Utah case or to a directly adverse case decided by the United States Court of Appeals for the Fifth Circuit. Nor would L have a duty to cite the court to a New York Court of Appeals case that was against L's position only by analogy. (Note, however, that many lawyers would cite these cases to the court as a matter of sound tactics.)

2. Candor About Facts of Case

An attorney is subject to discipline for knowingly making a false statement of fact to the court or for failing to correct a previously made false statement of material fact. [ABA Model Rule 3.3(a)(1)] Ordinarily, an attorney is not required to have personal knowledge of the facts stated in pleadings and other litigation documents—those contain assertions made by the client or by other persons, not by the attorney. But when an attorney does make an assertion of fact to the court (e.g., in an affidavit or when asserting facts in oral argument), the attorney is expected either to ***know*** that the assertion is true or to ***believe*** it to be true based on reasonably diligent inquiry. Furthermore, an attorney's ***failure to speak out*** is, in some contexts, the equivalent of an affirmative misrepresentation (e.g., when the attorney or the client has caused a mistake or misunderstanding). [ABA Model Rule 3.3, comment 3]

EXAMPLES

1) When the court was pondering whether to release attorney A's client on his own recognizance, the court asked A: "Does your client have a steady job here in the city, counsel?" A answered: "Oh, yes, Your Honor." If A knew that his client was unemployed, A is subject to discipline. Furthermore, if A had never inquired about his client's employment status and had no reasonable basis for the assertion, A is subject to discipline.

2) When the court was deciding what sentence to impose on attorney B's client, the court said: "I assume that this is your client's first drunk driving offense, counsel, so I am ordering him to attend drunk driving school and to pay a fine of $100." B knew that his client had two prior drunk driving offenses and that the mandatory sentence for the third such offense is revocation of license and 90 days in the county jail. Because neither B nor his client caused the court's mistake, B may keep quiet. *But note:* If B or his client had caused the mistake, B would have to speak up and correct it.

3. No Obligation to Volunteer Harmful Facts

An attorney generally has no obligation to volunteer a fact that is harmful to his client's case. The adversary system assumes that opposing sides can use discovery proceedings and their own investigations to find out the facts. [*See* ABA Model Rule 3.3, comment 14] If an attorney's adversary fails to uncover a harmful fact, an injustice may result, but that is simply the way the adversary system works.

EXAMPLE

Lawyer L is defending D at the trial of a private treble damages antitrust case. Plaintiff's case-in-chief is defective. L knows that the defect could be cured if plaintiff were aware of a certain meeting between D and D's competitors. Throughout the long discovery proceedings, plaintiff never inquired about this meeting, although he had ample opportunity to do so. L has no duty to volunteer information about the meeting; L's ethical obligation is to move for a directed verdict at the close of plaintiff's case-in-chief.

a. Exception—Ex Parte Proceedings

In an ex parte proceeding, only one side is present. Because the other side has no opportunity to offer its version of the facts, the model of the adversary system does not apply in the ex parte context. Therefore, a lawyer in an ex parte proceeding ***must inform*** the tribunal of ***all material facts*** known to the lawyer that will help the tribunal make an informed decision. [ABA Model Rule 3.3(d); Restatement §112(2)]

EXAMPLE

The same day that W filed for divorce from H, W's lawyer petitioned for a temporary restraining order to prevent H from entering the family home and from bothering the children. Because H could not be found, the court agreed to hear the petition ex parte. At the hearing, W's lawyer must inform the court of ***all the material facts***, both helpful and harmful, that bear on the issue before the court.

4. Using False Evidence

In a matter pending before a tribunal, a lawyer is subject to discipline for offering evidence that the lawyer ***knows*** is false. [ABA Model Rule 3.3(a)(3)] "Knows" means actual knowledge, but actual knowledge can be inferred from the circumstances. [ABA Model Rule 1.0(f)] A lawyer should resolve doubts about veracity in favor of her client, but a lawyer cannot ignore an obvious falsehood. [ABA Model Rule 3.3, comment 8] Furthermore, a lawyer ***may*** refuse to offer evidence that she ***reasonably believes*** is false, except for a criminal defendant's testimony on his own behalf. [ABA Model Rule 3.3(a)(3)] These principles apply, not just in court, but also in an ancillary proceeding, such as a deposition.

a. Discovery of Falsity After Evidence Has Been Offered

If a lawyer has offered a piece of evidence and later discovers that it is false, she must take reasonable remedial measures. First, the lawyer must speak confidentially with her client, urging the client's cooperation in withdrawing or correcting the false evidence. [ABA Model Rule 3.3, comment 10] Second, if the client will not cooperate, the lawyer should consider asking the court's permission to withdraw. Ordinarily, withdrawal is not mandatory, but it becomes mandatory if the lawyer's discovery of the false evidence creates such a rift between the lawyer and client that the lawyer can no longer represent the client effectively. [ABA Model Rule 3.3, comment 15] Withdrawal alone is not a sufficient remedial step if it leaves the false evidence before the tribunal. The lawyer should also move to strike the false evidence or take other steps to cancel out its effect. [*See* Restatement §120, comment h] Third, if withdrawal is not permitted or will not solve the problem, the lawyer ***must*** disclose the situation to the judge, even if that means disclosing the client's information that would otherwise be protected under the duty of confidentiality. [ABA Model Rule 3.3, comment 10]

Note that the duty to rectify false evidence continues until the end of the proceedings, which means when a final judgment has been affirmed on appeal or the time for appeal has expired. [ABA Model Rule 3.3, comment 13]

b. False Testimony by Criminal Defendant

When a lawyer in a ***civil*** matter learns that her client has testified falsely or is about to testify falsely, the lawyer's path is clear. If the client has not yet testified, the lawyer cannot call her client to the stand. If the client has testified and the lawyer learns that the testimony is false, the lawyer must take the reasonable remedial measures explained in a., above. However, when the setting is a ***criminal*** rather than civil case, the situation becomes more complicated. Indeed, one of the thorniest

problems in legal ethics arises when a criminal defense lawyer learns that her client has testified falsely, or is about to testify falsely, in his own defense. A criminal defendant has a Sixth Amendment right to the effective assistance of counsel. A criminal defendant also has a constitutional right to testify on his own behalf. [Rock v. Arkansas, 483 U.S. 44 (1987)] On the other hand, a criminal defense lawyer must not present evidence that he knows is false, and ordinarily he must not reveal the client's confidential information. What is the criminal defense lawyer to do when the client insists on testifying to something that the lawyer knows (because of the client's confidential disclosures) is false?

1) ABA Model Rules and Restatement Solution

When you take the MPRE, apply the solution adopted by the ABA Model Rules and the Restatement. [*See* ABA Model Rule 3.3(a)(3); Restatement §120, comment i] That is, the criminal defense lawyer should follow the same three steps stated in a., above. First, the lawyer must try to convince the defendant not to testify falsely. Second, if the defendant insists on testifying falsely, the lawyer should consider withdrawal, if that will solve the problem. Usually it will not solve the problem, either because the court will not permit withdrawal or because withdrawal will not erase or prevent the false testimony. Third, if all else fails, the lawyer must reveal the situation to the judge, even if that means disclosing the client's confidential information. The judge must then decide what to do, perhaps declare a mistrial, make some kind of statement to the jury, or perhaps nothing. The duty to rectify false evidence continues until the end of the proceedings, which means when a final judgment has been affirmed on appeal or the time for appeal has expired. [ABA Model Rule 3.3, comment 13] This solution to the problem does not violate a criminal defendant's constitutional right to effective assistance of counsel. [Nix v. Whiteside, 475 U.S. 157 (1986)]

2) Minority View

Several jurisdictions (including New York and California) handle the problem by allowing the criminal defendant to testify in "narrative fashion." That means that the defense lawyer questions the defendant in the ordinary way up to the point of the false testimony. At that point, the defense lawyer asks a question that calls for a narrative answer (such as "What else happened?"). The defendant then tells his story. The defense lawyer is not permitted to rely on the false parts of the story when arguing the case to the trier of fact. ABA Model Rule 3.3 defers to the local law in jurisdictions that follow the minority view. [ABA Model Rule 3.3, comment 7]

5. Other Corruption of an Adjudicative Proceeding

A lawyer who represents a client in an adjudicative proceeding must take appropriate measures to prevent any person (a client or anyone else) from committing criminal or fraudulent conduct that will corrupt the proceedings. [*See* ABA Model Rule 3.3(b)] Examples of such conduct are: (1) hiding or destroying evidence, (2) bribing a witness, (3) intimidating a juror, (4) buying a judge, and (5) failing to obey a law or court order to disclose information. [ABA Model Rule 3.3, comment 12] Appropriate measures include disclosure to the court, if that becomes necessary.

EXAMPLE

Attorney A is defending surgeon S in a medical malpractice case. Student nurse N observed the operation in question, including the act that allegedly constitutes the malpractice. Two days before plaintiff took N's deposition, S's father told N: "If you testify at your deposition that you saw S do the act in question, I'll make sure you never get a nursing job in this state." At her deposition, N testified that she was not in the operating room at the time of the alleged act. Two days after the deposition, A learned what S's father did. A must set the record straight; if all else fails, A must tell the tribunal what happened.

D. DUTY OF FAIRNESS TO OPPOSING PARTY AND COUNSEL

1. Opponent's Access to Evidence

A lawyer must not unlawfully obstruct another party's access to evidence. Furthermore, a lawyer must not unlawfully alter, destroy, or conceal a document or other item having evidentiary value. In addition, a lawyer must not counsel or assist another person to do any of these things. [ABA Model Rule 3.4(a); Restatement §118] Suppressing or tampering with evidence may also constitute a crime. [*See*, *e.g.*, Cal. Penal Code §135]

EXAMPLE

A special prosecutor was appointed to investigate certain allegations against a government official. The official told his lawyer about some highly incriminating documents in a file in his office. The lawyer suggested that the official "deep six" the file in the nearest river. The lawyer is subject to discipline.

2. Falsifying Evidence and Assisting in Perjury

A lawyer must not falsify evidence. Furthermore, a lawyer must not counsel or assist a witness to testify falsely. [ABA Model Rule 3.4(b); Restatement §118] Well-prepared lawyers seldom pass up an opportunity to talk to a witness before the witness testifies. The lawyer may probe the witness's memory, explore the basis of the witness's knowledge, point out holes and fallacies in the witness's story, and seek to refresh the witness's recollection

by proper means. [Restatement §116] However, the lawyer must not try to "bend" the testimony or put words in the witness's mouth. New York's Judge Finch put the matter this way in an 1880 disciplinary case: "[The lawyer's] duty is to extract the facts from the witness, not to put them into him; to learn what the witness does know, not to teach him what he ought to know." [*In re* Eldridge, 82 N.Y. 161 (1880)]

3. Abusing Discovery Procedures

A lawyer must not make a frivolous discovery request, or fail to make reasonable efforts to comply with a legally proper discovery request made by the adversary. [ABA Model Rule 3.4(d)] Abuse of discovery proceedings can also subject both the lawyer and the client to fines and other sanctions. [*See*, *e.g.*, Fed. R. Civ. P. 37(b); Roadway Express, Inc. v. Piper, 447 U.S. 752 (1980)—federal court has inherent authority to hold counsel personally responsible for expenses and attorneys' fees incurred because of counsel's bad faith in discovery]

EXAMPLE

Lawyer L intentionally failed to produce a certain set of handwritten notes that were clearly called for by a court order. L's conduct caused L's adversary to spend several hundred hours in developing alternative evidence of the facts stated in the notes. L is subject to discipline and is subject to such other sanctions as the court may see fit to impose.

4. Paying Witnesses

A lawyer must not offer an inducement to a witness that is prohibited by law. [ABA Model Rule 3.4(b); Restatement §117] However, except when prohibited by local law, the following payments to witnesses are proper.

a. Travel, Meals, and Lodging

An attorney may pay expenses reasonably incurred by the witness in attending and testifying (e.g., travel, hotel, meals, and incidental expenses). [ABA Model Rule 3.4, comment 3]

b. Loss of Time

An attorney may pay reasonable compensation for the witness's loss of time in attending and testifying (e.g., the amount the witness would have earned at her job had she not had to come to testify). [Restatement §117, comment b]

c. Experts' Fees

An attorney may pay a reasonable fee to an ***expert*** witness for preparing to testify and for testifying. The fee must not be contingent on either the content of the testimony or the outcome of the case. [ABA Model Rule 3.4, comment 3]

EXAMPLE
In a complex securities case, client C needed the testimony of an expert on securities brokerage. C's lawyer L agreed to advance the expenses for expert E and promised to pay E's travel, hotel, meal, and incidental expenses. L also promised E a witness fee of $1,000 or 2% of C's eventual recovery, whichever was greater. The arrangement for expenses was proper, but the witness fee arrangement makes L subject to discipline.

5. Securing Absence or Noncooperation of Witness

A lawyer must not advise or cause a person to secrete himself or to flee the jurisdiction for the purpose of making him unavailable as a witness. [ABA Model Rule 3.4(a); Restatement §116] A lawyer may, however, advise a person not to voluntarily give information to an opponent or other party if the following conditions are met:

a. The person is a client, or a relative, employee, or agent of a client; and

b. The lawyer reasonably believes that the person's interests will not be harmed by not volunteering the information.

[ABA Model Rule 3.4(f)]

EXAMPLE
Attorney A represents W in a child custody dispute with W's former husband, H. A believes that H's lawyer will probably try to interview W's sister to find out information about W's fitness as a parent. Absent some kind of harm to the sister, A may advise the sister that she need not speak voluntarily with H's lawyer about the matter. However, if A learns that H's lawyer is trying to serve a deposition subpoena on the sister, A must not advise the sister to leave town or hide from the process server.

6. Witness Preparation and Coaching

Preparing a witness is part of a lawyer's duty of thoroughness and preparation, but some forms of witness preparation violate a lawyer's ethical obligations. For example, it is improper to counsel a witness to give false testimony, offer an unlawful inducement to a witness, or procure a witness's absence from a proceeding. Overtly attempting to manipulate testimony-in-progress, including during trial or deposition and via the use of electronic communications, can also violate the lawyer's ethical obligations. [ABA Formal Op. 508 (2023)]

7. Violating Court Rules and Orders

A lawyer must not knowingly violate a rule of procedure, a rule of evidence, a rule of court, or an order made by the court—but a lawyer may openly refuse

to obey such a rule or order for the purpose of making a good faith challenge to the validity of the rule or order. [ABA Model Rule 3.4(c); Restatement §105]

EXAMPLES

1) At the jury trial of D for automobile theft, the trial judge ordered prosecutor P to make no mention whatsoever of D's former misdemeanor convictions. In cross-examining one of D's witnesses, P asked: "When you and D were cellmates in the county jail back in 1998, did D invite you to join a car theft operation after your release?" If P was intentionally trying to evade the trial judge's order, P is subject to discipline.

2) In the civil suit of *P v. D*, P demanded production of some documents that D claimed were protected by the attorney-client privilege. The trial judge ordered the documents to be produced *in camera* so that he could determine whether the documents were privileged. D's lawyer asserted that the state law of attorney-client privilege did not authorize the judge to require an *in camera* examination. The trial judge refused to stay the order long enough to allow D to pursue an interlocutory appeal. D's lawyer may refuse to produce the documents while she seeks a writ of mandamus or prohibition to test the validity of the trial judge's order. [*See also In re* Tamblyn, 695 P.2d 902 (Or. 1985)—attorney may advise client not to obey void court order]

8. Chicanery at Trial

A lawyer is subject to discipline for engaging in the following types of chicanery during the trial of a case.

a. Referring to Inadmissible Material

During the trial of a case, a lawyer must not refer to material that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence. [ABA Model Rule 3.4(e); Restatement §107]

EXAMPLES

1) At the trial of a railway accident case, plaintiff's lawyer made repeated reference to the great size and wealth of the railway company. The comments were irrelevant to any issue in the case and were made solely to inflame the jury. The lawyer is subject to discipline. [*See also* Simmons v. Southern Pacific Transportation Co., 62 Cal. App. 3d 341 (1976)—verdict for plaintiff reversed because of counsel's misconduct]

2) During her opening statement to the jury, the defense lawyer pointed out that plaintiff had offered to settle his claim for a small sum. The defense lawyer knew that evidence of the settlement offer would not be admissible. The lawyer is subject to discipline.

b. Asserting Personal Knowledge of Contested Facts

During the trial of a case, a lawyer must not assert personal knowledge of facts in issue (except when testifying as a witness). [ABA Model Rule 3.4(e)]

EXAMPLE

Lawyer L represented the plaintiff in a dog bite case. The defendant contended that he was not the owner of the offending dog. In his closing argument to the jury, L said: "The defendant has solemnly told you that he does not own the dog. As it happens, I live down the street from the defendant, and every night about 10, I see the defendant taking that very same dog for a walk." L is subject to discipline.

c. Asserting Personal Opinions

During the trial of a case, a lawyer must not state a personal opinion about:

1) The justness of a cause;

2) The credibility of a witness;

3) The culpability of a civil litigant; or

4) The guilt or innocence of an accused.

[ABA Model Rule 3.4(e); Restatement §107] A lawyer may, of course, make an argument based on the ***evidence*** concerning any of these matters.

EXAMPLES

1) During his closing argument in a routine traffic accident case, attorney A said: "D has told you that the light was green. I was appalled to hear the man say that from the witness stand, under oath! I don't believe him for a minute, and I ask you not to believe him either." A's argument is not proper.

2) In the example above, it would have been proper for A to make his point by referring to the evidence rather than expressing personal opinion. For instance: "D has told you that the light was green. D stands to lose a great deal of money in this case. Two eyewitnesses, who have nothing to lose, testified that the light was red. It is up to you jurors to decide whom to believe."

9. Using Threats to Gain Advantage in Civil Case

Under the ABA Model Rules, a lawyer may bring, or threaten to bring, criminal charges against her adversary in order to gain an advantage in a civil case,

provided that the criminal and civil matters are closely related and that both the civil case and criminal charges are warranted by the law and the facts. [ABA Formal Op. 92-363 (1992)] However, a lawyer must not threaten to report adversary counsel for a disciplinary violation in order to gain an advantage for her client in a civil case. If the adversary counsel's disciplinary violation is the kind that must be reported, the lawyer should simply report it—she should not use it as a bargaining chip in the civil case. [ABA Formal Op. 94-383 (1994)]

EXAMPLE

Lawyer L has personal knowledge that adversary counsel lied to the judge about a certain document that L had requested in discovery. Lying to a judge is the kind of conduct that raises a substantial question about a person's fitness to practice, and L therefore must report it. L told adversary counsel: "If you accept my client's settlement proposal, then I will not report you for lying to the judge about that document." L's conduct is improper; she should simply have reported adversary counsel, not used the misconduct as a bargaining chip in the civil case.

E. DUTY TO PRESERVE IMPARTIALITY AND DECORUM OF TRIBUNAL

1. Improper Influence

A lawyer must not seek to influence a judge, court official, juror, or prospective juror by improper means. [*See* ABA Model Rule 3.5(a)] For example, a lawyer must not offer a gift to a judge unless the judge would be allowed to accept it under the ABA Code of Judicial Conduct.

EXAMPLE

Attorneys A and B frequently appear as counsel in the Superior Court. C is the chief clerk of that court. All three of them are avid fishermen. A and B invite C to join them, at their expense, for a week of salmon fishing at B's lodge in Alaska. It would not be proper under ABA Code of Judicial Conduct Rules 2.12(A) and 3.13(A) for C to accept such a gift, and it is not proper for A and B to offer it to C.

2. Improper Ex Parte Communication

While a proceeding is pending in a tribunal, a lawyer must not have an ex parte communication with a judge, court official, juror, or prospective juror except when authorized by law or court order. [*See* ABA Model Rule 3.5(b)] An "ex parte communication" is a communication that concerns the matter at issue and occurs outside the presence and without the consent of the other parties to the litigation or their representatives. [Restatement §113, comment c]

a. Judges and Court Officials

As ABA Model Rule 3.5(b) recognizes, local law and court orders may vary concerning ex parte communications with judges and court officials. Generally, a ***written*** communication to a judicial officer is not ex parte if a copy of the communication is timely sent to the opposing parties. [Restatement §113, comment c] A lawyer must not, however, communicate ***orally*** on the ***merits*** of a matter with the judge or other official before whom the matter is pending without giving ***adequate notice*** to the adversary. If the local rules of court allow lawyers to appear ex parte, without notice to the adversary, to obtain extensions of time to plead or respond to discovery, a lawyer may do so—but the lawyer must not discuss the ***merits*** of the case when requesting the extension of time. [*See* Restatement §113(1)]

b. Jurors and Prospective Jurors

ABA Model Rule 3.5(b) recognizes that local law may vary concerning contact between lawyers and jurors or prospective jurors. In general, however, before and during the trial of a case, a lawyer ***who is connected with the case*** must not communicate (outside of official proceedings) with a juror or member of the panel from which the jurors will be chosen. This rule forbids communication on ***any subject***—even the weather. It does not matter who initiates the communication. If a juror or prospective juror attempts to communicate with a lawyer, the lawyer must refuse. [Restatement §115] On the other hand, a lawyer who is ***not*** connected to the case may talk to a juror or prospective juror but not about the case (e.g., lawyer may talk to her friend the juror about the weather).

1) Investigation of Prospective Jurors

It is not improper for a lawyer to investigate members of a jury panel to determine their backgrounds and the existence of any factors that would be grounds for a challenge (e.g., bias, relationship to a party). Such an investigation must be done discreetly and must not involve contact with the prospective juror or, in most cases, her family.

a) Juror's Internet Presence

Unless limited by law or court order, a lawyer may review a juror's or potential juror's public Internet presence (e.g., postings on social media websites) in advance of and during a trial. However, a lawyer must not send the juror an access request (e.g., a "friend" request) either personally or through an agent. This constitutes a prohibited ex parte communication. [ABA Formal Op. 14-466 (2014)]

2) Post-Trial Communications with Jurors
After the trial is over and the jury is discharged, a lawyer must not communicate with a former jury member (or even a person who was a prospective juror) if any of the following conditions is met: (1) local law or a court order prohibits such communication; (2) the juror has told the lawyer that he does not want to communicate; or (3) the communication involves misrepresentation, coercion, or harassment. [ABA Model Rule 3.5(c)]

3. Disruptive Conduct

A lawyer must not engage in conduct intended to disrupt a tribunal. [ABA Model Rule 3.5(d)] This rule applies in depositions as well as in the courtroom. [ABA Model Rule 3.5, comment 5]

EXAMPLE
Despite repeated warnings by the trial judge, attorney A persisted in banging on the counsel table, interrupting the judge in mid-sentence, making sour faces while witnesses were examined, and leaning over the jury rail in an intimidating manner. A is subject to discipline (and, at the court's discretion, to punishment for contempt of court).

F. TRIAL PUBLICITY

The litigants in a trial have a Fifth Amendment right to have their dispute resolved on admissible evidence, by fair procedures, in a tribunal that is not influenced by public sentiment or outcry. Protection of that right requires some limits on the kinds of information that can be disseminated to the public before trial—particularly where the trial is to be by jury. On the other hand, the public and the press have countervailing rights under the First Amendment. The public has a right to know about threats to its safety, and it has an interest in knowing about the conduct of judicial proceedings. Moreover, the subjects of litigation are often significant in debate over questions of public policy.

