INTRODUCTION

ABOUT THE MPRE

On the Multistate Professional Responsibility Examination (MPRE), you will be required to answer 60 multiple-choice questions in a two-hour period. Fifty of those questions will be scored, and 10 will be unscored pretest questions. The pretest questions are indistinguishable from the scored questions, so be sure to answer all of the questions. You should choose the best answer from the four answer choices in each question. Scores are based on the number of questions answered correctly. Points are not subtracted for incorrect answers.

The MPRE is administered on computers at Pearson VUE testing centers. You will be provided with an erasable note board and marker to use during the test session. The test session will terminate automatically at the end of the two-hour period.

HOW TO USE THIS BOOK

As you start to prepare for the MPRE, be aware that the exam is designed to test your ability to apply a set of detailed legal rules—similar to the legal rules you have learned in other courses in law school. You cannot pass the exam simply by having good morals and good manners. You must know the rules, and you must know how to apply them.

The best way to prepare for the exam is to complete all of your course assignments. This will include reading the outline, watching the lecture, and answering black letter law questions and practice questions in the online learning platform.

Here's what you'll find in this book:

Comprehensive Outline of the Law: This outline not only summarizes all the essential law, but it also contains many examples to illustrate less obvious points.

Optional Review Questions: These are short-answer questions that test your basic understanding of the concepts discussed in the outline. Check your answers against the answers we have provided, referring back to the pertinent section of the outline if you need more review of a particular topic.

Practice Sets: You should complete the practice questions in the online learning platform as assigned so you can get immediate feedback after each question. These questions are also available in this book if you prefer to practice offline.

Practice Exam: There is a full practice exam online, but these questions are also available in this book if you would prefer to practice offline.

Simulated MPRE: We strongly recommend that you take this exam online under timed conditions—even if you don't feel fully prepared. There is no substitute for experiencing the time pressures imposed by a pace of approximately two minutes per question.

Conviser Mini Review: This is a condensed version of the comprehensive outline, and you should use it as a final refresher before you take the exam.

INSTRUCTIONS FOR PRACTICE AND SIMULATED EXAMS

Although ***we suggest doing practice questions online*** to simulate the exam experience and get detailed score information, you may wish to practice offline. A full practice exam and a simulated exam follow. You have ***two hours*** to answer the questions in an exam. An answer sheet is provided after the questions portion of the exams.

The exams each contain 60 questions, as does the actual MPRE. On the actual exam, 50 questions are scored and 10 are nonscored "pretest" questions. Because ***you will not know which are the nonscored questions,*** you must answer all questions.

Your score will be based on the number of questions you answer correctly. It is therefore to your advantage to answer as many questions as you can. Use your time effectively. If a question seems too difficult, go on to the next one. Nevertheless, you should try to answer ***all*** questions because wrong answers are not deducted from the right answers.

As on the actual MPRE, a few questions in each practice exam will measure aspects of the ABA Code of Judicial Conduct. The remaining questions are designed so that disciplinary questions can be answered solely under the ABA Model Rules of Professional Conduct, and questions outside the disciplinary context should be answered under the general law governing lawyering, including statutory and common law.

Each question may include, among others, one of the following key words or phrases:

1. ***Attorney*** usually refers to the particular lawyer whose conduct is at issue. ***Lawyer*** in the same question usually refers to a different lawyer whose conduct is not at issue. Specific functional names for a lawyer, e.g., ***litigator, judge, managing partner, associate, prosecutor***, etc., may also be used if those names do not create ambiguity.

2. ***Subject to discipline*** asks whether the conduct described in the question would subject the lawyer to discipline under the provisions of the ABA Model Rules of Professional Conduct. In the case of a judge, the test question asks whether the judge would be subject to discipline under the ABA Model Code of Judicial Conduct.

3. ***May*** or ***proper*** asks whether the conduct referred to or described in the question is professionally appropriate in that it: (1) would not subject the lawyer or judge to discipline; (2) is not inconsistent with the Preamble, Comments, or text of the ABA Model Rules of Professional Conduct or the ABA Model Code of Judicial Conduct; and (3) is not inconsistent with generally accepted principles of the law of lawyering.

4. ***Subject to litigation sanction*** asks whether the conduct described in the question would subject the lawyer or the lawyer's law firm to sanction by a tribunal, such as punishment for contempt, fine, fee forfeiture, disqualification, or other sanction.

5. ***Subject to disqualification*** asks whether the conduct described in the question would subject the lawyer or the lawyer's law firm to disqualification as counsel in a civil or criminal matter.

6. ***Subject to civil liability*** asks whether the conduct described in the question would subject the lawyer or the lawyer's law firm to civil liability, such as claims arising from malpractice, misrepresentation, and breach of fiduciary duty.

7. ***Subject to criminal liability*** asks whether the conduct described in the question would subject the lawyer to criminal liability for participation in or aiding and abetting criminal acts, such as prosecution for insurance and tax fraud, destruction of evidence, or obstruction of justice.

8. When a question refers to discipline by the ***bar, state bar,*** or ***disciplinary authority,*** it refers to the appropriate entity in the jurisdiction with authority to enforce the rules of professional conduct.

9. The phrases ***client-lawyer relationship*** and ***lawyer-client relationship*** have the same meaning.

PROFESSIONAL RESPONSIBILITY

I. REGULATION OF THE LEGAL PROFESSION

A. SOURCES OF REGULATION

1. The State

The practice of law, like other professions and businesses, affects the public interest and is, therefore, subject to regulation by the states in the exercise of their police powers.

a. Courts

Because the practice of law is intimately connected with the administration of justice, the courts have the ***inherent*** power to regulate the legal profession in and out of court. The ultimate power thus rests with the ***highest court*** in the state, not with the state legislature. The highest court generally promulgates the ethics rules and oversees the discipline of lawyers.

1) Ethics Rules—The American Bar Association ("ABA") Model Rules and Judicial Code

Every state has professional ethics rules that govern the conduct of lawyers, and nearly every state has adopted some version of the ABA Model Rules of Professional Conduct. Likewise, most states have adopted some version of the ABA Model Code of Judicial Conduct.

2) Case Law

Every state has a body of judge-made case law concerning the rights and duties of lawyers. For example, the case law of a state may limit a lawyer's ability to enforce a fee contract after being fired by the client.

3) Rules of Court

State courts typically have rules of court with which lawyers must comply. For example, a rule of court may govern the lawyer's obligation to represent an indigent client at the court's request.

b. Bar Associations

Each state has an association of lawyers, commonly called the state bar association. A majority of states have an "integrated" bar system, meaning that every lawyer who is admitted to practice in the state must be a member of the state bar association. Common functions of a state bar association are to administer the state's bar examination, to provide continuing education programs for practicing lawyers, and to assist the state courts in regulating and imposing professional discipline on lawyers.

c. Congress and State Legislatures

Congress and the states have enacted statutes that govern some aspects of the practice of law. For example, the Sarbanes-Oxley Act imposes a mandatory reporting duty when a securities lawyer becomes aware of credible evidence that a client is materially violating a federal or state securities law. Also, a state evidence statute may define the scope of the attorney-client privilege.

2. The Federal System

a. Courts

A lawyer who practices in a federal court or agency is also constrained by federal statutes, federal case law, and the rules of that particular court or agency. Each federal court has its own bar, and a lawyer cannot practice before a particular court without first becoming a member of its bar.

b. Government Attorneys

An attorney for the federal government is subject to state laws and rules (as well as local federal court rules) governing attorneys in each state in which the attorney engages in her duties. [28 U.S.C. §530B(a)] Note that federal regulations interpret this statute as pertaining only to rules that prescribe ethical conduct for attorneys and that would subject an attorney to professional discipline (e.g., it does not apply to state rules of evidence or procedure, or state substantive law). [28 C.F.R. §§77.2, .3]

3. Regulation by Multiple States

A lawyer is subject to regulation by ***each*** state in which the lawyer is ***admitted*** to practice, regardless of where the lawyer actually practices law or where the lawyer's conduct occurred. [ABA Model Rule 8.5] If the rules of the states in which the lawyer is admitted are in conflict, choice of law rules apply (*see* C.4., *infra*).

B. ADMISSION TO THE PRACTICE OF LAW

In most states, to be admitted to the practice of law, a person must have successfully completed college and law school, passed a bar examination, and submitted to a bar admission committee an application for admission, which generally includes proof of good moral character. If the committee approves the application, the candidate is sworn in to practice before the highest court of the state. Note that each state has its own "bar" (roster of lawyers who are admitted to practice), and admission to the bar of one state does not, without more, entitle a person to practice law in any other state.

1. The Application

An applicant for admission to the bar must respond truthfully and completely

to inquiries made on the application or otherwise by the admissions committee.

a. False Statements

An applicant for admission to the bar, or a lawyer in connection with a bar admission application, must not ***knowingly*** make a false statement of material fact. [ABA Model Rule 8.1(a)]

EXAMPLE

When A applied for admission to the bar, he was required to fill out a personal information form that asked whether he had ever been convicted of a crime, received less than an honorable discharge from the military service, or been disciplined for dishonesty by any school. A knowingly failed to reveal that he had been suspended from college for a semester for cheating on an examination. A's failure to reveal the suspension is grounds for denying his bar application. If A's failure to reveal is discovered after A is admitted to the bar, A is subject to discipline. [*See* Carter v. Charos, 536 A.2d 527 (R.I. 1988)]

b. Failure to Disclose Information

Likewise, an applicant (or a lawyer in connection with an applicant's application for admission to the bar) must not: (1) ***fail to disclose*** a fact necessary to correct a misapprehension ***known*** by the person to have arisen in the matter, or (2) ***knowingly fail to respond*** to a lawful demand for information from an admissions authority. [ABA Model Rule 8.1(b)] This rule does not, however, require disclosure of information otherwise protected by the confidentiality provisions of the Rules of Professional Conduct. (*See* III., *infra*.)

EXAMPLE

Bar applicant B applied for admission using a forged certificate of graduation from the State University School of Law. Attorney A knew about B's forgery, and she knew that the forgery had not been detected by the bar admission officials. A must voluntarily tell the bar admission officials about the forgery.

2. Character and Fitness—"Good Moral Character"

The state has an interest in insuring that lawyers admitted to practice possess high moral standards and are mentally and emotionally stable.

a. Investigative Procedure

A bar applicant is usually required to fill out a detailed questionnaire and list a number of references as part of his application. (Some states also

require the applicant to submit fingerprints and photographs.) This information is then checked either by letter or personal investigation. If there is a question concerning the applicant's moral fitness, the applicant may be asked to appear at a hearing before the committee.

1) Burden of Proof and Duties of Applicant
The burden of coming forward and establishing good moral character is on the applicant. In addition, the applicant owes a duty to cooperate in reasonable investigations by the state bar and to make disclosures relevant to his fitness to practice law. [*In re* Anastaplo, 366 U.S. 82 (1961)]

2) Procedural Rights
A bar applicant has a right to due process in committee proceedings. Thus, he has the right to know the charges filed against him, to explain away derogatory information, and to confront critics. [Willner v. Committee, 373 U.S. 96 (1963)] An applicant who is denied admission on the basis of bad moral character is entitled to judicial review, usually by the state's highest court.

b. Conduct Relevant to Moral Character
All aspects of an applicant's past conduct that reflect on his honesty and integrity are relevant to an evaluation of moral character. The committee may consider any conduct or charges against the applicant—including those charges of which the applicant was acquitted—and any litigation to which the applicant was a party.

EXAMPLE
In one case, an applicant was denied admission because of personality traits that were deemed to make him unfit to practice. It was shown that the applicant was overly sensitive, rigid, and suspicious; was excessively self-important; and had a tendency to make false accusations against others and ascribe evil motives to them. [Application of Ronwin, 555 P.2d 315 (Ariz. 1976)]

1) Criminal Conduct
Mere conviction of any crime is not sufficient to deny the admission of an applicant to practice law. To cause disqualification of an applicant, the crime in question must involve ***moral turpitude***, such as a crime involving intentional dishonesty for the purpose of personal gain (e.g., forgery, bribery, theft, perjury, robbery, extortion) or a crime involving violence (e.g., murder, rape, mayhem). The nature of the offense and the motivation of the violator are also factors in determining whether moral turpitude exists.

a) "Adolescent Misbehavior" and Civil Disobedience
Examples of criminal behavior that do not rise to the level of moral turpitude include an applicant's arrest when he was a youth for a fistfight (adolescent behavior that does not necessarily bear on the applicant's current fitness to practice law) and an applicant's arrest for nonviolent civil disobedience. [*See* Hallinan v. Committee of Bar Examiners, 65 Cal. 2d 447 (1966)]

2) Rehabilitation
An applicant may still gain admission to the legal profession despite past conduct involving moral turpitude if he can demonstrate sufficient rehabilitation of his character and a present fitness to practice law. [*See, e.g.*, March v. Committee of Bar Examiners, 67 Cal. 2d 718 (1967)]

3) Concealment of Past Conduct Constitutes Moral Turpitude
False statements or concealment of facts in response to an inquiry by the admissions committee is itself evidence of sufficient lack of moral character to deny admission—even if the underlying conduct does not involve moral turpitude. [ABA Model Rule 8.1; *and see* Geoffrey C. Hazard, Jr. and W. William Hodes, The Law of Lawyering (hereafter "Hazard & Hodes") §66.04 (4th ed. 2015)]

4) Political Activity
An applicant who refuses to take the oath to uphold the state and federal Constitutions may be denied admission because there is a rational connection between this requirement and the practice of law. [Law Students Research Council v. Wadmond, 401 U.S. 154 (1971)] However, an applicant's mere membership in the Communist Party (when there is no showing that the applicant engaged in or advocated actions to overthrow the government by force or violence) is not sufficient to show a lack of moral character and deny the applicant admission to practice law. [Schware v. Board of Bar Examiners, 353 U.S. 232 (1957)]

3. Citizenship and Residency Are Not Valid Requirements

A state cannot require that a person be a United States citizen to be admitted to the practice of law; such a requirement violates the Equal Protection Clause of the United States Constitution. [*In re* Griffiths, 413 U.S. 717 (1973)] Similarly, a requirement that a bar applicant be a resident of the state in which he is seeking admission to practice law violates the Privileges and Immunities Clause of the Constitution and is, therefore, invalid. [Supreme Court of New Hampshire v. Piper, 470 U.S. 274 (1985)]

C. REGULATION AFTER ADMISSION

Upon admission to the bar, a person becomes a lawyer and is thus subject to the applicable law governing such matters as professional discipline, procedure and evidence, civil remedies, and criminal sanctions.

1. What Constitutes Professional Misconduct

a. Violation of the Rules of Professional Conduct

It is professional misconduct for a lawyer to: (1) violate or ***attempt*** to violate any of the Rules of Professional Conduct, (2) knowingly ***assist or induce another*** person to violate the Rules, or (3) ***use the acts of another person*** to commit a violation. [ABA Model Rule 8.4(a)]

EXAMPLE

Attorney A knows that it is a violation of the Rules to approach an accident victim at the scene of the accident and offer his legal services. A asks his brother-in-law T, a tow truck driver, to give A's business cards to people involved in the accidents that T is called to tow. A is guilty of professional misconduct for using the acts of another to violate a rule.

b. Certain Criminal Acts

A lawyer is subject to discipline for committing a criminal act that reflects adversely on his honesty, trustworthiness, or fitness as a lawyer in other respects. [ABA Model Rule 8.4(b)] To constitute professional misconduct, the crime must involve some characteristic that is relevant to the practice of law. For example, crimes involving dishonesty, breach of trust, substantial interference with the administration of justice, and most crimes involving violence reflect on the lawyer's fitness to practice law. Other crimes (e.g., solicitation of prostitution, single offense of drunk driving, possession of a marijuana cigarette), while punishable by law, do not necessarily trigger professional discipline.

EXAMPLES

1) Attorney A willfully failed to file a personal federal income tax return, knowing that she owed a substantial amount of tax. Even though A's conduct was not connected with her practice of law, A is subject to discipline.

2) Lawyer L is arrested for soliciting sexual acts from an undercover police officer whom L believed to be a prostitute. L is not subject to discipline because his criminal conduct does not show dishonesty, untrustworthiness, or unfitness to practice law.

c. Dishonesty, Fraud, Deceit, or Misrepresentation

Any conduct involving dishonesty, fraud, deceit, or misrepresentation

constitutes professional misconduct. [ABA Model Rule 8.4(c)] Examples of this type of misconduct, which need not rise to the level of a crime, include cheating on a bar examination [*see In re* Lamb, 49 Cal. 3d 239 (1989)—lawyer who impersonated her husband for exam was disbarred], plagiarism [*see In re* Lamberis, 443 N.E.2d 549 (Ill. 1982)—plagiarism in preparation of LL.M. thesis resulted in discipline], and defrauding one's own law firm by misusing expense accounts [*see In re* Siegel, 627 A.2d 156 (N.J. 1993); *and see* Hazard & Hodes, §69.05].

d. Conduct Prejudicial to the Administration of Justice
A lawyer is subject to discipline for engaging in conduct that is prejudicial to the administration of justice. [ABA Model Rule 8.4(d)] This rule is rarely invoked because nearly all of the offenses that would arise under it (e.g., falsifying evidence, improper delaying tactics, frivolous claims) are dealt with more specifically in the rules relating to litigation (*see* VI., *infra*).

e. Stating or Implying Ability to Improperly Influence 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)]

f. Assisting a Judge in Violation of Judicial Code
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)]

g. Harassment or Discrimination in Law Practice
A lawyer must not, ***in conduct related to the practice of law*** (e.g., representing clients, interacting with witnesses, operating and managing a law practice), engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status, or socioeconomic status. *Note:* A trial judge's finding that a lawyer exercised peremptory challenges on a discriminatory basis does not, on its own, establish a violation of this rule. [ABA Model Rule 8.4(g)]

1) Permitted Actions
This rule does not limit a lawyer's ability to:

a) Accept, decline, or withdraw from a representation in accordance with ABA Model Rule 1.16 (*see* II.G., *infra*), or limit her practice to members of underserved populations in accordance with the Rules of Professional Conduct;

b) Provide legitimate advice or advocacy that is otherwise consistent with the Rules of Professional Conduct; or

c) Promote diversity or inclusion (e.g., efforts aimed at recruiting, hiring, retaining, and advancing diverse employees).

2. Duty to Report Professional Misconduct

The legal profession prides itself on being self-policing. One element of a self-policing group is that each member of the group must be obligated to report misconduct by the other members. Therefore, a lawyer who ***knows*** that another lawyer has violated the Rules of Professional Conduct in such a way that it raises a ***substantial*** question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer must report the violation to the appropriate professional authority. Similarly, a lawyer who knows that a judge has violated the Code of Judicial Conduct in a way that raises a substantial question as to the judge's fitness for office must report the violation to the appropriate authority. [ABA Model Rule 8.3]

EXAMPLES

1) Attorney A learned that attorney B and accountant T had formed a tax service partnership in which T would do solely accounting work and B would do solely legal work. B has thus violated the disciplinary rule against partnerships with nonlawyers. (*See* H.2., *infra*.) A may report the violation, but she will not be subject to discipline if she fails to do so. A may decline to report B's violation because it concerns an arcane guild rule and does not indicate that B is dishonest, untrustworthy, or unfit to practice law. Other examples of violations that may not raise a substantial question as to a lawyer's fitness to practice include some types of improper solicitation and the improper use of nonlawyer assistants.

2) Lawyer M and lawyer N are good friends and golfing buddies. One day, they were golfing and mutually complaining about the tax laws; N mentioned that he does not worry about tax increases because he just underreports his income when the taxes go up. M must report N to the disciplinary authorities. Despite the fact that N was discussing his conduct in his personal affairs, it is illegal conduct involving dishonesty and must be reported. [*See* Hazard & Hodes, §68.04]

a. Key Definitions

"Knowledge" means actual knowledge, but it may be inferred from the circumstances. It has been held to mean more than mere suspicion. Thus, while a lawyer ***may*** report ***suspected*** misconduct, she ***must*** report ***known*** misconduct. "Substantial" means "a material matter of clear and weighty importance." [ABA Model Rules, Terminology]

b. Sanctions for Failure to Report Misconduct
A lawyer who fails to report this type of misconduct is herself subject to discipline for violating the rule requiring disclosure. [ABA Model Rule 8.3]

c. Exceptions—Confidential Information and Lawyers' Assistance Programs
This rule does not require disclosure of information protected by the confidentiality rules (*see* III., *infra*). Thus, if a lawyer learns about another lawyer's misconduct while representing the other lawyer or some other client, the lawyer has no duty to report the misconduct. Indeed, the lawyer would be subject to discipline for violating the confidentiality rules if he did report it. Moreover, there is no duty to disclose information gained by a lawyer or judge while serving as a member of an approved lawyers' assistance program that helps lawyers and judges with substance abuse problems. [ABA Model Rule 8.3(c) and comment 5]

EXAMPLES

1) Lawyer L sought legal advice from his mentor, lawyer M, as to what L should do about offering a certain piece of evidence in court. L made it plain that he was seeking advice from M in M's role as a lawyer. L told M that he knew the evidence was false. M, of course, advised L not to offer the evidence. A few months later, M learned that L had ignored her advice and had offered the evidence. Because M's knowledge of the matter is protected by the ethical duty of confidentiality, M must not report L's disciplinary violation.

