IN THE SUPREME COURT OF TEXAS

Misc. Docket No. 10-9190

APPROVAL OF REFERENDUM ON PROPOSED AMENDMENTS TO THE TEXAS DISCIPLINARY RULES OF PROFESSIONAL CONDUCT

WHEREAS:

1. On October 20, 2009, in Misc. Docket No.09-9175, the Supreme Court of Texas proposed amendments to the Texas Disciplinary Rules of Professional Conduct and invited public comments through December 31, 2009. The Court received numerous comments in response.

2. As a result of comments received, the Court made revisions to the proposed rules. The Court sent the revised version of the proposed rules to the State Bar of Texas Board of Directors on April 14, 2010, with a request that the Board consider the revised version of the proposed rules and, by October 6, 2010, provide the Court with recommendations or comments.

3. On July 7, 2010, the Court sent the revised version of the proposed rules, accompanied by proposed interpretive comments, to the Board and again requested that the Board provide the Court with any feedback regarding the proposed rules and interpretive comments by October 6, 2010.

4. From August 30 through September 10, 2010, the Board conducted public-education hearings in Lubbock, El Paso, Houston, Tyler, Dallas, Corpus Christi, McAllen, San Antonio, and Austin to obtain feedback from lawyers and members of the public regarding the proposed rules and interpretive comments. The Board also invited feedback on the State Bar's website.

5. As a result of feedback received, the Board suggested revisions to the proposed rules and interpretive comments. The Board approved the modified version of the proposed rules and comments in public meetings on October 1 and November 5, 2010. The Board also petitioned the Court to submit the proposed rules to State Bar members for a referendum between January 15 and February 14, 2011, by electronically transmitted and paper ballots in a form attached to the petition.

6. The Court has considered the Board's petition and concluded that the proposed amendments to the Texas Disciplinary Rules of Professional Conduct, as provided in Exhibit A (in clean form)

and B (in redlined form comparing the proposed rules with the existing rules) to this Order, should be submitted to State Bar members for a referendum between January 18 and February 17, 2011, using electronically transmitted and paper ballots in the form attached to this Order.

7. The Court's approval of this referendum is not a predetermination of any legal issues regarding the proposed rules.

IT IS THEREFORE ORDERED THAT:

1. The State Bar of Texas is directed to conduct a referendum on the attached, proposed amendments to the Texas Disciplinary Rules of Professional Conduct. The referendum must be on the proposed rules in Exhibits A (clean) and B (redlined), not on the proposed interpretive comments in Exhibit A. The interpretive comments are included in this Order to serve solely as guidance for individuals who vote on or otherwise consider the proposed rules.

2. The State Bar of Texas is directed further to conduct the referendum as follows:

   a. Online voting must begin on January 18, 2011, at 8:00 a.m., and end on February 17, 2011, at 5:00 p.m.

   b. On January 18, 2011, a written ballot must be sent to each State Bar of Texas member who is registered and eligible to vote in the referendum.

   c. No ballot received by the State Bar of Texas after 5:00 p.m. on February 17, 2011 will count.

   d. The ballot must be substantively in the form attached to this Order.

3. The Clerk of the Supreme Court of Texas is directed to:

   a. submit a copy of this Order for publication in the *Texas Register*;

   b. cause a copy of this Order to be mailed to each registered member of the State Bar of Texas by publication in the *Texas Bar Journal*; and

   c. cause a copy of this Order to be posted on the website of the Supreme Court of Texas at http://www.supreme.courts.state.tx.us/.

ENTERED this 16th day of November, 2010.

Wallace B. Jefferson, Chief Justice

Nathan L. Hecht, Justice

Dale Wainwright, Justice

David M. Medina, Justice

Paul W. Green, Justice

Phil Johnson, Justice

Don R. Willett, Justice

Eva M. Guzman, Justice

Debra H. Lehrmann, Justice

FORM OF BALLOT

A. Terminology, Competent and Diligent Representation, Scope of Representation and Allocation of Authority, Communication, Fees, Confidentiality, Safekeeping Property, and Declining or Terminating Representation:

Do you favor the adoption of Proposed Rules 1.00–1.05 and 1.15–1.16 of the Texas Disciplinary Rules of Professional Conduct, as published in the December 2010 issue of the *Texas Bar Journal*?

☐ YES ☐ NO

B. Conflicts of Interest: Multiple Clients in the Same Matter:

Do you favor the adoption of Proposed Rule 1.07 of the Texas Disciplinary Rules of Professional Conduct, as published in the December 2010 issue of the *Texas Bar Journal*?

☐ YES ☐ NO

C. Other Conflicts of Interest:

Do you favor the adoption of Proposed Rules 1.06 and 1.08–1.12 of the Texas Disciplinary Rules of Professional Conduct, as published in the December 2010 issue of the *Texas Bar Journal*?

☐ YES ☐ NO

D. Prohibited Sexual Relations, Diminished Capacity, and Prospective Clients:

Do you favor the adoption of new Proposed Rules 1.13, 1.14, and 1.17 of the Texas Disciplinary Rules of Professional Conduct, as published in the December 2010 issue of the *Texas Bar Journal*?

☐ YES ☐ NO

E. Advocate, Law Firms and Associations, Public Service, and Maintaining the Integrity of the Profession:

Do you favor the adoption of Proposed Rules 3.01–3.10, 5.01–5.07, 6.01–6.03, and 8.01–8.05 of the Texas Disciplinary Rules of Professional Conduct, as published in the December 2010 issue of the *Texas Bar Journal*?

☐ YES ☐ NO

F. Counselor, Non-Client Relationship, Information About Legal Services, and Severability of Rules:

Do you favor the adoption of Proposed Rules 2.01–2.02, 4.01–4.04, 7.01–7.07, and 9.01 of the Texas Disciplinary Rules of Professional Conduct, as published in the December 2010 issue of the *Texas Bar Journal*?

☐ YES ☐ NO

A copy of the proposed Texas Disciplinary Rules of Professional Conduct can be found online at www.texasbar.com/rulesupdate

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Misc. Docket No. 10-9190
Exhibit A

ARTICLE X — TEXAS DISCIPLINARY RULES OF PROFESSIONAL CONDUCT

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PREAMBLE

I. A Lawyer's Responsibilities

1. Lawyers act as representatives of clients, officers of the legal system, and public citizens having special responsibility for the quality of justice. Lawyers, as guardians of the law, also play a vital role in the preservation of society. The fulfillment of these roles requires that lawyers understand their relationship with, and function in, our legal system and maintain the highest standards of ethical conduct.

A. Representative of Clients

2. As a representative of clients, a lawyer performs various functions. As an evaluator and advisor, a lawyer provides a client with the lawyer's informed understanding of the client's legal rights and obligations and explains their practical implications. As an advocate, a lawyer asserts the client's position under the rules of the adversary system. As a negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealing with others. In any representation, the Rules require that a lawyer competently, promptly, and diligently pursue a client's interests within the bounds of the law; communicate with a client concerning the representation; and keep in confidence information relating to the representation except to the extent that use or disclosure is required or permitted by law or these Rules.

B. Officer of the Legal System

3. As an officer of the legal system, a lawyer is expected to demonstrate respect for that system and for those who serve it, including judges, other lawyers, and public officials. But it is a lawyer's duty, when necessary, to challenge the rectitude of official action. A lawyer may use the law's procedures only for legitimate purposes and not for harassment or intimidation of others. A lawyer should cultivate knowledge of the law beyond its use for clients, employ that knowledge to reform the law, and work to strengthen legal education.

4. The legal profession has a responsibility to assure that it is regulated in the public interest rather than in furtherance of parochial or self-interested concerns of the bar, and to insist that every lawyer comply with its minimum disciplinary standards and aid in securing their observance by other lawyers. Neglect of these responsibilities compromises the independence of the profession and the public interest that it serves.

C. Public Citizen

5. As a public citizen, a lawyer should seek to improve the law, the administration of justice, and the quality of service rendered by the legal profession. A lawyer should be mindful of deficiencies in the administration of justice and of the fact that persons sometimes cannot afford adequate legal assistance. A lawyer has a moral obligation to devote professional time and civic influence on their behalf, regardless of professional prominence or workload. A lawyer may discharge this obligation by providing public interest legal services without a fee, or at a substantially reduced fee, and by providing financial support for organizations that provide legal services to persons of limited means.

II. Scope of the Rules

6. In the practice of law, lawyers can encounter conflicting responsibilities. Virtually all difficult ethical problems arise from apparent conflict among a lawyer's responsibilities to clients, a lawyer's responsibilities to the legal system, and the lawyer's personal interests. These Rules prescribe terms for resolving such tensions. They do so by stating minimum standards of conduct below which no lawyer can fall without being subject to disciplinary action. Within the framework of these Rules, many difficult issues of professional discretion can arise. The Rules and their Comments constitute a body of principles a lawyer can rely upon for guidance in resolving such issues through the exercise of sensitive professional and moral judgment. In applying these Rules, lawyers may find interpretive guidance in the Comments.

7. The Rules are rules of reason that define proper conduct for purposes of professional discipline. Generally, they are imperatives, cast in terms of "shall" or "shall not." Occasionally, however, some Rules are cast in terms of "may" or "should." In the latter situation, the Rules are permissive, defining areas in which the lawyer has professional discretion or indicating specific exceptions to required action. When a lawyer exercises such discretion, no disciplinary action may be taken. The Comments to the Rules are intended to illustrate or explain applications of the Rules, in order to provide guidance for interpreting the Rules and practicing in compliance with their spirit. The Comments do not, however, add obligations to the Rules. No disciplinary action may be taken solely for a lawyer's failure to conform to the Comments.

8. The Rules presuppose a larger legal context shaping the lawyer's role. That context includes court rules and statutes relating to matters of licensure, laws defining specific obligations of lawyers, and substantive and procedural law in general. Compliance with the Rules, as with all law in an open society, depends primarily upon understanding and voluntary compliance,

secondarily upon reinforcement by peer and public opinion, and finally, when necessary, upon enforcement through disciplinary proceedings. The Rules and Comments do not, however, exhaust the moral and ethical considerations that should guide a lawyer, for no worthwhile human activity can be completely defined by legal rules. A lawyer's conduct should often rise above the disciplinary standards prescribed by these Rules.

9. Most of the duties flowing from the client-lawyer relationship attach only after the client has requested the lawyer to render legal services and the lawyer has agreed to do so. For purposes of determining the lawyer's authority and responsibility, individual circumstances and principles of substantive law external to these Rules establish whether a client-lawyer relationship exists. But there are some duties, such as of that of confidentiality, that may attach before a client-lawyer relationship has been created.

10. The responsibilities of government lawyers, under various legal provisions, including constitutional, statutory, and common law, may include authority concerning legal matters that ordinarily is vested in the client in private client-lawyer relationships. For example, a lawyer for a government entity may have authority on behalf of the government to decide upon settlement or whether to appeal from an adverse judgment. Such authority in various respects is generally vested in the attorney general and the state's attorney in state government, and their federal counterparts, and the same may be true of other government officials. Also, lawyers under the supervision of these officials may be authorized to represent several government entities in intragovernmental legal controversies in circumstances in which a private lawyer could not represent multiple private clients. They also may have authority to represent the public interest in circumstances in which a private lawyer would not be authorized to do so. These Rules do not abrogate any such authority.

11. These Rules make no attempt to prescribe disciplinary procedures or penalties for violation of a Rule, which are reflected in a separate body of rules.

12. These Rules are intended to define proper conduct for purposes of professional discipline and are not intended to define standards of civil liability of lawyers for professional conduct. Thus, violation of a Rule does not by itself give rise to a private cause of action or create any presumption that a legal duty to a client has been breached or that a client has suffered any harm. In some instances, however, courts have decided that certain Rules provide guidance concerning the applicable standard of conduct. These Rules do not address the extent to which such use is appropriate.

13. Likewise, these Rules are not designed to be standards for procedural decisions, such as disqualification. Furthermore, the purpose of the Rules can be abused when they are invoked

by opposing parties as procedural weapons. The fact that a Rule provides a just basis for a lawyer's self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the Rule. Notwithstanding those concerns, however, courts have in some instances considered these Rules in such procedural contexts, concluding that they provide guidance. These Rules do not address the extent to which such use is appropriate.

14. These Rules are not intended to govern or affect judicial application of the attorney-client privilege or work-product doctrine. The fact that, in exceptional situations, the Rules grant a lawyer limited discretion to disclose a client confidence does not vitiate the general proposition that the client has a reasonable expectation that information relating to the client will not be voluntarily disclosed or used adversely by the client's lawyer without the client's informed consent and that disclosure of such information by the lawyer may be judicially compelled only in accordance with recognized exceptions to the attorney-client privilege and work-product doctrine.

15. The desire for the respect and confidence of the members of the profession and of the society that the profession serves provides the lawyer the incentive to attain the highest possible degree of ethical and legal conduct in the lawyer's professional, personal, and business affairs. The possible loss of that respect and confidence is the ultimate sanction. So long as its practitioners are guided by these principles and by their role as guardians of our Constitution, the practice of law will continue to be a noble profession.

TERMINOLOGY

Rule 1.00. Terminology

The following definitions apply to all Texas Disciplinary Rules of Professional Conduct unless the context in which the word or phrase is used requires a different definition.

(a) "Adjudicatory official" denotes a person who serves on a Tribunal.

(b) "Adjudicatory proceeding" denotes the consideration of a matter by a Tribunal.

(c) "Affiliated":

(1) A lawyer is "affiliated" with a firm if either the lawyer or the lawyer's professional entity:

(i) is a shareholder, partner, member, associate, or employee of that firm;

(ii) has any other relationship with that firm, regardless of the title given to it, that provides the lawyer with access to the confidences of the firm's clients that is comparable to that typically afforded to lawyers in category (i); or

(iii) is held out as being in category (i) or (ii).

(2) A lawyer is "affiliated" with another lawyer if either the lawyers or their professional entities have any of the relationships described in categories (i)–(iii) above.

(d) "Belief" or "believes" denotes that the person involved actually supposed the fact in question to be true. A person's belief may be inferred from circumstances.

(e) "Competent" or "competence" denotes possession of or the ability to timely acquire the legal knowledge, skill, and training reasonably necessary for the representation of the client.

(f) "Confirmed in writing," when used in reference to the informed consent of a person, denotes informed consent that is provided in writing by the person, or a writing that a lawyer promptly transmits to the person confirming an oral informed consent. If it is not reasonable for the lawyer to obtain or transmit the writing at the time the person provides informed consent, then the lawyer shall obtain or transmit it within a reasonable time after the person provides informed consent.

(g) "Consult" or "consultation" denotes communication of information and advice reasonably sufficient to permit the client to appreciate the significance of the matter in question.

(h) "Firm" or "law firm" denotes a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship, or other association authorized to practice law; or a lawyer or lawyers employed

in the legal department of a corporation, legal services organization, or other organization, or in a government entity.

(i) "Fitness" denotes those qualities of physical and mental health that enable a lawyer to discharge the lawyer's responsibilities to a client in conformity with the Texas Disciplinary Rules of Professional Conduct. Normally a lack of fitness is indicated most clearly by a persistent inability to discharge, or an unreliability in carrying out, significant obligations.

(j) "Fraud" or "fraudulent," when used in relation to conduct by a lawyer, denotes an intent to deceive and either:

(1) a knowing misrepresentation of a material fact; or

(2) a knowing concealment of a material fact if there is a duty to disclose the material fact.

(k) "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has explained, in a manner that a reasonable lawyer would believe sufficient for the person to understand, the material risks of and reasonably available alternatives to the proposed course of conduct.

(l) "Knowingly," "known," or "knows" denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.

(m) "Partner" denotes a member of a partnership, shareholder in a law firm organized as a professional corporation, or member of an association authorized to practice law.

(n) "Person" includes a legal entity, as well as an individual.

(o) "Personally prohibited" means a lawyer is prohibited based on the lawyer's direct knowledge or involvement rather than being prohibited based on the lawyer merely being affiliated with another lawyer.

(p) "Reasonable" or "reasonably," when used in relation to conduct by a lawyer, denotes the conduct of a reasonably prudent and competent lawyer.

(q) "Reasonable belief" or "reasonably believes," when used in reference to a lawyer, denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.

(r) "Reasonably should know," when used in reference to a lawyer, denotes that a lawyer of reasonable prudence and competence would ascertain the matter in question.

(s) "Represents": A lawyer "represents" a client when the lawyer personally exercises legal skill or judgment on behalf of the client in connection with a matter.

(t) "Substantial" or "substantially," when used in reference to degree or extent, denotes a material matter of clear significance.

(u) "Tribunal" denotes a court, an arbitrator in a binding arbitration proceeding, or a legislative body, an administrative agency, or another body acting in an adjudicative capacity. A legislative body, an administrative agency, or another body acts in an adjudicative capacity when, after the presentation of evidence or legal argument by a party or parties, one or more neutral officials will render a proposal for decision or a binding legal order or decision directly affecting a party's or parties' interests in a particular matter.

(v) "Writing" or "written" denotes a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photostating, photography, audio or videorecording, and email. A "signed" writing includes an electronic sound, symbol, or process attached to or logically associated with a writing and executed or adopted by a person with the intent to sign the writing.

Comment:

Paragraph (c)

1. A lawyer is not "affiliated" with another lawyer or firm on the sole basis that the lawyer: (a) jointly represents a client with the other lawyer or firm; or (b) represents a client in a matter when the client has entered a joint-defense or similar agreement in regard to that matter. Similarly, a lawyer is not "affiliated" with another lawyer or firm solely because the lawyer assists the other lawyer or firm with a matter and thereby gains access to some of the other lawyer's or firm's client confidences. Examples of lawyers who may fall into this category include outside counsel with expertise in a particular area of the law or in dealing with a particular government entity, counsel in another state hired to advise regarding the application of that state's laws, local counsel, and lawyers hired individually or through an organization who provide temporary additional staffing or capabilities such as document review or research for a particular matter.

2. On the other hand, a lawyer is "affiliated" with another lawyer or firm if, by virtue of working with the other lawyer or firm, the lawyer gains access to client confidences that is comparable to the other lawyer's access or to the access typically afforded to a shareholder,

partner, member, associate, or employee of the other firm. Examples of lawyers who may fall into this category include of-counsel lawyers, senior lawyers, contract lawyers who provide long-term assistance on multiple matters, and part-time lawyers.

Paragraph (f)

3. Several Rules require the informed consent of a client or other person (e.g., a former client, prospective client, government entity, or third party) to be confirmed in writing. The writing is required to impress upon the client or other person the seriousness of the decision the client or other person is being asked to make and to help avoid disputes or ambiguities that may arise later in the absence of a writing.

Paragraph (j)

4. The terms "fraud" and "fraudulent" do not incorporate all of the elements of common-law fraud. For example, for purposes of these Rules, it is not necessary that anyone suffer damages or rely on the misrepresentation or failure to inform. Also, the terms do not include negligent misrepresentation or negligent failure to apprise another of relevant information.

Paragraph (k)

5. Several Rules require a lawyer to obtain the informed consent of a client or other person before accepting or continuing a representation or pursuing some other course of conduct. The communication necessary to obtain such consent will vary according to the Rule involved and the circumstances giving rise to the need to obtain informed consent. Under paragraph (k), the lawyer is required to make reasonable efforts to ensure that the client or other person has sufficient information to make an informed decision. Ordinarily, this requires the lawyer to provide an explanation that includes a disclosure of the facts leading to the situation at hand, information reasonably necessary to inform the client or other person of the material advantages and disadvantages of the proposed course of conduct, and a discussion of the alternatives that are reasonably available to the client or other person. In some circumstances, it may be appropriate for a lawyer to advise a client or other person to seek the advice of other counsel. A lawyer need not inform a client or other person of facts or implications already known to the client or other person; nevertheless, a lawyer who does not personally inform the client or other person assumes the risk that the client or other person is insufficiently informed and the consent is invalid. In determining whether the explanation provided is sufficient, relevant factors include whether the client or other person is experienced in legal matters generally and in making decisions of the type involved, and whether the client or other person is independently represented by other counsel in providing

the consent. Normally, such persons need less explanation than others, and generally a client or other person who is independently represented by other counsel in providing the consent should be assumed to have provided informed consent.

Paragraph (u)

6. The revisions to the definition of the term "tribunal" do not lessen or otherwise impact a lawyer's obligation, as provided in Rule 8.04(a)(3), not to engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.

SECTION I. CLIENT-LAWYER RELATIONSHIP

Rule 1.01. Competent and Diligent Representation

(a) A lawyer shall not accept or continue employment in a legal matter that the lawyer knows or reasonably should know is beyond the lawyer's competence, unless:

(1) another lawyer who is competent to handle the matter is, with the prior informed consent of the client, associated in the matter; or

(2) the advice or assistance of the lawyer is reasonably required in an emergency and the lawyer limits the advice and assistance to that reasonably necessary in the circumstances.

(b) In representing a client, a lawyer shall not neglect a legal matter entrusted to the lawyer but shall act with reasonable diligence and promptness.

(c) As used in this Rule, "neglect" signifies inattentiveness involving a conscious disregard for the responsibilities owed to a client or clients.

Terminology: See Rule 1.00 for the definitions of "competence," "competent," "informed consent," "knows," "reasonable," "reasonably," "reasonably should know," and "represents."

Comment:

Paragraph (a)

1. Competent representation contemplates a lawyer's application of legal knowledge, skill, and training; reasonable thoroughness in the study and analysis of the law and facts; and reasonable attentiveness to the responsibilities the lawyer owes to the client. To maintain

the requisite knowledge and skill of a competent practitioner, a lawyer should keep abreast of changes in the law and its practice and engage in continuing study and education. If additional preparation contemplated by the definition of "competence" will result in unusual delay or expense to the client, the lawyer should not accept employment except with the client's informed consent.

2. For disciplinary purposes, a lawyer does not necessarily fail to provide competent representation by committing an isolated inadvertent or unskilled act or omission, tactical error, or error of judgment.

3. The "emergency" referenced in subparagraph (a)(2) may include a situation in which referral to or consultation with another lawyer would be impractical.

4. In a determination of whether a matter is beyond a lawyer's competence, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience in the field in question, the preparation and study the lawyer will be able to give the matter, and whether it is feasible either to refer the matter to or associate with a lawyer of established competence in the field in question. The required attention and preparation depend in part on what is at stake. Major litigation and complex transactions ordinarily require more extensive treatment than matters of lesser complexity and consequence. An agreement between the lawyer and the client that limits the scope of the representation may also limit the lawyer's responsibility described in this Rule. See Rule 1.02(b).

5. All legal problems require some important legal skills, such as the analysis of precedent, the evaluation of evidence, and legal drafting. Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, which is a skill that necessarily transcends any particular specialized knowledge. A lawyer may not need to have special training or prior experience to accept employment to handle legal problems of a type with which the lawyer is unfamiliar. Although expertise in a particular field of law may be required in some circumstances, the appropriate proficiency in many instances is that of a general practitioner. A newly admitted lawyer can be as competent in some matters as a practitioner with long experience.

Paragraph (b)

6. Having accepted employment, a lawyer should act with competence, commitment, and dedication to the interest of the client and with zeal in advocacy on the client's behalf. Under paragraph (b), a lawyer must pursue a matter on behalf of a client with reasonable diligence and promptness and should do so despite opposition, obstruction, or personal inconvenience

to the lawyer. The lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect. A lawyer's workload should be controlled so that each matter can be handled with diligence and competence.

7. A client's interests often can be affected adversely by the passage of time or the change of conditions; in extreme instances, as when a lawyer overlooks a statute of limitations, the client's legal position may be destroyed. Even when the client's interests are not affected in substance, however, unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness. A lawyer's duty to act with reasonable promptness, however, does not preclude the lawyer from agreeing to a reasonable request for a postponement that will not prejudice the lawyer's client.

Rule 1.02. Scope of Representation and Allocation of Authority

(a) Subject to (b) through (f) and Rule 1.14, a lawyer shall abide by a client's decisions:
(1) concerning the objectives and general methods of representation;
(2) whether to accept an offer of settlement of a matter, except as otherwise authorized by law; and
(3) in a criminal case, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial, and whether the client will testify.

(b) A lawyer may limit the scope, objectives, and general methods of the representation if the client provides informed consent and the limitation is reasonable under the circumstances.

(c) A lawyer shall not assist or counsel a client to engage in conduct that the lawyer knows is criminal or fraudulent. A lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel and represent a client in connection with the making of a good faith effort to determine the validity, scope, meaning, or application of law.

(d) When a lawyer has confidential information clearly establishing that a client is likely to commit a criminal or fraudulent act that is likely to result in substantial injury to the financial interests or property of another, the lawyer shall promptly make reasonable efforts under the circumstances to dissuade the client from committing the crime or fraud.

(e) When a lawyer has confidential information clearly establishing that the lawyer's client has committed a criminal or fraudulent act in the commission of which the lawyer's services have been

used, the lawyer shall make reasonable efforts under the circumstances to persuade the client to take corrective action.

(f) When a lawyer knows that a client expects representation not permitted by law or these Rules, the lawyer shall consult with the client regarding the relevant limitations on the lawyer's conduct.

Terminology: See Rule 1.00 for the definitions of "consult," "consultation," "informed consent," "knows," "reasonable," "represents," and "substantial."

Comment:

Allocation of Authority between Client and Lawyer

1. Paragraph (a) recognizes that the client has the ultimate authority to determine the objectives to be served by legal representation, within the limits imposed by law, the lawyer's professional obligations, and the agreed scope of representation. The lawyer is responsible for determining the best means for achieving the client's objectives. Thus, a lawyer has very broad discretion to determine technical and legal tactics, subject to the client's wishes regarding such matters as the expense to be incurred and concern for third persons who might be affected adversely. The client may authorize the lawyer to take specific action on the client's behalf without further consultation. Absent a material change in circumstances and subject to Rule 1.03, a lawyer may rely on such an advance authorization. The client may, however, revoke such authority at any time. In a case in which the client appears to have diminished capacity, Rule 1.14 clarifies the lawyer's duty to abide by the client's decisions.

2. Except when prior communications have made clear that a particular proposal would be unacceptable to the client, a lawyer is obligated to communicate any settlement offer to the client in a civil case. A lawyer has a comparable responsibility with respect to a proposed plea bargain in a criminal case.

3. A lawyer should consult with the client concerning any settlement proposal. Generally the client decides whether to make or accept a settlement proposal, but the exception in subparagraph (a)(2) to this principle includes at least three situations. First, in class actions a lawyer may recommend a settlement of the matter to the court over the objections of named plaintiffs in the case. Second, in insurance-defense cases a lawyer's ability to implement an insured client's wishes with respect to settlement may be qualified by the contractual rights of the insurer under its policy. Finally, a lawyer's normal deference to a client's wishes concerning settlement may be abrogated if the client has validly relinquished to a third party

any rights to pass upon settlement offers. Whether any such waiver is enforceable is a question largely beyond the scope of these Rules. But see Comment 6 below.

Agreements Regarding Representation

4. An agreement with the client or the terms under which the lawyer makes services available to the client may limit the lawyer's scope of representation. For example, a retainer may be for a specifically defined objective. Likewise, representation provided through a legal-aid agency may be subject to limitations on the types of cases the agency handles. Similarly, when an insurer has retained a lawyer to represent an insured, the representation may be limited to matters related to the insurance coverage. The scope within which the lawyer undertakes the representation also may exclude specific objectives or means, such as those that the lawyer or client regards as repugnant or imprudent, as well as actions that the client deems too costly.

5. Although this Rule affords the lawyer and client substantial latitude to limit the representation, the limitation must be reasonable under the circumstances. If, for example, a client's objective is limited to securing general information about the law that the client needs in order to handle a common and typically uncomplicated legal problem, the lawyer and client may agree that the lawyer's services will be limited to a brief telephone consultation. Such a limitation, however, would not be reasonable if the time allotted was not sufficient to yield advice on which the client could rely. Although an agreement for a limited representation does not exempt a lawyer from the duty to provide competent representation, the limitation is a factor to be considered when determining whether the lawyer has provided competent representation. See Rule 1.01.

6. An agreement concerning the scope of representation must accord with the law and these Rules. Thus, a lawyer may not ask a client to surrender the right to terminate the lawyer's services or the right to settle or continue litigation that the lawyer might wish to handle differently.

7. Unless the lawyer terminates a representation as provided in Rule 1.16, a lawyer should carry through to conclusion all matters the lawyer undertakes for a client. If a lawyer's representation is limited to a specific matter, the relationship terminates when the matter has been resolved. If a lawyer has represented a client over a substantial period of time in a variety of matters, the client may assume that the lawyer will continue to serve on a continuing basis unless the lawyer gives notice to the contrary. The lawyer should clarify with the client any doubt about whether a client-lawyer relationship still exists, preferably

in writing, so that the client will not assume mistakenly that the lawyer is looking after the client's affairs when the lawyer has ceased to do so. For example, if a lawyer has handled a judicial or administrative proceeding that produced a result adverse to the client but the client has not specifically instructed the lawyer concerning pursuit of an appeal, the lawyer should advise the client of the possibility of appeal before relinquishing responsibility for the matter.

Criminal, Fraudulent, and Prohibited Transactions

8. Paragraph (c) prohibits a lawyer from counseling or assisting a client to commit what the lawyer knows to be a crime or fraud. This prohibition, however, does not preclude the lawyer from giving an honest opinion about the actual consequences that appear likely to result from a client's conduct. The fact that a client uses advice in a course of action that is criminal or fraudulent does not, of itself, make a lawyer a party to the course of action. There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which the client may commit a crime or fraud with impunity.

9. When a client has already begun and is continuing a course of action, the lawyer's responsibility is especially delicate. The lawyer must avoid furthering the client's wrongdoing, for example, by drafting or delivering documents that the lawyer knows are fraudulent or by suggesting how the client might conceal the wrongdoing. A lawyer may not continue assisting a client in conduct that the lawyer originally supposed is legally proper but then discovers is criminal or fraudulent. Withdrawal from the representation, therefore, may be necessary. See Rule 1.16(a)(1).

10. A lawyer violates paragraph (c) by accepting a general retainer for legal services to an enterprise that the lawyer knows to be unlawful. Paragraph (c) does not, however, preclude undertaking a criminal defense incident to a general retainer for legal services to a lawful enterprise.

11. The last clause of paragraph (c) recognizes that determining the validity or interpretation of a statute or regulation may require a course of action involving disobedience of the statute or regulation or of a government authority's interpretation of the statute or regulation.

12. Paragraph (d) requires a lawyer in certain instances to use reasonable efforts to dissuade a client from committing a crime or fraud. If the client used the lawyer's services in committing a crime or fraud, paragraph (e) requires the lawyer to use reasonable efforts to

persuade the client to take corrective action. See also Rule 1.05(a), which contains a definition of confidential information, Rule 1.05(c), and Rule 3.03(d).

Rule 1.03. Communication

(a) A lawyer shall:

(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent is required by these Rules;

(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;

(3) keep the client reasonably informed about the status of the matter; and

(4) promptly comply with reasonable requests for information.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Terminology: See Rule 1.00 for the definitions of "consult," "informed consent," "reasonably," and "represents."

Comment:

1. Rule 1.03 recognizes that reasonable communication between the lawyer and client is necessary for the client to participate effectively in the representation. The Rule's guiding principle is that the lawyer reasonably should fulfill client expectations for information, consistent with the lawyer's duty to act in the client's best interests and with the client's overall requirements as to the representation. For example, a lawyer negotiating on a client's behalf should provide the client with facts relevant to the matter, inform the client of communications from another party, and take other reasonable steps to permit the client to make a decision regarding another party's offer. Similarly, a lawyer should promptly inform the client of the substance of any offer of settlement or plea bargain that the lawyer receives from opposing counsel, unless the client has made it clear that the proposal will be unacceptable. See Rule 1.02.

2. Although a lawyer is required to communicate certain information to a client, the lawyer is not necessarily required to communicate the information immediately after learning it. Like the character and amount of information a lawyer should communicate, the promptness with

which a lawyer should communicate information may vary with the character of the representation, a client's expectations, and other surrounding circumstances.

3. Moreover, in certain situations, a lawyer may not need to consult or share information with a client. Practical exigency, for example, may require a lawyer to act for a client without prior consultation. Similarly, the lawyer does not need to consult with the client and secure the client's informed consent before acting if the client has made clear what action the client wants the lawyer to take. Further, rules or court orders may provide that information supplied to a lawyer not be disclosed to the client; Rule 3.04(d) describes the lawyer's obligations with respect to such rules or orders. Regardless of the situation, a lawyer should not withhold information to serve the lawyer's or another person's interests or convenience.

4. The client should generally have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which the objectives are to be pursued, to the extent the client is willing and able to participate. As indicated above, adequacy of communication depends in part on the kind of advice or assistance involved. For example, a lawyer ordinarily does not need to describe trial or negotiation strategy in detail. When there is time to explain a proposal made in negotiation, however, the lawyer should review all important provisions of the proposal with the client before proceeding to an agreement. In addition, in litigation, a lawyer should explain the general strategy and prospects of success and ordinarily should consult the client on tactics that are likely to result in significant expense or delay or severe adverse consequences. In certain circumstances, other Rules also require the lawyer's communication to be sufficient for the client to give informed consent.

5. Ordinarily, the information to be provided is that appropriate for a client who is a comprehending and responsible adult. However, fully informing the client according to this standard may be impractical or impossible, as, for example, when the client has diminished capacity. See Rule 1.14. When the client is an organization or group, informing every one of its members about its legal affairs may often be impossible or inappropriate; ordinarily, the lawyer should address communications to the appropriate officials of the organization. See Rule 1.12. When the representation involves many routine matters, the lawyer may arrange a system of limited or occasional reporting with the client.

6. In addition to these Rules, lawyers handling class actions should consult applicable law, rules of procedure, and other rules for guidance regarding communications.

Rule 1.04. Fees

(a) A lawyer shall not enter into an arrangement for, charge, or collect an illegal or clearly excessive fee. A fee is clearly excessive when, after a review of the facts, a reasonable lawyer would be left with a firm belief or conviction that the fee is in excess of a reasonable fee.

(b) Factors that may be considered in determining the reasonableness of a fee include, but are not limited to, the following:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
(3) the fee customarily charged in the locality for similar legal services;
(4) the amount involved and the results obtained;
(5) the time limitations imposed by the client or by the circumstances;
(6) the nature and length of the professional relationship with the client;
(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
(8) whether the fee is fixed or contingent on results obtained or uncertainty of collection before the legal services have been rendered.

(c) The scope of the representation and the basis or rate of the fee and expenses shall be communicated to the client before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. Any change in the basis or rate of the fee or expense shall also be communicated to the client.

(d) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by law or (f). A contingent-fee agreement shall:

(1) be in writing, and signed by the lawyer and the client;
(2) state the method by which the fee is to be determined, including if there is to be a differentiation in the percentage or percentages that will accrue to the lawyer in the event of settlement, trial, or appeal, and the percentage for each;
(3) state the litigation and other expenses to be deducted from the recovery, and whether such expenses are to be deducted before or after the contingent fee is calculated; and
(4) inform the client of the litigation and other expenses for which the client will be liable whether or not the client is the prevailing party.

(e) Upon conclusion of a contingent-fee matter, the lawyer shall provide the client with a written statement describing the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

(f) A lawyer shall not enter into an arrangement for, charge, or collect a contingent fee for representing a defendant in a criminal case.

(g) A division or arrangement for division of a fee between lawyers who are not in the same firm may be made only if:

(1) the division is:

(i) in proportion to the professional services performed by each lawyer; or

(ii) made between lawyers who assume joint responsibility for the representation;

(2) the client consents in writing to the terms of the arrangement prior to the time of the association or referral proposed, including:

(i) the identity of all lawyers or law firms who will participate in the fee-sharing arrangement;

(ii) whether fees will be divided based on the proportion of services performed or by lawyers agreeing to assume joint responsibility for the representation; and

(iii) the share of the fee that each lawyer or law firm will receive or, if the division is based on the proportion of services performed, the basis on which the division will be made; and

(3) the aggregate fee does not violate (a).

(h) Every agreement that allows a lawyer or law firm to associate other counsel in the representation of a person, or to refer the person to other counsel for such representation, and that results in such an association with or referral to a different law firm or a lawyer in such a different firm, shall be confirmed by an arrangement conforming to (g). Consent by a client or a prospective client without knowledge of the information specified in (g)(2) does not constitute a confirmation within the meaning of this Rule. No lawyer shall collect or seek to collect a fee or expense in connection with any such agreement that is not confirmed in that way, except for:

(1) the reasonable value of legal services provided to that person; and

(2) the reasonable and necessary expenses actually incurred on behalf of that person.

(i) Paragraph (g) does not apply to payment made to a former partner or associate pursuant to a separation or retirement agreement, or to payment made to a lawyer referral program in accordance with law.

Terminology: See Rule 1.00 for the definitions of "belief," "firm," "law firm," "person," "reasonable," "represent," "writing," and "written."

Comment:

1. A lawyer in good conscience should not charge or collect more than a reasonable fee, although a lawyer may charge less or no fee at all. Thus, paragraph (a) subjects a lawyer to discipline when a reasonable lawyer would be left with a firm belief or conviction that the fee is in excess of a reasonable fee. But this paragraph's "clearly excessive" standard does not preclude use of the "reasonableness" standard of paragraph (b) in other settings.

Basis or Rate of Fees and Expenses

2. When a lawyer has regularly represented a client, the lawyer and client may have an understanding concerning the bases and rates of fees and expenses for which the client will be responsible. But if such fees or expenses differ from that understanding, the lawyer should so advise the client.

3. In a new client-lawyer relationship, the lawyer should promptly establish with the client an understanding as to the fees and expenses. Generally, a lawyer may do so by furnishing the client with a memorandum or copy of the lawyer's customary fee arrangements that states the general nature of the legal services to be provided, the bases and rates of fees and expenses, and whether and to what extent the client will be responsible for any costs, expenses, or disbursements in the course of the representation. Because a written statement concerning the terms of the engagement reduces the possibility of misunderstanding, it is generally preferable for the bases and rates of fees and expenses to be communicated to the client in writing. In the case of a contingent fee, a written agreement is mandatory.

4. The lawyer should provide the client with reasonable notice of any change in the basis or rate of fees or expenses that occurs during the lawyer's representation of the client. Any such change should be consistent with the terms of the agreement governing the representation.

5. Fee arrangements normally are made at the outset of representation, when many uncertainties and contingencies exist, while claims of excessive fees are made in hindsight, when the contingencies have been resolved. The "clearly excessive" standard reflects that difference in perspective and requires that a lawyer be given the benefit of any such uncertainties for disciplinary purposes. Except in very unusual situations, circumstances at the time a fee arrangement is made should control in determining the question of fees.

6. Applicable law may impose requirements beyond this Rule. Such law may also impose additional limitations on fee agreements, such as limiting the percentage allowable, or may prohibit contingent-fee agreements in certain circumstances. Applicable law also may apply

to situations other than a contingent fee, for example, government regulations regarding fees in certain tax matters.

Fees in Family Law Matters

7. Contingent and percentage fees in family-law matters may tend to create a conflict of interest between lawyer and client regarding the appraisal of assets obtained for the client. See also Rule 1.08(h). Furthermore, in certain family-law matters, such as child custody and adoption, no res is created to fund a fee. Because of the human relationships involved and the unique character of the proceedings, contingent-fee arrangements in domestic relations cases are rarely justified.

Division of Fees

8. A division of fees is a single billing to a client covering the fee of two or more lawyers who are not in the same firm. A division of fees facilitates association of more than one lawyer in a matter in which neither alone could serve the client as well, and most often is used when the fee is contingent and the division is between a referring or associating lawyer initially retained by the client and a trial specialist, but it applies in all cases in which two or more lawyers are representing a single client in the same matter, and without regard to whether litigation is involved. Paragraph (g) permits the lawyers to divide a fee either on the basis of the proportion of services they render or if each lawyer assumes joint responsibility for the representation.

9. Contingent-fee agreements must be in a writing signed by the client and must otherwise comply with paragraph (d) of this Rule.

10. A division of a fee based on the proportion of services rendered by two or more lawyers contemplates that each lawyer is performing substantial legal services on behalf of the client with respect to the matter. In particular, it requires that each lawyer who participates in the fee have performed services beyond those involved in initially seeking to acquire and being engaged by the client. There must be a reasonable correlation between the amount or value of services rendered and responsibility assumed, and the share of the fee to be received. However, if each participating lawyer performs substantial legal services on behalf of the client, the agreed division should control even though the division is not directly proportional to actual work performed. If a division of fee is to be based on the proportion of services rendered, the arrangement may provide that the allocation not be made until the end of the representation. When the allocation is deferred until the end of the representation, the terms of the arrangement must include the basis by which the division will be made.