1. General Rule

A lawyer who is connected with a case must not make a public statement outside the courtroom that the lawyer reasonably should know would have a "substantial likelihood of materially prejudicing" the case (e.g., discussing the character or credibility of a party or witness, performance or results of an examination, possibility of a guilty plea, or existence or contents of a confession). [ABA Model Rule 3.6(a); Restatement §109]

2. Right of Reply

A lawyer may, however, make a public 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." [ABA Model Rule 3.6(c)]

EXAMPLE

Professional tennis star Jacques LaMont was arrested for sexually assaulting an employee in the hotel where he was staying. Dozens of media reporters descended on the inexperienced prosecutor assigned to LaMont's case. The reporters demanded to know what evidence there was against LaMont, who was reputed to be a clean-living family man. The prosecutor said he could not disclose any details, but that there was "some incriminating physical evidence," plus a "helpful signed statement that LaMont gave to the police voluntarily." The prosecutor's comments got wide coverage in the press and on television. LaMont's counsel feared that the prosecutor's characterization of LaMont's signed statement as "helpful" would make people think that LaMont had incriminated himself. Seeking to dispel that false impression, LaMont's counsel told reporters, quite accurately, that the most "incriminating" parts of LaMont's statement were that he was a paying guest of the hotel on the night in question and that at the time in question LaMont was asleep in his own hotel room, alone. The prosecutor is subject to discipline, but the defense lawyer's statement was proper. [*See* ABA Model Rule 3.6(c) and comment 5; *see also* ABA Model Rule 3.8(f)]

3. Additional Constraint on Criminal Prosecutors

There is an additional constraint on the prosecutor in a criminal case. The prosecutor must not make extrajudicial comments that have a "substantial likelihood of heightening public condemnation of the accused." [ABA Model Rule 3.8(f)]

4. Dry Facts About Case Permitted

Notwithstanding the general rule against prejudicial statements, a lawyer who is connected with the case may publicly state the following "dry facts" about the case:

a. The claim, charge, or defense involved (provided there is an accompanying statement that the charge is only an accusation and that the party is deemed innocent until proven guilty);

b. The names of persons involved (unless the law prohibits it);

c. Any information that is already in the public record;

d. The scheduling or result of any step in litigation;

e. The fact that an investigation is ongoing, a request for help in getting information, and a warning of danger (if appropriate); and

f. Routine booking information about a criminal defendant, such as his name, address, occupation, family status, the time and place of arrest,

the names of arresting officers, and the names of investigating officers or agencies.

5. Rules Also Apply to Associated Lawyers

The rules stated above apply equally to other lawyers who are associated in a law firm or agency with the lawyers participating in the case. [ABA Model Rule 3.6(d)]

G. TRIAL COUNSEL AS WITNESS

1. Reasons to Avoid Dual Role

Several problems are posed when a client's trial counsel also testifies as a witness at the trial.

a. Conflict of Interest

The dual role may create a conflict of interest between the client and the trial counsel. For example, the trial counsel's testimony may contradict the client's testimony, or the trial counsel's obvious bias may make her an ineffective witness on behalf of the client. [ABA Model Rule 3.7, comment 6]

b. Differing Functions

The functions of trial counsel and witness are different. A witness must state facts objectively, but a trial counsel is supposed to present facts as a partisan advocate. When the two roles are combined, it may be unclear whether a particular statement is to be taken as evidence or as advocacy. The tribunal itself can object when the dual role may confuse or mislead the trier of fact. [ABA Model Rule 3.7, comment 2]

c. Effect on Adversary

The adversary may be handicapped in challenging the credibility of one who serves as both trial counsel and witness. Courtesy and sound tactics may force the adversary to tread softly on cross-examination. Furthermore, a favorable impression created as trial counsel may lend unjustified believability to the trial counsel's words as witness.

2. Ethical Limitations Imposed

For the foregoing reasons, the ABA Model Rules place limits on serving as both trial counsel and witness. [*See also* Restatement §108] Except in the situations discussed below, a lawyer must not act as an advocate at a trial in which the lawyer is likely to be a ***necessary*** witness. [ABA Model Rule 3.7(a)]

a. Uncontested Matter or Mere Formality

A lawyer may serve as trial counsel if her testimony as a witness will relate solely to an uncontested matter or to a mere formality. [*See* ABA Model Rule 3.7(a)(1)]

EXAMPLE
Attorney A's testimony will be limited to the authentication of a letter, and there is no reason to doubt the letter's authenticity. Either A or another lawyer in her firm may serve as trial counsel.

b. Testimony About Legal Services Rendered in the Case
A lawyer may serve as trial counsel if his testimony will relate solely to the nature and value of legal services he has rendered in the case. [ABA Model Rule 3.7(a)(2)]

EXAMPLE
State law allows attorneys' fees to be awarded to the victor in environmental suits brought under the public trust doctrine. Attorney B's client won such a case. At the fee setting hearing, B may continue as trial counsel and may also testify about the number of hours he spent on the case, the nature of the services, and the amount of his ordinary hourly fee.

c. Substantial Hardship on Client
A lawyer may serve as trial counsel and also testify about any matter if withdrawal as trial counsel would cause "***substantial***" hardship. [ABA Model Rule 3.7(a)(3)] Courts tend to be narrow-minded in applying this exception. Mere duplication of legal fees or the loss of a long working relationship with counsel are sometimes held not to constitute substantial hardship.

EXAMPLE
For the past five years, attorney C has worked full-time on the discovery and pretrial preparation of a major tax fraud case. Just before trial, C discovered that she would have to testify on a contested issue concerning some entries in her client's books of account. If C withdraws as trial counsel, it will cost her client many thousands of dollars in extra legal fees, and it will delay the trial by 18 months. The substantial hardship exception ***ought to*** apply here, but there is some authority to the contrary.

d. Other Lawyers in Firm May Be Witnesses
A lawyer is permitted to act as an advocate at 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 the conflict of interest rules. [ABA Model Rule 3.7(b)]

3. Conflict of Interest Rules Also Apply
A lawyer who is asked to be both an advocate and a witness must comply not only with ABA Model Rule 3.7, but also with the general conflict of interest

principles stated in ABA Model Rules 1.7 (current clients) and 1.9 (former clients). For instance, the dual role can create a conflict between the current client's interest in winning the case and the lawyer's interest in earning a fee as trial counsel.

EXAMPLE

Rock climbers A, B, C, and L (a lawyer) went on a rock climbing venture guided by professional climber Bea Lai Long. C was badly injured on the climb, allegedly by Bea's foolhardy decision to take an exposed route when a storm was approaching. A, B, and L were the only people who saw what happened to C, and their testimony will be vital to C's claim against Bea. C has asked L to be her trial counsel. L would like to earn the fee, but he also knows that his testimony about the accident will be open to attack for bias; C might be better off having another trial counsel and using L only as an eyewitness. L must not represent C unless he fully explains the conflict to C and obtains her informed consent, confirmed in writing.

VII. TRANSACTIONS AND COMMUNICATIONS WITH PERSONS OTHER THAN CLIENTS

A. TRUTHFULNESS IN STATEMENTS TO THIRD PERSONS

1. Must Not Make False Statements of Material Fact or Law

When dealing on behalf of a client with a third person, a lawyer must not knowingly make a false statement of law or material fact. [ABA Model Rule 4.1(a); Restatement §98] Generally, a lawyer has no duty to inform a third person of relevant facts. [ABA Model Rule 4.1, comment 1] However, a lawyer must not misrepresent the facts.

a. Types of Misrepresentation

A misrepresentation can occur when the lawyer makes a statement knowing that it is false, when the lawyer affirms or incorporates a statement knowing that it is false, when the lawyer states something that is partly true but misleading, or in some contexts when the lawyer fails to speak or act. [*Id.*]

EXAMPLES

1) Lawyer L represented seller S in negotiating a sale of S's farm to buyer B. L and S accompanied B on a walking tour of the farmlands, and it soon became apparent to them that B knew little or nothing about farming. When B looked over the north 40 acres, he said: "I assume that the soil and water here would be good for a nice walnut orchard." L and S both knew that the soil was far too wet and heavy to grow walnuts. S replied: "Oh, you'd be surprised what can grow here." L said nothing. L's failure

to speak out in this context is equivalent to an affirmative misrepresentation. L is subject to discipline.

2) Attorney A represented plaintiff P in a personal injury case. P died while settlement negotiation was going on with the defendant. A must not pursue the settlement negotiation without notifying the defense lawyer of P's death. [ABA Formal Op. 95-397 (1995)]

b. Distinguish Conventional Puffery

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 are ordinarily regarded as mere puffery, and so is a statement of a party's intentions as to settlement of a claim. [ABA Model Rule 4.1, comment 2]

EXAMPLE

Attorney A was employed by Consolidated Liability Insurance Company to defend its insured, D, in an automobile accident case. After careful investigation, A concluded that D was clearly at fault. A advised Consolidated to settle, and Consolidated authorized A to settle the case for any sum under $10,000. A few days later, plaintiff's lawyer telephoned A and suggested that they meet to discuss a settlement. A responded: "I will be glad to listen to whatever you have to propose, but I sincerely doubt that Consolidated will be interested in settling—I think we can win this one at trial." Under generally accepted conventions, A's statements would be regarded as mere puffery, not as false statements of material fact.

2. Failure to Disclose Material Facts—Client's Crime or Fraud

A lawyer must disclose material facts to a third person when necessary to avoid assisting the client in a crime or fraud—unless the lawyer is forbidden to do so by the ethical duty of confidentiality. [ABA Model Rule 4.1(b)] Under the ABA Model Rules view, where the duty of confidentiality prevents the lawyer from disclosing material facts, and where continued representation would require the lawyer to assist in the client's crime or fraud, the lawyer must withdraw. [*See* ABA Model Rules 1.16(a)(1), 1.2(d); ABA Formal Op. 92-366 (1992)] The lawyer may notify the affected third person of the withdrawal and may withdraw or disaffirm any opinion, document, or affirmation previously furnished in connection with the matter. [*See* ABA Model Rules 1.2, comment 10; 4.1, comment 3; *and see* ABA Formal Op. 92-366 (1992)]

EXAMPLE

Client C hired attorney A to obtain import licenses to sell C's chemical fertilizer in Australia and New Zealand. While the license applications were pending,

C and A negotiated a contract to sell C's entire fertilizer business to X. At C's request, A prepared a "Statement of Operations, Assets, and Liabilities" for X. In the statement, A represented that the Australian and New Zealand import licenses were pending and that in A's opinion they would be granted. Before the sale was closed, both Australia and New Zealand notified C that they would not issue the import licenses, and C conveyed this information to A in confidence. A advised C that X must be informed of this material fact, but C responded: "To hell with X—your job is to get the sale completed. Now get busy." Under the ABA Model Rules view, the duty of confidentiality forbids A from revealing the license denial to X, but if A continues with the representation, he will be assisting C in defrauding X. A must withdraw. A may advise X of his withdrawal, and he may disaffirm his prior opinion as to the Australian and New Zealand import licenses. The Restatement takes a simpler, more forthright position. The news of the license denial is not protected by the duty of confidentiality because the law of fraud requires A to disclose it to X. [*See* Restatement §§63, 98, comment d]

B. COMMUNICATION WITH PERSONS REPRESENTED BY COUNSEL

1. When Communication Forbidden

A lawyer must not communicate about a matter with a person the lawyer knows is represented by counsel, unless that person's counsel expressly or impliedly consents, or unless the law or a court order authorizes the communication. This is true even if the represented person initiates or consents to the communication. [ABA Model Rule 4.2; Restatement §99]

EXAMPLES

1) In the case of *P v. D*, the lawyer for D had excellent reason to believe that P's lawyer had failed to convey D's settlement offer to P. D's lawyer therefore telephoned P and made the settlement offer directly. D's lawyer is subject to discipline for communicating with a represented person without consent of that person's counsel. [ABA Formal Op. 92-362 (1992)] P's lawyer is also subject to discipline if he failed to convey D's settlement offer to P.

2) Defendant D was in jail awaiting trial for murder. D was represented by appointed counsel. Without the consent of the appointed counsel, the prosecutor visited D at the jail and discussed the possibility of a plea bargain with D. The prosecutor is subject to discipline. [ABA Model Rule 4.2, comment 5; ABA Formal Op. 95-396 (1995); Restatement §99, comment h]

2. Application to Organizations

Corporations and other organizations are "persons" for purposes of this rule. Thus, a lawyer must get the consent of the organization's counsel before communicating with the following constituents of the organization:

a. A person who ***supervises, directs, or regularly consults with the organization's lawyer*** about the matter at hand;

b. A person whose conduct may be ***imputed*** to the organization for purposes of criminal or civil liability; or

c. A person who has ***authority to obligate the organization*** concerning the matter.

[ABA Model Rule 4.2, comment 7] Note that if the constituent is represented in the matter by her own counsel, then consent by that counsel (rather than the organization's counsel) is sufficient. Consent is ***not*** needed before talking to a ***former*** constituent of the organization. [*Id.*] However, when talking with either a present or former constituent, a lawyer must take care not to violate the organization's legal rights, such as the attorney-client privilege.

EXAMPLE

Lawyer L represents the plaintiff in a defamation action against the Herald Newspaper Corp. Without getting the permission of the Herald's counsel, L interviewed the newspaper's former editor-in-chief and convinced him to disclose some privileged communications he had with the newspaper's lawyer about the case. L acted improperly in prying into the privileged communications. [*Id.*; *and see* ABA Model Rule 4.4, comment 1]

3. Communications Allowed by the Rule

The rule does not prohibit: (1) a lawyer from communicating with a represented person when the communication is authorized by law or court order, when the communication does not concern the subject of the representation, or when the represented person's attorney consents; (2) represented persons from communicating directly with each other; and (3) a lawyer from interviewing an unrepresented person who will be called as a witness by some other party. [ABA Model Rule 4.2, comment 4; *and see* Lewis v. S.S. Baune, 534 F.2d 1115 (5th Cir. 1976)]

EXAMPLES

1) In a complex contract suit between P and D, both parties were represented by counsel. For several months, the respective sets of lawyers tried to work out a satisfactory settlement, but without success. P concluded that the lawyers had become befogged by petty detail and bickering. P therefore invited D out to lunch, and the two of them worked out a settlement within the space of an hour. Direct communication between represented persons is not prohibited by the rule.

2) If Lawyer L represents Client C and copies C on an email sent to Attorney A, another attorney involved in the matter, unless the email expressly states

otherwise, L will have impliedly consented to A using "Reply All" and thus communicating directly with C. It would have been wiser for L to have separately forwarded the message to C rather than copying C on the email to A. [*See* ABA Formal Ethics Op. 503 (2022)]

a. Exception—Lawyers Acting Pro Se

Even though parties may generally communicate directly with each other, when a lawyer is representing themself (acting pro se), they are considered to be representing a client and therefore subject to the prohibition on communicating with a represented person. [ABA Formal Ethics Op. 502 (2022)]

C. DEALING WITH UNREPRESENTED PERSONS

When dealing with an unrepresented person, a lawyer must 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 must make reasonable efforts to correct the misunderstanding. Likewise, if the lawyer knows or should know that her client's interests are likely to be in conflict with those of the unrepresented person, she must not give legal advice to that person (other than to get a lawyer). [ABA Model Rule 4.3; Restatement §103] The rule does not, however, prevent a lawyer from negotiating a transaction or settling a client's dispute with an unrepresented person. [ABA Model Rule 4.3, comment 2]

EXAMPLE

Property owner O wants to lease his empty retail store to merchant M, who wants to use it for a shoe store. M does not have a lawyer, but O is represented by attorney A. In negotiating the terms of the lease, A may communicate directly with M, but A should make clear to M that A represents O and is not looking out for M's interests. During the lease negotiations, A may tell M what terms will be acceptable to O. A may also draft a proposed lease agreement and may explain to M what A believes the legal effect of the lease will be. [*Id.*]

D. RESPECT FOR RIGHTS OF THIRD PERSONS

1. Heavy-Handed Tactics

In representing a client, a lawyer must not use means that have no substantial purpose other than to embarrass, delay, or burden a third person. [ABA Model Rule 4.4(a)] Furthermore, a lawyer must not use methods of obtaining evidence that violate the legal rights of a third person.

EXAMPLES

1) When preparing to cross-examine witness W, attorney A discovered that W had six misdemeanor convictions for prostitution. A knew that under the

applicable evidence law, he would not be allowed to use those misdemeanor convictions for impeachment, and A knew that they were not otherwise relevant to the proceeding. Nonetheless, on cross-examination, A asked: "How old were you when you decided to devote your life to prostitution, Miss W?" A is subject to discipline.

2) Lawyer L represented P in a complicated trade secrets case against D Corporation. During discovery, L used a subpoena duces tecum to require E Corporation (a nonparty) to produce thousands of documents in connection with the depositions of some employees of E Corporation. The lawyer for E Corporation allowed L to personally go through E Corporation's files to pick out and photocopy documents responsive to the subpoena. While doing that, L made copies of many other documents that were not covered by the subpoena, and L did not tell the lawyer for E Corporation what he had done. L is subject to discipline.

3) Deputy District Attorney A was assigned to prosecute a bank robbery case against D. A suspected that heroin addict X could probably furnish valuable evidence against D but that X would doubtless refuse to do so. Therefore, A told the police: "Go pick up X on suspicion of drug peddling, and we'll find out what he knows about D and the bank robbery." A is subject to discipline.

2. Documents Sent to Lawyer by Mistake

Lawyers sometimes receive documents that were sent to them by mistake. That happens with e-mail, fax transmission, postal service, and even personal messenger service. It can also happen when documents—whether paper documents or electronically stored information—are produced pursuant to a discovery request. When a lawyer obtains such a document, and when she knows or reasonably should know that it was sent by mistake, she must promptly notify the sender so that the sender can take protective measures. [ABA Model Rule 4.4(b) and comment 2] The Model Rule does not address some related questions on which state law is split: e.g., whether the recipient must return the document to the sender, or delete electronically stored information, and whether the inadvertent disclosure of the document waives a privilege that would otherwise protect it.

VIII. DIFFERENT ROLES OF THE LAWYER

A. LAWYER AS ADVISOR TO THE CLIENT

1. Duty to Render Candid Advice

When acting as advisor to a client, a lawyer must exercise independent judgment and render candid advice. [ABA Model Rule 2.1] Candid advice is sometimes hard to take—the facts may be harsh and the choices

unattractive. The lawyer should attempt to keep the client's morale up but should neither sugarcoat the advice nor delude the client. [*See* ABA Model Rule 2.1, comment 1]

2. Giving Advice Beyond the Law

A lawyer may give a client not only legal advice, but also moral, economic, social, or political advice when relevant to the client's situation. [ABA Model Rule 2.1] When appropriate, a lawyer may also urge a client to seek advice from persons in related professions—e.g., advice from an accountant, psychiatrist, physician, or family counselor. [*See* ABA Model Rule 2.1, comment 4]

3. Volunteering Advice

A lawyer ordinarily has no duty to give advice until asked. However, if the lawyer knows that the client is planning a course of action that will have substantial adverse legal consequences for the client, the lawyer may volunteer advice without being asked. [*See* ABA Model Rule 2.1, comment 5]

EXAMPLE

Client C hired lawyer L to do some tax work. In the course of that work, L learned that C was regularly putting large amounts of money into a trust established for her grandchildren. If L reasonably believes that C is endangering her ability to provide for her own needs in old age, L may call that fact to C's attention, and L may assist C in working out a safer plan for investment and disposition of her assets.

B. EVALUATION FOR USE BY THIRD PERSONS

ABA Model Rule 2.3 concerns the lawyer who is asked, expressly or impliedly, to evaluate the affairs of a client and to supply the evaluation for use by third persons.

EXAMPLES

1) Client X asks her lawyer to evaluate her legal title to 40 acres of ranch land and to furnish the evaluation to a proposed purchaser of the land.

2) Client Y Corp. wants to borrow a large sum from a bank and asks its lawyer to evaluate its legal and business affairs and to furnish a report to the bank.

3) Client Z, a school district, proposes to issue some school bonds and asks its lawyer to examine its situation and its proposed bond issue and to render a legal opinion for use by election officials, voters, and potential investors.

Note that in each of the foregoing examples, the client is the person or entity whose affairs are to be evaluated by the lawyer. ABA Model Rule 2.3 does not apply when a client asks a lawyer to evaluate the affairs of a third party and then to make a report to the client.

EXAMPLE
Bank proposes to lend a large sum of money to Y. Bank therefore asks its own lawyer to evaluate Y's business and legal affairs and to report back to Bank. ABA Model Rule 2.3 does ***not*** apply to this situation. [ABA Model Rule 2.3, comment 2]

1. Requirements of the Rule

A lawyer may evaluate a client's affairs for the use of a third person if the lawyer reasonably believes that making the evaluation is compatible with the lawyer's other responsibilities to the client. [ABA Model Rule 2.3(a)]

EXAMPLE
Lawyer L is defending client D Company in a suit for infringement of three United States patents. If D loses the infringement suit, its business will be virtually wiped out. D seeks to borrow a substantial sum of money from trust company T, and D asks L to evaluate its business and its pending litigation and to render a report to T. L should decline to perform the evaluation. L's responsibilities to D as an advocate in the patent infringement case are not compatible with rendering a candid evaluation for use by T. [*See* ABA Model Rule 2.3, comment 3]

2. Harmful Evaluation

If the lawyer knows or should know that the evaluation will materially harm the client, the lawyer must obtain the client's informed consent before making the evaluation. [ABA Model Rule 2.3(b)]

3. Confidentiality

Except as disclosure is authorized in connection with a report of an evaluation, the ordinary rules of confidentiality apply to information gained during the evaluation. [ABA Model Rule 2.3(c)] The client may limit the scope of the evaluation or the sources of information available to the lawyer, but the lawyer should describe any material limitations in the report furnished to the third person. [ABA Model Rule 2.3, comment 4] The lawyer may have other legal duties to the third person in connection with the report—that depends on the applicable law and is not covered in ABA Model Rule 2.3. [ABA Model Rule 2.3, comment 3]

4. Lawyer's Liability to Third Person

A lawyer who is hired to evaluate a client's affairs for a third person may be liable to the third person for negligence in rendering the evaluation.