2) Attorney X had long been aware that attorney Y, another partner in his firm, had a very serious drinking problem, but X did not have any proof that it was affecting Y's job performance. One day, X ran into Y as Y was on his way into court. Y was clearly drunk and could barely follow their conversation. X cautioned Y not to appear before the judge, but Y responded that he had tried cases when he was in worse shape than this. X must report Y to the disciplinary authorities. X did not learn of Y's substance abuse in the context of an approved lawyers' assistance program or an attorney-client relationship.

3. Disciplinary Process

"Professional discipline" means punishment imposed on a lawyer for breaking a rule of professional ethics.

a. Complaint
Disciplinary proceedings against a lawyer begin when a complaint

is made to the state disciplinary authority (usually the state bar). Complaints are often brought by aggrieved clients, but may also be brought by anyone with knowledge of the misconduct. Filing a complaint against a lawyer is considered privileged, and thus cannot be the basis of an action (e.g., defamation) by the lawyer against the complainant.

b. Screening

If the complaint is without merit, it might be dismissed by the grievance committee without ever involving the lawyer. If the complaint appears to have merit, the lawyer will be asked to respond to the charges. After further investigation, the committee will either dismiss the complaint or schedule a hearing. If the committee dismisses the complaint, the complainant does not have any right to appeal; the decision is final.

c. Hearing

1) Due Process Required

If there is a hearing on the complaint, the accused lawyer is entitled to procedural due process, which means that she has the right to counsel, to proper notice, to be heard and introduce evidence, and to cross-examine adverse witnesses. In addition, the hearing must be limited to the charges made in the complaint. [*In re* Ruffalo, 390 U.S. 544 (1968)]

2) Application of Other Rights

The exclusionary rules of criminal law do not apply to disciplinary proceedings. Thus, evidence obtained through an illegal search, for example, is admissible in a disciplinary proceeding. A lawyer may, however, invoke his Fifth Amendment privilege and refuse to answer questions at the hearing, and ***no disciplinary action can be taken*** against the lawyer if it is based solely on the claim of Fifth Amendment privilege. [Spevack v. Klein, 385 U.S. 511 (1967)]

3) Burden of Proof

The burden of proof is on the party prosecuting the charge, and most states require proof of the charge beyond a preponderance of the evidence (but less than beyond a reasonable doubt). Most states also require that only evidence admissible under the rules of evidence be considered; thus, inadmissible hearsay would be excluded.

4) Decision and Review

After the hearing, the grievance committee will either dismiss the charges or recommend sanctions. If sanctions are recommended or disciplinary action is actually taken, the lawyer is entitled to

review of the decision by the state's highest court. The burden is then on the lawyer to show that the committee's action or recommendation is not supported by the record or is otherwise unlawful.

d. Sanctions

The most common sanctions imposed on a lawyer found to have committed professional misconduct are:

1) ***Private or public reprimand or censure***, which is an acknowledgment of misconduct that goes on the lawyer's record with the disciplinary authorities;

2) ***Suspension*** of the lawyer's license to practice for a definite period of time, at the end of which the right to practice is automatically reinstated; and

3) ***Disbarment***, which is the ***permanent*** revocation of the lawyer's license to practice. A disbarred lawyer may, however, apply for readmission upon proof of rehabilitation.

Other sanctions available include probation, restitution, costs of the disciplinary proceedings, and limitations on the lawyer's practice. Which sanction is imposed generally depends on the severity of the misconduct and the presence or absence of mitigating or aggravating circumstances.

4. Choice of Law in Disciplinary Proceedings

If the conduct in question occurred in connection with a proceeding that is pending before a tribunal, the ethics rules of the jurisdiction in which the tribunal sits will be applied, unless the tribunal's rules provide otherwise. For any other conduct, the rules of the jurisdiction in which the conduct occurred will apply, but if the predominant effect of the conduct is in some other jurisdiction, that jurisdiction's rules will apply. A lawyer will ***not*** be subject to discipline if her conduct is proper in the jurisdiction in which she reasonably believes the predominant effect of her conduct will occur. [ABA Model Rule 8.5]

EXAMPLE

The legal ethics rules of East Dakota prohibit a lawyer from paying a "referral fee" to another lawyer as compensation for the referral of a legal matter. The legal ethics rules of West Dakota permit such referral fees if they are reasonable in amount and if the referred client consents. East Dakota lawyer Ed referred an estate planning client to West Dakota lawyer Wes. The client lives in West Dakota and most of her property is located there. With the client's consent, Wes sent Ed a reasonable referral fee. Wes is not subject to discipline in either state.

a. Conflicts of Interest—Choice of Law Agreements Permitted

As stated above, there is a safe harbor for a lawyer whose conduct conforms to the rules of a jurisdiction in which she "reasonably believes" the predominant effect will occur. Regarding conflicts of interest only, a lawyer and client may enter into an advance written agreement specifying the predominant effect jurisdiction, i.e., which jurisdiction's conflicts rules will apply to the matter. If the agreement is entered into with the client's informed consent and the client later tries to disqualify the lawyer from another matter or files a disciplinary complaint, the agreement may be considered by the court or disciplinary authority in determining whether the lawyer reasonably believed the jurisdiction's rules would apply. [ABA Model Rule 8.5, comment 5]

5. Effect of Sanctions in Other Jurisdictions

A suspension or disbarment in one jurisdiction does not automatically affect a lawyer's ability to practice in another jurisdiction.

a. Other States

Professional discipline imposed by one state is not necessarily binding on another. Most states recognize the determinations of lawyer misconduct by sister states, but they do not agree on the reasons for recognition. The preferred view is that sister states accept disciplinary action by one state as conclusive proof of the misconduct, but not of the sanctions imposed. [*See* Kentucky Bar Association v. Signer, 558 S.W.2d 582 (Ky. 1977); Florida Bar v. Wilkes, 179 So. 2d 193 (Fla. 1965); ABA Model Rule for Lawyer Disciplinary Enforcement 22E] Under this view, sister states are free to impose their own sanctions for the misconduct.

b. Federal Courts

Each federal court in which a lawyer is admitted to practice must make an independent evaluation of the lawyer's conduct. [Theard v. United States, 354 U.S. 278 (1957)] The fact that a lawyer has been disciplined by a state, however, is competent evidence in a federal proceeding and may in itself be sufficient to convince a federal court to impose a similar sanction. [*See In re* Rhodes, 370 F.2d 411 (8th Cir. 1967)]

6. Disability Proceedings

A lawyer who is incapacitated by an impairment such as substance abuse poses a particular risk of harm to clients, the public, and legal institutions. Most jurisdictions have disability proceedings, which result in the disabled lawyer's suspension from practice until she can show that rehabilitation has occurred. The procedures followed are generally the same as those of disciplinary proceedings, but provision may be made for psychiatric evaluation and diversion into a rehabilitation program. [Restatement of the Law (Third)

Governing Lawyers (hereinafter “Restatement”) ch. 1, topic 2, tit. C, introductory note]

D. UNAUTHORIZED PRACTICE AND MULTI-JURISDICTIONAL PRACTICE

The rule against unauthorized practice of law has two prongs: (1) a lawyer is subject to discipline for practicing in a jurisdiction where she is not admitted to practice, and (2) a lawyer is subject to discipline for assisting another person in the unlicensed practice of law. [ABA Model Rule 5.5(a)]

1. Unauthorized Practice by Lawyer

A lawyer who is admitted to practice law in one jurisdiction is not, without more, authorized to practice in any other jurisdiction. A lawyer is subject to discipline for practicing in a jurisdiction where she is not admitted to practice. [ABA Model Rule 5.5(a)] Except as allowed by that jurisdiction's laws or ethics rules, the unadmitted lawyer must not: (1) represent that she is admitted to practice in that jurisdiction, or (2) establish an office or other systematic or continuous presence for the practice of law in that jurisdiction. [ABA Model Rule 5.5(b)]

2. Permissible Types of Temporary Multi-Jurisdictional Practice

The nature of modern law and commerce requires many lawyers to practice across state lines. ABA Model Rule 5.5(c) recognizes this fact and provides that if a lawyer is admitted to practice in one state, and is not disbarred or suspended from practice in any state, then she may provide legal services in a second state ***on a temporary basis*** in four situations:

a. Association with Local Lawyer

A lawyer may practice on a temporary basis in a state in which she is not admitted if she associates a local lawyer who ***actively participates*** in the matter. [ABA Model Rule 5.5(c)(1)]

EXAMPLE

Attorney A is admitted to practice in State One only, and she works for a law firm that regularly represents a nationwide labor union. The union is trying to organize workers in State Two, and A is sent there to give legal advice to the union's organizers. With the union's consent, A associates local labor lawyer L and rents a temporary office near L's office. L works actively with A in handling legal problems arising from the union's organizing efforts. A's temporary practice in State Two is proper.

b. Special Permission to Practice in Local Tribunal

An out-of-state lawyer may request special permission from a local court, administrative agency, or other tribunal to handle a matter in that tribunal. [ABA Model Rule 5.5(c)(2)] In a court, such permission is commonly called admission "pro hac vice," which means admission for purposes of this

matter only. (The rules of many states require the out-of-state lawyer to associate local counsel as a condition of pro hac vice admission.) An out-of-state lawyer who reasonably expects to be admitted pro hac vice may engage in preliminary activities in the state, such as meeting with clients, reviewing documents, and interviewing witnesses.

EXAMPLE

Toxic tort lawyer L is admitted to practice in Oklahoma only. He has been retained by three Oklahoma clients to bring a class action on behalf of persons injured by a herbicide manufactured by a California defendant. L plans to file the class action in a California state court, and he reasonably expects to be admitted pro hac vice to handle the case in that court. It would be proper for L to take a two-week trip to California to interview other potential class representatives, even though he has not yet filed the case in California or been admitted pro hac vice.

c. Mediation or Arbitration Arising Out of Practice in Home State

A lawyer may mediate, arbitrate, or engage in another form of alternative dispute resolution in a state in which she is not admitted to practice if her services arise out of, or are reasonably related to, her practice in the state in which she is admitted. [ABA Model Rule 5.5(c)(3)]

EXAMPLE

Attorney A is admitted to practice in State One only. She represents a State One client in a contract dispute, and the contract states that all such disputes will be submitted to arbitration in State Two. It is proper for A to represent her client in the State Two arbitration, and the same would be true of a mediation or other form of alternative dispute resolution.

d. Other Temporary Practice Arising Out of Practice in Home State

ABA Model Rule 5.5(c)(4) is a catch-all category that permits a lawyer to temporarily practice out of state if the lawyer's out-of-state practice is reasonably related to the lawyer's home state practice.

EXAMPLE

Lawyer L is admitted to practice in State One only. He represents a State One client that buys up and revitalizes run-down shopping centers. That client asks L to travel to State Two to negotiate with the owner of a State Two shopping center, and to draft a purchase agreement that will satisfy the owner and that will be valid under the law of State Two. It would be proper for L to render those services in State Two.

e. Temporary Practice by Foreign Lawyers
A lawyer who is licensed and in good standing in a foreign jurisdiction may engage in temporary practice in the United States under circumstances similar to those described in a. - d., above. Furthermore, a foreign lawyer may provide legal services temporarily in the United States if the services are governed primarily by international law or the law of a foreign jurisdiction. [ABA Model Rule for Temporary Practice by Foreign Lawyers] Foreign lawyers who seek pro hac vice admission are subjected to greater scrutiny than United States lawyers. Even if a lawyer is so admitted, the judge has the discretion to limit the foreign lawyer's participation in the matter. [ABA Model Rule on Pro Hac Vice Admission]

3. Permissible Types of Permanent Multi-Jurisdictional Practice

A lawyer who is admitted in one United States or foreign jurisdiction, and who is not disbarred or suspended from practice in any jurisdiction, may open a law office and establish a systematic and continuous practice in a different jurisdiction in two narrowly limited situations:

a. Lawyers Employed by Their Only Client
Some lawyers are salaried employees of their only client, e.g., in-house corporate lawyers and lawyers employed by the government. They may set up a permanent office to render legal services to their employer in a state in which they are not admitted to practice, but if they want to ***litigate*** a matter in that state, they must seek admission pro hac vice. [ABA Model Rule 5.5(d)(1)]

EXAMPLE
Attorney A is admitted to practice in Maryland and Virginia. She is employed by General Motors ("GM"), which assigns her to be the legal advisor in the GM office in Idaho. A need not be admitted to practice in Idaho, but if she wants to represent GM in a suit pending in an Idaho court, she must seek admission pro hac vice.

1) Foreign Lawyers Advising on United States Law
A foreign lawyer practicing under this rule (e.g., serving as in-house counsel for a corporation) ***may not directly advise*** her client on the law of a United States jurisdiction. Rather, she must consult with a lawyer who is licensed by the relevant jurisdiction and base any advice to her client on advice she obtains from the local lawyer.

b. Legal Services Authorized by Federal or Local Law
In rare instances, federal or local law authorizes a lawyer to practice a restricted branch of law in a state in which he is not otherwise admitted to practice. [ABA Model Rule 5.5(d)(2)]

EXAMPLE
Lawyer L is admitted to practice law in New York, and he is admitted to prosecute patents in the United States Patent and Trademark Office, which is located in Washington, D.C. When L "retired" and moved to Florida, he did not become a member of the Florida bar; rather, he set up a Florida practice that is limited to patent prosecution in the Patent and Trademark Office. L does not handle other patent matters, such as patent licensing or patent infringement, and he does not practice any other kind of law. L's restricted practice in Florida is proper. [*See* Sperry v. Florida, 373 U.S. 379 (1963)]

4. Consequences of Multi-Jurisdictional Practice

A lawyer who is admitted to practice in only one jurisdiction but practices in another jurisdiction pursuant to 2. or 3., above, is subject to the disciplinary rules of both jurisdictions. [ABA Model Rule 8.5(a); comment 19 to ABA Model Rule 5.5] Furthermore, an in-house or government lawyer who practices under 3.a., above, may be subject to the second jurisdiction's client security assessments and continuing legal education requirements. [ABA Model Rule 5.5, comment 17]

5. Unauthorized Practice by Nonlawyers

A person not admitted to practice as a lawyer must not engage in the unauthorized practice of law, and a lawyer must not assist such a person to do so. [ABA Model Rule 5.5(a); Restatement §4]

a. General Considerations in Defining "Practice of Law"

Important considerations in determining whether the practice of law is involved include: (1) whether the activity involves legal ***knowledge and skill*** beyond that which the average layperson possesses; (2) whether the activity constitutes advice or services concerning ***binding legal rights*** or remedies; and (3) whether the activity is one ***traditionally*** performed by lawyers. [ABA, Annotated Model Rule of Professional Conduct 5.5 (9th ed. 2019)]

1) Activities Constituting Law Practice

Examples of activities that courts have found constitute law practice when done on behalf of another include: appearing in judicial proceedings; engaging in settlement negotiations; and drafting documents that affect substantial legal rights or obligations (e.g., contracts, wills, trusts). Preparing an estate plan is generally considered the province of lawyers, and some courts have also held that nonlawyer clinics on how to obtain a low-cost divorce constitute unauthorized practice.

2) Activities Not Constituting Law Practice

There are some activities that a nonlawyer may undertake that do

not constitute the practice of law. For example, state and federal agencies often permit nonlawyers, such as accountants, to appear before them representing clients. Also, while nonlawyers may not draft legal documents, they can act as scriveners, filling in the blanks on standard forms. Thus, real estate brokers, title insurance companies, and escrow companies are usually permitted to fill in the blanks on standard documents related to the sale of real property. Nonlawyers can also publish books or pamphlets offering general advice, including most do-it-yourself books and kits.

3) Tax Advice
Giving advice on tax ***law*** would probably constitute the unauthorized practice of law, but an accountant or other layperson may prepare tax returns and answer questions incidental to the preparation of the returns.

b. Consequences of Unauthorized Practice
A nonlawyer who engages in the unauthorized practice of law is subject to several sanctions, including injunction, contempt, and criminal conviction. [Restatement §4, comment a] A lawyer who assists in such an endeavor is subject to professional discipline.

c. Delegating Work to Nonlawyer Assistants
The rule stated above does not, of course, prohibit a lawyer from delegating tasks to a paralegal, law clerk, student intern, or other such person, including tasks related to client intake. But the lawyer must ***supervise*** the delegated work carefully and must be ***ultimately responsible*** for the results. In other words, the practice of delegating tasks to nonlawyer assistants must be ***carefully and astutely managed***. [ABA Model Rule 5.5, comment 2; ABA Formal Op. 506 (2023)]

EXAMPLES
1) Paralegal P is working under attorney A's supervision on a complex real estate transaction. P may write and sign letters on the law firm letterhead to make routine requests for information from banks, mortgage companies, and governmental agencies, provided that P indicates that she is a paralegal, not a lawyer. But P should not sign letters to clients, adversaries, opposing counsel, or tribunals; she may draft such letters, but they should be approved and signed by A. That helps assure that A is properly supervising P's work. [New Jersey Op. 611 (1988)]

2) Secretary S assists Lawyer L with various tasks related to client intake, including obtaining initial information about the matter and performing initial conflict checks. This assistance is proper provided that L has trained and

supervises S, that the tasks do not constitute the practice of law, and that all prospective clients are offered the opportunity to discuss the fee agreement and scope of representation with L. [ABA Formal Op. 506 (2023)]

d. Training Nonlawyers for Law-Related Work
A lawyer may advise and instruct nonlawyers whose employment requires a knowledge of the law—e.g., claims adjusters, bank trust officers, social workers, accountants, and government employees. [ABA Model Rule 5.5, comment 3]

e. Helping Persons Appear Pro Se
A lawyer may advise persons who wish to appear on their own behalf in a legal matter. [*Id.*]

EXAMPLE
Client C asked attorney A to represent her in a dispute with her landlord concerning the stopped-up plumbing in her apartment. After hearing C's explanation, A advised C that she would be able to handle the matter herself in small claims court at far less expense. A instructed C on how to obtain the proper forms for small claims court and gave her general advice on what facts to gather and how to prove her case. A's conduct is proper.

f. Assisting a Suspended or Disbarred Lawyer
A lawyer violates ABA Model Rule 5.5(a) if he assists a lawyer whose license has been suspended or revoked in practicing law. It is proper to hire a suspended or disbarred lawyer to do work that a layperson is permitted to do, but the suspended or disbarred lawyer must not be permitted to do any work that constitutes the practice of law.

E. RESPONSIBILITIES OF PARTNERS, MANAGERS, AND SUPERVISORY LAWYERS

1. Partners' Duty to Educate and Guide in Ethics Matters
The partners or managing lawyers of a law firm (and the supervisory lawyers in a governmental agency, business, or other group of lawyers) must make reasonable efforts to assure that the other lawyers adhere to the Rules of Professional Conduct. [ABA Model Rule 5.1(a); Restatement §11]

2. Duties of Direct Supervisor
A lawyer who directly supervises the work of another lawyer must make reasonable efforts to assure that the other lawyer adheres to the Rules of Professional Conduct. [ABA Model Rule 5.1(b)]

3. How Duties Are Fulfilled
The steps necessary to fulfill these two duties depend on the kind and size of the firm or other group. In a small private law firm, informal supervision and

occasional admonition may be sufficient. In a larger organization, more elaborate steps may be necessary. Some firms provide continuing legal education programs in professional ethics, and some firms have designated a partner or committee to whom a junior lawyer may turn in confidence for assistance on an ethics issue. [ABA Model Rule 5.1, comment 3]

4. Ethical Responsibility for Another Lawyer's Misconduct

A lawyer is subject to discipline for a disciplinary violation committed by a second lawyer if:

a. The first lawyer ***ordered*** the second lawyer's misconduct or ***knew about it and ratified it***; or

b. The first lawyer is a partner or manager or has direct supervisory responsibility over the second lawyer, ***and*** she knows about the misconduct at a time when its consequences can be avoided or mitigated and ***fails to take reasonable remedial action***.

[ABA Model Rule 5.1(c)]

EXAMPLES

1) Attorney A is not a partner in the M, N & O firm, but she is a senior associate and has been assigned direct supervisory responsibility for the work of junior associate J in the case of *Cox v. Fox*. A told J to interview Ms. Cox and to prepare her to have her deposition taken. In a fit of misdirected zeal, J advised Ms. Cox to testify to a patent falsehood. After the Cox deposition was taken, but while Ms. Cox was still available as a witness, A discovered what had happened. A made no effort to reopen the Cox deposition or otherwise remedy J's misconduct. A is subject to discipline.

2) In the *Cox v. Fox* example, above, suppose that M, a partner in the firm, is not J's supervisor and has no connection whatever with the *Cox v. Fox* case. In a casual lunchtime conversation with J, M learned that J had advised Ms. Cox to testify falsely at her deposition. M made no effort to rectify the consequences of J's misconduct. M is subject to discipline.

F. RESPONSIBILITIES CONCERNING NONLAWYER ASSISTANCE

1. Duty to Educate and Guide in Ethics Matters

Law firms, governmental and business law departments, and other groups of lawyers employ many kinds of nonlawyers—secretaries, investigators, paralegals, law clerks, messengers, and law student interns. Lawyers who work with such employees—whether those nonlawyers are within or outside the firm—must instruct them concerning the ethics of the profession and should be ultimately responsible for their work. [ABA Model Rule 5.3, comment 1]

2. Duty of Partners Respecting Nonlawyer Employees

The partners and managers in a law firm (and the supervisory lawyers in a governmental agency, business, or other group of lawyers) must make reasonable efforts to assure that the conduct of the nonlawyers is compatible with the obligations of the profession. [ABA Model Rule 5.3(a)]

EXAMPLE

Lawyer L hired secretary S without carefully checking her background. L put S in charge of his client trust fund account, but did not carefully supervise her bookkeeping procedures. S stole a substantial sum from the account. L failed to fire S even after he discovered her theft. L is subject to discipline for gross negligence. [*See In re* Scanlan, 697 P.2d 1084 (Ariz. 1985)]

3. Duties of Direct Supervisor Respecting Nonlawyer Employees

A lawyer who directly supervises the work of a nonlawyer employee must make reasonable efforts to assure that the conduct of the nonlawyer is compatible with the obligations of the profession. [ABA Model Rule 5.3(b); Restatement §11(4)]

EXAMPLE

Deputy Public Defender D directly supervises the work of her secretary, S, and her investigator, I. D must instruct S and I about the need to keep clients' information in confidence, and D must make reasonable efforts to assure that they do so.