11. Joint responsibility for the representation entails ethical and perhaps financial responsibility for the representation. The ethical responsibility assumed requires that a referring or associating lawyer make reasonable efforts to assure adequacy of representation and to provide adequate client communication. Adequacy of representation requires that the referring or associating lawyer conduct a reasonable investigation of the client's legal matter and refer the matter to a lawyer whom the referring or associating lawyer reasonably believes is competent to handle it. See Rule 1.01. Adequate client-lawyer communication requires that a referring or associating lawyer monitor the matter throughout the representation and ensure that the client is informed of those matters that come to that lawyer's attention and that a reasonable lawyer would believe the client should be aware. See Rule 1.03. Attending all depositions and hearings, or requiring that copies of all pleadings and correspondence be provided a referring or associating lawyer, is not necessary in order to meet the monitoring requirement proposed by this Rule. These types of activities may increase the transactional costs, which ultimately the client will bear, and unless some benefit will be derived by the client, they should be avoided. The monitoring requirement is only that the referring lawyer be reasonably informed of the matter, respond to client questions, and assist the handling lawyer when necessary. Any referral or association of other counsel should be made based solely on the client's best interest.

12. In the aggregate, the minimum activities that must be undertaken by referring or associating lawyers pursuant to an arrangement for a division of fees are substantially greater than those assumed by a lawyer who forwarded a matter to other counsel, undertook no ongoing obligations with respect to it, and yet received a portion of the handling lawyer's fee once the matter was concluded, as was permitted under the prior version of this Rule. Whether such activities, or any additional activities that a lawyer might agree to undertake, suffice to make one lawyer participating in such an arrangement responsible for the professional misconduct of another lawyer who is participating in it and, if so, to what extent, are intended to be resolved by Texas Civil Practice and Remedies Code, Ch. 33, or other applicable law.

13. A client must consent in writing to the terms of the arrangement prior to the time of the association or referral proposed. For this consent to be effective, the client must have been advised of at least the key features of that arrangement. Those essential terms, which are specified in subparagraph (g)(2), are (a) the identity of all lawyers or law firms who will participate in the fee-sharing agreement, (b) whether fees will be divided based on the proportion of services performed or by lawyers agreeing to assume joint responsibility for the representation, and (c) the share of the fee that each lawyer or law firm will receive or the basis on which the division will be made if the division is based on proportion of service performed. Consent by a client or prospective client to the referral to or association of other counsel, made before any actual referral or association but without knowledge of the

information specified in subparagraph (g)(2), does not constitute sufficient client confirmation within the meaning of this Rule. The referring or associating lawyer or any other lawyer who employs another lawyer to assist in the representation has the primary duty to ensure full disclosure and compliance with this Rule.

14. Paragraph (h) facilitates the enforcement of the requirements of paragraph (g). It does so by providing that agreements that authorize a lawyer either to refer a person's case to another lawyer, or to associate other counsel in the handling of a client's case, and that actually result in such a referral or association with counsel in a different law firm from the one entering into the agreement, must be confirmed by an arrangement between the person and the lawyers involved that conforms to paragraph (g). As noted there, that arrangement must be presented to and agreed to by the person before the referral or association between the lawyers involved occurs. See subparagraph (g)(2). Because paragraph (h) refers to the party whose matter is involved as a "person" rather than as a "client," it is not possible to evade its requirements by having a referring lawyer not formally enter into a client-lawyer relationship with the person involved before referring that person's matter to other counsel. Paragraph (h) does provide, however, for recovery in quantum meruit when its requirements are not met. See subparagraphs (h)(1) and (h)(2).

15. What should be done with any otherwise agreed-to fee that is forfeited in whole or in part due to a lawyer's failure to comply with paragraph (h) is not resolved by these Rules.

16. Subparagraph (g)(3) requires that the aggregate fee charged to clients in connection with a given matter by all of the lawyers involved meet the standards of paragraph (a) — that is, not be clearly excessive.

Fee Disputes and Determinations

17. If a procedure has been established for resolution of fee disputes, such as an arbitration or mediation procedure established by a bar association, the lawyer should conscientiously consider submitting to it. Law may prescribe a procedure for determining a lawyer's fee, for example, in representation of an executor or administrator, or when a class or a person is entitled to recover reasonable attorney fees as part of the measure of damages. All involved lawyers should comply with any prescribed procedures.

Rule 1.05. Confidentiality

(a) Confidential information:

(1) in the case of a client or former client, is all information relating to representation of the client from whatever source, whether acquired by the lawyer personally or through an agent, other than information that is or becomes generally known or is readily obtainable from sources generally available to the public; and

(2) in the case of a prospective client, as described in Rule 1.17, is information furnished to the lawyer by that prospective client, either personally or through an agent or other representative authorized to act on the prospective client's behalf, in the course of seeking legal representation, other than information that:

(i) is or becomes generally known or is readily obtainable from sources generally available to the public; or

(ii) is furnished under the circumstances described in Rule 1.17(d)(2).

(b) Except as permitted by (c) or Rule 1.14, or required by (d), a lawyer shall not knowingly:

(1) disclose information the lawyer knows or reasonably should know is confidential; or

(2) use information the lawyer knows or reasonably should know is confidential to the disadvantage of a client, former client, or prospective client.

(c) A lawyer may disclose or use confidential information to the extent reasonably necessary:

(1) when the client, former client, or prospective client provides informed consent for the lawyer to do so;

(2) except when otherwise instructed, when communicating with:

(i) representatives of the client, former client, or prospective client;

(ii) any affiliated lawyer or employees of the lawyer or affiliated lawyer; or

(iii) any persons who are required to be supervised in accordance with the requirements of Rule 5.03;

(3) when the lawyer reasonably believes it is necessary to:

(i) comply with a court order, law, or these Rules;

(ii) prevent the client, former client, or prospective client from committing a criminal or fraudulent act;

(iii) rectify the consequences of a client or former client's criminal or fraudulent act in the commission of which the lawyer's services had been used;

(iv) prevent reasonably certain death or substantial bodily harm;

(v) establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, former client, or prospective client;

(vi) establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client, former client, or prospective client was involved;

(vii) respond to allegations in any proceeding concerning the lawyer's representation of the client or former client or discussion with a prospective client; or

(viii) carry out the representation effectively, except when otherwise instructed by the client; or

(4) when the lawyer seeks legal advice about the lawyer's compliance with these Rules.

(d) A lawyer shall disclose confidential information:

(1) when a lawyer has information clearly establishing that a client is likely to commit a criminal or fraudulent act that is likely to result in death or substantial bodily harm to a person, to the extent disclosure reasonably appears necessary to prevent the client from committing the criminal or fraudulent act; or

(2) when required to do so by Rule 3.03(c)–(e) or 4.01(b).

Terminology: See Rule 1.00 for the definitions of "affiliated," "informed consent," "knowingly," "known," "knows," "person," "reasonably," "reasonably believes," "reasonably should know," "represents," and "substantial."

Comment:

General Principles

1. This Rule clarifies that all information relating to a representation is protected as confidential and, subject to limited exceptions, cannot be disclosed or used adversely by the lawyer without the client's permission or informed consent. This protection contributes to the trust that is the hallmark of the client-lawyer relationship, because it encourages the client to seek legal assistance and to communicate fully and frankly with the lawyer, even as to embarrassing or legally damaging subject matter. The lawyer needs such full and frank communications with the client to represent the client effectively.

2. Although other bodies of law also pertain to the disclosure of confidential information, such as attorney-client privilege, work-product doctrine, and agency law, this Rule is broader and applies to both litigation and non-litigation matters. Even the existence of the client-lawyer relationship may be deemed confidential under certain circumstances.

Paragraph (a)

3. Subparagraph (a)(1) excludes from the broad definition of "confidential information" information that is or becomes generally known or readily obtainable from sources generally

available to the public. Whether information is "generally known" or "readily obtainable" depends on all circumstances relevant to obtaining the information. For example, information contained in books or records in public libraries, public-record depositories such as government offices, or publicly accessible electronic-data storage should be deemed "generally known" or "readily obtainable" if the particular information is obtainable through publicly available indices and similar methods of access. Information is not "generally known" or "readily obtainable" when a person interested in knowing the information could obtain it only by means of special knowledge or substantial difficulty or expense. Special knowledge may include, for example, facts about the whereabouts or identity of a person or facts about other sources from which the confidential information can be acquired, such as from deposition transcripts, if those facts are not otherwise generally known. In addition, a lawyer may not justify disclosure or adverse use of otherwise confidential client information simply because the information has become known to third persons, if the information is not otherwise generally known or readily obtainable.

4. The purpose of subparagraph (a)(2) is to limit the broad definition of "confidential information" as it applies to prospective clients. Accordingly, subparagraph (a)(2) defines confidential information more narrowly than does subparagraph (a)(1), by classifying as confidential only information furnished by the prospective client, either personally or through an agent or other representative authorized to act on the prospective client's behalf. For example, before deciding to take a representation, a lawyer may talk to other lawyers working on similar matters but for other parties. Factual information acquired from the other lawyers should not be considered confidential under any circumstances if the client-lawyer relationship does not come to fruition, as the information was not acquired from the prospective client or during an existing client-lawyer relationship. If the lawyer accepts the representation, however, and the prospective client becomes a current client, then any facts learned from those outside discussions with other lawyers may be deemed confidential under subparagraph (a)(1). Moreover, not all information that a prospective client provides meets the definition of confidential information. For example, if a discussion with a prospective client occurs after obtaining the prospective client's informed consent under Rule 1.17(d)(2), then information acquired during that discussion is not confidential.

Paragraph (b)

5. Paragraph (b) forbids not only the knowing disclosure of confidential information, but also the knowing use of confidential information to the client's disadvantage, even if the lawyer's use of this information does not require disclosure. For example, a lawyer who has learned that the client is investing in specific real estate may not seek to acquire nearby property if doing so would adversely affect the client's plan for investment. Similarly, information the

lawyer acquired in the course of representing a client may not be used to the client's disadvantage even after the termination of the lawyer's representation of the client. Confidential information the lawyer acquired from a prospective client is also protected under paragraph (b), even if the lawyer never represents the prospective client.

Paragraph (c) — Permitted Disclosure or Adverse Use

Generally

6. Paragraph (c) permits, but does not require, the disclosure or adverse use of information under the circumstances specified in subparagraphs (c)(1) through (c)(4).

7. Under all of the provisions in paragraph (c), a lawyer is permitted to disclose or adversely use information only to the extent reasonably necessary. Disclosure or adverse use beyond that limit violates this Rule and may violate other Rules, laws, or standards, such as those governing fiduciary duties. For example, a lawyer should recognize that, even when forced to defend personally against a claim and permitted to disclose confidential information in the process, the lawyer's general obligation to protect confidential information mandates that the lawyer's disclosure of such information be as limited as reasonably possible under the circumstances.

Disclosure or Use When Communicating with Individuals Involved with the Provision of Legal Services

8. Subparagraph (c)(2) generally permits a lawyer to disclose confidential information to individuals whose assistance may be necessary for the lawyer to provide legal services to the client. For example, in the course of representing a client, a lawyer may disclose confidential information to the client's representatives or to other lawyers with whom the lawyer practices, as well as to the lawyer's employees, unless the client has instructed that particular information be confined to specified representatives, lawyers, or employees.

9. Subparagraph (c)(2) also generally permits a lawyer to disclose confidential information to individuals under the lawyer's supervision who the lawyer has retained to assist with the provision of legal services to the client. These may include outside providers of bookkeeping, accounting, data processing, banking, printing, or other legitimate services. But before making any disclosures to any nonlawyers who are under the lawyer's supervision, the lawyer should inform the nonlawyers that they must act in conformity with the lawyer's duty of confidentiality. See Rule 5.03.

Disclosure or Use Reasonably Believed Necessary to Accomplish Certain Purposes

10. Because any disclosure or adverse use of confidential information is contrary to the lawyer's general obligations, the lawyer must reasonably believe a disclosure or adverse use is necessary to accomplish the purposes listed in subparagraph (c)(3). The lawyer's actions will be judged by an objective standard of a "reasonable lawyer" acting under the same or similar circumstances existing at the time of the disclosure or adverse use, rather than by the lawyer's subjective belief.

Complying with Court Order, Law, or Rules

11. Subparagraph (c)(3)(i) permits a lawyer to disclose or use confidential information to comply with a court order, law, or these Rules. When disclosure or use of confidential information appears to be mandated, however, Rule 1.03 may require the lawyer to discuss the matter with the client.

12. A court, tribunal, or government entity may order a lawyer to disclose confidential information, claiming authority pursuant to other law to compel disclosure. Absent the client's permission to do otherwise, fiduciary duties to the client may require the lawyer to assert on the client's behalf all nonfrivolous arguments that the order is not authorized by other law or that the information at issue is protected against disclosure by applicable law, for example the attorney-client privilege. In the event of an adverse ruling, Rule 1.03 may require the lawyer to consult with the client about whether the client would like to seek appellate review of the adverse ruling.

Preventing or Rectifying Client Crime or Fraud

13. Subparagraphs (c)(3)(ii) and (iii) address disclosure and adverse use relating to a client's crime or fraud. A lawyer may learn that a client intends serious and perhaps irreparable harm or that the consequences of an already committed crime or fraud accomplished through use of the lawyer's services can be rectified. If the lawyer were prohibited from disclosing or using confidential information in this context, the victim's interests would be sacrificed in favor of preserving the confidentiality of the client's information, even though the client's purpose is wrongful. On the other hand, a client who knows or believes that a lawyer is permitted to disclose a client's wrongful purposes may be inhibited from revealing facts that would enable the lawyer to counsel effectively against wrongful action or persuade the client to rectify past harm. In balancing these competing interests, subparagraph (c)(3)(ii) gives the lawyer discretion to disclose or adversely use confidential information to prevent a client from committing a criminal or fraudulent act.

14. Subparagraph (c)(3)(iii) gives the lawyer discretion to disclose or adversely use confidential information when (a) the crime or fraud has occurred; (b) the consequences of the crime or fraud can be rectified by the disclosure or adverse use of confidential information; and (c) the client used the lawyer's services to accomplish the crime or fraud. Subparagraph (c)(3)(iii) does not apply when a person who has committed a crime or fraud thereafter consults with or employs a lawyer for representation concerning that past crime or fraud.

15. The extent to which subparagraphs (c)(3)(ii) and (iii) allow disclosure or adverse use of confidential information involves consideration of such factors as the magnitude, proximity, and likelihood of the contemplated wrong, the nature of the lawyer's relationship with the client and with those who might be injured or were injured by the client, the nature and degree of the lawyer's involvement in the matter, and any extenuating factors. A disclosure or adverse use of confidential information should be no greater than the lawyer reasonably believes is necessary to accomplish the objective.

16. While subparagraphs (c)(3)(ii) and (iii) permit disclosures, subparagraph (d)(2) reminds lawyers of the connection between this Rule and other Rules that require disclosure, including, for example, Rules 3.03(c)–(e) and 4.01(b).

Preventing Death or Substantial Bodily Harm

17. Subparagraph (c)(3)(iv) recognizes the overriding value of life and physical integrity and permits disclosure or adverse use of confidential information to the extent reasonably necessary to prevent reasonably certain death or substantial bodily harm. Such harm is reasonably certain to occur if it will be suffered imminently or if there is a present and substantial threat that a person will suffer such harm at a later date if the lawyer fails to take action the lawyer reasonably believes is necessary to eliminate the threat. A lawyer may disclose confidential information to prevent death or substantial bodily harm even if the behavior that may cause harm does not constitute a crime or fraud. For example, a lawyer who knows that a person has accidentally discharged toxic waste into a town's water supply may reveal this information to the authorities if there is a present and substantial risk that one who drinks the water will contract a life-threatening or debilitating disease and the lawyer's disclosure is necessary to eliminate the threat or reduce the number of victims. The lawyer is allowed to disclose or adversely use such confidential information regardless of whether the person who discharged the toxic waste was the lawyer's client or someone whom the lawyer's client wishes to protect from disclosure.

Establishing a Claim or Defense or Responding to Allegations

18. Subparagraphs (3)(c)(v)–(vii) allow a lawyer to disclose or adversely use confidential information in certain limited circumstances when it is in the lawyer's interest to do so. First, subparagraph (3)(c)(v) recognizes that a client, as the beneficiary of a fiduciary relationship, may not exploit the relationship to the lawyer's detriment. Thus, a lawyer may, without the client's permission or consent, disclose or adversely use confidential information to the extent reasonably necessary to establish a claim or defense in a dispute between the lawyer and the client, former client, or prospective client.

19. Subparagraphs (3)(c)(vi) and (vii) apply in circumstances other than a dispute between the lawyer and the client, former client, or prospective client. Subparagraph (3)(c)(vi) allows a lawyer to disclose or adversely use confidential information to defend criminal charges or civil claims against the lawyer if such charges or claims concern conduct in which the client was involved. Subparagraph (3)(c)(vii) is broader, allowing disclosure and adverse use of confidential information to respond to an allegation against any person or entity in any proceeding as long as the allegation or proceeding concerns the lawyer's representation of the client or former client or the discussion with a prospective client.

20. In contrast to subparagraph (c)(3)(vii), subparagraphs (c)(3)(v) and (vi) do not require the lawyer to wait for the commencement of a proceeding that charges the lawyer with wrongdoing before the lawyer may disclose or adversely use confidential client information to establish a defense. The right to disclose or adversely use confidential information also applies, of course, when a proceeding has commenced. What constitutes a "proceeding" will depend on the existing facts and circumstances.

21. While confidential information may be disclosed or adversely used under the circumstances identified in subparagraphs (3)(c)(v)–(vii) without the client's, former client's, or prospective client's permission or consent, the lawyer's disclosure or adverse use should be no greater than the lawyer reasonably believes is necessary to accomplish the purposes listed in those subparagraphs.

Carrying Out Representation Effectively

22. Subparagraph (c)(3)(viii) recognizes that a lawyer generally has implied-in-fact authority to make disclosures about a client when appropriate in carrying out the representation, to the extent the client's instructions do not limit that authority. In negotiations, for example, a lawyer may reasonably believe that it is necessary to disclose confidential information at that very moment to facilitate the negotiation. Subparagraph (c)(3)(viii) allows the lawyer to do

so, except when otherwise instructed by the client. Similar considerations arise when a lawyer reasonably believes that it is in the client's best interest to consult immediately with an expert witness or an a lawyer specialist concerning certain aspects of the client's situation, but the client cannot be reached to discuss the matter. Once again, subparagraph (c)(3)(viii) allows the lawyer to do so, except when otherwise instructed by the client.

Permitted Disclosure or Use When the Lawyer Seeks Legal Advice

23. A lawyer's confidentiality obligations do not preclude a lawyer from securing confidential legal advice about the lawyer's responsibility to comply with these Rules. In most situations, disclosing or using confidential information to secure such advice will be impliedly authorized for the lawyer to carry out the representation. Even when the disclosure or use is not impliedly authorized, subparagraph (c)(4) allows such disclosure or use because of the importance of a lawyer's compliance with these Rules.

Paragraph (d) — Mandatory Disclosure Adverse to Client

24. Paragraph (d) addresses mandatory disclosure of confidential information. Because it is very difficult for a lawyer to know when a client's criminal or fraudulent purpose will be carried out, subparagraph (d)(1) requires the lawyer to act only if the lawyer has information clearly establishing the likelihood of a criminal or fraudulent act. If the information shows clearly that the client's contemplated crime or fraud is likely to result in death or substantial bodily harm, the lawyer is required seek to avoid those results by disclosing information to the extent disclosure reasonably appears necessary to prevent the criminal or fraudulent act. When the threatened crime or fraud is likely to have the less serious result of substantial injury to the financial interests or property of another, the lawyer is not required to disclose confidential information to prevent such consequences, but may do so in conformity with subparagraph (c)(3)(ii). See also Rules 1.02(d)–(e) and 3.03(d).

25. Although a violation of subparagraph (d)(1) could subject a lawyer to disciplinary action, the lawyer's decisions whether or how to act should not constitute grounds for discipline unless the lawyer's conduct was unreasonable under all existing circumstances as they reasonably appeared to the lawyer who made the decision. The lawyer's affirmative duty to act is based on how the situation appeared at the time the lawyer made the decision, rather than how it might appear after the fact.

Withdrawal

26. After a lawyer withdraws, the lawyer's conduct generally continues to be governed by Rule 1.05. But the lawyer's duties of disclosure under paragraph (d) of this Rule, insofar as such duties are mandatory, do not survive the end of the relationship, even though disclosure may be permissible under other provisions of this Rule, such as subparagraphs (c)(3)(ii)–(iv). This Rule does not prevent a lawyer from giving notice to others of the fact of withdrawal.

Rule 1.06. Conflicts of Interest

(a) A conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client, or a third person, or by a personal interest of the lawyer.

(b) A lawyer shall not, even with informed consent, represent opposing parties in the same matter before a tribunal.

(c) In situations other than the situation described in (b), when representation of a client will involve a conflict of interest, the lawyer shall not represent the client unless:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to the client;

(2) the client provides informed consent, confirmed in writing; and

(3) the representation complies with Rule 1.07 if the lawyer is considering representing more than one client in the same matter.

(d) If a lawyer has accepted representation in violation of this Rule, or if a representation properly accepted becomes improper under this Rule, the lawyer shall promptly withdraw from one or more representations to the extent necessary for any remaining representation not to be in violation of these Rules.

(e) When a lawyer is personally prohibited by this Rule from representing a person in a matter, no lawyer who is affiliated with the personally prohibited lawyer, and who knows or reasonably should know of the prohibition, shall represent that person in that matter, unless the prohibition is based only on a personal interest of the personally prohibited lawyer and the affiliated lawyer reasonably believes that the affiliated lawyer will be able to provide competent and diligent representation.

Terminology: See Rule 1.00 for the definitions of "affiliated," "competent," "confirmed in writing," "informed consent," "knows," "person," "personally prohibited," "reasonably believes," "reasonably should know," "represents," "tribunal," and "writing."

Comment:

Overview

1. Conflicts of interest can arise from the lawyer's responsibilities to another client, a former client, or a third person, or from the lawyer's own interests. In addition to this general Rule, other Rules concern these and other specific conflicts of interest. See, for example, Rule 1.07, Multiple Clients in the Same Matter; Rule 1.08, Prohibited Transactions; Rule 1.09, Former Client; Rule 1.10, Former and Current Government Officers and Employees; Rule 1.11, Adjudicatory Officials, Third-Party Neutrals, and Court Lawyers; Rule 1.12, Organization as a Client; and Rule 1.17, Prospective Clients.

2. This Rule is designed to protect loyalty and independent judgment, which are essential elements in a lawyer's relationship with a client. Specifically, paragraph (a) of this Rule defines a "conflict of interest." Paragraph (b) categorically prohibits representation of opposing parties in the same matter before a tribunal, even if the clients provide or are prepared to provide informed consent. In all other situations, the ability of the lawyer to accept or continue a representation is resolved in accordance with paragraph (c). Paragraph (d) recognizes that, if a lawyer identifies a conflict after undertaking the representation, the lawyer is still required to comply with paragraph (b) or (c), which at times may be possible only through withdrawal. When more than one client is involved and the lawyer withdraws because a conflict arises after the representation commences, whether the lawyer may continue to represent any of the remaining clients is determined by this Rule and others, most commonly Rules 1.05, 1.07, and 1.09. Under paragraph (e), a conflict that prevents a lawyer from undertaking or continuing a representation of a client also prevents any other lawyer who is or becomes affiliated with that lawyer from doing so, unless the exception in paragraph (e) applies.

3. Resolution of a conflict of interest under this Rule requires the lawyer to do the following things: (a) clearly identify the clients; (b) determine whether a conflict of interest exists; (c) if a conflict exists, decide whether the lawyer may undertake the representation with the client's informed consent despite the existence of the conflict; and (d) if a consentable conflict exists, consult with the affected clients and obtain their informed consent, confirmed in writing.

Identifying Clients

4. Before a lawyer can perform a conflicts analysis, the lawyer needs to identify clearly the client to be represented. Often, it is easy to identify the client; but, in some instances, such as in estate planning or in the representation of an organizational client, identification is more difficult. A lawyer who represents a corporation or other organization does not, by virtue of that representation, necessarily represent any constituent or affiliate of the organization, such as its shareholders, officers, directors, parents, or subsidiaries. See Rule 1.12. Thus, the lawyer for an organization is not barred from accepting representation adverse to a constituent or affiliate in an unrelated matter, unless (a) the constituent or affiliate is also a client of the lawyer, (b) there is an understanding between the lawyer and the organizational client that the lawyer will avoid representation adverse to the client's constituents or affiliates, or (c) the lawyer's obligations to either the organizational client or the new client are likely to limit materially the lawyer's representation of the other client. The terms of any engagement under which the lawyer was retained, the law governing the formation of a client-lawyer relationship, or the reasonable expectations of the client may determine whether a lawyer is barred from accepting representation adverse to a constituent or affiliate.

Identifying Conflicts — Meaning of Directly Adverse and Materially Limited

5. This Rule prohibits a lawyer from undertaking or continuing representation directly adverse to a client except in compliance with paragraph (c). Therefore, unless the requirements of paragraph (c) are satisfied, a lawyer may not represent a client in one matter against a client the lawyer represents in another matter, even if the matters are wholly unrelated. Otherwise, each client may feel betrayed and fear that the lawyer will pursue the client's own case less effectively out of deference to the other client. The resulting damage to the client-lawyer relationship is likely to impair the lawyer's ability to represent one or both clients effectively. Similarly, a directly adverse conflict may arise when a lawyer is required to cross-examine a client who appears as a witness in a lawsuit involving another client, as when the testimony will be damaging to the client who is represented in the lawsuit. Directly adverse conflicts can also arise in transactional matters. For example, if a lawyer is asked to represent the seller of a business in negotiations with a buyer represented by the lawyer in another, unrelated matter, the lawyer could not undertake the representation without complying with paragraph (c). On the other hand, simultaneous representation in unrelated matters of clients whose interests are only economically adverse, such as representation of competing economic enterprises in unrelated litigation, does not ordinarily constitute a conflict of interest and thus may not require compliance with paragraph (c).

6. Even when there is no direct adversity, a conflict of interest exists if there is a significant risk that a lawyer's ability to consider, recommend, or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer's other responsibilities or interests. For example, a lawyer asked to represent several individuals seeking to form a joint venture is likely to be materially limited in recommending or advocating all possible positions that each might take because of the lawyer's duty of loyalty to the others. The conflict in effect forecloses alternatives that would otherwise be available to the client. The mere possibility of subsequent harm, however, does not itself require disclosure and consent. The critical questions are the likelihood that a difference in interests will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that the lawyer reasonably should pursue on the client's behalf.

Lawyer's Responsibilities to Former Clients and Third Persons

7. In addition to conflicts with other current clients, a lawyer's duties of loyalty and independent judgment may be materially limited by responsibilities to former clients under Rule 1.09 or by the lawyer's responsibilities to other persons, such as fiduciary duties arising from a lawyer's service as a trustee, executor, or corporate director.

Interest of Third Person Paying for a Lawyer's Service

8. A lawyer may be paid for a representation by a third person or another source other than the client, such as a co-client, insurance company, or legal-services organization. Acceptance of the payment from any other source may present a significant risk that the lawyer's representation of the client will be materially limited by the lawyer's interest in accommodating the person paying the lawyer's services or by the lawyer's responsibilities to the payer. If so, this Rule requires the lawyer to comply with the requirements of paragraph (c) before accepting or continuing the representation, including determining whether the conflict is consentable and, if so, whether the client has adequate information about the material risks of, and reasonably available alternatives to, the representation.

Conflict with Lawyer's Own Interests

9. Loyalty to a client can be impaired not only by the representation of parties with adverse interests or by the lawyer's loyalty to another, but also by the lawyer's own interests. For example, a lawyer should not allow related business interests to affect the lawyer's representation of clients by referring clients to an enterprise in which the lawyer has an undisclosed interest. Further, if the propriety or competency of a lawyer's own conduct in

a transaction is in question, the lawyer may be unable to give a client detached advice. A conflict may also arise from a lawyer's non-financial interests. For example, a lawyer may have a strongly held conviction that would limit materially the lawyer's representation of a client, such as moral repugnance to a position that could be advanced in the client's matter.

Paragraphs (b) and (c) — Their Interaction

10. Paragraph (b) identifies a conflict of interest that is non-consentable, meaning that the lawyer involved should not ask for consent and cannot provide representation on the basis of the client's consent. Even with informed consent, it is never appropriate to represent opposing parties in the same matter before a tribunal.

11. Although a lawyer is prohibited by paragraph (b) from representing opposing parties, a lawyer may represent co-plaintiffs or co-defendants in the same matter before a tribunal. Such a representation is governed by Rule 1.07 and, if a conflict exists, paragraph (c) of this Rule. A co-party conflict may exist by reason of, for example, a substantial discrepancy in the parties' testimony, incompatibility in positions in relation to an opposing party, or the fact that there are substantially different possibilities of settlement of the claims or liabilities in question. Such conflicts can arise in criminal cases as well as in civil cases.

Paragraph (c)

12. Paragraph (c) identifies other conflicts of interest that do not foreclose a representation as long as the lawyer obtains the client's informed consent to proceed with the representation despite the conflicts. The requirements of subparagraphs (c)(1) and (c)(3) must be met before the lawyer may obtain the client's informed consent. Thus, if the lawyer does not reasonably believe that the lawyer will be able to provide competent and diligent representation to the client, then the requirement of subparagraph (c)(1) is not met and the conflict is non-consentable. The "reasonably believes" standard is an objective one, intended to make the lawyer review the matter from the perspective of a reasonable, disinterested lawyer rather than from the lawyer's own personal, subjective perspective.

Positional Conflicts

13. Ordinarily, a lawyer may take inconsistent legal positions in different tribunals at different times on behalf of different clients. Merely advocating a legal position on behalf of one client that might create precedent adverse to the interests of a client the lawyer represents in an unrelated matter does not necessarily create a conflict of interest. But a conflict of interest exists if there is a serious risk that a lawyer's action on behalf of one client will limit

materially the lawyer's effectiveness in representing another client in a different case — for example, when a decision favoring one client will create a precedent likely to weaken seriously the position taken on behalf of the other client. Factors relevant in determining whether the clients need to be advised of such potential conflicts include whether the cases are pending, whether the issue is substantive or procedural, the temporal relationship between the matters, the significance of the issue to the immediate and long-term interests of the clients involved, and the clients' reasonable expectations in retaining the lawyer.

Non-litigation Conflicts

14. Conflicts of interest may exist in contexts other than matters before tribunals. Relevant factors in a lawyer's determination of whether clients in a transaction are directly adverse or whether a material limitation does or will exist include the duration and intimacy of the lawyer's relationship with the client or clients involved, the functions the lawyer is performing, the likelihood that an actual conflict will arise, and the likely prejudice to the client if a conflict arises. The question is often one of proximity and degree. A non-litigation conflict is consentable under paragraph (c) if the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to the client. A lawyer is expected to assess that possibility before undertaking the representation of two or more clients in that context, just as in a litigation setting.

Informed Consent

15. Disclosure and consent are not formalities. Disclosure sufficient for sophisticated clients may not be sufficient to permit less sophisticated clients to provide fully informed consent. See Comment 5 to Rule 1.00. While this Rule does not require the lawyer to provide written disclosure, a lawyer should consider making disclosure in writing to avoid difficulties that may arise when a lawyer claims to have made disclosure and the client claims otherwise. But the Rule does require the client's informed consent to be confirmed in writing. When a lawyer represents multiple clients in the same matter, Rule 1.07 imposes additional, specific requirements for informed consent.

16. A client who has consented to a conflict may revoke the consent and, like any other client, may terminate the lawyer's representation at any time. Whether the client's revocation of consent precludes the lawyer from continuing to represent other clients depends on the circumstances, including the terms of the engagement, the nature of the conflict, a material change in circumstances, the reasonable expectations of the other clients, and whether potential material detriment to the other clients or the lawyer would result. Although the

client's revocation does not have to be in writing, the lawyer should consider obtaining a written revocation.

17. Whether consent to future conflicts is informed generally depends on the extent to which the client reasonably understands the material risks that could arise in connection with the future conflict. The more comprehensive the explanation of the circumstances that might arise in the future, and the reasonably foreseeable or known adverse consequences of those circumstances, the greater the likelihood that the client will have the requisite understanding to provide informed consent. If the client consents to a particular type of conflict with which the client is already familiar, then the consent ordinarily will be considered informed with regard to that type of conflict. If the consent is general and open-ended, then the consent ordinarily will not be considered informed if the client did not understand the material risks involved. On the other hand, if the client is an experienced user of the legal services involved and is reasonably informed regarding the risk that a conflict may arise, such consent is more likely to be considered informed, particularly if, for example, the client is independently represented by other counsel in giving consent and the consent is limited to future conflicts unrelated to the subject of the current representation. See Comment 5 to Rule 1.00. In any case, consent to future conflicts cannot be effective if the circumstances that materialize are such as would make the conflict non-consentable under paragraph (b) or (c).

Paragraph (e) — Imputation

18. The concern underlying paragraph (e) is the possibility that a lawyer who cannot undertake a representation under this Rule will seek to avoid that prohibition by having another lawyer in the lawyer's firm (*i.e.*, an affiliated lawyer), who is not personally subject to the prohibition, assume responsibility for the representation. Because such a representation by an affiliated lawyer would not prevent the harm that this Rule is designed to prevent, paragraph (e) generally provides that the prohibition may not be so circumvented. But paragraph (e) provides an exception to the imputation of these conflicts that applies only when the conflict arises from the personally prohibited lawyer's personal interests.

19. Paragraph (e) also provides that an affiliated lawyer should not be disciplined for undertaking a representation unless the affiliated lawyer knew or reasonably should have known that the lawyer was prohibited from undertaking the representation. An affiliated lawyer in a large firm, especially a firm with offices in different cities, would be particularly vulnerable to an unwitting and innocent violation of the Rule absent this scienter requirement. But this scienter requirement does not diminish or otherwise affect the affiliated lawyer's obligation

to make efforts before undertaking a representation to ascertain the existence of a conflict of interest relating to that representation. See Rule 1.00(r).

Conflict Issues for Certain Government Lawyers

20. Like private lawyers, government lawyers owe a duty of loyalty to their clients. Some conflict issues that may arise in a government practice, however, are not specifically addressed by these Rules. For example, when a lawyer has been employed by one government entity and then moves to a second government entity, it is beyond the scope of these Rules whether the government entities should be regarded as the same client or different clients.

21. Rule 1.10 specifically governs certain conflicts that may arise when a lawyer moves from government employment to private employment or vice versa. Conflicts not addressed within the scope of Rule 1.10, however, remain governed by this Rule, as well as by any other applicable Rules and laws pertaining to conflicts of interest and confidential information.

22. To the extent a government lawyer is authorized by law to represent a client or the public interest in circumstances in which a private lawyer would not be authorized to do so, these Rules do not abrogate that authority. See Preamble, ¶ 10.

Standing to Raise Conflict Concerns

23. Raising questions of possible conflicts of interest within the meaning of this Rule is primarily the responsibility of the lawyer undertaking the representation, who should advise the clients accordingly. A court, however, may raise the question when it has reason to believe that the lawyer has neglected that responsibility. In a criminal case, for example, inquiry by the court is generally required when a lawyer represents multiple defendants. When the conflict is such as to clearly call into question the fair or efficient administration of justice, opposing counsel may properly raise the question. Such an objection should be viewed with great caution, however, for these Rules are not designed to provide standards for disqualification of counsel, and a motion seeking such relief, if misused, can subject the movant to discipline. See Preamble, ¶ 13; Rule 3.04(c); and Rule 8.04.

Rule 1.07. Conflicts of Interest: Multiple Clients in the Same Matter

(a) A lawyer shall not represent two or more clients in a matter unless:

(1) the representation complies with Rule 1.06;

(2) prior to undertaking the representation or as soon as reasonably practicable thereafter, the lawyer discloses to the clients that during the representation the lawyer:

(i) must act impartially as to all clients;

(ii) cannot serve as an advocate for one client in the matter against any of the other clients, as a consequence of which each client must be willing to make independent decisions without the lawyer's advice to resolve issues that arise among the clients concerning the matter; and

(iii) may be required to withdraw from representing some or all of the clients before the matter is completed due to events that occur during the representation; and

(3) as soon as reasonably practicable after making the disclosures required by (a)(2), the lawyer obtains each client's informed consent, confirmed in writing, to the representation.

(b) When a lawyer represents multiple clients in a matter pursuant to a court order or appointment, and the court requires or permits the lawyer to conduct the representation in accordance with standards that differ from those set out in this Rule, the lawyer may comply with those different standards notwithstanding this Rule.

(c) When a lawyer is personally prohibited by this Rule from representing a person in a matter, no lawyer who is affiliated with the personally prohibited lawyer, and who knows or reasonably should know of the prohibition, shall represent that person in that matter.

Terminology: See Rule 1.00 for the definitions of "affiliated," "confirmed in writing," "informed consent," "knows," "person," "personally prohibited," "reasonably," "reasonably should know," "represents," and "writing."

Comment:

Overview

1. This Rule explains what a lawyer needs to tell clients before agreeing to represent multiple clients in a single matter. Such a joint representation may be permissible, in both litigation and non-litigation contexts, even when there are some differences among the clients' interests. For example, in the non-litigation context, clients may ask a lawyer to memorialize a transaction between them after they have settled between themselves all material terms of the transaction. Similarly, a lawyer may seek to establish or adjust a relationship between

clients on an amicable and mutually advantageous basis, for example, in helping to organize a business involving two or more clients, working out the financial organization of an enterprise in which two or more clients have an interest, or arranging a property distribution of an estate. Otherwise, each client might have to obtain separate representation, with the possibility of incurring additional cost or other complications. Given these and other relevant factors, the clients may prefer that the lawyer act for all of them.

2. Such a joint representation is frequently laden with conflict-of-interest risks. The lawyer has fiduciary obligations to each client, which include loyalty, candor, and confidentiality. But the representation may develop so that protecting one joint client harms another joint client or concealing information helps one joint client but adversely affects another joint client.

Other Rules

3. A joint representation of multiple clients may create particular issues under Rules in addition to this Rule, including Rules 1.03, 1.05, 1.06, 1.08, 1.09, and 1.12. For example, the joint representation might present a conflict of interest because the lawyer has acquired adverse confidential information about one of the clients during a former representation, see Rules 1.05 and 1.09, or because the lawyer is involved in a business transaction with one of the clients, see Rule 1.08.

4. A joint representation of multiple clients requires a lawyer to strike the delicate balance between the lawyer's obligation to keep each client reasonably informed about the status of a matter, see Rule 1.03, and the lawyer's obligation to keep confidential the information obtained from a client, see Rule 1.05. When the lawyer is balancing these two requirements, the lawyer's duty of disclosure generally will outweigh the lawyer's duty of confidentiality. Therefore, a lawyer representing joint clients will be required to share material information regarding the representation and correct material false or misleading statements or omissions made by or on behalf of one client to the other jointly represented clients. If the lawyer is concerned whether such disclosures would violate the lawyer's duty of confidentiality to a joint client, the lawyer should obtain that client's informed consent for the disclosure. If one or more clients ask the lawyer not to share material information or correct material false or misleading statements or omissions, then the lawyer should consider whether withdrawal from the representation of some or all clients is necessary.

5. The conflict described above can be resolved by joint clients' agreement, after the clients have been informed properly, that the lawyer will keep certain information confidential. For example, joint clients may agree that the lawyer will keep one client's trade secrets confidential in a representation involving a joint venture between the clients. Of course,

obtaining joint clients' informed consent to keep certain information confidential may be difficult, because a joint client may not be able to make an adequate evaluation of information the client does not have.

Conditions and Considerations for Representation

6. Subparagraph (a)(1) reminds lawyers that Rule 1.06, which provides general conflict-of-interest principles, is the starting point for assessing conflicts of interest. Only after a lawyer has determined that a representation complies with Rule 1.06 should the lawyer consider the implications of a joint representation involving multiple clients in the same matter, which requires analysis under this Rule.

7. A lawyer's obligation to comply with Rule 1.06 continues after the lawyer accepts the joint representation of multiple clients. See Rules 1.06(d) and 1.16(a)(1). Therefore, if a conflict of interest arises during the representation, the lawyer will be required to do one of the following things: (a) obtain the joint clients' informed consent, confirmed in writing, to the continuation of the representation, if the lawyer reasonably believes the lawyer can continue to provide competent and diligent representation to the clients; or (b) withdraw from the representation of one or more clients.

8. When deciding whether to represent multiple clients in the same matter, a lawyer should consider whether the clients can proceed with a representation in which the lawyer acts impartially. Thus, before agreeing to represent the joint clients, the lawyer should determine that any potential differences between or among the clients are not so serious that the clients would be unable to agree among themselves to a resolution of any material issue, and each joint client can understand the issues and make independent decisions based on what is in that individual client's best interest. These determinations are important because joint clients may have to act without the benefit of the lawyer's advice, if by giving such advice the lawyer would breach the obligation to act impartially. For example, if a lawyer were to believe that a proposed settlement offer benefits one client more than another, while the lawyer must disclose that assessment to both clients, the lawyer could not advocate for or against the settlement. Instead, each client would have to make an independent decision, which could be made with the advice of independent legal counsel, on whether to agree to the settlement.