EXAMPLE
Client C hired attorney A to evaluate C's financial condition for bank B in the hope that B would lend money to C. A's opinion letter to B negligently

misrepresented C's financial condition, as a direct result of which B suffered a large loss. A is liable to B for the negligent misrepresentation. [*See* Vereins-Und Westbank, AG v. Carter, 691 F. Supp. 704 (S.D.N.Y. 1988)]

5. Cases in Which Opinion Is to Be Widely Disseminated

When a lawyer agrees to certify facts to a large number of persons who can be expected to rely on the lawyer, the lawyer has a special obligation to be complete, accurate, and candid.

a. Securities Cases

This special obligation most often arises when a lawyer has prepared an opinion letter to be used in disclosure documents for securities investors. The lawyer may be held liable for both misstatements and omissions of material facts. [SEC v. National Student Marketing Corp., 457 F. Supp. 682 (D.D.C. 1978)]

1) Due Diligence Required

A lawyer is not a guarantor of every fact in the disclosure materials about the company or transaction. However, if the disclosures are inconsistent, or the lawyer has any reason to doubt their accuracy, the lawyer has a ***duty to inquire*** to determine the correct facts. [ABA Formal Op. 335 (1974)]

b. Tax Shelter Opinions

When a lawyer gives a widely disseminated legal opinion about the tax treatment likely to be afforded an investment, the lawyer must candidly disclose and estimate the degree of risk that the IRS will not allow the tax treatment being sought, even if such disclosure will be contrary to the interest of the client in selling the investment. [ABA Formal Op. 346 (1982)]

C. LAWYER AS NEGOTIATOR

Lawyers must negotiate in both litigation (e.g., settlement negotiations) and nonlitigation contexts (e.g., real estate transactions, business merger negotiations). Issues of honest and affirmative disclosure often arise in connection with such negotiations. Thus, the Rules prohibit a lawyer from making a false statement of ***material fact***. [ABA Model Rule 4.1(a)] However, the lawyer is under no duty to do the other side's fact research or volunteer any facts that would undermine the client's position.

1. Puffing and Subjective Statements

Because it is the essence of negotiation that the lawyer attempt to magnify the strength of the client's position, there are some statements that the ABA Model Rules will allow even though they may constitute "puffing" of the client's position—i.e., they are not considered statements of material fact. The key factor to examine when determining if a statement contains a material fact

is whether the opposing party would be reasonable in relying on the statement made. Certain types of subjective statements, such as those relating to the relative merits of the case, estimates of price and value, and a party's intentions as to an acceptable settlement are not considered statements of material fact in this context. [ABA Model Rule 4.1, comment 2]

2. Misapprehension

A lawyer who believes an opponent is underestimating the strength of his client's position has no duty to correct that misapprehension unless the lawyer or the client caused it. [Brown v. County of Genesee, 872 F.2d 169 (6th Cir. 1989)—opponent miscalculated amount of lost pay] However, in certain instances, the opponent's lack of knowledge of pertinent facts may be so important that disclosure is required.

EXAMPLES

1) Plaintiff's lawyer failed to disclose to the defendant that, during the settlement negotiations, the plaintiff, who was considered to be a strong witness, died. The settlement of the case was set aside. [Virzi v. Grand Trunk Warehouse, 571 F. Supp. 507 (E.D. Mich. 1983)]

2) Prosecutor had a duty to disclose to a criminal defendant that, prior to the acceptance of his guilty plea, physical evidence of the defendant's guilt was accidentally destroyed. [Fambo v. Smith, 433 F. Supp. 590 (W.D.N.Y. 1977)]

D. LAWYER AS THIRD-PARTY NEUTRAL

1. General Principles

A lawyer serves as a third-party neutral when she assists two or more nonclients in resolving a dispute or other matter that has arisen between them. [ABA Model Rule 2.4(a)] Examples of a third-party neutral are an arbitrator, mediator, conciliator, or evaluator. [ABA Model Rule 2.4, comment 1] Nonlawyers can serve as third-party neutrals, but some court rules require lawyers for some types of cases. When a lawyer serves as a third-party neutral, she is subject not only to the ordinary rules of legal ethics, but also to various codes of conduct devised by groups such as the American Arbitration Association. [ABA Model Rule 2.4, comment 2]

2. Warning to Unrepresented Parties

A lawyer who serves as a third-party neutral does not represent any of the parties. A party who is not familiar with arbitration, mediation, or the like, and who is not represented by counsel, may erroneously believe that the lawyer third-party neutral is protecting his interests, but that is not so. The lawyer must therefore clearly explain the situation to the unrepresented party; e.g., the lawyer should explain that the attorney-client privilege does not apply to communications between them. [ABA Model Rule 2.4, comment 3]

3. Conflicts of Interest

A lawyer who serves as a third-party neutral in a matter must not thereafter become the lawyer for anyone involved in the matter, unless all of the parties give their informed consent, confirmed in writing. [ABA Model Rule 1.12(a)] This conflict is imputed to other lawyers in the lawyer's firm, but it can be solved by screening the lawyer from the matter, assuring that he does not share the fee, and notifying the parties in writing about the screening arrangement. [ABA Model Rule 1.12(c)] No conflict arises when a lawyer who served as a ***partisan*** arbitrator for a party is later asked to become that party's lawyer. [ABA Model Rule 1.12(d)]

E. SPECIAL RESPONSIBILITIES OF A PROSECUTOR

The prosecutor in a criminal case is not simply an advocate but also a minister of justice; the prosecutor's primary goal is to ***seek justice***, not to convict. Thus, the prosecutor must assure that the defendant is tried by fair procedures and that guilt is decided on proper and sufficient evidence. Local laws may impose additional duties on a prosecutor, and failure to comply with such laws is grounds for professional discipline. [ABA Model Rule 3.8, comment 1]

1. Prosecuting Without Probable Cause

A prosecutor must not prosecute a charge that she knows is not supported by probable cause. [ABA Model Rule 3.8(a)]

2. Protecting Accused's Right to Counsel

A prosecutor must make reasonable efforts to assure that the accused is:

a. Advised of the right to counsel;

b. Advised of the procedure for obtaining counsel; and

c. Given a reasonable opportunity to obtain counsel.

[ABA Model Rule 3.8(b)]

EXAMPLE

Sheriff S is in charge of the county jail. S has established jail regulations that frequently result in an accused being held incommunicado for a long period before being given a chance to use the telephone. County District Attorney A must make reasonable efforts to have the jail regulations changed. [*See* ABA Model Rule 3.8(b)]

3. Securing Waiver of Pretrial Rights

A prosecutor must not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing.

Note: An accused who is appearing pro se with the court's approval is not "unrepresented" for purposes of this rule. [ABA Model Rule 3.8(c) and comment 2]

EXAMPLE

Indigent accused A was advised of his right to remain silent and of his right to have counsel appointed to defend him. A asked for the services of a public defender, and A said that he did not want to make any statement. Before the public defender arrived, A was brought to a small room and allowed to relax over a cup of coffee. At that time, prosecutor P urged him to "assist us voluntarily in finding out what happened so we can clear this up and get you out of here without getting into legal technicalities." P is subject to discipline.

4. Disclosing Evidence that May Help Defense

A prosecutor must timely disclose to the defense all evidence and information known to the prosecutor that tends to negate the guilt of the accused or mitigate the degree of the offense. [ABA Model Rule 3.8(d)] Failure to disclose material information may deprive the defendant of due process. [*See* Brady v. Maryland, 373 U.S. 83 (1963), *explained in* United States v. Bagley, 473 U.S. 667 (1985)]

EXAMPLE

D was accused of second degree murder. Prosecutor P asked the county coroner to pay special attention to the size, shape, and location of the stab wound that killed the victim. The coroner reported that the wound was probably inflicted by a person who was being held down on the ground by the victim. Since this information tends to suggest self-defense, P must promptly report it to D's lawyer.

5. Disclosing Information that May Mitigate Punishment

When a convicted person is to be sentenced, the prosecutor must disclose to the defense and to the court all unprivileged mitigating information known to the prosecutor (except when a protective order of the court relieves the prosecutor of this obligation). [ABA Model Rule 3.8(d)]

6. Public Statements About Pending Matters

Except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, a prosecutor must not make extrajudicial statements that have a "substantial likelihood of heightening public condemnation of the accused." A prosecutor must take reasonable care to prevent investigators, police, employees, and other subordinates from making such statements. [ABA Model Rule 3.8(f)]

7. Disclosing Evidence to Remedy Conviction

A prosecutor must promptly disclose new, credible, and material evidence that creates a reasonable likelihood that a defendant was wrongly convicted. [ABA Model Rule 3.8(g)] Further, the prosecutor must seek to remedy the conviction of a defendant in his jurisdiction if he knows of clear and convincing evidence that the defendant was innocent. [ABA Model Rule 3.8(h)]

8. Subpoenaing Other Lawyers

A prosecutor must not subpoena another lawyer to give evidence about a client or former client unless the evidence is not privileged, is essential, and cannot be obtained in another way. [ABA Model Rule 3.8(e)]

9. Other Government Lawyers

Many of the above duties are incumbent on all government lawyers, not merely public prosecutors.

a. Terminating Actions

A government lawyer with discretionary power relative to civil litigation should not institute or continue actions that are obviously unfair. [Freeport-McMoRan Oil & Gas Co. v. F.E.R.C., 962 F.2d 45 (D.C. Cir. 1992)]

b. Developing Full Record

Even if litigation appears warranted, a government lawyer has a responsibility to develop a full and fair record. The lawyer must not use her position or the economic power of the government to harass parties or to force unjust settlements or results.

F. ADVOCATE IN LEGISLATIVE AND ADMINISTRATIVE PROCEEDINGS

1. Appearances in a Representative Capacity

Lawyers sometimes appear before legislatures, city councils, executive agencies, regulatory boards, and other groups that act in a rule-making or policy-making capacity. When a lawyer appears on behalf of a client before a legislative body or administrative agency, the lawyer must disclose that she is acting in a representative capacity (not on her own behalf). [ABA Model Rule 3.9; Restatement §104]

EXAMPLE

The Columbia Association of Manufacturers and Retailers hired lawyer L to assist it in opposing a proposed new inventory tax. In that capacity, L testified in hearings before the Finance Committee of the Columbia Municipal Council. In her testimony, L presented both legal and economic arguments against the proposed tax. L must disclose to the Finance Committee that she is acting in a representative capacity.

2. Duties of Candor and Respect

When a lawyer represents a client before a legislative body or administrative agency in an official hearing or meeting at which the lawyer or client presents evidence or argument, the lawyer must, generally speaking, follow the same rules as though in court. [ABA Model Rule 3.9 and comment 2] For example, the lawyer must not make false statements of fact or law, offer evidence known to be false, obstruct access to evidence, knowingly violate the rules and orders of the legislative or administrative body, seek to use undue influence, or engage in disruptive conduct. [ABA Model Rules 3.9, 3.3(a) - (c), 3.4(a) - (c), 3.5] A lawyer should comply with these rules even though the rules do not bind nonlawyers who do similar work. [ABA Model Rule 3.9, comment 2]

3. Limits of These Rules

The rules stated in 1. and 2., above, do ***not*** apply: (1) when a lawyer represents a client in bilateral negotiations with the government, (2) in an application for a license or other privilege, (3) when the government is investigating the client's affairs, or (4) when the government is examining the client's compliance with a regular reporting requirement (such as the filing of tax returns).

G. ORGANIZATION AS CLIENT

1. Duty of Loyalty to Organization

A corporation, governmental agency, unincorporated association, or similar organization is a legal entity, but it must act through the people who make up the organization—the directors, officers, agency employees, shareholders, owners, or the like. A lawyer who represents an organization obviously must work through those people. However, when the organization is the lawyer's client, the lawyer owes the duty of loyalty to the ***organization***—not to the people who are its constituents. [ABA Model Rule 1.13(a); Restatement §96]

2. Conflicts Between the Organization and Its Constituents

Ordinarily, there is no conflict between the interests of the organization and the interests of the people who make up the organization. Sometimes, however, their interests do come into conflict. When they do, the lawyer for the organization should caution the person in question that the attorney represents the organization, not the person. For instance, the lawyer should warn the person that communications between them may not be protected by the attorney-client privilege. Furthermore, when appropriate, the lawyer should advise the person to obtain independent legal counsel. [ABA Model Rule 1.13, comment 10]

EXAMPLE

The board of directors of Growers' Export Corp. instructed the corporation's general counsel to give classes for all management personnel concerning the

laws and corporate rules against using bribery and kick-backs when negotiating business contracts in foreign nations. After such a class, one of the foreign office managers told the general counsel that he had frequently used bribes to secure business for the corporation. The general counsel should remind the manager that she represents the corporation, not the manager, that bribery is both illegal and against the rules of the corporation, and, if appropriate, that the manager should seek independent legal counsel. [*See* ABA Model Rule 1.13(f); ABA Model Rule 1.13, comment 10]

3. Protecting the Organization's Interests

If the lawyer for an organization learns that a person associated with the organization has acted, or is about to act, in a way that violates a duty to the organization or a law in a way that might be imputed to the organization, and if the violation is likely to cause substantial injury to the organization, the lawyer must proceed as is reasonably necessary to protect the interests of the organization. [ABA Model Rule 1.13(b)]

a. Duty to Report to Higher Authority in Organization

In the situation described above, the lawyer must ordinarily report the violation to a higher authority in the organization (e.g., to a corporation's president). If necessary, the lawyer must report it to the organization's highest authority (e.g., a corporation's outside directors). ABA Model Rule 1.13(b) does, however, give the lawyer a narrow range of discretion—she need not report the violation if she reasonably believes that the organization's best interests do not require the violation to be reported. [*Id.*]

b. Duty to Report Outside the Organization

If the lawyer reports the violation to the organization's highest authority, but the highest authority fails to take timely, appropriate action, the lawyer ***may*** report the relevant information to appropriate persons outside of the organization. This is true even if the information would otherwise be protected by the duty of confidentiality expressed in ABA Model Rule 1.6. [ABA Model Rule 1.13(c)] However, the lawyer's authority to report to outsiders applies only if, and to the extent that, the lawyer ***reasonably believes*** that reporting is necessary to ***prevent substantial injury*** to the organization. The authority to report to outsiders does not apply to a lawyer who is hired by the organization to investigate an alleged violation of law or to defend the organization or its constituents against a claimed violation of law. [ABA Model Rule 1.13(d)]

EXAMPLE

Attorney A's corporate client produces frozen chicken pies. C's production process creates large quantities of liquid waste, which C is supposed

to pump into recycling tanks. C's manufacturing vice president sometimes orders his workers to dump the waste into a ditch that drains into some neighboring wetlands; the dumping is cheaper and quicker, but it gradually destroys the wetlands in violation of state and federal environmental laws. When A learns about the dumping, she reports it to C's president and warns him that C will be fined millions of dollars if it gets caught. C's president ignored A's warning, so A reported the matter to the highest authority in the company—the audit committee of the board of directors. The audit committee did nothing. If A reasonably believes that the company will be seriously injured if the dumping continues, A ***may*** report the relevant information to the appropriate environmental enforcement authority, even if some of that information would otherwise be protected by the duty of confidentiality.

c. Whistle Blower Protection

A lawyer who reasonably believes that she has been fired because she acted pursuant to Model Rule 1.13(b) or (c) (*see* a. and b. above), or who withdraws under circumstances that require or permit her to act pursuant to either of those paragraphs, must proceed as she reasonably believes necessary to assure that the organization's highest authority is informed of the firing or withdrawal. [ABA Model Rule 1.13(e)]

4. Representing Both the Organization and an Associated Person

The lawyer for an organization may represent both the organization and one or more of the directors, officers, employees, or other persons associated with the organization, provided that the ordinary conflict of interest rules are satisfied. [ABA Model Rule 1.13(g); Restatement §§96, comment h, 131, comment e] When dual representation requires the consent of the organization, the consent must be given by an appropriate person other than the person to be represented. [ABA Model Rule 1.13(g)]

EXAMPLE

The Anti-Nuclear Coalition sued Consolidated Light and Power Co. and the president of Consolidated under federal, state, and common law to prevent Consolidated from starting up a nuclear generating plant that it had constructed. The firm of W, X & Y was retained to represent both Consolidated and its president. After careful examination, the firm concluded that it could represent both clients effectively, even though their interests potentially conflict on one or two points. After the firm explained the potential conflicts, the president gave informed consent on his own behalf, confirmed in writing, and the chairman of the board of directors gave informed consent on behalf of the company, confirmed in writing. The dual representation is proper.

5. Serving as Both Director and Lawyer

The ABA Model Rules do not forbid a lawyer from serving as both a director of an organization and as a lawyer for the organization, but the Model Rules point out that the dual role can create conflicts of interest. For instance, when the lawyer participates in a meeting as a director (rather than as the organization's lawyer), the attorney-client privilege will not apply to communications at the meeting, but some of the other directors may not realize that. If there is a substantial risk that the dual role will compromise the lawyer's professional judgment, the lawyer should either resign as director or not act as the organization's lawyer when a conflict arises. [*See* ABA Model Rule 1.7, comment 35]

6. Securities Lawyer's Duties Under Sarbanes-Oxley Act

In response to the collapse of several high-flying corporations in 2002, Congress passed the Sarbanes-Oxley Act. Among other things, the Act instructs the Securities and Exchange Commission ("SEC") to make rules for securities lawyers who discover their clients violating the federal or state securities laws or similar laws. The SEC did make rules, which are now part of the "law of lawyering" that is covered on the MPRE. [*See* 17 C.F.R. §205] The following discussion includes highlights of the Sarbanes-Oxley rules.

a. Application to "Securities Lawyers"

The rules apply to lawyers who represent an issuer of securities and who practice before the SEC ("securities lawyers"). This includes not only lawyers who transact business with the SEC, communicate with it, or represent a securities issuer before it, but also lawyers who give advice about a document that will be filed with the SEC or advice about whether information must be filed with the SEC.

b. Reporting Requirement

If a securities lawyer becomes aware of credible evidence that her client is materially violating a federal or state securities law, she ***must*** report the evidence to her client's chief legal officer ("CLO") or chief executive officer. The same reporting duty applies to credible evidence that one of her client's personnel has breached a fiduciary duty under federal or state law or has committed a "similar material violation" of federal or state law.

c. Investigation by CLO

The CLO must investigate the situation to determine whether a violation occurred. Alternatively, the CLO can turn the matter over to a legal compliance committee, but for purposes of this discussion, that complication will be ignored.

d. If Violation Found—"Appropriate Response" Required

If the CLO concludes that no violation occurred, he must report that conclusion back to the securities lawyer. If the CLO concludes that a

violation did occur, is occurring, or is about to occur, the CLO must take all reasonable steps to get the client to make an "appropriate response." Roughly stated, that means that the client must stop or remedy the violation and make sure that it does not happen again. The CLO must report those results to the securities lawyer.

e. When Appropriate Response Not Taken

If the securities lawyer believes that the CLO did not achieve an appropriate response from the client, the securities lawyer ***must*** report the evidence to one of the following: (1) the client's whole board of directors, (2) the audit committee of the board, or (3) a committee made up of outside directors (directors who are not beholden to the client). Notice that the Sarbanes-Oxley reporting rule is ***mandatory***, unlike ABA Model Rule 1.13(b), which gives the lawyer some discretion about how to proceed (*see* 3., *supra*).

f. Revealing Confidential Information

The securities lawyer ***may*** reveal to the SEC, without the client's consent, any confidential information that is reasonably necessary to: (1) stop the client from committing a violation that will cause substantial financial injury to the client or its investors; (2) rectify such a financial injury if the lawyer's services were used to further the violation; or (3) prevent the client from committing or suborning perjury in an SEC matter or lying in any matter within the jurisdiction of any branch of the federal government.

g. Compliance with Rules

A securities lawyer who violates the Sarbanes-Oxley rules can be disciplined by the SEC, but a securities lawyer who complies with the Sarbanes-Oxley rules cannot be held civilly liable for doing so and cannot be disciplined under any inconsistent state rule.

h. Action When Securities Lawyer Is Fired

If a securities lawyer is fired for complying with the Sarbanes-Oxley rules, she may report the firing to the client's board of directors (thus setting up the client for an expensive wrongful termination suit).

IX. SAFEKEEPING FUNDS AND OTHER PROPERTY

A. GENERAL DUTY

When money or property belonging to a client comes into the lawyer's hands, the lawyer must not steal it, borrow it, or put it to the lawyer's own use. Furthermore, the lawyer must keep it separated from the lawyer's own money and property. A lawyer is subject to discipline for commingling the client's money or property with the lawyer's own personal or business funds or property.

[ABA Model Rule 1.15; *and see* Restatement §44—lawyer safeguarding client's property acts as a fiduciary and is subject to civil liability for failure to safeguard such property]

B. SAFEGUARDING PROPERTY

When the lawyer comes into possession of property (other than money) to be held on a client's behalf, the lawyer must identify it as belonging to the client and must put it in a safe place. [ABA Model Rule 1.15(a)] For small items, most lawyers use a bank safe deposit box. Lawyers are required to hold the property of others with the ***care required of a professional fiduciary***. [ABA Model Rule 1.15, comment 1] Accordingly, a lawyer cannot use the client's property for her own purposes, and must promptly take steps necessary to safeguard the client's property as are appropriate to the circumstances.

EXAMPLE

Lawyer L represented horse breeder B in negotiating a contract whereby B exchanged two valuable horses for a lakeside cottage. While the transfer was pending, B turned the two horses over to L for safekeeping. L arranged for them to be boarded at a certified and bonded stable. L's conduct was proper.

C. CLIENT TRUST FUND ACCOUNT

All money that a lawyer receives ***in connection with a representation*** (whether from the client or a third party) must promptly be placed in a client trust fund account, separate from the lawyer's own personal and business accounts. [ABA Model Rule 1.15(a)]

1. Type of Account

The client trust fund account must be located in the state where the lawyer practices, unless the client or third person consents to having it elsewhere. [ABA Model Rule 1.15(a)] Ordinarily, a lawyer must never put her own money or her firm's money into the client trust account, but she may put some of her own money into that account for the sole purpose of paying bank service charges. [ABA Model Rule 1.15(b)]

a. Large Sum Held for Long Period

If a lawyer is entrusted with a large sum to hold for a long period, the lawyer should put it into a separate, interest-bearing account, and the interest it earns will belong to the client. [*See* Restatement §44, comment d] A separate account is recommended when the lawyer is administering estate funds or the like. [ABA Model Rule 1.15, comment 1]

b. Small Sums

Usually, lawyers are entrusted with only relatively small sums to hold for relatively short periods of time. The lawyer should put these sums into

a pooled client trust account; the account is pooled in the sense that it holds funds entrusted to the lawyer by a variety of different clients. The pooled client trust account is typically a checking account that earns interest. If each client's small sum were put in an individual account, the amount of interest it could earn would be less than the bank's service charge for maintaining the individual account. The 50 states devised Interest On Lawyer Trust Account ("IOLTA") programs. If a client entrusts a lawyer with a sum that is too small to earn any net interest, the lawyer must put it into a pooled checking account that earns interest. After the bank deducts its service charges from the interest, the bank sends the remaining interest to the state bar or to a legal foundation, which uses the interest to fund charitable legal programs. In short, an IOLTA program creates an asset that would otherwise not exist, and it then puts that asset to a public use. In *Brown v. Legal Foundation of Washington*, 538 U.S. 216 (2003), a sharply divided Supreme Court upheld the constitutionality of IOLTA programs, holding that the individual clients whose interest was "taken" for "public use" were not entitled to "just compensation" because they did not lose anything they would otherwise have had.