4. Ethical Responsibility for Nonlawyer's Misconduct

A lawyer is subject to discipline in two situations when a nonlawyer does something that, if done by a lawyer, would violate a disciplinary rule. The lawyer is subject to discipline if:

a. The lawyer ***ordered*** the conduct ***or knew*** about it and ratified it; or

b. The lawyer is a partner or manager or has direct supervisory responsibility over the nonlawyer, ***and*** the lawyer knows about the misconduct at a time when its consequences can be avoided or mitigated and fails to take reasonable remedial action.

[ABA Model Rule 5.3(c)]

G. RESPONSIBILITIES OF A SUBORDINATE LAWYER

1. Duties Concerning Clear Ethics Violation

Orders from a supervisory lawyer are ***no excuse*** for clearly unethical conduct—a lawyer must follow the ethics rules even when acting under the

directions of another person. [ABA Model Rule 5.2; Restatement §12] However, the fact that a subordinate lawyer was acting on directions from a supervisor may be relevant in determining whether the subordinate had the ***knowledge*** that is required for some ethics violations. [ABA Model Rule 5.2, comment 1]

EXAMPLE
Partner P gave associate A a memorandum of fact and asked A to draft a complaint for fraud based on the information in the memorandum. A had no way to know whether the information in the memorandum was complete and truthful. A's lack of opportunity to gather the facts personally is relevant in deciding whether to discipline A for participating in the filing of a frivolous complaint.

2. Duties Concerning Debatable Ethics Questions

A subordinate lawyer does ***not*** violate the rules of professional conduct by acting in accordance with a supervisor's reasonable resolution of an ***arguable question*** of professional duty. When a debatable ethics question arises, someone must decide on a course of action, and that responsibility must rest with the supervisory lawyer. If the supervisor's judgment turns out to have been wrong, the subordinate lawyer should not be disciplined for doing what the supervisor directed. [ABA Model Rule 5.2 and comment 2]

EXAMPLE
Subordinate lawyer L was assisting supervisor S on a summary judgment motion in a products disparagement case. When drafting the reply memorandum on the motion, L stumbled across a new appellate decision in the controlling jurisdiction concerning libel and slander of persons. The new decision had not been cited by S and L's adversary. S and L's duty to call the new decision to the attention of the trial judge depends on whether it is "directly adverse" to their position. L argues that the law of products disparagement and the law of personal libel and slander are so closely related that the new decision must be considered "directly adverse." S, on the other hand, argues that the two bodies of law are similar only by crude analogy. On this debatable point of ethics, the responsibility for making the final decision rests with S, and L should not be disciplined for following S's instructions not to mention the new decision in the reply memorandum.

H. PROFESSIONAL INDEPENDENCE OF A LAWYER

1. Fee Splitting with Nonlawyers and Temporary Lawyers

Except as provided below, a lawyer must not share her legal fee with a nonlawyer. [ABA Model Rule 5.4(a); Restatement §10] The purpose of this rule is ill-defined, but it is said to help "protect the lawyer's professional independence of judgment." [ABA Model Rule 5.4, comment 1] Obviously,

the salaries of nonlawyer employees of a firm are paid with money earned as legal fees, but that is not regarded as "sharing" a fee. Furthermore, a firm can employ temporary lawyers through a placement agency without violating the fee-splitting rule.

EXAMPLE
Lawyer L wants to practice law part-time, doing work for law firms that need extra temporary help. L gives copies of her resume to LawTemp, Inc., a placement agency that is owned by nonlawyers. When law firms need extra help, they call LawTemp, which sends them resumes of several available lawyers. By this route, L obtains temporary work at a firm that agrees to pay her $100 per hour for her work and to pay LawTemp a "placement fee" equal to 5% of the total amount it pays to L. The law firm's bill to its client includes the amount the firm pays to L and the "placement fee" paid to LawTemp. This arrangement is ***proper***. [ABA Formal Op. 88-356 (1988)]

a. Death Benefits Permitted
The lawyers in a firm may agree that, when one of them dies, the others will pay a death benefit over a reasonable period of time to the dead lawyer's estate or to designated persons. [ABA Model Rule 5.4(a); Restatement §10]

EXAMPLE
The R, S & T firm set up a death benefit program. After a partner or associate dies, the firm will make monthly payments to her estate for three years after the death, each payment to equal 40% of her average monthly income during the year before death. The death benefit program is proper.

b. Compensation and Retirement Plans for Nonlawyer Employees
The nonlawyer employees of a firm may be included in a compensation or retirement plan even though the plan is based on a profit-sharing arrangement. [*Id.*]

EXAMPLE
The U, R & S firm sets aside 10% of all legal fees in a fund to be used for year-end bonuses to the partners, associates, and nonlawyer employees. The year-end bonus program is proper, even though it is a profit-sharing arrangement with nonlawyers.

c. Sale of a Law Practice
One lawyer's practice can be sold to another lawyer pursuant to rules that are discussed in J., *infra*. One who buys the practice of a

dead, disabled, or disappeared lawyer may pay the purchase price to the estate or representatives of the lawyer. [ABA Model Rule 5.4(a); Restatement §10]

d. Sharing Court-Awarded Fee with Nonprofit Organization
When a court awards attorneys' fees to the winning lawyer in a case, the lawyer may share the fee with a nonprofit organization that hired or recommended him as counsel. [*Id.*]

EXAMPLE
Justice International, a nonprofit organization, hired lawyer L to represent a class of persons who were imprisoned after 9/11 in violation of their civil rights. L won the case, and the court awarded her attorney fees to be paid by the defendants. L may share the fees with Justice International.

2. Partnership with Nonlawyer to Practice Law Prohibited

A lawyer must not form a partnership with a nonlawyer if ***any*** part of the partnership activities will constitute the practice of law. [ABA Model Rule 5.4(b)] Distinguish this from ancillary services provided by a separate entity (*see* K., *infra*).

EXAMPLE
Family lawyer F formed a partnership with marital psychologist P; their purpose was to offer a full range of counseling and legal services to family clients. All of the legal work was done by F, and all of the other counseling was done by P—neither transgressed into the domain of the other. Nevertheless, F is subject to discipline because part of the partnership activity constitutes the practice of law.

3. Nonlawyer Involvement in Incorporated Firm or Other Association

A lawyer must not practice in an incorporated law firm or association authorized to practice law for profit if:

a. A nonlawyer owns any interest in the firm or association (but, when a lawyer dies, her estate may hold an interest during the administration of the estate);

b. A nonlawyer is a corporate director or officer or the equivalent thereof; or

c. A nonlawyer has the right to direct or control the professional judgment of a lawyer.

[ABA Model Rule 5.4(d)]

EXAMPLE
M is a nonlawyer. She is the business manager of W, Y & U Ltd., an incorporated law firm. As business manager, she keeps the firm's calendar, does the firm's accounting, hires, fires, and supervises all of the firm's nonlawyer employees, procures all of the firm's supplies and equipment, and runs the firm's library. Despite M's central role in the firm's operations, M cannot become a stockholder in the firm.

4. Interference with Lawyer's Professional Judgment

A lawyer must not allow a person who recommends, employs, or pays her for serving a client to direct or regulate the lawyer's professional judgment. [ABA Model Rule 5.4(c)]

EXAMPLE
Federated Life Insurance Company employs lawyer L to prepare estate plans for potential life insurance customers. The potential customer pays nothing for the estate planning service; L works on a flat salary paid by Federated. L, realizing who provides his daily bread, makes sure that every estate plan includes a careful explanation of the "benefits of balanced protection through Federated's term and whole life policies." L is subject to discipline.

I. RESTRICTIONS ON RIGHT TO PRACTICE

1. Restrictive Partnership and Employment Agreements

A lawyer must neither make nor offer a partnership or employment or similar agreement that restricts a lawyer's right to practice after termination of the relationship, except for an agreement concerning benefits upon retirement. [ABA Model Rule 5.6(a); Restatement §13] Such agreements not only limit a lawyer's autonomy but also limit the freedom of clients to choose a lawyer.

EXAMPLES
1) Oakville practitioner A employed young lawyer L by an agreement that purported to prohibit L from practicing in Oakville after leaving A's employment. Both A and L are subject to discipline.

2) Sixty-four-year-old solo practitioner S took young lawyer Y in as a partner. Their partnership agreement provided that after S retired, the firm would pay S a retirement benefit of $5,000 per month so long as S did not re-enter the practice of law. The agreement is proper.

2. Restrictive Settlement Agreements for Clients

A lawyer must neither make nor offer an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a client controversy. [ABA Model Rule 5.6(b); *and see* ABA Formal Op. 93-371 (1993)]

EXAMPLE
Over a period of several years, attorney A represented a series of federal employees in personal injury suits against the federal government concerning cancers allegedly caused by working in the Dos Arboles Radiation Laboratory. The government settled each suit as it came along, but the more suits the government settled, the more new plaintiffs A was able to find. Ultimately, the government offered to settle all then-pending suits for generous sums, provided that A would never again represent a claimant in a Dos Arboles Radiation case. If A agrees to settle on those terms, A will be subject to discipline. [*See* ABA Formal Op. 95-394 (1995)]

J. SALE OF A LAW PRACTICE

1. When Sale Permitted

ABA Model Rule 1.17 permits the sale of a law practice or a field of law practice, including goodwill, under certain circumstances. Pursuant to this rule: (1) the seller must ***cease to engage in the private practice of law***, or in the sold field of practice, in the area where the practice has been conducted; (2) the entire practice, or the entire field of practice, must be sold to one or more lawyers or firms; and (3) ***written notice*** must be given to the seller's clients regarding the sale, the clients' right to retain other counsel or to take possession of their files, and the fact that consent to the transfer of the clients' files will be presumed if a client takes no action within 90 days of receipt of the notice. If notice cannot be given to a client, a court order is required to authorize the transfer of the representation of that client to the purchaser. [ABA Model Rule 1.17(c)] Also, the seller must "exercise competence in identifying a purchaser qualified to assume the practice." [ABA Model Rule 1.17, comment 11]

a. Selling Lawyer May Practice in Limited Circumstances

After the sale of his practice, a lawyer may still be employed as a lawyer on the staff of a public agency or legal services entity that provides legal services to the poor, or as in-house counsel to a business. [ABA Model Rule 1.17, comment 3] Additionally, a lawyer's return to private practice because of an unanticipated change in circumstances does not necessarily violate the Rules. [ABA Model Rule 1.17, comment 1]

2. Protection of Seller's Clients After Sale

The purchaser must undertake ***all*** client matters ***in the practice***, and not just those that generate substantial fees (subject of course to client consent and conflict of interest rules). [*See* ABA Model Rule 1.17, comment 6] This requirement prevents the sale of only fee-generating matters, which could leave clients whose matters are not very lucrative in a situation where they might find it difficult to find other representation. Also, clients' fees must not be increased because of the sale. [ABA Model Rule 1.17(d)] The purchaser must

honor existing fee agreements made by the seller. [ABA Model Rule 1.17, comment 10]

K. LAW-RELATED (ANCILLARY) SERVICES

Lawyers are permitted to provide law-related services. Law-related services (often referred to as ancillary services) are services that might reasonably be performed in conjunction with (and are related to) the provision of legal services and that are not prohibited as unauthorized practice of law when provided by a nonlawyer. Examples of law-related services include financial planning, accounting, lobbying, trust services, real estate counseling, providing title insurance, and preparing tax returns. Even though law-related services are not legal services, a lawyer who provides such services is subject to the Rules of Professional Conduct in two situations:

1. Nonlegal Services and Legal Services Provided Together

If a lawyer provides nonlegal services in circumstances that are not distinct from her provision of legal services, then the Rules of Professional Conduct apply to both the legal and nonlegal services. [ABA Model Rule 5.7(a)(1)]

EXAMPLE

Attorney A is an expert in setting up new business ventures. He also knows many wealthy people who invest money in untried business ventures—so-called venture capitalists. When A draws up the articles of incorporation for client C's new business venture and also finds some willing investors for C, A is subject to the Rules of Professional Conduct in both activities.

2. Nonlegal Services Provided by Entity that Is Controlled by the Lawyer

If a lawyer provides nonlegal services through an entity that is not her law office but that she controls (either alone or with other lawyers), that lawyer must take reasonable steps to assure that people who receive the nonlegal services understand that those services are not legal services and that the Rules of Professional Conduct do not cover those services. For instance, the attorney-client privilege does not apply to the nonlegal services. If the lawyer does not take those reasonable steps, then the lawyer is subject to the Rules of Professional Conduct with respect to the nonlegal services.

EXAMPLE

Lawyer L is a certified specialist in family law. Many of her clients are women who want to divorce their husbands and also want to find work outside the home. L and one of her nonlawyer friends own and manage Jobs-4-U, a job placement service. When one of her law clients needs a job, L usually refers the client to Jobs-4-U. L is always careful to tell the client that she has a personal financial stake in Jobs-4-U, but L does not explain that the Rules of Professional Conduct do not apply to services rendered by Jobs-4-U. L is therefore bound by the Rules of Professional Conduct in her job placement work.

3. Providing Nonlegal Services to Clients

When a ***client-lawyer relationship*** exists between the lawyer and the individual receiving the law-related services, the lawyer must comply with Rule 1.8(a), which specifies the conditions a lawyer must satisfy when she enters into a business transaction with her own client. [ABA Model Rule 5.7, comment 5] Specifically, the transaction must meet the following requirements: the terms of the transaction must be fair to the client; the terms must be fully disclosed to the client in writing, and such disclosure must cover the essential terms of the transaction and the lawyer's role in the transaction; the client must be advised in writing that he should seek advice from an independent lawyer regarding the arrangement; and the client must give informed consent in a writing signed by the client. (*See also* IV.C.2.a., *supra*.)

[Restatement §14]

II. THE CLIENT-LAWYER RELATIONSHIP

A. NATURE OF THE RELATIONSHIP

The relationship between a lawyer and client is contractual. The terms of that contract are generally implied by custom, but for the most part can be varied by mutual agreement. The lawyer operates as both the client's fiduciary and agent, with the duties and limitations of those designations. For example, because the lawyer is considered a fiduciary, the contract between the lawyer and client will be construed against the lawyer and closely scrutinized for fairness. Similarly, the lawyer is subject to the limitations imposed by the laws of agency.

B. CREATING THE LAWYER-CLIENT RELATIONSHIP

1. How Relationship Is Formed

In lore, although perhaps not in fact, an English barrister has an ethical duty to take any case offered upon tender of a proper fee. [Wolfram, Modern Legal Ethics §10.2.2 (1986)] In contrast, lawyers in the United States are generally free to refuse service to any person for any reason. A lawyer-client relationship arises when:

(i) A person manifests an intent that the lawyer provide legal services and the lawyer ***agrees***;

(ii) A person manifests an intent to have the lawyer represent him, the lawyer fails to make clear that he does not want to undertake the representation, and the lawyer knows or should know that the prospective client is ***reasonably relying*** on the lawyer to provide the services; or

(iii) A tribunal ***appoints*** a lawyer to represent a client.

[Restatement §14]

a. Implied Assent and Reasonable Reliance

The lawyer's assent is implied when he fails to clearly decline representation and the prospective client reasonably relies on the representation. The reasonableness of the reliance is a question of fact.

EXAMPLES

1) Client Carla writes a letter to attorney Aida, asking Aida to represent her in a personal injury case. Aida never responds to the letter. One year later, the statute of limitations expires on Carla's claim, and she sues Aida for malpractice for failing to file the suit. Here, there was no attorney-client relationship. Although Aida did not expressly decline the representation, it was unreasonable for Carla to rely on Aida's representation based on an unanswered letter. [*See* Restatement §14, illus. 3]

2) Client Casey calls lawyer Lisa's office asking that Lisa represent him in a court proceeding relating to his arrest for driving under the influence ("DUI"). Lisa is out of the office. Casey tells Lisa's secretary that he understands that Lisa handles many DUI cases and hopes that she will take the case even though the court date is only 10 days away. The secretary tells Casey to send over all papers relevant to the proceeding. She does not tell him that Lisa will decide whether to take the case only after reviewing the papers. One day before Casey's court date, Lisa phones Casey and declines to represent him. Here, it would likely be found that an attorney-client relationship existed because Casey's reliance was reasonable. Lisa regularly handled DUI cases, her agent responded to his request for help by asking him to send the papers, and the imminence of the hearing made it appropriate for Lisa to decline while there was still time for Casey to get another lawyer. [Restatement §14, illus. 4]

2. Duty to Reject Certain Cases

A lawyer must refuse employment in the following situations, as taking on a representation in these circumstances would violate the Rules of Professional Conduct.

a. Client's Motive Is Harassment

A lawyer is subject to discipline for bringing an action, conducting a defense, asserting a position, or taking other steps if the client's motive is to embarrass, delay, or burden a third person. [ABA Model Rule 4.4(a)] Thus, a lawyer must reject any case where he believes this is the prospective client's motive.

b. Unsupportable Factual or Legal Position

A lawyer who is serving as an advocate in a legal proceeding must not take a position that is either factually or legally frivolous. [ABA Model

Rule 3.1] A position is not frivolous if the lawyer can make a good faith argument that the facts are as claimed or that the present law should be changed. A position also is not frivolous merely because the lawyer does not have all the facts at hand at the outset, but expects to develop them during discovery. Note that in a criminal case, the defense lawyer may defend his client to the extent allowed by constitutional law even if the defense would otherwise violate this rule. [ABA Model Rule 3.1, comments 1 - 3; *and see* VI.A., *infra*]

c. Lawyer Not Competent
A lawyer must reject a case if he is too busy or too inexperienced to handle the matter competently. [ABA Model Rule 1.1]

d. Strong Personal Feelings
If a lawyer's personal feelings about a case are so strong that they would impair his ability to effectively represent the client, he must refuse the case. [ABA Model Rules 1.16(a)(1), 1.7(a)(2)]

e. Impaired Mental or Physical Condition
A lawyer must decline a case if his mental or physical condition would materially impair his ability to represent the client. [ABA Model Rule 1.16(a)(2)]

3. Duties Owed to Prospective Client

When a person consults with a lawyer about the possibility of forming a lawyer-client relationship, and no such relationship ensues, the lawyer has a duty to: (1) protect the prospective client's confidential information, which includes declining to represent other clients in the same or a related matter if the confidential information would be harmful to the prospective client; (2) protect any property the prospective client has given to the lawyer; and (3) use reasonable care in giving the person any legal advice, such as whether the claim has merit, whether conflicts of interest exist, and when the action must be commenced. [Restatement §15]

4. Ethical Obligation to Accept Unpopular Cases

Lawyers have an ethical obligation to help make legal service available to all who need it. A lawyer can fulfill this obligation by accepting a ***fair share*** of unpopular matters or indigent or unpopular clients. [ABA Model Rule 6.2, comment 1]

C. ATTORNEYS' FEES

The nature and amount of an attorney's fee are subjects for contractual agreement between the attorney and the client (except when the fee is set by statute or court order). In theory, the attorney and client bargain at arm's length over the fee, but in practice many clients are inexperienced with attorneys' fees. Thus, in fee disputes,

courts strain to give the benefit of the doubt to the client. [*See, e.g.,* Terzis v. Estate of Whalen, 489 A.2d 608 (N.H. 1985); with respect to fee setting in general, *see* Restatement §§34 - 43]

1. Must Communicate Fee Arrangement to Client

A lawyer must, before or within a reasonable time after commencing a representation, communicate the basis or rate of the fee and the expenses for which the client will be responsible. Although a writing is preferable, it is generally ***not*** required (except in contingent fee agreements, *infra*). The lawyer also has an ongoing duty to communicate any changes regarding the fee arrangement. [ABA Model Rule 1.5(b)]

a. Exception—Regularly Represented Client

If the lawyer regularly represents the client and will be charging the same basis or rate as in other matters, the lawyer need not communicate the fee arrangement each time.

EXAMPLES

1) At the close of her first appointment with a new client, attorney A gave the client a simple written memorandum. The memorandum explained that her fee would be calculated at $175 per hour, and that the number of hours could not be predicted with certainty but would probably be about 100. Later, when the matter proved more difficult than A had anticipated, A gave the client a supplemental memorandum that doubled the estimated number of hours. A handled the fee issue properly under the ABA Model Rules.

2) At the end of his third appointment with lawyer L, a new client asked how L planned to charge him for the work. L responded: "In a matter of this nature, it's simply impossible to tell you in advance what the fee will be. But you have my assurance that it will be a fair fee." L's conduct is a disciplinary violation under ABA Model Rule 1.5(b).