9. Further, the lawyer should consider whether the lawyer has a greater sense of loyalty toward one of the joint clients. For example, one joint client may have a long-standing relationship with the lawyer or may have recommended the lawyer to the others. A lawyer should not

assume a joint representation if this greater sense of loyalty toward one client would impair the lawyer's representation of the other joint clients.

10. The lawyer should also consider whether the joint representation of multiple clients is likely to materially prejudice the interests of any of the clients. This calls on the lawyer to assess each client's interests separately and to assess how the proposed joint representation is likely to affect their common interests. If the joint representation is likely to materially prejudice the interests of any of the clients, the lawyer should not proceed with the representation.

Required Disclosures and Informed Consent

11. Subparagraph (a)(2) requires lawyers to make specific disclosures concerning the lawyer's role in a joint representation of multiple clients. The lawyer is not required to make such disclosures in writing, but a lawyer should consider doing so to avoid difficulties that may arise when a lawyer claims to have made the disclosures and the client claims otherwise. The client's informed consent to the joint representation must be confirmed in writing under subparagraph (a)(3).

12. A lawyer should consider making additional disclosures to obtain clients' informed consent to a joint representation under subparagraph (a)(3). For example, as detailed in Comment 4, the lawyer should disclose the effect of joint representation on the lawyer's duties of confidentiality and disclosure. Additionally, the lawyer should disclose that, while joint representation might be less expensive and more efficient than independent representation, it might also be more expensive and might delay resolution of the matter. Additional costs and delay might occur, for example, when the lawyer withdraws from representing some or all of the joint clients during a representation, particularly if it is late in the matter, which would substantially increase the matter's ultimate cost if the clients are required to expend additional fees and expenses to hire and educate new lawyers.

13. The concern underlying paragraph (c) is the possibility that a lawyer who cannot undertake a representation under this Rule will seek to avoid that prohibition by having another lawyer in the lawyer's firm (*i.e.*, an affiliated lawyer), who is not personally subject to the prohibition, assume responsibility for the representation. Because such a representation by an affiliated lawyer would not prevent the harm that this Rule is designed to prevent, paragraph (c) generally provides that the prohibition may not be so circumvented.

14. Paragraph (c) also provides that an affiliated lawyer should not be disciplined for undertaking a representation unless the affiliated lawyer knew or reasonably should have known that the lawyer was prohibited from undertaking the representation. An affiliated lawyer in a large

firm, especially a firm with offices in different cities, would be particularly vulnerable to an unwitting and innocent violation of the Rule absent this scienter requirement. But this scienter requirement does not diminish or otherwise affect the affiliated lawyer's obligation to make efforts before undertaking a representation to ascertain the existence of a conflict of interest relating to that representation. See Rule 1.00(r).

Representation Authorized by Court

15. Paragraph (b) recognizes that, when a lawyer represents multiple clients pursuant to a court order or appointment, that joint representation is governed by the court's standards. If the court's standards are different from the standards in this Rule, the lawyer may comply with the court's standards without being subject to discipline under this Rule. Further, lawyers approved or appointed by a court to represent a class or a client who lacks legal capacity should consult applicable law, rules of procedure, and other rules, along with these Rules, for guidance regarding such representations.

Joint Representation of a Person Individually and as Next Friend

16. A variation of a joint representation occurs when the lawyer's clients are pursuing both their own interests and those of another person, such as when parents of an injured child are asserting both the parents' own claims and, as next friends, the child's claims. In circumstances involving parents and their child, the lawyer should advise the parents of the parents' duties as next friends of the child and determine whether in reasonable likelihood those parents will be able to discharge those duties. Assuming that the lawyer reasonably believes that the parents are able to do so, the lawyer can jointly represent the parents individually and as next friends of the child in the matter. The lawyer may accept the parents' views as to what is in the best interest of their child, as long as the lawyer reasonably believes that no prohibited conflict of interest between the parents and child exists. Should such a conflict of interest develop, the lawyer should take reasonable measures to protect the interests of all of the clients, which in some cases may require the lawyer to seek the appointment of an ad litem for the child or to withdraw from the representation of some or all of the clients.

Rule 1.08. Conflicts of Interest: Prohibited Transactions

(a) A lawyer shall not enter into a business transaction with a client, other than a standard commercial transaction between the lawyer and the client for products or services that the client generally markets to others, unless:

(1) the lawyer reasonably believes that the terms of the transaction between the lawyer and the client:

(i) are fair and reasonable to the client; and

(ii) if known to the lawyer and not known to the client, are fully disclosed in a manner that can be reasonably understood by the client;

(2) the lawyer advises the client of the desirability of seeking, and gives the client a reasonable opportunity to seek, the advice of independent legal counsel on the transaction; and

(3) the client provides informed consent, confirmed in a writing signed by the client, to the material terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

(b) A lawyer shall neither prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift, nor solicit any substantial gift from a client for the lawyer or for a person related to the lawyer, unless the lawyer or other person is related to the client. For the purposes of this paragraph, related persons include a spouse, child, grandchild, parent, grandparent, and other relative or individual with whom the lawyer or the client maintains a close, familial relationship.

(c) Before the conclusion of all aspects of the matter giving rise to a lawyer's employment, a lawyer shall not make or negotiate an agreement with a client, prospective client, or former client, or anyone acting on that person's behalf, that gives the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.

(d) A lawyer shall not provide financial assistance to a client in connection with contemplated or pending proceedings before a tribunal, except that:

(1) a lawyer may advance or guarantee the costs and expenses of such proceedings, and reasonably necessary medical and living expenses, the repayment of which may be contingent on the outcome of the matter; and

(2) a lawyer representing an indigent client may pay costs and expenses of such proceedings on behalf of the client.

(e) A lawyer shall not accept compensation for representing a client from one other than the client unless:

(1) the client, if not represented by a court-appointed lawyer or a lawyer employed by a legal service program incorporated as a nonprofit entity under the Business Organizations Code, provides informed consent;

(2) the lawyer reasonably believes that the lawyer's exercise of independent professional judgment on behalf of the client will not be affected; and

(3) information relating to representation of the client is protected as required by Rule 1.05.

(f) Except as otherwise authorized by law, a lawyer who represents two or more clients shall not make an aggregate settlement of the claims of or against that lawyer's clients, or in a criminal case an aggregated agreement to guilty or nolo contendere pleas, unless the lawyer obtains the informed consent of each client, confirmed in writing, after advising each client of:

(1) the total amount of the settlement or result of the agreement;

(2) the existence and nature of material claims, defenses, or pleas involved;

(3) the nature and extent of each client's participation in the settlement or agreement, whether by contribution to payment, share of receipts, or resolution of criminal charges;

(4) the total fees, costs, and expenses to be paid to the lawyer from the proceeds, or by an opposing party or parties; and

(5) the method by which the costs and expenses are to be apportioned to each client.

(g) A lawyer shall not:

(1) make an agreement with a client prospectively limiting the lawyer's liability to a client for malpractice or professional misconduct unless the client is represented by independent legal counsel in making the agreement;

(2) make an agreement with a client that requires a dispute between the lawyer and client to be referred to binding arbitration unless either:

(i) the client is represented by independent legal counsel in making the agreement; or

(ii) the lawyer discloses to the client, in a manner that can reasonably be understood by the client, the scope of the issues to be arbitrated, that the client will waive a trial before a judge or jury on these issues, and that the rights of appeal may be limited; or

(3) settle a claim or potential claim for malpractice or professional misconduct with a client or former client of the lawyer not represented by independent legal counsel with respect to that claim unless the lawyer advises that person in writing of the desirability of seeking, and gives a reasonable opportunity to seek, the advice of independent legal counsel in connection therewith.

(h) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation in which the lawyer is representing a client, except that the lawyer may:

(1) acquire a lien granted by law to secure the lawyer's fee or expenses; and

(2) contract in a civil case with a client for a contingent fee that is permissible under Rule 1.04.

(i) When a lawyer is personally prohibited by this Rule from engaging in particular conduct, no lawyer who is affiliated with the personally prohibited lawyer, and who knows or reasonably should know of the prohibition, shall engage in that conduct.

Terminology: See Rule 1.00 for the definitions of "affiliated," "confirmed in writing," "informed consent," "known," "knows," "person," "personally prohibited," "reasonable," "reasonably," "reasonably believes," "reasonably should know," "represents," "substantial," "tribunal," and "writing."

Comment:

Transactions between Client and Lawyer

1. As a general principle, all transactions between a client and lawyer should be fair and reasonable to the client. But a lawyer's legal skill and training, together with the relationship of trust and confidence between a lawyer and client, create the possibility of overreaching when the lawyer participates in a business, property, or financial transaction — for example, a loan, sales, or investment transaction — with a client. The requirements of paragraph (a) pertain even when the transaction is not closely related to the subject matter of the representation, as when a lawyer drafting a will for a client learns that the client needs money for unrelated expenses and offers to make a loan to the client. This Rule applies to lawyers engaged in the sale of goods or services related to the practice of law, for example, the sale of title insurance or investment services to existing clients of the lawyer's legal practice.

2. Paragraph (a) does not, however, apply to standard commercial transactions between the lawyer and client for products or services that the client generally markets to others, such as banking or brokerage services, medical services, products manufactured or distributed by the client, and utilities services. In such transactions, the lawyer has no advantage in dealing with the client; thus, the restrictions in paragraph (a) are unnecessary.

3. Paragraph (a) also does not apply to ordinary fee arrangements, such as hourly, fixed, or contingent-fee agreements entered into at the outset of the lawyer's representation of a client, which are governed by Rule 1.04. But it may apply to a modified fee agreement either proposed or agreed to in the course of the representation. And it typically will apply if a lawyer accepts an interest in the client's business or other nonmonetary property as payment for all or part of a fee.

4. Subparagraph (a)(1)(i) requires that the transaction be fair and reasonable to the client. Subparagraph (a)(1)(ii) requires the full disclosure of terms that the lawyer knows but the

client does not know. For example, a transaction between a lawyer and client may be initiated by the client, who knows as many or more terms than the lawyer does. In that case, the disclosures required by subparagraph (a)(1)(ii) are not necessary to prevent lawyer overreaching.

5. Subparagraph (a)(2) applies when the lawyer's client does not have independent legal representation with respect to the business transaction at issue. When the client has such representation, subparagraph (a)(2) is inapplicable. The fact that the client was independently represented in the transaction is relevant in a determination of whether the agreement was fair and reasonable to the client, as subparagraph (a)(1)(i) further requires.

6. In addition to requiring a lawyer to obtain a client's informed consent, confirmed in writing, subparagraph (a)(3) also requires that the client sign the confirmation. For the client's consent to be informed, however, the lawyer may need to explain not only the terms of the transaction itself but also the material risks of the proposed transaction, including any risk to the representation presented by the lawyer's involvement, and the existence of reasonably available alternatives. The lawyer should also disclose any benefit the lawyer may receive as a result of the transaction other than those benefits explicitly set out in the terms of the transaction. Although subparagraph (a)(3) does not require the lawyer to make any disclosures in writing, the lawyer should consider doing so to avoid difficulties that may arise when a lawyer claims to have made the disclosures and the client claims otherwise.

7. The risk to a client is greatest when the client expects the lawyer to represent the client in the transaction itself or when the lawyer's financial interest otherwise poses a significant risk that the lawyer's representation of the client will be materially limited by the lawyer's financial interest in the transaction. Here the lawyer's role requires that the lawyer comply not only with paragraph (a) of this Rule, but also with Rule 1.06.

8. When a lawyer serves a dual role as a representative of the client and participant in a transaction, the lawyer should disclose the risks associated with the lawyer acting as both legal adviser and transaction participant, including the risk that the lawyer will structure the transaction or give legal advice in a way that favors the lawyer's interests at the client's expense. In some cases, the lawyer's conflicting interests may be such that Rule 1.06 will preclude the representation even if the client is willing to provide informed consent.

Gifts to Lawyers

9. A lawyer may accept a gift from a client if the transaction meets general standards of fairness. For example, a simple gift such as a present given at a holiday or as a token of

appreciation is permitted. But a substantial gift to a lawyer or a person related to a lawyer may be voidable by the client based on undue influence. In any event, due to concerns about overreaching and imposition on clients, a lawyer may not suggest that a substantial gift be made to the lawyer or a person related to the lawyer, or for the lawyer's benefit, except when the lawyer or other person is related to the client as set forth in paragraph (b). In addition to biological and legal relatives, a "related" person may be a person who maintains a close, familial relationship with either the lawyer or the client, as the case may be, with a level of intimacy often associated with the legal or biological relationships identified in paragraph (b).

10. If effectuation of a substantial gift requires preparing a legal instrument such as a will or conveyance, the client should have the detached advice that another lawyer can provide. As provided in Comment 9, however, an exception to this Rule exists when the client is related to the recipient of the gift.

11. This Rule does not prohibit a lawyer from seeking to have himself or herself or an affiliated lawyer named as executor of the client's estate or to another potentially lucrative fiduciary position. Nevertheless, such appointments will be subject to the general conflict-of-interest provision in Rule 1.06 when there is a significant risk that the lawyer's interests will materially limit the lawyer's independent professional judgment in advising the client, as in, for example, appointing a fiduciary or executor. Thus, in obtaining the client's informed consent to an appointment, the lawyer should advise the client concerning the nature and extent of the lawyer's financial interest in the appointment, as well as the availability of alternative candidates for the position.

Literary Rights

12. An agreement by which a lawyer acquires literary or media rights concerning the conduct of an ongoing representation creates a conflict between the client's interests and the lawyer's personal interests. This can occur, for example, because measures suitable in the representation of the client may detract from the publication value of an account of the representation. Paragraph (c) applies to the lawyer's dealing with a representative of the client, as well as the client.

13. Paragraph (c) does not prohibit a lawyer from representing a client in a transaction concerning literary property from agreeing that the lawyer's fee shall consist of a share in ownership in the property, if the arrangement conforms to Rule 1.04 and to paragraph (h) of this Rule.

Person Paying for Lawyer's Services

14. Lawyers may be asked to represent a client under circumstances in which a third person will compensate the lawyer, in whole or in part. The third person might be a relative or friend, an indemnitor (such as a liability insurance company or employer), or a co-client (such as a corporation sued along with one or more of its employees). Because third-party payers frequently have interests that differ from those of the client, including interests in minimizing the amount spent on the representation and in learning how the representation is progressing, lawyers are prohibited from accepting or continuing such representations unless the lawyer determines that the lawyer's independent professional judgment on behalf of the client will not be affected and the client, if not represented by a court-appointed lawyer or a lawyer employed by a legal service program incorporated as a nonprofit entity under the Business Organizations Code, provides informed consent to the arrangement. When an insurance company pays the lawyer's fee for representing an insured, normally the insured has consented to the arrangement by the terms of the insurance contract. See also Rule 5.04(c) (prohibiting interference with a lawyer's professional judgment by one who recommends, employs, or pays the lawyer to render legal services for another). When the client is a class, informed consent may be obtained on behalf of the class by court-supervised procedure.

15. An arrangement by which a third party pays for the lawyer's services also must comply with Rule 1.06 regarding conflicts of interest and provide for the protection of confidential information as required by Rule 1.05.

Aggregate Settlements

16. Paragraph (f) applies to an aggregate settlement or, in a criminal case, an aggregated agreement in which the claims or defenses of two or more clients, who are represented by a common lawyer or firm, are resolved under a single proposal or plea agreement. The risks associated with such agreements can arise from differences in each client's willingness to make or accept an offer of settlement or plea in a joint representation of multiple clients by a single lawyer. In addition, Rule 1.02(a) protects each client's right to accept or reject an offer of settlement and, in a criminal case, to enter a guilty or nolo contendere plea. Paragraph (f) reflects the concerns underlying both of these Rules by requiring the lawyer to inform each client of material terms of the agreement before any settlement offer or plea agreement is made or accepted. Because the disclosures in paragraph (f) require a discussion of the participation of each client in the proposed agreement, a lawyer should obtain in advance a waiver from each client as to confidentiality regarding specified information in case of an offer or demand for an aggregate agreement. See Rule 1.05.

17. Lawyers representing a class of plaintiffs or defendants should consult applicable law, rules of procedure, and other rules for guidance regarding communications about settlements.

Prospectively Limiting Liability and Settling Malpractice Claims

18. Subparagraph (g)(1) prohibits a lawyer from obtaining a client's agreement prospectively limiting the lawyer's liability to that client for malpractice or professional misconduct, such as breach of fiduciary duty, unless the client has independent representation in making the agreement.

19. Similarly, subparagraph (g)(2) prohibits a lawyer from entering into an agreement with the client to arbitrate a dispute between the lawyer and client, unless the client has independent legal counsel regarding the agreement. Alternatively, the lawyer may agree with the client to have disputes between them referred to binding arbitration in the absence of the client being independently represented, but only if the lawyer makes the disclosures in subparagraph (g)(2)(ii) in such a way that the client is reasonably likely to understand them. Other disclosures likely to aid the client in understanding the effect of the agreement include that arbitration proceedings may not be faster than a lawsuit tried to a judge or jury and that the client may ultimately pay as much or more in arbitration costs as the client would pay were the matter to be tried in court.

20. The requirements in subparagraph (g)(3) are intended to protect a client or former client from overreaching by the lawyer who seeks to settle a claim or potential claim for malpractice or professional misconduct.

21. Neither subparagraph (g)(1) nor subparagraph (g)(3) authorizes a lawyer to make an agreement with a client that limits the lawyer's obligations under these Rules or the enforcement of these Rules.

Acquisition of Interest in Litigation

22. This Rule embodies the traditional general precept that lawyers are prohibited from acquiring a proprietary interest in the subject matter of litigation. This general precept, which has its basis in common law champerty and maintenance, is subject to specific exceptions developed in decisional law and continued in these Rules, such as the exception for contingent fees in Rule 1.04 and the exception for certain advances of the costs of litigation set in paragraph (d) of this Rule. A special instance arises when a lawyer proposes to incur litigation or other expenses with an entity in which the lawyer has a pecuniary interest. A lawyer should not incur such expenses unless the client has entered into a written agreement complying with

paragraph (a) that contains a full disclosure of the nature and amount of the possible expenses and the relationship between the lawyer and the other entity involved.

Imputation

23. The concern underlying paragraph (i) is the possibility that a lawyer who cannot undertake a representation under this Rule will seek to avoid that prohibition by having another lawyer in the lawyer's firm (*i.e.*, an affiliate lawyer), who is not personally subject to the prohibition, assume responsibility for the representation. Because such a representation by an affiliated lawyer would not prevent the harm that this Rule is designed to prevent, paragraph (i) generally provides that the prohibition may not be so circumvented.

24. Paragraph (i) also provides that an affiliated lawyer should not be disciplined for undertaking a representation unless the affiliated lawyer knew or reasonably should have known that the lawyer was prohibited from undertaking the representation. An affiliated lawyer in a large firm, especially a firm with offices in different cities, would be particularly vulnerable to an unwitting and innocent violation of the Rule absent this scienter requirement. But this scienter requirement does not diminish or otherwise affect the affiliated lawyer's obligation to make efforts before undertaking a representation to ascertain the existence of a conflict of interest relating to that representation. See Rule 1.00(r).

Rule 1.09. Conflicts of Interest: Former Client

(a) Unless the former client provides informed consent, confirmed in writing:

(1) a lawyer who personally has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client; and

(2) if a lawyer personally prohibited by (a)(1) has left the firm with which the lawyer was affiliated at the time the lawyer personally represented the former client, no lawyer who is presently affiliated with that firm, and who knows or reasonably should know of the prohibition, shall represent another person in the same or a substantially related matter in which the formerly affiliated lawyer represented the client if any lawyer remaining in the firm has information protected by Rule 1.05 or 1.09(d) that is material to the matter.

(b) Unless the former client provides informed consent, confirmed in writing, a lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was affiliated previously represented a client:

(1) whose interests are materially adverse to the interests of that person; and

(2) about whom the lawyer acquired information protected by Rule 1.05 or 1.09(d) that is material to the matter.

(c) Unless the former client provides informed consent, confirmed in writing:

(1) a lawyer who personally has formerly represented a client in a matter shall not thereafter represent another person in a matter adverse to the former client in which such other person questions the validity of the lawyer's services or work product for the former client; and

(2) if a lawyer personally prohibited by (c)(1) has left the firm with which the lawyer was affiliated at the time the lawyer provided the services or work product to the former client, no lawyer who is presently affiliated with that firm, and who knows or reasonably should know of the prohibition, shall represent a person in a matter that requires a challenge to the formerly affiliated lawyer's services or work product for the former client.

(d) A lawyer who personally has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former client except as these Rules provide, or when the information is or becomes generally known or is readily obtainable from sources generally available to the public; or

(2) disclose information relating to the representation except as these Rules provide.

(e) When a lawyer is personally prohibited by this Rule from representing a person in a matter, no lawyer who is affiliated with the personally prohibited lawyer, and who knows or reasonably should know of the prohibition, shall represent that person in that matter.

Terminology: See Rule 1.00 for the definitions of "affiliated," "confirmed in writing," "firm," "informed consent," "knowingly," "known," "knows," "person," "personally prohibited," "reasonably should know," "represents," and "writing."

Comment:

Scope

1. A lawyer owes obligations to a former client. Rule 1.09 addresses the circumstances in which a lawyer in private practice, as well as lawyers who were or are affiliated with a firm in which that lawyer practiced or practices, may be disciplined for representing a client against that lawyer's former client. Representations that are prohibited due to a lawyer's successive government and private employment are governed by Rule 1.10 rather than by this Rule.

2. Generally, a former client can waive the protections in this Rule by providing informed consent, confirmed in writing, for a lawyer to proceed with a representation that is adverse to the former client. The lawyer is not required to make disclosures in writing when obtaining the former client's informed consent, but the lawyer should consider doing so to avoid difficulties that may arise when a lawyer claims to have made disclosures and a client claims otherwise.

3. This Rule, like all of these Rules, is a disciplinary standard, not a disqualification standard. Courts have held, however, that the Rules governing conflicts of interest also provide guidelines and suggest considerations relevant to the issue of disqualification. Thus, compliance with these Rules might not foreclose disqualification; and, by the same token, a violation of these Rules might not require disqualification. In any event, a lawyer who knows of a substantial likelihood of disqualification should timely communicate that information to the lawyer's client or prospective client. See Rule 1.03.

4. Provisions in this Rule refer to a lawyer who "personally represented" or "personally has formerly represented" a client. A lawyer "represents" a client when the lawyer personally exercises legal skill or judgment on behalf of the client in connection with a matter. See Rule 1.00(s). The addition of "personally" in provisions of this Rule does not alter the meaning of the term "represents"; instead, it is intended both to emphasize and to clarify that those provisions apply to lawyers who have themselves actually been involved in rendering legal services, rather than to affiliated lawyers who have not been actually involved.

Paragraph (a)

5. This Rule is intended to prevent a former client's confidential information from being used or disclosed in a subsequent representation of a person in a matter in which that person's interests are materially adverse to those of the former client.

6. Whether this Rule prohibits a lawyer from accepting a representation depends in part on the scope of the matter involved in the prior representation of the former client. The scope of a matter for purposes of this Rule depends on the facts of a particular situation or transaction, not the legal issues involved. For example, a lawyer who has argued regularly against the award of punitive damages generally is not precluded by this Rule from representing another client seeking punitive damages. But when a lawyer has been directly involved in a specific matter, this Rule prohibits subsequent representation of other clients with materially adverse interests in that same matter. This Rule also prohibits a lawyer from representing a client with materially adverse interests in a matter that is substantially related to the matter in which the lawyer previously representated the former client.

7. Courts have employed the "substantial relationship" standard used in this Rule in disqualification opinions. Texas courts have held that, for disqualification purposes, a matter is substantially related to another matter if a genuine threat exists that a lawyer may divulge in one representation confidential information acquired by the lawyer in another representation because the facts and issues involved in the representations are so similar. But a lawyer should note the circumstances resulting in discipline may differ from those under which a court may disqualify the lawyer. For example, in deciding whether to disqualify a lawyer, a court will consider the competing interests of all litigants involved. The disciplinary standard found in this Rule does not require consideration of competing interests. Therefore, while a review of disqualification opinions may help a lawyer understand the parameters of the "substantial relationship" standard, the holdings in such opinions should not be used as conclusive statements that a disciplinary matter would have the same result.

8. Subparagraph (a)(2) provides that, even when a lawyer who personally represented a former client has left a firm, the lawyers affiliated with that firm remain prohibited from undertaking a representation adverse to that client in the same or a substantially related matter so long as any lawyer with the firm has information protected by Rule 1.05 or 1.09(d) that is material to the matter. The fact that the prior matter and the contemplated new matter are substantially related does not alone require that the new matter be declined by the firm unless a lawyer currently in the firm possesses such confidential information.

Paragraph (b)

9. Paragraph (b) applies when a lawyer leaves one law firm and joins another firm. This paragraph prohibits the lawyer who leaves a firm from subsequently undertaking a representation only when the lawyer involved has actual knowledge of information protected by Rule 1.05 or 1.09(d) that is material to a matter. A lawyer may obtain knowledge of such information without personally representing a client, such as by communicating with affiliated lawyers. Absent such actual knowledge, however, this paragraph does not impose discipline on either the lawyer or anyone in the lawyer's new firm who represents a client whose interests are materially adverse to a former client. For purposes of discipline under paragraph (b), knowledge of confidential information possessed by a formerly affiliated lawyer who personally represented a client at the lawyer's former firm is not imputed to a formerly affiliated lawyer who did not personally represent the client. The legal standards and burden of proof may be different for purposes of disqualification.

10. A lawyer does not need to use or disclose a former client's confidential information in a subsequent representation to be subject to discipline under this Rule. Actual unauthorized use or disclosure, however, may violate Rule 1.05.

Paragraph (c)

11. Paragraph (c) prohibits a lawyer who once personally represented a client from personally representing a second client who either wishes to question or, if properly counseled, would be advised to question, the services or work product the lawyer provided for that former client. Thus, for example, a lawyer who drew a will would violate subparagraph (c)(1) by personally representing the testator's heirs at law in an action seeking to overturn the will.

12. Subparagraph (c)(2) provides that, even when a lawyer who personally represented a former client has left a firm, the lawyers affiliated with that firm remain prohibited from undertaking a representation adverse to that client that requires challenging the formerly affiliated lawyer's services or work product for the former client.

Paragraph (d)

13. A lawyer's obligations under paragraph (d) are related to the obligations imposed by Rule 1.05. Under paragraph (d), the fact that a lawyer has once represented a client does not preclude the lawyer from using "generally known" or "readily obtainable" information about that client when later representing another client. See Comment 3 for Rule 1.05.

14. Paragraph (d) restricts the use of information only when the use would adversely affect the client whose information is involved. But paragraph (d) prohibits the disclosure of information, even without adverse effect, if such disclosure is prohibited by these Rules.

15. Paragraph (d) limits a lawyer's use or disclosure of information relating to the lawyer's former firm's representation of a client, if the lawyer actually acquired such information while working at the former firm.

Paragraph (e)

16. The concern underlying paragraph (e) is the possibility that a lawyer who cannot undertake a representation under this Rule will seek to avoid that prohibition by having another lawyer in the lawyer's firm (*i.e.*, an affiliate lawyer), who is not personally subject to the prohibition, assume responsibility for the representation. Because such a representation by an affiliated

lawyer would not prevent the harm that this Rule is designed to prevent, paragraph (e) generally provides that the prohibition may not be so circumvented.

17. Paragraph (e) also provides that an affiliated lawyer should not be disciplined for undertaking a representation unless the affiliated lawyer knew or reasonably should have known that the lawyer was prohibited from undertaking the representation. An affiliated lawyer in a large firm, especially a firm with offices in different cities, would be particularly vulnerable to an unwitting and innocent violation of the Rule absent this scienter requirement. But this scienter requirement does not diminish or otherwise affect the affiliated lawyer's obligation to make efforts before undertaking a representation to ascertain the existence of a conflict of interest relating to that representation. See Rule 1.00(r).

Rule 1.10. Special Conflicts of Interest: Former and Current Government Officers and Employees

(a) Except as law may otherwise expressly permit, a lawyer shall not represent a private client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government entity provides informed consent, confirmed in writing, to the representation.

(b) When a lawyer is personally prohibited by (a) from representing a private client in a matter, no lawyer who is affiliated with the personally prohibited lawyer, and who knows or reasonably should know of the prohibition, shall represent that private client in that matter unless:

(1) the personally prohibited lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(2) written notice is promptly given to the appropriate government entity disclosing the affiliation of the personally prohibited lawyer and the screening measures adopted to ensure compliance with this Rule.

(c) Except as law may otherwise expressly permit, a lawyer having information that the lawyer knows is confidential government information about a person acquired when the lawyer was a public officer or employee shall not represent a private client whose interests are adverse to that person in a matter in which the lawyer knows or reasonably should know the information could be used to the material disadvantage of that person. As used in this Rule, the term "confidential government information" means information that has been obtained under government authority and that, at the time this Rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose and that is not otherwise available to the public.

(d) When a lawyer is personally prohibited by (c) from representing a private client in a matter, no lawyer who is affiliated with the personally prohibited lawyer, and who knows or reasonably should know of the prohibition, shall represent that private client in that matter unless the personally prohibited lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom.

(e) Except as law may otherwise expressly permit, a lawyer currently serving as a public officer or employee shall not:

(1) participate in a matter involving a former private client if doing so would violate Rule 1.09;

(2) participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless the appropriate government entity provides informed consent, confirmed in writing; or

(3) negotiate for private employment with any person who is involved as a party or as a lawyer for a party in a matter in which the lawyer is participating personally and substantially, except that a court lawyer to an adjudicatory official may negotiate for private employment in accordance with Rule 1.11.

(f) As used in this Rule, the term "matter" includes:

(1) any adjudicatory proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest, or other comparable particular action or transaction involving a specific party or parties, but not regulation-making or rule-making proceedings or assignments; and

(2) any other action or transaction covered by conflicts-of-interest statutes or by conflicts-of-interest rules of the appropriate government entity.

(g) As used in this Rule, the term "private client" means any person, including a government entity, who is represented by the lawyer when the lawyer is engaged in the private practice of law.

(h) As used in this Rule, the term "screened" means that the law firm:

(1) has instituted measures adequate to prevent participation of the personally prohibited lawyer in the matter and to protect from disclosure information that the personally prohibited lawyer is obligated to protect under applicable law or these Rules; and

(2) can demonstrate that the personally prohibited lawyer did not disclose the information described in (h)(1) before the law firm implemented the screening measures described in (h)(1).

Terminology: See Rule 1.00 for the definitions of "adjudicatory official," "adjudicatory proceeding," "affiliated," "confirmed in writing," "informed consent," "knows," "law firm," "person," "personally prohibited," "reasonably should know," "represents," "substantially," "writing," and "written."

Comment:

1. This Rule represents a balancing of interests regarding successive representations. On the one hand, when the successive clients are a government entity and another client (public or private), the risk exists that the lawyer could use the power or discretion vested in public authority for the special benefit of the other client. Also, unfair advantage could accrue to the other client by reason of access to confidential government information about the client's adversary obtainable only through the lawyer's government service. On the other hand, the restrictions on lawyers presently or formerly employed by a government entity should not be so onerous as to inhibit transfer of employment to and from the government. The government has a legitimate need to attract qualified lawyers, as well as to maintain high ethical standards. The provisions for informed consent, screening, and notice avoid imposition of too severe a deterrent against a lawyer entering public service. The lawyer is not required to make disclosures in writing when obtaining informed consent, but the lawyer should consider doing so to avoid difficulties that may arise if a lawyer claims to have made disclosures and a government entity claims otherwise. The screening provisions contemplate that the screened lawyer has not furnished and will not furnish other lawyers with information relating to the matter, will not have access to the files pertaining to the matter, and will not participate in any way in the matter.

2. A lawyer who has served or is serving as a public officer or employee is subject to these Rules. This Rule, rather than Rule 1.09, applies to former and current government officers and employees, while Rule 1.11, rather than Rules 1.09 and 1.10, applies to former and current adjudicatory officials, court lawyers, and third-party neutrals in nonbinding proceedings. A lawyer subject to this Rule may also be subject to statutes and government regulations that address conflicts of interest and that may limit the extent to which the government entity may provide informed consent under paragraph (a) of this Rule. But a lawyer in private practice does not become subject to this Rule by representing a government entity. Instead, Rules 1.06, 1.07, and 1.09 apply to that lawyer.

3. Although this Rule does not impute the conflicts of interest of a lawyer currently serving as a government officer or employee to other affiliated government officers or employees, such officers or employees should be mindful that an imputation of a conflict may nonetheless be imposed on them by law, administrative rules, codes of conduct, or similar binding regulations. See Comment 9 below.

4. Paragraphs (a), (c), and (e) apply regardless of whether a lawyer is adverse to a former client and are thus designed not only to protect the former client, but also to prevent a lawyer from exploiting public office for the advantage of another client. For example, a lawyer who has pursued a claim on behalf of the government may not later pursue the same claim on behalf of a private client after the lawyer has left government service, except when authorized to do so by the government entity under paragraph (a). Similarly, a lawyer who has pursued a claim on behalf of a private client may not later pursue the claim on behalf of the government, except when authorized to do so by paragraph (e).

5. The concern underlying paragraphs (b) and (d) is the possibility that a lawyer who cannot undertake a representation under this Rule will seek to avoid that prohibition by having an affiliated lawyer, who is not personally subject to the prohibition, assume responsibility for the representation. Unless the prohibited lawyer is timely screened from the representation in accordance with paragraph (h), such a representation by an affiliated lawyer would not prevent the harm that this Rule is designed to prevent.

6. Paragraphs (b) and (d) also provide that an affiliated lawyer should not be disciplined for undertaking a representation unless the affiliated lawyer knew or reasonably should have known that the lawyer was prohibited from undertaking the representation for either of the reasons stated in paragraphs (a) and (c) and that the lawyer was not timely screened from the representation in accordance with paragraph (h). An affiliated lawyer in a large firm, especially a firm with offices in different cities, would be particularly vulnerable to an unwitting and innocent violation of the Rule absent this scienter requirement. But this scienter requirement does not diminish or otherwise affect the affiliated lawyer's obligation to make efforts before undertaking a representation to ascertain the existence of a conflict of interest relating to that representation. See Rule 1.00(r).

7. Subparagraph (b)(l) and paragraph (d) do not prohibit a lawyer from receiving a salary or partnership share established by prior independent agreement. They prohibit directly relating the lawyer's compensation to the fee in the matter from which the lawyer is screened. The notice required by subparagraph (b)(2), including a description of the screened lawyer's affiliation and of the screening procedures employed, generally should be given as soon as practicable after the need for screening becomes apparent.

8. Paragraph (c) operates only when the lawyer in question has actual, as opposed to imputed, knowledge of the confidential government information.

9. This Rule addresses conflict-of-interest issues related only to a lawyer's movement between government practice and private practice. Beyond the general provisions of Rule 1.06 and

its Comment, the Rules do not specifically address conflict of interest issues that may arise when a government lawyer moves from employment with one government entity to employment with another government entity, or when a government lawyer assumes different responsibilities within the same government entity. In the course of such changes in employment, a government lawyer nonetheless should be mindful that law, administrative rules, codes of conduct, or similar binding regulations may impose limitations independent of these Rules on the lawyer's successive governmental practice.

Rule 1.11. Special Conflicts of Interest: Adjudicatory Officials, Third-Party Neutrals, and Court Lawyers

(a) A lawyer shall not represent a person in connection with a matter in which the lawyer participated personally and substantially as an adjudicatory official or a court lawyer to an adjudicatory official, or as a third-party neutral in a nonbinding proceeding, unless all parties to the proceeding provide informed consent, confirmed in writing.

(b) A lawyer shall not negotiate for employment with any person who is involved as a party or as lawyer for a party in a pending matter in which the lawyer is participating personally and substantially as an adjudicatory official, or as a third-party neutral in a nonbinding proceeding. A lawyer serving as a court lawyer to an adjudicatory official may negotiate for employment with a party or lawyer involved in a pending matter in which the court lawyer is participating personally and substantially, but only after the court lawyer has notified the adjudicatory official.

(c) When a lawyer is personally prohibited by (a) from representing a person in a matter, no lawyer who is affiliated with the personally prohibited lawyer, and who knows or reasonably should know of the prohibition, shall represent that person in that matter unless:

(1) the personally prohibited lawyer is timely screened from any participation in the matter in accordance with Rule 1.10(h) and is apportioned no part of the fee therefrom; and

(2) written notice is promptly given to the parties and any appropriate tribunal disclosing the affiliation of the personally prohibited lawyer and the screening measures adopted to ensure compliance with this Rule.

(d) For purposes of this Rule, "court lawyer" includes law clerks, briefing attorneys, and staff attorneys, whether or not assigned to a particular adjudicatory official, as well as persons who were not yet licensed as lawyers at the time they began providing services to a tribunal.

Terminology: See Rule 1.00 for the definitions of "adjudicatory official," "affiliated," "confirmed in writing," "informed consent," "knows," "person," "personally prohibited," "reasonably should know," "represents," "substantially," "tribunal," "writing," and "written."

Comment:

1. Adjudicatory officials, court lawyers, and third-party neutrals in nonbinding proceedings should use this Rule, rather than Rule 1.10, when they leave the adjudicatory, court-lawyer, or third-party-neutral position. The term "adjudicatory official" is broadly defined in Rule 1.00 to cover such positions as full-time or part-time judges, justices, commissioners, masters, magistrates, referees, arbitrators, and hearing officers, as well as other similar official positions.

2. The term "personally and substantially" signifies that an adjudicatory official or court lawyer who leaves a multi-member tribunal is not prohibited from representing a client in a matter before the tribunal in which the former adjudicatory official or court lawyer did not participate. Similarly, an adjudicatory official or court lawyer who exercised administrative responsibility in a tribunal is not prevented from acting as a lawyer in matters in which the adjudicatory official or court lawyer exercised remote or incidental administrative responsibility that did not affect the merits. Provisions in the Texas Code of Judicial Conduct or other authority, such as other ethics codes, may also apply to the conduct covered by this Rule.

3. A lawyer who has participated personally and substantially as an adjudicatory official, court lawyer, or third-party neutral in a proceeding may be asked to represent a client in a matter in connection with the proceeding. This Rule forbids such representation unless all of the parties to the proceeding provide informed consent, confirmed in writing. Although the lawyer is not required to make disclosures in writing when obtaining informed consent, the lawyer should consider doing so to avoid difficulties that may arise if a lawyer claims to have made disclosures and the parties claim otherwise.

4. The concern underlying paragraph (c) is the possibility that a lawyer who cannot undertake a representation under this Rule will seek to avoid that prohibition by having an affiliated lawyer, who is not personally subject to the prohibition, assume responsibility for the representation. Unless the prohibited lawyer is timely screened from representation in accordance with Rule 1.10(h), such a representation by an affiliated lawyer would not prevent the harm that this Rule is designed to prevent.

5. Paragraph (c) also provides that an affiliated lawyer should not be disciplined for undertaking a representation unless the affiliated lawyer knew or reasonably should have known that the lawyer was prohibited from undertaking the representation and that the lawyer was not timely screened in accordance with Rule 1.10(h). An affiliated lawyer in a large firm, especially a firm with offices in different cities, would be particularly vulnerable to an unwitting and innocent violation of the Rule absent this scienter requirement. But this scienter requirement does not diminish or otherwise affect the affiliated lawyer's obligation to make efforts before undertaking a representation to ascertain the existence of a conflict of interest relating to that representation. See Rule 1.00(r).

6. Subparagraph (c)(1) does not prohibit a lawyer from receiving a salary or partnership share established by prior independent agreement. It prohibits directly relating the lawyer's compensation to the fee in the matter from which the lawyer is screened. The notice required by subparagraph (c)(2), including a description of the screened lawyer's affiliation and of the screening procedures employed, generally should be given as soon as practicable after the need for screening becomes apparent.

7. Some "court lawyers" have not been licensed as lawyers at the time they commence service. Obviously, paragraph (c) cannot apply until a person has been licensed as a lawyer. Paragraph (a) applies, however, to a lawyer without regard to whether the lawyer was licensed at the time of the service as a court lawyer, and once that court lawyer is licensed as a lawyer and joins a firm, paragraph (c) applies to affiliated lawyers.

Rule 1.12. Organization as a Client

(a) Notwithstanding that a lawyer reports to and takes direction from an organization's duly authorized constituents, a lawyer employed or retained to provide legal services for an organization represents that organization and shall proceed as reasonably necessary in the best legal interest of that organization at all times, including the situations described in (d).

(b) A lawyer shall explain that the lawyer represents the organization rather than a constituent of the organization when the lawyer knows or reasonably should know the organization's interests are adverse to the interests of that constituent, or when an explanation appears reasonably necessary to avoid misunderstanding on the part of that constituent.

(c) A lawyer shall not jointly represent the organization and a constituent of the organization in a matter unless the joint representation is in conformity with Rule 1.07.

(d) A lawyer who represents an organization shall take reasonable remedial actions whenever the lawyer has information clearly establishing that:

(1) a constituent of the organization has committed or intends to commit a violation of a legal obligation to the organization or a violation of law that reasonably may be imputed to the organization;

(2) the violation is likely to result in substantial injury to the organization; and

(3) the violation is related to a matter within the scope of the lawyer's representation of the organization.