2. Funds that Must Be Placed in Account

a. Money Advanced by Client to Cover Costs and Expenses

When the client entrusts the lawyer with money to pay costs and expenses not yet incurred, the advance ***must*** be put into the lawyer's client trust fund account. [ABA Model Rule 1.15] The lawyer can then pay the expenses with checks drawn on the account.

b. Legal Fees Advanced by Client

Sometimes a client entrusts the lawyer with an advance against legal fees that the lawyer has not yet earned. Such an advance must be put into the client trust account. That is because a lawyer must refund to the client any unearned, prepaid legal fees at the close of the representation, and an irresponsible lawyer could harm a client by frittering away a fee advance. When a lawyer holds a fee advance in her client trust account, she may make withdrawals as fees are earned if there is no existing dispute about the lawyer's right to do so. To make sure there is no dispute, cautious lawyers send the client an itemized bill before withdrawing legal fees from the trust account. [*See* Restatement §44, comment f]

c. Disputed Funds

If there is a dispute over funds (between the lawyer and the client, or between the client and some third person), the lawyer must keep the disputed portion in the client trust account until the dispute is resolved. [ABA Model Rule 1.15(e)] This is further discussed in E., *infra*.

D. DUTY TO NOTIFY, KEEP RECORDS, RENDER ACCOUNTINGS, AND PAY OVER PROMPTLY

A lawyer has the following additional duties respecting a client's money or property:

1. The lawyer must ***notify the client promptly*** when a third party turns over money or property to the lawyer to hold on the client's behalf;

2. The lawyer must ***keep complete, accurate, and up-to-date records*** of all money and property held on behalf of the client. These records must be kept in accordance with generally accepted accounting practice, and they must be preserved for five years after the termination of the representation;

3. The lawyer must ***render appropriate accountings*** of all money and property held on behalf of the client; and

4. When the time comes to ***pay over money or deliver property*** to which the client or a third party is entitled, the lawyer must do so ***promptly***.

[ABA Model Rule 1.15(a), (d)]

E. DISPUTED PROPERTY

When a lawyer is in possession of property in which two or more persons (one of whom may be the lawyer) claim interests, the ***disputed portion of the property must be kept separate*** by the lawyer until the dispute is resolved. The lawyer must promptly distribute all portions of the property as to which the interests are not in dispute. [ABA Model Rule 1.15(e)]

1. Funds in Which Both Client and Lawyer Have an Interest

A lawyer sometimes receives funds from a third party that are to be used, in part, to pay the lawyer's fee. The lawyer must place such funds in a client trust account until there is an accounting and severance of the respective interests of the client and the lawyer. If the client disputes the amount that is due to the lawyer, then the disputed portion must be kept in the client trust account until the dispute is resolved. [ABA Model Rule 1.15(e)]

EXAMPLE

Attorney A agreed to represent P as plaintiff in a products liability case. P agreed to pay A $75 per hour for her work, and P agreed that the fee could be deducted from the proceeds of the suit before remittance to P. After expending 100 hours on the case, A arranged a settlement of $50,000, and the defendant sent A a check in that amount. A deposited the check in her client trust fund account and notified P that it had arrived. The same day, A sent P a statement for services showing 100 hours of work and a total fee of $7,500. P protested the fee, saying that she would pay $5,000, but not a cent more. Furthermore, P demanded immediate payment of the entire $50,000. A then sent

P $42,500, transferred $5,000 to her personal bank account, and kept the remaining $2,500 in her client trust fund account. P and A ultimately submitted their fee dispute to arbitration; when the arbitrator ruled in A's favor, she transferred the $2,500 to her personal bank account. A handled the matter properly. [*See* Restatement §44, comment f]

2. Funds in Which a Third Party Has an Interest

Sometimes a third party has an interest in funds that come into the lawyer's possession on behalf of a client. Statute, common law, or contract may require the lawyer to protect the third party's interest against interference by the client; accordingly, when the third party's claim is not frivolous, the lawyer must refuse to surrender the funds to the client until the third party has been paid. However, a lawyer should not unilaterally presume to arbitrate a dispute between the client and the third party. If there are substantial grounds for the dispute, the lawyer may file an interpleader action to have a court resolve the dispute. [ABA Model Rule 1.15, comment 4] The lawyer must promptly distribute any sums that are not in dispute. [ABA Model Rule 1.15(e)]

EXAMPLE

When attorney A agreed to represent client C in a personal injury case, A and C made a three-way agreement with C's physician that A would pay C's medical bills out of the proceeds of C's suit. When C won a $10,000 judgment, he demanded that the entire sum be immediately paid over to him because of a dispute between C and the physician over the medical bills. A's legal and ethical obligation is to hold the amount of money necessary to pay C's medical bills until the dispute between C and the physician is resolved.

X. COMMUNICATIONS ABOUT LEGAL SERVICES

A. CONTENT-BASED RULES FOR ADVERTISING AND OTHER COMMUNICATIONS

The ABA Model Rules include various guidelines and restrictions concerning communications about the lawyer and the lawyer's services.

1. Basic Rule—Communications Must Be True and Not Misleading

A lawyer is subject to discipline for ***any type*** of communication about the lawyer or the lawyer's services that is ***false or misleading***. [ABA Model Rule 7.1] This rule applies to all kinds of communications, including advertisements, personal communications, office signs, professional cards, professional announcements, letterheads, brochures, letters sent by post or e-mail, and recorded telephone messages. [*See* ABA Model Rule 7.1, comment 1]

a. Types of False or Misleading Communications

1) Outright Falsehoods

Obviously, a lawyer must not use a communication that is simply false.

EXAMPLE

Attorney A's office letterhead lists him as "Trial Counsel—ExxonMobil Corporation." Indeed, A used to do trial work in the in-house law department of ExxonMobil, but no member of that department carries the title "Trial Counsel"; moreover, A left ExxonMobil 18 months ago. The listing is an outright falsehood.

2) Omitted Facts

A communication can be true but misleading if it omits a fact that is necessary to make the communication as a whole not materially misleading. [ABA Model Rule 7.1, comment 2]

EXAMPLE

Lawyer L's display advertisement in the telephone book Yellow Pages includes the phrase "Yale Law School—1987." Indeed, L did attend a two-week summer program at Yale Law School in 1987, but he earned his law degree at a school of considerably less distinction. The statement is misleading.

3) Unfounded Conclusions

A truthful communication can be 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. [*Id.*]

EXAMPLE

Lawyer L, who has no medical training, specializes in defending lawyers against medical malpractice claims. His billboard advertisement describes him as the "The Juris DOCTOR," states that he has "decades of experience in health care," and includes a photo of him in scrubs, wearing a stethoscope. The commercial is misleading if it would lead a reasonable person to believe L is a physician.

4) Unjustified Expectations

A true communication about a lawyer's accomplishments in past cases is misleading if it could make a reasonable person think that the lawyer could do as well in a similar case, without regard to the facts and law in that case. [ABA Model Rule 7.1, comment 3]

EXAMPLE
Attorney A won jury verdicts in excess of $500,000 in the last three asbestos cases she took to trial. Her television advertisement includes that truthful statement without explaining that the recovery in asbestos cases varies dramatically, depending on the precise facts surrounding the plaintiff's exposure to asbestos. A's statement is misleading.

5) Unsubstantiated Comparisons
An unsubstantiated comparison of a lawyer's services or fees with those of other lawyers is misleading if it could make a reasonable person think that it can be substantiated. [*Id.*]

EXAMPLE
Lawyer L advertises that her fees for estate planning services are "15% lower than the prevailing rate in Fairmont County." If L cannot substantiate that statement with hard data, she is subject to discipline.

b. Including a Disclaimer
Depending on the circumstances, the inclusion of an appropriate disclaimer or other qualifying language may preclude a finding that the advertisement or other communication is misleading to the public. [ABA Model Rule 7.1, comment 3]

2. Required and Permitted Information

ABA Model Rule 7.2(a) gives lawyers broad latitude in advertising or otherwise communicating about their services in a true and nonmisleading manner. They may communicate through any type of media.

a. Identification of Advertiser
Every advertisement or other communication about the lawyer's or firm's services must include the name and contact information (website address, telephone number, e-mail address, or physical office location) of at least one lawyer or law firm that is responsible for its content. [ABA Model Rule 7.2(d)]

b. Generally Permitted Information
The following are among the types of information that a lawyer may publicly disseminate: (1) information concerning the name of the lawyer or her firm, and the lawyer's or firm's address, e-mail address, website, and telephone number; (2) the kinds of services the lawyer will undertake; (3) the basis on which fees are determined, including prices for specific services and payment and credit arrangements; (4) the lawyer's

foreign language ability; (5) the names of references; and (6) other information that might invite the attention of persons seeking legal assistance. [ABA Model Rule 7.2, comment 1]

1) **Consent of Named Clients**
If a lawyer wishes to identify some regular clients in an advertisement, the lawyer must first obtain the clients' consent. [*Id.*]

3. Firm Names, Letterheads, and Other Professional Designations

Like all communications concerning a lawyer's services, law firm names and other professional designations must not be false or misleading.

a. Current, Deceased, and Retired Partners

A private law partnership may be designated by the names of one or more of its current members. "Member" is generally interpreted to mean a partner or shareholder, because it is inferred that such persons carry the liabilities and responsibilities for the firm's obligations. When partners die or retire, their names may be carried over to successor partnerships. For example, a law partnership may properly continue to practice under the name "X, Y, & Z," even though lawyer X has died. [ABA Model Rule 7.1, comment 5; ABA Informal Op. 85-1511 (1985)]

1) **Misleading—Non-Associated Lawyers and Nonlawyers**
A law firm name is misleading if it includes the name of (or otherwise implies a connection with): (1) a deceased lawyer who was not a former member of the firm, (2) the name of any lawyer who is not associated with the firm or predecessor firm, or (3) the name of a nonlawyer. [ABA Model Rule 7.1, comment 5]

b. Using Names of Lawyers Who Have Entered Public Service

A private law firm must not use the name of a lawyer who holds public office (either as part of the firm name or in communications on the firm's behalf) during any ***substantial*** period in which the lawyer is not ***regularly and actively practicing*** with the firm. [ABA Model Rule 7.1, comment 8]

EXAMPLE
Attorney Tzao took an indefinite leave of absence from the Tzao, Dean & Goldberg firm to serve as a commissioner on the Federal Communications Commission. The firm must remove Tzao's name from the firm name until he returns to regular, active practice.

c. Must Not Imply Connection with Public or Charitable Organization

Trade names (e.g., "The Bulldog Law Firm")—even ones that do not include the names of one or more partners—are permitted, provided the

name is not misleading and does not imply a connection with a governmental agency or with a public or charitable legal services organization. If a firm name uses a trade name that includes a ***geographical*** name (e.g., Greater Chicago Legal Clinic), a disclaimer explaining that it is not a public legal aid organization may be required to avoid a misleading implication. [ABA Model Rule 7.1, comment 5]

d. False Indications of Partnership

Lawyers must not imply that they are partners or are practicing together as one law firm unless they really are. [ABA Model Rule 7.1, comment 7]

EXAMPLE

Attorneys A and B share office space, secretarial services, and a common law library. They frequently refer cases to one another, and they continually consult each other on difficult legal questions. The sign on their office door says: "Offices of A and B, Attorneys at Law." The sign is not proper; it implies that they are in partnership when they are not.

1) Associated and Affiliated Law Firms

Two law firms may hold themselves out to the public as being "associated" or "affiliated" if they have a close, regular, ongoing relationship and if the designation is not misleading. But using such a designation has a significant drawback—ordinarily the two firms would be treated as a single unit for conflict of interest purposes. [ABA Formal Op. 84-351 (1984)]

2) Office-Sharing Arrangements

Lawyers who participate in office-sharing arrangements but do not practice together as a law firm must take care to clearly communicate the nature of their relationship to the public and to their clients. [ABA Formal Op. 507 (2023)]

EXAMPLE

The ABC firm practices business law in Denver. For many years it has worked regularly and closely with the XYZ firm, which practices patent law in Washington, D.C. If the ABC firm letterhead lists the XYZ firm as its Washington, D.C., affiliate in patent matters, then any conflict of interest that would disqualify the XYZ firm will ordinarily also disqualify the ABC firm.

e. Multistate Firms

A law firm that has offices in more than one jurisdiction may use the same name, Internet address, or other professional designation in each jurisdiction. [ABA Model Rule 7.1, comment 6]

4. Identifying Fields of Practice

A lawyer may communicate that she does or does not practice in particular fields of law. Additionally, the lawyer is permitted to state that she "concentrates in," "specializes in," or is a "specialist" in particular fields based on the lawyer's experience, specialized training, or education, as long as such communications are not false or misleading. However, a lawyer must not state or imply that she is ***certified as a specialist*** in a particular field of law, unless: (1) the lawyer has in fact been certified as a specialist by an organization that has been approved by the ABA or by an appropriate state authority; and (2) the name of the certifying organization is clearly identified in the communication. [ABA Model Rule 7.2(c) and comment 9]

a. Patent and Admiralty Lawyers

Patent and admiralty lawyers have traditionally been accorded special treatment. A lawyer who is admitted to practice before the United States Patent and Trademark Office may use the designation "Patent Attorney," or something similar. A lawyer who is engaged in admiralty practice may use the designation "Proctor in Admiralty," or something similar. A lawyer's communications about these practice areas are not prohibited by the rule above. [ABA Model Rule 7.2, comment 10]

B. RECOMMENDATIONS

A communication about a lawyer's services is a "recommendation" if it endorses or vouches for the lawyer's credentials, abilities, competence, character, or other professional qualities. Subject to the exceptions below, a lawyer ***must not compensate, give anything of value, or promise*** to give anything of value to a person for recommending the lawyer's services. *Note:* Directory listings or group advertisements listing lawyers by practice area, without any further information, do not constitute prohibited recommendations. [ABA Model Rule 7.2(b) and comment 2]

1. Exceptions to General Rule

a. Paying for Advertising and Other Services

A lawyer may pay the ***reasonable costs of permitted advertisements*** (e.g., broadcast airtime, directory listings, or newspaper ads). Additionally, a lawyer may pay the ***usual charges*** of: (1) a legal service plan (*see* D., *infra*), (2) a not-for-profit lawyer referral service, or (3) a qualified lawyer referral service. "Qualified" means that the service has been approved by an appropriate regulatory authority. A lawyer who accepts assignments or referrals from a legal services plan or lawyer referral service must ensure that the organization's communications comply with the lawyer's obligations (that is, are not false or misleading). [ABA Model Rule 7.2(b)(1), (2) and comment 7]

EXAMPLE

The A, B & C firm seeks to increase its client base. The firm may hire and pay a media consultant to design some newspaper advertisements, and it may pay the newspaper for the advertising space. The firm may also participate in a prepaid legal service plan that advertises to obtain new members. Furthermore, some of the lawyers in the firm are listed with the nonprofit lawyer referral service run by the local county bar association; when those lawyers obtain clients through the referral service, they may pay the referral fees charged by the service.

1) Paying Others to Generate Client Leads

"Lead generators" provide consumers with matching, referral, and directory services (e.g., a consumer goes to a website, selects a type of legal problem, and is provided with a list of lawyers who provide that service and the ability to select and contact one of those lawyers). A lawyer may pay others to generate client leads as long as the lead generator ***does not recommend*** the lawyer and the lead generator's communications are not false or misleading. A communication by the lead generator is false or misleading if it creates a reasonable impression that: (1) it is recommending the lawyer; (2) it has analyzed the person's legal problems when determining whether to refer the person to the lawyer; or (3) it is making the referral without any payment from the lawyer. [ABA Model Rule 7.2, comment 5]

b. Purchase of a Law Practice

Of course, the lawyer may purchase a law practice (*see* I.J., *supra*) even though the seller is, in a sense, recommending the purchasing lawyer to her clients. [ABA Model Rule 7.2(b)(3)]

c. Reciprocal Referral Agreements

Under certain circumstances, a lawyer is permitted to set up a reciprocal referral agreement with ***another lawyer or with a nonlawyer professional***—i.e., "I will refer potential clients, patients, or customers to you if you will do likewise for me." [ABA Model Rule 7.2(b)(4)] "Another lawyer" means a lawyer at a different firm (the rule does not restrict referrals among members of the same firm). The term "nonlawyer professional" is not defined, but is generally interpreted as a person who belongs to a professional body that requires a high level of proficiency and regulates its members (e.g., doctor, accountant, insurance agent). A reciprocal referral agreement is subject to the following restrictions and guidance [ABA Model Rule 7.2(b)(4) and comment 8]:

1) The agreement must ***not be exclusive*** (i.e., the lawyer must not promise to refer ***all*** potential estate planning clients to his friend F and to no one else).

2) The ***referred client must be told*** about the agreement. If the agreement creates a conflict of interest for either the referring or the receiving lawyer, then that lawyer must obtain the client's informed consent, confirmed in writing, under ABA Model Rule 1.7. (Of course, one must wonder whether a reciprocal referral agreement invariably creates a conflict because it gives the referring lawyer a personal financial interest in sending the case to his referral counterpart rather than to some other lawyer.)

3) The reciprocal agreement must ***not interfere with the lawyer's professional judgment as to making referrals*** or providing substantive legal services.

4) The agreement ***"should not" be of indefinite duration*** and should ***be reviewed periodically*** to make sure it complies with the ABA Model Rules.

d. Nominal Gifts or Gratuities

A lawyer may give a nominal gift or gratuity as an expression of appreciation to a person who recommended the lawyer or the lawyer's firm, provided the gift or gratuity was ***not intended or reasonably expected to be a form of compensation*** for recommending the lawyer's services. Such gifts must not exceed a token item that would be given for a holiday or in the course of ordinary social hospitality. A gift is prohibited if offered or given in consideration of any understanding that such a gift would be forthcoming or that referrals would be made or encouraged in the future. [ABA Model Rule 7.2(b)(5)]

C. SOLICITATION

A solicitation is a communication ***initiated by a lawyer or firm*** that is directed to a specific person the lawyer knows or reasonably should know ***needs legal services in a particular matter***, and that offers to provide, or can reasonably be understood as offering to provide, legal services for that matter. However, a communication is ***not*** a solicitation if it: (1) is directed to the general public (e.g., through a billboard, website, television commercial, or Internet banner advertisement); (2) responds to a request for information; or (3) is automatically generated in response to an Internet search. [ABA Model Rule 7.3(a) and comment 1]

1. Live Person-to-Person Solicitation Generally Prohibited

Subject to the exceptions below, a lawyer or firm must not, by live person-to-person contact, solicit professional employment when a significant motive for

doing so is the lawyer's or firm's pecuniary gain (i.e., money). "Live person-to-person contact" means in-person, ***face-to-face***, ***live telephone***, or other ***real-time visual or auditory person-to-person communications*** (e.g., Skype or FaceTime) where the targeted person is subject to a direct personal encounter without time for reflection. [ABA Model Rule 7.3(b)]

a. Exception to Prohibition—Significant Motive Is Not Pecuniary Gain
Offers to provide free legal services are generally permissible. Furthermore, certain political or ideological solicitation (e.g., solicitation on behalf of a civil rights organization or nonprofit organization) is constitutionally protected. [*See* ABA Model Rule 7.3(b) and comment 5]

b. Exceptions to Prohibition—Certain Targets Are Considered Less Vulnerable
Subject to the limitations in 3., below, a lawyer or firm is generally not prohibited from initiating live person-to-person contact with (1) other ***lawyers***; (2) persons with whom the lawyer or firm has a ***familial, close personal, or prior professional or business relationship*** (including current and former clients); or (3) ***routine business users of the type of legal services*** offered by the lawyer or firm (e.g., entrepreneurs, small business owners, executives who hire outside counsel to represent an entity, and any other persons who regularly engage lawyers for business purposes).

EXAMPLE
Attorney A prepared an estate plan for client C. A did no further work for C. Two years later, the state repealed its inheritance tax, thus creating a much more advantageous way for C to dispose of her assets on death. A may telephone C, advising C to have her estate plan revised, and A may do the necessary work if C asks her to do so.

2. Written, Recorded, or Electronic Solicitation Generally Permitted
Generally, a lawyer is not prohibited from sending truthful, nondeceptive communications (via mail, e-mail, text message, chat room message, etc.) to persons known to face a specific legal problem. These types of communications can be easily disregarded by the recipient and do not constitute live person-to-person contact. [ABA Model Rule 7.3, comment 2]

3. Circumstances Rendering All Contacts Impermissible
A lawyer is prohibited from soliciting professional employment, ***regardless of what method is used or who the target is***, if [ABA Model Rule 7.3(c)]:

a. The target of the solicitation has ***made known to the lawyer that she does not want*** to be solicited by the lawyer; or

b. The solicitation involves ***coercion, duress, or harassment***.

EXAMPLE
Lawyer L obtained a mailing list of all persons who used a certain prescription drug that allegedly caused grave side effects. L sent personal letters to each person, offering to represent them for a fee in litigation against the drug manufacturer. C, one of the recipients of L's letters, telephoned L's office and told her that she did not want to sue anybody and did not want to hear further from L. L failed to remove C from the mailing list, so C received a series of follow-up letters, each urging C to join in litigation against the drug manufacturer. L is subject to discipline.

4. Communications Authorized by Law or Court Order

These rules do not prohibit communications authorized by law or ordered by a court or other tribunal (e.g., in class action litigation, a notice to potential members of the class). [ABA Model Rule 7.3(d)]

5. Use of Others to Solicit

A lawyer's responsibility for prohibited solicitation extends to actions by those employed by, retained by, and in certain circumstances, associated with the lawyer. [*See* ABA Formal Ethics Op. 501 (2022)]

a. Agents

Recall that a lawyer is always prohibited from using an agent to do that which the lawyer must not do, e.g., violate a law or disciplinary rule. [ABA Modle Rule 8.4(a)] Thus, a lawyer must not use an agent (sometimes called a "runner" or "capper") to contact prospective clients in a manner that would violate the Rules of Professional Conduct.

b. People Employed, Retained, or Associated with Lawyer

Lawyer supervisors are required to make reasonable efforts to ensure that all persons (lawyers and nonlawyers) employed, retained, or associated with the lawyer are trained to comply with solicitation rules. Recall that a lawyer is responsible for the conduct of others if the lawyer orders the conduct, knows and approves the conduct, or when acting as a manager or supervisor fails to take remedial action when the consequences could have been avoided. [*See* ABA Model Rule 5.3(b), (c)]

c. Other Third Parties

Recommendations or referrals by third parties who are not employees of a lawyer and whose communications are not directed to make specific statements to particular potential clients on behalf of a lawyer do not constitute "solicitations." Thus, a lawyer's colleagues in other professions,

satisfied clients, and family and friends may provide information about a lawyer's services to other people. [ABA Formal Ethics Op. 501 (2022)]

EXAMPLES

1) Lawyer L hired R to be a "claims investigator." R's work involved checking accident and crime reports at the local police station and then personally contacting those involved to "advise them of their legal rights." L furnishes R with copies of her standard form retainer agreement and instructs R to sign up clients when possible. L is subject to discipline.