2. Discipline for Unreasonable Fee

A court will not enforce a contract for an unreasonably high attorney's fee or an unreasonably high amount for expenses, and the attorney is subject to discipline for trying to exact such a fee or expenses. [ABA Model Rule 1.5(a)]

a. Factors

The factors considered in determining the reasonableness of a fee are:

1) The ***time and labor*** required;

2) The ***novelty and difficulty*** of the questions involved;

3) The ***skill*** needed to perform the legal services properly;

4) The likelihood, if apparent to the client, that ***the work for this client will preclude the lawyer from doing fee-paying work for others***;

5) The ***fee customarily charged*** in the locality for similar legal work;

6) The ***amount at stake and the results obtained*** for the client;

7) The ***time limitations*** imposed by the client or the circumstances;

8) The ***nature and length of the relationship*** between the lawyer and the client;

9) The ***experience, reputation, and ability of the lawyer*** performing the services; and

10) Whether the fee is ***fixed or contingent*** (a contingent fee can be higher because it requires the lawyer to take a gamble).

[ABA Model Rule 1.5(a)]

b. Items that May and May Not Be Billed

The attorney must disclose the basis on which a client will be charged for legal services and expenses, and the attorney's bill should clearly show how the amount due has been computed. The attorney must not charge the client for ordinary overhead expenses associated with staffing, equipping, and running the attorney's office, but the attorney may charge the client for the ***actual cost to the attorney*** of special services such as photocopying, long distance calls, computer research, special deliveries, secretarial overtime, and the like. [Restatement §38(3)(a)] Alternatively, the attorney may charge a reasonable amount to which the client has agreed in advance. [ABA Model Rule 1.5, comment 1] The attorney must not charge the client more than her actual cost for services provided by third parties, such as court reporters, travel agents, and expert witnesses. Furthermore, the attorney must not "double bill" her time. [*See* ABA Formal Op. 93-379 (1993)]

EXAMPLE

Attorney spends three hours working on client A's case while flying on an airplane to take depositions in client B's case. Attorney must not bill B for three hours of travel time if she elects to bill A for three hours of work time. She may charge either one or the other for the full three hours, or she may apportion the time between the two clients.

3. Collecting and Financing Attorneys' Fees

a. Payment in Advance

A lawyer may require her fee to be paid in advance, but she must refund any unearned part of the advance if she is fired or withdraws. [ABA

Model Rule 1.16(d); comment 4 to ABA Model Rule 1.5; *and see* G.5., *infra*] Be careful to ***distinguish a true retainer fee*** from a payment of a fee in advance. A true retainer fee is money that is paid solely to ensure the availability of the lawyer, and the lawyer who is fired or withdraws generally need not refund the retainer fee. Further, fees paid in advance for services to be rendered in the future must be placed in a client trust account and may be withdrawn only as earned. [ABA Model Rule 1.15(a); ABA Formal Ethics Op. 505 (2023); *and see* IX.C.2.b., *infra*]

EXAMPLES

1) XYZ Oil Company pays the A & B environmental defense firm a monthly retainer fee of $1,000 simply to be available to represent XYZ in the case of an oil spill. The retainer fee agreement provides that the $1,000 per month will not be credited against hours spent on XYZ's legal work. This is a true retainer fee. If the A & B firm withdraws or is fired from a particular case, it may keep the retainer payments provided: (1) the retainer amount was reasonable, and (2) it has not violated the retainer agreement.

2) Client C agrees in writing to pay Lawyer L "a nonrefundable retainer of $6,000, which shall be deemed earned upon receipt. This is for the purpose of assuring L's availability. No portion of the fee shall be returned to C for any reason." C also agrees that if L spends more than 20 hours on the matter, C will pay "additional retainers as requested by L which shall be applied to L's billing for this matter at a rate of $300 per hour and to any costs or expenses." The $6,000 payment is an advance, not a true retainer. Simple math reveals that L is rendering legal services at the rate of $300 per hour, and the $6,000 entitles C to 20 hours of L's work on the matter. Merely labeling a payment "nonrefundable" or a "retainer" does not remove the obligation under the rule if it is not a true retainer. [*See* ABA Formal Ethics Op. 505 (2023)]

b. Property for Services

A lawyer may accept property in return for services (e.g., an ownership interest in a business), provided that this does not involve a proprietary interest in the cause of action or subject of litigation contrary to ABA Model Rule 1.8(i) (*see* IV.C.3., *infra*). Such an arrangement is also subject to scrutiny as a conflict of interest because it may be a business transaction between the lawyer and the client (*see* IV.C.2., *infra*). [ABA Model Rule 1.5, comment 4]

c. Cutting Off Services

A lawyer must not make a fee agreement that could curtail services in the middle of the relationship and thus put the client at a bargaining disadvantage. [ABA Model Rule 1.5, comment 5]

EXAMPLE
Attorney A agreed to defend client D in a drug smuggling case. A clause buried in the middle of A's wordy fee agreement provides that all work must be paid for in advance. D paid A $2,000 in advance. In the middle of preparation for trial, A told D that the original advance was used up and that if D did not advance more money, the work would stop. A's conduct is not proper. [*Id.*; *and see* State v. Mayes, 531 P.2d 102 (Kan. 1975)]

d. Credit Arrangements and Security

A lawyer may permit the client to pay a legal fee by credit card [ABA Formal Op. 00-419 (2000)], and a lawyer may participate in a bar association program that enables clients to finance fees through bank loans. A lawyer may also take an interest-bearing promissory note from a client to secure the payment of fees. [*See* Hulland v. State Bar, 8 Cal. 3d 440 (1972)] When permitted by local law, a lawyer may use a statutory, common law, or contractual attorney's lien to secure the payment of a fee. [ABA Model Rule 1.8(i)(1)]

4. Contingent Fees

Under a contingent fee agreement, the lawyer collects a fee only if the matter is resolved in the client's favor. Often, the fee is expressed as a percentage of the client's eventual recovery in the case. However, a contingent fee need not be a percentage of the amount recovered; an otherwise proper contingent fee may still be proper even if there is no *res*, or pool of money, from which the fee can be paid. Contingent fees are regarded as unethical in some common law countries, but they are tolerated in the United States. Critics contend that they stir up litigation, encourage excessive fees, and give the lawyer an unprofessional stake in the outcome of the case. Proponents reply that only through a contingent fee arrangement can a client of modest means afford to litigate a claim. Some states have set statutory limits on the contingent fee percentages a lawyer can exact in personal injury, medical malpractice, and similar types of cases.

a. When Contingent Fee Prohibited

1) Criminal Cases

A lawyer is subject to discipline for using a contingent fee arrangement when defending a person in a criminal case. [ABA Model Rule 1.5(d)(2)]

2) Domestic Relations Cases

A lawyer is also subject to discipline for using a contingent fee in a domestic relations case when the contingency is based on the securing of a divorce, the amount of alimony or support, or the amount of a property settlement. However, a lawyer may use a

contingent fee in a suit to recover money that is ***past due*** under an alimony or support decree. [ABA Model Rule 1.5 and comment 6]

EXAMPLE
Lawyer L agreed to represent W in a marital dissolution case in exchange for 10% of the amount to be received by W as a property settlement. The arrangement would subject L to discipline.

b. Contingent Fee Must Be Reasonable
A contingent fee must be reasonable in amount; moreover, a lawyer must not use a contingent fee when the facts of the case make it unreasonable to do so. [ABA Model Rule 1.5, comment 3]

EXAMPLE
Client C asked lawyer L to represent her as plaintiff in a medical malpractice case. Liability was clear, the damages were large, and the defendants were affluent. The case was a clear winner, and L knew that he could settle it with only a few hours of work. Nonetheless, L signed C up to a 33% contingent fee agreement. After two hours of work, L arranged a lucrative settlement that C accepted. It was unreasonable for L to use a contingent fee agreement in the first place, and it would be unreasonable for L to collect one-third of the settlement proceeds. [*See* ABA Model Rule 1.5, comment 3]

c. Writing Requirement for Contingent Fee Agreements
A contingent fee agreement must be in a writing ***signed by the client***, and the writing must state:

1) How the fee is to be ***calculated***, including the percentage that the lawyer will get if the case is settled before trial, won after trial, or won after appeal;

2) What ***litigation and other expenses*** are to be ***deducted*** from the recovery;

3) Whether ***deductions for expenses*** will be made ***before or after*** the contingent fee is calculated; and

4) What ***expenses the client must pay***, whether or not she wins the case.

At the ***end*** of a contingent fee case, the lawyer must give the client a written statement showing the outcome of the case, the remittance to the client, and how the remittance was calculated. [ABA Model Rule 1.5(c)]

5. Fee Disputes

a. In General

In seeking compensation from a client, a lawyer may not employ collection methods forbidden by law, improperly use confidential information, or harass a client. [Restatement §41]

b. Remedies

1) Liens

In addition to filing a lawsuit to recover their fees, lawyers have several remedies if a client refuses to pay all or a portion of a fee. Most states recognize a common law or statutory charging lien, under which any recovery obtained for the client serves as security for the lawyer's fees. Even states that do not recognize a charging lien usually recognize such a lien if created by the lawyer and client's express agreement. [3 A.L.R.2d 148 (1949)] Many states also permit the lawyer to exercise a retaining lien, under which he can retain documents, funds, and property of the client until his fee is paid, but there is a strong minority view contra.

2) Retention of Funds in Trust Account

If a lawyer receives funds on behalf of a client from which his fee is to be paid (e.g., a settlement check), and the client disputes the amount of his fee, the lawyer must retain the ***disputed*** amount in a client trust account (IX.C.2.b., *infra*) until the dispute is resolved. [ABA Model Rule 1.15(e) and comment 3]

3) Arbitration or Mediation

Bar associations in many jurisdictions have established arbitration or mediation services to help lawyers resolve fee disputes with their clients. Comment 9 to ABA Model Rule 1.5 urges lawyers to use these services when they are available.

EXAMPLE

Lawyer L's standard retainer agreement includes a provision that requires arbitration of both fee disputes and legal malpractice claims. The agreement is proper, provided that it is clear and that L's clients truly understand its ramifications. [District of Columbia Bar Op. 190 (1988)]

6. Fee Splitting with Other Lawyers

As a general rule, a lawyer must not split a legal fee with another lawyer. The rule is designed to prevent lawyers from becoming "client brokers" and to discourage excessive fees. The general rule is subject to three exceptions.

a. Lawyers Within a Firm

The partners and associates within a law firm may, of course, pool and split legal fees—that is the essence of practice in a law firm.

b. Separation and Retirement Agreements

A law firm may make payments to a former partner or associate under a separation or retirement agreement.

EXAMPLE

The partnership agreement of the P, D & Q law firm provides that when partner Q retires, the firm will pay her monthly benefits equal to 30% of Q's average monthly billings during the year prior to her retirement. The arrangement is proper.

c. Certain Splits with Lawyers Outside Firm

Sometimes two or more lawyers from different firms work together on a case. ABA Model Rule 1.5(e) permits them to submit a single bill to the client, and then to split the fee, ***if*** the following conditions are met:

1) The total fee is ***reasonable***;

2) The split is ***in proportion to the services performed by each lawyer***, or some different proportion if ***each lawyer assumes joint responsibility*** for the matter; and

3) The ***client agrees to the split in a writing that discloses the share each lawyer will receive***.

EXAMPLE

In a complex corporate tender offer matter that involves both antitrust and securities law issues, lawyers from three firms join forces to represent Grundy, Inc. Lawyers from firm A will do whatever courtroom work needs to be done. Lawyers from firm B will do the out-of-court work on the antitrust issues, and lawyers from firm C will do the out-of-court work on the securities law issues. The three firms do not agree to assume joint responsibility for the matter, but they agree to send Grundy, Inc. a single bill and to divide the proceeds in proportion to the work done by each firm. Grundy, Inc. is advised of the arrangement and consents to it in writing. Assuming that the total fee is reasonable, the arrangement is proper.

7. True Referral Fees Are Unethical

Referral of cases between lawyers is common, for instance, when the referring lawyer is too busy to handle a case or does not feel competent to handle a case. However, ABA Model Rule 7.2(b) prohibits a lawyer from paying

anyone—including another lawyer—for recommending him or referring a matter to him. Furthermore, ABA Model Rule 1.5(e) does not permit fee splitting with a referring lawyer who neither assumes responsibility for a matter nor does work on the matter (*see* 6.c., above). A lawyer may, however, set up a "reciprocal referral" arrangement with another lawyer or with a nonlawyer professional in which each person agrees to refer clients or customers to the other. The arrangement must not be exclusive, and the lawyer's client must be informed of the existence and nature of the arrangement. [ABA Model Rule 7.2(b) and comment 8] These reciprocal referral arrangements are discussed further in X.B.1.c., *infra*.

D. SCOPE AND BOUNDS OF REPRESENTATION

Generally, a lawyer must abide by a client's decisions concerning the objectives of a representation, and must consult with the client as to the means by which those objectives are pursued. A lawyer also may take actions that are ***impliedly authorized*** to carry out the representation. [ABA Model Rule 1.2(a)]

1. May Limit Scope of Representation

A lawyer may limit the scope of the representation if: (1) the limitation is ***reasonable*** under the circumstances, and (2) the client gives ***informed consent***. For example, a lawyer might agree to counsel her client about a dispute with the client's landlord, but stipulate that if the dispute has to be arbitrated or litigated, the client will hire another lawyer for that purpose. [ABA Model Rule 1.2(c) and comment 7]

2. Must Not Assist Client in Crime or Fraud

A lawyer must inquire into and assess the facts and circumstances of a representation both before accepting it and on a continuing basis throughout the representation. [ABA Model Rule 1.16(a) and comment 1] A lawyer must not advise a client to engage in conduct that the lawyer knows is criminal or fraudulent, or assist the client in such conduct. However, the lawyer ***may discuss the legal consequences*** of any proposed course of conduct. The lawyer may also counsel or assist a client to make a good faith effort to determine the validity, scope, meaning, or application of the law (e.g., violating a statute to test its validity or scope in an enforcement proceeding). [ABA Model Rule 1.2(d)]

a. Duty to Inquire and Assess

A lawyer's duty to inquire into and assess the facts and circumstances of a representation must be informed by the risk that a client or prospective client intends to use the lawyer's services to commit or further a crime or fraud. Thus, the level of inquiry will vary for each representation depending on the level of risk involved. [ABA Model Rule 1.16(a), comment 1]

1) Factors to Be Considered

When assessing the risk of a crime or fraud involving the lawyer's services, the lawyer should consider:

- Who the client is and, for organizational clients, who the beneficial owners are;
- The lawyer's experience and familiarity with the client;
- The services requested;
- Whether the jurisdiction involved is considered high risk for money laundering or terrorist financing; and
- How the client trust account is being used and whether there is a risk of money laundering or terrorist financing.

[*See* ABA Model Rule 1.16(a), comment 1]

b. Telling the Client "No"

When a lawyer discovers that her client expects assistance that violates a law or legal ethics rule, or if the lawyer intends to act contrary to the client's instructions, the lawyer must explain why she cannot do what the client expects. [ABA Model Rule 1.2(d), comment 13]

c. Discussing Proposed Conduct

A lawyer may discuss a proposed course of conduct with a client, and explain to the client that the conduct would be unlawful. If the client later uses the lawyer's advice to carry out a crime or fraud, that does not make the lawyer a party to the illegal conduct. However, the lawyer must not recommend the illegal conduct or instruct the client on how to break the law and get away with it. [ABA Model Rule 1.2(d) and comment 9] If a client insists on illegal or unethical assistance, the lawyer must withdraw from representation. [ABA Model Rule 1.16(a)]

d. Discovering a Client's Illegal Conduct

When a lawyer discovers that a client has begun an illegal course of action and the action is continuing, the lawyer must not assist in the wrongdoing, e.g., by drafting fraudulent documents or suggesting how the wrongdoing can be concealed. [ABA Model Rule 1.2(d) and comment 10] In this situation, the lawyer ***must*** withdraw because continued representation would violate the rules of professional conduct. [ABA Model Rule 1.16(a)(1); *and see* G.3.b., *infra*] Sometimes withdrawal alone is not enough—the lawyer may have to make a "noisy withdrawal" in which she gives outsiders notice of her withdrawal and disaffirms any of her prior opinions, documents, affirmations, or the like that the client is using to carry out the wrongdoing. [ABA Model Rule 1.2, comment 10] The

lawyer's noisy withdrawal may put the client's victim on guard, but that is permissible (and probably praiseworthy). [*See also* ABA Model Rule 4.1(b) and comment 3—concerning disclosure of confidential information]

3. Decisions to Be Made by Client

When a client brings a legal problem to a lawyer, it is the client who must decide what shall be the objectives of the lawyer's work. Thus, it is the client who must make the key decisions that affect the client's substantial legal rights. A lawyer must therefore abide by the client's decision regarding the following matters:

a. Whether to accept a ***settlement offer***;

b. What ***plea*** to enter in a criminal case;

c. Whether to ***waive a jury trial*** in a criminal case;

d. Whether the client will ***testify*** in a criminal case; and

e. Whether to ***appeal***.

[ABA Model Rule 1.2(a); Restatement §22(1)]

EXAMPLES

1) Lawyer L agrees to represent C on a contingent fee basis in C's suit against D for slander. L's fee agreement provides that the suit cannot be settled before trial without L's consent. L is subject to discipline. The decision to settle a suit is made by the client, not the lawyer—even in a contingent fee case. [*See* ABA Model Rule 1.2(a)]

2) Attorney A is defending B in a burglary case. A has carefully advised B about the legal and practical consequences of pleading not guilty, waiving a jury trial, and testifying on his own behalf. Having done that, A must now allow B to make the final decision on those three vital issues. [*Id.*]

a. Disagreements Between Lawyer and Client

Lawyers and clients sometimes disagree about the means to be used to reach the client's objectives. Clients normally defer to their lawyers about issues of law, tactics, and strategy. Conversely, lawyers normally defer to their clients about questions of expense and concern for third persons who might be affected by a legal tactic. A lawyer and client should try to resolve their disagreements, but if they cannot, the lawyer may withdraw or the client may fire the lawyer. [*See* ABA Model Rule 1.16(a)(3), (b)(4)]

4. Lawyer's Authority to Bind Client

A lawyer is the client's agent. Under the law of agency, the lawyer's actions on behalf of a client will legally bind the client if the lawyer acted with actual or apparent authority.

a. Actual Authority—Lawyer's Belief

A lawyer has actual authority if she reasonably believes she is authorized to act based on her dealings with the client. Actual authority can be ***express or implied*** (i.e., what the client has expressly told the lawyer to do, along with anything else impliedly authorized to carry out the representation). A lawyer also has actual authority to take actions that she reasonably believes are required by law or court order. [Restatement §26]

b. Apparent Authority—Third Party's Belief

When dealing with the court and third parties, a lawyer has apparent authority when the ***court or third party reasonably assumes*** that the lawyer has authority to act ***based on some manifestation from the client*** that the lawyer had authority. Even if the lawyer acted without actual authority, the client is still bound if the lawyer had apparent authority. However, the client can sue the lawyer for damages (and of course, the lawyer is still subject to discipline). [Restatement §27 and comment f]

1) How Client Creates Apparent Authority

Often, the client's mere act of retaining the lawyer is enough to give the lawyer apparent authority to act on the client's behalf. However, when it comes to ***settlement*** and other decisions that are ultimately left to the client (*see* 3., above), merely retaining the lawyer is ***not enough*** to give the lawyer apparent authority. [Restatement §27, comment d] Thus, if a lawyer settles a case for a client without actual authority, the client is not bound to the agreement unless the client somehow indicated to the opposing party that the lawyer was authorized to settle the case.

c. Ratification

Even if a lawyer acted without any authority, the client may subsequently ratify the act (e.g., by cashing a settlement check). The effect of ratification is the same as if the lawyer had originally acted with actual authority. [Restatement §26] Consequently, the client is bound and may not sue the lawyer for damages. Note, however, that the lawyer would still be subject to discipline.

d. When Lawyer's Authority Ends

A lawyer's actual authority to represent a client ends when: (1) the matter is complete or the lawyer is ***fired or withdraws***; (2) the ***client dies*** (or dissolves, if the client is an organization); or (3) the ***lawyer dies***

or is otherwise unable to continue the representation (e.g., because of disbarment or disability). The lawyer's apparent authority ends when the third party knows or should know that any of these events occurred, or whenever it can reasonably be inferred that the lawyer lacks actual authority. [Restatement §31]

1) **Must Notify Third Parties Relying on Authority**
When a lawyer's actual authority ends, the lawyer must no longer purport to have authority and must notify third parties who are relying on the continued existence of the authority. [Restatement §31, comment i]

5. Client with Diminished Capacity

a. Lawyer's Duties

Normally, it is assumed that a client can make decisions about important matters, but if the client is a minor or has diminished mental capacity, that may not be true. Nevertheless, such a client may be able to make some kinds of decisions that affect her own well-being. For example, even very young children can have valuable opinions about who should have custody of them. Similarly, even very old clients can handle routine financial matters, although they may need legal protection concerning major transactions. The lawyer has a duty, so far as reasonably possible, to maintain a normal lawyer-client relationship with the client. [ABA Model Rule 1.14(a) and comment 1] The lawyer must treat the client with attention and respect. Even if the client has a guardian or other representative, the lawyer should, so far as possible, treat the client as a client, particularly in communicating with the client about significant developments. [ABA Model Rule 1.14, comment 2]

b. Protective Action and Appointment of Guardian

When the client has diminished capacity and faces a risk of substantial physical, financial, or other harm, the lawyer may take reasonable actions to protect the client. These actions include consulting with people or entities that can protect the client, and, when appropriate, seeking the appointment of a guardian or similar surrogate. [ABA Model Rule 1.14(b)] When taking protective action, the lawyer has implied authority to reveal the client's confidential information, but only to the extent necessary to protect the client. [ABA Model Rule 1.14(c)]

EXAMPLE

For many years, lawyer L has represented widower W in personal and business matters. Now W's physical and mental condition make it unsafe for him to continue living alone in the old family home, and he has no close relatives or friends to assist him. L may search out suitable liv-

ing quarters for W, where eating facilities and medical help are close at hand. To the extent possible, L should involve W in making the decision to move. If L reasonably believes that W needs a conservator, she may seek to have one appointed; in the appointment process, she may, if necessary, disclose confidential information about W's condition. After a conservator is appointed, L should still treat W as her client, consulting with him, keeping him advised of developments, and allowing him to make all decisions of which he is capable.