(e) Unless otherwise required by law or these Rules, reasonable remedial actions may include, but are not limited to, one or more of the following:

(1) asking for reconsideration of the matter;

(2) advising that a separate legal opinion on the matter be sought for presentation to an appropriate authority within the organization; and

(3) referring the matter to a higher authority within the organization, including, if warranted by the seriousness of the matter, referral to the highest authority that can act on behalf of the organization as determined by applicable law.

(f) If, despite the lawyer's initiation of reasonable remedial action, the organization continues to pursue, or fails to address in a timely and appropriate manner, a matter called to its attention by the lawyer pursuant to (d) and (e), then the lawyer may disclose confidential information to the extent permitted by Rule 1.05.

(g) A lawyer who resigns or is terminated from representing an organization shall comply with Rule 1.16. Upon doing so, a lawyer is excused from proceeding further as set out in (d), (e), and (f). Rule 1.05 governs any further obligations regarding confidential information.

Terminology: See Rule 1.00 for the definitions of "knows," "reasonable," "reasonably," "reasonably should know," "represents," and "substantial."

Comment:

The Entity as the Client

1. An organizational client is a legal entity, but it cannot act except through its constituents. As used in this Rule, the term "constituents" includes employees and persons holding an ownership interest in, or having any authority to act on behalf of or bind, the organizational client. For example, officers, directors, employees, members, and shareholders are constituents of the corporate organizational client. This Rule also applies equally to

unincorporated associations and other legal entities. For those entities, the term "constituents" encompasses positions equivalent or similar to the positions held by officers, directors, employees, members, and shareholders of a corporation.

2. When one of the constituents of an organizational client communicates with the organization's lawyer in that person's organizational capacity, the communication is protected by Rule 1.05. Thus, by way of example, if an officer of an organizational client asks its lawyer to investigate allegations of wrongdoing, interviews conducted in the course of that investigation between the lawyer and the client's employees or other constituents are covered by Rule 1.05. This does not mean, however, that constituents of an organizational client are the clients of the lawyer. Joint representation of an organization and its constituent is governed by Rule 1.07. Absent representation of constituents in accordance with Rule 1.07, the lawyer may not disclose to constituents information relating to the representation of the organization except to the extent that Rule 1.05 permits such disclosure.

Clarifying the Lawyer's Role

3. In circumstances described in paragraph (b), the lawyer should advise any constituent whose interests the lawyer finds adverse to the organization's interests that there is a conflict or potential conflict of interest, the lawyer cannot represent the constituent, discussions between the lawyer for the organization and the constituent may not be privileged insofar as the constituent is concerned, and the constituent may wish to obtain independent representation. Whether the constituent's interests are adverse to the organization's interests depends on the facts of each case.

Decisions by Constituents

4. A lawyer for an organization ordinarily should accept the decisions that the constituents have made for the organization, even if the lawyer doubts the utility or prudence of those decisions. Decisions concerning policy and operations, including ones entailing serious business risk, are not, as such, in the lawyer's province. But different considerations arise when the lawyer has, in regard to a matter within the scope of the lawyer's representation of the organization, information clearly establishing that the organization is likely to be substantially injured by a constituent's action that is in violation of law or a legal obligation to the organization. Because the lawyer cannot ignore the obvious, paragraph (d) does not permit a lawyer to substitute a personal concern, such as job security, for a professional duty the lawyer owes to the organization. Rather, once the lawyer has information clearly establishing the violation, paragraph (d) requires the lawyer to take reasonable remedial actions. Lawyers may have an obligation under securities law, criminal law, or other law to

address perceived problems in earlier stages, when they first begin to see information indicating potential harm to the organization.

Remedial Action

5. Paragraph (e) provides a nonexclusive list of remedial actions that, depending on the circumstances, will meet the requirement in paragraph (a) that a lawyer proceed as reasonably necessary in the best legal interest of the organization. In determining how to proceed under paragraph (e), the lawyer should give due consideration to the seriousness of the violation and its consequences, the scope and nature of the lawyer's representation, the responsibility in the organization, the apparent motivation of the person involved, the policies of the organization concerning such matters, and any other relevant considerations.

6. The organization's stated policy may define circumstances and prescribe channels for review by a higher authority in the organization. Even in the absence of organization policy, it may be reasonably necessary for the lawyer to refer the matter to the organization's highest responsible authority. Thus, in some circumstances, the lawyer may comply with paragraphs (a) and (d) only by causing disclosure of the violation to the organization's appropriate constituents. Ordinarily, that is the board of directors or similar governing body. But applicable law may prescribe that, under certain conditions, highest authority reposes elsewhere, such as in a corporation's independent directors.

7. Even the remedial action of the lawyer referring the matter to a higher authority, however, may not result in compliance with paragraphs (a) and (d). The ultimate and difficult ethical question is whether the lawyer should circumvent the organization's highest authority when one or more constituents persist in a course of action that clearly violates law or a legal obligation to the organization and is likely to result in substantial injury to the organization. These situations are governed by Rule 1.05 and paragraph (f) of this Rule. If the lawyer does not violate Rule 1.02 or Rule 1.05 by doing so, the lawyer's further remedial action, after the lawyer has exhausted remedies within the organization, may include disclosing information relating to the representation to persons outside the organization. In fact, in some circumstances, the lawyer may comply with this Rule only by disclosing the violation to persons other than the organization's constituents. If the conduct of the organization's constituent is likely to result in death or serious bodily injury to another, the lawyer may have a duty to reveal information under Rule 1.05. The lawyer may resign, of course, in accordance with Rule 1.16, in which event the lawyer is excused from further proceeding as required by paragraphs (a) and (d), and any further obligations are determined by Rule 1.05.

Relation to Other Rules

8. The authority and responsibility provided in this Rule are concurrent with the authority and responsibility provided in other Rules, most notably Rules 1.05, 1.16, 3.03, and 4.01. If the lawyer's services are being used by an organization to further a crime or fraud by the organization, Rule 1.02 may be applicable.

Government Entity

9. The duties defined in this Rule apply to a government entity. But when the client is a government entity, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful official act is prevented or rectified because public business is involved. In addition, statutes and regulations may define duties of lawyers employed by the government or lawyers in military service. Therefore, in the government context, it may be more difficult to define precisely the identity of the client and to prescribe the resulting obligations of the lawyer representing the client. In a matter involving the conduct of government officials, a government lawyer may have authority to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances. This Rule does not limit that authority. See Preamble, ¶ 10.

Derivative Actions

10. Under generally prevailing law, the shareholders or members of a corporation may bring suit to compel the directors to perform their legal obligations in the supervision of the organization. Members of unincorporated associations have essentially the same right. Such an action may be brought nominally by the organization, but usually is a legal controversy over management of the organization.

11. The question may arise whether counsel for the organization may defend such an action. The proposition that the organization is the lawyer's client does not alone resolve the issue. Most derivative actions are a normal incident of an organization's affairs, to be defended by the organization's lawyer like any other suit. If the claim involves serious charges of wrongdoing by those in control of the organization, however, a conflict may arise between the lawyer's duty to the organization and the lawyer's relationship with those managing or controlling its affairs.

Rule 1.13. Prohibited Sexual Relations [new, renumbered]

(a) A lawyer shall not condition the representation of a client or prospective client, or the quality of such representation, on having any person engage in sexual relations with the lawyer.

(b) A lawyer shall not solicit or accept sexual relations as payment of fees or expenses.

(c) A lawyer shall not have sexual relations with a client that the lawyer is personally representing unless the lawyer and client are married to each other, or are engaged in an ongoing consensual sexual relationship that began before the representation.

Terminology: See Rule 1.00 for the definitions of "person" and "represents."

Comment:

1. The relationship between a lawyer and client is a fiduciary one in which the lawyer occupies the highest position of trust and confidence. The relationship is almost always unequal; thus, a sexual relationship between a lawyer and client can involve unfair exploitation of the lawyer's fiduciary role, in violation of the lawyer's basic ethical obligation not to use the client's trust to the client's disadvantage. In addition, such a relationship presents a significant danger that, because of the lawyer's emotional involvement, the lawyer will be unable to represent the client competently and without impairment of independent professional judgment. Moreover, a blurred line between the professional and personal relationships may make it difficult to predict to what extent client communications are protected by the attorney-client privilege. Because of the significant danger that the client's interests will be prejudiced or otherwise damaged and because the client's own emotional involvement renders it unlikely that the client could provide the lawyer with informed consent, this Rule, with specified exceptions, prohibits the lawyer from having sexual relations with the client regardless of whether the relationship is consensual and regardless of the absence of prejudice to the client.

2. This Rule does more than simply prohibit sexual relations with an existing client. For example, paragraph (a) also prohibits sexual relations with a prospective client or any other person if sexual relations are a condition of the representation or the quality of the representation. For example, a lawyer cannot condition representation of a prospective client on sexual relations with the prospective client or the prospective client's spouse or child.

3. Under paragraph (c), a lawyer may have sexual relations with a client if the lawyer is married to the client or is engaged in an ongoing consensual sexual relationship that predates the representation. Issues relating to the exploitation of the fiduciary relationship and client dependency are generally diminished when the sexual relationship existed prior to the commencement of the client-lawyer relationship. Before proceeding with the representation in these circumstances, however, the lawyer should consider whether the lawyer's representation will violate or potentially lead to a violation of any other Rule.

4. Paragraph (c) refers to a lawyer who is "personally representing" a client. A lawyer "represents" a client if the lawyer personally exercises legal skill or judgment on behalf of the client in connection with a matter. See Rule 1.00(s). The addition of "personally" in this Rule does not alter the meaning of the term "represents"; instead, it is intended both to emphasize and to clarify that paragraph (c) applies to any lawyer who is actually involved in rendering legal services to the client.

5. A lawyer may have sexual relations with a former client after the lawyer has terminated the client-lawyer relationship and withdrawn from the representation. Thus, a lawyer may have sexual relations with a former prospective client after the lawyer has declined the representation. Of course, any termination of the client-lawyer relationship must be in compliance with these Rules, including Rule 1.16.

6. A lawyer may engage in sexual relations with a client of the lawyer's firm, provided that the lawyer has no involvement in the performance of legal services for the client. A lawyer is involved in the performance of legal services for a client if the lawyer, among other things, oversees the representation of the client, instructs other lawyers regarding the representation of the client, or sets the fees charged to the client.

7. If the client is an organization, any individual who oversees the representation or gives instructions to the lawyer on behalf of the organization is deemed, for purposes of this Rule, to be the client.

Rule 1.14. Diminished Capacity [new, renumbered]

(a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment, or for another reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial, or other harm unless action is taken, and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action. Such action may include, but is not limited to, consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, attorney ad litem, amicus attorney, or conservator, or submitting an information letter to a court with jurisdiction to initiate guardianship proceedings for the client.

(c) When taking protective action pursuant to (b), the lawyer may disclose the client's confidential information to the extent the lawyer reasonably believes is necessary to protect the client's interests, unless otherwise prohibited by law.

Terminology: See Rule 1.00 for the definitions of "consult," "reasonably," "reasonably believes," "represents," and "substantial."

Comment:

1. The normal client-lawyer relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters. But maintaining the ordinary client-lawyer relationship may not be possible when the client suffers from a mental impairment, is a minor, or has a diminished capacity for some other reason to make adequately considered decisions regarding representation. In particular, a severely incapacitated person may have no power to make legally binding decisions. Nevertheless, a client with diminished capacity often can understand, deliberate on, and reach conclusions about matters affecting the client's own well-being. For example, some people of advanced age are capable of handling routine financial matters but need special legal protection concerning major transactions. Also, some children are regarded as having opinions entitled to weight in legal proceedings concerning their custody.

2. In determining the extent of the client's diminished capacity, the lawyer should consider and balance such factors as the client's ability to articulate reasoning leading to a decision, variability of state of mind, and ability to appreciate consequences of a decision; the substantive fairness of a decision; and the consistency of a decision with the lawyer's knowledge of the client's long-term commitments and values.

3. The fact that a client suffers from diminished capacity does not diminish the lawyer's obligation to treat the client with attention and respect. Even if the client has a guardian or other legal representative, the lawyer should, as far as possible, accord the client the normal status of a client, particularly in maintaining communication. If a guardian or other legal

representative has been appointed for the client, however, the law may require the client's lawyer to look to the representative for decisions on the client's behalf. If the lawyer represents the guardian as distinct from the ward and is aware that the guardian is acting adversely to the ward's interest, the lawyer may have an obligation to prevent or rectify the guardian's misconduct.

4. The client may wish to have family members or other persons participate in discussions with the lawyer; however, paragraph (a) requires the lawyer to keep the client's interests foremost and, except when taking protective action authorized by paragraph (b), to look to the client, not the family members or other persons, to make decisions on the client's behalf. In matters involving a minor, whether the lawyer should look to the parents as natural guardians may depend on the type of proceeding or matter in which the lawyer is representing the minor.

Taking Protective Action

5. Paragraph (b) contains a non-exhaustive list of actions a lawyer may take in certain circumstances to protect a client who does not have a guardian or other legal representative. Such actions could include consulting with family members, using a reconsideration period to permit clarification or improvement of circumstances, using voluntary surrogate decision-making tools such as existing durable powers of attorney, or consulting with support groups, professional services, adult-protective agencies, or other individuals or entities that have the ability to protect the client. In taking any protective action, the lawyer should be guided by such factors as the client's wishes and values to the extent known, the client's best interests, and the goals of intruding into the client's decision-making autonomy to the least extent feasible, maximizing client capacities, and respecting the client's family and social connections.

6. A client with diminished capacity also may cause or threaten physical, financial, or other harm to third parties. In such situations, the client's lawyer should consult applicable law to determine the appropriate response.

7. When a legal representative has not been appointed, the lawyer should consider whether an appointment is reasonably necessary to protect the client's interests. Thus, for example, if a client with diminished capacity has substantial property that should be sold for the client's benefit, effective completion of the transaction may require appointment of a legal representative. In addition, applicable law provides for the appointment of certain legal representatives in certain circumstances. For example, the Texas Family Code prescribes when a guardian ad litem, attorney ad litem, or amicus attorney should be appointed in a suit affecting the parent-child relationship, and the Texas Probate Code prescribes when a

guardian should be appointed for an incapacitated person. In many circumstances, however, appointment of a legal representative may be more expensive or traumatic for the client than circumstances in fact require. Evaluation of such circumstances is a matter entrusted to the lawyer's professional judgment; but, in considering alternatives, the lawyer should be aware of any law that requires the lawyer to advocate on the client's behalf for the action that imposes the least restriction.

Disclosure of the Client's Condition

8. Disclosure of the client's diminished capacity could adversely affect the client's interests. For example, raising the question of diminished capacity could, in some circumstances, lead to proceedings for involuntary commitment. As with any client-lawyer relationship, information relating to the representation of a client is confidential under Rule 1.05. But when the lawyer is taking protective action, paragraph (b) of this Rule permits the lawyer to make necessary disclosures. Given the risks to the client of disclosure, paragraph (c) limits what the lawyer may disclose in consulting with other individuals or entities or in seeking the appointment of a legal representative. At the very least, the lawyer should determine whether it is likely that the person or entity consulted will act adversely to the client's interests before discussing matters related to the client.

Rule 1.15. Safekeeping Property [renumbered]

(a) When, in connection with a representation, a lawyer receives property that belongs in whole or in part to a client or third person, the lawyer shall safeguard the property and hold it in trust separately from the lawyer's own property. In addition, the lawyer shall:

(1) deposit any funds into one or more accounts designated as trust accounts, maintained in the state where the lawyer's office is situated, or elsewhere with the informed consent of the client or third person;

(2) identify any other property as such and safeguard it appropriately; and

(3) create and maintain complete records of all trust-account funds and other property and preserve those records for five years after termination of the representation.

(b) Upon receiving the property described in (a), the lawyer shall with reasonable promptness:

(1) notify the client of the receipt and proposed distribution of such property;

(2) notify the third person of the receipt of such property the lawyer knows belongs to the third person;

(3) distribute to the client or third person such property the client or third person is entitled to receive, except as otherwise specifically provided by this Rule or law;

(4) upon the client's request or when otherwise specifically required by these Rules, render a full accounting to the client as to such property the lawyer is holding in trust; and
(5) upon the third person's request, render an accounting to the third person as to such property the lawyer knows belongs to the third person.

(c) When, in the course of representation, a lawyer possesses property to which the lawyer knows two or more persons, one of whom may be the lawyer, claim a right and a dispute arises concerning their rights, the lawyer shall, unless the lawyer reasonably believes the claim giving rise to the dispute is not valid, retain disputed funds in a trust account and continue to safeguard other property appropriately, deposit disputed funds or other property into the registry of a court, or otherwise safeguard the disputed funds or other property in a manner agreeable to those claiming a right. When the dispute has been resolved, the lawyer shall with reasonable promptness distribute the property in the lawyer's possession to persons entitled to the property.

(d) A lawyer shall deposit unearned fees and advanced expenses into a client trust account, to be withdrawn by the lawyer only as fees are earned or expenses are incurred.

(e) Notwithstanding (a), a lawyer may deposit the lawyer's own funds into a client trust account for the purpose of paying service charges on that account.

Terminology: See Rule 1.00 for the definitions of "informed consent," "knows," "person," "reasonable," "reasonably believes," and "represents."

Comment:

1. A lawyer should hold property of others with the care required of a professional fiduciary. Securities should be kept in a safe deposit box, except when some other form of safekeeping is warranted by special circumstances. This Rule requires that all property of clients or third persons be kept separate from the lawyer's business and personal property and, if funds, in one or more trust accounts, until distributed in accordance with paragraphs (b) or (c), with a limited exception provided by paragraph (e).

2. A client trust account is a separate account maintained at a bank, savings-and-loan association, credit union, or similar financial institution for the purpose of holding client funds. Client trust accounts may be subject to the requirements of the Texas Interest on Lawyers Trust Accounts (IOLTA) program or another, similar program. Paragraph (a) does not affect the requirements of such programs. Additionally, separate trust accounts may be warranted when a lawyer receives funds as an executor of an estate or while acting in another fiduciary capacity.

3. The reasonable promptness required under paragraphs (b) and (c) depends on the circumstances, including the client's or third person's reasonable expectations.

4. Under subparagraphs (b)(1) and (b)(2), the lawyer's duty to provide notice about receipt of property is different in regard to a client versus a third person. Subparagraph (b)(1) requires that the lawyer notify the client about all property received in connection with the representation that belongs in whole or in part to the client or a third person, and inform the client of the lawyer's proposed distribution of the property. In contrast, under subparagraph (b)(2), the lawyer is required to give notice to a third person concerning only property the lawyer knows belongs to that third person.

5. If a client requests an accounting, subparagraph (b)(4) requires that the lawyer provide a full accounting of all property held in trust in connection with the representation. In contrast, if a third person requests an accounting, subparagraph (b)(5) requires a lawyer to render an accounting to that third person only as to property received in connection with the representation that the lawyer knows belongs to that third person.

6. A lawyer's knowledge that property belongs to a third person can be based on notification by the client or the third person regarding the third person's entitlement, or on the lawyer's independent discovery of entitlement made in connection with the representation, such as discovery of a contractual or statutory right.

7. A lawyer who is uncertain about a third person's entitlement to property may seek a court order to clarify the third person's entitlement.

8. Lawyers often receive funds from which the lawyer's fee will be paid. The lawyer is not required to remit to the client funds that represent fees owed. But a lawyer may not hold undisputed funds to coerce a client into accepting the lawyer's claim to the funds.

9. Paragraph (c) requires that only the disputed portion of the property be retained. Any undisputed portion of the property should be distributed reasonably promptly. Additionally, the lawyer should suggest means for prompt resolution of the dispute.

10. If the client provides property to the lawyer for a particular use, the lawyer should not use that property for any other purpose without the client's permission. If a lawyer has made disbursements out of the lawyer's own funds, the lawyer should disclose the nature and amount of such disbursements to the client before reimbursing himself or herself for those expenses.

11. Paragraphs (b) and (c) recognize that a third person may have a lawful claim against specific funds or other property in a lawyer's custody, such as a client's creditor who has a lien on funds recovered in a personal-injury action. A lawyer may have a duty under applicable law to protect such a third-person claim against wrongful interference by the client. In such cases, unless the lawyer reasonably believes the third-person claim is not valid under applicable law, this Rule requires the lawyer to refuse to surrender the property to the client until the claim is resolved. A lawyer should not unilaterally assume to arbitrate a dispute between the client and the third person, but the lawyer may file an action to have a court resolve the dispute.

12. Paragraph (d) addresses unearned fees. Fee agreements sometimes state that the fee is a flat fee, advance fee, nonrefundable retainer, or some other kind of fee. But without regard to the label, if the fee is a prepayment for services, paragraph (d) requires a lawyer to deposit the fee into a trust account until it is earned. Applicable law, not these Rules, determines when a fee is earned.

13. In addition to the obligations under this Rule, a lawyer may have fiduciary duties independent of those arising from activity as a lawyer. For example, a lawyer who serves as an escrow agent is governed by applicable law, even though the lawyer does not render legal services in the transaction and, thus, is not governed by this Rule.

Rule 1.16. Declining or Terminating Representation [renumbered]

(a) Except as stated in (c), a lawyer shall not represent a client or, when representation has commenced, shall withdraw from the representation of a client, if:

(1) the representation will result in violation of law or these Rules;

(2) the lawyer's physical or mental condition materially impairs the lawyer's fitness to represent the client; or

(3) the lawyer is discharged.

(b) Except as required by (a), a lawyer shall not withdraw from representing a client unless:

(1) withdrawal can be accomplished without material adverse effect on the interests of the client;

(2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;

(3) the client has used the lawyer's services to perpetrate a crime or fraud;

(4) a client insists upon pursuing an objective or taking action that the lawyer considers repugnant or imprudent or with which the lawyer has fundamental disagreement;

(5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services, including an obligation to pay the lawyer's fee as agreed, and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;
(6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or
(7) other good cause for withdrawal exists.

(c) A lawyer shall comply with these Rules, applicable rules of practice or procedure, and applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, including giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled, and refunding any advance payments of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by law only if such retention will not prejudice the client in the subject matter of the representation.

Terminology: See Rule 1.00 for the definitions of "fitness," "reasonable," "reasonably," "reasonably believes," "represents," "substantially," and "tribunal."

Comment:

1. A lawyer should not accept representation in a matter unless the lawyer can perform the representation in accordance with the law and these Rules. For examples of Rules that determine whether a lawyer should accept a representation, see Rules 1.01, 1.06, 1.07, 1.08, 1.09, 1.10, 1.11, 1.17, and 3.08. Having accepted a representation, a lawyer normally should endeavor to handle the matter until the agreed-upon representation has been concluded. Nevertheless, in certain situations the lawyer must withdraw from the representation; and, in certain other situations, the lawyer may withdraw. Other Rules, in addition to Rule 1.16, require or suggest withdrawal in certain situations. See, for example, Rules 1.01(a), 1.06(d), 1.07(a)(2)(iii), 1.12(g), 3.08(a)–(b), and 7.06.

Mandatory Refusal, Withdrawal

2. Notwithstanding subparagraph (a)(1), a lawyer is not obliged to decline or withdraw from representation merely because the client suggests a course of conduct in violation of the law

or these Rules. For example, the lawyer may discuss the legal consequences of suggested criminal or fraudulent conduct with the client and, under certain circumstances, must make reasonable efforts to persuade the client to abandon the suggested course of conduct. See Rules 1.02(c) and (d).

3. When a lawyer has been appointed to represent a client and in certain other instances in litigation, withdrawal ordinarily requires approval of the appointing authority or presiding judge. See Rule 6.01(a). A lawyer may encounter difficulty if withdrawal is based on the client's demand that the lawyer engage in unprofessional conduct. The tribunal may request an explanation for the withdrawal, while the lawyer may be bound to keep confidential the facts that would constitute such an explanation. The tribunal should ordinarily accept as sufficient the lawyer's statement that professional considerations require termination of the representation. In such situations, lawyers should also be mindful of their obligations to clients and the tribunal under Rules 1.05, 1.06, and 3.03.

Discharge

4. Ordinarily, when discharged by a client, a lawyer is required under subparagraph (a)(3) to withdraw. The client has the power to discharge the lawyer at any time, with or without cause, subject to liability for payment for the lawyer's services. Permission of any tribunal before which the matter is pending may be required. When the lawyer anticipates a dispute about the withdrawal, it may be advisable for the lawyer to prepare a written statement reciting the circumstances.

5. Whether a client can discharge an appointed counsel depends on the applicable law. A lawyer who represents a client by appointment should give the client a full explanation of the consequences of discharge. One consequence may be a decision by the appointing authority or presiding judge that appointment of successor counsel is unjustified, thus requiring the client to represent himself or herself.

Client with Diminished Capacity

6. A client with diminished capacity may lack the legal capacity to discharge the lawyer; and, in any event, a discharge may be seriously adverse to the client's interests. The lawyer should proceed as required by Rule 1.14.

Optional Withdrawal

7. Under subparagraph (b)(1), the lawyer may withdraw if the lawyer can do so without material adverse effect on the client's interests. Withdrawal pursuant to subparagraphs (b)(2) through (7) is permissible even though the withdrawal may have a material adverse effect on the client's interests. Under subparagraph (b)(2), withdrawal is permissible if the client persists in a course of action that the lawyer reasonably believes is criminal or fraudulent, because a lawyer is not required to be associated with such conduct even if the lawyer does not further it. But a lawyer is not required to discontinue the representation unless it will result in a violation of law or these Rules, at which point subparagraph (a)(1) mandates the lawyer's withdrawal.

Assisting the Client Upon Withdrawal

8. In every instance of withdrawal, and even if the client has discharged the lawyer unfairly, the lawyer must take all reasonable steps to mitigate the consequences to the client. See paragraph (d). The lawyer may retain papers as security for a fee only to the extent permitted by law.

9. Nothing in this Rule affects a lawyer's rights or obligations with respect to withdrawal under any other Rule.

Rule 1.17. Prospective Clients [new]

(a) A person who in good faith discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.

(b) A lawyer shall not use or disclose confidential information provided by the prospective client, except as provided in Rule 1.05 or (d)(2).

(c) A lawyer who has received confidential information from a prospective client shall not represent a person with interests materially adverse to those of the prospective client in the same or a substantially related matter, except as provided in (d)(1) or (d)(2). When a lawyer is personally prohibited by this paragraph from representing a person in a matter, no lawyer who is affiliated with the personally prohibited lawyer, and who knows or reasonably should know of the prohibition, shall represent that person in that matter.

(d) When a lawyer has received confidential information from a prospective client, representation of a client with interests materially adverse to those of the prospective client in the same or a substantially related matter is permissible if:

(1) the prospective client has provided informed consent, confirmed in writing, to the representation; or

(2) the lawyer conditioned the discussion with the prospective client on the prospective client's informed consent that no information disclosed during the discussion would be confidential or prohibit the lawyer from representing a different client in the matter.

Terminology: See Rule 1.00 for the definitions of "affiliated," "confirmed in writing," "informed consent," "knows," "person," "personally prohibited," "reasonably should know," "represents," and "writing."

Comment:

1. Prospective clients, like clients, may disclose information to a lawyer, place documents or other property in the lawyer's custody, or rely on the lawyer's advice. A lawyer's discussions with a prospective client usually are limited in time and depth, and the prospective client and lawyer often proceed no further. Thus, not all of the protection given to a client or former client is appropriate for a prospective client.

2. To attempt to avoid acquiring information from a prospective client that could prohibit the lawyer from undertaking another representation, the lawyer considering whether to represent the prospective client in a new matter may choose to limit the receipt of information from that prospective client to information that will assist the lawyer in determining whether a conflict of interest or other reason for declining the representation exists.

3. The requirement in paragraph (a) that a lawyer's services be sought "in good faith" is intended to preclude the tactical disclosure of confidential information to a lawyer so as to prevent the individual lawyer or the lawyer's firm from representing an adverse party.

4. A person does not become a prospective client unless that person actually "discusses" with a lawyer the possibility of forming a client-lawyer relationship, and the relationship discussed is in regard to a particular matter. A person's uninvited, unilateral contact with a lawyer does not constitute a discussion, regardless of whether the contact was made with a good-faith desire to employ the lawyer. A discussion, within the meaning of paragraph (a), requires bilateral oral or written communication. Under paragraph (a) and subparagraph (d)(2), a lawyer's discussion with a prospective client may occur either directly or through an agent or other representative authorized to act on the prospective client's behalf.

5. Often, a prospective client needs to reveal confidential information to the lawyer during an initial discussion, prior to the decision about forming a client-lawyer relationship. The lawyer often must learn such confidential information to determine whether there is a conflict of interest with an existing client and whether the matter is one that the lawyer is willing to undertake. Paragraph (b) in this Rule prohibits the lawyer from using or disclosing that information, except as permitted by Rule 1.05 or by virtue of a waiver obtained under subparagraph (d)(2) in this Rule.

6. The concern underlying paragraph (c) is the possibility that a lawyer who cannot undertake a representation under this Rule will seek to avoid that prohibition by having another lawyer in the lawyer's firm (*i.e.*, an affiliated lawyer), who is not personally subject to the prohibition, assume responsibility for the representation. Because the personally prohibited lawyer's knowledge of the prospective client's confidential information is imputed to the affiliated lawyer, a representation by the affiliated lawyer would not prevent the harm that this Rule is designed to prevent. Accordingly, paragraph (c) generally restricts an affiliated lawyer's ability to undertake a representation that a personally prohibited lawyer cannot undertake. If the affiliated lawyer never actually obtains the prospective client's confidential information, however, the affiliated lawyer's restriction ends when the affiliation with the personally prohibited lawyer ends.

7. Paragraph (c) also provides that an affiliated lawyer should not be disciplined for undertaking a representation unless the affiliated lawyer knew or reasonably should have known that the lawyer was prohibited from undertaking the representation. An affiliated lawyer in a large firm, especially a firm with offices in different cities, would be particularly vulnerable to an unwitting and innocent violation of the Rule absent this scienter requirement. But this scienter requirement does not diminish or otherwise affect the affiliated lawyer's obligation to make efforts before undertaking a representation to ascertain the existence of a conflict of interest relating to that representation. See Rule 1.00(r).

8. A lawyer does not need to use or disclose a prospective client's confidential information in a representation to be subject to discipline under this Rule. Actual unauthorized use or disclosure, however, may violate Rule 1.05.

9. Although subparagraphs (d)(1) and (d)(2) do not require a lawyer to provide written disclosures when obtaining a prospective client's informed consent, the lawyer should consider making such disclosures in writing to avoid difficulties that may arise when a lawyer claims to have made disclosures and the prospective client claims otherwise.

10. Although the informed consent referenced in subparagraph (d)(2) does not need to be confirmed in writing, the lawyer should consider obtaining a written consent signed by the prospective client before discussions with the prospective client begin. Subparagraph (d)(2) requires the lawyer to obtain the consent, whether written or oral, before the discussion commences.

11. Courts have employed the "substantial relationship" standard used in this Rule in disqualification opinions. Texas courts have held that, for disqualification purposes, a matter is substantially related to another matter if a genuine threat exists that a lawyer may divulge in one representation confidential information acquired by the lawyer in another representation because the facts and issues involved in the representations are so similar. But a lawyer should note the circumstances resulting in discipline may differ from those under which a court may disqualify the lawyer. For example, in deciding whether to disqualify a lawyer, a court will consider the competing interests of all litigants involved. The disciplinary standard found in this Rule does not require consideration of competing interests. Therefore, while a review of disqualification opinions may help a lawyer understand the parameters of the "substantial relationship" standard, the holdings in such opinions should not be used as conclusive statements that a disciplinary matter would have the same result.

SECTION II. COUNSELOR

Rule 2.01. Advisor

In representing a client, a lawyer shall exercise independent professional judgment and give candid advice.

Terminology: See Rule 1.00 for the definition of "represents."

Comment:

Scope of Advice

1. A client is entitled to straightforward advice expressing a lawyer's honest assessment. Legal advice often involves unpleasant facts and alternatives that a client may be disinclined to confront. In presenting advice, a lawyer endeavors to sustain the client's morale and may put

advice in as acceptable a form as honesty permits. However, a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client.

2. Advice couched in narrow legal terms may be of little value to a client, especially when practical considerations, such as costs or effects on other people, are predominant. Purely technical legal advice, therefore, can be inadequate. It is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice. Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge on most legal questions and may decisively influence how the law will be applied.

3. A client may expressly or impliedly ask the lawyer for purely technical advice. When a client experienced in legal matters makes such a request, the lawyer may accept it at face value. When a client inexperienced in legal matters makes such a request, however, the lawyer's responsibility as advisor may include indicating that more may be involved than strictly legal considerations.

4. Matters that go beyond strictly legal considerations may also be in the domain of another profession. Family matters can involve problems within the professional competence of psychiatry, clinical psychology, or social work; business matters can involve problems within the competence of the accounting profession or of financial specialists. When consultation with a professional in another field is itself something a competent lawyer would recommend, the lawyer should make such a recommendation. At the same time, a lawyer's advice at its best often consists of recommending a course of action in the face of conflicting recommendations of experts.

Offering Advice

5. In general, a lawyer is not expected to give advice until asked by a client. But when a lawyer knows that a client proposes a course of action that is likely to result in substantial adverse legal consequences to the client, the lawyer's duty to the client may require that the lawyer act if the client's course of action is related to the representation. A lawyer ordinarily has no duty to initiate investigation of a client's affairs or to give advice that the client has indicated is unwanted, but a lawyer may initiate advice to a client when doing so appears to be in the client's interest.

Rule 2.02. Evaluation for Use by Third Persons

A lawyer shall not provide an evaluation of a matter affecting a client for the use of someone other than the client unless:

(a) the lawyer reasonably believes that making the evaluation is compatible with other aspects of the lawyer's relationship with the client; and

(b) the client provides informed consent.

Terminology: See Rule 1.00 for the definitions of "informed consent," "person," and "reasonably believes."

Comment:

Definition

1. A lawyer may perform an evaluation that is at a client's direction but is for the primary purpose of establishing information for the benefit of a third person. For example, a lawyer may prepare an opinion concerning the title of property rendered at the behest of a vendor for the information of a prospective purchaser, or at the behest of a borrower for the information of a prospective lender. In some situations, a government entity may require an evaluation. For example, a lawyer may prepare an opinion concerning the legality of securities registered for sale under the securities laws. In other instances, a third person, such as a purchaser of a business, may require an evaluation.

2. Government lawyers may be called on to serve as advisors or as evaluators. A government lawyer serves as advisor when the lawyer is an advocate for a government entity or is a counselor for a government entity. When a lawyer is serving as an advisor, the rule of confidentiality of information applies. See Rules 1.05 and 2.01. A government lawyer serves as an evaluator when the lawyer's official responsibility is to render opinions establishing the limits on authorized government activity. In that situation, this Rule applies.

3. When an evaluation is intended for the information or use of a third person, the evaluation involves a departure from the normal client-lawyer relationship. This Rule does not permit a lawyer to provide an evaluation of a matter affecting a client for the use of a third person unless the client gives informed consent and the lawyer reasonably believes that making the evaluation is compatible with other aspects of the lawyer's relationship with the client. For example, if the lawyer is acting as advocate in defending the client against charges of fraud,

it would normally be incompatible with that responsibility for the lawyer to perform an evaluation for others concerning the same or a related transaction. Assuming no such impediment is apparent, however, the lawyer should advise the client of the implications of the evaluation, particularly any responsibilities the lawyer owes to a third person and any duty to disseminate the findings.

Access to and Disclosure of Information

4. The quality of an evaluation depends on the freedom and extent of the investigation on which it is based. Ordinarily, a lawyer should have the latitude of investigation that seems necessary as a matter of professional judgment. Under some circumstances, however, the terms of the evaluation may be limited. See Rule 1.02. For example, certain issues or sources may be categorically excluded, or the scope of search may be limited by time constraints or the non-cooperation of persons having relevant information. The lawyer's evaluation should describe all material limitations. If, after the lawyer has commenced an evaluation, the client refuses to comply with the terms on which the lawyer understood the evaluation would be made, then the lawyer's obligations are determined by reference to the facts, these Rules, and any other applicable authority. For example, see Rule 4.01.

Financial Auditors

5. When a question concerning the legal situation of a client arises at the insistence of a client's financial auditor and the question is referred to a lawyer, any response by that lawyer should be in accordance with procedures recognized in the legal profession. Such a procedure is set forth in the American Bar Association Statement of Policy Regarding Lawyers' Responses to Auditors' Requests for Information.

SECTION III. ADVOCATE

Rule 3.01. Meritorious Claims and Contentions

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless the lawyer reasonably believes there is a nonfrivolous basis for doing so.

Terminology: See Rule 1.00 for the definition of "reasonably believes."

Comment:

1. As an advocate, a lawyer must employ substantive and procedural law for the client's fullest benefit, but must not employ substantive or procedural law for harassment, unreasonable delay, or other abusive practices. Thus, these Rules impose limitations on the types of actions the lawyer may take on the client's behalf. Substantive and procedural law also affect the limits within which the lawyer may proceed. In determining the proper scope of advocacy, however, a lawyer may consider the law's ambiguities and potential for change.

2. Within the meaning of this Rule, a filing or position is frivolous if its primary purpose is to harass or maliciously injure a person. The filing or position is also frivolous if the lawyer is unable to make a good-faith argument that it is consistent with existing law or that existing law should be extended, modified, or reversed. In addition, a filing or position is frivolous if the lawyer knows it contains or is based on a false statement of material fact.

3. A filing or position is not frivolous, however, merely because the facts have not been first substantiated fully, the lawyer expects to develop vital evidence only by discovery, or the lawyer believes that the filing or position ultimately may not prevail. In addition, this Rule does not prohibit the use of a general denial or other pleading to the extent authorized by applicable rules of practice or procedure. Likewise, a lawyer for a defendant in a criminal proceeding or for the respondent in a proceeding that could result in commitment may defend the proceeding so as to require that every element of the case be established.

4. A lawyer should conform not only to this Rule's prohibition of frivolous filings and positions but also to any more stringent, applicable rule of practice or procedure. For example, the duties imposed on a lawyer by Rule 11 of the Federal Rules of Civil Procedure exceed those set out in this Rule. A lawyer must prepare all filings subject to Rule 11 in accordance with its requirements. See Rule 3.04(c)(1).

5. The lawyer's obligations under this Rule are subordinate to federal or state constitutional law that entitles a defendant in a criminal matter to the assistance of counsel in presenting a claim or contention that otherwise would be prohibited by this Rule.

Rule 3.02. Minimizing the Burdens and Delays of Litigation

In the course of litigation, a lawyer shall not take a position that unreasonably increases the costs or other burdens of the case or that unreasonably delays resolution of the matter.

Terminology: See Rule 1.00 for the definition of "reasonably."

Comment:

1. This Rule limits the lawyer's ability to delay resolution of the matter or increase the costs or other burdens of a case when the lawyer or client perceives such conduct to be in the client's interests. As to situations in which tactics addressed by this Rule are inconsistent with the client's interests, see Rule 1.01. As to those in which the lawyer's conduct is motivated primarily by a desire to receive a larger fee, see Rule 1.04 and its Comment.

2. A lawyer's compliance with Rules 3.01, 3.03, and 3.04, as supplemented by applicable rules of practice or procedure, is relevant to addressing compliance with this Rule. See Comment to Rule 3.04.

Unreasonable Costs or Other Burdens

3. Increases in the costs or other burdens of litigation may serve the client's interests. Many of these interests are entirely legitimate and merit the most stringent protection. Litigation by its very nature often is costly and burdensome. This Rule does not subject a lawyer to discipline for taking any reasonable action not otherwise prohibited by these Rules in order to fully and effectively protect the client's legitimate interests at stake in litigation.

4. Not all conduct that increases the costs or other burdens of litigation, however, is justifiable. For example, a lawyer who seeks to increase the costs or other burdens of litigation primarily because the lawyer's client is more able than an opponent to bear those burdens, and who thereby seeks to obtain advantage in resolving the matter in a manner unrelated to the merits, violates this Rule.

Unreasonable Delay

5. Dilatory practices indulged in merely for the convenience of lawyers bring the administration of justice into disrepute and normally will be unreasonable within the meaning of this Rule. See also Rule 1.01(b) and (c) and related paragraphs of its Comment. This Rule, however, does not require a lawyer to eliminate all conflicts between the demands placed on the lawyer's time by different clients, proceedings, or personal matters. Consequently, it is not professional misconduct either to seek (or as a matter of professional courtesy, to grant) reasonable delays in some matters in order to permit the competent discharge of a lawyer's multiple obligations.

6. A lawyer may seek a delay in some aspect of a proceeding in order to serve the client's legitimate interests rather than merely the lawyer's own interests. Seeking such a delay is justifiable. For example, to represent the client's legitimate interests effectively, a diligent lawyer may need more time to prepare a proper response than allowed by applicable rules of practice or procedure. Seeking a reasonable delay in that circumstance is professionally appropriate.