2) Attorney A has a reciprocal referral arrangement with a "debt consolidation" company. Employees of the company initiate personal, face-to-face conversations with debtors and advise them about loans and ways to get out of debt. If it appears that a debtor needs legal assistance, the company employee refers the debtor to A. In return, when one of A's clients needs help getting a loan or managing debts, A refers the client to the company. A is subject to discipline because he is using the debt consolidation company to initiate personal, face-to-face communications with potential clients.

COMPARE

A lawyer asks a personal friend and colleague who is a banker to provide the lawyer's contact information to banking customers the banker thinks might need an estate plan. The conduct does not violate the solicitation rules because the lawyer did not target a specific person in need of legal services in a particular matter, nor communicate or direct communications with that person. The lawyer has no authority over the banker's conduct. The lawyer does not control the content of any communication the banker makes nor even whether any communication occurs at all. The communication, if one occurs at all, is a recommendation, the type of "word-of-mouth" referral that is permissible. Moreover, because the lawyer is not directing what the banker should say and the banker's customers are not speaking directly to the lawyer, the lawyer's request to the banker is permissible. [ABA Formal Ethics Op. 501 (2022)]

D. GROUP AND PREPAID LEGAL SERVICE PLANS

Group or prepaid legal service plans typically are part of an employee benefit plan and bear some resemblance to health insurance plans. Participants typically pay a monthly premium, in return for which they may consult a plan-authorized lawyer and obtain legal services for a low or no cost. Such plans vary widely as to the services provided, ranging from a brief consultation to full representation, and as to the areas covered, ranging from estate planning to divorce, to civil or (less commonly) criminal actions.

1. Lawyer May Personally Contact Sponsoring Organizations

A lawyer or firm may personally contact representatives of groups that might wish to adopt a legal service plan for its members, beneficiaries, etc. This is

more akin to advertising than solicitation because it is not directed at people seeking legal services for ***themselves***; the representatives are acting in a fiduciary capacity and seeking legal services for their members (who will later choose whether to become a client of the lawyer or firm). [ABA Model Rule 7.3, comment 7]

2. Plan May Personally Contact Potential Members

Lawyers are permitted to participate in a group or prepaid legal service plan, even though the plan uses live person-to-person contacts to enroll memberships or sell subscriptions, provided that: (1) the ***personal contact is not undertaken by the lawyer*** themselves; and (2) the plan only contacts persons who are ***not known to need specific legal services in a particular matter*** covered by the plan (as this does not fall within the definition of solicitation). [ABA Model Rule 7.3(e) and comment 9]

EXAMPLE

The X, Y & Z law firm learns that the Lincoln Teachers' Association wants to form a group legal service program for schoolteachers. In such a program, the association would contract with a local law firm to provide a specified yearly amount of legal service to each teacher subscriber. The X, Y & Z firm may initiate live person-to-person contact with the association to present a proposed plan. Furthermore, if the association ends up hiring the X, Y & Z firm, it is proper for the association (but not the X, Y & Z law firm) to make live person-to-person contact with schoolteachers to urge them to subscribe to the plan.

a. Participating Lawyer Must Not Be Owner or Director

A lawyer must not participate in the legal service plan if the lawyer ***owns or directs*** the organization that operates the plan.

3. Must Assure Compliance With Advertising and Solicitation Rules

A lawyer who participates in a legal service plan must "reasonably assure" that the plan sponsors are in compliance with the advertising and solicitation rules (e.g., must not advertise in a false or misleading manner). [ABA Model Rule 7.3, comment 9]

E. GOVERNMENT REGULATION OF COMMUNICATIONS ABOUT LEGAL SERVICES

The Supreme Court has recognized lawyer advertising as commercial speech protected by the First and Fourteenth Amendments, holding that a state may adopt reasonable regulations to insure that lawyer advertising is not false or misleading, but may not flatly prohibit all lawyer advertising. [Bates v. State Bar of Arizona, 433 U.S. 350 (1977)]

1. False and Misleading Ads and In-Person Solicitation May Be Banned

A state may flatly prohibit lawyer advertising that is false or misleading. [*In*

re RMJ, 455 U.S. 191 (1982)] Similarly, a state may adopt prophylactic rules to forbid in-person solicitation for profit in circumstances that are likely to result in overreaching or misleading a layperson. [Ohralik v. Ohio State Bar Association, 436 U.S. 447 (1978)] In practice, misleading communications and in-person solicitation are regulated rather than completely banned.

2. Disclosure Requirements for Misleading Communications—Rational Basis Test

To ***prevent*** commercial speech from misleading consumers, the government may require commercial advertisers to make certain factual disclosures if such a requirement is: (1) not unduly burdensome, and (2) reasonably related to the state's interest in preventing deception. [Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio, 471 U.S. 626 (1985)]

EXAMPLE

Attorneys who provide bankruptcy assistance to consumer debtors ("debt relief agencies") may be required to include in their advertisements certain information—e.g., statements identifying themselves as debt relief agencies and disclosing that the advertised services relate to bankruptcy relief and may result in the debtor's filing for bankruptcy. [Milavetz, Gallop & Milavetz, P.A. v. United States, 559 U.S. 229 (2010)]

3. Other Regulation of Truthful, Nondeceptive Communications—Intermediate Scrutiny

Because attorney advertising is commercial speech, regulation of it is subject to only intermediate, rather than strict, scrutiny. [Florida Bar v. Went For It, Inc., 515 U.S. 618 (1995)] Thus, this type of commercial speech may be regulated if the government satisfies a three-prong test:

a. The government must assert a ***substantial interest*** in support of its regulation;

b. The government must demonstrate that the restriction on commercial speech ***directly and materially advances the interest***; and

c. The regulation must be ***narrowly drawn***.

[Florida Bar v. Went For It, Inc., *supra—citing* Central Hudson Gas & Electric Corp. v. Public Service Commission of New York, 447 U.S. 557 (1980)]

EXAMPLE

After conducting a two-year study on the effect of lawyer advertising on public opinion, which included surveys and hearings, Florida adopted a rule prohibiting lawyers from sending ***any*** targeted direct-mail solicitations to victims and their relatives for 30 days following an accident or disaster. The United States Supreme Court upheld the regulation, finding that it met the three-prong test

above. The Court found that: (1) the state has a substantial interest in protecting the privacy and tranquility of its citizens as well as in protecting the reputation of the legal profession; (2) the studies show that the public was offended by these solicitations and that the 30-day ban directly advances the state's interests; and (3) the regulation is narrowly tailored to achieve the desired results. [Florida Bar v. Went For It, Inc., *supra*]

XI. LAWYERS' DUTIES TO THE PUBLIC AND THE LEGAL SYSTEM

A. PRO BONO PUBLICO SERVICE

Every lawyer has a professional responsibility to provide legal service to people who cannot pay for it. [ABA Model Rule 6.1] Violating ABA Model Rule 6.1 is not grounds for professional discipline; Model Rule 6.1 recommends that every lawyer ***should*** spend 50 hours per year on pro bono work. A "substantial majority" of those hours should be spent doing unpaid legal service for poor people or organizations that address the needs of poor people.

B. COURT APPOINTMENTS

Trial and appellate courts often find it necessary to appoint lawyers to represent indigent clients and clients with unpopular causes. ABA Model Rule 6.2 provides that a lawyer must not seek to avoid such an appointment except for good cause. Examples of good cause are stated below.

1. Violation of Law or Disciplinary Rule

A lawyer must decline a court appointment if to accept it would require the lawyer to violate a law or disciplinary rule. [ABA Model Rule 6.2(a)]

EXAMPLE

When attorney A was a deputy public defender, he represented client Q in an aggravated assault case, and he learned a great deal of confidential information about Q's life and criminal background. Later, A entered private practice, and the local court appointed him to defend D, who was charged with the attempted murder of Q. The confidential information A obtained from Q is highly relevant to the defense of D. A must therefore decline the appointment to defend D.

2. Unreasonable Financial Burden

A lawyer may seek to be excused from an appointment if to accept it would impose an unreasonable financial burden on the lawyer. [ABA Model Rule 6.2(b)]

EXAMPLE

The Supreme Court of West Dakota appointed lawyer L to represent D in the appeal of D's conviction and death sentence for three murders. The trial of

D's case lasted 13 months and resulted in a trial record in excess of 150,000 pages. To handle the appeal properly, L would be required to work at least 600 hours. The West Dakota legislature has set legal fees at a paltry $17 per hour for appellate counsel in death penalty cases. L is a struggling solo practitioner and will not be able to support his family if he is required to take that much time away from his regular clients. L may seek to be excused from the supreme court appointment.

3. Personal Inability to Represent Client Effectively

A lawyer may seek to be excused from a court appointment if the lawyer finds the client or the cause so repugnant that the lawyer-client relationship would be impaired or the lawyer could not represent the client effectively. [ABA Model Rule 6.2(c)]

EXAMPLE

The trial court appointed attorney A to defend accused child molester M. As a young boy, A himself was molested by a similar person, and A finds that he cannot even look comfortably at M, much less represent him zealously. A may seek to be excused from the court appointment.

C. LIMITED LEGAL SERVICES PROGRAMS

Some courts and nonprofit organizations have established limited legal services programs in which lawyers offer "quick advice" to people who can then handle their own legal problem without further assistance. Examples are programs that show people how to fill out their own EZ tax forms, legal-advice hotlines, advice-only legal clinics, and programs that show people how to represent themselves in small claims court. A lawyer-client relationship exists between the lawyer and the person who obtains the quick advice, but neither person expects the relationship to continue past the quick-advice stage. [ABA Model Rule 6.5, comment 1] A lawyer may participate in a quick-advice program sponsored by a court or nonprofit organization, subject to the following rules.

1. Client Consents to Short-Term, Limited Legal Service

The lawyer must obtain the client's informed consent to the limited scope of the relationship. If the lawyer's quick advice is not enough to set the client on the right track, the lawyer must advise the client to obtain further legal help. [ABA Model Rule 6.5, comment 2]

2. Applicability of Ethics Rules

In a quick-advice situation, the conflict of interest rules are relaxed somewhat, as explained in 3., below. However, the remainder of the Rules of Professional Conduct apply to a quick-advice situation.

EXAMPLE

When attorney A was answering telephone calls on the bar association hotline, she took a call from a farmer who explained that six months ago he hired a farmhand to help him. The farmhand insisted on being paid in cash and insisted that the farmer not withhold any income taxes or pay any Social Security contributions on his behalf. Based on the farmer's answers to A's questions, A concluded that the farmhand was an employee, not an independent contractor. A then advised the farmer about his potential tax liability. The farmer's statements to A are protected by the attorney-client privilege and the ethical duty of confidentiality; therefore, A must not disclose the farmer's confidential information or use it to the farmer's disadvantage. [*See* ABA Model Rules 1.6, 1.9(c)]

3. Conflict of Interest Rules Are Relaxed

A lawyer who participates in a quick-advice program ordinarily has no time to conduct an ordinary conflict of interest check. Therefore, the general conflicts principles expressed in Rule 1.7 (current clients) and 1.9 (former clients) do not apply unless the lawyer actually knows that giving the quick advice creates a conflict of interest. [ABA Model Rule 6.5(a)(1)] As in other contexts, actual knowledge can be inferred from the circumstances. [ABA Model Rule 1.0(f)]

4. Imputed Conflict Rule Is Also Relaxed

The rule of imputed conflicts of interest [ABA Model Rule 1.10] is also relaxed in a quick-advice situation. Therefore, a lawyer may dispense advice in a quick-advice program unless the lawyer ***actually knows*** that he is disqualified from doing so because of a conflict imputed from another lawyer in his firm. [ABA Model Rule 6.5(a)(2)] Conversely, a conflict created by advice a lawyer dispenses in a quick-advice program will not be imputed to others in the lawyer's firm. [ABA Model Rule 6.5(b)]

EXAMPLES

1) Lawyer L and partner P are partners in the 300-lawyer firm of R & Q. L participates in a quick-advice program sponsored by a local court. In that context, L advised apartment tenant T that she could withhold rent from her landlord Z to pay for repairing a leaking roof that made the apartment uninhabitable. L did not realize that Z had recently hired L's partner P to deal with legal issues arising out of the apartment house in question.

2) In the example above, if L advised T about withholding rent on May 1, and landlord Z did not hire partner P until July 30, L's conflict is not imputed to P.

5. Conflicts Rules Apply Fully If Quick Advice Leads to Regular Representation

If a person who has received quick advice from a lawyer then wants to hire

that lawyer to render further service in the matter, the ordinary conflict of interest rules apply to that further service. [ABA Model Rule 6.5, comment 5]

EXAMPLE
After attorney A dispensed advice to client C in a quick-advice program, C asked to hire A as his trial counsel in the matter. Before agreeing to render the further service to C, A should check for conflicts of interest to make sure that neither she nor other lawyers in her office have a conflict that would disqualify her.

D. MEMBERSHIP IN LEGAL SERVICES ORGANIZATIONS

1. Statement of the Problem

Lawyers are encouraged to support and participate in legal services organizations—e.g., local legal aid societies that provide free legal assistance to underprivileged persons in civil matters. An officer or member of such an organization does not have a lawyer-client relationship with persons served by the organization, but there can be potential conflicts between the interests of those persons and the interests of the lawyer's regular, paying clients. [*See* ABA Model Rule 6.3]

2. General Rule

A lawyer may serve as a director, officer, or member of a legal services organization (apart from the lawyer's regular employment) even though the organization serves persons whose interests are adverse to the lawyer's regular clients. [ABA Model Rule 6.3] This general rule is, however, subject to the limitations stated below.

a. The lawyer must not knowingly participate in a decision or action of the organization if doing so would be incompatible with the lawyer's obligations to a client under the general conflict of interest rules. [*See* ABA Model Rules 1.7, 6.3(a)]

b. The lawyer must not knowingly participate in a decision or action of the organization if doing so would adversely affect the representation of one of the organization's clients whose interests are adverse to those of a client of the lawyer. [*See* ABA Model Rule 6.3(b)]

EXAMPLE
Lawyer L is a member of the board of directors of the Cuttler County Legal Aid Society. The board sets guidelines for the kinds of cases the society will and will not handle. The society's budget has recently been cut, and the board is forced to revise the guidelines to eliminate some kinds of service. L is also a partner in the R, S & T firm, and that firm is outside general counsel to the Cuttler County

Apartment Owners Association, a trade association for landlords. One proposal pending before the Legal Aid Society Board is to eliminate free legal service in landlord-tenant cases. L must not participate in this decision.

E. LAW REFORM ACTIVITIES AFFECTING CLIENT INTERESTS

1. Activities that May Harm Client

A lawyer may serve as a director, officer, or member of a law reform group, even though a reform advocated by the group may harm one of the lawyer's clients. [*See* ABA Model Rule 6.4]

EXAMPLE

Attorney A is a member of the West Carolina Law Revision Commission, a private organization that drafts and recommends new legislation to the West Carolina Legislature. The commission is now working on new statutes that will revise the West Carolina law respecting administration of trusts. One of A's clients is the First Carolina Bank. The bank's trust operations will become less profitable if the legislature passes the statutes recommended by the commission. A may work on the trust law project for the commission, unless doing so would violate the general conflict of interest rules. [*See* ABA Model Rule 1.7; ABA Model Rule 6.4, comment 1]

2. Activities that May Benefit Client

When a lawyer is working on a law reform project and is asked to participate in a decision that could materially benefit one of the lawyer's clients, the lawyer must disclose that fact—but the lawyer need not identify the client. [ABA Model Rule 6.4]

EXAMPLE

In the Law Revision Commission example above, suppose that one of the statutes proposed by the commission will substantially increase trustee fees paid to commercial banks. Before participating in a decision about that statute, A must disclose to the other commissioners that she represents a major commercial bank, but she need not identify which bank.

F. ASSISTING IN JUDICIAL MISCONDUCT

A lawyer is subject to discipline for ***knowingly*** assisting a judge or judicial officer in conduct that violates the Code of Judicial Conduct or other law. [ABA Model Rule 8.4(f)]

EXAMPLE

R graduated from law school and became a member of the bar, but he never practiced law. Instead, he entered politics and was ultimately elected to a high federal

office. When a drug charge was brought against R's chief deputy, R met personally with the judge before whom the case was pending and attempted to convince the judge to dismiss the charge. [*See* CJC Rule 2.9—prohibits ex parte communications about a pending matter] R is subject to discipline.

G. STATEMENTS ABOUT JUDICIAL AND PUBLIC LEGAL OFFICIALS

A lawyer must not make a statement that the lawyer knows is false about the ***qualifications or integrity*** of a judge, hearing officer, or public legal official, or about a candidate for a judicial or legal office. The same rule applies to statements made with ***reckless disregard*** as to truth or falsity. [ABA Model Rule 8.2(a); Restatement §114]

EXAMPLE

Lawyer K made unfounded accusations in two petitions, asserting that certain appellate judges were deliberately dishonest in failing to recuse themselves in a case K was handling. Such accusations in court papers constitute criminal contempt that can be summarily punished. The court fined K and referred her to the state bar disciplinary authorities. [*In re* Koven, 134 Cal. App. 4th 262 (2005)]

H. LAWYER RUNNING FOR JUDICIAL OFFICE

A lawyer who is running for judicial office must comply with the applicable provisions of the Code of Judicial Conduct. [ABA Model Rule 8.2(b)]

EXAMPLE

Attorney A was one of two candidates for a vacant superior court judgeship. She personally solicited and accepted campaign contributions from other members of her law firm, a violation of ABA Code of Judicial Conduct 4.1(A). A is subject to discipline.

I. ABILITY TO INFLUENCE GOVERNMENT OFFICIALS

A lawyer must never state or imply that he has the ability to improperly influence a government agency or official or to achieve results by means that violate the law or legal ethics rules. [ABA Model Rule 8.4(e)]

EXAMPLE

Lawyer L is a member of a very politically prominent family. Both his mother and brother are judges, and his father was once governor of the state. It would be improper for L to mention his prominent relatives in the course of procuring legal employment, as this implies he has some sort of improper influence with the courts or the government. If a client mentions L's relatives, L is obligated to explain that he has no special influence to wield on the client's behalf.

J. POLITICAL CONTRIBUTIONS TO OBTAIN GOVERNMENT EMPLOYMENT

A lawyer or firm must not accept a government legal engagement (i.e., employment that a public official has the power to award) or an appointment by a judge if the lawyer or firm makes or solicits a political contribution ***for the purpose of obtaining such employment or appointment*** ("pay to play" contributions). [ABA Model Rule 7.6 and comment 1]

1. Prohibited Contributions

This rule does not prohibit all political contributions by lawyers or firms—only those that would not have been made ***but for the desire to be considered for the employment or appointment***. The circumstances of the contribution may indicate its purpose. Contributions that are substantial compared to contributions made by other lawyers or firms, are made for the benefit of an official who can award such work, and are followed by an award to the lawyer or firm support an inference that the contributions were for the purpose of obtaining the work. Other factors, such as a family or professional relationship with the judge or a desire to further a political, social, or economic interest, weigh against inferring a prohibited purpose. [ABA Model Rule 7.6, comment 5]

2. Excluded Employment

Excluded from the ambit of the rule are: (1) uncompensated services; (2) engagements or appointments made on the basis of experience, expertise, qualifications, and cost, following a process that is free from influence based on political contributions; and (3) engagements or appointments made on a rotating basis from a list compiled without regard to political contributions. [ABA Model Rule 7.6, comment 3]

XII. JUDICIAL ETHICS

A. SELECTION, TENURE, AND DISCIPLINE OF JUDGES

1. Federal Judges

Justices of the United States Supreme Court and judges of other Article III federal courts are appointed by the President with the advice and consent of the Senate. They hold office for life during good behavior. [U.S. Const. art. III, §1] A federal judge can be removed from office by impeachment and can be disciplined in less drastic ways by a committee of federal judges. [U.S. Const. art. II, §4; 28 U.S.C. §§351 - 363] Federal judges generally are governed by the Code of Conduct for United States Judges, which is based largely on the ABA Model Code of Judicial Conduct. Justices of the United States Supreme Court, however, have asserted that they are not bound by the Code of Conduct for United States Judges or the ABA Model Code of Judicial Conduct. [*See* Cheney v. United States District Court, 541 U.S. 913 (2004)—Scalia, J.]

2. State Judges

The constitutions of most states specify how judges are to be selected. In some states, judges are appointed by the governor or the state legislature, while in others they are elected by the voters. In still other states, judges are initially appointed and later retained or rejected by the voters. State judges can be removed from office or otherwise disciplined in accordance with state constitutional and statutory provisions.

3. Code of Judicial Conduct

The ABA has provided standards for judicial conduct since 1924. These materials discuss the ABA's Model Code of Judicial Conduct ("CJC").

a. Adoption of the CJC

The CJC becomes binding on the judges in a jurisdiction when it is adopted (sometimes with significant amendments) by the appropriate authority in that jurisdiction. [*See*, *e.g.*, California Code of Judicial Ethics]

b. Who Is Subject to the CJC?

Where adopted, the CJC applies to all persons who perform judicial functions, including magistrates, court commissioners, referees, and special masters. [CJC, Application] Retired judges, part-time judges, and pro tempore part-time judges are exempted from some provisions of the CJC, as explained in F., below.

c. Format of the CJC

The CJC contains four Canons, each of which encompasses several numbered Rules. The Canons state overarching principles of judicial ethics that all judges must follow. Also, the Canons guide the interpretation of the Rules. The Rules are rules of reason, to be applied in a manner that is consistent with the law (statutory, constitutional, and decisional). Comments accompany the Rules. The Comments set forth aspirational goals for judges and also provide guidance regarding the meaning and application of the Rules.

B. PROMOTION OF JUDICIAL INTEGRITY AND AVOIDANCE OF APPEARANCE OF IMPROPRIETY

The CJC requires a judge to uphold and promote the independence, integrity, and impartiality of the judiciary and avoid both actual impropriety and the appearance of impropriety. [CJC Canon 1]

1. Compliance with Law and Promotion of Public Confidence in the Judiciary

A judge must comply with the law (including the CJC). [CJC Rule 1.1] A judge must avoid ***even the appearance*** of impropriety. ***At all times*** a judge must act so as to promote public confidence in the independence, integrity, and impartiality of the judiciary. [CJC Rule 1.2]

EXAMPLES

1) Judge R discovered his estranged wife in an automobile with another man. The judge broke the car window (causing the other man to be cut with broken glass) and slapped his estranged wife. Judge R is subject to discipline, even though his conduct was unconnected with his judicial duties. [*See In re* Roth, 645 P.2d 1064 (Or. 1982)]

2) While driving under the influence of alcohol, Judge L ran a traffic signal and violated other traffic laws. Judge L is subject to discipline. [*See* Matter of Lawson, 590 A.2d 1132 (N.J. 1991)]

2. Test for Appearance of Impropriety

An "appearance of impropriety" arises when a judge's conduct would create a reasonable perception that she has violated the CJC or acted in some other manner that reflects adversely on her honesty, impartiality, temperament, or fitness as a judge. [CJC Rule 1.2, comment 5]

3. Community Outreach

To promote public understanding of and confidence in the administration of justice, a judge should initiate and participate in community outreach activities. [CJC Rule 1.2, comment 6]

4. Abuse of Judicial Prestige

A judge must not abuse, or permit others to abuse, the prestige of her office to advance her personal or economic interests or those of others. [CJC Rule 1.3]

a. References and Recommendations

Based on personal knowledge, a judge may act as a reference or provide a recommendation for someone. Such a communication may be on official letterhead if: (1) the judge indicates that the reference is personal; and (2) there is no likelihood that use of the letterhead would reasonably be perceived as an attempt to use the judicial office to exert pressure. [CJC Rule 1.3, comment 2]

EXAMPLES

1) When Judge B was stopped for a routine traffic violation, he imperiously informed the traffic officer: "I am a judge in this town, young man, and I don't take kindly to being stopped for petty reasons!" Judge B is subject to discipline.