6. Emergency Legal Assistance to Nonclient with Seriously Diminished Capacity

When a person with seriously diminished capacity faces ***imminent and irreparable harm*** to her health, safety, or financial interest, a lawyer may take legal action on her behalf, despite her inability to establish a lawyer-client relationship or to make or express considered judgments about the matter. However, the lawyer cannot act until the person (or someone acting on her behalf) has consulted the lawyer, and the lawyer should not act unless he reasonably believes the person has no other representative available. Any action undertaken should be limited to that which is reasonably necessary to maintain the status quo or otherwise avoid imminent and irreparable harm. [ABA Model Rule 1.14, comment 9]

a. Lawyer's Duties

A lawyer who represents a person in such emergency circumstances has the same duties as he would with respect to a client. [*Id.*] In an emergency situation, confidences may be disclosed only to the extent necessary to accomplish the intended protective action. The lawyer should disclose the nature of his relationship with the person to any tribunal or counsel involved in the matter. Furthermore, steps should be taken to regularize the relationship as soon as possible. [ABA Model Rule 1.14, comment 10]

b. No Compensation for Lawyer

Normally, a lawyer would not seek compensation for emergency actions taken on behalf of a nonclient. [*Id.*]

E. COMMUNICATING WITH THE CLIENT

1. Matters that Require Informed Consent

The lawyer must promptly inform the client of any decision or circumstance that requires the client's ***informed consent***. [ABA Model Rule 1.4(a)] "Informed consent" means that the client agrees to a proposed course of conduct after the lawyer has sufficiently explained the material risks and reasonable alternatives. [ABA Model Rule 1.0(e)]

EXAMPLES

1) ABA Model Rule 1.7(b) permits a lawyer, in defined circumstances, to represent two clients who have a concurrent conflict of interests. One prerequisite is that both clients give informed consent in writing. The lawyer must sufficiently explain the material risks and reasonably available alternatives to both clients before they can give valid consent.

2) If an adversary offers to settle a civil case, or offers a plea bargain in a criminal case, the lawyer must promptly convey the offer to her client unless the client has previously instructed the lawyer that an offer on those terms is acceptable or unacceptable or has authorized the lawyer to accept or reject such an offer. [ABA Model Rule 1.4, comment 2]

2. Information About Status of the Matter and Means to Be Used

The lawyer must keep the client reasonably informed about the status of the matter and about the means by which the lawyer plans to accomplish the client's objectives. [ABA Model Rule 1.4(a)(2), (3)] If the lawyer must make an immediate decision (such as whether to object to a line of questioning during a trial), the lawyer need not consult with the client before acting. [ABA Model Rule 1.4, comment 3] However, in less urgent situations, the lawyer should consult with the client before acting.

EXAMPLE

Client C hired lawyer L to negotiate on C's behalf in a real estate dispute. C told L: "You have complete authority—just get the best deal you can." Despite the grant of broad authority, L should keep C advised of the progress of the negotiations. When there is time to do so, L should review the material issues with C before taking final action.

a. Admitting Mistakes

To comply with the duty of communication, a lawyer must inform a current client if the lawyer believes he has "materially erred" in any representation of the client. An error is considered material if a disinterested lawyer would conclude that: (1) it is reasonably likely to harm or prejudice the client; or (2) even in the absence of harm or prejudice, it is of such a nature that it would reasonably cause the client to consider discharging the lawyer. However, once an attorney-client relationship has ended, the lawyer has no obligation to inform the former client of material errors discovered after the fact. [ABA Formal Op. 481 (2018)]

3. Request for Information

If the lawyer keeps the client properly informed of developments in the matter, the client will not often need to ask the lawyer for information. When a client does make a reasonable request for information, the lawyer must

respond promptly. If that is impossible, then the lawyer or a member of her staff should acknowledge the client's request and tell the client when the information will be available. [ABA Model Rule 1.4(a)(4) and comment 4]

4. Consultation About Illegal or Unethical Conduct

If the client expects the lawyer to do something that is either illegal or unethical, the lawyer must consult with the client and explain why he cannot do what the client wants. [ABA Model Rule 1.4(a)(5)]

EXAMPLE

Attorney A is representing defendant D at a criminal trial. They expected to use an alibi defense based on the testimony of witness W, but the prosecution's case-in-chief proves beyond doubt that W's proposed testimony would be perjurious. In a recess before the defense's case-in-chief, D tells A to call W according to plan. A must explain to D why he cannot use W's testimony and must consult with D about an alternative defense strategy.

5. Special Circumstances

The amount and kind of information and explanations the lawyer should give to the client depend on the client's situation. If the client is young or has diminished capacity, the lawyer may have to do more explaining and assisting than if the client is an ordinary adult. If the client is an organization or group, the lawyer should ordinarily communicate with the appropriate officer. If the client and the lawyer have a regular, established relationship concerning many routine matters, the two of them may agree on a convenient arrangement for only limited or occasional reporting. [ABA Model Rule 1.4, comment 6]

EXAMPLE

For many years, attorney A has done the routine collection work for a major bank. In a normal week, the bank sends A 20 to 30 new collection cases. Over the years, A and the bank have settled on a standard procedure for handling these cases. It would be proper for A and the bank to agree that A must report only major or unusual occurrences.

6. Withholding Information from Client

A lawyer may delay the transmission of information to a client if the client would be likely to react imprudently to an immediate communication. The lawyer must not, however, withhold information to serve the lawyer's or a third person's interest or convenience. [ABA Model Rule 1.4, comment 7]

EXAMPLE

Defendants D and E were charged with the felony murder of X, and they were granted separate trials. In the depths of despondency, D vowed to take his

own life if E was convicted. That same day, E was convicted. D's lawyer may withhold that information from D until D is able to react to it more rationally.

a. Court Rule or Order

A court rule or order may forbid a lawyer from sharing certain information with a client, and the lawyer must comply with such a rule or order. [ABA Model Rule 3.4(c); ABA Model Rule 1.4, comment 7]

EXAMPLE

In a patent infringement case, the patentee's lawyer demanded production of all of the defendant's laboratory operating manuals. The defendant complied with the demand and gave the patentee's lawyer the manuals. Subsequently, however, the defendant convinced the judge that the manuals contained valuable trade secrets, and the judge therefore issued a protective order forbidding the patentee's lawyer from sharing the information in the manuals with her client. Patentee's lawyer must either obey the order or use appropriate legal means to challenge its validity.

F. CONTRACTS CONCERNING CLIENT–LAWYER RELATIONSHIP

Contracts that concern the relationship between a lawyer and client usually involve fees, but may involve other issues such as the extent of the lawyer's services, the identity of the lawyers who will work on the matter, etc. Such a contract is generally enforceable by either party if it is otherwise lawful (e.g., contains all the required disclosures and does not provide for an unreasonable fee). However, ***the client may avoid the contract*** in the following circumstances. [Restatement §14]

1. Contract Not Made at Outset

A contract between a lawyer and client, including a modification to an existing contract, is subject to scrutiny if made beyond a reasonable time after the representation begins (e.g., mid-way through the client's case). The rationale is that the client may feel pressured to accept the contract or modification because it is burdensome to change lawyers during a representation. Thus, in this situation, the client may avoid the contract ***unless the lawyer shows*** that the contract and the circumstances of its formation were ***fair and reasonable to the client***.

2. Contract Made After Work Completed

If the contract or modification was made after the lawyer had finished providing services, the client may avoid it if the ***client was not informed of facts*** needed to evaluate the appropriateness of the lawyer's compensation or other benefits conferred on the lawyer by the contract.

G. TERMINATING THE LAWYER-CLIENT RELATIONSHIP

Once established, the lawyer-client relationship ordinarily continues until the completion of the work for which the lawyer was hired. However, the relationship can end prematurely in any of three ways: (1) the client can ***fire*** the lawyer; (2) in some situations, the lawyer ***must*** withdraw; and (3) in some situations, the lawyer ***may*** withdraw. [*See* Restatement §32]

1. Client Fires Attorney

The client's complete trust is an essential part of any attorney-client relationship. The law thus allows the client to fire the attorney at any time, with or without just cause. Even if the client fires the attorney for no good reason, the client will not be held liable for breach of contract; for policy reasons, courts construe all attorney employment contracts as being terminable at will by the client. [*See, e.g.,* Fracasse v. Brent, 6 Cal. 3d 784 (1972)]

a. Client's Liability for Fees

When the client fires the attorney, the client is liable to the attorney in quantum meruit (an equitable action to avoid unjust enrichment) for the reasonable value of the work the attorney did before being fired. If the contract between the attorney and client provides for a flat fee or a maximum fee, that constitutes a ceiling on the quantum meruit recovery. [*See* Rosenberg v. Levin, 409 So. 2d 1016 (Fla. 1982)] That is, the attorney cannot recover ***more*** than was provided for by express contract.

b. Contingent Fee Cases

When a client hires a lawyer on a contingent fee basis, and then fires the lawyer before the case is over, the lawyer is still entitled to quantum meruit recovery for the reasonable value of the work done before the firing. However, the lawyer's claim does not arise until the contingency comes to pass. [*Id.*]

EXAMPLE

Lawyer L agreed to represent plaintiff P in a personal injury case. L agreed to do the work for 40% of P's recovery, but not more than $10,000. After L spent hundreds of hours preparing the case for trial, P fired L for no apparent reason. Then P settled the case for $40,000. Before the settlement, L had no claim against P because the contingency had not come to pass. After the settlement, L is entitled to the reasonable value of his services, but not more than $10,000 (the maximum set in the contract).

2. Court Permission to Substitute Attorneys

After a lawsuit has been filed, the rules of most courts require the court's permission for a substitution of attorneys. When a party wants to fire her

attorney, courts almost always grant the necessary permission, but permission may be denied if a substitution of attorneys would cause undue delay or disruption. [*See, e.g.*, Ruskin v. Rodgers, 399 N.E.2d 623 (Ill. 1979)—permission denied when client tried to fire attorney without cause two days before date set for trial] On the other hand, when an attorney seeks to withdraw from a case, the court may deny the necessary permission; in that event, the attorney must continue the representation, even if there is good cause for withdrawal. [ABA Model Rule 1.16(c)]

3. Mandatory Withdrawal

A lawyer must ***inquire into and assess*** the facts and circumstances of every representation both ***before*** taking the representation and ***on a continuing basis*** throughout the representation. The assessment must be tailored to the facts and circumstances of each matter (*see* II.D.2.a., *supra*). If the following circumstances exist at the start of an engagement, the lawyer must not enter into the representation. If these circumstances arise during a representation, the lawyer ***must*** withdraw. [ABA Model Rule 1.16(a) and comment (1)]

a. Disability

An attorney ***must*** withdraw if the attorney's mental or physical condition materially impairs the attorney's ability to continue representing the client. [ABA Model Rule 1.16(a)(2)]

b. Illegality or Ethical Violation

If to continue with the representation will require the attorney to violate a law or a disciplinary rule, the attorney ***must*** withdraw. [ABA Model Rule 1.16(a)(1)]

EXAMPLE

Attorney A agreed to represent client C in a slander suit against D. At the outset, A believed in good faith that C had a sound claim against D. Discovery later showed not a shred of evidence to support C's contentions. C finally confessed to A that she was maintaining the suit simply to harass and injure D. A must withdraw because to continue would require him to violate the disciplinary rule against frivolous litigation. [ABA Model Rule 3.1]

c. Crime or Fraud

If a client insists on using a lawyer's services to commit or further a crime or fraud despite the lawyer having discussed their inability to assist in the wrongdoing, the lawyer ***must*** withdraw. In particular, lawyers must be alert to the potential that their services may be used to further money laundering or terrorist financing operations. [ABA Model Rule 1.16(a)(4) and comments 1 and 2]

4. Permissive Withdrawal

An attorney ***may*** withdraw from representing a client ***for any reason*** if it can be done without material adverse effect on the client's interests or if the client consents. [ABA Model Rule 1.16(b)(1)] In addition, the attorney may withdraw despite an adverse impact on the client's interests in the situations listed below, provided the circumstances are severe enough to justify harming the client's interests. [*See* Restatement §32]

a. Client Persists in Criminal or Fraudulent Conduct

A lawyer ***may*** withdraw from representing a client if the client persists in a course of action that involves the lawyer's services and that the lawyer ***reasonably believes*** is criminal or fraudulent. [ABA Model Rule 1.16(b)(2)] Note that if the client's criminal or fraudulent conduct involves some assistance by the lawyer, then the lawyer ***must*** withdraw. [ABA Model Rules 1.16(a)(1), 1.2(d)]

b. Client Has Used Attorney's Services to Commit Past Crime or Fraud

An attorney ***may*** withdraw from representing a client if the client has used the attorney's services to commit a past crime or fraud. [ABA Model Rule 1.16(b)(3)]

c. Client's Objective Is Repugnant or Against Lawyer's Beliefs

An attorney ***may*** withdraw from representing a client if the client insists on taking action that the attorney considers to be repugnant or with which the lawyer has a fundamental disagreement. [ABA Model Rule 1.16(b)(4)]

d. Client Breaks Promise to Attorney

An attorney ***may*** withdraw from representing a client if the client substantially fails to fulfill an obligation to the attorney and has been warned that the attorney will withdraw unless it is fulfilled (for instance, client refuses to pay attorney's fee, or refuses to appear for scheduled hearings despite promises to attorney). [ABA Model Rule 1.16(b)(5)]

e. Financial Hardship for Attorney

An attorney ***may*** withdraw from representing a client if to continue the representation will impose an unreasonable financial burden on the attorney. [ABA Model Rule 1.16(b)(6)]

f. Client Will Not Cooperate

An attorney ***may*** withdraw from representing a client if the client has made the attorney's work unreasonably difficult (e.g., where the client refuses to cooperate with the attorney in discovery proceedings). [*Id.*]

g. Other Good Cause

An attorney ***may*** withdraw if there is other good cause for withdrawal. [ABA Model Rule 1.16(b)(7)]

5. Attorney's Duties Upon Termination of Representation

An attorney who withdraws from a matter must comply with local laws that require notice to or permission of the tribunal before withdrawal. [ABA Model Rule 1.16(c)] Moreover, upon termination of the representation, the attorney must take reasonable steps to protect the client's interests, including:

a. Providing the client with ***reasonable notice*** of the withdrawal;

b. Providing the client with ***time*** to obtain another attorney;

c. ***Refunding attorneys' fees*** paid in advance and not yet earned and expense advances not yet spent; and

d. ***Returning all papers and property*** to which the client is entitled.

[ABA Model Rule 1.16(d)]

EXAMPLES

1) Lawyer L decided to withdraw from representing client C in a workers' compensation case because C repeatedly failed to comply with the adversary's legitimate discovery requests, repeatedly failed to show up to have his deposition taken, and deliberately refused to make the monthly fee payments that he had promised to L. C asked L to turn the case files over to C's new lawyer, but L refused to do so until his past due fees had been paid. The law of L's state (following the better view) does not allow a lawyer to hold case files hostage to compel payment of legal fees. [*See* Academy of California Optometrists, Inc. v. Superior Court, 51 Cal. App. 3d 999 (1975)] L is subject to discipline.

2) Attorney A was retained to represent client C in a divorce case. With C's consent, C's parents paid A $1,000 as an advance on attorneys' fees not yet earned. The parents understood that they could not attempt to influence A's judgment about how to handle C's case. (*See* IV.C.8., *infra*.) C then departed for parts unknown, making it impossible for A to pursue the divorce case. The parents would now like to have their $1,000 back, and A would like to withdraw from the matter. In these circumstances, it is proper for A to withdraw and to refund the fee advance to C's parents. [New York City Bar Op. 83-62 (1983)]

IV. CONFLICTS OF INTEREST

A. THE GENERAL RULES CONCERNING CONFLICTS OF INTEREST

Loyalty is an essential element in the relationship between a lawyer and client. The lawyer's professional judgment must be exercised solely for the benefit of the client, free of compromising influences and loyalties. [*See* Restatement §§121 - 135—restates the law of conflicts of interest; *see also* ABA Model Rule 1.7, comment 1] Thus, ***absent the necessary informed consent*** (*see* B.2., *infra*), a lawyer must not represent a client if a conflict of interest exists.

1. Consequences of a Conflict of Interest

If a conflict of interest is apparent ***before*** a lawyer takes on a client's matter, then the lawyer must not take it on. [ABA Model Rule 1.7(a)] If a conflict becomes apparent only ***after*** the lawyer has taken on the client's matter, and if informed consent of the affected client(s) will not solve the problem, then the lawyer must withdraw. [ABA Model Rule 1.16(a)(1); ABA Model Rule 1.7, comment 4] A lawyer's failure to handle a conflict properly can have three unpleasant consequences: (1) disqualification as counsel in a litigated matter, (2) professional discipline, and (3) civil liability for legal malpractice.

2. Imputed Conflicts of Interest

Generally, lawyers who practice together in a "firm" are treated as a single unit for conflict of interest purposes. That is, when one of the lawyers cannot take on a matter because of a conflict of interest, the other lawyers in the "firm" are also barred from taking on that matter. [ABA Model Rule 1.10(a)] The conflict is said to be "imputed" from the first lawyer to the other lawyers.

a. Meaning of "Firm"

The term "firm" includes not only an ordinary private law firm, but also other groups of lawyers who practice closely together, such as lawyers in a corporate law department, legal aid office, or prosecutors' or public defenders' office. [*See* ABA Model Rule 1.0(c) and comments 2 - 4] Whether a group of lawyers should be regarded as a "firm" for conflict of interest purposes depends on many factors, including: (1) do the lawyers have a formal agreement among themselves, (2) do they hold themselves out in a way that would make the public think they practice together as a firm, (3) do they share their revenues and responsibilities, (4) do they have physical access to each other's client files, (5) do they routinely talk among themselves about the matters they are handling,

and (6) would the purpose of the particular conflict rule be served by imputing one lawyer's conflict to other lawyers in the group?

b. Exceptions to Imputed Disqualification

1) Conflict Based on Uniquely Personal Interest of Lawyer

As will be seen in the paragraphs below, some kinds of conflicts are ***not*** imputed to other lawyers in the firm. Generally, these conflicts are uniquely personal to the lawyer in question, which makes it unlikely that other lawyers in the firm would have divided loyalties. [ABA Model Rule 1.10(a) and comment 3]

EXAMPLE

Client C hires attorney A to defend her in a copyright infringement action. After A takes on C's case, C commences a sexual relationship with lawyer L, who is one of A's law partners. ABA Model Rule 1.8(j) prohibits a lawyer from starting a sexual relationship with a client (*see* C.9., *infra*); therefore, L would be subject to discipline if he himself were defending C in the copyright case. However, L's conflict is uniquely personal to L and is not likely to affect the way L's partner A handles C's case. Thus, L's conflict is not imputed to partner A.

2) Specific Situations Involving Lawyer's Former Dealings—Screening and Notice

As discussed in more detail *infra*, in certain situations involving conflicts based on a lawyer's former employment, or former consultation with a prospective client, the imputation will be cured provided the disqualified lawyer is timely screened from participation in the matter (does not have access to files, etc.) and is apportioned no part of the fee from the matter (apart from their normal salary or partnership share). Written notice of the procedures must promptly be given to the affected client or person. [ABA Model Rule 1.10(a)(2)]

c. Office-Sharing Arrangements

Lawyers who participate in office-sharing arrangements must take care to avoid the imputation of conflicts of interest. It may be permissible for lawyers who share offices to represent clients with adverse interests—even in the same lawsuit or transaction—but this depends on the specifics of the arrangement and the proposed representation. Further, engaging in occasional, informal consultations does not mean the lawyers will be treated as a firm, but they could trigger unintended conflicts of interest. [ABA Formal Op. 507 (2023)]

EXAMPLE

Lawyer A, who shares office space with Lawyer B, divulges client information to Lawyer B during an informal consultation intended to help Lawyer A prepare for trial. Lawyer B may have assumed the responsibility to maintain the client's confidences, which may materially limit Lawyer B's ability to represent a current or future client. This situation parallels the conflicts problems that can surface if a lawyer receives too much information from a prospective client during an initial consultation.

B. CONFLICTS OF INTEREST—CURRENT CLIENTS

1. Concurrent Conflicts of Interest

Except on the conditions stated in 2., below, a lawyer must not represent a client if the representation creates a concurrent conflict of interest. A concurrent conflict exists in two situations:

a. The representation of one client will be ***directly adverse*** to another client; or

b. There is a ***significant risk*** that the representation of one client will be ***materially limited*** by the lawyer's own interest or by the lawyer's responsibilities to another client, a former client, or a third person.