7. On the other hand, if a client seeks to delay a proceeding primarily for the purpose of harassing or maliciously injuring another, a lawyer is obliged not to engage in such conduct. See also Rule 3.01. It is not a justification that the bench and bar may tolerate similar conduct. The question is whether a competent lawyer acting in good faith would regard a course of action as having some substantial purpose other than delay undertaken to harass or maliciously injure another. The fact that a client benefits from otherwise unreasonable delay does not make that delay reasonable.

Rule 3.03. Candor Toward a Tribunal

(a) A lawyer shall not knowingly:

(1) make a false statement of material fact or law to a tribunal;

(2) fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

(3) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(4) offer or use evidence that the lawyer knows to be false.

(b) Notwithstanding any other of these Rules, a lawyer may refuse to offer or use evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes, but does not know, is false.

(c) If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered or used material evidence and the lawyer comes to know of its falsity, the lawyer shall make a reasonable effort to persuade the client to authorize the lawyer to correct or withdraw the false evidence. If those efforts are unsuccessful, the lawyer shall take other reasonable remedial measures, including, if necessary, disclosure of the falsehood to the tribunal.

(d) A lawyer who represents a client in an adjudicatory proceeding and who knows that a person intends to engage, is engaging, or has engaged in criminal or fraudulent conduct related to the

proceeding, shall take reasonable remedial measures, including, if necessary, disclosure of the falsehood to the tribunal.

(e) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts that are known to the lawyer, whether or not the facts are adverse, and that the lawyer reasonably believes are necessary to enable the tribunal to make an informed decision.

(f) The obligations stated in this Rule continue until remedial legal measures are no longer reasonably possible.

Terminology: See Rule 1.00 for the definitions of "adjudicatory proceeding," "knowingly," "known," "knows," "person," "reasonable," "reasonably," "reasonably believes," "represents," and "tribunal."

Comment:

Overview

1. This Rule governs the conduct of a lawyer who is representing a client in a proceeding before a tribunal or in an ancillary proceeding conducted pursuant to the tribunal's adjudicative authority, such as a deposition. As an advocate, the lawyer must present the client's case persuasively. Performance of that duty while maintaining client confidences, however, is qualified by the lawyer's duty of candor to the tribunal. Consequently, although a lawyer in an adversarial proceeding is not required to present the law impartially or to vouch for the evidence submitted in a cause, the lawyer should not allow the tribunal to be misled by statements of law or fact that the lawyer knows to be false. Legal argument based on knowingly false representations of law constitutes dishonesty toward the tribunal.

2. This Rule is intended to preclude a lawyer from deliberately misleading a tribunal. A lawyer does not violate this Rule, however, if the lawyer offers evidence for the purpose of establishing its falsity.

Representations by a Lawyer

3. The failure to make a disclosure may constitute an affirmative misrepresentation. For example, in seeking emergency relief from a tribunal, a lawyer cannot knowingly omit information that would establish the absence of an emergency.

4. Because a lawyer does not typically have personal knowledge of the matters asserted in pleadings and other litigation documents, a statement in a pleading or other litigation

document that is ultimately determined to be false ordinarily does not violate subparagraph (a)(1). But the lawyer must act within the confines of Rule 3.01. Moreover, an assertion purporting to be based on the lawyer's own knowledge, as in an affidavit by the lawyer or a representation of fact in open court, may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry.

5. If the lawyer subsequently learns of a false statement of law or material fact, subparagraph (a)(2) provides a basis for discipline if the lawyer does not correct the statement. Also, a lawyer who has intentionally made a false statement addressed in subparagraph (a)(1) violates subparagraph (a)(2) if the lawyer fails to correct the statement.

Offering and Using Evidence

6. The prohibition against offering and using false evidence in subparagraph (a)(4) applies only if the lawyer knows the evidence is false. Such knowledge may be inferred from the circumstances. As indicated in Rule 1.00, what a lawyer "knows" is different from what a lawyer "reasonably believes." Thus, the fact that a lawyer reasonably believes evidence is false does not preclude its presentation to the tribunal. But a lawyer's knowledge that evidence is false precludes the presentation of such evidence to the tribunal. Although a lawyer ordinarily should resolve doubts about the veracity of testimony or other evidence in favor of the client, the lawyer should not ignore an obvious falsehood.

7. Subparagraph (a)(4) requires the lawyer to refuse to offer or use evidence the lawyer knows to be false, regardless of the client's wishes. If the lawyer knows the client intends to testify falsely or will encourage the lawyer to introduce false evidence, the lawyer should seek to persuade the client that the evidence should not be offered. If the persuasion is ineffective and the lawyer continues to represent the client, the lawyer must refuse to offer the false evidence. If only a portion of a witness's testimony will be false, the lawyer may call the witness to testify but may not elicit or otherwise permit the witness to present the testimony that the lawyer knows is false.

8. If a client offers false evidence during examination by another party, the client's lawyer should urge that the false evidence be corrected or withdrawn. Even though the client's conduct would not place the lawyer in violation of subparagraph (a)(4), this Rule does not permit a lawyer to take advantage of a false impression created by the false evidence, including subsequent use of that false evidence in support of the client's case in trial or in settlement negotiations. Whether this Rule requires the lawyer to take other remedial measures, such as those required in paragraph (c), depends upon the circumstances.

Refusing to Offer Evidence Reasonably Believed to be False

9. While, in accordance with paragraph (b) of this Rule, a lawyer may refuse to offer evidence that the lawyer reasonably believes to be false, the lawyer should exercise that discretion cautiously, so as not to impair the client's legitimate interests. The lawyer's obligations under subparagraph (a)(2) and paragraphs (c) and (d) of this Rule are not triggered by the introduction of evidence the lawyer does not know but only reasonably believes to be false.

Remedial Measures

10. When a lawyer comes to know of a false statement or evidence that has been offered or used, paragraph (c) requires the lawyer to take remedial action. The lawyer's proper course is to confer with the client confidentially, advise the client of the lawyer's duty of candor to the tribunal, and seek the client's cooperation with respect to the withdrawal or correction of the false statement or evidence. If that fails, this Rule requires the lawyer to take further remedial action. If withdrawal from the representation is not permitted or will not undo the effect of the false statement or evidence, this Rule requires the lawyer to make such disclosure to the tribunal as is reasonably necessary to remedy the situation, even if doing so requires the lawyer to reveal information that otherwise would be protected by Rule 1.05. It is for the tribunal then to determine what further action may be necessary.

11. Normally, a lawyer's compliance with the duty of candor imposed by this Rule does not require that the lawyer withdraw from the representation of a client whose interests will be or have been adversely affected by the lawyer's disclosure. The lawyer may, however, be required by Rule 1.16 to seek permission of the tribunal to withdraw if the lawyer cannot simultaneously comply with this Rule's duty of candor and abide by the client's decisions. In connection with such a request to withdraw, a lawyer may reveal information relating to the representation, but only to the extent reasonably necessary to comply with this Rule or as otherwise permitted by Rule 1.05. If the tribunal refuses permission or the lawyer chooses not to withdraw, the lawyer should again urge the client not to offer or use the false evidence and advise the client of the steps the lawyer will take to comply with this Rule.

12. Paragraph (d) recognizes a lawyer's obligation to protect a tribunal against criminal or fraudulent conduct that undermines the integrity of the adjudicative process, such as bribing, intimidating, or otherwise unlawfully communicating with a witness, juror, court official, or other participant in the proceeding; unlawfully destroying or concealing documents or other evidence; or failing to disclose information to the tribunal when required by law to do so. Thus, paragraph (d) requires a lawyer to take reasonable remedial measures, including disclosure, if necessary, when the lawyer knows that a person, including the lawyer's client,

intends to engage, is engaging, or has engaged in criminal or fraudulent conduct related to the proceeding.

Counsel in Criminal Cases

13. Generally, the provisions of this Rule apply to counsel in Texas state criminal cases with the same force as they do in civil cases. Because of the special protections historically provided a criminal defendant, however, paragraph (b) does not permit a lawyer to refuse to offer the testimony of such a defendant when the lawyer reasonably believes but does not know that the testimony will be false.

14. A difficult situation arises when a defendant in a criminal case insists on the defendant's absolute right to testify and the tribunal will not permit the lawyer to withdraw even though the lawyer knows the anticipated testimony will be false. Under this Rule, the defendant should not have a right to the knowing assistance of counsel in committing perjury; thus, even in this difficult situation, a lawyer representing an accused must comply with the remedial measure requirements found in paragraphs (c) and (d), including the disclosure of a falsehood to the tribunal when necessary. However, some Texas courts have permitted the accused to give a narrative statement, if the accused so desires, even if counsel knows that the statement will be false. The lawyer's obligations as an advocate under these Rules are subordinate to a tribunal's decision to permit this use of a narrative statement.

Ex Parte Proceedings

15. Paragraph (e) imposes additional obligations on a lawyer participating in ex parte proceedings. Ordinarily, an advocate has the limited responsibility of presenting one side of the case, whereas the opposing party is expected to present the other. But in any ex parte proceeding, such as an application for a temporary restraining order, there is no balance of presentation by opposing advocates. Thus, paragraph (e) requires the lawyer for the represented party to disclose material facts that the lawyer reasonably believes are necessary for an informed decision. This Rule does not apply to a prosecutor's proceedings before a grand jury. See Rule 3.09 regarding special responsibilities of a prosecutor.

Duration of Obligation

16. To protect the integrity of the legal system, paragraph (f) provides that the obligation to correct the results of violating this Rule continues until remedial measures are no longer reasonably possible. Ordinarily, this will be at the conclusion of the proceedings, unless

remedial measures could later materially affect a party. For example, a prosecutor's obligation in a criminal case extends for the life of a wrongfully convicted criminal defendant, in that remedial measures could remove a wrongful conviction from the defendant's record. In civil cases, the obligation may be extended when remedial measures could enable a good-faith attack on the judgment.

Rule 3.04. Fairness in Adjudicatory Proceedings

A lawyer shall not:

(a) unlawfully obstruct another party's access to evidence; in anticipation of a dispute, unlawfully alter, destroy, or conceal a document or other material that a lawyer would reasonably believe has potential or actual evidentiary value; or counsel or assist another person to do any such act;

(b) falsify evidence, counsel or assist a witness to testify falsely, or pay, offer to pay, or acquiesce in the offer or payment of compensation to a witness or other entity contingent upon the content of the testimony of the witness or the outcome of the case. But the lawyer may advance, guarantee, or acquiesce in the payment of:

(1) expenses reasonably incurred by a witness in attending or testifying;
(2) reasonable compensation to a witness for loss of time in attending or testifying; and
(3) a reasonable fee for the professional services of an expert witness;

(c) except as stated in (d), in representing a client before a tribunal:

(1) habitually violate an established rule of procedure or evidence;
(2) state or allude to any matter that the lawyer does not reasonably believe is relevant to such proceeding or that will not be supported by admissible evidence, or assert personal knowledge of facts in issue except when testifying as a witness;
(3) state a personal opinion as to the justness of a cause, credibility of a witness, culpability of a civil litigant, or guilt or innocence of an accused, except that the lawyer may argue the lawyer's analysis of the evidence and other permissible considerations for any position or conclusion with respect to the matters stated in this Rule;
(4) ask any question intended to degrade a witness or other person except when the lawyer reasonably believes that the question will lead to relevant and admissible evidence; or
(5) engage in conduct intended to disrupt the proceedings;

(d) knowingly disobey, or advise the client to disobey, an obligation under the standing rules of or a ruling by a tribunal, except for an open refusal based either on an assertion that no valid obligation exists or on the client's willingness to accept any sanctions arising from such disobedience; or

(e) request a person other than the client to refrain from voluntarily giving relevant information to another party unless:

(1) the person is a relative or an employee or other agent of the client; and

(2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

Terminology: See Rule 1.00 for the definitions of "adjudicatory proceeding," "knowingly," "person," "reasonable," "reasonably," "reasonably believes," "represents," and "tribunal."

Comment:

1. Our adversary system contemplates that evidence in a case will be marshaled competitively. Fair competition is essential to the adversary system. Therefore, paragraphs (a) and (b) prohibit tactics such as destroying or concealing evidence and improperly influencing witnesses.

2. Evidence possessed by an opponent or third party is often essential to establish a claim or defense by an opposing party. Because the procedural right to obtain that evidence is so important, it is a crime to destroy material for the purpose of impairing its availability in a pending or anticipated proceeding. Falsifying evidence is also generally a criminal offense.

3. Subjecting a lawyer to discipline only for habitual abuses of procedural or evidentiary rules gives the presiding tribunal the responsibility to resolve most disputes regarding those rules and thereby avoid inappropriate resort to disciplinary proceedings as a means of furthering litigation objectives. But a lawyer in good conscience should not engage in even a single, intentional violation of those rules and may be subject to judicial sanctions for doing so.

4. Paragraph (c) states the traditional limitations on a lawyer's conduct in a proceeding before a tribunal. The obligations imposed by paragraph (c) prevent a lawyer from seeking to influence the outcome of a matter by introducing irrelevant or improper considerations or by engaging in deliberately harassing or disruptive conduct. Nevertheless, a lawyer may be a vigorous advocate for a client without violating paragraph (c).

5. Paragraph (d) requires a lawyer to acknowledge openly the lawyer's refusal to obey, or the lawyer's advice to a client to disobey, the standing rules of or a particular ruling by a tribunal. In addition, paragraph (d) states the only permissible bases for making an open refusal. The lawyer should consult with the client about the likely consequences of any such act of disobedience, but the final decision rests with the client.

Rule 3.05. Maintaining the Impartiality of a Tribunal

A lawyer shall not:

(a) seek to influence a tribunal concerning a pending matter by means prohibited by law or applicable rules of practice or procedure;

(b) except as otherwise permitted by law and not prohibited by applicable rules of practice or procedure, communicate or cause another to communicate ex parte with a tribunal for the purpose of influencing the tribunal concerning a pending matter other than:

(1) in the course of official proceedings in the cause;

(2) in writing if the lawyer promptly delivers a copy of the writing to opposing counsel or the adverse party if the adverse party is not represented by a lawyer; or

(3) orally upon adequate notice to opposing counsel or to the adverse party if the adverse party is not represented by a lawyer.

(c) For purposes of this rule:

(1) "Matter" has the meanings ascribed to it in Rule 1.10(f);

(2) A matter is "pending" before a particular tribunal either when that entity has been selected to determine the matter or when it is reasonably foreseeable that the entity will be selected.

Terminology: See Rule 1.00 for the definitions of "represents," "tribunal," and "writing."

Comment:

Undue Influence

1. Many forms of improper influence on tribunals are proscribed by criminal law or by rules of practice or procedure. Others are specified in the Texas Code of Judicial Conduct. A lawyer is required to be familiar with, and to avoid contributing to a violation of, all such provisions.

2. Use of alternative methods of dispute resolution, such as arbitration, has increased in recent years. In alternative-dispute-resolution settings, as in court proceedings, a lawyer should avoid any conduct that is or could reasonably be construed as being intended to corrupt or to unfairly influence the decision-maker.

Ex Parte Contacts

3. Historically, ex parte contacts between a lawyer and a tribunal have been subjected to stringent control because such contacts present the potential for abuse. For example, the Texas Code of Judicial Conduct prohibits many ex parte contacts with judicial officials. A lawyer in turn violates Rule 8.04(a)(6) by communicating with such an official in a manner that causes that official to violate the Texas Code of Judicial Conduct. This Rule maintains that traditional posture towards ex parte communications and extends it to the newer settings discussed in Comment 2.

4. In certain types of adjudicatory proceedings, however, a lawyer is permitted to discuss pending issues ex parte with a tribunal. Certain classes of zoning questions, for example, are frequently handled in that way. The exception in paragraph (b) provides that as long as such contacts are permitted by law and not prohibited by applicable rules of practice or procedure, such as state agency rules and the Texas Rules of Civil Procedure, the contacts will not serve as a basis for discipline under paragraph (b).

5. For limitations on the circumstances and the manner in which lawyers may communicate or cause another to communicate with venire members or jurors, see Rule 3.06.

Rule 3.06. Maintaining the Integrity of the Jury System

(a) A lawyer shall not:

(1) conduct or cause another, by financial support or otherwise, to conduct a vexatious or harassing investigation of a venire member or juror; or

(2) seek to influence a venire member or juror concerning the merits of a pending matter by means prohibited by law or applicable rules of practice or procedure.

(b) Prior to discharge of the jury from further consideration of a matter, a lawyer connected with the matter shall not communicate with or cause another to communicate with anyone the lawyer knows to be a venire member, juror, or alternate juror, except in the course of official proceedings.

(c) During the trial of a case, a lawyer not connected with the case shall not communicate with or cause another to communicate with a juror or alternate juror concerning the matter.

(d) After discharge of the jury from further consideration of a matter with which the lawyer was connected, the lawyer shall not ask questions of or make comments to a member of that jury that are calculated merely to harass the juror or to influence the juror's actions in future jury service.

(e) All restrictions imposed by this Rule on a lawyer also apply to communications with or investigations of a venire member's or juror's family member.

(f) A lawyer shall reveal promptly to the court improper conduct, of which the lawyer has knowledge, by a venire member or juror, or by another toward a venire member, juror, or venire member's or juror's family member.

Terminology: See Rule 1.00 for the definition of "knows."

Comment:

1. To safeguard the impartiality that is essential to the judicial process, venire members and jurors should be protected against extraneous influences. Impartial adjudication enhances public confidence in the judicial system. This Rule prohibits extrajudicial communication with venire members prior to trial or with jurors during trial or on behalf of a lawyer connected with the case. Furthermore, a lawyer who is not connected with the case should not communicate with or cause another to communicate with a venire member or a juror about the case. This Rule does not prohibit a lawyer from communicating with a juror after a trial, as long as the lawyer refrains from asking questions or making comments that tend to harass the juror or to influence actions of the juror in a future case. Contacts with discharged jurors, however, are also governed by procedural rules, the violation of which could subject a lawyer to discipline under Rule 3.04. When law permits an extrajudicial communication by a lawyer with a juror, the communication should be considerate and deferential to the juror's personal feelings.

2. Vexatious or harassing investigations of jurors seriously impair the effectiveness of our jury system. For this reason, a lawyer or anyone acting on the lawyer's behalf who conducts an investigation of venire members or jurors should act with circumspection and restraint.

3. When a lawyer or anyone acting on the lawyer's behalf communicates with or investigates a venire member's or juror's family member, the communication and investigation are subject to the same restrictions imposed on the lawyer with respect to the lawyer's communication with or investigation of a venire member and juror.

4. Because of the extremely serious nature of any actions that threaten the integrity of the jury system, a lawyer who learns of improper conduct by or towards a venire member, a juror, or a venire member's or juror's family member should make a prompt report to the court regarding such conduct. If such improper actions were taken by or on behalf of a lawyer,

either the reporting lawyer or the court normally should initiate appropriate disciplinary proceedings. See Rules 1.05, 8.03, and 8.04.

Rule 3.07. Trial Publicity

(a) A lawyer who is participating or who has participated in the investigation or litigation of a matter shall not make an extrajudicial statement the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicatory proceeding.

(b) This Rule does not preclude a lawyer from:

(1) responding to allegations of misconduct made against that lawyer, provided that the lawyer complies with the limitations in (a); or

(2) making a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this subparagraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.

(c) No lawyer affiliated in a firm with a lawyer subject to (a) shall make a statement prohibited by (a).

Terminology: See Rule 1.00 for the definitions of "adjudicatory proceeding," "affiliated," "believes," "firm," "knows," "reasonable," "reasonably should know," and "substantial."

Comment:

1. Preserving the right to a fair trial necessarily entails some curtailment of the information that may be disseminated publicly about a party before the trial. If there were no such limits, the results would be the practical nullification of the protective effects of the rules of forensic decorum and the exclusionary rules of evidence. Therefore, paragraph (a) provides that, in the course of investigating or litigating a matter, a lawyer's right to free speech is subordinate to the constitutional requirements of a fair trial.

2. The standard in paragraph (a) that prohibits certain extrajudicial statements also recognizes an involved lawyer's need or right to speak when, but only when, the right to a fair trial will not be affected.

3. Paragraph (b) expressly recognizes two recurring situations in which an involved lawyer may wish to make an extrajudicial statement that might have, or appear to have, the effect of materially prejudicing an adjudicatory proceeding. Subparagraphs (b)(1) and (b)(2) differentiate between the two situations.

4. Subparagraph (b)(1) recognizes that allegations of misconduct against the involved lawyer may merit a response for the lawyer's own protection. Nevertheless, subparagraph (b)(1) also recognizes that the need for a fair trial is the superior need, providing that the lawyer may make the extrajudicial response only if the lawyer complies with paragraph (a).

5. Subparagraph (b)(2) recognizes a specific situation in which a lawyer's extrajudicial statement may properly be made without endangering the right to a fair trial and, indeed, may tend to assure a fair trial. An extrajudicial statement as described in subparagraph (b)(2) constitutes an exception to paragraph (a). But if the extrajudicial statement is not limited in accordance with subparagraph (b)(2), the exception provided by subparagraph (b)(2) does not apply, and the lawyer must comply with paragraph (a).

6. Certain types of extrajudicial statements are particularly likely to violate paragraph (a). Such statements include those that refer to the following things: (a) the character, credibility, reputation, or criminal record of a party, suspect in a criminal investigation, or witness, or the expected testimony of a party or witness; (b) the possibility of a plea of guilty to an offense, or the existence or contents of any confession, admission, or statement given by a defendant or suspect, or that person's refusal to give such a statement; (c) the performance of, refusal to consent to the performance of, or the results of any examination or test, or the identity or nature of physical evidence expected to be presented at trial; (d) any opinion as to the guilt or innocence of a defendant or suspect in a criminal case; and (e) any other information that the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and that, if disclosed, would create a substantial risk of prejudicing an impartial trial. A lawyer should therefore exercise particular caution in making statements of these kinds, although ultimately discipline may be imposed for doing so only on a showing that the statement in question violated paragraph (a).

7. A lawyer who is participating or has participated in the investigation or litigation of a matter also may desire to make extrajudicial statements about other aspects of that matter. These statements may relate to the general nature of the claim or defense involved, the identity of persons involved, information contained in a public record, the fact that an investigation is in progress, the scheduling or result of any step in the litigation, a request for assistance in obtaining evidence and information about the assistance desired, or a warning of danger concerning the behavior of a person involved when there is a likelihood of substantial harm.

While such statements are not as apt to cause a lawyer making them to violate paragraph (a) as those referred to in Comment 6, the lawyer always should consider whether they do so in the particular situation, and the lawyer is subject to discipline under paragraph (a) if they do.

8. In a criminal matter, a lawyer may desire to make extrajudicial statements about matters such as the identity, residence, occupation, and family status of a suspect or defendant; information about assistance needed; the fact, time, and place of arrest; or the identity of investigating and arresting officers or agencies. Again, while such statements typically are not problematic, paragraph (a) nonetheless prohibits the lawyer from making them if the lawyer would violate paragraph (a) by doing so in the particular circumstances involved, because the constitutional right to a fair trial prevails.

9. Paragraph (c) applies the prohibitions of this Rule to any lawyer affiliated in a firm with a lawyer subject to paragraph (a).

10. If a lawyer is prohibited by paragraph (a) from making a particular statement, the lawyer also may be subject to discipline under other Rules for ordering, encouraging, or assisting another person, including one not directly subject to discipline under this Rule, in making the prohibited statement. See Rules 5.03 (regarding nonlawyer assistants) and 8.04(a)(1) (regarding inducement of others).

11. Other Rules, such as Rule 1.05 (regarding confidentiality of information), and applicable law, such as that governing juvenile proceedings, may further limit the statements a lawyer may make.

Rule 3.08. Lawyer as a Witness

(a) A lawyer shall not accept or continue employment as an advocate before a tribunal in a contemplated or pending adjudicatory proceeding if the lawyer knows or reasonably should know that the lawyer is or may be a witness necessary to establish an essential fact on behalf of the lawyer's client, unless:

(1) the testimony relates to an uncontested issue;

(2) the testimony relates solely to a matter of formality and there is no reason to believe that substantial evidence will be offered in opposition to the testimony;

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

(4) the lawyer is a party to the action and is appearing pro se; or

(5) the lawyer has promptly notified opposing counsel that the lawyer expects to testify in the adjudicatory proceeding and disqualification of the lawyer would work substantial hardship on the client.

(b) A lawyer shall not continue as an advocate in a pending adjudicatory proceeding if the lawyer knows or reasonably should know that the lawyer will be compelled to furnish testimony that will be substantially adverse to the lawyer's client, unless the client provides informed consent.

(c) Without the client's informed consent, a lawyer may not act as an advocate in an adjudicatory proceeding in which another lawyer in the lawyer's firm is prohibited by (a) or (b) from serving as an advocate.

(d) If the lawyer to be called as a witness could not also serve as an advocate under this Rule, that lawyer shall not take an active role before the tribunal in the presentation of the matter.

Terminology: See Rule 1.00 for the definitions of "adjudicatory proceeding," "believes," "firm," "informed consent," "knows," "reasonably should know," "substantial," "substantially," and "tribunal."

Comment:

1. A lawyer's appearance before a tribunal as both a witness and an advocate poses several risks to the administration of justice. First, a fact-finder may not understand whether a statement by an advocate-witness should be taken as evidence or as an analysis of evidence because a witness is required to testify on the basis of personal knowledge, while an advocate is expected to vigorously represent the client's interests by explaining and commenting on evidence that others provide. Second, playing both roles may prejudice an opposing party because the fact-finder may grant undue weight to the lawyer's testimony, and the opposing party may be hampered in challenging the lawyer's credibility. Third, acting as an advocate-witness may prejudice the lawyer's client because a lawyer's role as witness may hinder effective advocacy or the lawyer's testimony may be adverse to the client. This Rule attempts to balance such risks against a client's right to be represented by the client's chosen counsel by generally prohibiting a lawyer from acting as both a witness and an advocate when such actions may prejudice the tribunal or an opposing party, and by permitting a lawyer to serve in both capacities when the risk of harm to the tribunal or opposing party is diminished and the client provides his or her informed consent.

Paragraph (a)

2. Paragraph (a) generally prohibits a lawyer from acting as an advocate before a tribunal if the lawyer knows or reasonably should know that the lawyer may be a witness necessary to establish an essential fact for the lawyer's client. A lawyer is a necessary witness if a reasonable lawyer, viewing the circumstances objectively, would conclude that the lawyer's failure to testify would substantially, adversely affect the client's cause; if a lawyer's testimony is cumulative or redundant, the lawyer is not a necessary witness. Because the dual roles of advocate and witness are unlikely to create exceptional difficulties when the lawyer's testimony is limited to the areas set out in subparagraphs (a)(1)–(4), a lawyer is permitted to act as advocate and witness in the situations set forth in those subparagraphs.

3. Subparagraph (a)(1) recognizes that, if the testimony will be uncontested, the ambiguities in the dual role are purely theoretical. Nonetheless, a lawyer should consider that some courts disapprove of a lawyer being the vehicle by which undisputed facts are presented.

4. Subparagraph (a)(2) recognizes that similar considerations apply if a lawyer's testimony relates solely to a matter of formality and there is no reason to believe that substantial opposing evidence will be offered. Examples include testimony offered to establish the chain of custody or authenticity of a document. In such situations, requiring involvement of another lawyer would be costly and would serve no significant countervailing purpose.

5. Subparagraph (a)(3) recognizes that, when the testimony concerns the extent and value of the lawyer's legal services in the action in which the testimony is offered, permitting the lawyer to testify avoids the need for a second trial with new counsel to resolve that issue. Moreover, in such a situation the judge has firsthand knowledge of the matter in issue; hence, there is less dependence on the adversary process to test the credibility of the testimony.

6. Subparagraph (a)(4) makes clear that this Rule is not intended to affect a lawyer's right to self-representation.

7. Apart from these four exceptions, subparagraph (a)(5) recognizes that, in certain situations, the hardship inflicted on a client by a lawyer's disqualification outweighs the prejudice a tribunal or opposing party may suffer if a lawyer is permitted to act as both an advocate and witness. Therefore, it permits a lawyer to act as advocate and witness when (a) the lawyer's disqualification would impose a substantial hardship on the lawyer's client and (b) the lawyer promptly notifies opposing counsel of the lawyer's intent to testify and present the client's case. When determining whether disqualification imposes a substantial hardship on a client, a lawyer should consider, among other things, whether the lawyer's testimony reasonably

could be obtained from another source; the length of time the lawyer has represented the client; the complexity of the issues in the case; the client's economic resources; additional expenses that disqualification would entail; the effect of delay upon the interests of the parties and the tribunal; the importance and probable tenor of the lawyer's testimony; and the probability that the lawyer's testimony will conflict with the testimony of other witnesses. The requirement that a lawyer intending to rely on this exception promptly notify opposing counsel of that fact serves two purposes. First, it prevents the testifying lawyer from creating a substantial hardship where none existed, by virtue of a lengthy representation of the client in the matter at hand. Second, it enables opposing parties to object to the lawyer's serving as advocate and witness at the earliest opportunity.

Paragraph (b)

8. Paragraph (b) generally prohibits a lawyer from acting as an advocate in an adjudicatory proceeding if the lawyer knows or reasonably should know that the lawyer will be compelled to furnish testimony substantially adverse to his or her client. A lawyer is allowed to act as an advocate and a witness with the client's informed consent, however, because a lawyer's participation in a matter as both advocate and witness is unlikely to prejudice an opposing party.

Paragraph (c)

9. Because the tribunal is unlikely to be misled when a lawyer acts as an advocate in an adjudicatory proceeding in which another lawyer in the lawyer's firm will testify, paragraph (c) permits another lawyer in the testifying lawyer's firm to act as an advocate if the client provides informed consent.

Paragraph (d)

10. The risks against which this Rule protects are absent when a testifying lawyer is merely performing out-of-court functions, such as drafting pleadings, engaging in settlement negotiations, or assisting with pretrial strategy. Therefore, this Rule does not prohibit the lawyer who may or will be a witness from participating in the preparation of a matter for presentation to a tribunal. To minimize the possibility of unfair prejudice to an opposing party, however, paragraph (d) prohibits any testifying lawyer who could not serve as an advocate from taking an active role before the tribunal in the presentation of the matter.

Disqualification

11. Rule 3.08 provides a disciplinary standard and is not well suited for use as a disqualification standard. But this Rule may furnish some guidance in disqualification disputes when the party seeking disqualification can demonstrate actual prejudice resulting from the opposing lawyer's service as an advocate and witness. The actual-prejudice requirement is necessary to prevent this Rule from being misused as a tactical weapon to deprive opposing parties of the counsel of their choice. For example, a lawyer should not seek to disqualify an opposing lawyer under this Rule merely because the opposing lawyer's dual role may create a conflict between the lawyer and the client, for that is a matter to be resolved between lawyer and client or in a subsequent disciplinary proceeding. Likewise, a lawyer should not seek to disqualify an opposing lawyer by unnecessarily calling that lawyer as a witness; disqualification is inappropriate when opposing counsel does no more than announce an intention to call the lawyer as a witness. Such unintended application of this Rule, if allowed, would subvert its true purpose by converting it into a mere tactical weapon in litigation.

Rule 3.09. Special Responsibilities of a Prosecutor

The prosecutor in a criminal case shall:

(a) not prosecute or threaten to prosecute a charge the prosecutor knows is not supported by probable cause;

(b) not conduct or assist in a custodial interrogation of an accused unless the prosecutor has made reasonable efforts to be assured that the accused has been advised of any right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;

(c) not initiate or encourage efforts to obtain from an unrepresented accused a waiver of important pre-trial, trial, or post-trial rights;

(d) timely disclose to the defense all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal; and

(e) exercise reasonable care to prevent persons employed or controlled by the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.07.

Terminology: See Rule 1.00 for the definitions of "known," "knows," "person," "reasonable," and "tribunal."

Comment:

Overview

1. A prosecutor in the criminal justice system is not simply an advocate; the prosecutor must also see that justice is done. Applicable law may require other measures by the prosecutor. Knowing disregard of those obligations or a systematic abuse of prosecutorial discretion could constitute a violation of Rule 8.04.

2. Paragraph (a) does not apply to situations in which the prosecutor is using a grand jury to determine whether any crime has been committed, nor does it prevent a prosecutor from presenting a matter to a grand jury even though the prosecutor has some doubt as to what charge, if any, the grand jury may decide is appropriate, as long as the prosecutor does not know there is a lack of probable cause to support any charge. A prosecutor's obligations under paragraph (a) are satisfied by the return of a true bill by a grand jury, unless the prosecutor knows that material inculpatory information presented to the grand jury was false. This obligation is narrower than that imposed by Rule 3.03(e) on lawyers participating in other ex parte proceedings because a grand jury proceeding is accusatory rather than adjudicatory.

3. Paragraph (b) does not forbid the lawful questioning of any person who has knowingly, intelligently, and voluntarily waived the rights to counsel and to silence, nor does it forbid such questioning of any unrepresented person who has not stated that he or she wishes to retain a lawyer and who is not entitled to appointed counsel. Rule 4.03 also imposes certain limitations on the prosecutor's methods of questioning such persons.

4. Paragraph (c) does not apply to any person who has knowingly, intelligently, and voluntarily waived the rights referred to therein in open court, nor does it apply to any person appearing pro se with the tribunal's approval.

5. The exception in paragraph (d) recognizes that a prosecutor may seek an appropriate protective order from the tribunal if disclosure of information to the defense could result in substantial harm to an individual or to the public interest.

6. Subparagraph (e) does not subject a prosecutor to discipline for failing to take measures to prevent investigators, law-enforcement personnel, or other persons assisting or associated with the prosecutor, but not in the prosecutor's employ or control, from making extrajudicial statements that the prosecutor would be prohibited from making under Rule 3.07. To the extent feasible, however, the prosecutor should make reasonable efforts to discourage such persons from making statements of that kind.

Rule 3.10. Advocate in Nonadjudicatory Proceedings

A lawyer representing a client before a legislative or administrative body in a nonadjudicatory proceeding shall disclose that the appearance is in a representative capacity and shall conform to Rules 3.04(a) through (d), 3.05(a), and 4.01.

Terminology: See Rule 1.00 for the definitions of "adjudicatory proceeding" and "represents."

Comment:

1. In appearing before bodies such as legislatures, municipal councils, and executive and administrative agencies acting in a rule-making or policy-making capacity, lawyers may present facts, formulate issues, and advance arguments. The decision-making body, like a court, should be able to rely on the integrity of the lawyer's submissions. A lawyer should deal with the body honestly and in conformity with applicable rules of practice and procedure. One aspect of this obligation is to disclose when the lawyer is appearing in a representative capacity. Although not required to do so by this Rule, a lawyer should reveal the identities of the lawyer's clients, unless privileged or otherwise protected, so the decision-making body can weigh the lawyer's presentation more accurately. See also Rule 4.01.

2. Lawyers have no exclusive right to appear before nonadjudicatory bodies, as they do before a court. Thus, this Rule's requirements may subject lawyers to regulations inapplicable to advocates who are not lawyers.

SECTION IV. NON-CLIENT RELATIONSHIP

Rule 4.01. Truthfulness in Statements to Others

In the course of representing a client, a lawyer shall not knowingly:

(a) make a false statement of material fact or law to a third person; or

(b) fail to disclose a material fact to a third person when disclosure is necessary to avoid making the lawyer a party to a criminal act or knowingly assisting a fraudulent act perpetrated by a client.

Terminology: See Rule 1.00 for the definitions of "knowingly," "person," and "represents."

Comment:

General

1. A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts.

False Statements of Material Fact

2. Paragraph (a) refers to false statements of material fact. Whether a particular statement should be regarded as one of material fact will depend on the circumstances. For example, certain types of statements ordinarily are not taken as statements of material fact because they are viewed as matters of opinion or conjecture. Estimates of price or value placed on the subject of a transaction are in this category. Similarly, under generally accepted conventions in negotiation, a party's supposed intention as to an acceptable settlement of a claim may be viewed merely as a negotiating position rather than an accurate representation of material fact. Likewise, according to commercial conventions, a lawyer need not disclose the fact that a particular transaction is being undertaken on behalf of an undisclosed principal, except when nondisclosure of the principal would constitute fraud.

3. A lawyer violates paragraph (a) either by making a false statement of law or material fact or by incorporating or affirming such a statement made by another person. Such a statement will violate this Rule, however, only if the lawyer knows it is false and intends thereby to mislead. Lawyers should recognize their obligations under applicable law to avoid criminal and tortious misrepresentations.

Failure to Disclose a Material Fact

4. Paragraph (b) relates only to a lawyer's failure to disclose a material fact. Generally, in the course of representing a client, a lawyer has no duty to inform a third person of a relevant or material fact, except as required by law or by applicable rules of practice or procedure, such as formal discovery. But paragraph (b) of this Rule, like subparagraph (d)(1) of Rule 1.05, may require the lawyer to disclose certain facts related to a criminal or fraudulent act. Specifically, subparagraph (d)(1) of Rule 1.05 requires a lawyer who has confidential information clearly establishing that a client is likely to commit a criminal or fraudulent act that is likely to result in death or substantial bodily harm to disclose confidential information to the extent disclosure reasonably appears necessary to prevent a client from committing the crime or fraud, while paragraph (b) of this Rule requires the lawyer to disclose a material fact, which may be confidential or privileged, if the lawyer knows disclosure is necessary to avoid assisting in what the lawyer knows to be a client's crime or fraud. But failure to disclose under such circumstances violates this Rule only if the lawyer intends thereby to mislead. In addition, the lawyer's duty to disclose under this Rule applies only while the lawyer is representing the client.

5. A disclosure is necessary under paragraph (b) only if the lawyer's attempts to counsel the client not to commit the crime or fraud, or to persuade the client to take corrective action, are unsuccessful. See Rule 1.02(d)–(e). A lawyer is not authorized to make a disclosure without having first undertaken those other remedial actions. Furthermore, since this Rule presupposes that the lawyer is "in the course of representing the client," ordinarily a lawyer is not required to make the disclosure if the lawyer withdraws from the representation before the lawyer has knowingly become a party to the client's effort to commit a crime or before the lawyer has knowingly assisted in the client's attempt to commit a fraud. But the lawyer's obligations under the law or applicable rules of practice or procedure may require the lawyer to give notice of the fact of withdrawal or to disaffirm an opinion, document, affirmation, or the like. See also Rule 1.16 for the lawyer's duties relating to declining or terminating representation.

Rule 4.02. Communication With One Represented by Counsel

(a) In representing a client, a lawyer shall not communicate or cause or encourage another to communicate about the subject of the representation with a person, organization, or government entity the lawyer knows to be represented by another lawyer regarding that subject, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

(b) In representing a client, a lawyer shall not communicate or cause another to communicate about the subject of representation with a person or organization a lawyer knows to be employed or retained for the purpose of conferring with or advising another lawyer about the subject of the representation, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

(c) For the purpose of this Rule, "organization" or "government entity" means a person who:

(1) has managerial responsibility within an organization or government entity that relates to the subject of the representation; or

(2) is employed by such organization or government entity and whose act or omission in connection with the subject of representation may make the organization or government entity vicariously liable for such act or omission.

(d) When a person, organization, or government entity that is represented by a lawyer in a matter seeks advice regarding that matter from another lawyer, the second lawyer is not prohibited by (a) from giving such advice without notifying or seeking consent of the first lawyer.

Terminology: See Rule 1.00 for the definitions of "knows," "person," and "represents."

Comment:

1. This Rule is intended to protect a represented person, organization, or government entity from the following things: (a) overreaching by a lawyer for another person, organization, or government entity; (b) interference with the client-lawyer relationship; and (c) the uncounseled disclosure of information relating to the representation. A lawyer's failure to communicate with the lawyer's own client does not excuse direct communication by another lawyer with the client.

2. Paragraph (a) reminds lawyers that they may not circumvent the requirements of this Rule by encouraging another to engage in the communication prohibited by this Rule. See Rule 8.04(a). Paragraph (a) does not, however, prohibit communication between a lawyer's client and a person, organization, or government entity represented by another lawyer, as long as the lawyer does not cause or encourage the communication without the consent of the lawyer for the person, organization, or government entity. Similarly, paragraph (a) does not oblige a lawyer to affirmatively discourage communication between the lawyer's client and another represented person, organization, or government entity. Further, this Rule does not prohibit a lawyer from advising a client concerning a communication the client is legally entitled to make, as long as the client communication is not for the purpose of evading this Rule's prohibitions.

3. Paragraph (a) does not prohibit client communications concerning matters outside the subject of the representation with a represented person, organization, or government entity.

4. Under paragraph (a), the prohibition on communications applies only when the lawyer knows that (a) a person, organization, or government entity is represented by a lawyer; and (b) this representation includes the matter to which the communication pertains. If possible, a lawyer should attempt to determine whether a person, organization, or government entity is represented and the scope of the representation before communicating with the person, organization, or government entity. Inquiring whether a person, organization, or government entity is represented is not a communication prohibited by this Rule.

5. Paragraph (a) permits a lawyer to communicate with a person, organization, or government entity represented by a lawyer if that lawyer consents to such communication. Consent may be express or implied.