2) Judge C used her official court stationery when writing to a building contractor with whom she was having a personal contract dispute. Judge C is subject to discipline.

3) When Judge D's teenage daughter was charged with shoplifting, Judge D called Judge E, to whom the daughter's case was assigned. D said: "E, as a fellow judge, I want to tell you that my little girl is a good kid who deserves a break." Judge D is subject to discipline.

4) Judge F writes materials and gives lectures for a proprietary continuing legal education company. Judge F should retain control over the company's advertisements of his materials and lectures to avoid exploitation of his judicial office. [CJC Rule 1.3, comment 4]

C. IMPARTIAL, COMPETENT, AND DILIGENT PERFORMANCE OF JUDICIAL DUTIES

The CJC requires a judge to perform the duties of judicial office impartially, competently, and diligently. [CJC Canon 2]

1. Judicial Duties—In General

Judicial duties include all the duties of the judge's office that are prescribed by law. Judicial duties take precedence over all of the judge's other activities, including personal and nonjudicial activities. [CJC Rule 2.1]

EXAMPLE

Judge P's elderly, infirm sister needs a custodian to look after her personal and financial affairs. Judge P should not undertake this responsibility if it will interfere with the proper performance of her judicial duties.

2. Hearing and Deciding Matters Assigned

A judge must hear and decide all matters assigned to her, except those in which disqualification is required. [CJC Rule 2.7] Disqualification should not be used as a tool to avoid cases that present difficult, controversial, or unpopular issues. [CJC Rule 2.7, comment 1]

3. Impartiality and Fairness

A judge must uphold and apply the law, and must perform her duties fairly and impartially. [CJC Rule 2.2]

4. External Influences on Judicial Conduct

Public clamor or fear of criticism must not sway a judge. Family, social, political, or financial interests must not influence a judge's conduct or judgment. A judge may not convey, or allow others to convey, the impression that anyone is in a position to influence the judge. [CJC Rule 2.4]

5. Competence, Diligence, and Cooperation

A judge must perform her judicial and administrative duties competently and diligently. [CJC Rule 2.5(A)] "Competence" requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary to perform the

judge's responsibilities. [CJC Rule 2.5, comment 1] To accomplish prompt disposition of the court's business, a judge must: (1) devote adequate time to her duties; (2) be punctual in attending court and expeditious in determining matters submitted to her; and (3) take reasonable measures to ensure that court officials, litigants, and attorneys cooperate in this regard. [CJC Rule 2.5, comment 3] Also, a judge must cooperate with other judges and court officials in the administration of court business. [CJC Rule 2.5(B)]

6. Ensuring Right to Be Heard

A judge must allow every person with a legal interest in a proceeding the right to be heard according to law. Although a judge may encourage settlements, he must not act so as to coerce a party into settlement. It is important to keep in mind the possible effects of a judge's participation in settlement talks, i.e., the effects on the judge's views of the case as well as on the parties' perceptions if the judge retains the case following unsuccessful negotiations. [CJC Rule 2.6 and comment 2]

a. Factors for Determining Appropriate Settlement Practice

When deciding on an appropriate settlement practice, the judge should consider the following factors: (1) whether the parties have requested or consented to a certain level of participation by the judge in settlement discussions; (2) whether the parties and their attorneys are relatively sophisticated in legal matters; (3) whether the case will be tried by the judge or a jury; (4) whether the parties participate with their lawyers in the discussions; (5) whether any parties are not represented by counsel; and (6) whether the case is civil or criminal. [CJC Rule 2.6, comment 2]

7. Avoidance of Bias, Prejudice, and Harassment

A judge must avoid bias, prejudice, and harassment and must require others (including lawyers) who are under the judge's direction and control to do likewise. [CJC Rule 2.3] Prohibited bias, prejudice, or harassment includes that which is based on race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation. [CJC Rule 2.3] Harassment consists of verbal or physical conduct that denigrates or shows hostility or aversion toward a person on any of the bases above. [CJC Rule 2.3, comment 3] A judge's duty to control lawyers does not preclude legitimate advocacy by lawyers when issues of prejudice arise in a case. [CJC Rule 2.3(D)] A judge should be aware that facial expression and body language can convey prejudice as easily as words. [CJC Rule 2.3, comment 2]

EXAMPLE

Whenever an old person testifies in Judge S's court, Judge S speaks extra loudly and in a patronizing manner. Whenever Judge S conducts the voir dire

of a jury panel member who is poor, Judge S scowls and adopts a tone of voice normally reserved for slow learners and errant pets. Judge S is subject to discipline.

8. Ex Parte Communications

"Ex parte" means one side only. An ex parte communication means a communication between a judge and representative from one side of a matter when no representative from the other side is present. A judge must not initiate, permit, or consider ex parte communications except in these three situations:

a. Expressly Authorized by Law

A judge may have ex parte communications when expressly authorized by law [CJC Rule 2.9(A)(5)], which is defined to include court rules and decisional law, as well as constitutional and statutory law. [CJC, Terminology] Some communications authorized by law occur in conjunction with a judge's service on certain "specialized" courts, such as drug courts or mental health courts. Judges serving on such courts may have to assume a more interactive role with parties, treatment providers, probation officers, and social workers. [CJC Rule 2.9, comment 4]

b. Mediation or Settlement

With the consent of the parties, the judge may confer separately with the parties and their lawyers in an effort to settle or mediate a pending matter. [CJC Rule 2.9(A)(4)]

c. Emergencies or Administrative Matters

In other situations, the judge may have an ex parte communication only if ***all four*** of the following conditions are met:

1) The ***circumstances*** require the judge to communicate with one side only (if the other side cannot be reached);

2) The communication concerns an ***emergency or a scheduling or administrative matter*** as distinct from a substantive matter or matter affecting the merits;

3) The judge believes that ***no party will gain a procedural, substantive, or tactical advantage*** from the communication; and

4) The judge ***notifies*** the lawyers for the other parties of the essence of the communication and gives them an opportunity to respond.

[CJC Rule 2.9(A)(1)]

d. Inadvertent Receipt of Unauthorized Ex Parte Communication

If a judge inadvertently receives an unauthorized ex parte

communication that relates to substantive matters, she must make provision promptly to notify the parties of the substance of the communication and give them an opportunity to respond. [CJC Rule 2.9(B)]

9. Communications from Others

A judge must not initiate, permit, or consider communications from others made to the judge outside the presence of the parties' lawyers concerning a pending or impending matter, except in these two situations:

a. Court Personnel

A judge may consult about a matter with other judges and with other court personnel whose function is to aid the judge in carrying out adjudicative responsibilities (e.g., the judge's law clerk). However, the judge: (1) must make reasonable efforts to avoid receiving factual information that is not part of the record; and (2) must not abrogate his responsibility to decide the matter. [CJC Rule 2.9(A)(3)]

b. Disinterested Legal Experts

A judge may obtain the written advice of a disinterested expert on the applicable law, provided that the judge gives advance notice to the parties of the expert's identity and the subject matter of the advice to be solicited, and gives the parties a reasonable opportunity to object and respond to the notice and the advice. [CJC Rule 2.9(A)(2)]

10. Independent Investigation of Facts

A judge must not independently investigate the facts in a case and must consider only the evidence presented. This prohibition extends to information available in all mediums, including electronic research (e.g., Internet research). [CJC Rule 2.9(C) and comment 6]

EXAMPLE

Judge U took a case under submission. While reading the transcript and pondering her decision, she became puzzled about the testimony of witness W. To save time and effort, Judge U simply telephoned W and asked him to clarify the point that puzzled her. Judge U's conduct is improper.

11. Public Comments on Cases

When a case is pending or impending in ***any*** court, a judge must not make any ***public*** comment that might reasonably be expected to affect its outcome or impair its fairness, or make any ***nonpublic*** comment that might substantially interfere with a fair trial. The judge must require like abstention from court personnel under her control. [CJC Rule 2.10]

a. Official Duties Excepted

The duty to abstain from comment does not prohibit judges from making

public statements in the course of their official duties, or from publicly explaining court procedures. [CJC Rule 2.10(D)]

b. Judge as a Party

The duty to abstain from comment does not apply if the judge is a litigant in a personal capacity. [*Id.*] The duty does apply, however, if the judge is a litigant in an official capacity, as in writ of mandamus proceedings.

EXAMPLE

During the trial of a state criminal case, Judge V ordered the State Governor to appear as a witness and to bring certain documents that the Governor claimed were protected as government secrets. The State Attorney General sought a writ of prohibition from the appellate court to block Judge V's order. At that point, Judge V made a public statement that "the Governor apparently has a lot to hide." If Judge V's statement might reasonably be expected to impair the fairness of the proceedings, Judge V is subject to discipline.

12. Promises with Respect to Cases Likely to Come Before Court

With respect to cases or issues that are likely to come before the court, a judge must not make pledges, promises, or commitments that are inconsistent with the impartial performance of the adjudicative duties of the office. [CJC Rule 2.10(B)]

13. Decorum, Demeanor, and Communication with Jurors

A judge must require order and decorum in court proceedings. With regard to persons with whom the judge deals in an official capacity (e.g., litigants, jurors, witnesses, lawyers, court staff, and court officials), a judge must be patient, dignified, and courteous, and must require similar conduct of others subject to his control. A judge must not commend or criticize jurors for their verdict other than in a court order or opinion. [CJC Rule 2.8]

EXAMPLE

After the jury came in with a multimillion-dollar verdict for the plaintiff, Judge X told the jurors: "Apparently you people just didn't understand what was going on in this case." Judge X then issued a court order setting aside the jury verdict and ordering a new trial. Judge X's order was proper, but his comment to the jury was not.

14. Administrative Appointments

Administrative appointments (e.g., appointments of assigned counsel, referees, special masters, guardians, and court personnel) must be made

impartially on the basis of merit, without nepotism or favoritism. A judge must refrain from making unnecessary appointments and must not approve compensation of appointees in excess of the fair value of services rendered. [CJC Rule 2.13]

a. Appointments of Lawyers Contributing to Judge's Election Campaign

A judge must not appoint a lawyer to a position if the judge knows (or learns through a timely motion) that the lawyer, the lawyer's spouse, or the lawyer's domestic partner has contributed to the judge's election campaign more than the jurisdiction's specified dollar amount within a designated number of years prior to the judge's campaign. However, this provision does not apply if the appointive position is substantially uncompensated; the lawyer is selected as part of a rotation of qualified lawyers chosen without regard to their political contributions; or the judge finds that no other lawyer is willing, competent, and able to accept the position. [CJC Rule 2.13(B)]

15. Responding to Judicial and Lawyer Misconduct

If a judge has ***knowledge*** that another judge has violated the CJC in a manner that raises a substantial question as to the other judge's honesty, trustworthiness, or fitness as a judge, the judge must inform the appropriate authority. The same duty applies if the judge has knowledge that a lawyer has committed a similar violation of the Rules of Professional Conduct. A judge who receives information indicating a ***substantial likelihood*** that another judge has violated the CJC (or that a lawyer has violated the RPC) must take "appropriate action." What is "appropriate" may range from direct communication with the alleged violator to reporting the suspected violation to the appropriate authority. [CJC Rule 2.15 and comment 2]

16. Disability and Impairment of Other Judges or Lawyers

A judge having a reasonable belief that the performance of a lawyer or another judge is impaired by drugs or alcohol or by a mental, physical, or emotional condition must take appropriate action, which may include a confidential referral to a lawyer or judicial assistance program. [CJC Rule 2.14] If the conduct of the impaired person is sufficiently serious, the judge may be required to report the person to the appropriate disciplinary authority. [CJC Rule 2.14, comment 2]

17. Cooperation with Disciplinary Authorities

A judge must cooperate and be honest with judicial and lawyer disciplinary agencies. Retaliation against a person known or suspected to have cooperated with an investigation of a judge or lawyer is not permitted. [CJC Rule 2.16]

18. Disqualification

a. General Rule—Whenever Impartiality Might Reasonably Be Questioned

CJC Rule 2.11(A) states the broad, general rule on disqualification of a judge: A judge must disqualify himself in a proceeding in which the judge's impartiality might reasonably be questioned. (Disqualification of federal judges is governed by 28 U.S.C. section 455.) Note that the rule employs a reasonableness standard; a far-fetched argument or litigant's whim is not sufficient to disqualify a judge. [*See In re* Drexel Burnham Lambert Inc., 861 F.2d 1307 (2d Cir. 1988), *cert. denied*, 490 U.S. 1102 (1989); *see also* Caperton v. A.T. Massey Coal Co., 556 U.S. 868 (2009)—due process required recusal when state supreme court justice received campaign contributions in an extraordinary amount from, and through the efforts of, the board chairman and principal officer of the corporate party]

1) Disclosure by Judge

The judge should disclose on the record any information the judge believes that the parties or their lawyers might consider relevant to the question of disqualification, even if the judge believes there is no reasonable basis for disqualification. [CJC Rule 2.11, comment 5]

EXAMPLE

Judge Y plans to retire from the bench at the end of the year and return to private law practice. Judge Y has held tentative discussions with the private firm of A, B & C about joining that firm. Now Judge Y is assigned to hear a case in which the defendant is represented by the A, B & C law firm. Judge Y should disclose the facts and let the parties decide whether to waive disqualification.

2) Rule of Necessity

Case law has created a rule of necessity that overrides the rules of disqualification. For example, suppose that Judge Z is the only judge available to rule on an emergency motion for a temporary restraining order. Judge Z may rule on the motion even though he might be disqualified were it not an emergency. Even in such a situation, Judge Z should disclose the ground for disqualification on the record and should use reasonable efforts to transfer the matter to a different judge as soon as possible. [CJC Rule 2.11, comment 3]

EXAMPLE

State trial judge A is assigned to hear a case concerning the constitutionality of a statute that will raise the salary of all trial judges

in the state. Judge A may hear the case because the reason for disqualification applies equally to all other judges to whom the case might be assigned.

b. Bias or Personal Knowledge

A judge must disqualify himself if there is reasonable ground to believe that the judge has: (1) a personal bias concerning a party or a party's lawyer; or (2) personal knowledge of relevant evidentiary facts. [CJC Rule 2.11(A)(1)] To be disqualifying, a bias must be personal and stem from an extrajudicial source; adverse attitudes toward a party formed on the basis of evidence presented in the case are not disqualifying. [*See, e.g.*, *In re* Cooper, 821 F.2d 833 (1st Cir. 1987)]

c. Prior Involvement

A judge must disqualify himself if the judge previously:

1) Served as a ***material witness*** in the matter;

2) Served as a ***lawyer*** in the matter;

3) Was ***associated in law practice*** with a person who participated substantially as a lawyer in the matter at the time they practiced together;

4) ***Presided as a judge*** over the matter in another court; or

5) Served in ***governmental employment***, and in such capacity participated personally and substantially as a lawyer or public official concerning the proceeding, or publicly expressed in such capacity an opinion concerning the merits of the particular matter in controversy.

[CJC Rule 2.11(A)(6)]

EXAMPLES

1) Before her appointment as a state supreme court justice, Justice C practiced law with lawyer L. At the time C and L were in practice together, L represented X in the trial of *X v. Y.* After the trial, L withdrew as X's lawyer. Now the case is on appeal to the state supreme court. Justice C is disqualified.

2) In the preceding example, suppose that L did not begin representing X until C had left the practice and become a supreme court justice. Justice C need not recuse herself unless her prior association with L creates a reasonable question about her impartiality under the general rule of disqualification (*see* a., *supra).*

d. Economic Interest

A judge must disqualify himself if the judge knows that he, either as an individual or as a fiduciary, has an ***economic*** interest in the matter or in one of the parties. Disqualification is also required if the interest is held by the judge's spouse, domestic partner, parent, or child (wherever residing) or by any other member of the judge's family who resides in the judge's household. [CJC Rule 2.11(A)(3)] A judge must keep informed about his economic interests and must make a reasonable effort to keep informed about the economic interests of the judge's spouse or domestic partner and minor children residing in the judge's household. [CJC Rule 2.11(B)]

1) Definition of "Economic Interest"

For the purpose of this rule, the term "economic interest" means that a person owns more than a de minimis legal or equitable interest. A "de minimis interest" is an insignificant interest that raises no reasonable question regarding the judge's impartiality. [CJC, Terminology]

2) Exceptions to Definition

The following are excepted from the definition of "economic interest":

a) Mutual Funds

Ownership of an interest in a mutual fund or common investment fund that holds securities is not an economic interest in those securities unless: (1) the judge participates in the management of the fund; or (2) the proceeding could substantially affect the value of the interest.

EXAMPLE

Judge D's son owns 100 shares of Universal Diversified Fund, a mutual fund that owns common stocks of many different companies, including Ohio Chemicals, Inc. Judge D is assigned to hear a case in which Ohio Chemicals is the defendant. The outcome of the case will not significantly affect the value of the mutual fund shares, and Judge D does not participate in the management of the fund. Judge D is not disqualified.

b) Securities Held by Organization

Suppose that a judge is an officer, director, advisor, or other active participant in an educational, religious, charitable, fraternal, or civic organization. Suppose, further, that the organization owns securities of the XYZ Corporation, which

is a party to a case that the judge is assigned to hear. The judge's involvement with the organization does ***not*** give the judge an economic interest in the XYZ Corporation. The same is true if a judge's spouse, domestic partner, parent, or child is an officer, director, advisor, or other active participant in such an organization.

EXAMPLE
Judge E's wife is a vice president of P.E.O. International, a philanthropic organization that promotes educational opportunities for women. Among its many investments, P.E.O. owns 1,000 shares of common stock in Delta Coal & Steel Inc. Judge E is assigned to hear a case in which Delta is a party. Judge E is not disqualified.

c) Bank Deposits, Mutual Insurance Policies, and the Like
Suppose that a judge, or member of the judge's family, owns a deposit in the First Federal Bank. That does not disqualify the judge from hearing a case in which First Federal is a party, unless the proceedings could substantially affect the value of the deposit. The same rule applies to a deposit in a mutual savings association or credit union.

d) Government Securities
An interest in the issuer of government securities is not a disqualifying economic interest, unless the value of the securities could be substantially affected by the proceedings.

EXAMPLE
Judge G has invested a substantial part of her retirement nest egg in municipal bonds issued by the city of Springfield. Springfield is on the brink of fiscal collapse, and Judge G is assigned to hear a case in which the outcome could substantially affect the value of her bonds. Judge G is disqualified.

e. Involvement in the Proceeding
A judge must disqualify herself if the judge knows that she, her spouse or domestic partner, or a person within the third degree of relationship to either of them, or the spouse or domestic partner of such a person, is:

1) A ***party***, or an officer, director, general partner, managing partner, or trustee of a party;

2) A ***lawyer*** in the proceeding;

3) A ***person with more than a de minimis interest*** that could be substantially affected by the proceeding; or

4) Likely to be a ***material witness*** in the proceeding.

[CJC Rule 2.11(A)(2)]

1) Meaning of Third Degree of Relationship
Persons within the third degree of relationship are: great-grandparents, grandparents, parents, uncles, aunts, brothers, sisters, children, grandchildren, great-grandchildren, nieces, and nephews—in short, anyone related more closely than cousin. [CJC, Terminology]

f. Persons Making Contributions to Judge's Election Campaign
A judge who is subject to public election must disqualify himself if he knows, or learns through a timely motion, that a party, a party's lawyer, or the law firm of a party's lawyer has, within a designated number of prior years, made contributions to the judge's election campaign that exceed the jurisdiction's specified amount. [CJC Rule 2.11(A)(4)]

g. Public Statements of Judicial Commitment
A judge must disqualify himself if he, while a judge or a candidate for judicial office, has made a public statement other than in a court proceeding, judicial decision, or opinion, that commits or appears to commit the judge to reach a particular result or to rule in a particular way in the proceeding or controversy. [CJC Rule 2.11(A)(5)]

h. Remittal of Disqualification
The parties and their lawyers can remit (waive) all of the foregoing grounds of disqualification, except personal bias concerning a party or a party's lawyer. [CJC Rule 2.11(C)] The procedure for remittal is as follows:

1) The judge discloses on the record the ground for disqualification. The judge may then ask whether the parties and their lawyers wish to discuss waiver.

2) The lawyers consult privately with their respective clients.

3) All of the parties and their lawyers meet, outside the presence of the judge, and agree that the judge should not be disqualified. The agreement must be incorporated into the record.

4) If the judge is willing to do so, she may then proceed with the case.

D. EXTRAJUDICIAL ACTIVITIES

A judge must conduct his personal and extrajudicial activities to minimize the risk of conflict with the obligations of judicial office. [CJC Canon 3]

1. In General

Judges are encouraged to engage in appropriate extrajudicial activities. Nevertheless, when engaging in such activities, a judge must not:

a. Participate in activities that will interfere with the proper performance of the judge's duties; lead to frequent disqualification; or reasonably appear to undermine the judge's independence, integrity, or impartiality;

b. Engage in conduct that would reasonably appear to be coercive; or

c. Use court premises, staff, stationery, equipment, or other resources, except incidentally, for activities that concern the law, the legal system, or the administration of justice, unless such additional use is legally permitted.

[CJC Rule 3.1]

2. Governmental Hearings and Consultations

A judge must not appear voluntarily at a public hearing before, or otherwise consult with, an executive or legislative body or official, except on matters concerning the law, the legal system, or the administration of justice. However, this duty does not apply when the judge is acting pro se in a matter that involves the judge or his interests, or when the judge is acting as a fiduciary. Also, the duty does not apply in connection with matters about which the judge acquired knowledge or expertise in the course of her judicial duties. [CJC Rule 3.2]

EXAMPLES

1) Judge M is invited to testify before the State Assembly Committee on Criminal Justice concerning a proposed revision of the state's mandatory sentencing statute. Judge M may testify.

2) Judge N met privately with the Mayor of the city of Glenview to protest the city's plan to open a city dump adjacent to Judge N's property. As long as Judge N did not refer to his judicial position or otherwise use the prestige of his office (*see* B.4., *supra*), the meeting was proper because it concerned Judge N's own interests.