[ABA Model Rule 1.7(a)]

EXAMPLE

Client C asked attorney A to defend her in a vehicular manslaughter case in which C is charged with killing victim V while driving drunk. Unbeknownst to C, V was A's college roommate, and they remained best friends until V's death. There is a significant risk that A's efforts on C's behalf would be materially limited by A's personal grief at the loss of his best friend. Therefore, A must not take on C's case.

2. Informed Consent Can Solve Some Conflicts

Despite a concurrent conflict of interest, a lawyer ***may*** represent a client if all four of the following conditions are satisfied: (1) the lawyer reasonably believes that he can competently and diligently represent each affected client, despite the conflict of interest; (2) the representation is not prohibited by law; (3) the representation does not involve asserting a claim by one client against another client represented by that lawyer in the same litigation (or other proceeding before a tribunal); and (4) each affected client gives informed consent, confirmed in writing. [ABA Model Rule 1.7(b)]

a. Consent Must Meet Reasonable Lawyer Standard

Notice that the consent rule creates a ***reasonable lawyer standard***. That is, if a reasonable lawyer looking at the facts would conclude that the client's interests would not be adequately protected in light of the conflict, then the conflict is ***unconsentable***, meaning that the client's consent will not solve the conflict. [*See* ABA Model Rule 1.7, comments 14 and 15; *and see* ABA Formal Op. 05-436]

EXAMPLE

General practitioner G represents husband H in legal matters arising out of the investment of H's inherited fortune. G has represented H for many years, and he knows all of H's innermost secrets, both financial and personal. Now wife W has asked G to represent her in obtaining a divorce from H. In light of all of the confidential information G has learned about H over the years, a reasonable lawyer would have to advise H ***not*** to consent to the conflict of interest. Thus, even if H did consent, the consent would not solve the conflict.

b. Consent Must Be Informed

Only ***informed*** consent will solve a conflict. That means that the affected client is aware of all of the relevant circumstances, reasonable alternatives, and foreseeable ways the conflict might harm her. [*See* ABA Model Rule 1.0(e); ABA Model Rule 1.7, comment 18] Sometimes a lawyer cannot obtain informed consent from one client without revealing a fact that she learned in confidence from another client; if the second client will not permit the lawyer to reveal that confidence, then the lawyer cannot represent the first client; consent will not solve the conflict.

c. Consent Must Be Confirmed in Writing

A consent that is merely oral will not solve a conflict. The consent must be "confirmed in writing." Usually that means either of two things: (1) there is a ***tangible or electronic record*** that is physically or electronically ***signed*** by the client; or (2) there is an ***oral*** consent that is ***promptly memorialized*** in a tangible or electronic record that is promptly sent to the client. [*See* ABA Model Rule 1.0(b), (n); ABA Model Rule 1.7, comment 20] *But note*: The client's consent to an aggregate settlement or a business transaction with the lawyer must be ***signed by the client*** (*see* C.2.a. and C.7., *infra*). [ABA Model Rule 1.8(a), (g)]

1) Rationale

The writing requirement has two purposes: (1) it helps impress on the client that consent to a conflict is a serious matter, and (2) it helps avoid later disputes that might arise if there were no writing.

d. Must Not Be on Both Sides of Litigation

Even if the clients consent, a lawyer must not assert a claim on behalf of one client against another client represented by that lawyer in the same litigation (or other proceeding before a tribunal). In other words, the lawyer cannot be on both sides of the same proceeding. However, in a transactional matter, the lawyer may be able to address the conflict and act for both parties.

e. Revocation of Consent

Just as a client can almost always fire a lawyer, the client can almost always revoke a previously given consent to a conflict. [ABA Model Rule 1.7, comment 21] The revocation may or may not mean that the lawyer can continue representing other clients in the matter, depending on the particular facts. [*Id.*]

f. Consent to Future Conflicts

A lawyer may properly ask a client to consent to conflicts that may arise in the future, but only if it is ***reasonable*** to do so, and only if the client truly understands the particular kinds of conflicts that may arise and the consequences of consenting. [ABA Model Rule 1.7, comment 22; *and see* ABA Formal Op. 05-436]

EXAMPLE

The standard contract that a firm of class action lawyers uses when signing up class representatives provides that: "Client hereby consents to and waives any and all conflicts of interest, both present and future." The contract does not explain the possible present or future conflicts, nor do the lawyers offer any explanation when they sign up the class representatives. The consent provision is invalid.

3. Specific Conflict Situations Concerning "Direct Adversity" Between Clients' Interests

ABA Model Rule 1.7(a) prohibits a lawyer from representing one client whose interests are ***directly adverse*** to those of another client, unless both of the affected clients give their informed consent, confirmed in writing. The following examples show the bounds of "direct adversity."

EXAMPLES

1) Lawyer L represents patent owner O in connection with the licensing of O's patent. Manufacturer M is one of O's licensees, but M does not realize that L represents O. M asks L's law partner P to sue O for a declaratory judgment that O's patent is invalid and that O's license agreements are void. Obviously, L herself could not represent M because M's interests are directly adverse to

O's interests. L's conflict is imputed to her law partner P. A reasonable lawyer would advise O and M not to consent to this conflict. Moreover, consent will not solve the conflict when one client sues another client represented by the lawyer in the same litigation. [*See* ABA Model Rule 1.7(b)(3)] Therefore, P must not represent M.

2) Attorney A represents GenCorp, a genetic engineering company that is working on a cure for melanoma. A's law partner P represents BioTek, another genetic engineering company that is working on an entirely different way to cure melanoma. BioTek and GenCorp are head-to-head adversaries in an economic sense, but their interests are not adverse in any legal sense. If A and her partner P can disclose the situation to their respective clients without revealing confidential information, they may do so for the sake of client goodwill, but they would not be subject to discipline for failing to do so. [*See* ABA Model Rule 1.7, comment 6]

3) Lawyer L is defending D, who is accused of the armed robbery of a liquor store. L is stunned when he sees the prosecutor's witness list because it includes Z, a purported eyewitness to the armed robbery. L knows Z very well because he is defending Z in a drunk driving case. From confidential information L gathered in the drunk driving case, L knows that Z is an alcoholic who sometimes sees things that are not there and sometimes remembers things that did not happen. In defending D, L will have to cross-examine Z about his capacity to perceive, remember, and relate events accurately. If L cross-examines Z vigorously, he might seem to be using information about Z that he learned in confidence, or at least Z might think so. On the other hand, if L soft-pedals the cross-examination of Z, D might think he is not getting the effective assistance of counsel. A reasonable lawyer would have to advise D and Z not to consent to this conflict of interest. L must seek the court's permission to withdraw from one case or the other, preferably the case in which his withdrawal will be least harmful to the client. [*See* ABA Model Rule 1.7, comment 6]

4) Attorney A represents client C as plaintiff in an employment discrimination case against Mack's Grill. While that matter is pending, one of A's regular clients, Grinch Rentals, Inc., asks A to represent it in unlawful detainer proceedings to have C thrown out of her apartment for failure to pay rent. Even if the two cases are completely unrelated, A faces a conflict of interest. If A agrees to represent Grinch, C could feel betrayed by her own lawyer, and that could destroy A's ability to represent C effectively in the employment discrimination case. [*See* ABA Model Rule 1.7, comment 6] Would the conflict be solved by getting informed consent, confirmed in writing, from both C and Grinch? Comment 6 suggests that it could. (Do you agree?)

5) Lawyer L represents buyer B in negotiations for the purchase of a run-down shopping center from seller S. While those negotiations are in progress, S seeks to hire L to represent it in negotiations with the Planning Commission

of a different city concerning an urban renewal project S wants to pursue. The shopping center sale is totally unrelated to the urban renewal project. Nevertheless, L must not represent S without first getting informed consent, confirmed in writing, from both B and S. [*See* ABA Model Rule 1.7, comment 7]

a. Unnamed Members of a Class Do Not Count as Clients

In class action litigation, the unnamed members of a class ordinarily are ***not*** regarded as clients for purposes of the "direct adversity" conflicts rule. [ABA Model Rule 1.7, comment 25]

EXAMPLE

Lawyer L is presently representing victim V in a medical malpractice case against Dr. D. Today, United Motors Corp. asked L to defend it in a class action case that is unrelated to the malpractice case. V is not a named plaintiff in the class action, but she will be a member of the class if the court eventually certifies the case as a class action. L does not need to obtain V's consent before agreeing to defend United Motors. [*Id.*]

4. Specific Conflict Situations Concerning "Material Limitation"

The discussion in 3., above, concerned conflicts caused by "direct adversity" between the interests of two clients. ABA Model Rule 1.7 also covers a second kind of conflict—situations in which there is a ***significant risk*** that the lawyer's representation of a client will be ***materially limited*** by the lawyer's own personal interests or by the lawyer's responsibilities to: (1) a different client, (2) a former client, or (3) a third person. [ABA Model Rule 1.7(a)(2)] When there is such a risk, the lawyer must not take on the matter (or must withdraw), unless each affected client gives informed consent, confirmed in writing. Illustrations of these "material limitation" conflicts are discussed in a. through e., below.

a. Representing Multiple Clients in the Same Matter

1) Co-Parties in Criminal Litigation

The Sixth Amendment guarantees every criminal defendant the right to effective assistance of counsel. Because the interests of criminal co-defendants are very likely to diverge, ***ordinarily a lawyer should not*** try to defend two people in a criminal case. [ABA Model Rule 1.7, comment 23] If a trial judge requires two criminal defendants with divergent interests to share a single lawyer, and if they are prejudiced as a result, their Sixth Amendment rights have been violated. [*See* Strickland v. Washington, 466 U.S. 668 (1984); Cuyler v. Sullivan, 446 U.S. 335 (1980)] Here are four examples of divergent interests:

a) One defendant seeks to put the blame on the other;

b) The story told by one defendant is inconsistent with the story told by the other;

c) One defendant has a strong defense that is compromised to protect the other; and

d) The trial tactics that would help one would harm the other.

2) Co-Parties in Civil Litigation

In civil litigation, one lawyer ***may*** represent multiple plaintiffs or defendants whose interests are potentially in conflict. However, the conflict must be addressed in accordance with 4), below. [*See* ABA Model Rule 1.7, comment 23] The advantages of having a single lawyer are obvious: the cost will probably be lower than having two lawyers, and the single lawyer can present a united front for both clients. The disadvantages are also obvious: the interests of the clients may be mostly harmonious but partly or potentially in conflict (e.g., one personal injury plaintiff may need money badly and may therefore be anxious to accept a joint settlement offer that the other plaintiff thinks is too low).

3) Nonlitigation Matters

Lawyers are often asked to represent more than one client in nonlitigation matters. Whether that creates a conflict of interest depends on many factors, including the length and intimacy of the lawyer's relationship with one or more of the clients, the kind of work the lawyer is asked to do, the chances of disagreement between the clients, and the consequences to the clients if the joint representation breaks down. [*See* ABA Model Rule 1.7, comment 26] If there is a conflict, the lawyer must follow the steps in 4), below.

EXAMPLES

1) Clients X, Y, and Z ask lawyer L to represent the three of them in forming a new business venture. X will supply the capital, Y will supply a valuable trade secret, and Z will supply the managerial skill. Although their interests are mostly harmonious, there are potential conflicts. For instance, if the venture folds, who will own the trade secret? L ***may*** represent all three clients if she follows the four steps outlined in 4), below.

2) Estate planning attorney E is asked to prepare estate plans and wills for four members of a family—G (the wealthy grandmother), H and W (the irresponsible parents), and D (the talented daughter). All four have the same basic goals: to maximize the family's wealth and to allocate it rationally. However, their interests are potentially

in conflict. For instance, H and W may want to get their hands on money that G wants to preserve for D. E ***may*** represent all of the family members if she follows the four steps outlined in 4), below.

4) Handling Multiple Representation Conflicts
In both litigation and nonlitigation matters, there is a four-step guide for handling this situation:

a) First, the lawyer should ***analyze the facts*** of the case and the applicable law. If she concludes that she can ***effectively represent both clients***, despite their potentially conflicting interests, then she can move to the second step. [*See* ABA Model Rule 1.7, comment 15]

b) Second, the lawyer should ***disclose the potential conflict*** to each client and explain how it can harm each client, the reasonably available alternatives, and the disadvantages of having only one lawyer for the two of them (*see* 5), below). [*See* ABA Model Rule 1.7, comment 18]

c) Third, when the clients fully understand the situation, the lawyer may invite their ***informed consent*** to the joint representation and ***confirm*** such consent ***in writing***. [*Id.*]

d) Fourth, ***if the potential conflict eventually ripens into a present conflict***, the lawyer must repeat steps a), b), and c), above. The lawyer must withdraw from the joint representation if a reasonable lawyer would have to advise either of the two clients not to consent. [*See* ABA Model Rule 1.7, comments 4, 14, and 15] The lawyer may continue to represent one consenting client, but only if the client who is dropped gives informed consent to the continuation, confirmed in writing. [*See* ABA Model Rule 1.9(a)]

EXAMPLE
Attorney A agreed to defend Ace Corp. and Bay Corp. in a negligence case. At the outset, A believed that neither Ace nor Bay caused the harm to the plaintiff. A went through steps a), b), and c), above, and obtained Ace's and Bay's informed, written consent to the joint representation. Discovery revealed that Ace had a credible defense, but that Bay was very likely negligent, and that its negligence probably harmed the plaintiff. A repeated steps a), b), and c), at which point Ace insisted

on obtaining a separate lawyer. A ***may*** continue representing Bay, but ***only if*** Ace gives informed consent, confirmed in writing (under ABA Model Rule 1.9(a)), and Bay gives informed consent, confirmed in writing (under ABA Model Rule 1.7(b)).

5) Special Problems of Representing More than One Client
A lawyer must be impartial in dealing with the multiple clients. If the relationships among the clients are already antagonistic, or if contentious negotiations or litigation is on the horizon, a single lawyer ordinarily should not try to represent all of the clients. [ABA Model Rule 1.7, comment 29]

a) Confidentiality and Privilege Problems
In litigation between two people who were formerly joint clients of a single lawyer, neither of them can claim the attorney-client privilege for their communications with that lawyer. [*See* Restatement §75] That is one disadvantage of having one lawyer for multiple clients, and the lawyer should warn the clients about it before undertaking multiple representation. Moreover, a multiple representation is unlikely to work if one client wants to disclose material to the lawyer in confidence and wants to keep it confidential from the other clients. [ABA Model Rule 1.7, comment 31] Therefore, the lawyer should ordinarily make clear to all clients at the outset that whatever one client discloses will be shared with all of the other clients. [*Id.*] In special situations, however, the clients may agree that one of them may disclose a given item of information to the lawyer but not to the other clients.

EXAMPLE
Clients X, Y, and Z hire attorney A to represent all of them in forming a new business venture. Z's contribution to the business will be a valuable invention. Z has applied for a patent, but until a patent issues, the specifics of the invention are protected as Z's trade secret. X, Y, and Z may agree that Z may disclose the specifics of the invention to A in confidence and that A will not share that information with X or Y.

b. Representing Two Clients with Inconsistent Legal Positions in Two Unrelated Cases
Suppose a lawyer represents two clients in different cases that are pending in different tribunals. On behalf of Client One, the lawyer needs to argue that a certain statute is unconstitutional. On behalf of Client Two, the lawyer needs to argue that the same statute is constitutional. Aside

from that legal issue, the cases are unrelated. On those bare facts, there is no conflict of interest between Client One and Client Two. [ABA Model Rule 1.7, comment 24] Suppose, however, that Client One's case will be heard next week in the intermediate appellate court that hears cases from Judicial District Six. Client Two's case will be tried seven months from now in a trial court in Judicial District Six. Thus, the appellate court's decision in Client One's case is likely to become the controlling precedent in Client Two's case. That presents a substantial risk that the lawyer's representation of one client will be materially limited by her responsibilities to the other client. [*Id.*] Therefore, the lawyer must fully disclose the situation to both clients and seek their informed consent, confirmed in writing. If either or both clients will not consent, the lawyer must seek the court's permission to withdraw from one or both cases. [*Id.*]

c. Conflicts Caused by Lawyer's Own Interests

If a lawyer's own interests are likely to materially limit her ability to represent a client effectively, then she must not take on the matter (or she must withdraw) unless she obtains the client's informed consent, confirmed in writing. [*See* ABA Model Rule 1.7(a)(2)] The following paragraphs illustrate some of the lawyer's interests that may create a conflict. Additionally, note that there is a specific conflicts rule regarding sexual relationships with clients (*see* C.9., *infra*).

1) Lawyer's Financial Interest

A conflict of interest may be created by a lawyer's own financial interest. Suppose that attorney A is representing client C in a gender discrimination action against Magnum Corp. After one of the pretrial hearings, the general counsel of Magnum spoke quietly to A in the courthouse hallway, saying: "Your courtroom skills are first-rate. When you want to start playing in the big leagues, please come to see me—our law department could really use a person like you, and we pay top money." If the employment overture creates a substantial risk that A will curry favor with Magnum at C's expense, A must fully disclose the situation to C and obtain C's informed consent, confirmed in writing, before continuing as C's counsel.

2) Lawyers Who Are Close Relatives

A conflict of interest also may be created by a lawyer's relationship to another lawyer. Suppose that lawyer L is a partner in the J, K, & L firm. L lives with her parents, and her mother M is the senior litigation partner of the M, N, & O firm. M regularly serves as trial counsel for the Kansas Central Railway Co. in railway accident cases. L's regular client C was badly injured when his car was struck at a crossing by one of Kansas Central's trains, and C asked

L to represent him in a suit against Kansas Central. If L serves as C's lawyer, and M serves as Kansas Central's lawyer, there is a risk that client confidences may be compromised (e.g., if M takes a telephone message at home for L, M may inadvertently learn something confidential about C). [ABA Model Rule 1.7, comment 11] Moreover, the family relationship may interfere with the loyalty or independent judgment of the two lawyers. [*Id.*] Thus, L and M must each disclose the situation to their respective clients and must not proceed without their respective client's informed consent, confirmed in writing. The same is true of other lawyers who are closely related by blood or marriage (e.g., parent, child, spouse, or sibling). This kind of conflict is personal in nature and is ordinarily ***not*** imputed to other lawyers in a firm. [*Id.*]

d. Conflict Between Client's Interest and Third Person's Interest

Sometimes the interest of a third person may create a substantial risk of materially limiting the lawyer's ability to represent the client effectively. [ABA Model Rule 1.7(a)(2)] When that is true, the lawyer may represent the client, provided that: (1) the lawyer reasonably believes that the third person's interest will not adversely affect the representation; and (2) the client gives informed consent, confirmed in writing. [ABA Model Rule 1.7(b)]

EXAMPLES

1) Carter Corp. and its executive vice president K were indicted for mail fraud in connection with the interstate sale of certain investment properties. The bylaws of Carter Corp. provide that the corporation will pay for separate legal representation of any officer accused of wrongdoing in the course of the corporation's business; however, there is no provision for indemnifying officers who are found guilty of wrongdoing. Carter Corp. asks lawyer L to provide the necessary separate representation for K. L's fee will be paid by Carter Corp. L may represent K if: (1) the arrangement between Carter Corp. and L assures L's independence, (2) L reasonably believes that he can represent K effectively, and (3) K gives informed consent, confirmed in writing.

2) The United Coastal Charities Fund offers to pay attorney A's fee for drafting the will of any person who leaves a bequest of $2,000 or more to the Fund. If A agrees to the arrangement, he will be subject to discipline. [New York City Bar Op. 81-69 (1981)]

3) Lawyer L is a staff attorney for the County Legal Aid Society. Her salary is set by the board of directors of the Society, but her clients are those who come to the Society for legal assistance and are assigned to L. The board of directors may set general operating policies, but L must

not allow the board of directors to influence her independent legal judgment about how to handle a particular client's legal matter. [ABA Model Rule 5.4(c); ABA Formal Op. 334 (1974)]

e. Conflicts Raised by Liability Insurance

1) Policyholder's Interests

Liability insurance policies commonly provide that the insurance company will select and pay for a lawyer to defend the policyholder in suits arising out of events covered by the policy. The policyholder, in turn, promises to cooperate with the defense. Generally, the policyholder wants a claim handled in a way that minimizes his risk of paying money out of his own pocket (e.g., if the policy limit is $50,000, but the claimant wins a judgment for $60,000, the policyholder would have to pay the $10,000 difference from his own pocket).

2) Insurance Company's Interests

The insurance company generally wants a claim handled in a way that minimizes what it must pay, whether in litigation costs or payments to a claimant. To minimize litigation costs (and thus to keep insurance premiums affordable), some insurance companies adopt spending limits and audit procedures that limit the defense lawyer's fees and expenses for various steps in the litigation process. Insurance defense lawyers have complained that these limits sometimes undercut their ability to represent policyholders effectively.

3) Whom Does the Defense Lawyer Represent?