6. Paragraph (a) also permits a lawyer to communicate with a person, organization, or government entity represented by another lawyer if the communication is authorized by law. Examples of authorized communications include the following:

(A) Communications Authorized by Court Order. A lawyer who is uncertain whether a communication with a represented person is prohibited by this Rule may seek a court order to resolve the uncertainty. A lawyer may also seek a court order authorizing a communication otherwise prohibited by this Rule, for example, when communication with a person represented by counsel is necessary to avoid reasonably certain injury.

(B) Communications Authorized by Statute, Rule, or Contract. A lawyer may communicate with a represented person, organization, or government entity if the communication is required or authorized by a statute, rule, or contract. For example, a statute may require that a lawyer serve a pleading or notice directly on an adverse party, authorizing a communication otherwise prohibited by this Rule.

(C) Communications With Government Entities. When representing a client with a grievance against a represented government entity, a lawyer may communicate directly with government officials having the authority to address the complaint. But a lawyer is not permitted to bypass another lawyer representing the government entity on every issue that may arise in the course of a dispute. For example, a lawyer may communicate with government officials to argue that governmental policy with respect to a dispute is faulty or that government personnel are conducting themselves improperly with respect to aspects of

the dispute, but a lawyer may not bypass the government entity's lawyer on routine matters, such as discovery disputes or scheduling issues.

(D) Investigative Activities of Government Entities. Communications authorized by law may include investigative activities of lawyers representing government entities, directly or through investigative agents or informants, as permitted or limited by law.

7. Paragraph (b) extends the prohibitions of paragraph (a) to experts employed or retained by a lawyer for a particular matter; if contact with a person, organization, or government entity is prohibited by paragraph (a), paragraph (b) prohibits communication with experts retained to assist that person, organization, or government entity in the matter. Paragraph (b) prohibits only communications with a "person or organization" because the Rule's drafters presumed that a government representative could not be retained as an expert. But if this presumption proves to be incorrect, paragraph (b) may also prohibit a communication with a government representative.

8. Paragraph (c) identifies the agents of a represented organization or government entity with whom communication is prohibited. A lawyer's communication with people outside of this group is not barred by paragraph (a)'s prohibition of communications with such an organization or government entity. Therefore, paragraph (a) does not prohibit a lawyer's communication with former agents of the organization or government entity or with present agents who do not have managerial responsibility that relates to the subject of the representation or who cannot obligate the organization or government entity in connection with the subject of the representation, unless such an agent is represented by his or her own lawyer. Before a lawyer communicates with a present agent of a represented organization or government entity, the lawyer should disclose his or her connection to the matter and explain the purpose of the communication.

9. If a person described in paragraph (c) is represented in the matter by that person's own lawyer, that lawyer's consent to communicate will be sufficient for purposes of this Rule.

10. Paragraph (d) permits a lawyer who is not involved in a matter to respond to a communication initiated by a person, organization, or government entity that is involved in that matter without notifying or seeking consent of the lawyer representing the communicating person, organization, or government entity. Although paragraph (d) could be construed more broadly to permit even lawyers involved in the matter to respond to such a communication, it should not be, because such communications could create impermissible conflicts of interest for the lawyer involved.

11. This Rule applies to communications with any person — whether or not a party to a formal adjudicative proceeding, contract, or negotiation (for example, a witness or potential party to civil litigation) — who is represented by a lawyer in the matter to which the communication relates.

12. This Rule does not prohibit a lawyer's request for information pursuant to an open records statute, even if the information is related to the representation of the person, organization, or government entity from which the lawyer requests the information.

13. This Rule does not apply to a written notice sent by an insurance company to an insurance claimant, provided: (a) the notice is sent after the claim is settled and at the same time payment is sent to the claimant's representative; and (b) the information in the notice is limited to the amount and method of payment and the name and address of the party to whom payment is made.

14. For purposes of this Rule, a person, organization, or government entity is no longer represented by a lawyer once the client-lawyer relationship is terminated.

15. Rule 4.03 governs a lawyer's communications with a person, organization, or government entity not known to be represented by counsel.

Rule 4.03. Dealing With an Unrepresented Person

A lawyer who communicates on behalf of a client with a person who is not represented by counsel shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.

Terminology: See Rule 1.00 for the definitions of "knows," "person," "reasonable," "reasonably should know," and "represents."

Comment:

1. An unrepresented person, particularly one not experienced in dealing with legal matters, might assume that a lawyer representing a client in a matter with interests adverse to that person nonetheless is disinterested. In order to avoid this misunderstanding, a lawyer typically will need to identify the lawyer's client, explain that the lawyer's client has interests

opposed to those of the unrepresented person, and state that the lawyer's role is to further that client's interests rather than the interests of the unrepresented person.

2. As a general rule, during the course of a lawyer's representation of a client, a lawyer should not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being adversely affected. If the person involved remains unrepresented, however, the lawyer will be obliged to communicate directly with the person regarding the matter. Therefore, a lawyer who has made the disclosures listed in Comment 1 may inform the unrepresented person of the terms on which the lawyer's client will enter into an agreement or settlement, prepare documents that require the unrepresented person's signature, and explain truthfully the lawyer's view of the meaning of those documents or of the parties' underlying obligations.

3. With regard to the special responsibilities of a prosecutor who is dealing with an unrepresented arrestee or criminal defendant, see Rule 3.09.

Rule 4.04. Respect for Rights of a Third Person

(a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to harass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

(b) A lawyer shall not present, participate in presenting, or threaten to present:
(1) criminal or disciplinary charges solely to gain an advantage in a civil matter; or
(2) civil, criminal, or disciplinary charges against a complainant, witness, or potential witness in a bar disciplinary proceeding solely to prevent participation by the complainant, witness, or potential witness in the bar disciplinary proceeding.

Terminology: See Rule 1.00 for the definitions of "person," "represents," and "substantial."

Comment:

1. Although in most cases a lawyer's responsibility to the interests of a client is paramount to a lawyer's consideration of the interests of other persons, that responsibility does not imply that a lawyer may disregard the rights of third persons. For example, if a lawyer receives a document relating to the lawyer's representation of a client and knows that the document was sent inadvertently, the lawyer should promptly notify the sender.

2. Using or threatening to use the criminal process solely to coerce a party in a private matter improperly suggests that the criminal process can be manipulated by private interests for personal gain. But giving any notice required by law or applicable rules of practice or procedure as a prerequisite to instituting or presenting criminal charges does not violate this Rule if the lawyer has a valid purpose for doing so other than obtaining an advantage in a civil matter.

3. Using or threatening to use the civil, criminal, or disciplinary processes to coerce a complainant, witness, or potential witness in a bar disciplinary proceeding implies that lawyers can manipulate the legal system to their personal advantage. Creating such false impressions is an abuse of the legal system that diminishes public confidence in the legal profession and in the fairness of the legal system as a whole.

SECTION V. LAW FIRMS AND ASSOCIATIONS

Rule 5.01. Responsibilities of a Managerial or Supervisory Lawyer

A lawyer shall be subject to discipline because of another lawyer's violation of these Rules if the lawyer has managerial authority in the law firm in which the other lawyer practices or has direct supervisory authority over the other lawyer, and that managerial or supervisory lawyer:

(a) orders, encourages, or knowingly permits the conduct involved; or

(b) with knowledge of the other lawyer's violation of these Rules, knowingly fails to take reasonable remedial action within the scope of the lawyer's authority to avoid or mitigate the consequences of the other lawyer's violation.

Terminology: See Rule 1.00 for the definitions of "law firm," "knowingly," and "reasonable."

Comment:

1. Rule 5.01 conforms to the general principle that a lawyer is not vicariously subject to discipline for the misconduct of another person. But this Rule makes clear that a lawyer with managerial authority in a law firm or direct supervisory authority over another lawyer in the law firm will be subject to discipline for exercising his or her authority in a manner that leads to a Rule violation or for failing to exercise his or her authority to avoid or mitigate the consequences of a Rule violation.

2. This Rule applies to a lawyer who has managerial or direct supervisory authority in a "law firm." This includes a lawyer employed in the legal department of a corporation, legal-services organization, or other organization, as well as in a government entity. See Rule 1.00(h).

3. Paragraph (a) provides that a lawyer with managerial or direct supervisory authority over another lawyer who orders, encourages, or knowingly permits conduct by another lawyer that violates these Rules is subject to discipline.

4. Paragraph (b) likewise is concerned with the lawyer who is in a position of authority over another lawyer and who knows that the other lawyer has violated these Rules. This paragraph makes clear that the managerial or supervisory lawyer has a duty to exercise whatever authority the lawyer has to take remedial action to avoid or mitigate the harm that was caused or could be caused by that violation. Thus, paragraph (b) may require a managing partner or section head to whom a Rule violation has been reported to take more immediate and more extensive corrective action than it may require of another partner who simply learns of a subordinate's Rule violation.

5. Whether a lawyer has "managerial authority" or "direct supervisory authority" in particular circumstances is a question of fact. For example, in some instances, a more senior associate may have such authority over a less senior associate.

6. Under paragraph (b), appropriate remedial action by a lawyer with managerial or direct supervisory authority will depend on many factors, such as the immediacy of the managerial or supervisory lawyer's knowledge and involvement, the nature of the action reasonably expected to avoid or mitigate injurious consequences, and the seriousness of the anticipated consequences. Appropriate remedial action also depends on the extent of the managerial or supervisory lawyer's authority. Thus, for example, in certain circumstances, it may be sufficient to comply with this Rule for a junior partner or senior associate to refer the ethical problem directly to a designated senior partner or a management committee, depending on the authority of the junior partner or senior associate. Appropriate remedial action by a lawyer supervising a specific legal matter may include more direct intervention. For example, if a supervisory lawyer knows that a supervised lawyer misrepresented a matter to an opposing party in negotiation, the supervisory lawyer, as well as the other lawyer, may be required to correct the resulting misapprehension.

7. Thus, neither paragraph (a) nor paragraph (b) places vicarious disciplinary liability on the lawyer in a position of authority. Rather, the managerial or supervisory lawyer is exposed to discipline for his or her own knowing actions or knowing failures to act.

8. A lawyer in a position of authority over other lawyers in the law firm should adopt appropriate procedural measures, or make reasonable efforts to ensure the law firm adopts such measures, giving reasonable assurance that all lawyers in the law firm conform to these Rules. The measures that should be undertaken to give such reasonable assurance may depend on the structure of the law firm and on the nature of the legal work performed. In a small firm, informal supervision and an occasional admonition ordinarily will suffice. In a large firm, or in practice situations in which intensely difficult ethical problems frequently arise, more elaborate procedures may be called for in order to give such assurance.

Rule 5.02. Responsibilities of a Supervised Lawyer

(a) A lawyer is bound by these Rules notwithstanding that the lawyer acted at the direction of another person.

(b) A supervised lawyer does not violate these Rules if that lawyer acts in accordance with a managerial or supervisory lawyer's reasonable resolution of an arguable question of professional duty.

Terminology: See Rule 1.00 for the definitions of "person" and "reasonable."

Comment:

1. Rule 5.02 embodies the fundamental concept that every lawyer is a trained, mature, licensed professional who has sworn to uphold ethical standards and who is responsible for the lawyer's own conduct. Accordingly, a lawyer is not relieved from compliance with these Rules simply because the lawyer acted under the supervision of an employer or other person. In some situations, the fact that a lawyer acted at the direction of another person may be relevant in determining whether the lawyer had the knowledge required to render the conduct a violation of these Rules. The fact that a lawyer acted at the direction of another may also, of course, be a circumstance for a grievance committee or court to consider in mitigation of the penalty to be imposed for the violation of a Rule.

2. In many law firms, as defined by Rule 1.00(h), the relatively inexperienced lawyer works as an assistant to a more experienced lawyer or is directed, supervised, or given guidance by an experienced lawyer in the firm. In the normal course of practice, the senior lawyer has the responsibility to make decisions involving professional judgment as to procedures to be taken, the status of the law, and the propriety of actions to be taken by the lawyers. Otherwise, a consistent course of action could not be taken on clients' behalf. The

supervised lawyer can be expected reasonably to abide by a decision the supervisory or managerial lawyer makes, unless the decision is clearly wrong.

3. Rule 5.02 takes a realistic attitude toward the prevailing modes of practice by lawyers who are not engaged in solo practice. Accordingly, paragraph (b) provides the supervised lawyer with a special defense in a disciplinary proceeding in which the lawyer is charged with having violated a Rule. The supervised lawyer is entitled to this defense only if it appears that an arguable question of professional duty was resolved by a managerial or supervisory lawyer and that the resolution made by the managerial or supervisory lawyer was reasonable. The resolution is reasonable, even if it is ultimately found to be officially unacceptable, provided it would have appeared reasonable to a disinterested, competent lawyer based on the information reasonably available to the managerial or supervisory lawyer at the time the resolution was made. The reference to a managerial or supervisory lawyer as used in Rule 5.02 should be construed in conformity with the prevailing modes of practice in law firms and, therefore, should include a senior lawyer who undertakes to resolve a question of professional propriety, as well as a lawyer who more directly supervises the supervised lawyer.

4. By providing such a defense to the supervised lawyer, paragraph (b) recognizes that an inexperienced lawyer working under the direction or supervision of an employer or senior lawyer is not in a favorable position to disagree with reasonable decisions made by the more experienced lawyer. Often, the only choices available to the supervised lawyer are to accept the more experienced lawyer's decision, resign, or otherwise lose employment. Paragraph (b) also recognizes that it is not necessarily improper for the inexperienced lawyer to rely, reasonably and in good faith, on decisions that a more experienced lawyer makes in an unclear matter.

5. The defense provided by paragraph (b) is available without regard to whether the conduct in question was originally proposed by the supervised lawyer or another person. Nevertheless, the supervised lawyer is not permitted to act in accordance with an unreasonable decision as to the propriety of professional conduct. Rule 5.02 obviously provides no defense to the supervised lawyer who participates in clearly wrongful conduct. Reliance can be placed only on a reasonable resolution made by the managerial or supervisory lawyer.

6. The protection that Rule 5.02 affords to a supervised lawyer relates only to professional disciplinary proceedings. Whether a similar defense may exist in actions in tort or for breach of contract is a question beyond the scope of these Rules.

Rule 5.03. Responsibilities Regarding Nonlawyers

A lawyer shall be subject to discipline for the conduct of a nonlawyer employed by, retained by, or affiliated with a lawyer or law firm that would be a violation of these Rules if engaged in by a lawyer, if:

(a) the lawyer has direct supervisory authority over the nonlawyer and fails to make reasonable efforts to ensure that the nonlawyer's conduct is compatible with the lawyer's professional obligations;

(b) the lawyer orders, encourages, or knowingly permits the conduct involved; or

(c) the lawyer:

(1) has managerial authority in the law firm that has retained, employed, or affiliated the nonlawyer, or has direct supervisory authority over such nonlawyer; and

(2) with knowledge of such misconduct by the nonlawyer knowingly fails to take reasonable remedial action within the scope of the lawyer's authority to avoid or mitigate the consequences of that nonlawyer's misconduct.

Terminology: See Rule 1.00 for the definitions of "affiliated," "knowingly," "law firm," and "reasonable."

Comment:

1. Lawyers generally employ assistants in their practice, including secretaries, investigators, law-student interns, and paraprofessionals. Such assistants act for the lawyer in rendition of the lawyer's professional services. A lawyer should give such assistants appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to representation of the client, and should be responsible for their work product. Under paragraph (a), the measures employed in supervising nonlawyers should take account of the fact that nonlawyers do not have legal training and are not subject to professional discipline under these Rules. Those measures that constitute reasonable efforts may depend on the size, structure, or organization of the firm and on the nature of the legal work performed.

2. Like Rule 5.01, Rule 5.03 conforms to the general principle that a lawyer is not vicariously subject to discipline for the misconduct of another person. But the supervisory lawyer is exposed to discipline for his or her own knowing actions or knowing failures to act. This Rule makes clear that a lawyer will be disciplined for failure to exercise his or her

supervisory authority over nonlawyers to prevent, avoid, or mitigate the consequences of conduct that would constitute a Rule violation if committed by a lawyer.

3. Paragraph (c) applies to a lawyer who has managerial or direct supervisory authority in a "law firm." This includes a lawyer employed in the legal department of a corporation, legal services organization, or other organization, or in a government entity. See Rule 1.00(h). Whether a lawyer has direct supervisory authority over a nonlawyer in particular circumstances is a question of fact. For example, a junior associate often has such authority over nonlawyers; and more than one lawyer can have such authority over the same nonlawyer.

4. Under paragraph (c), the appropriate remedial action required will depend on many factors, such as the extent of the managerial or supervisory lawyer's knowledge and involvement, the nature of the action reasonably expected to avoid or mitigate injurious consequences, and the seriousness of the anticipated consequences.

Rule 5.04. Professional Independence of a Lawyer

(a) A lawyer or law firm shall not share or promise to share legal fees with a nonlawyer, except that:
(1) an agreement by a lawyer with the lawyer's firm, partner, or associate, or a lawful court order, may provide for the payment of money, over a reasonable period of time, to the lawyer's estate to or for the benefit of the lawyer's heirs or personal representatives, beneficiaries, or former spouse, after the lawyer's death or as otherwise provided by law or court order;
(2) a lawyer who undertakes to complete unfinished legal business of a deceased lawyer may pay to the estate of the deceased lawyer that proportion of the total compensation that fairly represents the services rendered by the deceased lawyer;
(3) a lawyer or law firm may include nonlawyer employees in a retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement; and
(4) a lawyer may share legal fees with a lawyer referral service in accordance with law.

(b) A lawyer shall not form a firm with a nonlawyer if any activity of the firm consists of the practice of law.

(c) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

(d) A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit if:

(1) a nonlawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration;

(2) a nonlawyer is a corporate director or officer thereof; or

(3) a nonlawyer has the right to direct or control the professional judgment of a lawyer.

Terminology: See Rule 1.00 for the definitions of "firm," "law firm," "partner," "person," and "reasonable."

Comment:

1. Paragraph (a) expresses traditional limitations on sharing legal fees with nonlawyers. These limitations are meant to prevent solicitation by lay persons of clients for lawyers and to deter lawyers from encouraging or assisting nonlawyers in the unauthorized practice of law. See Rules 5.04(d), 5.05, and 7.03 (prohibited solicitations and payments).

2. This Rule does not necessarily mandate that employees be paid only on the basis of a fixed salary. The payment of an annual or other bonus does not constitute the sharing of legal fees if the nonlawyer employee's bonus is neither based on a percentage of the law firm's profits or particular legal fees nor given as a reward for conduct forbidden to lawyers.

3. The division between lawyer and client of the proceeds of a settlement, judgment, or other award in which both damages and attorney fees have been included does not constitute an improper sharing of legal fees with a nonlawyer because such division does not conflict with the reasons for the prohibition in paragraph (a).

4. The four exceptions stated in paragraph (a) involve situations in which the sharing of legal fees with a nonlawyer is not inconsistent with the reasons for the limitations in that paragraph.

5. The exception in paragraph (a)(4) permits the sharing of legal fees with a lawyer referral service that meets the requirements established by Texas law governing lawyer referral services. This exception permitting the sharing of legal fees includes permission for a lawyer to reimburse the lawyer referral service, according to applicable law.

6. A lawyer's professional judgment should be exercised only for the client's benefit, free of compromising influences and loyalties. Accordingly, paragraph (c) forbids a lawyer from

permitting a person who recommends, employs, or pays the lawyer to render legal services for another to interfere with the lawyer's professional judgment in rendering such legal services. The lawyer should be watchful that such persons, who may have potential power to exert pressures on the lawyer, are not seeking to further their own economic, political, or social goals without regard to the lawyer's responsibility to the client. See Rule 1.08(e) regarding limitations on a lawyer accepting compensation from a third party.

7. Although a lawyer generally may practice with or in the form of a professional corporation or association authorized to practice law for profit, the danger of erosion of the lawyer's professional independence exists whenever a nonlawyer, other than a fiduciary representing the estate of a lawyer, owns an interest in the organization. Similarly, that danger exists whenever a nonlawyer is a corporate director or officer in the organization. Therefore, this Rule protects the professional independence of a lawyer by forbidding a lawyer to practice with or in the form of a professional corporation or association in either of the two situations described above or whenever a nonlawyer in the organization has the right to direct or control the lawyer's professional judgment. Preferably, the relationship between the organization and the lawyer will be defined by a written agreement.

8. The danger of erosion of the lawyer's professional independence may exist when a lawyer practices with associations or organizations not covered by paragraph (d). For example, when legal-aid offices are administered by boards of directors composed of lawyers and nonlawyers, a lawyer should guard against a violation of paragraph (d) by refusing to accept or continue employment with such an organization unless the board sets only broad policies and does not interfere with the relationship of the lawyer and the individual client that the lawyer represents.

Rule 5.05. Unauthorized Practice of Law[1]

A lawyer shall not:

(a) practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction; or

(b) assist a person who is not a member of the bar in the performance of activity that constitutes

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[1] The Court is still considering proposed revisions to Rule 5.05. At this time, there are no changes to the text of the Rule; however, the Court incorporated a terminology reference directly after the Rule.

the unauthorized practice of law.

Terminology: See Rule 1.00 for the definition of "person."

Comment:

1. Courts generally have prohibited the unauthorized practice of law because of a perceived need to protect individuals and the public from the mistakes of the untrained and the schemes of the unscrupulous, who are not subject to the judicially imposed disciplinary standards of competence, responsibility, and accountability.

2. Neither statutory nor judicial definitions offer clear guidelines as to what constitutes the practice of law or the unauthorized practice of law. All too frequently, the definitions are so broad as to be meaningless and amount to little more than the statement that the practice of law is merely whatever lawyers do or are traditionally understood to do. The definition of the practice of law is established by law and varies from one jurisdiction to another. Whatever the definition, limiting the practice of law to members of the bar protects the public against rendition of legal services by unqualified persons.

3. Rule 5.05 does not attempt to define what constitutes the unauthorized practice of law but leaves the definition to judicial development. Judicial development of the concept of law practice should emphasize that the concept is broad but only broad enough to cover all situations where there is rendition of services for others that call for the professional judgment of a lawyer and where the one receiving the services generally will be unable to judge whether adequate services are being rendered and is, therefore, in need of the protection afforded by the regulation of the legal profession. Competent professional judgment is the product of a trained familiarity with law and legal processes, a disciplined, analytical approach to legal problems and a firm ethical commitment; and the essence of the professional judgment of the lawyer is the lawyer's educated ability to relate the general body and philosophy of law to a specific legal problem of a client.

4. Paragraph (b) of Rule 5.05 does not prohibit a lawyer from employing the services of paraprofessionals and delegating functions to them. So long as the lawyer supervises the delegated work, retains responsibility for the work, and maintains a direct relationship with the client, the paraprofessional cannot reasonably be said to have engaged in activity that constitutes the unauthorized practice of law. See Rule 5.03. Likewise, paragraph (b) does not prohibit lawyers from providing professional advice and instructions to nonlawyers whose employment requires knowledge of law. For example, claims adjusters, employees of financial institutions, social workers, abstractors, police officers, accountants, and persons

employed in government entities are engaged in occupations requiring knowledge of law; and a lawyer who assists them to carry out their proper functions is not assisting the unauthorized practice of law. In addition, a lawyer may counsel nonlawyers who wish to proceed pro se, since a nonlawyer who represents himself or herself is not engaged in the unauthorized practice of law.

5. Authority to engage in the practice of law conferred in any jurisdiction is not necessarily a grant of the right to practice elsewhere, and it is improper for a lawyer to engage in practice where doing so violates the regulation of the practice of law in that jurisdiction. However, the demands of business and the mobility of our society pose distinct problems in the regulation of the practice of law by individual states. In furtherance of the public interest, lawyers should discourage regulations that unreasonably impose territorial limitations upon the right of a lawyer to handle the legal affairs of a client or upon the opportunity of a client to obtain the services of a lawyer of his or her choice.

Rule 5.06. Restrictions on Right to Practice

A lawyer shall not participate in offering or making:

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

(b) an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a suit or controversy, except that as part of the settlement of a disciplinary proceeding against a lawyer an agreement may be made placing restrictions on the right of that lawyer to practice.

Terminology: See Rule 1.00 for the definition of "firm."

Comment:

1. An agreement restricting the rights of a lawyer to practice after leaving a firm not only limits the lawyer's professional autonomy but also limits the freedom of clients to choose a lawyer. Paragraph (a) prohibits such agreements except for restrictions incident to provisions concerning retirement benefits for service with the firm.

2. Paragraph (b) prohibits a lawyer from agreeing not to represent other persons in connection with settling a claim on a client's behalf.

Rule 5.07. Prohibited Discriminatory Activities [renumbered]

(a) A lawyer shall not willfully, in connection with an adjudicatory proceeding, except as provided in (b), manifest, by words or conduct, bias or prejudice based on race, color, national origin, religion, disability, age, sex, or sexual orientation towards any person involved in that proceeding in any capacity.

(b) Paragraph (a) does not apply to a lawyer's decision whether to represent a particular person in connection with an adjudicatory proceeding, or to the process of jury selection, or to communications protected as "confidential information" under these Rules. See Rule 1.05(a)–(b). It also does not preclude advocacy in connection with an adjudicatory proceeding involving any of the factors set out in (a) if that advocacy:

(1) is necessary in order to address any substantive or procedural issues raised by the proceeding; and

(2) is conducted in conformity with applicable rulings and orders of a tribunal and applicable rules of practice or procedure.

Terminology: See Rule 1.00 for the definitions of "adjudicatory proceeding," "person," "represents," and "tribunal."

Comment:

1. Subject to the exemptions in paragraph (b), paragraph (a) prohibits willful expressions of bias or prejudice that are made in connection with an adjudicatory proceeding and directed towards any person involved in that proceeding in any capacity. Because the prohibited conduct needs to occur only "in connection with" an adjudicatory proceeding, it applies to misconduct transpiring in, as well as outside of, the presence of the tribunal's adjudicatory official. Moreover, the broad definition of the term "adjudicatory proceeding" in Rule 1.00(b) means that paragraph (a)'s prohibition applies to many settings besides conventional litigation in federal or state courts.

2. The exemption in paragraph (b) relating to the lawyer's words or conduct in selecting a jury ensures that the lawyer will be free to probe the venire members thoroughly in an effort to identify potential jurors having a bias or prejudice towards the lawyer's client, or in favor of the client's opponent, based on, among other things, the factors enumerated in paragraph (a). A lawyer should remember, however, that the use of peremptory challenges to remove persons from juries based solely on the factors listed in paragraph (a) raises separate constitutional issues.

SECTION VI. PUBLIC SERVICE

Rule 6.01. Appointments by a Tribunal

(a) When a tribunal appoints a lawyer to represent a person, the lawyer shall represent the person until the representation is terminated in accordance with Rule 1.16(c).

(b) A lawyer shall not seek to avoid appointment by a tribunal to represent a person except for good cause, such as:

(1) representing the client is likely to result in violation of law or these Rules;

(2) representing the client is likely to result in an unreasonable financial burden on the lawyer; or

(3) the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client.

Terminology: See Rule 1.00 for the definitions of "person," "reasonable," "represents," and "tribunal."

Comment:

1. The rights and responsibilities of individuals and organizations in Texas and throughout the United States are increasingly defined in legal terms. As a consequence, legal assistance in coping with the web of statutes, rules, and regulations is imperative for all persons. Each lawyer engaged in the practice of law should therefore render public-interest legal service. Personal involvement in the problems of the disadvantaged can be one of the most rewarding experiences in the life of a lawyer.

Paragraph (a)

2. A tribunal's appointment of a lawyer creates a client-lawyer relationship that begins upon appointment. An appointed lawyer has the same obligations to the client as a retained lawyer, including the obligations of loyalty and confidentiality, and is subject to the same limitations on the client-lawyer relationship, such as the obligation to refrain from assisting the client in violation of the Rules. Withdrawal from such a representation requires compliance with Rule 1.16 and with other applicable rules of practice or procedure.

Paragraph (b)

3. A lawyer may be subject to appointment by a court to serve unpopular clients or persons unable to afford legal services. For good cause, a lawyer may seek to decline an appointment to represent a person who cannot afford to retain counsel or whose cause is unpopular. Good cause exists if the lawyer could not handle the matter competently, see Rule 1.01, or if undertaking the representation would result in an improper conflict of interest, for example, when the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client. Compare Rules 1.06(b), 1.16(a)(2), and 1.16(b)(4).

4. A lawyer may also seek to decline an appointment if acceptance would be unreasonably burdensome, for example, when it would impose a financial sacrifice so great as to be unjust. Compare Rule 1.16(b)(6).

5. A lawyer ordinarily is not obliged to accept an appointment to represent a client whose character or cause the lawyer regards as repugnant. Frequently, however, the needs of such a client for a lawyer's services are particularly pressing; in some cases, the client may have a right to legal representation. At the same time, either financial considerations or the same qualities of the client or the client's cause that make a lawyer reluctant to accept employment may severely limit the client's ability to obtain legal representation. As a consequence, the lawyer's freedom to reject a client is morally qualified. Legal representation should not be denied to people who are unable to afford legal services or whose cause is controversial or the subject of popular disapproval. By the same token, a lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social, or moral views or activities.

6. An individual lawyer may fulfill the lawyer's ethical responsibility to provide public-interest legal service by accepting a fair share of unpopular matters or indigent or unpopular clients. History is replete with instances of distinguished and sacrificial services by lawyers who have represented unpopular clients and causes. Regardless of a lawyer's personal feelings, the lawyer should not decline representation solely because a client or a cause is unpopular or community reaction is adverse. Likewise, a lawyer should not reject tendered employment because of the lawyer's personal preference to avoid adversary alignment against judges, other lawyers, public officials, or influential members of the community.

Rule 6.02. Membership in Legal Services Organization [renumbered]

A lawyer serving as a director, officer, or member of a legal services organization, apart from the law firm in which the lawyer practices, shall not knowingly participate in a decision or an action of the organization if:

(a) participating in the decision or action would violate the lawyer's obligations to a client under Rule 1.06; or

(b) the decision or action could have a material adverse effect on the representation of any client of the organization whose interests are adverse to a client of the lawyer.

Terminology: See Rule 1.00 for the definitions of "knowingly," "law firm," and "represents."

Comment:

1. A lawyer is encouraged to serve as a director, officer, or member of a legal services organization. With two exceptions, the lawyer may do so notwithstanding that the organization has interests adverse to the lawyer's client or serves persons having such adverse interests. Although a potential conflict does not preclude a lawyer from serving such an organization, Rule 1.06 does not allow the lawyer to participate in decisions or actions that would be incompatible with the lawyer's obligations to a current client.

2. When the lawyer is a director, officer, or member of a legal services organization, further problems can arise when a client the organization serves has interests adverse to those of a client the lawyer serves. Paragraph (b) prohibits the lawyer's participation in actions or decisions of the organization that could have a material adverse effect on the representation of any client of the organization, if that client's interests are adverse to those of a client of the lawyer.

Rule 6.03. Law Reform Activities Affecting Client Interests [new]

A lawyer may serve as a director, officer, or member of an organization involved in reform of the law or its administration notwithstanding that the reform may affect the interests of a client of the lawyer. When the lawyer knows the interests of a client may be materially benefited by a decision in which the lawyer participates, the lawyer shall disclose that fact to the organization but need not identify the client.

Terminology: See Rule 1.00 for the definition of "knows."

Comment:

1. Lawyers involved in organizations seeking law reform generally do not have a client-lawyer relationship with the organization. Otherwise, it might follow that a lawyer could not be involved in a bar association law-reform program that might indirectly affect a client. But in participating in particular decisions that arise in the course of such involvement, a lawyer should recognize the lawyer's obligations to clients under other Rules, particularly Rule 1.06, which may prohibit the lawyer from participating in any decision that would violate a duty the lawyer owes to a current client.

2. A lawyer is professionally obligated to protect the integrity of the law-reform organization by making an appropriate disclosure to the organization before the lawyer participates in any decision that the lawyer knows may materially benefit the interests of the lawyer's client. The phrase "may be materially benefited," as used in this Rule, applies to any situation in which a decision of the organization could materially affect the lawyer's client, no matter what position the lawyer contemplates taking regarding the decision.

SECTION VII. INFORMATION ABOUT LEGAL SERVICES

Rule 7.01. Firm Names and Letterhead

(a) A lawyer in private practice shall not practice under a trade name, a name that is misleading as to the identity of the lawyer or lawyers practicing under such name, or a firm name containing names other than those of one or more of the lawyers in the firm, except that the names of a professional corporation, professional association, limited liability partnership, or professional limited liability company may contain "P.C.," "P.A.," "L.L.P.," "P.L.L.C.," or similar symbols indicating the nature of the organization, and if otherwise lawful a firm may use as, or continue to include in, its name the name or names of one or more deceased or retired members of the firm or of a predecessor firm in a continuing line of succession. Nothing herein shall prohibit a married woman from practicing under her maiden name.

(b) A firm with offices in more than one jurisdiction may use the same name in each jurisdiction, but identification of the lawyers in an office of the firm shall indicate the jurisdictional limitations on those not licensed to practice in the jurisdiction where the office is located.

(c) The name of a lawyer occupying a judicial, legislative, or public executive or administrative position shall not be used in the name of a firm, or in communications on its behalf, during any substantial period in which the lawyer is not actively and regularly practicing with the firm.

(d) A lawyer shall not hold himself or herself out as being a partner, shareholder, or associate with one or more other lawyers unless they are in fact partners, shareholders, or associates.

(e) A lawyer shall not advertise in the public media or seek professional employment by any communication under a trade or fictitious name, except that a lawyer who practices under a firm name as authorized by (a) may use that name in such advertisement or communication but only if that name is the firm name that appears on the lawyer's letterhead, business cards, office sign, fee contracts, and with the lawyer's signature on pleadings and other legal documents.

(f) A lawyer shall not use a firm name, letterhead, or other professional designation that violates Rule 7.02(a).

Terminology: See Rule 1.00 for the definitions of "firm," "partner," and "substantial."

Comment:

1. A lawyer or law firm may not practice law using a name that is misleading as to the identity of the lawyers practicing under such name, but the continued use of the name of a deceased or retired member of the firm or of a predecessor firm is not considered to be misleading. Trade names are generally considered inherently misleading. Other types of firm names can be misleading as well, such as a firm name that creates the appearance that lawyers are partners or employees of a single law firm when in fact they are merely associated for the purpose of sharing expenses. In such cases, the lawyers involved may not denominate themselves in any manner suggesting such an ongoing professional relationship as, for example, "Smith and Jones" or "Smith and Jones Associates" or "Smith and Associates." Such titles create the false impression that the lawyers named have assumed a joint professional responsibility for clients' legal affairs. See paragraph (d).

2. The practice of law firms having offices in more than one state is commonplace. Although it is not necessary that the name of an interstate firm include Texas lawyers, a letterhead including the name of any lawyer not licensed in Texas must indicate the lawyer is not licensed in Texas.

3. Paragraph (c) is designed to prevent the exploitation of a lawyer's public position for the benefit of the lawyer's firm. Likewise, because it may be misleading under paragraph (a), a

lawyer who occupies a judicial, legislative, or public executive or administrative position should not indicate that fact on a letterhead which identifies that person as an lawyer in the private practice of law. However, a firm name may include the name of a public official who is actively and regularly practicing law with the firm. But see Rule 7.02(a)(5).

4. With certain limited exceptions, paragraph (a) forbids a lawyer from using a trade name or fictitious name. Paragraph (e) sets out this same prohibition with respect to advertising in public media or communications seeking professional employment and contains additional restrictions on the use of trade names or fictitious names in those contexts. In a largely overlapping measure, paragraph (f) forbids the use of any such name or designation if it would amount to a "false or misleading communication" under Rule 7.02(a).

Rule 7.02. Communications Concerning a Lawyer's Services

(a) A lawyer shall not make or sponsor a false or misleading communication about the qualifications or the services of any lawyer or firm. A communication is false or misleading if it:

(1) contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading;

(2) contains any reference in a public media advertisement to past successes or results obtained unless:

(i) the communicating lawyer or member of the law firm served as lead counsel in the matter giving rise to the recovery, or was primarily responsible for the settlement or verdict;

(ii) the amount involved was actually received by the client;

(iii) the reference is accompanied by adequate information regarding the nature of the case or matter and the damages or injuries sustained by the client; and

(iv) if the gross amount received is stated, the attorney's fees and litigation expenses withheld from the amount are stated as well;

(3) is likely to create an unjustified expectation about results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate these rules or other law;

(4) compares the lawyer's services with other lawyers' services, unless the comparison can be substantiated by reference to verifiable, objective data;

(5) states or implies that the lawyer is able to influence improperly or upon irrelevant grounds any tribunal, legislative body, or public official;

(6) designates one or more specific areas of practice in an advertisement in the public media or in a solicitation communication unless the advertising or soliciting lawyer is competent to handle legal matters in each such area of practice; or

(7) uses an actor or model to portray a client of the lawyer or law firm.

(b) Rule 7.02(a)(6) does not require that a lawyer be certified by the Texas Board of Legal Specialization at the time of advertising in a specific area of practice, but such certification shall conclusively establish that such lawyer satisfies the requirements of Rule 7.02(a)(6) with respect to the area(s) of practice in which such lawyer is certified.

(c) A lawyer shall not advertise in the public media or state in a solicitation communication that the lawyer is a specialist except as permitted under Rule 7.04.

(d) Any statement or disclaimer required by these Rules shall be made in each language used in the advertisement or solicitation communication with respect to which such required statement or disclaimer relates; provided however, the mere statement that a particular language is spoken or understood shall not alone result in the need for a statement or disclaimer in that language.

Terminology: See Rule 1.00 for the definitions of "competent," "firm," "law firm," and "tribunal."

Comment:

1. The Rules within Section VII are intended to regulate communications made for the purpose of obtaining professional employment. They are not intended to affect other forms of speech by lawyers, such as political advertisements or political commentary, except insofar as a lawyer's effort to obtain employment is linked to a matter of current public debate.

2. This Rule governs all communications about a lawyer's services, including advertisements regulated by Rule 7.04 and solicitation communications regulated by Rules 7.03 and 7.05. Whatever means are used to make known a lawyer's services, statements about them must be truthful and nondeceptive.

3. Subparagraph (a)(1) recognizes that statements can be misleading both by what they contain and what they leave out. Statements that are false or misleading for either reason are prohibited. A truthful statement is misleading if it omits a fact necessary to make the lawyer's communication considered as a whole not materially misleading. A truthful statement is also misleading if there is a substantial likelihood that it will lead a reasonable person to formulate a specific conclusion about the lawyer or the lawyer's services for which there is no reasonable factual foundation.

4. Subparagraphs (a)(2) and (3) recognize that truthful statements may create "unjustified expectations." For example, an advertisement that truthfully reports that a lawyer obtained a jury verdict of a certain amount on behalf of a client would nonetheless be misleading if it were to turn out that the verdict was overturned on appeal or later compromised for a

substantially reduced amount, and the advertisement did not disclose such facts as well. Even an advertisement that fully and accurately reports a lawyer's achievements on behalf of clients or former clients may be misleading if presented so as to lead a reasonable person to form an unjustified expectation that the same results could be obtained for other clients in similar matters without reference to the specific factual and legal circumstances of each client's case. Those unique circumstances would ordinarily preclude advertisements in the public media and solicitation communications that discuss the results obtained on behalf of a client, such as the amount of a damage award, the lawyer's record in obtaining favorable settlements or verdicts, as well as those that contain client endorsements.

5. Subparagraph (a)(4) recognizes that comparisons of lawyers' services may also be misleading unless those comparisons "can be substantiated by reference to verifiable objective data." Similarly, an unsubstantiated comparison of a lawyer's services or fees with the services or fees of other lawyers may be misleading if presented with such specificity as would lead a reasonable person to conclude that the comparison can be substantiated. Statements comparing a lawyer's services with those of another where the comparisons are not susceptible of precise measurement or verification, such as "we are the toughest lawyers in town," "we will get money for you when other lawyers can't," or "we are the best law firm in Texas if you want a large recovery" can deceive or mislead prospective clients.

6. The inclusion of a disclaimer or qualifying language may preclude a finding that a statement is likely to create unjustified expectations or otherwise mislead a prospective client, but it will not necessarily do so. Unless any such qualifications and disclaimers are both sufficient and displayed with equal prominence to the information to which they pertain, that information can still readily mislead prospective clients into believing that similar results can be obtained for them without reference to their specific factual and legal circumstances. Consequently, in order not to be false, misleading, or deceptive, other of these Rules require that appropriate disclaimers or qualifying language must be presented in the same manner as the communication and with equal prominence. See Rules 7.04(q) and 7.05(a)(2).

7. On the other hand, a simple statement of a lawyer's own qualifications devoid of comparisons to other lawyers does not pose the same risk of being misleading so does not violate subparagraph (a)(4). Similarly, a lawyer making a referral to another lawyer may express a good faith subjective opinion regarding that other lawyer.