3. Testifying as Character Witness

A judge must not testify as a character witness, except when duly summoned to do so, i.e., by subpoena. Ordinarily, a judge should discourage parties from requiring his testimony as a character witness. [CJC Rule 3.3 and comment 1]

4. Governmental Committees and Commissions

A judge must not accept an appointment to a governmental committee or commission or other governmental position that does not relate to the law, the legal system, or the administration of justice. Such appointments are likely to be very time-consuming, can involve the judge in controversial matters, and can interfere with the independence of the judiciary. A judge may, however, represent a governmental unit on a ceremonial occasion, or in connection with a historical, educational, or cultural activity. [CJC Rule 3.4 and comments 1 and 2]

5. Participation in Educational, Religious, Charitable, Fraternal, or Civic Organizations and Activities

Subject to the general restrictions on extrajudicial activities, a judge may take part in activities sponsored by organizations or governmental entities concerned with the law, the legal system, or the administration of justice, and those sponsored by or on behalf of educational, religious, charitable, fraternal, or civic organizations not conducted for profit. [CJC Rule 3.7(A)] Included among such permissible activities are the following:

(i) Assistance in planning for fund-raising, and participation in management and investment of funds;

(ii) Solicitation of contributions for the organization, but ***only*** from members of the judge's family or from judges over whom the judge has no supervisory or appellate authority;

(iii) Membership solicitation, even though the dues or fees generated may be used to support the objectives of the organization, but only if the organization is concerned with the law, the legal system, or the administration of justice;

(iv) Appearing or speaking at, receiving an award at, being featured on the program of, and permitting her title to be used in connection with an organization's event (if the event is a fundraiser, such participation is permitted only if the event concerns the law, the legal system, or the administration of justice);

(v) Making recommendations to a fund-granting organization in connection with its programs and activities, but only if the organization is concerned with the law, the legal system, or the administration of justice; and

(vi) Service as an officer, director, trustee, or nonlegal advisor, unless it is likely that the organization will be engaged in proceedings that would ordinarily come before the judge, or will frequently be engaged in adversary proceedings in the court on which the judge sits or one under its appellate jurisdiction.

a. Encouraging Pro Bono Service
A judge may encourage lawyers to provide pro bono publico legal services. However, in providing such encouragement, a judge must not use coercion or abuse the prestige of her office. [CJC Rule 3.7(B), comment 5]

6. Affiliation with Discriminatory Organizations

A judge must not hold membership in an organization that practices ***invidious discrimination*** based on ***race, sex, gender, religion, national origin, ethnicity, or sexual orientation.*** [CJC Rule 3.6(A)] Even if the judge is not a member of such an organization, he must not use the organization's benefits or facilities if he knows or should know that it practices one of the prohibited forms of invidious discrimination. However, the judge may attend an event in a facility of the organization if his attendance is an isolated event that could not reasonably be perceived as an endorsement of the organization's practices. [CJC Rule 3.6(B)]

EXAMPLE
The Ashmount Golf and Tennis Club limits its membership to Caucasian males. Judge M is not a member of the club, but three times a week he eats lunch at the club as a guest of a member. Judge M is in violation of Rule 3.6(B).

a. Determination of "Invidious Discrimination"
An organization discriminates invidiously if it arbitrarily excludes from membership, on any of the bases enumerated above, persons who would otherwise be eligible for admission. An examination of the organization's membership rolls is not solely dispositive of the issue. It is important to determine how the organization selects its members. Other relevant factors include whether the organization is dedicated to the preservation of religious, ethnic, or cultural values of legitimate common interest to its members, or whether it is an intimate, purely private organization whose membership limitations could not constitutionally be prohibited. [CJC Rule 3.6, comment 2]

EXAMPLE
Judge G belongs to the Slovenian League, which limits its membership to all descendants (regardless of sex or race) of persons from Slovenia. The object of the organization is to preserve the culture and traditions of the Slovenian people. Judge G's membership is permissible.

b. Exercise of Religion Does Not Violate Rule
Membership in a religious organization as a lawful exercise of freedom of religion does not violate Rule 3.6. [CJC Rule 3.6, comment 4]

c. Immediate Resignation Required
Upon learning that an organization to which he belongs engages in invidious discrimination, a judge must resign immediately from the organization. [CJC Rule 3.6, comment 3]

7. Use of Nonpublic Information

A judge must not intentionally disclose or use nonpublic information acquired in his judicial capacity for any purpose unrelated to his judicial duties. [CJC Rule 3.5]

8. Financial, Business, or Remunerative Activities

Generally, a judge may not serve as an officer, director, manager, general partner, advisor, or employee of a business. However, a judge may hold and manage her own investments and those of her family and may manage or participate in a business closely held by the judge or a family member, or in a business primarily engaged in investing the financial resources of the judge or her family, unless such activity will:

(i) Interfere with the proper performance of the judge's duties;

(ii) Lead to frequent disqualification of the judge;

(iii) Involve the judge in frequent transactions or continuing business relationships with lawyers or other persons likely to come before the court on which the judge serves; or

(iv) Result in a violation of other provisions of the CJC.

[CJC Rule 3.11]

a. Divesting Problematic Interests
As soon as practicable without serious financial detriment, a judge must divest herself of investments and other financial interests that might require frequent disqualification or otherwise violate Rule 3.11. [CJC Rule 3.11, comment 2]

b. Minimizing Time Spent on Business Activities
It is improper for a judge to devote so much time to her business activities that it interferes with her judicial duties. [CJC Rule 3.11, comment 1]

9. Acceptance and Reporting of Gifts, Loans, Bequests, Benefits, or Other Things of Value

A judge must not accept gifts, loans, bequests, benefits, or other things of value if acceptance thereof is prohibited by law or would reasonably appear to undermine the judge's independence, integrity, or impartiality. [CJC Rule 3.13(A)]

a. Gifts Acceptable Without Reporting

If not prohibited by the requirements of Rule 3.13(A), the following may be accepted without being publicly reported:

1) Items of little intrinsic value (e.g., plaques or certificates);

2) Things of value from individuals whose appearance or interest in a case would require the judge's disqualification in any event—e.g., friends, relatives, or persons with cases pending or impending before the judge under Rule 2.11 (*see* C.18., *supra*);

3) Ordinary social hospitality;

4) Commercial or financial opportunities, including discounts and loans in the regular course of business, provided the same opportunities are available on the same terms to similarly situated persons who are not judges;

5) Rewards and prizes given to participants in drawings and contests that are open to persons who are not judges;

6) Scholarships and fellowships, provided they are available to similarly situated persons who are not judges, based on identical criteria;

7) Books, magazines, journals, and other resource materials supplied by publishers on a complimentary basis for official use; and

8) Gifts, awards, or benefits associated with the business or separate activity of a spouse, domestic partner, or other family member residing in the judge's household, but that incidentally benefit the judge.

[CJC Rule 3.13(B)]

b. Gifts that Must Be Reported

If not prohibited by the requirements of Rule 3.13(A), the following may be accepted but must be publicly reported if so required by Rule 3.15:

1) Gifts incident to a public testimonial;

2) Invitations to the judge and her spouse, domestic partner, or guest to attend without charge an activity related to the law, the legal system, or the administration of justice, or an event associated with any of the judge's educational, religious, charitable, fraternal, or civic activities permitted by the CJC, if the same invitation is

offered to nonjudges who are engaged in similar ways in the activity; and

3) Gifts, loans, bequests, or other things of value, if the source is a person who has come, or is likely to come, before the judge, or whose interests have come, or are likely to come, before the judge.

[CJC Rule 3.13(C)]

10. Fiduciary Activities

Generally, a judge must not serve as an executor, administrator, trustee, guardian, or other fiduciary. However, a judge may serve in such a capacity for a member of the judge's family, ***if*** the service will not:

(i) Interfere with the judge's judicial duties;

(ii) Involve the judge in proceedings that would ordinarily come before him; or

(iii) Involve the judge in adversary proceedings in the court on which the judge sits or one under its appellate jurisdiction.

[CJC Rule 3.8]

a. Financial Dealings as Fiduciary

The restrictions on financial dealings that apply to a judge personally also apply when the judge acts as a fiduciary. [CJC Rule 3.8(C)]

b. Conflicting Duties

When the duties of a fiduciary conflict with the judge's duties under the Code of Judicial Conduct, the judge should resign as fiduciary. [CJC Rule 3.8, comment 1]

EXAMPLE

Judge V is appointed as trustee of a fund for the use and benefit of his invalid brother. The trust fund includes common stock of several companies that frequently appear as litigants before Judge V. The judge must manage her investments in a way that minimizes disqualifications. If the trust fund would be harmed by divestiture of those stocks, Judge V should not serve as trustee. [*Id.*]

c. Fiduciary Who Becomes a Judge Must Comply with Rule

If a person serving as a fiduciary becomes a judge, she must comply with Rule 3.8 as soon as reasonably practicable, but no later than one year after becoming a judge. [CJC Rule 3.8(D)]

11. Service as Arbitrator or Mediator

A ***full-time*** judge must not act as an arbitrator, mediator, or private judge unless expressly authorized by law. This does not, of course, prevent the judge from participating in arbitration, mediation, or settlement conferences as part of her regular judicial duties. [CJC Rule 3.9 and comment 1]

12. Practice of Law

A ***full-time*** judge must not practice law. However, a judge may act pro se and may, without compensation, give legal advice to, and draft or review documents for, a member of her family. A judge must not, however, act as a family member's lawyer in any forum. [CJC Rule 3.10]

13. Compensation for Extrajudicial Activities

Reasonable compensation for a judge's extrajudicial activities (e.g., compensation for speaking, teaching, or writing) is permitted unless acceptance thereof would reasonably appear to undermine the judge's independence, integrity, or impartiality. Any such compensation must be reasonable and commensurate with the task performed. [CJC Rule 3.12 and comment 1]

14. Reimbursement of Expenses and Waiver of Fees or Charges

Unless otherwise prohibited by the CJC, a judge may accept reimbursement of necessary and reasonable expenses for travel, food, lodging, or other incidentals, or a waiver of fees or charges for registration or tuition, from sources other than the judge's employer, if such expenses are associated with the judge's participation in extrajudicial activities permitted by the CJC. Reimbursement for expenses may not exceed the actual costs reasonably incurred by the judge and, when appropriate, her spouse, domestic partner, or guest. A judge who accepts reimbursement of expenses or waivers of fees must comply with the public reporting requirements of Rule 3.15. [CJC Rule 3.14]

a. Factors Judge Should Consider in Determining Propriety of Reimbursement or Fee Waiver

A judge must assure herself that acceptance of reimbursement or a fee waiver would not appear to undermine her independence, integrity, or impartiality. In making this determination, a judge should consider the following:

1) Whether the sponsor is an accredited educational institution or bar association rather than a trade association or a for-profit entity;

2) Whether funding comes largely from numerous contributors rather than from a single entity and is earmarked for programs with specific content;

3) Whether the content is related to the subject matter of litigation pending or impending before the judge, or to matters likely to come before the judge;

4) Whether the activity is primarily educational rather than recreational, and whether the costs are reasonable and comparable to the costs of similar events sponsored by the judiciary or bar associations;

5) Whether information related to the activity and its funding sources is available upon request;

6) Whether the sponsor or source of funding is generally associated with parties or interests currently appearing or likely to appear in the judge's court, thus potentially requiring the judge's disqualification under Rule 2.11 (*see* C.18., *supra*);

7) Whether differing viewpoints are presented; and

8) Whether a broad range of judicial and nonjudicial participants are invited, whether a large number of participants are invited, and whether the program is designed specifically for judges.

[CJC Rule 3.14, comment 3]

15. Reporting Requirements

A judge must publicly report the amount or value of:

(i) Compensation received for extrajudicial activities as permitted by Rule 3.12 (*see* 13., *supra*);

(ii) Gifts and other things of value permitted by Rule 3.13 (*see* 9., *supra*), unless the value, alone or in aggregation with other items received from the same source during the same calendar year, does not exceed a dollar amount determined by other state law; and

(iii) Reimbursement of expenses and waiver of fees or charges permitted by Rule 3.14 (*see* 14., *supra*), unless the amount thereof, alone or in aggregation with other reimbursements or waivers received from the same source during the same calendar year, does not exceed a dollar amount determined by other state law.

[CJC Rule 3.15(A)]

a. Contents of Public Report

The public report must state the date, place, and nature of the activity for which the judge received compensation. Any gifts, loans, or other things of value must be described. The report must also state the source of reimbursement of expenses or waiver of fees or charges. [CJC Rule 3.15(B)]

b. Time for Making Report
Public reports must be made at least annually. However, reports of reimbursement of expenses and waiver of fees or charges must be made within 30 days after the conclusion of the event or program. [CJC Rule 3.15(C)]

c. Location of Filing
Public reports must be filed in the office of the clerk of the court on which the judge sits, or in some other office designated by law. If feasible, reports must also be filed on the court's website. [CJC Rule 3.15(D)]

E. JUDGES' POLITICAL AND CAMPAIGN ACTIVITIES

A judge or candidate for judicial office must not engage in political or campaign activity that is inconsistent with the independence, integrity, or impartiality of the judiciary. [CJC Canon 4] A person becomes a judicial candidate when she publicly announces her candidacy, declares or files with the election or appointment authority, authorizes or, where permitted, engages in solicitation or acceptance of contributions or support, or is nominated for election or appointment to office. [CJC Terminology]

1. Political and Campaign Activities of Judges and Judicial Candidates in General

Except where permitted by law or by Rules 4.2, 4.3, or 4.4 of the CJC (discussed *infra*), a judge or a judicial candidate must not:

(i) Lead or hold office in a political organization;

(ii) Make speeches on behalf of a political organization;

(iii) Publicly endorse or oppose a candidate for public office;

(iv) Solicit funds for, pay an assessment to, or contribute to a political organization or a candidate for public office;

(v) Attend or buy tickets for dinners or other events sponsored by a political organization or a candidate for public office;

(vi) Publicly identify herself as a candidate of a political organization;

(vii) Seek, accept, or use endorsements from a political organization;

(viii) Personally solicit or accept campaign contributions other than through a campaign committee authorized by Rule 4.4;

(ix) Use or permit the use of campaign contributions for private benefit;

(x) Use court staff, facilities, or other court resources in her campaign;

(xi) Knowingly, or with reckless disregard for the truth, make a statement that is false or misleading, or that omits facts necessary to make the communication considered as a whole not materially misleading;

(xii) Make a statement that would reasonably be expected to affect the outcome or impair the fairness of a matter pending or impending in any court; or

(xiii) In connection with cases, controversies, or issues that are likely to come before the court, make pledges, promises, or commitments that are inconsistent with the impartial performance of the adjudicative duties of judicial office.

[CJC Rule 4.1(A)]

a. Activities of Other Persons
A judge or candidate must take reasonable measures to ensure that other persons do not undertake on her behalf any of the prohibited activities set forth in 1., *supra*. [CJC Rule 4.1(B)]

b. No "Family Exception" to Prohibition Against Candidate Endorsement
A judge or candidate must avoid involvement in a family member's political activity or campaign for public office. Reasonable steps must be taken to avoid the implication that the judge or candidate endorses the family member. [CJC Rule 4.1, comment 5]

c. Participation in Caucus-Type Elections Is Permitted
Participation in a caucus-type election procedure does not constitute public support for or endorsement of a political organization or candidate. [CJC Rule 4.1, comment 6]

d. Responding to Statements by Others
A judicial candidate may make a factually accurate public response to false or misleading statements issued by her opponent, third parties, or the media, concerning, e.g., her integrity, experience, or fitness for office. [CJC Rule 4.1, comment 8] Although the candidate may respond directly, if the allegations to which she is responding relate to a pending case, it is preferable for someone else to respond. [CJC Rule 4.1, comment 9]

e. Pledges or Promises
To determine whether a candidate has made a pledge or promise, one must examine the totality of a statement. If a reasonable person would think that the candidate has ***specifically undertaken to reach***

a particular result, then a pledge, promise, or commitment has been made. Note, however, that a statement of personal views on legal, political, or other issues is not prohibited. [CJC Rule 4.1, comment 13] The United States Supreme Court has held that such "announce clauses"—i.e., prohibitions on judicial candidates announcing their views on disputed legal or political issues—violate the First Amendment. [Republican Party of Minnesota v. White, 536 U.S. 765 (2002)]

1) **Promises Related to Judicial Organization Permitted**
A judicial candidate may make campaign promises related to judicial organization, administration, and court management, e.g., promises to dispose of case backlogs or to begin court sessions on time. It is also permissible to pledge to take certain actions outside the courtroom, such as working to improve the jury selection system or advocating more funds to improve the physical facilities of a courthouse. [CJC Rule 4.1, comment 14]

2) **Responding to Media Questionnaires Requires Caution**
Candidates often receive questionnaires or interview requests from the media or from issue advocacy groups, in an effort to discern their views on disputed or controversial issues. Responses to such questions might be viewed as impermissible promises or pledges. Thus, candidates who respond to such inquiries should give assurances that they will keep an open mind and will carry out their adjudicative duties faithfully and impartially if elected. If a candidate does not respond, she may state that a response might be perceived as undermining her independence or impartiality, or might lead to frequent disqualification. [CJC Rule 4.1, comment 15]

2. Political and Campaign Activities of Judicial Candidates in Public Elections

A judicial candidate in a partisan, nonpartisan, or retention public election must:

(i) Act in a manner consistent with the independence, integrity, and impartiality of the judiciary;

(ii) Comply with applicable election, election campaign, and campaign fund-raising laws and regulations of the jurisdiction;

(iii) Review and approve the content of campaign statements and materials produced by the candidate or her campaign committee before their dissemination; and

(iv) Take reasonable measures to ensure that other persons do not undertake on her behalf activities that the candidate is prohibited from doing by Rule 4.1.

[CJC Rule 4.2(A)]

a. Certain Activities Permitted
Unless prohibited by law, a candidate for elective judicial office may, no earlier than a minimum amount of time (to be determined by other state law) prior to the first applicable primary, caucus, or general or retention election, do the following:

(i) Establish a campaign committee pursuant to Rule 4.4 (*see* 4., *infra*);

(ii) Speak on behalf of her candidacy through any medium;

(iii) Publicly endorse or oppose candidates for the same judicial office for which she is running;

(iv) Attend or purchase tickets for dinners or other events sponsored by a political organization or a candidate for public office;

(v) Seek, accept, or use endorsements from any person or organization ***other than a partisan political organization***; and

(vi) Contribute to a political organization or candidate for public office, but not more than a maximum dollar amount to be determined by each jurisdiction to any one organization or candidate.

[CJC Rule 4.2(B)]

1) Exception—Candidates in Partisan Elections May Be Identified with Political Organizations
Unless prohibited by law, a judicial candidate in a ***partisan*** election may, not earlier than a minimum amount of time designated by other state law prior to the first applicable primary, caucus, or general election:

a) Identify herself as a candidate of a political organization; and

b) Seek, accept, and use endorsements of a political organization.

[CJC Rule 4.2(C)]

3. Activities of Candidates for Appointive Judicial Office

A candidate for appointment to judicial office may communicate with the appointing or confirming authority, including any selection, screening, or

nominating commission. Also, a candidate may seek the endorsement of a person or organization, other than a partisan political organization. [CJC Rule 4.3]

4. Campaign Committees

A judicial candidate running in a public election may establish a ***campaign committee*** to manage and conduct her campaign. The candidate is responsible for ensuring that the committee complies with applicable law and applicable parts of the CJC. [CJC Rule 4.4(A)]

a. Solicitation Time Limits

The candidate must direct the committee not to solicit or accept contributions more than a certain amount of time (designated by other state law) prior to the applicable election, nor more than a designated number of days after the last election in which the candidate participated. [CJC Rule 4.4(B)(2)]

b. Campaign Contribution Limits

The candidate must direct the committee to solicit and accept only reasonable contributions, not to exceed the jurisdiction's specified limits. [CJC Rule 4.4(B)(1)]

c. Disclosure Requirements

The candidate must direct the committee to comply with any statutory requirements for disclosure and divestiture of campaign contributions, and to file with the appropriate authority a report that states the name, address, occupation, and employer of each person who has contributed an amount in excess of the applicable maximum. The report must be filed within a post-election time period designated by the jurisdiction. [CJC Rule 4.4(B)(3)]

5. Activities of Judges Who Become Candidates for Nonjudicial Office

When a judge becomes a candidate for a nonjudicial ***elective*** office, she must resign her judgeship unless applicable law permits her to retain her judicial office. If the judge becomes a candidate for a nonjudicial ***appointive*** office, she need not resign her judgeship, provided that she complies with all other provisions of the CJC. [CJC Rule 4.5]

F. APPLICATION OF THE CODE OF JUDICIAL CONDUCT

In jurisdictions that adopt the Code of Judicial Conduct, it applies to all persons who perform judicial functions, including magistrates, court commissioners, and special masters and referees. The Application section of the CJC contains a group of highly detailed exceptions that make various parts of the CJC inapplicable to several categories of retired and part-time judges. If your purpose in reading this book is to answer a specific question about the conduct of such a person, you should examine the Application section of the CJC with care. On the other

hand, if your purpose is to prepare for the Multistate Professional Responsibility Examination, we suggest that mastering the detailed exceptions is not the best use of your time, and that you be content with the following broad generalizations:

1. A ***retired judge*** subject to recall is allowed to serve as an arbitrator or mediator (except while serving as a judge) and is allowed to serve as a fiduciary. [CJC Application II]

2. ***Continuing part-time judges, periodic part-time judges***, and ***pro tempore part-time judges*** are exempt from many, but not all, of the CJC provisions that restrict outside activities and political activities. [*See* CJC Application III, IV, V]

III. CLIENT CONFIDENTIALITY

A. GENERAL RULE

As a general rule, a lawyer must not reveal any information relating to the representation of the client. A lawyer may, however, reveal such information if the client gives ***informed consent***, or if the disclosure is ***impliedly authorized*** to carry out the representation. [ABA Model Rule 1.6] The ethical duty is subject to some additional exceptions, discussed in D., *infra*. The rationale of the ethical duty is that

it encourages candor between the lawyer and the client, encourages the client to seek early legal advice, and helps the lawyer discover all of the information relevant to the client's legal problem. [*See* ABA Model Rule 1.6, comment 2; with respect to the ethical duty of confidentiality, *see generally* Restatement §§59 - 67]

B. RELATIONSHIP BETWEEN ETHICAL DUTY OF CONFIDENTIALITY AND ATTORNEY–CLIENT PRIVILEGE

The ethical duty of confidentiality is closely related to the attorney-client privilege, but the two doctrines differ in three important ways.

1. Compulsion vs. Gossip

The ***attorney-client privilege*** is an exclusionary rule of evidence law. It prevents a court, or other governmental tribunal, from using the twin powers of subpoena and contempt to compel the revelation of confidential communications between an attorney and a client. In contrast, the ***ethical duty of confidentiality*** prohibits an attorney from ***voluntarily*** revealing information relating to the representation of a client—it applies in every context where the attorney-client privilege does not apply. [*See* ABA Model Rule 1.6, comment 3]

EXAMPLES

1) During the course of a civil trial, lawyer L's adversary called her to the witness stand and posed questions about her confidential communications with her client. In this context, the rights and duties of L and her client are governed by the attorney-client privilege, not by the ethical duty of confidentiality.

2) When lawyer L was chatting with a friend at a cocktail party, the friend asked L for some information that L had gained in the course of representing one of her clients. In this context, the attorney-client privilege is irrelevant—the privilege does not apply at cocktail parties. Here, L is governed by the ethical duty of confidentiality.