Does an insurance defense lawyer represent the policyholder (a person he is likely to encounter only once) or the insurance company (which pays his fees and can send him repeat business)? Curiously, the law on this question varies from state to state. [*See* ABA Formal Op. 01-421, notes 6, 7 (2001)] Some states say that the client is the policyholder only, but others say that the policyholder and the insurance company are joint clients. [*See* Restatement §134, comments a and f—insurance law and contract law determine who is the client] No matter whether the defense lawyer represents the policyholder only or both the policyholder and the insurance company, the defense lawyer's ethical obligations are governed by the Rules of Professional Conduct and not by the insurance contract. [ABA Formal Op. 01-421]

4) Conflicts Between Insurance Company and Policyholder

Most of the time, the insurance company's interests are in harmony

with those of the policyholder. Both of them want to see the claim defeated or settled at the least possible expense. Their respective interests can, however, come into conflict, as in the following examples.

a) Is the Event Covered by the Policy?
Suppose that G drove her car over her boyfriend B in circumstances that make it unclear whether G acted intentionally or only negligently. B sued G, alternatively alleging negligence and intentional conduct. G's auto liability policy covers negligence, but not intentional conduct. G's insurance company hired lawyer L to defend the case, but it sent G a "reservation of rights" letter, informing her that it might ultimately contend that G acted intentionally, thus freeing the company from liability. During pretrial preparation, G told L in confidence that she ran over B intentionally. L must not disclose that confidential information to the insurance company. [*See* Parsons v. Continental National American Group, 550 P.2d 94 (Ariz. 1976)] If G's confidential statement means that L cannot defend G effectively, L must withdraw. [Restatement §134, comment f]

b) Settlement Within the Policy Limits
Suppose that Insco Insurance Co. hires attorney A to defend policyholder D in a slip-and-fall case brought by P. The liability limit in D's policy is $100,000, and P offers to settle for $90,000. D wants to settle because that would free him from paying P anything from his own pocket. Insco, on the other hand, might rather go to trial because its exposure is only $10,000 more than the settlement offer. The settlement offer creates a conflict of interest that has the following consequences: (1) A and Insco must disclose the conflict to D and invite D to obtain independent counsel (at Insco's expense) to advise D on the settlement issue; (2) if A fails to do that and negligently or in bad faith advises D to reject the settlement offer, A is subject to discipline and perhaps civil liability to D for malpractice; and (3) if Insco negligently or in bad faith rejects the settlement offer, Insco will be liable for the entire judgment P obtains against D, even the amount over the policy limits. [Easley v. State Farm Mutual Insurance Co., 528 F.2d 558 (5th Cir. 1976)]

c) Settlement Controlled by Insurance Company
Although the policyholder is usually glad to have the insurance company settle a claim within the policy limits, that is

not always true. For example, a physician might not want her malpractice insurance company to settle for fear that the settlement will tarnish her medical reputation. Some insurance policies authorize the insurance company to control the defense and to settle within the policy limits at the company's sole discretion. In that situation, a lawyer hired by the insurance company must inform the policyholder, as early in the case as possible, about the constraints on the representation. Having done that, the lawyer may then follow the insurance company's instructions about settlement. If the lawyer knows that the policyholder objects to a settlement, the lawyer must not proceed without first giving the policyholder a chance to reject the insurance company's defense and to assume responsibility for her own defense at her own expense. [ABA Formal Op. 96-403]

d) Unreasonable Limits on Defense Fees and Expenses

Seeking to control litigation costs, some insurance companies insist on detailed audits of a defense lawyer's time records and litigation files. Some companies also limit the amount a defense lawyer can spend in preparing the case for trial. Some companies use "litigation managers" who look over the lawyer's shoulder and sometimes try to micromanage the defense. A defense lawyer must not disclose a policyholder's confidential information to an outside auditor without the policyholder's informed consent, but he may disclose bills and time records containing confidential information to the insurance company itself if doing so will aid, not harm, the policyholder. [ABA Formal Op. 01-421] Furthermore, a defense lawyer must refuse to follow insurance company litigation management guidelines that interfere with the lawyer's professional judgment or prevent the lawyer from representing the policyholder competently. If the insurance company will not relent, the lawyer must withdraw. [*Id.*]

C. CONFLICTS OF INTEREST—SPECIFIC RULES FOR CURRENT CLIENTS

The discussion in B., *supra*, covered the general principles concerning conflicts of interest that involve one or more current clients, which is the subject matter of ABA Model Rule 1.7. However, some kinds of conflicts arise time and time again in law practice. They are so common that the drafters of the ABA Model Rules devised specific rules to deal with them. These rules are the subject matter of ABA Model Rule 1.8, discussed below.

1. Misuse of Client's Confidential Information

As was discussed previously in III.A., *supra*, a lawyer has a duty not to

disclose information relating to the representation of a client, except when an exception to the duty of confidentiality applies. In addition, a lawyer must not use such information to the ***client's disadvantage***, unless the client gives informed consent or some other exception to the duty of confidentiality applies. [*See* ABA Model Rule 1.8(b)] The same rule applies to misuse of a ***former or prospective*** client's confidential information. [*See* ABA Model Rules 1.9(c)(1), 1.18(b)]

EXAMPLE
Prospective client P came to patent attorney A's office, seeking to hire A to file a patent application on P's behalf. In the course of their preliminary discussions, P told A what chemical compound he uses to make his invention work. P ultimately decided not to hire A. A then told one of his other inventor clients about the chemical compound, and that client used the information in a way that prevented P from obtaining a patent. A is subject to discipline. [*See* ABA Model Rule 1.18(b)]

a. Use to Benefit Lawyer or Someone Else
The rule applies not only when the lawyer uses the information for the lawyer's own benefit, but also when the lawyer uses it to benefit someone else, such as another client or a third party.

EXAMPLE
While representing client Chez Nous Catering Co., lawyer L learned that Chez Nous was teetering on the edge of insolvency. L knew that his good friend F had contracted with Chez Nous to cater F's daughter's big wedding reception. L advised F to cancel the contract and hire a different caterer. L is subject to discipline for using the information to the disadvantage of Chez Nous.

b. Possible Civil Liability Even When Client Is Not Disadvantaged
Note that the rule applies only when the lawyer's misuse of confidential information disadvantages the client, former client, or prospective client. However, a lawyer who uses the confidential information for his own pecuniary gain (other than in the practice of law) may be subject to ***civil liability***—i.e., he may have to account to the client, former client, or prospective client for his profits. [Restatement §60(2)]

EXAMPLE
Attorney A's client C told A in confidence that she was about to build a large new medical complex on the corner of 5th and Main Streets. Without telling C, A quietly bought land at 4th and Main and built a four-story parking garage to serve the new medical complex. The garage did not

harm C; in fact it was a benefit to her. Nevertheless, A must disgorge the garage profits to C because A used C's confidential information to enrich himself other than in the practice of law.

2. Business Transactions with Client and Money or Property Interests Adverse to Client

a. Statement of the Rule

A lawyer's professional training, together with the bond of trust and confidence between a lawyer and client, create a risk that the lawyer can overreach the client in a business, property, or financial transaction. Therefore, a lawyer must not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security, or money interest that is adverse to a client, unless all of the following conditions are satisfied:

1) The terms of the business transaction (or the terms on which the interest is acquired) are ***fair to the client***;

2) The terms are ***fully disclosed*** to the client ***in writing***, expressed in a manner that the client can reasonably understand (i.e., not in technical legal terminology). The lawyer's disclosure to the client must cover the ***essential terms*** of the transaction and the ***lawyer's role*** in the transaction (including whether the lawyer is acting as the client's lawyer in the transaction);

3) The client is advised ***in writing*** that he should get the ***advice of an independent lawyer*** about the arrangement before entering into it (and the client must be given a reasonable chance to obtain that advice); and

4) The client gives ***informed consent, in a writing that the client signs***.

[ABA Model Rule 1.8(a)]

b. Outer Limits of the Rule

The lawyer need not advise the client to consult independent counsel if the client already has independent counsel in the matter. Moreover, if the client has independent counsel, the disclosure of conflict can be made by the independent counsel. Finally, the rule about business transactions and adverse interests does not apply to an ordinary fee agreement between a lawyer and client or to standard commercial transactions in which the lawyer buys goods or services that the client routinely markets to the public (e.g., the lawyer who buys a car from his

car dealer client or the lawyer who uses a client as her stockbroker). [*See* ABA Model Rule 1.8, comments 1 - 4]

3. Proprietary Interest in Subject of Litigation

Except as permitted below, a lawyer must not acquire a proprietary interest in the cause of action or the subject matter of litigation that the lawyer is conducting for the client. [ABA Model Rule 1.8(i); Restatement §36(1)]

EXAMPLES

1) Lawyer L regularly does consumer loan collection work for American Consumer Finance Company. When one of American's debtors defaults, American assigns the debt and cause of action to L; in return, L immediately pays American 50% of the face value of the debt. If L ultimately collects more than the 50%, she pays half of the excess to American and keeps the other half. L is subject to discipline.

2) F owns a United States patent on a process for manufacturing fertilizer. R brings a declaratory judgment action against F, alleging that F's patent is invalid. Attorney A agrees to represent F in the declaratory judgment action in exchange for an assignment of a one-half ownership interest in F's patent. A is subject to discipline.

a. Contingent Fee Exception

Despite the rule stated above, a lawyer may enter into a contingent fee arrangement with a client in a civil case. A contingent fee arrangement gives the lawyer a personal stake in the outcome of the case and may thus affect the lawyer's objectivity. This arrangement is thus clearly at odds with the spirit of the rule. Nevertheless, because contingent fees have been so long tolerated in the United States, they are excepted from the rule. [*See* ABA Model Rule 1.8(i)(2)]

EXAMPLE

In both the American Consumer Finance example and the patent case example (above), the lawyers can escape the general rule by using a contingent fee arrangement rather than an assignment of the cause of action or assignment of one-half ownership of the patent. In both examples, a contingent fee arrangement would be proper.

b. Attorney's Lien Exception

In some states, an attorney is allowed to secure payment of her fee and repayment of advanced litigation expenses by taking a lien on the proceeds of a client's case. Some states authorize attorney's liens by statute or case law. In other states, they must be created by contract between the attorney and the client. [*See generally* Pennsylvania Bar

Op. 94-35 (1994)] An attorney's lien gives the attorney a personal stake in the outcome of the client's case, but this situation is tolerated as an exception to the general rule. [ABA Model Rule 1.8(i)(1)]

EXAMPLE

The law of East Carolina permits an attorney to contract with a client for a lien to secure the attorney's fee and advanced litigation expenses. Attorney A's fee agreement with client C provides that A shall have a lien on whatever C recovers in her case against X to secure payment of A's fee and to secure repayment of litigation expenses that A advances on C's behalf. This provision of A's fee agreement is proper.

4. Gifts to Lawyer from Client Who Is Not a Relative

The following rules limit a lawyer's freedom to solicit or accept a substantial gift from a client who is not the lawyer's relative. The same rules apply to a substantial gift from a client to the lawyer's relative. In this rule, "relative" includes a spouse, child, parent, grandparent, grandchild, and other persons with whom the lawyer maintains a close, familial relationship. [ABA Model Rule 1.8(c)] "Gift" includes a testamentary gift. [*Id.*]

a. Soliciting Substantial Gift

A lawyer must not ***solicit*** a ***substantial*** gift from a client who is not the lawyer's relative. However, a lawyer may accept a small gift from a client, such as a token of appreciation or an appropriate holiday gift. [ABA Model Rule 1.8, comment 6] Indeed, the rule does not prohibit a lawyer from accepting even a substantial gift, although the gift may be voidable for undue influence.

EXAMPLE

Lawyer L is a loyal alumnus of the Port Arthur School of Law. The school asked L to serve as a pro bono legal advisor to a committee that was drafting a new affirmative action policy for the school. L gladly agreed and worked many hours on the project for no fee. When the work was done, L told the school's dean that his daughter would love to attend the school, but that she could not afford the high tuition. The dean then arranged for L's daughter to be admitted on a full scholarship. L is subject to discipline for soliciting a substantial gift from the school to his daughter.

b. Preparing Legal Instrument that Creates Substantial Gift

ABA Model Rule 1.8(c) also prohibits a lawyer from preparing a legal instrument (such as a will or a deed of property) that creates a substantial gift to the lawyer (or the lawyer's relative), except when the donor is one of the lawyer's relatives.

EXAMPLE
Attorney A's aged father asks her to draft a new will for him. The father tells A that he wants to set up a testamentary trust that will provide college funds for A's children. A may draft the will and related documents, but only because the client is her father.

c. Lucrative Appointments
ABA Model Rule 1.8(c) does not prohibit a lawyer from seeking to have himself or his law partner or associate named as executor of an estate or counsel to the executor or to some other fee-paying position. However, the general conflict of interest principles expressed in ABA Model Rule 1.7 do prohibit such efforts if the lawyer's advice is tainted by the lawyer's self-interest. [ABA Model Rule 1.8, comment 8] Moreover, lawyers with long experience in probate and estate planning law know that clients tend to rebel when they discover the lawyer trying to feather his own nest in this manner.

5. Acquiring Literary or Media Rights Concerning Client's Case

A lawyer must not acquire literary or media rights to a story based in substantial part on information relating to the lawyer's representation of a client. However, a lawyer may acquire such rights ***after*** the client's legal matter is entirely completed, appeals and all. [ABA Model Rule 1.8(d)] The reason behind the rule is that the client's interest in effective representation may conflict with the lawyer's interest in maximizing the value of the literary or media rights. For instance, the lawyer might conduct the client's criminal trial in a sensational manner, simply to pump up public interest in the client's story. The rule does not apply to literary or media rights that are not substantially based on information relating to the representation. [ABA Model Rule 1.8, comment 9]

EXAMPLE
Legendary rock star Deep River wrote an autobiography that tells the story of his rise from a poverty-stricken childhood to life as a beloved musical icon. Attorney A agreed to represent River in negotiating a book contract and a motion picture contract. In lieu of money, A agreed to do the legal work in return for 5% of the book and movie royalties. The literary rights rule does not apply to this arrangement because River's manuscript is about his life and not about negotiation of the book and movie contracts. [*Id.*] However, the arrangement must comply with ABA Model Rule 1.5 (prohibits unreasonably high fee) and ABA Model Rule 1.8(a) (business transactions with a client).

6. Financial Assistance to Client in Litigation

Except as permitted below, ABA Model Rule 1.8(e) prohibits a lawyer from financially assisting a client in connection with pending or contemplated

litigation. For instance, the lawyer must not make or guarantee a loan to the client. The prohibition harkens back to ancient English common law, which forbade lawyers from stirring up litigation or supporting it out of their own purse. More to the point, a lawyer who has too great a financial stake in a case may be unable to give the client objective legal advice.

a. Advancing Litigation Expenses

A lawyer may advance court costs and other litigation expenses on the client's behalf, and repayment may be contingent on the outcome of the case. [ABA Model Rule 1.8(e)(1)]

EXAMPLE

Lawyer L's fee agreement with personal injury victim V provides that L will advance the court costs and litigation expenses in V's suit against the person who injured him. The agreement also states that if V wins the case, L will be repaid out of the judgment or settlement proceeds, but that if V loses, L will not be repaid. The fee agreement is proper.

b. Paying Costs and Expenses for Indigent Client

A lawyer may simply pay the court costs and litigation expenses for an indigent client, without any provision for repayment. [ABA Model Rule 1.8(e)(2)]

Note: These exceptions apply even if the representation is eligible for fees under a fee-shifting statute. In other words, the lawyer can advance or pay litigation expenses as permitted by this rule even if the client's opponent might end up being responsible for the client's fees and costs.

c. Modest Gifts When Representing Indigent Client Pro Bono

A lawyer representing an indigent client pro bono (on their own, or through a nonprofit organization or a law school clinical or pro bono program) may provide modest gifts (not loans) to the client for food, rent, transportation, medicine, and other basic living expenses. However, the lawyer must not: (1) promise or imply the availability of such gifts prior to retention, or as an inducement to continue the client-lawyer relationship after retention; (2) seek or accept reimbursement from the client or anyone affiliated with the client; or (3) publicize or advertise a willingness to provide such gifts to prospective clients. [RPC 1.8(e)(3)]

d. Other Financial Help Is Prohibited

A lawyer is subject to discipline for giving a client other financial help in the context of pending or contemplated litigation. [ABA Model Rule 1.8(e)]

EXAMPLE
Chem Corp.'s chemical plant blew up, spreading toxic fumes across pasture land belonging to dozens of dairy farmers. The grass shriveled, the cows died, and the farmers became destitute. The law offices of E.Z. Bucks took out newspaper ads offering to represent the farmers on contingency, to advance the costs and expenses of litigation, and to lend them money to restore their pastures and dairy herds. The last feature of that offer makes the lawyers subject to discipline.

7. Aggregate Settlement Agreements

When a lawyer represents several co-parties in a matter (e.g., several plaintiffs or several defendants), the adversary sometimes makes an "aggregate settlement offer," for example, an offer to settle all claims for a lump sum of $1 million. That creates a potential conflict of interest among the lawyer's several clients. Some of them may want to settle for that amount, but others may want to hold out for a better offer. Moreover, the several clients may disagree about how the lump sum is to be allocated—who pays how much or who receives how much. Because of the potential conflict, the lawyer must not participate in the making of an aggregate settlement agreement unless all of the following conditions are met:

(i) The lawyer must assure that the ***clients have come to an agreement*** among themselves about how the aggregate sum will be shared (who will pay how much or receive how much);

(ii) The lawyer must ***disclose to each client all of the terms*** of the aggregate settlement, including: (a) the total amount that will be paid or received; (b) the existence and nature of all the claims, defenses, and pleas involved in the settlement; (c) the details of every other client's participation in the settlement, including how much each will contribute or receive and how each criminal charge will be resolved; and (d) how the lawyer's fees and costs will be paid and by whom. *Note:* These extensive disclosures may require the lawyer to share one client's confidential information with the others, so at the outset of the matter, the lawyer should get each client's informed consent to do that; and

(iii) Each client must give informed consent to the aggregate settlement agreement in a ***writing signed by the client***.

[ABA Model Rule 1.8(g); ABA Formal Op. 06-438]

a. Class Action Settlements

In a class action, the lawyer who represents the class ordinarily does not have a complete lawyer-client relationship with the unnamed members of the class. Even so, at settlement time, the class's lawyer must follow

all of the class action rules concerning notice and other procedural requirements that protect the unnamed class members. [ABA Model Rule 1.8, comment 16]

b. Aggregate Settlement of Criminal Case
The same rules that apply to an aggregate settlement in a civil case also apply to a joint plea bargain in a criminal case [ABA Model Rule 1.8(g)], although ordinarily one lawyer will not be representing more than one defendant in a criminal case [*see* Restatement §129(1)].

8. Compensation from Third Person

A lawyer must not accept compensation from a third person for representing a client, ***unless*** three conditions are met:

a. The client ***gives informed consent***;

b. The third person ***does not interfere with the lawyer's independence*** or the representation of the client; and

c. The arrangement ***does not compromise the client's confidential information***.

[ABA Model Rules 1.8(f), 1.7(b), 5.4(c)]

EXAMPLES

1) T, a pimp, seeks to employ attorney A to defend C, who is charged with prostitution. T demands to be present whenever A talks with C, and T directs C to plead not guilty, promising to pay the fine if C is found guilty after trial. If A agrees to represent C under these conditions, A is subject to discipline.

2) Midwest Highway Construction Corp. and its executive vice president C are both indicted for conspiring with other highway contractors to rig the bids on government highway contracts. Midwest seeks to employ lawyer L to serve as C's separate defense counsel. Midwest will pay L's fee, but will not interfere with L's handling of the case or with the confidentiality of the relationship between L and C. Under these conditions, L may agree to represent C.

3) Trimmers and Fitters Union Local #876 established a group legal service program for the benefit of its members. Using money from union dues, the Local hired the law firm of R, S, and T to provide the necessary legal services to members. Union member C asked the firm to represent her in a sexual harassment case against her fellow worker D, a loyal member of the union. When the president of the Local heard about C's case, he called the law firm, demanding to know what C said about D and demanding that the firm dismiss the case. The law firm must not allow the union or its officials to interfere with the handling of C's case.

9. Sexual Relationship Between Lawyer and Client

Because a sexual relationship between a lawyer and client is likely to distort the lawyer's professional judgment and endanger confidentiality and the attorney-client privilege, such a relationship makes the lawyer ***subject to discipline***, whether or not the client consents and whether or not the client is harmed—***unless*** their consensual sexual relationship ***predated*** the lawyer-client relationship. When the client is an organization, this rule applies to any person who supervises, directs, or regularly consults with the lawyer concerning the organization's legal matters. [*See* ABA Model Rule 1.8(j); ABA Model Rule 1.7, comment 12; ABA Model Rule 1.8, comments 20, 21, and 22]

a. No Imputation

All of the other specific conflicts discussed in 1. - 8., above, are imputed to other lawyers in the disqualified lawyer's firm. However, a conflict created by a sexual relationship is ***personal*** in nature and unlike most conflicts, it is not imputed to the lawyer's colleagues. [ABA Model Rule 1.8(k)]

b. Pre-Existing Relationship May Still Cause Conflict

Even where the sexual relationship predated the lawyer-client relationship, the lawyer should stop to consider whether the sexual relationship will "materially limit" the lawyer-client relationship and implicate the general conflict of interest rule for current clients (*see* B., *supra*). [ABA Model Rule 1.8, comment 21]

D. CONFLICTS INVOLVING FORMER CLIENTS

1. Continuing Duty of Confidentiality

An attorney's duty to preserve a client's confidential information does not cease when the representation ends. The attorney has a continuing obligation to preserve information gained in confidence during the representation. [ABA Model Rule 1.9(c)]

EXAMPLES

1) When A retired from his solo law practice, he sold his practice to another lawyer. The purchaser received not only books, furniture, and an office lease but also all of A's files relating to past and pending legal matters. Many of the files contained confidential information, and A made no effort to obtain the consent of his clients and former clients before transferring the files. A is subject to discipline. [*See* ABA Model Rules 1.17(c), 1.6, 1.9(c)]

2) Lawyer L, a solo practitioner, left instructions for the winding up of his law practice in the event of his unexpected death. L directed his personal representative to contact each client to find out whether that client's files should be delivered directly to the client, to another lawyer of the client's choice, or to a young lawyer designated by L. L's instructions are proper.