8. Thus, this Rule does not prohibit communication of information concerning a lawyer's name or firm name, address, and telephone numbers; the basis on which the lawyer's fee is determined, including prices for specific services and payment and credit arrangements; names of references and with their consent, names of clients regularly represented; and other

truthful information that might invite the attention of those seeking legal assistance. When a communication permitted by Rule 7.02 is made in the public media, the lawyer should consult Rule 7.04 for further guidance and restrictions. When a communication permitted by Rule 7.02 is made by a lawyer through a solicitation communication, the lawyer should consult Rules 7.03 and 7.05 for further guidance and restrictions.

9. Subparagraph (a)(5) prohibits a lawyer from stating or implying that the lawyer has an ability to influence a tribunal, legislative body, or other public official through improper conduct or upon irrelevant grounds. Such conduct brings the profession into disrepute, even though the improper or irrelevant activities referred to are never carried out, and so are prohibited without regard to the lawyer's actual intent to engage in such activities.

Communication of Fields of Practice

10. Subparagraph (a)(6) and paragraphs (b) and (c) of Rule 7.02 regulate communications concerning a lawyer's fields of practice and should be construed together with Rule 7.04 or 7.05, as applicable. If a lawyer in a public media advertisement or in a solicitation communication designates one or more specific areas of practice, that designation is at least an implicit representation that the lawyer is qualified in the areas designated. Accordingly, Rule 7.02(a)(6) prohibits the designation of a field of practice unless the communicating lawyer is in fact competent in the area.

11. Typically, one would expect competency to be measured by special education, training, or experience in the particular area of law designated. Because certification by the Texas Board of Legal Specialization involves special education, training, and experience, certification by the Texas Board of Legal Specialization conclusively establishes that a lawyer meets the requirements of Rule 7.02(a)(6) in any area in which the Board has certified the lawyer. However, competency may be established by means other than certification by the Texas Board of Legal Specialization. See Rule 7.04(b).

12. Lawyers who wish to advertise in the public media that they specialize should refer to Rule 7.04. Lawyers who wish to assert a specialty in a solicitation communication should refer to Rule 7.05.

Actor Portrayal of Clients

13. Subparagraph (a)(7) further protects prospective clients from false, misleading, or deceptive advertisements and solicitations by prohibiting the use of actors to portray clients of the lawyer or law firm. Other rules prohibit the use of actors to portray lawyers in the

advertising or soliciting lawyer's firm. See Rules 7.04(g) and 7.05(a). The truthfulness of such portrayals is extremely difficult to monitor, and almost inevitably they involve actors whose apparent physical and mental attributes differ in a number of material respects from those of the actual clients portrayed.

Communication in a Second Language

14. The ability of lawyers to communicate in a second language can facilitate the delivery and receipt of legal services. Accordingly, it is in the best interest of the public that potential clients be made aware of a lawyer's language ability. A lawyer may state an ability to communicate in a second language without any further elaboration. However, if a lawyer chooses to communicate with potential clients in a second language, all statements or disclaimers required by the Texas Disciplinary Rules of Professional Conduct must also be made in that language. See paragraph (d). Communicating some information in one language while communicating the rest in another is potentially misleading if the recipient understands only one of the languages.

Rule 7.03. Prohibited Solicitations and Payments

(a) A lawyer shall not by in-person contact, or by regulated telephone or other electronic contact as defined in (f), seek professional employment concerning a matter arising out of a particular occurrence or event, or series of occurrences or events, from a prospective client or nonclient who has not sought the lawyer's advice regarding employment or with whom the lawyer has no family or past or present client-lawyer relationship when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain. Notwithstanding the provisions of this paragraph, a lawyer for a qualified nonprofit organization may communicate with the organization's members for the purpose of educating the members to understand the law, to recognize legal problems, to make intelligent selection of counsel, or to use legal services. In those situations where in-person or telephone or other electronic contact is permitted by this paragraph, a lawyer shall not have such a contact with a prospective client if:

(1) the communication involves coercion, duress, fraud, overreaching, intimidation, undue influence, or harassment;

(2) the communication contains information prohibited by Rule 7.02(a); or

(3) the communication contains a false, fraudulent, misleading, deceptive, or unfair statement or claim.

(b) A lawyer shall not pay, give, or offer to pay or give anything of value to a person not licensed to practice law for soliciting prospective clients for, or referring clients or prospective clients to, any

lawyer or firm, except that a lawyer may pay reasonable fees for advertising and public relations services rendered in accordance with this Rule and may pay the usual charges of a lawyer referral service that meets the requirements of Occupational Code Title 5, Subtitle B, Chapter 952.

(c) A lawyer, in order to solicit professional employment, shall not pay, give, advance, or offer to pay, give, or advance anything of value, other than actual litigation expenses and other financial assistance as permitted by Rule 1.08(d), to a prospective client or any other person; provided however, this provision does not prohibit the payment of legitimate referral fees as permitted by (b) or by Rule 1.04(g).

(d) A lawyer shall not enter into an agreement for, charge for, or collect a fee for professional employment obtained in violation of Rule 7.03(a), (b), or (c).

(e) A lawyer shall not participate with or accept referrals from a lawyer referral service unless the lawyer knows or reasonably believes that the lawyer referral service meets the requirements of Occupational Code Title 5, Subtitle B, Chapter 952.

(f) As used in (a), "regulated telephone or other electronic contact" means any electronic communication initiated by a lawyer or by any person acting on behalf of a lawyer or law firm that will result in the person contacted communicating in a live, interactive manner with any other person by telephone or other electronic means. For purposes of this Rule, a website for a lawyer or law firm is not considered a communication initiated by or on behalf of that lawyer or firm.

Terminology: See Rule 1.00 for the definitions of "firm," "fraud," "fraudulent," "knows," "person," "reasonable," and "reasonably believes."

Comment:

1. In many situations, in-person, telephone, or other prohibited electronic solicitations by lawyers involve well-known opportunities for abuse of prospective clients. Traditionally, the principal concerns presented by such contacts are that they can overbear the prospective client's will, lead to hasty and ill-advised decisions concerning choice of counsel, and be very difficult to police. The approach taken by this Rule may be found in paragraph (f), which prohibits such communications if they are initiated by or on behalf of a lawyer or law firm and will result in the person contacted communicating with any person by telephone or other electronic means. Thus, forms of electronic communications are prohibited that pose comparable dangers to face-to-face solicitations, such as soliciting business in "chat rooms," or transmitting an unsolicited, interactive communication to a prospective client that, when accessed, puts the recipient in direct contact with another person. Those that do not present

such opportunities for abuse, such as pre-recorded telephone messages requiring a separate return call to speak to or retain an attorney, or websites that must be accessed by an interested person and that provide relevant and truthful information concerning a lawyer or law firm, are permitted.

2. Nonetheless, paragraphs (a) and (f) unconditionally prohibit those activities only when profit for the lawyer is a significant motive and the solicitation concerns matters arising out of a particular occurrence, event, or series of occurrences or events. The reason this outright ban is so limited is that there are circumstances where the dangers of such contacts can be reduced by less restrictive means. As long as the conditions of subparagraphs (a)(1) through (a)(3) are not violated by a given contact, a lawyer may engage in in-person, telephone or other electronic solicitations when the solicitation is unrelated to a specific occurrence, event, or series of occurrences or events. Similarly, subject to the same restrictions, in-person, telephone, or other electronic solicitations are permitted where the prospective client either has a family or past or present client-lawyer relationship with the lawyer or where the potential client had previously contacted the lawyer about possible employment in the matter.

3. In addition, Rule 7.03(a) does not prohibit a lawyer for a qualified non-profit organization from in-person, telephone, or other electronic solicitation of prospective clients for purposes related to that organization. Historically and by law, nonprofit legal aid agencies, unions, and other qualified nonprofit organizations and their lawyers have been permitted to solicit clients in-person or by telephone, and more modern electronic means of communication pose no additional threats to consumers justifying a more restrictive treatment. Consequently, Rule 7.03(a) is not in derogation of those organizations' constitutional rights to employ such methods. Attorneys for such nonprofit organizations, however, remain subject to this Rule's general prohibitions against undue influence, intimidation, overreaching, and the like.

Paying for Solicitation

4. Rule 7.03(b) does not prohibit a lawyer from paying standard commercial fees for advertising or public relations services rendered in accordance with these Rules. In addition, a lawyer may pay the fees required by a lawyer referral service that meet the requirements of Occupational Code Title 5, Subtitle B, Chapter 952. However, paying, giving, or offering to pay or give anything of value to persons not licensed to practice law who solicit prospective clients for lawyers has always been considered to be against the best interest of both the public and the legal profession. Such actions circumvent these Rules by having a nonlawyer do what a lawyer is ethically proscribed from doing. Accordingly, the practice is forbidden by Rule 7.03(b). As to payments or gifts of value to licensed lawyers for soliciting prospective clients, see Rule 1.04(g).

5. Rule 7.03(c) prohibits a lawyer from paying or giving value directly to a prospective client or any other person as consideration for employment by that client except as permitted by Rule 1.08(d).

6. Paragraph (d) prohibits a lawyer from agreeing to or charging for professional employment obtained in violation of Rule 7.03. Paragraph (e) further requires a lawyer to decline business generated by a lawyer referral service unless the lawyer knows or reasonably believes that service is operated in conformity with statutory requirements.

7. References to a "lawyer" in this and other Rules include lawyers who practice in law firms. A lawyer associated with a firm cannot circumvent these Rules by soliciting or advertising in the name of that firm in a way that violates these Rules. See Rule 7.04(e).

Rule 7.04. Advertisements in the Public Media

(a) A lawyer shall not advertise in the public media by stating that the lawyer is a specialist, except as permitted under Rule 7.04(b) or as follows:

(1) A lawyer admitted to practice before the United States Patent Office may use the designation "Patents," "Patent Attorney," or "Patent Lawyer," or any combination of those terms. A lawyer engaged in the trademark practice may use the designation "Trademark," "Trademark Attorney," or "Trademark Lawyer," or any combination of those terms. A lawyer engaged in patent and trademark practice may hold himself or herself out as specializing in "Intellectual Property Law," "Patent, Trademark, Copyright Law and Unfair Competition," or any of those terms.

(2) A lawyer may permit his or her name to be listed in lawyer referral service offices that meet the requirements of Occupational Code Title 5, Subtitle B, Chapter 952, according to the areas of law in which the lawyer will accept referrals.

(3) A lawyer available to practice in a particular area of law or legal service may distribute to other lawyers and publish in legal directories and legal newspapers (whether written or electronic) a listing or an announcement of such availability. The listing shall not contain a false or misleading representation of special competence or experience, but may contain the kind of information that traditionally has been included in such publications.

(b) A lawyer who advertises in the public media:

(1) shall publish or broadcast the name of at least one lawyer who is responsible for the content of such advertisement; and

(2) shall not include a statement that the lawyer has been certified or designated by an organization as possessing special competence or a statement that the lawyer is a member of

an organization the name of which implies that its members possess special competence, except that:

(i) a lawyer who has been awarded a Certificate of Special Competence by the Texas Board of Legal Specialization in the area so advertised, may state with respect to each such area, "Board Certified, [area of specialization] — Texas Board of Legal Specialization"; and

(ii) a lawyer who is a member of an organization the name of which implies that its members possess special competence, or who has been certified or designated by an organization as possessing special competence, may include a factually accurate statement of such membership or may include a factually accurate statement, "Certified [area of specialization] [name of certifying organization]," but such statements may be made only if that organization has been accredited by the Texas Board of Legal Specialization as a bona fide organization that admits to membership or grants certification only on the basis of objective, exacting, publicly available standards (including high standards of individual character, conduct, and reputation) that are reasonably relevant to the special training or special competence that is implied and that are in excess of the level of training and competence generally required for admission to the Bar; and

(3) shall, in the case of infomercial or comparable presentation, state that the presentation is an advertisement:

(i) both verbally and in writing at its outset, after any commercial interruption, and at its conclusion; and

(ii) in writing during any portion of the presentation that explains how to contact a lawyer or law firm.

(c) Separate and apart from any other statements, the statements referred to in (b) shall be displayed conspicuously and in language easily understood by an ordinary consumer.

(d) Subject to the requirements of (a) through (c) and Rules 7.02 and 7.03, a lawyer may, either directly or through a public relations or advertising representative, advertise services in the public media, such as (but not limited to) a telephone directory, legal directory, newspaper or other periodical, outdoor display, radio, television, the internet, or electronic or digital media.

(e) All advertisements in the public media for a lawyer or firm must be reviewed and approved in writing by the lawyer or a lawyer in the firm.

(f) A copy or recording of each advertisement in the public media and relevant approval referred to in (e), and a record of when and where the advertisement was used, shall be kept by the lawyer or firm for four years after its last dissemination.

(g) In advertisements in the public media, any person who portrays a lawyer whose services or whose firm's services are being advertised, or who narrates an advertisement as if he or she were such a lawyer, shall be one or more of the lawyers whose services are being advertised.

(h) If an advertisement in the public media by a lawyer or firm discloses the willingness or potential willingness of the lawyer or firm to render services on a contingent-fee basis, the advertisement must state whether the client will be obligated to pay all or any portion of the court costs and, if a client may be liable for other expenses, this fact must be disclosed. If specific percentage fees or fee ranges of contingent-fee work are disclosed in such advertisement, it must also disclose whether the percentage is computed before or after expenses are deducted from the recovery.

(i) A lawyer who advertises in the public media a specific fee or range of fees for a particular service shall conform to the advertised fee or range of fees for the period during which the advertisement is reasonably expected to be in circulation or otherwise expected to be effective in attracting clients, unless the advertisement specifies a shorter period; but in no instance is the lawyer bound to conform to the advertised fee or range of fees for a period of more than one year after the date of publication.

(j) A lawyer or firm who advertises in the public media shall disclose the geographic location, by city or town, of the lawyer's or firm's principal office. A lawyer or firm shall not advertise the existence of any office other than the principal office unless:

(1) that other office is staffed by a lawyer at least three days a week; or

(2) the advertisement states:

(i) the days and times during which a lawyer will be present at that office; or

(ii) that meetings with lawyers will be by appointment only.

(k) A lawyer may not, directly or indirectly, pay all or a part of the cost of an advertisement in the public media for a lawyer not in the same firm unless such advertisement discloses the name and address of the financing lawyer, the relationship between the advertising lawyer and the financing lawyer, and whether the advertising lawyer is likely to refer cases received through the advertisement to the financing lawyer.

(l) If an advertising lawyer knows or should know at the time of an advertisement in the public media that a case or matter will likely be referred to another lawyer or firm, a statement of such fact shall be conspicuously included in such advertisement.

(m) No motto, slogan, or jingle that is false or misleading may be used in any advertisement in the public media.

(n) A lawyer shall not include in any advertisement in the public media the lawyer's association with a lawyer referral service unless the lawyer knows or reasonably believes that the lawyer referral service meets the requirements of Occupational Code Title 5, Subtitle B, Chapter 952.

(o) A lawyer may not advertise in the public media as part of an advertising cooperative or venture of two or more lawyers not in the same firm unless each such advertisement:

(1) states that the advertisement is paid for by the cooperating lawyers;

(2) names each of the cooperating lawyers;

(3) sets forth conspicuously the special competency requirements required by Rule 7.04(b) of lawyers who advertise in the public media;

(4) does not state or imply that the lawyers participating in the advertising cooperative or venture possess professional superiority, are able to perform services in a superior manner, or possess special competence in any area of law advertised, except that the advertisement may contain the information permitted by Rule 7.04(b)(2); and

(5) does not otherwise violate these Rules.

(p) Each lawyer who advertises in the public media as part of an advertising cooperative or venture shall be individually responsible for:

(1) ensuring that each advertisement does not violate this Rule; and

(2) complying with the filing requirements of Rule 7.07.

(q) If these Rules require that specific qualifications, disclaimers, or disclosures of information accompany communications concerning a lawyer's services, the required qualifications, disclaimers, or disclosures must be presented in the same manner as the communication and with equal prominence.

(r) A lawyer who advertises on the internet shall display the statements and disclosures required by Rule 7.04.

Terminology: See Rule 1.00 for the definitions of "competence," "firm," "law firm," "knows," "person," "reasonably," "reasonably believes," "writing," and "written."

Comment:

1. Neither Rule 7.04 nor Rule 7.05 prohibits communications authorized by law, such as notice to members of a class in class action litigation.

Advertising Areas of Practice and Special Competence

2. Paragraphs (a) and (b) permit a lawyer, under the restrictions set forth, to indicate areas of practice in advertisements about the lawyer's services. See also paragraph (d). The restrictions are designed primarily to require that accurate information be conveyed. These restrictions recognize that a lawyer has a right protected by the United States Constitution to advertise publicly, but that the right may be regulated by reasonable restrictions designed to protect the public from false or misleading information. The restrictions contained in Rule 7.04 are based on the experience of the legal profession in the State of Texas and are designed to curtail what experience has shown to be misleading and deceptive advertising. To ensure accountability, subparagraph (b)(1) requires identification of at least one lawyer responsible for the content of the advertisement.

3. Because of long-standing tradition, a lawyer admitted to practice before the United States Patent Office may use the designation "patents," "patent attorney," or "patent lawyer," or any combination of those terms. As recognized by subparagraph (a)(1), a lawyer engaged in patent and trademark practice may hold himself out as concentrating in "intellectual property law," "patents, or trademarks and related matters," or "patent, trademark, copyright law and unfair competition" or any combination of those terms.

4. Subparagraph (a)(2) recognizes the propriety of listing a lawyer's name in legal directories according to the areas of law in which the lawyer will accept new matters. The same right is given with respect to lawyer referral service offices, but only if those services comply with statutory guidelines. The restriction in subparagraph (a)(2) does not prevent a legal aid agency or prepaid legal services plan from advertising legal services provided under its auspices.

5. Subparagraph (a)(3) continues the historical exception that permits advertisements by lawyers to other lawyers in legal directories and legal newspapers (whether written or electronic), subject to the same requirements of truthfulness that apply to all other forms of lawyer advertising. Such advertisements traditionally contain information about the name, location, telephone numbers, and general availability of a lawyer to work on particular legal matters. Other information may be included so long as it is not false or misleading. Because advertisements in these publications are not available to the general public, lawyers who list various areas of practice are not required to comply with paragraph (b).

6. Some advertisements, sometimes known as tombstone advertisements, mention only such matters as the name of the lawyer or law firm, a listing of lawyers associated with the firm, office addresses and telephone numbers, office and telephone service hours, dates of

admission to bars, the acceptance of credit cards, and fees. The content of such advertisements is not the kind of information intended to be regulated by Rule 7.04(b). However, if the advertisement in the public media mentions any area of the law in which the lawyer practices, then, because of the likelihood of misleading material, the lawyer must comply with paragraph (b).

7. Sometimes lawyers choose to advertise in the public media the fact that they have been certified or designated by a particular organization or that they are members of a particular organization. Such statements naturally lead the public to believe that the lawyer possesses special competence in the area of law mentioned. Consequently, in order to ensure that the public will not be misled by such statements, subparagraph (b)(2) and paragraph (c) place limited but necessary restrictions upon a lawyer's basic right to advertise those affiliations.

8. Rule 7.04(b)(2) gives lawyers who possess certificates of specialization from the Texas Board of Legal Specialization or other meritorious credentials from organizations approved by the Board the option of stating that fact, provided that the restrictions set forth in subparagraphs (b)(2)(i) and (b)(2)(ii) are followed.

9. Paragraph (c) is intended to ensure against misleading or material variations from the statements required by paragraph (b).

10. Paragraphs (e) and (f) provide the advertising lawyer, the Bar, and the public with requisite records should questions arise regarding the propriety of a public media advertisement. Paragraph (e), like subparagraph (b)(1), ensures that a particular attorney accepts responsibility for the advertisement. It is in the public interest and in the interest of the legal profession that the records of those advertisements and approvals be maintained.

Examples of Prohibited Advertising

11. Paragraphs (g) through (o) regulate conduct that has been found to mislead or be likely to mislead the public. Each paragraph is designed to protect the public and to guard the legal profession against these documented misleading practices while at the same time respecting the constitutional rights of any lawyer to advertise.

12. Paragraph (g) prohibits lawyers from misleading the public into believing a nonlawyer portrayer or narrator in the advertisement is one of the lawyers prepared to perform services for the public. It does not prohibit the narration of an advertisement in the third person by an actor, as long as it is clear to those hearing or seeing the advertisement that the actor is not a lawyer prepared to perform services for the public.

13. Contingent-fee contracts present unusual opportunities for deception by lawyers or for misunderstanding by the public. By requiring certain disclosures, paragraph (h) safeguards the public from misleading or potentially misleading advertisements that involve representation on a contingent-fee basis. The affirmative requirements of paragraph (h) are not triggered solely by the expression of "contingent fee" or "percentage fee" in the advertisement. To the contrary, they encompass advertisements in the public media where the lawyer or firm expresses a mere willingness or potential willingness to render services for a contingent fee. Therefore, statements in an advertisement such as "no fee if no recovery" or "fees in the event of recovery only" are clearly included as a form of advertisement subject to the disclosure requirements of paragraph (h).

14. Paragraphs (i), (j), (k), and (l) jointly address the problem of advertising that experience has shown misleads the public concerning the fees that will be charged, the location where services will be provided, or the attorney who will be performing these services. Together they prohibit the same sort of "bait and switch" advertising tactics by lawyers that are universally condemned.

15. Paragraph (i) requires a lawyer who advertises a specific fee or range of fees in the public media to honor those commitments for the period during which the advertisement is reasonably expected to be in circulation or otherwise expected to be effective in attracting clients, unless the advertisement itself specifies a shorter period. In no event, however, is a lawyer required to honor an advertised fee or range of fees for more than one year after publication.

16. Paragraph (j) prohibits advertising the availability of a satellite office unless the requirements of subparagraphs (1) or (2) are satisfied. Paragraph (j) does not require, however, that a lawyer or firm specify which of several properly advertised offices is its "principal" one, as long as the principal office is among those advertised and the advertisement discloses the city or town in which that office is located. Experience has shown that, in the absence of such regulation, members of the public have been misled into employing a lawyer in a distant city who advertises that there is a nearby satellite office, only to learn later that the lawyer is rarely available to the client because the nearby office is seldom open or is staffed only by lay personnel. Paragraph (j) is not intended to restrict the ability of legal services programs to advertise satellite offices in remote parts of the program's service area even if those satellite offices are staffed irregularly by attorneys. Otherwise low-income individuals in and near such communities might be denied access to the only legal services truly available to them.

17. When a lawyer or firm advertises, the public has a right to expect that lawyer or firm will perform the legal services. Experience has shown that attorneys not in the same firm may create a relationship wherein one will finance advertising for the other in return for referrals. Nondisclosure of such a referral relationship is misleading to the public. Accordingly, paragraph (k) prohibits such a relationship between an advertising lawyer and a lawyer who finances the advertising unless the advertisement discloses the nature of the financial relationship between the two lawyers. Paragraph (l) addresses the same problem from a different perspective, requiring a lawyer who advertises the availability of legal services and who knows or should know at the time that the advertisement is placed in the media that business will likely be referred to another lawyer or firm, to include a conspicuous statement of that fact in any such advertising. This requirement applies whether or not the lawyer to whom the business is referred is financing the advertisements of the referring lawyer. It does not, however, require disclosure of all possible scenarios under which a referral could occur, such as an unforeseen need to associate with a specialist in accordance with Rule 1.01(a) or the possibility of a referral if a prospective client turns out to have a conflict of interest precluding representation by the advertising lawyer. Lawyers participating in any type of arrangement to refer cases must comply with Rule 1.04(g).

18. Paragraph (m) protects the public by forbidding mottos, slogans, and jingles that are false or misleading. There are, however, mottos, slogans, and jingles that are informative rather than false or misleading. Accordingly, paragraph (m) recognizes an advertising lawyer's constitutional right to include appropriate mottos, slogans, and jingles in advertising.

19. Some lawyers choose to band together in a cooperative or joint venture to advertise. Although those arrangements are lawful, the fact that several independent lawyers have joined together in a single advertisement increases the risk of misrepresentation or other forms of inappropriate expression. Special care must be taken to ensure that cooperative advertisements identify each cooperating lawyer, state that each cooperating lawyer is paying for the advertisement, and accurately describe the professional qualifications of each cooperating lawyer. See paragraph (o). Furthermore, each cooperating lawyer must comply with the filing requirements of Rule 7.07. See paragraph (p).

20. The use of disclosures, disclaimers, and qualifying information is necessary to inform the public about various aspects of a lawyer or firm's practice in public media advertising and solicitation communications. In order to ensure that disclaimers required by these rules are conspicuously displayed, paragraph (q) requires that such statements be presented in the same manner as the communication and with prominence equal to that of the matter to which it refers. For example, in a television advertisement that necessitates the use of a disclaimer, if a statement or claim is made verbally, the disclaimer should also be included verbally in

the commercial. When a statement or claim appears in print, the accompanying disclaimer must also appear in print with equal prominence and legibility.

Rule 7.05. Prohibited Written, Electronic, or Digital Solicitations

(a) A lawyer shall not send, deliver, or transmit, or knowingly permit or knowingly cause another person to send, deliver, or transmit, a written, audio, audiovisual, digital media, recorded telephone message, or other electronic communication to a prospective client for the purpose of obtaining professional employment on behalf of any lawyer or law firm if:

(1) the communication involves coercion, duress, fraud, overreaching, intimidation, undue influence, or harassment;

(2) the communication contains information prohibited by Rule 7.02 or fails to satisfy each of the requirements of Rule 7.04(a) through (c), and (g) through (q) that would be applicable to the communication if it were an advertisement in the public media; or

(3) the communication contains a false, fraudulent, misleading, deceptive, or unfair statement or claim.

(b) Except as provided in (f), a written, electronic, or digital solicitation communication to prospective clients for the purpose of obtaining professional employment:

(1) shall, in the case of a non-electronically transmitted written communication, be plainly marked "ADVERTISEMENT" on its first page, and on the face of the envelope or other packaging used to transmit the communication. If the written communication is in the form of a self-mailing brochure or pamphlet, the word "ADVERTISEMENT" shall be:

(i) in a color that contrasts sharply with the background color; and

(ii) in a size of at least 3/8" vertically or three times the vertical height of the letters used in the body of such communication, whichever is larger;

(2) shall, in the case of an electronic mail message, be plainly marked "ADVERTISEMENT" in the subject portion of the electronic mail and at the beginning of the message's text;

(3) shall not be made to resemble legal pleadings or other legal documents;

(4) shall not reveal on the envelope or other packaging or electronic mail subject line used to transmit the communication, or on the outside of a self-mailing brochure or pamphlet, the nature of the legal problem of the prospective client or non-client; and

(5) shall disclose how the lawyer obtained the information prompting the communication to solicit professional employment if such contact was prompted by a specific occurrence involving the recipient of the communication or a family member of such person(s).

(c) Except as provided in (f), an audio, audio-visual, digital media, recorded telephone message, or other electronic communication sent to prospective clients for the purpose of obtaining professional employment:

(1) shall, in the case of any such communication delivered to the recipient by non-electronic means, plainly and conspicuously state in writing on the outside of any envelope or other packaging used to transmit the communication, that it is an "ADVERTISEMENT";

(2) shall not reveal on any such envelope or other packaging the nature of the legal problem of the prospective client or non-client;

(3) shall disclose, either in the communication itself or in accompanying transmittal message, how the lawyer obtained the information prompting such audio, audio-visual, digital media, recorded telephone message, or other electronic communication to solicit professional employment, if such contact was prompted by a specific occurrence involving the recipient of the communication or a family member of such person(s);

(4) shall, in the case of a recorded audio presentation or a recorded telephone message, plainly state that it is an advertisement prior to any other words being spoken and again at the presentation's or message's conclusion: and

(5) shall, in the case of an audio-visual or digital media presentation, plainly state that the presentation is an advertisement:

(i) both verbally and in writing at the outset of the presentation and again at its conclusion; and

(ii) in writing during any portion of the presentation that explains how to contact a lawyer or law firm.

(d) All written, audio, audio-visual, digital media, recorded telephone message, or other electronic communications made to a prospective client for the purpose of obtaining professional employment of a lawyer or law firm must be reviewed and either signed by or approved in writing by the lawyer or a lawyer in the firm.

(e) A copy of each written, audio, audio-visual, digital media, recorded telephone message, or other electronic solicitation communication, the relevant approval thereof, and a record of the date of each such communication; the name, address, telephone number, or electronic address to which each such communication was sent; and the means by which each such communication was sent shall be kept by the lawyer or firm for four years after its dissemination.

(f) The provisions of (b) and (c) do not apply to a written, audio, audio-visual, digital media, recorded telephone message, or other form of electronic solicitation communication:

(1) directed to a family member or a person with whom the lawyer had or has a client-lawyer relationship;

(2) that is not motivated by or concerned with a particular past occurrence or event or a particular series of past occurrences or events, and also is not motivated by or concerned with the prospective client's specific existing legal problem of which the lawyer is aware;
(3) if the lawyer's use of the communication to secure professional employment was not significantly motivated by a desire for, or by the possibility of obtaining, pecuniary gain; or
(4) that is requested by the prospective client.

Terminology: See Rule 1.00 for the definitions of "firm," "fraud," "fraudulent," "knowingly," "law firm," "person," "writing," and "written."

Comment:

1. Rule 7.03 deals with in-person, telephone, and other prohibited electronic contact between a lawyer and a prospective client wherein the lawyer seeks professional employment. Rule 7.04 deals with advertisements in the public media by a lawyer seeking professional employment. This Rule deals with solicitations between a lawyer and a prospective client. Typical examples are letters or other forms of correspondence (including those sent, delivered, or transmitted electronically), recorded telephone messages, audiotapes, videotapes, digital media, and the like, addressed to a prospective client.

2. Written, audio, audio-visual, and other forms of electronic solicitations raise more concerns than do comparable advertisements. Being private, they are more difficult to monitor, and for that reason paragraph (e) requires retention for four years of certain information regarding all such solicitations. See also Rule 7.07(a). Paragraph (a) addresses such concerns as well as problems stemming from exceptionally outrageous communications such as solicitations involving fraud, intimidation, or deceptive and misleading claims. Because receipt of multiple solicitations appears to be most pronounced and vexatious in situations involving accident victims, subparagraphs (b)(1), (b)(2), (c)(1), (c)(4), and (c)(5) require that the envelope or other packaging used to transmit the communication, as well as the communication itself, plainly disclose that the communication is an advertisement, while subparagraphs (b)(5) and (c)(3) requires disclosure of the source of information if the solicitation was prompted by a specific occurrence.

3. Because experience has shown that many written, audio, audio-visual, electronic mail, and other forms of electronic solicitations have been intrusive or misleading by reason of being personalized or being disguised as some form of official communication, special prohibitions against such practices are necessary. The requirements of paragraphs (b) and (c) greatly lessen those dangers of deception and harassment.

4. Newsletters or other works published by a lawyer that are not circulated for the purpose of obtaining professional employment are not within the ambit of paragraph (b) or (c).

5. This Rule also regulates audio, audio-visual, or other forms of electronic communications used to solicit business. It includes such formats as recorded telephone messages, movies, audio or audio-visual recordings or tapes, digital media, the internet and other comparable forms of electronic communications. It requires that such communications comply with all of the substantive requirements applicable to written solicitations that are compatible with the different forms of media involved, as well as with all requirements related to approval of the communications and retention of records concerning them. See paragraphs (c), (d), and (e).

6. In addition to addressing these special problems posed by solicitations, Rule 7.05 regulates the content of those communications. It does so by incorporating the standards of Rule 7.02 and those of Rule 7.04 that would apply to the solicitation were it instead a comparable form of advertisement in the public media. See subparagraphs (a)(2) and (3). In brief, this approach means that, except as provided in paragraph (f), a lawyer may not include or omit anything from a solicitation unless the lawyer could do so were the communication a comparable form of advertisement in the public media.

7. Paragraph (f) provides that the restrictions in paragraphs (b) and (c) do not apply in certain situations because the dangers of deception, harassment, vexation, and overreaching are quite low. For example, a written solicitation may be directed to a family member or a present or a former client, or in response to a request by a prospective client without stating that it is an advertisement. Similarly, a written solicitation may be used in seeking general employment in commercial matters from a bank or other corporation, when there is neither concern with specific existing legal problems nor concern with a particular past event or series of events. All such communications, however, remain subject to Rule 7.02 and paragraphs (h) through (o) of Rule 7.04. See subparagraph (a)(2).

8. In addition, paragraph (f) allows such communications in situations not involving the lawyer's pecuniary gain. For purposes of these Rules, it is presumed that communications made on behalf of a nonprofit legal aid agency, union, or other qualified nonprofit organization are not motivated by a desire for, or by the possibility of obtaining, pecuniary gain, but that presumption may be rebutted.

Rule 7.06. Prohibited Employment

(a) A lawyer shall not accept or continue employment in a matter when that employment was procured by conduct prohibited by any of Rules 7.01 through 7.05, 8.04(a)(2), or 8.04(a)(9), engaged in by that lawyer personally or by any other person whom the lawyer ordered, encouraged, or knowingly permitted to engage in such conduct.

(b) A lawyer shall not accept or continue employment in a matter when the lawyer knows or reasonably should know that employment was procured by conduct prohibited by any of Rules 7.01 through 7.05, 8.04(a)(2), or 8.04(a)(9), engaged in by any other person or entity that is a shareholder, partner, or member of, an associate in, or of counsel to that lawyer's firm; or by any other person whom any of the foregoing persons or entities ordered, encouraged, or knowingly permitted to engage in such conduct.

(c) A lawyer who has not violated (a) or (b) in accepting employment in a matter shall not continue employment in that matter once the lawyer knows or reasonably should know that the person procuring the lawyer's employment in the matter engaged in, or ordered, encouraged, or knowingly permitted another to engage in, conduct prohibited by any of Rules 7.01 through 7.05, 8.04(a)(2), or 8.04(a)(9) in connection with the matter unless nothing of value is given thereafter in return for that employment.

Terminology: See Rule 1.00 for the definitions of "firm," "knowingly," "knows," "partner," "person," and "reasonably should know."

Comment:

Selection of a lawyer by a client often is a result of the advice and recommendation of third parties — relatives, friends, acquaintances, business associates and other lawyers. Although that method of referral is perfectly legitimate, the client is best served if the recommendation is disinterested and informed. All lawyers must guard against creating situations where referral from others is the consequence of some form of prohibited compensation or from some form of false or misleading communication, or by virtue of some other violation of any of Rules 7.01 through 7.05, 8.04(a)(2), or 8.04(a)(9). Paragraph (a) forbids a lawyer who violated these Rules in procuring employment in a matter from accepting or continuing employment in that matter. This prohibition also applies if the lawyer ordered, encouraged, or knowingly permitted another to violate these Rules. Paragraph (b) also forbids a lawyer from accepting or continuing employment in a matter if the lawyer knows or reasonably should know that a member or employee of his or her firm or any other person has procured employment in a matter as a result of conduct that violates these Rules. Paragraph (c) addresses the situation where the lawyer becomes aware that the matter was procured

in violation of these Rules by an attorney or individual, but had no culpability. In such circumstances, the lawyer may continue employment and collect a fee in the matter as long as nothing of value is given to the attorney or individual involved in the violation of the Rule(s). See also Rule 7.03(d), forbidding a lawyer to charge or collect a fee where the misconduct involves violations of Rule 7.03 (a), (b), or (c).

Rule 7.07. Filing Requirements for Public Advertisements and Written, Recorded, Electronic, or Other Digital Solicitations

(a) Except as provided in (c) and (e), a lawyer shall file with the Advertising Review Committee of the State Bar of Texas, no later than the mailing or sending by any means, including electronic, of a written, audio, audio-visual, digital or other electronic solicitation communication:

(1) a copy of the written, audio, audio-visual, digital, or other electronic solicitation communication being sent or to be sent to one or more prospective clients for the purpose of obtaining professional employment, together with a representative sample of the envelopes or other packaging in which the communications are enclosed;

(2) a completed lawyer advertising and solicitation communication application; and

(3) a check or money order payable to the State Bar of Texas for the fee set by the Board of Directors. Such fee shall be for the sole purpose of defraying the expense of enforcing the rules related to such solicitations.

(b) Except as provided in (e), a lawyer shall file with the Advertising Review Committee of the State Bar of Texas, no later than the first dissemination of an advertisement in the public media, a copy of each of the lawyer's advertisements in the public media. The filing shall include:

(1) a copy of the advertisement in the form in which it appears or will appear upon dissemination, such as a videotape, audiotape, DVD, CD, a print copy, or a photograph of outdoor advertising;

(2) a production script of the advertisement setting forth all words used and describing in detail the actions, events, scenes, and background sounds used in such advertisement together with a listing of the names and addresses of persons portrayed or heard to speak, if the advertisement is in or will be in a form in which the advertised message is not fully revealed by a print copy or photograph;

(3) a statement of when and where the advertisement has been, is, or will be used;

(4) a completed lawyer advertising and solicitation communication application form; and

(5) a check or money order payable to the State Bar of Texas for the fee set by the Board of Directors. Such fee shall be for the sole purpose of defraying the expense of enforcing the rules related to such advertisements.

(c) Except as provided in (e), a lawyer shall file with the Advertising Review Committee of the State Bar of Texas no later than its first posting on the internet or other comparable network of computers information concerning the lawyer's or lawyer's firm's website. As used in this Rule, a "website" means a single or multiple page file, posted on a computer server, which describes a lawyer or law firm's practice or qualifications, to which public access is provided through publication of a uniform resource locator (URL). The filing shall include:

(1) the intended initial access page of a website;

(2) a completed lawyer advertising and solicitation communication application form; and

(3) a check or money order payable to the State Bar of Texas for the fee set by the Board of Directors. Such fee shall be for the sole purpose of defraying the expense of enforcing the rules related to such websites.

(d) A lawyer who desires to secure an advance advisory opinion, referred to as a request for pre-approval, concerning compliance of a contemplated solicitation communication or advertisement may submit to the Lawyer Advertising Review Committee, not less than thirty (30) days prior to the date of first dissemination, the material specified in (a) or (b) or the intended initial access page submitted pursuant to (c), including the application form and required fee; provided however, it shall not be necessary to submit a videotape or DVD if the videotape or DVD has not then been prepared and the production script submitted reflects in detail and accurately the actions, events, scenes, and background sounds that will be depicted or contained on such videotapes or DVDs, when prepared, as well as the narrative transcript of the verbal and printed portions of such advertisement. If a lawyer submits an advertisement or solicitation communication for pre-approval, a finding of noncompliance by the Advertising Review Committee is not binding in a disciplinary proceeding or disciplinary action, but a finding of compliance is binding in favor of the submitting lawyer as to all materials actually submitted for pre-approval if the representations, statements, materials, facts, and written assurances received in connection therewith are true and are not misleading. The finding of compliance constitutes admissible evidence if offered by a party.

(e) The filing requirements of (a), (b), and (c) do not extend to any of the following materials, provided those materials comply with Rule 7.02(a) through (c) and, where applicable, Rule 7.04(a) through (c):

(1) an advertisement in the public media that contains only part or all of the following information,

(i) the name of the lawyer or firm and lawyers associated with the firm, with office addresses, electronic addresses, telephone numbers, office and telephone service hours, telecopier numbers, and a designation of the profession such as "attorney," "lawyer," "law office," or "firm";

(ii) the particular areas of law in which the lawyer or firm specializes or possesses special competence;

(iii) the particular areas of law in which the lawyer or firm practices or concentrates or to which it limits its practice;
(iv) the date of admission of the lawyer or lawyers to the State Bar of Texas, to particular federal courts, and to the bars of other jurisdictions;
(v) technical and professional licenses granted by this state and other recognized licensing authorities;
(vi) foreign language ability;
(vii) fields of law in which one or more lawyers are certified or designated, provided the statement of this information is in compliance with Rule 7.02(a) through (c);
(viii) identification of prepaid or group legal service plans in which the lawyer participates;
(ix) the acceptance or nonacceptance of credit cards;
(x) any fee for initial consultation and fee schedule;
(xi) other publicly available information concerning legal issues, not prepared or paid for by the firm or any of its lawyers, such as news articles, legal articles, editorial opinions, or other legal developments or events, such as proposed or enacted rules, regulations, or legislation;
(xii) in the case of a website, links to other websites;
(xiii) that the lawyer or firm is a sponsor of a charitable, civic, or community program or event, or is a sponsor of a public service announcement;
(xiv) any disclosure or statement required by these rules; and
(xv) any other information specified from time to time in orders promulgated by the Supreme Court of Texas;

(2) an advertisement in the public media that:
(i) identifies one or more lawyers or a firm as a contributor to a specified charity or as a sponsor of a specified charitable, community, or public interest program, activity, or event; and
(ii) contains no information about the lawyers or firm other than names of the lawyers or firm or both, location of the law offices, and the fact of the sponsorship or contribution;

(3) a listing or entry in a regularly published law list;

(4) an announcement card stating new or changed associations, new offices, or similar changes relating to a lawyer or firm, or a tombstone professional card;

(5) in the case of communications sent, delivered, or transmitted to, rather than accessed by, intended recipients, a newsletter, whether written, digital, or electronic, provided that it is sent, delivered, or transmitted mailed only to:
(i) existing or former clients;
(ii) other lawyers or professionals; or

(iii) members of a nonprofit organization that meets the following conditions: the primary purposes of the organization do not include the rendition of legal services; the recommending, furnishing, paying for, or educating persons regarding legal services is incidental and reasonably related to the primary purposes of the organization; the organization does not derive a financial benefit from the rendition of legal services by a lawyer; and the person for whom the legal services are rendered, and not the organization, is recognized as the client of the lawyer who is recommended, furnished, or paid by the organization;

(6) a solicitation communication that is not motivated by or concerned with a particular past occurrence or event or a particular series of past occurrences or events, and also is not motivated by or concerned with the prospective client's specific existing legal problem of which the lawyer is aware;

(7) a solicitation communication if the lawyer's use of the communication to secure professional employment was not significantly motivated by a desire for, or by the possibility of obtaining, pecuniary gain; or

(8) a solicitation communication that is requested by the prospective client.