2. Kinds of Information Covered

The ethical duty of confidentiality covers ***more*** kinds of information than the attorney-client privilege. The attorney-client privilege protects only ***confidential communications*** between the attorney and client (or the agents of either of them). The ethical duty, in contrast, covers not only confidential communications, but also ***any other information*** that the attorney obtains relating to the representation of the client, no matter what the source of that information. The ethical duty thus applies to ***all*** information that relates to the representation of the client, regardless of whether it is privileged, whether the client asked for it to be kept in confidence, and whether revealing it might harm or embarrass the client. For purposes of this outline, the term "confidential information" means all information protected by the duty of confidentiality expressed in ABA Model Rule 1.6.

EXAMPLE

Attorney A is representing client C in proceedings to challenge the will left by C's mother. While conducting her own investigation of the facts of the case, A learns from a third party that C is the illegitimate son of an itinerant book salesman. This information is not protected by the attorney-client privilege because A did not gain it through a confidential communication with C. Nevertheless, under ABA Model Rule 1.6, the information is covered by the ethical duty of confidentiality.

3. Disclosure vs. Use

The attorney-client privilege concerns only the disclosure of information. In contrast, the ethical duty of confidentiality concerns both the disclosure and use of information. An attorney can be disciplined for ***disclosing*** a client's confidential information without the client's informed consent (unless one of the exceptions to the ethical duty is applicable) [ABA Model Rule 1.6(a)], or for ***using*** confidential information to the disadvantage of a client, former client, or prospective client, without the affected client's informed consent. [ABA Model Rules 1.8(b), 1.9(c), 1.18(b)]

C. SUMMARY OF ATTORNEY-CLIENT PRIVILEGE

Because the ethical duty of confidentiality is so closely related to the attorney-client privilege, the following is a brief summary of the main features of the privilege. [*See* Restatement §§68 - 86—restates the law of attorney-client privilege]

1. Basic Rule

The attorney-client privilege prohibits a court or other governmental tribunal from compelling the revelation of confidential communications between an attorney (or an attorney's agent) and a client (or a client's agent) if the subject of the communication concerns the professional relationship between the attorney and the client.

2. Client

A "client" means a person or entity that seeks legal services from an attorney. The privilege covers preliminary communications leading up to an attorney-client relationship, even if no such relationship develops. [*See also* ABA Model Rule 1.18—duty of confidentiality to a prospective client]

EXAMPLE

H wants to hire a lawyer to obtain a dissolution of his marriage. After speaking in confidence with lawyer L about his marital problems, H decides not to hire L as his lawyer. Even though no attorney-client relationship ultimately develops between H and L, the attorney-client privilege protects what H told L in confidence.

a. Corporate Clients

When the client is a corporation, the privilege covers communications between the lawyer and a high-ranking corporate official. It also covers communications between the lawyer and another corporate employee if the following conditions are met:

1) The employee communicates with the lawyer ***at the direction of the employee's superior***;

2) The employee knows that the ***purpose of the communication is to obtain legal advice for the corporation***; and

3) The communication concerns a ***subject within the scope of the employee's duties to act*** for the corporation.

[*See* Upjohn Co. v. United States, 449 U.S. 383 (1981)]

3. Attorney

An "attorney" means a person who is authorized (or whom the client reasonably believes to be authorized) to practice law in any state or nation. However, for the privilege to apply, the attorney must be acting as an attorney—not in some other capacity, such as a friend, business advisor, or member of the family.

4. Communication

The term "communication" covers information passed from the client to the attorney and from the attorney to the client. It also covers information passed to or from the agents of either the attorney or the client.

EXAMPLE

Whitney Corp. hires attorney A to represent it in a dispute over the construction of a nuclear power plant. A hires structural engineer E to assist her on the technical aspects of the case. At A's direction, E talks with F, the chief engineer of Whitney Corp., to find out certain facts about the case. E's discussion with F is covered by the attorney-client privilege.

a. Mechanical Details of Relationship

Usually the attorney-client privilege does not cover the mechanical details of the attorney-client relationship, such as the identity of the client, the fee arrangement between the attorney and client, and the bare fact that the attorney is acting for the client. But these mechanical details can be protected by the privilege if revealing them is tantamount to revealing a privileged communication. [*See* Christopher Mueller & Laird Kirkpatrick, Evidence §5.19 (6d ed. 2018)]

EXAMPLE

X came to lawyer L's office and asked to employ L in a confidential matter. X then said that he was the hit and run driver in the car wreck reported on the front page of today's newspaper. X asked L to negotiate with the authorities for him, but not to reveal his identity without first getting X's specific permission. Later, the parents of the victim in the hit and run brought a wrongful death action against a John Doe defendant. They subpoenaed L and asked her to reveal the identity of the person who had consulted her about the hit and run. A court cannot compel L to disclose X's identity; the attorney-client privilege protects it because to reveal it would be tantamount to revealing X's statement that he was the hit and run driver. [*See* Baltes v. Doe I, 4 ABA/BNA Lawyer's Manual on Professional Conduct 356]

b. Preexisting Documents and Things

The attorney-client privilege covers both oral and written communications. However, the client cannot protect a preexisting document or thing from discovery simply by turning it over to the attorney. If the document or thing would be discoverable in the client's hands, it is equally discoverable in the attorney's hands.

EXAMPLES

1) Client C hires attorney A to defend her in a breach of contract case. C turns over to A her entire file of records relating to the contract. If the records would be discoverable when in the possession of C, they are equally discoverable when in the possession of A.

2) D tells his lawyer, L: "I just shot X, and I threw the revolver in the trashcan behind my apartment." The revolver itself is not privileged, but D's communication with L about the revolver is privileged. [California v. Meredith, 29 Cal. 3d 682 (1981)] L's knowledge of the whereabouts of the revolver is privileged. If L simply looks in the trashcan to confirm D's story, D can invoke the privilege and prevent L from testifying about what he saw. [*Id.*] L has no legal or ethical duty to retrieve the revolver from the trashcan. Furthermore, absent D's informed consent, L must not tell anyone where the revolver is. [ABA Model Rule 1.6] If L retrieves the revolver from the trashcan, he may keep it long enough to obtain from it any information that may be useful in D's defense. Then L must turn it over to the proper authorities. [California v. Meredith, *supra;* State v. Olwell, 394 P.2d 681 (Wash. 1964)] By removing the revolver from the trashcan, L has destroyed a valuable piece of evidence—the incriminating ***location*** of the revolver. L's action requires a compromise between the need to protect privileged communications and the need for relevant evidence. The compromise reached in *Meredith* and *Olwell* is as follows: The trier of fact will be told

where the revolver was found, but the trier of fact will not be told that L was the source of that information. For example, L and the prosecutor can simply stipulate that the jury at D's trial will be informed of the location of the revolver, without telling them the source of that information. However, if L retrieves the revolver from the trashcan and hides or destroys it, L may face criminal liability for tampering with evidence, and L is also subject to professional discipline. [*In re* Ryder, 263 F. Supp. 360 (E.D. Va. 1967)]

5. "Confidential" Defined

To be covered by the attorney-client privilege, a communication must be "confidential"; it must have been made by a means not intended to disclose the communicated information to outsiders, and the communicating person must reasonably believe that no outsider will hear the contents of the statement.

a. Presence of Third Party

The presence of a third party will not destroy the confidentiality ***if*** the third party was present to help further the attorney-client relationship. However, the third party need not play a direct role in the communication and may be present because of the client's psychological needs (e.g., a family member accompanying the client). [Restatement §70, comment f]

EXAMPLE

Five persons were present during an office conference between Client and Attorney. In addition to Client and Attorney, the persons present were Client's accountant (who was there to help explain Client's books of account), Attorney's law clerk (who was there to assist Attorney in drafting some interrogatory answers), and Attorney's legal secretary (who was there to take dictation). The presence of the accountant, the law clerk, and the secretary does not destroy the confidentiality.

COMPARE

During a recess in trial, Attorney and Client discussed Client's intended testimony in a crowded courthouse corridor where bystanders could obviously overhear. This conversation is not confidential for purposes of the attorney-client privilege. Thus, the privilege does not bar examination of either Client or Attorney regarding the conversation.

b. Eavesdroppers

In days gone by, the presence of an unsuspected eavesdropper was sometimes held to destroy the confidentiality of a communication. Under modern evidence law, that is no longer true; an eavesdropper can be prohibited from testifying about a confidential communication.

6. Client Is Holder of Privilege

The attorney-client privilege exists for the benefit of the client, not for the benefit of the attorney. Therefore, the client is the "holder" of the privilege—i.e., the client is the one who can claim or waive the privilege.

a. Waiver of Privilege

A waiver consists of a failure to claim the privilege when there is an opportunity to do so, or the intentional revelation of a significant portion of the privileged communication.

EXAMPLE

Client C shows his next-door neighbor the first two pages of a three-page privileged letter. In a later civil case, C's adversary can compel production of the entire letter. C has waived the privilege.

1) Client Puts Legal Services at Issue

The client may also waive the privilege by asserting a claim or defense that puts the legal services at issue in the case. For example, where a defendant appeals a criminal conviction on the basis of ineffective assistance of counsel at trial, the communications between the defendant and the trial attorney are not privileged. [Restatement §80]

b. Lawyer's Duty to Invoke Privilege

If the client has not waived the privilege, and if someone tries to obtain privileged information when the client is not present, the lawyer must claim the privilege on the client's behalf.

EXAMPLE

Lawyer L represents client C in a civil case. On a day when C is not present in court, C's adversary calls L to the witness stand and poses questions about confidential communications between C and L. L must claim the privilege on C's behalf.

7. Duration of Privilege

The attorney-client privilege continues indefinitely. Termination of the relationship, even for cause, does not terminate the privilege. The privilege even survives the death of the client. [Swidler & Berlin v. United States, 524 U.S. 399 (1998)] Thus, a lawyer has a continuing obligation to assert the privilege on behalf of a client who has died, subject to exceptions relating to the deceased's disposition of property. [Restatement §77, comment c]

8. Exceptions to Privilege

Modern evidence law provides several ***exceptions*** to the attorney-client privilege.

a. The privilege does not apply if the client seeks the attorney's services ***to engage in or assist a future crime or fraud***. [*See* Restatement §82]

b. The privilege does not apply to a communication that is ***relevant to an issue of breach*** (by either the attorney or the client) ***of the duties arising out of the attorney-client relationship***. [*Id.* §83]

c. The privilege does not apply ***in civil litigation between two persons who were formerly the joint clients of the attorney***. [*Id.* §75(2)]

d. The privilege does not apply in a variety of situations in which the attorney can furnish evidence about the ***competency or intention of a client who has attempted to dispose of property by will or inter vivos transfer***.

9. Related Doctrine of Work Product Immunity

Generally, material prepared by a lawyer for litigation or in anticipation of litigation is immune from discovery or other compelled disclosure unless the opposition shows a substantial need for the material and an inability to gather the material without undue hardship. A lawyer's mental impressions or opinions are immune from discovery or compelled disclosure regardless of the opposition's need unless the immunity has been waived. [*See* Restatement §§87 - 93]

D. ETHICAL DUTY OF CONFIDENTIALITY AND ITS EXCEPTIONS

As explained previously (*see* B.1., *supra*), the ethical duty of confidentiality applies in every context in which the attorney-client privilege does not apply. The ethical duty also covers a broader range of information than the privilege. Finally, the ethical duty concerns not only the disclosure of information, but also the use of information to the disadvantage of a client, a prospective client, or a former client.

1. Duty Not Destroyed by Presence of Third Party

Unlike the attorney-client privilege, the presence of a nonprivileged third person does not necessarily destroy an attorney's duty of confidentiality. Confidential information remains confidential even if it is known to others, ***unless the information becomes generally known***. Whether information is generally known depends on all the surrounding circumstances, but information is ***not generally known*** when it can be obtained only by means of ***special knowledge or substantial difficulty or expense***.

2. Exceptions to the Duty of Confidentiality

The ***exceptions*** to the ethical duty are discussed separately in the following paragraphs.

a. Client's Informed Consent

An attorney may reveal or use confidential information if the client gives informed consent. [ABA Model Rule 1.6(a)] Remember that "informed

consent" means that the client agrees to a proposed course of action after the lawyer has adequately explained the risks and reasonable alternatives. [ABA Model Rule 1.0(e)]

EXAMPLE

Attorney A is representing defendant D in an armed robbery case. D reluctantly tells A that at the time of the alleged robbery, D was 10 miles away visiting a house of prostitution, and that at least five witnesses can vouch for his presence there. A may disclose and use this embarrassing information in the defense of the armed robbery case if D gives informed consent.

b. Implied Authority

An attorney has implied authority from the client to use or disclose confidential information when appropriate to carry out the representation—unless, of course, the client gives specific instructions to the contrary. [ABA Model Rule 1.6(a)]

EXAMPLES

1) Lawyer L represents client A in negotiating a construction contract. Unless A instructs L to the contrary, L has implied authority to disclose confidential information about A's business if that will serve A's interests in the negotiation. [ABA Model Rule 1.6, comment 5]

2) Lawyer M represents client B in litigation. Unless B instructs M to the contrary, M has implied authority to disclose confidential information in a fact stipulation if that will serve B's interests in the litigation. [*Id.*]

3) Lawyer N is drawing up a will and a trust agreement for client C. Unless C instructs N to the contrary, N has implied authority to discuss C's confidential information with other lawyers in N's firm if that will serve C's interests. [*Id.*]

4) Lawyer O is representing client D in a bankruptcy case. Unless D instructs O to the contrary, O has implied authority to allow her paralegal, her law clerk, her legal secretary, and the law firm's copy-machine operator to have access to D's confidential business papers. However, O must take reasonable steps to assure that those employees preserve the confidentiality of the information. [ABA Model Rule 5.3; ABA Formal Op. 95-398 (1995)]

5) Lawyer Q is representing X Corp. in secret merger negotiations with Y Corp. Secrecy is vital because if word leaks out, the stock prices of the two companies will move apart, making the merger impossible. On one knotty issue, Q seeks the informal, uncompensated advice of his friend,

lawyer R, a merger expert in a different law firm. Q poses the issue to R in the form of a hypothetical that does not identify either X Corp. or Y Corp. by name. Unfortunately, Q is careless in posing the hypothetical, which allows R to deduce the identities of X Corp. and Y Corp. Q is subject to discipline for breaching the duty of confidentiality. A lawyer may use a hypothetical to obtain advice from a fellow lawyer for the benefit of the client, but the hypothetical must be discreet enough to preclude any reasonable chance that the fellow lawyer will be able to deduce the identity of the client or the situation at hand. [ABA Model Rule 1.6, comment 4; ABA Formal Op. 98-411]

c. Disclosure to Prevent Death or Substantial Bodily Harm

ABA Model Rule 1.6(b)(1) permits a lawyer to reveal the client's confidential information to the extent that the lawyer reasonably believes necessary to prevent ***reasonably certain death or substantial bodily harm***. Note that the exception applies to death or bodily harm whatever the cause; it need not be caused by the client, and the cause need not be a criminal act. Notice also that the death or bodily harm need not be imminent—it need only be reasonably certain. Finally, notice that the exception gives the lawyer ***discretion*** to disclose the confidential information; it does ***not require*** disclosure. Some states, however, do require disclosure.

EXAMPLES

1) Kidnapper K is in custody pending trial, and he hires attorney A to defend him against a charge that he kidnapped and murdered victim V. K tells A in confidence where he buried V's body. This is a completed crime—disclosure of K's secret could not prevent death or substantial bodily harm to anyone. If A reveals K's secret, A will be subject to discipline.

2) Kidnapper J telephones attorney B and asks for B's legal advice. J tells B in confidence that he has kidnapped victim U, that he has her bound and gagged in the back of his van, and that he is on the road to Lonesome Pine, where he plans to hold U for ransom. The legal advice J seeks from B is whether the penalty for murder is more serious than the penalty for kidnapping for ransom. B promises to call J back in a few minutes. B then telephones the police, tells them the situation, and tells them that J is on the road to Lonesome Pine. B's conduct is proper in light of the reasonably certain risk of death or substantial bodily injury to U.

d. Disclosure to Prevent or Mitigate Substantial Financial Harm

A lawyer may reveal the client's confidential information to the extent necessary to prevent the client from committing a crime or fraud that is

reasonably certain to result in ***substantial financial harm*** to someone, if the client is using or has used the lawyer's services in the matter. The same is true if the client has already acted, and the lawyer's disclosure can prevent or mitigate the consequent financial harm. [*See* Restatement §67; ABA Model Rule 1.6(b)(2), (3)]

e. Dispute Concerning Attorney's Conduct

An attorney may reveal a client's confidential information to the extent necessary to protect the attorney's interests in a dispute that involves the conduct of the attorney. [ABA Model Rule 1.6(b)(5)] In using this exception, the attorney should: (1) reveal only what is necessary, (2) attempt to limit the disclosure to those who need to know it, and (3) obtain protective orders or take other steps to minimize the risk of unnecessary harm to the client. [ABA Model Rule 1.6, comment 14]

EXAMPLES

1) Attorney A represented client C in a child custody case. C told A in confidence about C's emotional difficulties, alcoholism, and inability to hold steady employment. These confidential disclosures made the task of representing C vastly more difficult and time-consuming than A had originally anticipated. C ultimately lost the child custody case. C then refused to pay A's legal fee, claiming that it was unreasonably high. If A is unable to settle the fee dispute amicably and has to sue C to collect the fee, A may reveal C's confidential disclosures to the extent necessary to prove why A's fee is reasonable under the circumstances. [ABA Model Rule 1.6(b)(5)]

2) Lawyer L defended client D in an arson case. D told L in confidence that he did burn the building, hoping to collect the fire insurance. After careful consideration, D followed L's advice and did not testify on his own behalf at the trial. Furthermore, L refused to call two alibi witnesses whose testimony L knew would be false. D was convicted. D then sued L for legal malpractice. In defending against D's malpractice claim, L may reveal as much of D's confidential disclosures as is necessary to prove why L did not present the testimony of D and the two alibi witnesses. [*Id.*]

3) In the arson example described above, instead of suing L for malpractice, D filed a complaint with the state bar, accusing L of incompetence in the conduct of the trial. At the disciplinary hearing, L may reveal as much of D's confidential disclosures as is necessary to prove why L did not present the testimony of D and the two alibi witnesses. [*Id.*]

4) Client T hired attorney Y to help him form a limited partnership venture for real estate investments. T furnished Y with confidential data for Y to use in preparing financial statements and other documents needed

in connection with the sale of the partnership shares. Unbeknownst to Y, some of the confidential data was fraudulent, and T's partners lost their investments as a consequence. Two of the partners confronted Y and accused him of being knowingly involved in the fraud. Y ***may*** reveal enough of T's confidential information to convince the partners that Y did not know that the data was fraudulent, even though Y has not yet been formally charged with a criminal or civil wrong or a disciplinary violation. [*See* ABA Model Rule 1.6, comment 10] This illustrates the doctrine called "preemptive self-defense." [*See* Hazard & Hodes, §10.37]

f. Disclosure to Obtain Legal Ethics Advice

A lawyer may disclose enough of the client's confidential information as is necessary to obtain legal ethics advice for the lawyer. [ABA Model Rule 1.6(b)(4)]

EXAMPLE

Client C came to attorney A's office carrying a mysterious package about the size of a shoebox. C explained that federal narcotics agents were looking for C in connection with the illegal importation of a significant quantity of uncut heroin; C told A that he had no connection with any heroin or any other drug trade. A agreed to represent C, and he asked C for a $5,000 advance on attorneys' fees. C replied that he had no ready cash, but that he would entrust A with the mysterious package, assuring A that its contents were worth much more than $5,000. A was uncertain about his ethical obligations in this situation so he excused himself, went to another room, and telephoned T, his old legal ethics professor. After disclosing enough facts to give T the essence of the problem—but not enough to disclose C's identity or the precise circumstances—A asked T for legal ethics advice. A's disclosure was proper. [*Id.*]

g. Disclosure to Detect and Resolve Conflicts of Interest

When a lawyer changes firms, when two firms merge, or when a law practice is being purchased, lawyers may disclose limited client information (e.g., client names and a brief summary of the general issues involved) in order to detect and resolve conflicts of interest, subject to four conditions: (1) the disclosure may be made only after substantive discussions regarding the new relationship have occurred; (2) the disclosure must be limited to the minimum necessary to detect any conflicts of interest; (3) the disclosed information must not compromise the attorney-client privilege or otherwise prejudice the clients; and (4) the disclosed information may be used only to the extent necessary to detect and resolve any conflicts of interest. [ABA Model Rule 1.6(b)(7) and comments 13 and 14]

h. Disclosure Required by Law or Court Order

ABA Model Rule 1.6(b)(6) permits a lawyer to reveal her client's confidential information to the extent that she is required to do so by law or court order.

EXAMPLES

1) Suppose that a federal anti-terrorism statute arguably requires lawyer L to reveal the whereabouts of client C, who is suspected of illegal entry into the United States. If L knows of C's whereabouts only because of a confidential communication from C, the information is protected by both the attorney-client privilege and the ethical duty of confidentiality. L must first determine whether the anti-terrorism statute purports to supersede the privilege and ethical duty. [*See* ABA Model Rule 1.6, comment 12] If L concludes that it does, she must next disclose the situation to C because this is the kind of vital information that a lawyer must communicate to a client. [*See* ABA Model Rule 1.4(a)(3)] If L cannot find a nonfrivolous ground for challenging the validity or applicability of the statute, ABA Model Rule 1.6(b)(6) permits her to reveal the information about C's whereabouts. [*See* ABA Model Rule 1.6, comments 12 and 13]

2) In the situation described in 1), above, suppose that a federal district judge is considering whether to order L to disclose C's whereabouts. Absent C's informed consent to the disclosure, L should assert all nonfrivolous grounds for not disclosing the information. If the court orders disclosure, L should consult with C about an appeal. If no appeal is taken, or if the order is upheld on appeal, then ABA Model Rule 1.6(b)(6) permits L to reveal the information about C's whereabouts. [*Id.*]

3. Protecting Confidential Information

A lawyer must make reasonable efforts to protect a client's confidential information from inadvertent or unauthorized disclosure by the lawyer and those under the lawyer's supervision, and from unauthorized access by third parties. [ABA Model Rule 1.6(c)] The reasonableness of the lawyer's efforts is determined by considering such factors as the sensitivity of the client's information, the cost of additional safeguards, and the difficulty of implementing the safeguards. [ABA Model Rule 1.6, comment 18]

a. Office Sharing by Lawyers

Lawyers in office-sharing arrangements must take particular care to protect client confidences. This might include having separate waiting areas, refraining from leaving client files in shared spaces, installing privacy screens on computer monitors, and conducting regular training to remind staff of the importance of confidentiality. If the lawyers engage in occasional, informal consultations, they must take

care to protect client confidences, such as by speaking in carefully worded hypotheticals that protect client identity and other confidential matters. Failure to take these precautions may result in the second lawyer assuming obligations of confidentiality and give rise to conflicts problems. [ABA Formal Op. 507 (2023)]