2. Using Confidential Information to Former Client's Disadvantage

When a lawyer has obtained confidential information from a former client, the lawyer must not thereafter use the confidential information to the former client's disadvantage, unless the former client gives informed consent, confirmed in writing. This rule does not apply to information that has become generally known. Furthermore, it does not apply to any information that the lawyer would be allowed to reveal or use under an exception to the general ethical duty of confidentiality. [ABA Model Rule 1.9(c)]

EXAMPLE

Three years ago, attorney A represented C, the son of a movie star, in a drug possession case. In that connection, C told A in confidence that he had abused drugs for several years and had become a hard drug addict. Based on information from other sources, several tabloid newspapers and gossip magazines published stories about C's drug problems; within a few weeks, the public knew all there was to know about C. Now A represents C's ex-wife in a dispute with C over the custody of their infant daughter. In the custody dispute, A may use publicly known information about C's history of drug abuse.

3. Opposing Former Client in Substantially Related Matter

A lawyer must not represent one client whose interests are materially adverse to those of a former client in a matter that is "substantially related" to a matter in which the lawyer represented the former client (unless the former client gives informed consent, confirmed in writing). [ABA Model Rule 1.9(a)] One purpose of this rule is to protect confidential information that the lawyer may have received from the former client, but the rule applies even when the former client cannot demonstrate that the lawyer received any confidential information.

a. Meaning of "Substantially Related" Matter

Matters are "substantially related" if: (1) they involve the ***same transaction or legal dispute***, or (2) there otherwise is a substantial risk that ***confidential factual information as would normally have been obtained*** in the prior representation would ***materially advance*** the new client's position. Note, however, that if a lawyer routinely handled a type of problem for a former client, the lawyer may later oppose that former client in a factually distinct problem of the same general type. [ABA Model Rule 1.9 and comments 2 and 3]

EXAMPLES

1) Summitville Hospital employed lawyer L to draft a consent form to be signed by all patients scheduled for elective surgery at the hospital. L drafted the form and thereafter did no further legal work for the hospital. Three years later, client C asked L to represent her in a suit against the hospital; in that suit, C will contend that the consent form violates

public policy and is therefore void. L must not represent C unless the hospital gives informed consent, confirmed in writing.

2) For many years, lawyer L represented client H in matters relating to H's business and personal finances. Then L and H had a sharp disagreement and came to a parting of the ways. Later, X asked L to represent her in her divorce from H. The information that L obtained in confidence about H's business and personal finances would materially advance X's case against H. Thus, L must not represent X unless H gives informed consent, confirmed in writing.

3) When attorney A was an associate in the M, N, O & P firm, she regularly represented the Magnum Oil Company in suits to eject service station dealers for failure to comply with the terms of their service station leases. Two years ago, A left the firm to enter solo practice. Now S, a Magnum service station dealer, has asked her to defend him in an ejectment suit brought by Magnum. A may represent S without getting Magnum's consent.

4. Clients of Former Firm

A lawyer's duties may extend not only to the clients she represented personally, but also to clients of the lawyer's former firm. A lawyer whose firm formerly represented a client in a matter and who acquired protected confidential information [Rule 1.6] or information pertaining to the representation [Rule 1.9(c)] may not thereafter represent another person in the ***same or a substantially related matter*** if that person's interests are ***materially adverse*** to those of the former client, unless the former client gives ***informed consent***, ***confirmed in writing***. [ABA Model Rule 1.9(b)]

EXAMPLE

Lawyer L is an associate at Firm One, which represents client A in the case of *A v. B*. L works on the *A v. B* case, and he receives reams of confidential information about the case from A. L then quits Firm One and becomes an associate at Firm Two.

Absent informed consent from A, confirmed in writing, L may not now represent B in the *A v. B* case. Furthermore, L may not represent C in the case of *C v. A* if the *C v. A* case is substantially related to the *A v. B* case and if the confidential information L obtained from A is material to the *C v. A* case.

5. Disqualification of Lawyer's New Firm

If a lawyer who is disqualified from representing a client under the rules set out in 3. - 4., above, joins a new firm, the new firm may be disqualified as well ***unless the lawyer is properly screened*** (i.e., the disqualified lawyer does not

work on the case, discuss it with those who do, or have access to case files) and does not share fees from the matter, and the former client is given notice.

EXAMPLE

Same facts as in example in 4., above. A lawyer at Firm Two may not represent B in the *A v. B* case or C in the *C v. A* case, unless L is screened from the case and shares no fees, and A is given notice.

Note: The prohibition against sharing fees does not prevent the lawyer from receiving a regular salary or partnership share set by prior independent agreement. It means only that the lawyer's compensation must not be "directly related to the matter in which the lawyer is disqualified." [*See* ABA Model Rule 1.10, comment 8]

a. Notice and Certifications to Former Client

Prompt written notice must be given to any affected former client detailing: (1) a description of the screening procedures employed, (2) a statement of the firm's and the lawyer's compliance with these requirements, (3) a statement that review before a tribunal may be available, and (4) an agreement by the firm to respond promptly to written inquiries or objections by the former client concerning the screening procedures. The disqualified lawyer and a partner of the firm must provide the former client with certifications of compliance with the ABA Model Rules and with the screening procedures at reasonable intervals upon written request, and upon termination of the screening procedures. [ABA Model Rule 1.10(a)(2)]

6. Disqualification of Lawyer's Former Firm

A lawyer's former firm is prohibited from representing a person with interests materially adverse to those of a client of the formerly associated lawyer if: (1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and (2) a lawyer remaining in the firm has information protected by Rules 1.6 and 1.9(c) that is material to the matter. [ABA Model Rule 1.10(b)]

EXAMPLE

Lawyer L is a partner at Firm One. L and three associates of Firm One represent client A in the *A v. B* case. L and the three associates obtain reams of confidential information from A about the case. Then L leaves Firm One to form Firm Two. The three associates stay at Firm One. Now L and Firm Two represent client A in the *A v. B* case.

No lawyer at Firm One may represent B in the *A v. B* case because the three associates who obtained confidential information from A are still at Firm One.

No lawyer at Firm One may represent C in the case of *C v. A* if that case is substantially related to the *A v. B* case, and if the confidential information the three associates obtained from A is material to the *C v. A* case.

If the three associates had also left Firm One, and if no other lawyer in Firm One had been privy to the confidential information received from A, then any lawyer at Firm One may represent B in the *A v. B* case or C in the *C v. A* case.

The disqualification can be waived if A gives informed consent, confirmed in writing. Thus, if A consents, the results of the foregoing hypotheticals would be the opposite.

E. CONFLICTS INVOLVING PROSPECTIVE CLIENTS

1. Lawyer's Duty Concerning Confidential Information

A prospective client is someone who consults with a lawyer about the possibility of forming a lawyer-client relationship. [ABA Model Rule 1.18(a)] The attorney-client privilege protects confidential communications between a lawyer and a prospective client. The ethical duty of confidentiality also applies to information learned during a consultation between a lawyer and prospective client. Thus, the lawyer must not reveal or use information learned from a prospective client, unless an exception to the duty of confidentiality applies.

EXAMPLES

1) Prospective client PC came to lawyer L's office seeking L's legal advice about a plan to murder PC's sister-in-law without getting caught. The attorney-client privilege would not protect PC's communication because he was seeking L's aid to commit a future crime. Furthermore, the ethical duty of confidentiality would not prohibit L from warning the sister-in-law and telling the police if L reasonably believes that PC really will carry out the plan. [ABA Model Rules 1.18(b), 1.6(b)(1)]

2) Senator S telephoned attorney A, asking A to visit him in the county jail. When A arrived, S explained in confidence that he was picked up for felony drunk driving, that he was very drunk at the time, and that he wanted A to represent him. A was overburdened with other work and could not do so. Several weeks later, the entire story of Senator S's drunken escapade became common knowledge after S talked about it on a popular television show. Not long afterward, in an unrelated matter, A had occasion to cross-examine S, who had testified on behalf of A's adversary. A asked S: "Sir, shortly before witnessing the events about which you testified on direct, had you drunk any alcohol?" S was outraged and accused A of violating the duty of confidence owed to a potential client. A's conduct was proper. The question on cross-examination was designed to test S's ability to perceive correctly. Furthermore,

the information about S's drinking, although originally confidential, lost its protection when S himself made it public on television. [*See* ABA Model Rules 1.18(b), 1.9(c)(1)]

2. Lawyer's Duty Concerning Conflict of Interest

Subject to the exceptions stated in 3., below, a lawyer who obtains confidential information during a consultation with a prospective client must not later represent a different person in the same or a substantially related matter if the confidential information could significantly harm the prospective client. [ABA Model Rule 1.18(c)] This conflict is imputed to others in the lawyer's firm, but the imputation can be overcome by screening, as stated in 3., below.

3. How to Overcome a Prospective Client Conflict

One way to overcome the conflict described in 2., above, is to obtain informed consent, confirmed in writing, from both the affected client and the prospective client. [ABA Model Rule 1.18(d)(1)] A second way to overcome the conflict is to satisfy all of the following conditions:

a. Demonstrate that the lawyer who held discussions with the prospective client took care to ***avoid exposure to any more confidential information than was necessary*** to determine whether to represent the prospective client;

b. Demonstrate that the disqualified lawyer is ***timely screened from any participation in the matter*** and will not share the fee (but he may take his ordinary salary or partnership share); and

c. Give ***written notice*** to the prospective client.

[ABA Model Rule 1.18(d)(2)]

F. CONFLICT RULES FOR CURRENT AND FORMER GOVERNMENT OFFICERS AND EMPLOYEES

When a lawyer serves as an officer or employee of the government for a period and then leaves to enter private law practice, the government has a right to expect that its confidential information will not be abused. Furthermore, private clients should not be allowed to gain an unfair advantage from information known to a lawyer only because of prior government service, and lawyers should not be in a position to benefit private clients because of prior government service. Finally, possible future benefit to private clients should not distort a lawyer's professional judgment while working for the government. [*See* ABA Model Rule 1.11, comments 3 and 4] All of the foregoing would suggest that there should be a broad, rigid rule of disqualification for lawyers who move from the government to private practice. However, such a rule would have a serious drawback—the government would be hindered in recruiting good lawyers for short-term government service. Thus, the

ABA Model Rules establish disqualification rules that are relatively narrow and flexible. [*See also* Restatement §133]

1. Federal and State Conflict of Interest Laws

Lawyers who move between government and private jobs must comply not only with the ethics rules but also with various state and federal statutes and regulations. [*See, e.g.*, Federal Ethics in Government Act, 18 U.S.C. §§207 - 208] Those are not covered in this outline, but they must be considered in solving an actual problem of successive government and private employment.

2. Private Work Following Government Work on Same Matter

Except when expressly permitted by law, a lawyer who leaves government service and enters private practice must not represent a private client in a ***matter*** in which the lawyer participated ***personally and substantially*** while in government service, unless the government agency gives informed consent, confirmed in writing. [ABA Model Rule 1.11(a)]

a. Meaning of the Term "Matter"

As used in this rule, "matter" has a narrow, technical meaning. It does ***not*** mean "general topic" or "broad subject area." It means a ***specific set of facts involving some specific parties***. [ABA Formal Op. 342 (1975)] ABA Model Rule 1.11(e) defines it more fully as, "any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest, or other particular matter involving a specific party or parties" (plus anything else that is covered under the conflict of interest rules of the government agency in question).

EXAMPLES

1) When lawyer L worked for the State Consumer Protection Agency, she was assigned to draft some regulations to govern the conduct of door-to-door salespeople. The regulations that she drafted were ultimately adopted, almost verbatim, by the agency. A year later, L left government service and entered private practice. She was asked to represent American Encyclopedia Company (a door-to-door sales company) in a dispute with the State Consumer Protection Agency. The essence of the dispute is the proper application of the regulations that L herself drafted. L may represent American because the drafting of regulations is not a "matter"; it does not involve specific facts and specific parties.

2) When serving as Oakville City Attorney, lawyer L drafted a city ordinance for the rezoning of a particular tract of land owned by developer R. The drafting of the ordinance is a "matter" because it involved one narrow, specific situation. Thus, when L later enters private law practice,

she may not work on a case that involves that ordinance. [*See* Restatement §133]

b. Meaning of "Personally and Substantially"

The term "personally and substantially" means just what it says—the disqualification rule applies only when the lawyer's work on a matter was both personal and substantial. The term does not include work that is trifling, and it does not include mere supervisory responsibility. [*See* ABA Formal Op. 342 (1975)]

EXAMPLE

Attorney A is the District Attorney of Colma County. She is in charge of 16 deputies working out of five different offices spread through the county. A's rubber-stamped signature appears on every paper that goes out of the five offices. In theory, she is personally responsible for every detail of every case; in fact, most of A's day is consumed in supervision and administration. The disqualification rule would cover only the few, exceptional cases in which A does become personally and substantially involved. [*Id.*]

c. Imputed Disqualification

If a lawyer is disqualified by the rule stated above, then everyone in that lawyer's firm is also disqualified ***unless*** the lawyer is ***timely screened from the case***, the lawyer ***does not share fees*** from the matter, and ***written notice is promptly given to the governmental agency*** to enable it to make sure that the above conditions are being met.

EXAMPLE

When lawyer L worked for the State Environmental Safety Bureau, he participated personally and substantially in an investigation of Noxatox Corp. concerning the dumping of radioactive industrial waste in Evergreen Slough. Later, L quit the Bureau and became a partner in the T, S & U firm. One of L's law partners is now asked to defend Noxatox in private litigation arising out of the Evergreen Slough matter. L will not work on the case, will have no access to the case files, and will not discuss the case with others in the office. L will receive his ordinary share of the proceeds of the partnership, set by prior independent agreement. Finally, the Bureau will be promptly informed of the foregoing facts in writing. Under these conditions, the partner may represent Noxatox.

3. Subsequent Use of Information Gained During Government Service

ABA Model Rule 1.11(c) provides that (except when expressly permitted by

law) a government lawyer who receives confidential government information about a person must not later represent a private client whose interests are adverse to that person, when the information could be used to the material disadvantage of that person. The rule covers only information ***actually received*** by the government lawyer, not information that could be fictionally imputed to the lawyer. "Confidential government information" means information that is gained under government authority and which the government is prohibited from revealing, or has a privilege not to reveal, and which is not otherwise available to the public. [ABA Model Rule 1.11(c) and comment 8]

EXAMPLE
When attorney A worked on the legal staff of the State Parole Board, he received confidential information about the personal life, character, and criminal proclivities of X, a parolee. Later, A entered private practice as a criminal defense lawyer. He was assigned to defend D in a case in which it appeared quite likely that X, not D, was the perpetrator. The proper defense of D would require a thorough investigation of the very facts that A learned about X in confidence. A must request the court to relieve him of the assignment to defend D.

a. Imputed Disqualification
If a former government lawyer is disqualified by this rule, then everyone in that lawyer's firm is also disqualified unless:

1) The lawyer is timely screened from the matter; and

2) The lawyer is not apportioned any part of the fee earned in the matter.

[ABA Model Rule 1.11(c)]

EXAMPLE
In the State Parole Board example above, attorney A's law partner P may defend D if A is screened from the case and is not apportioned any part of the fee earned in the case.

4. Current Government Service After Private Practice

ABA Model Rule 1.11(d) states the rules that apply to a person who becomes a government officer or employee after private practice or other nongovernmental work.

a. Ordinary Conflict Rules Apply
The ordinary conflict rules stated in ABA Model Rules 1.7 (current clients) and 1.9 (former clients) apply to a lawyer who enters government service

after private practice or other nongovernmental work. [ABA Model Rule 1.11(d)(1)]

EXAMPLE

For the past five years, lawyer L worked for the M & N law firm. In that job, L worked on a few matters for Cosmoplex, a diversified communications company, and he gained considerable confidential information about the company's finances. Now, L has quit M & N and has gone to work for the United States Department of Labor, which is about to sue Cosmoplex for fraud in connection with the purchase of overvalued company stock for its employee pension plan. ABA Model Rule 1.9 prohibits L from working on that suit (unless Cosmoplex gives informed consent, confirmed in writing). However, if L is timely screened from the suit, other labor department lawyers may work on it—L's conflict will not be imputed to them.

b. "Personal and Substantial" Rule Also Applies

If a lawyer worked "personally and substantially" on a "matter" in private practice or other nongovernmental employment, the lawyer must not work on that same matter when she later enters government service, whether or not the later work would be adverse to a former client. However, informed consent, confirmed in writing, can solve the conflict.

EXAMPLE

In private practice, attorney A represented Electro Corp. in trying to obtain a license from the State Energy Commission to build a geothermal electric generating plant. While Electro's application was still pending, A quit private practice to become a lawyer for the Commission. A must not work on the Electro application unless she obtains the informed consent, confirmed in writing, from both the Commission [ABA Model Rule 1.11(d)(2)(i)] and Electro [ABA Model Rule 1.9(a)].

c. Negotiating for Private Employment

When a person in government service is currently working personally and substantially on a matter, she must not negotiate for private employment with any party or lawyer who is involved in that matter. There is a special exception for judges' and adjudicative officers' law clerks who are seeking work after their clerkships end (*see* G.3., *infra*). [ABA Model Rule 1.11(d)(2)(ii)]

EXAMPLE

Lawyer L currently serves on the State Agriculture and Fisheries Commission. L's work for the Commission is strictly nonlegal; he does

not function as a lawyer for the Commission. Currently, L and the other Commissioners are working personally and substantially on a matter involving the Shady Bay Salmon Farm. Now, Shady Bay approaches L, asking if he would like to become Shady Bay's in-house general counsel. If L negotiates for employment with Shady Bay, he will be subject to discipline. Notice that the rule applies to L, even though his work for the Commission is nonlegal.

G. CONFLICTS INVOLVING FORMER JUDGES, ARBITRATORS, AND THE LIKE

The conflict of interest problems posed when a lawyer switches between government and private practice are also present when a judge leaves the bench and enters private practice. Thus, the rules discussed here are similar to those discussed above.

1. Switching from Judicial Service to Private Law Practice

A lawyer must not represent a private client in a matter in which the lawyer has earlier participated personally and substantially while serving as a judge or other adjudicative officer (e.g., a referee or special master) or as a law clerk to such person, or as an arbitrator, mediator, or other third-party neutral, unless all parties to the proceedings give informed consent, confirmed in writing. [ABA Model Rule 1.12(a)] However, an arbitrator who is selected as a partisan of a party in a multi-member arbitration panel may subsequently represent that party. [ABA Model Rule 1.12(d)]

EXAMPLES

1) Lawyer L was selected as the partisan of union U on a three-member arbitration panel. L may serve as U's lawyer in later proceedings relating to the dispute that was arbitrated.

2) Law clerk C worked on the case of *P v. D* and made recommendations to Judge J about some discovery motions and a motion for default judgment. When C completes her clerkship and enters private practice, she cannot work on the case of *P v. D.* [*See* Maryland State Bar Op. 85-23 (1985)]

3) J was one of 15 judges on the County Superior Court (a trial court) while the case of *State v. Able* was pending in that court. However, the *Able* case was assigned to a different judge, and Judge J never had anything to do with it. Later, Judge J resigned from the bench and entered private practice. Able asked J to represent her on the appeal of her case. J may represent Able because J did not personally work on the *Able* case. [*See* ABA Model Rule 1.12(a)]

4) S was the Senior Presiding Judge of the Circuit Court of Appeal (an intermediate appellate court). In that capacity, Judge S was responsible for all court administration and for assigning judges to hear various cases. During that period, the case of *Commonwealth v. Beale* was heard and decided by

the court, but Judge S had nothing to do with that case except to assign it to three other judges. Later, Judge S left the bench and entered private practice. S may represent Beale in a subsequent stage of Beale's case. [*Id.*]

2. Screening Can Avoid Imputed Disqualification

If a lawyer is disqualified under Rule 1.12(a), everyone else in the lawyer's firm is also disqualified unless the following conditions are met:

a. The lawyer is timely screened from the matter;

b. The lawyer is not apportioned any part of the fee earned in the matter; and

c. Written notice is given to the parties and the appropriate tribunal so that they can ensure that the foregoing conditions are met.

[ABA Model Rule 1.12(c); ABA Formal Op. 342 (1975)]

3. Law Clerks Negotiating for Private Employment

A law clerk to a judge or other adjudicative officer must ***notify*** that judge/officer before negotiating for private employment with a party (or the attorney for a party) in a matter in which the law clerk is participating personally and substantially. [ABA Model Rule 1.12(b)] Law clerks are specially treated because they are usually newly admitted lawyers for whom a clerkship is only a temporary first step in a legal career.

EXAMPLE

After graduating from law school, S became a law clerk for Judge J. In that capacity, S wrote the bench brief and drafted an opinion in the case of *Arner v. Bosch*. While that case was still pending before the court, the attorney for Bosch invited S to visit her law firm and interview for a job. S must notify Judge J before discussing future employment with the attorney.

4. Other Adjudicative Officers Negotiating for Private Employment

The lenient rule that applies to law clerks does not apply to judges, arbitrators, mediators, third-party neutrals, and other adjudicative officers. They are forbidden to negotiate for private employment with a party (or the attorney for a party) in a matter in which they are participating personally and substantially. [ABA Model Rule 1.12(b)]