(f) If requested by the Advertising Review Committee, a lawyer shall promptly submit information to substantiate statements or representations made or implied in any advertisement in the public media and/or written solicitation communication by which the lawyer seeks paid professional employment.

Terminology: See Rule 1.00 for the definitions of "competence," "consultation," "firm," "law firm," "person," and "written."

Comment:

1. Rule 7.07 covers the filing requirements for public media advertisements (see Rule 7.04) and written, recorded, or other electronic solicitations (see Rule 7.05). Rule 7.07(a) deals with solicitation communications sent by a lawyer to one or more specified prospective clients. Rule 7.07(b) deals with advertisements in the public media. Rule 7.07(c) deals with websites. Although websites are a form of advertisement in the public media, they require different treatment in some respects and so are dealt with separately. Each provision allows the Bar to charge a fee for reviewing submitted materials, but requires that fee be set solely to defray the expenses of enforcing those provisions.

2. Copies of non-exempt solicitations communications or advertisements in the public media (including websites) must be provided to the Advertising Review Committee of the State Bar of Texas either in advance or concurrently with dissemination, together with the fee required

by the State Bar of Texas Board of Directors. Presumably, the Advertising Review Committee will report to the appropriate grievance committee any lawyer whom it finds from the reviewed products has disseminated an advertisement in the public media or solicitation communication that violates Rules 7.02, 7.03, 7.04, or 7.05, or, at a minimum, any lawyer whose violation raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects. See Rule 8.03(a).

3. Paragraph (a) does not require that a lawyer submit a copy of each and every written solicitation letter a lawyer sends. If the same form letter is sent to several people, only a representative sample of each form letter, along with a representative sample of the envelopes used to mail the letters, need be filed.

4. A lawyer wishing to do so may secure an advisory opinion from the Advertising Review Committee concerning any proposed advertisement in the public media (including a website) or any solicitation communication in advance of its first use or dissemination by complying with Rule 7.07(d). This procedure is intended as a service to those lawyers who want to resolve any possible doubts about their proposed advertisements' or solicitations' compliance with these Rules before utilizing them. Its use is purely optional. No lawyer is required to obtain advance clearance of any advertisement in the public media (including a website) or any solicitation communication from the State Bar. Although a finding of noncompliance by the Advertising Review Committee is not binding in a disciplinary proceeding, a finding of compliance is binding in favor of the submitting lawyer as to all materials actually submitted for review, as long as the lawyer's presentation to the Advertising Review Committee in connection with that advisory opinion is true and not misleading.

5. Under its Internal Rules and Operating Procedures, the Advertising Review Committee is to complete its evaluations no later than 25 days after the date of receipt of a filing. The only way that the Committee can extend that review period is to: (a) determine that there is reasonable doubt whether the advertisement or solicitation communication complies with these Rules; (b) conclude that further examination is warranted but cannot be completed within the 25 day period; and (c) advise the lawyer of those determinations in writing within that 25 day period. The Committee's Internal Rules and Operating Procedures also provide that a failure to send such a communication to the lawyer within the 25-day period constitutes approval of the advertisement or solicitation communication. Consequently, if an attorney submits an advertisement in the public media (including a website) or a solicitation communication to the Committee for advance approval not less than 30 days prior to the date of first dissemination as required by these Rules, the attorney will receive an assessment of that advertisement or communication before the date of its first intended use.

6. Consistent with the effort to protect the first amendment rights of lawyers while ensuring the right of the public to be free from misleading advertising and the right of the Texas legal profession to maintain its integrity, paragraph (e) exempts certain types of advertisements and solicitation communications prepared for the purpose of seeking paid professional employment from the filing requirements of paragraphs (a), (b), and (c). Those types of communications need not be filed at all if they were not prepared to secure paid professional employment.

7. For the most part, the types of exempted advertising listed in subparagraphs (e)(1)–(5) are objective and less likely to result in false, misleading or fraudulent content. Similarly the types of exempted solicitation communications listed in subparagraphs (e)(6)–(8) are those found least likely to result in harm to the public. See Rule 7.05(f) and Comment 7 to Rule 7.05. The fact that a particular advertisement or solicitation made by a lawyer is exempted from the filing requirements of this Rule does not exempt a lawyer from the other applicable obligations of these Rules. See generally Rules 7.01 through 7.06.

8. Paragraph (f) does not empower the Advertising Review Committee to seek information from a lawyer to substantiate statements or representations made or implied in advertisements or written communications that do not seek to obtain paid professional employment for that lawyer.

SECTION VIII. MAINTAINING THE INTEGRITY OF THE PROFESSION

Rule 8.01. Bar Admission, Reinstatement, and Disciplinary Matters

An applicant for admission to the bar, a petitioner for reinstatement to the bar, or a lawyer in connection with a bar admission application, a petition for reinstatement, or a disciplinary matter, shall not:

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

(b) fail to correct a misapprehension known by the person to have arisen in the matter, or knowingly fail to respond to a lawful demand for information from an admission, reinstatement, or disciplinary authority, except that this Rule does not require disclosure of information otherwise protected by Rule 1.05.

Terminology: See Rule 1.00 for the definitions of "knowingly," "known," and "person."

Comment:

1. The duty imposed by this Rule extends to persons seeking admission or reinstatement to the bar, as well as to lawyers. Hence, if a person makes a material false statement in connection with an application for admission or a petition for reinstatement, it may be the basis for subsequent disciplinary action if the person is admitted or reinstated, and in any event may be relevant in any subsequent application for admission or petition for reinstatement. The duty imposed by this Rule applies to a lawyer's own admission, reinstatement, or discipline, as well as that of others. Thus, for example, it is a separate professional offense for a lawyer to knowingly make a material misrepresentation or omission in connection with a disciplinary investigation of the lawyer's own conduct. Likewise, it is a separate professional offense for a lawyer to fail to respond to a lawful demand for information of a disciplinary authority inquiring into that lawyer's professional activities or conduct. See Rule 8.04(a)(8). This Rule also requires correction of any prior misstatement that the applicant, petitioner, or lawyer made and affirmative clarification of any misunderstanding on the part of the admissions, reinstatement, or disciplinary authority of which the applicant, petitioner, or lawyer involved becomes aware.

2. This Rule is subject to the provisions of the Fifth Amendment of the United States Constitution and corresponding provisions of Article 1, Section 10, of the Texas Constitution. A person relying on such a provision in response to a specific question or more general demand for information, however, should do so openly and not use the right of nondisclosure as an unasserted justification for failure to comply with this Rule. See Rule 8.04(a)(8).

3. A lawyer representing an applicant for admission or petitioner for reinstatement to the bar, or representing another lawyer who is the subject of a Disciplinary Proceeding, as defined in the Rules of Disciplinary Procedure, is governed by the rules applicable to the client-lawyer relationship, including communications protected under these Rules. See, for example, Rules 1.05 and 8.03(c).

Rule 8.02. Judicial and Legal Officials

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

(b) A lawyer who is a candidate for judicial office shall comply with the applicable provisions of the Texas Code of Judicial Conduct.

(c) A lawyer who is a candidate for an elective public office shall comply with the applicable provisions of the Texas Election Code.

Terminology: See Rule 1.00 for the definitions of "adjudicatory official" and "knows."

Comment:

1. The public often relies on assessments by lawyers in evaluating the professional or personal fitness of persons being considered for election or appointment to a judicial office and to a public legal office, such as attorney general, prosecuting attorney, and public defender. Thus, a lawyer's honest and candid opinions on such matters can contribute to improving the administration of justice. Conversely, a lawyer's false statements can unfairly undermine public confidence in the administration of justice.

2. When a lawyer seeks to be elected for a judicial or public office, the lawyer is bound by applicable limitations on political activity.

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

Rule 8.03. Reporting Professional Misconduct

(a) Except as permitted in (c) or (d), a lawyer who knows that another lawyer has committed a violation of applicable rules of professional conduct that raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects shall inform the appropriate disciplinary authority.

(b) Except as permitted in (c) or (d), a lawyer who knows that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the appropriate authority.

(c) A lawyer who knows or suspects that another lawyer or judge whose conduct the lawyer is required to report pursuant to (a) or (b) is impaired by chemical dependency on alcohol or drugs or by mental illness may report that person to an approved peer assistance program rather than to an appropriate disciplinary authority. If a lawyer elects that option, the lawyer's report to the approved

peer assistance program shall disclose any disciplinary violations that the reporting lawyer would otherwise have to disclose to the authorities referred to in (a) and (b).

(d) This rule does not require disclosure of information protected by:

(1) Rule 1.05; or

(2) any statutory or regulatory provisions applicable to the counseling activities of the approved peer assistance program.

(e) A lawyer shall not make, or assist a client in making, any agreement that restricts a lawyer's rights or obligations under this Rule.

(f) Within thirty (30) days of a finding of guilt or an order deferring adjudication by any court for the commission of an Intentional Crime or a Serious Crime, as defined by the Texas Rules of Disciplinary Procedure, a lawyer licensed in Texas shall report, in writing, to the Office of the Chief Disciplinary Counsel, the finding of guilt, including any verdict of guilty, plea of guilty or no contest, or deferred adjudication for an Intentional or Serious Crime. The appeal of the finding of guilt or order of deferred adjudication does not stay the duty to report.

Terminology: See Rule 1.00 for the definitions of "fitness," "knows," "person," "substantial," and "writing."

Comment:

1. As part of a system of self-regulation, these Rules and the rules governing judicial conduct are effective only to the extent that lawyers and judges are willing or required to enforce them.

2. In this Rule, "substantial" refers to the seriousness of the professional misconduct at issue and not the quantum of evidence of which the lawyer is aware.

3. This Rule does not prohibit a lawyer from reporting known or apparent violations to an appropriate disciplinary authority, even if the lawyer cannot determine the existence or scope of a disciplinary violation with certainty. Frequently, the existence of a violation cannot be established with certainty until a disciplinary investigation or peer assistance program inquiry has been undertaken. Similarly, an apparently isolated violation may indicate a pattern of misconduct that only such an investigation or inquiry can uncover. Reporting a possible violation is especially important if the victim is unlikely to discover the offense absent such a report.

4. This Rule also does not prohibit a lawyer who knows or suspects that another lawyer or judge is impaired by chemical dependency on alcohol or drugs or by mental illness from informing an approved peer assistance program of that concern even if unaware of any disciplinary violation committed by the possibly impaired person. If the lawyer is aware of a disciplinary violation committed by the possibly impaired person, however, the lawyer may report that person to an approved peer assistance program, to an appropriate disciplinary authority, or to both.

5. Because the reporting obligations under this Rule are central to the self-regulation of the profession, a lawyer is not excused from mandatory reporting requirements, even if the lawyer acquired the information while representing a client. But under paragraph (d), if the lawyer represents a lawyer and acquires knowledge of that lawyer's professional misconduct in the course of representing that lawyer, then the mandatory reporting requirements do not apply. This situation is governed by the Rules applicable to the client-lawyer relationship, such as Rule 1.05. In addition, paragraph (e) does not permit an agreement that restricts a lawyer's obligations under this Rule.

6. The reporting requirement in paragraph (f) applies only to the lawyer subject to the finding of guilt or order deferring adjudication.

Rule 8.04. Misconduct

(a) A lawyer shall not:

(1) violate these Rules, knowingly assist or induce another to do so, or do so through the acts of another, whether or not such violation occurred in the course of a client-lawyer relationship;

(2) commit a serious crime or commit any other criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects;

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

(4) engage in conduct constituting obstruction of justice;

(5) state or imply an ability to influence improperly a government entity or official;

(6) knowingly assist a judge or judicial officer in conduct that is a violation of law or applicable rules of judicial conduct;

(7) violate any disciplinary or disability order or judgment;

(8) fail to timely furnish to the Chief Disciplinary Counsel's office or a district grievance committee a response or other information as required by the Texas Rules of Disciplinary Procedure, unless the lawyer in good faith timely asserts a privilege or other legal ground for failure to do so;

(9) engage in conduct that constitutes barratry as defined by the law of this state;
(10) fail to comply with the Texas Rules of Disciplinary Procedure relating to notification of a lawyer's cessation of practice;
(11) engage in the practice of law when the lawyer is on inactive status or when the lawyer's right to practice has been suspended or terminated, including but not limited to situations in which a lawyer's right to practice has been administratively suspended for failure to timely pay required fees or assessments or for failure to comply with Article XII of the State Bar Rules relating to Minimum Continuing Legal Education; or
(12) violate any laws of this state relating to the professional conduct of lawyers and to the practice of law.

(b) As used in (a)(2), "serious crime" means barratry; any felony involving moral turpitude; any misdemeanor involving theft, embezzlement, or fraudulent or reckless misappropriation of money or other property; or any attempt, conspiracy, or solicitation of another to commit any of the foregoing crimes.

Terminology: See Rule 1.00 for the definitions of "fitness," "fraud," "fraudulent," and "knowingly."

Comment:

1. There are four principal sources of professional obligations for lawyers in Texas: these Rules, the State Bar Act, the State Bar Rules, and the Texas Rules of Disciplinary Procedure (TRDP). Rule 1.06(V) of the TRDP contains a partial listing of the grounds for discipline under those Rules.

2. All lawyers are presumed to know the requirements of these Rules and the TRDP.

3. Rule 8.04 identifies various forms of conduct that are grounds for discipline under these Rules, the State Bar Act, the TRDP, or the State Bar Rules. In particular, some of the provisions of Rule 8.04 are designed to correspond to certain provisions of the TRDP relating to professional misconduct.

4. Many kinds of illegal conduct reflect adversely on a lawyer's fitness to practice law. However, some illegal conduct carries no such implication. Traditionally in this State, the distinction has been drawn in terms of serious crimes and other offenses. The TRDP distinguish between intentional crimes, serious crimes, and other offenses. These Rules make only those criminal acts either amounting to serious crimes or having the salient characteristics of such crimes the subject of discipline. See Rules 8.04(a)(2) and 8.04(b).

5. Although a lawyer is personally answerable to the entire body of criminal law, a lawyer should be professionally answerable only for criminal acts that indicate a lack of those characteristics relevant to the lawyer's fitness for the practice of law, as fitness is defined in these Rules. A pattern of repeated criminal acts, even ones of minor significance when considered separately, can indicate indifference to legal obligations that legitimately could call a lawyer's overall fitness to practice into question.

6. A lawyer may refuse to comply with an obligation imposed by law upon a good faith belief, openly asserted, that no valid obligation exists. The provisions of Rule 1.02(c) concerning a good-faith challenge to the validity, scope, meaning or application of the law apply to challenges to legal regulation of the practice of law.

7. Lawyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer's abuse of public office can suggest an inability to fulfill the professional role of attorney. The same is true of the abuse of positions of private trust. See Rules 8.04(a)(2), 8.04(a)(3), and 8.04(b).

Rule 8.05. Jurisdiction[2]

(a) A lawyer is subject to the disciplinary authority of this state, if admitted to practice in this state or if specially admitted by a court of this state for a particular proceeding. In addition to being answerable for his or her conduct occurring in this state, any such lawyer also may be disciplined in this state for conduct occurring in another jurisdiction or resulting in lawyer discipline in another jurisdiction, if it is professional misconduct under Rule 8.04.

(b) A lawyer admitted to practice in this state is also subject to the disciplinary authority for:

(1) an advertisement in the public media that does not comply with these rules and that is broadcast or disseminated in another jurisdiction, even if the advertisement complies with the rules governing lawyer advertisements in that jurisdiction, if the broadcast or dissemination of the advertisement is intended to be received by prospective clients in this state and is intended to secure employment to be performed in this state; and

(2) a written solicitation communication that does not comply with these rules and that is mailed in another jurisdiction, even if the communication complies with the rules governing written solicitation communications by lawyers in that jurisdiction, if the communication is

[2] The Court is still considering proposed revisions to Rule 8.05. At this time, there are no changes to the text of the Rule; however, the Court incorporated a terminology reference directly after the Rule.

mailed to an addressee in this state or is intended to secure employment to be performed in this state.

Terminology: See Rule 1.00 for the definition of "written."

Comment:

1. This Rule describes those lawyers who are subject to the disciplinary authority of this state. It includes all lawyers licensed to practice here as well as lawyers admitted specially for a particular proceeding. This Rule is not intended to have any effect on the powers of a court to punish lawyers for contempt or for other breaches of applicable rules of practice or procedure.

2. In modern practice lawyers licensed in Texas frequently act outside the territorial limits or judicial system of this state. In doing so, they remain subject to the governing authority of this state. If their activity in another jurisdiction is substantial and continuous, it may constitute the practice of law in that jurisdiction. See Rule 5.05.

3. If the rules of professional conduct of this state and that other jurisdiction differ, principles of conflict of laws may apply. Similar problems can arise when a lawyer is licensed to practice in more than one jurisdiction and these jurisdictions impose conflicting obligations. A related problem arises with respect to practice before a federal tribunal, where the general authority of the state to regulate the practice of law must be reconciled with such authority as federal tribunals may have to regulate practice before them. In such cases, this state will not impose discipline for conduct arising in connection with the practice of law in another jurisdiction or resulting in lawyer discipline in another jurisdiction unless that conduct constitutes professional misconduct under Rule 8.04.

4. Normally, discipline will not be imposed in this state for conduct occurring solely in another jurisdiction or judicial system and authorized by the rules of professional conduct applicable thereto even if that conduct would violate these Rules. If, however, the conduct is the solicitation of employment through the use of the public media or a written solicitation that is directed at a prospective client in Texas or is for employment to be performed in Texas, discipline will be imposed if the communication does not comply with Section VII of these Rules. A lawyer admitted to practice in Texas cannot avoid the regulations of Section VII by using the public media in another state or by mailing the written solicitation from another state. This is true without regard to whether the advertisement or solicitation complies with the laws or disciplinary rules of the other state from which it originates.

SECTION IX. SEVERABILITY OF RULES

Rule 9.01. Severability

If any provision of these Rules or any application of these Rules to any person or circumstances is held invalid, such invalidity shall not affect any other provision or application of these Rules that can be given effect without the invalid provision or application and, to this end, the provisions of these Rules are severable.

Terminology: See Rule 1.00 for the definition of "person."

Comment:

The history of the regulation of American lawyers is replete with challenges to various rules on grounds of unconstitutionality. Because many of these Rules are interrelated to an extent, the voiding of a particular Rule or of a single provision in a Rule could raise questions as to whether other provisions should survive. Rule 9.01 makes clear that these Rules should be construed so as to minimize the effect of a determination that a particular application or provision of them is unconstitutional. A decision invalidating one provision or application of a Rule should not be expanded unnecessarily so as to invalidate other provisions or applications. These Rules have the specificity found in statutes, and it is appropriate for Rule 9.01 to contain a provision, frequently found in legislation, that reasonably limits the effect of the invalidity of one provision or one application of a Rule.

Misc. Docket No. 10–9190
Exhibit B

TERMINOLOGY

Rule 1.00. Terminology

The following definitions apply to all Texas Disciplinary Rules of Professional Conduct unless the context in which the word or phrase is used requires a different definition.

(a) "Adjudicatory ~~O~~official" denotes a person who serves on a Tribunal.

(b) "Adjudicatory ~~P~~proceeding" denotes the consideration of a matter by a Tribunal.

(c) "Affiliated":

(1) A lawyer is "affiliated" with a firm if either the lawyer or the lawyer's professional entity:

(i) is a shareholder, partner, member, associate, or employee of that firm;

(ii) has any other relationship with that firm, regardless of the title given to it, that provides the lawyer with access to the confidences of the firm's clients that is comparable to that typically afforded to lawyers in category (i); or

(iii) is held out as being in category (i) or (ii).

(2) A lawyer is "affiliated" with another lawyer if either the lawyers or their professional entities have any of the relationships described in categories (i)–(iii) above.

(d) "Belief" or "~~B~~believes" denotes that the person involved actually supposed the fact in question to be true. A person's belief may be inferred from circumstances.

(e) "Competent" or "~~C~~competence" denotes possession of or the ability to timely acquire the legal knowledge, skill, and training reasonably necessary for the representation of the client.

(f) "Confirmed in writing," when used in reference to the informed consent of a person, denotes informed consent that is provided in writing by the person, or a writing that a lawyer promptly transmits to the person confirming an oral informed consent. If it is not reasonable for the lawyer to obtain or transmit the writing at the time the person provides informed consent, then the lawyer shall obtain or transmit it within a reasonable time after the person provides informed consent.

(g) "Consult" or "~~C~~consultation" denotes communication of information and advice reasonably sufficient to permit the client to appreciate the significance of the matter in question.

(h) "Firm" or "~~L~~law firm" denotes a lawyer or lawyers in a ~~private firm~~law partnership, professional corporation, sole proprietorship, or other association authorized to practice law; or a lawyer or

lawyers employed in the legal department of a corporation, legal services organization, or other organization, or in a ~~unit of~~ government entity.

(i) "Fitness" denotes those qualities of physical; and mental ~~and psychological~~ health that enable a ~~person~~lawyer to discharge ~~a~~the lawyer's responsibilities to a clients in conformity with the Texas Disciplinary Rules of Professional Conduct. Normally a lack of fitness is indicated most clearly by a persistent inability to discharge, or an unreliability in carrying out, significant obligations.

(j) "Fraud" or ~~"Fraudulent" denotes conduct having a purpose~~"fraudulent," when used in relation to conduct by a lawyer, denotes an intent to deceive and ~~not merely negligent~~either:

(1) a knowing misrepresentation ~~or failure to apprise another of relevant information.~~ of a material fact; or

(2) a knowing concealment of a material fact if there is a duty to disclose the material fact.

(k) "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has explained, in a manner that a reasonable lawyer would believe sufficient for the person to understand, the material risks of and reasonably available alternatives to the proposed course of conduct.

(l)"Knowingly," "~~K~~known," or "~~K~~knows" denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.

~~"Law firm" : see Firm.~~

(m) "Partner" denotes ~~an individual or corporate~~a member of a partnership ~~or a~~, shareholder in a law firm organized as a professional corporation, or member of an association authorized to practice law.

(n) "Person" includes a legal entity, as well as an individual.

(o) "Personally prohibited" means a lawyer is prohibited based on the lawyer's direct knowledge or involvement rather than being prohibited based on the lawyer merely being affiliated with another lawyer.

(p) "Reasonable" or "~~R~~reasonably," when used in relation to conduct by a lawyer, denotes the conduct of a reasonably prudent and competent lawyer.

(q) "Reasonable belief" or "Rreasonably ~~believes"~~believes," when used in reference to a lawyer, denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.

(r) "Reasonably Sshould Kknow," when used in reference to a lawyer, denotes that a lawyer of reasonable ~~lawyer under the same or similar circumstances~~prudence and competence would ~~know~~ascertain the matter in question.

(s) "Represents": A lawyer "represents" a client when the lawyer personally exercises legal skill or judgment on behalf of the client in connection with a matter.

(t) "Substantial" or "substantially," when used in reference to degree or extent, denotes a material matter of ~~meaningful~~clear significance ~~or involvement~~.

(u) "Tribunal" denotes ~~any governmental body or official or any other person engaged in a process of resolving a particular dispute or controversy. "Tribunal" includes such institutions as courts and~~a court, an arbitrator in a binding arbitration proceeding, or a legislative body, an administrative ~~agencies when engaging in adjudicatory or licensing activities as defined by applicable law or rules of practice or procedure, as well as judges, magistrates, special masters, referees, arbitrators, mediators, hearing officers and comparable persons empowered to resolve or to recommend a resolution of~~agency, or another body acting in an adjudicative capacity. A legislative body, an administrative agency, or another body acts in an adjudicative capacity when, after the presentation of evidence or legal argument by a party or parties, one or more neutral officials will render a proposal for decision or a binding legal order or decision directly affecting a party's or parties' interests in a particular matter~~; but it does not include jurors, prospective jurors, legislative bodies or their committees, members or staffs, nor does it include other governmental bodies when acting in a legislative or rule-making capacity~~.

(v) "Writing" or "written" denotes a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photostating, photography, audio or videorecording, and e-mail. A "signed" writing includes an electronic sound, symbol, or process attached to or logically associated with a writing and executed or adopted by a person with the intent to sign the writing.

SECTION I. CLIENT-LAWYER RELATIONSHIP

Rule 1.01. Competent and Diligent Representation

(a) A lawyer shall not accept or continue employment in a legal matter ~~which~~that the lawyer knows or reasonably should know is beyond the lawyer's competence, unless:

(1) another lawyer who is competent to handle the matter is, with the prior informed consent of the client, associated in the matter; or

(2) the advice or assistance of the lawyer is reasonably required in an emergency and the lawyer limits the advice and assistance to that ~~which is~~ reasonably necessary in the circumstances.

(b) In representing a client, a lawyer shall not: ~~(1)~~ neglect a legal matter entrusted to the lawyer; ~~or (2) frequently fail to carry out completely the obligations that the lawyer owes to a client or clients~~ but shall act with reasonable diligence and promptness.

(c) As used in this Rule, "neglect" signifies inattentiveness involving a conscious disregard for the responsibilities owed to a client or clients.

Terminology: See Rule 1.00 for the definitions of "competence," "competent," "informed consent," "knows," "reasonable," "reasonably," "reasonably should know," and "represents."

Rule 1.02. Scope ~~and Objectives~~ of Representation and Allocation of Authority

(a) Subject to ~~paragraphs~~ (b), through (cf), ~~(d),~~ and ~~(e), (f), and (g)~~Rule 1.14, a lawyer shall abide by a client's decisions:

(1) concerning the objectives and general methods of representation;

(2) whether to accept an offer of settlement of a matter, except as otherwise authorized by law; and

(3) ~~i~~in a criminal case, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial, and whether the client will testify.

(b) A lawyer may limit the scope, objectives, and general methods of the representation if the client provides informed consent~~s after consultation~~ and the limitation is reasonable under the circumstances.

(c) A lawyer shall not assist or counsel a client to engage in conduct that the lawyer knows is criminal or fraudulent. A lawyer may discuss the legal consequences of any proposed course of

conduct with a client and may counsel and represent a client in connection with the making of a good faith effort to determine the validity, scope, meaning, or application of ~~the~~ law.

(d) When a lawyer has confidential information clearly establishing that a client is likely to commit a criminal or fraudulent act that is likely to result in substantial injury to the financial interests or property of another, the lawyer shall promptly make reasonable efforts under the circumstances to dissuade the client from committing the crime or fraud.

(e) When a lawyer has confidential information clearly establishing that the lawyer's client has committed a criminal or fraudulent act in the commission of which the lawyer's services have been used, the lawyer shall make reasonable efforts under the circumstances to persuade the client to take corrective action.

(f) When a lawyer knows that a client expects representation not permitted by law or these rRules ~~of professional conduct or other law~~, the lawyer shall consult with the client regarding the relevant limitations on the lawyer's conduct.

~~(g) A lawyer shall take reasonable action to secure the appointment of a guardian or other legal representative for, or seek other protective orders with respect to, a client whenever the lawyer reasonably believes that the client lacks legal competence and that such action should be taken to protect the client.~~

Terminology: See Rule 1.00 for the definitions of "consult," "consultation," "informed consent," "knows," "reasonable," "represents," and "substantial."

Rule 1.03. Communication

(a) A lawyer shall:

(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent is required by these Rules;

(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;

(3) keep ~~a~~ the client reasonably informed about the status of ~~a~~ the matter; and

(4) promptly comply with reasonable requests for information.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Terminology: See Rule 1.00 for the definitions of "consult," "informed consent," "reasonably," and "represents."

Rule 1.04. Fees

(a) A lawyer shall not enter into an arrangement for, charge, or collect an illegal ~~fee~~ or ~~unconscionable~~ clearly excessive fee. A fee is ~~unconscionable~~ clearly excessive ~~if a competent lawyer could not form a reasonable belief~~ when, after a review of the facts, a reasonable lawyer would be left with a firm belief or conviction that the fee is in excess of a reasonable fee.

(b) Factors that may be considered in determining the reasonableness of a fee include, but are not limited to ~~the exclusion of other relevant factors~~, the following:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) whether the fee is fixed or contingent on results obtained or uncertainty of collection before the legal services have been rendered.

(c) ~~When~~ The scope of the ~~lawyer has not regularly represented the client~~, representation and the basis or rate of the fee and expenses shall be communicated to the client~~, preferably in writing~~, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. Any change in the basis or rate of the fee or expense shall also be communicated to the client.

(d) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by ~~paragraph (c)~~law or ~~other law~~(f). A contingent fee agreement shall:

(1) be in writing, and ~~shall~~signed by the lawyer and the client;

(2) state the method by which the fee is to be determined~~.~~, including if there is to be a differentiation in the percentage or percentages that ~~shall~~will accrue to the lawyer in the

event of settlement, trial, or appeal, and the percentage for each ~~shall be stated. The agreement shall~~;

(3) state the litigation and other expenses to be deducted from the recovery, and whether such expenses are to be deducted before or after the contingent fee is calculated; and

(4) inform the client of the litigation and other expenses for which the client will be liable whether or not the client is the prevailing party.

(e) Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement describing the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

(~~e~~f) A lawyer shall not enter into an arrangement for, charge, or collect a contingent fee for representing a defendant in a criminal case.

(~~f~~g) A division or arrangement for division of a fee between lawyers who are not in the same firm may be made only if:

(1) the division is:

(i) in proportion to the professional services performed by each lawyer; or

(ii) made between lawyers who assume joint responsibility for the representation; ~~and~~

(2) the client consents in writing to the terms of the arrangement prior to the time of the association or referral proposed, including:

(i) the identity of all lawyers or law firms who will participate in the fee sharing arrangement~~, and~~;

(ii) whether fees will be divided based on the proportion of services performed or by lawyers agreeing to assume joint responsibility for the representation; and

(iii) the share of the fee that each lawyer or law firm will receive or, if the division is based on the proportion of services performed, the basis on which the division will be made; and

(3) the aggregate fee does not violate ~~paragraph~~ (a).

(~~g~~h) Every agreement that allows a lawyer or law firm to associate other counsel in the representation of a person, or to refer the person to other counsel for such representation, and that results in such an association with or referral to a different law firm or a lawyer in such a different firm, shall be confirmed by an arrangement conforming to ~~paragraph (f~~(g). Consent by a client or a prospective client without knowledge of the information specified in ~~subparagraph (f~~(g)(2) does not constitute a confirmation within the meaning of this rRule. No ~~attorney~~lawyer shall collect or seek to collect a fees or expenses in connection with any such agreement that is not confirmed in that way, except for:

(1) the reasonable value of legal services provided to that person; and
(2) the reasonable and necessary expenses actually incurred on behalf of that person.

(~~h~~i) Paragraph (~~f~~g) ~~of this rule~~ does not apply to payment made to a former partner or associate pursuant to a separation or retirement agreement, or to payment made to a lawyer referral program ~~certified by the State Bar of Texas~~ in accordance with ~~the Texas Lawyer Referral Service Quality Act, Tex. Occ. Code 952.001 et seq., or any amendments or recodifications thereof~~ law.

Terminology: See Rule 1.00 for the definitions of "belief," "firm," "law firm," "person," "reasonable," "represent," "writing," and "written."

Rule 1.05. Confidentiality ~~of Information~~

(a) ~~"~~Confidential information~~" includes both "privileged information" and "unprivileged client information." "Privileged information" refers to the information of a client protected by the lawyer-client privilege of Rule 503 of the Texas Rules of Evidence or of Rule 503 of the Texas Rules of Criminal Evidence or by the principles of attorney-client privilege governed by Rule 501 of the Federal Rules of Evidence for United States Courts and Magistrates. "Unprivileged client information" means:~~

(1) in the case of a client or former client, is all information relating to ~~a client or furnished by the client, other than privileged information, acquired by the lawyer during the course of or by reason of the~~ representation of the client from whatever source, whether acquired by the lawyer personally or through an agent, other than information that is or becomes generally known or is readily obtainable from sources generally available to the public; and
(2) in the case of a prospective client, as described in Rule 1.17, is information furnished to the lawyer by that prospective client, either personally or through an agent or other representative authorized to act on the prospective client's behalf, in the course of seeking legal representation, other than information that:

(i) is or becomes generally known or is readily obtainable from sources generally available to the public; or
(ii) is furnished under the circumstances described in Rule 1.17(d)(2).

(b) Except as permitted by ~~paragraphs (c) and (d)~~ or Rule 1.14, or ~~as~~ required by ~~paragraphs (e), and~~ (~~f~~d), a lawyer shall not knowingly:

~~(1) Reveal confidential information of a client or a former client to:~~

~~(i) a person that the client has instructed is not to receive the information; or~~
~~(ii) anyone else, other than the client, the client's representatives, or the members, associates, or employees of the lawyer's law firm.~~

~~(2) Use confidential information of a client to the disadvantage of the client unless the client consents after consultation.~~

~~(3) Use confidential information of a former client to the disadvantage of the former client after the representation is concluded unless the former client consents after consultation or the confidential information has become generally known.~~

~~(4) Use privileged information of a client for the advantage of the lawyer or of a third person, unless the client consents after consultation.~~

(1) disclose information the lawyer knows or reasonably should know is confidential; or

(2) use information the lawyer knows or reasonably should know is confidential to the disadvantage of a client, former client, or prospective client.

~~(c) A lawyer may reveal confidential information:~~

~~(1) When the lawyer has been expressly authorized to do so in order to carry out the representation.~~

~~(2) When the client consents after consultation.~~

~~(3) To the client, the client's representatives, or the members, associates, and employees of the lawyer's firm, except when otherwise instructed by the client.~~

~~(4) When the lawyer has reason to believe it is necessary to do so in order to comply with a court order, a Texas Disciplinary Rules of Professional Conduct, or other law.~~

~~(5) To the extent reasonably necessary to enforce a claim or establish a defense on behalf of the lawyer in a controversy between the lawyer and the client.~~

~~(6) To establish a defense to a criminal charge, civil claim or disciplinary complaint against the lawyer or the lawyer's associates based upon conduct involving the client or the representation of the client.~~

~~(7) When the lawyer has reason to believe it is necessary to do so in order to prevent the client from committing a criminal or fraudulent act.~~

~~(8) To the extent revelation reasonably appears necessary to rectify the consequences of a client's criminal or fraudulent act in the commission of which the lawyer's services had been used.~~

~~(d) A lawyer also may reveal unprivileged client information.~~

~~(1) When impliedly authorized to do so in order to carry out the representation.~~

~~(2) When the lawyer has reason to believe it is necessary to do so in order to:~~

~~(i) carry out the representation effectively;~~

~~(ii) defend the lawyer or the lawyer's employees or associates against a claim of wrongful conduct;~~

~~(iii) respond to allegations in any proceeding concerning the lawyer's representation of the client; or~~

~~(iv) prove the services rendered to a client, or the reasonable value thereof, or both, in an action against another person or organization responsible for the payment of the fee for services rendered to the client.~~

(c) A lawyer may disclose or use confidential information to the extent reasonably necessary:

(1) when the client, former client, or prospective client provides informed consent for the lawyer to do so;

(2) except when otherwise instructed, when communicating with:

(i) representatives of the client, former client, or prospective client;

(ii) any affiliated lawyer or employees of the lawyer or affiliated lawyer; or

(iii) any persons who are required to be supervised in accordance with the requirements of Rule 5.03;

(3) when the lawyer reasonably believes it is necessary to:

(i) comply with a court order, law, or these Rules;

(ii) prevent the client, former client, or prospective client from committing a criminal or fraudulent act;

(iii) rectify the consequences of a client or former client's criminal or fraudulent act in the commission of which the lawyer's services had been used;

(iv) prevent reasonably certain death or substantial bodily harm;

(v) establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, former client, or prospective client;

(vi) establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client, former client, or prospective client was involved;

(vii) respond to allegations in any proceeding concerning the lawyer's representation of the client or former client or discussion with a prospective client; or

(viii) carry out the representation effectively, except when otherwise instructed by the client; or

(4) when the lawyer seeks legal advice about the lawyer's compliance with these Rules.

~~(c)~~ (d) A lawyer shall disclose confidential information:

(1) ~~W~~when a lawyer has ~~confidential~~ information clearly establishing that a client is likely to commit a criminal or fraudulent act that is likely to result in death or substantial bodily harm to a person, ~~the lawyer shall reveal confidential information~~ to the extent ~~revelation~~ disclosure reasonably appears necessary to prevent the client from committing the criminal or fraudulent act~~.~~; or

(~~f~~2) ~~A lawyer shall reveal confidential information~~ when required to do so by Rule ~~3.03(a)(2),~~ 3.03~~(b)~~(c)–(e)~~;~~ or ~~by~~ Rule 4.01(b).

Terminology: See Rule 1.00 for the definitions of "affiliated," "informed consent," "knowingly," "known," "knows," "person," "reasonably," "reasonably believes," "reasonably should know," "represents," and "substantial."

Rule 1.06. Conflicts of Interest~~: General Rule~~

(a) A conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client, or a third person, or by a personal interest of the lawyer.

(~~a~~b) A lawyer shall not, even with informed consent, represent opposing parties ~~to~~ in the same ~~litigation~~ matter before a tribunal.

~~(b) In other situations and except to the extent permitted by paragraph (c), a lawyer shall not represent a person if the representation of that person:~~

~~(1) involves a substantially related matter in which that person's interests are materially and directly adverse to the interests of another client of the lawyer or the lawyer's firm; or~~

~~(2) reasonably appears to be or become adversely limited by the lawyer's or law firm's responsibilities to another client or to a third person or by the lawyer's or law firm's own interests.~~

(c) In situations other than the situation ~~A lawyer may represent a client in the circumstances~~ described in (b) ~~if~~, when representation of a client will involve a conflict of interest, the lawyer shall not represent the client unless:

(1) the lawyer reasonably believes ~~the representation of each client will not be materially affected~~ that the lawyer will be able to provide competent and diligent representation to the client; ~~and~~

(2) ~~each affected or potentially affected~~ the client provides informed consents ~~to such representation after full disclosure of the existence, nature, implications, and possible adverse consequences of the common representation and the advantages involved, if any~~, confirmed in writing; and

(3) the representation complies with Rule 1.07 if the lawyer is considering representing more than one client in the same matter.

~~(d) A lawyer who has represented multiple parties in a matter shall not thereafter represent any of such parties in a dispute among the parties arising out of the matter, unless prior consent is obtained from all such parties to the dispute.~~

(ed) If a lawyer has accepted representation in violation of this Rule, or if ~~multiple~~a representation properly accepted becomes improper under this Rule, the lawyer shall promptly withdraw from one or more representations to the extent necessary for any remaining representation not to be in violation of these Rules.

(fe) ~~If~~When a lawyer ~~would be~~is personally prohibited by this Rule from ~~engaging in particular conduct, no other lawyer while a member or associated with that lawyer's firm may engage in that conduct.~~representing a person in a matter, no lawyer who is affiliated with the personally prohibited lawyer, and who knows or reasonably should know of the prohibition, shall represent that person in that matter, unless the prohibition is based only on a personal interest of the personally prohibited lawyer and the affiliated lawyer reasonably believes that the affiliated lawyer will be able to provide competent and diligent representation.

Terminology: See Rule 1.00 for the definitions of "affiliated," "competent," "confirmed in writing," "informed consent," "knows," "person," "personally prohibited," "reasonably believes," "reasonably should know," "represents," "tribunal," and "writing."

Rule 1.07. Conflicts of Interest: ~~Intermediary~~Multiple Clients in the Same Matter

(a) A lawyer shall not ~~act as intermediary between~~ represent two or more clients in a matter unless:

(1) the representation complies with Rule 1.06 ~~the lawyer consults with each client concerning the implications of the common representation, including the advantages and risks involved, and the effect on the attorney-client privileges, and obtains each client's written consent to the common representation~~;

~~(2) the lawyer reasonably believes that the matter can be resolved without the necessity of contested litigation on terms compatible with the clients' best interests, that each client will be able to make adequately informed decisions in the matter and that there is little risk of material prejudice to the interests of any of the clients if the contemplated resolution is unsuccessful; and~~

(23) ~~the lawyer reasonably believes that the common representation can be undertaken impartially and without improper effect on other responsibilities the lawyer has to any of the clients.~~ prior to undertaking the representation or as soon as reasonably practicable thereafter, the lawyer discloses to the clients that during the representation the lawyer:

(i) must act impartially as to all clients;

(ii) cannot serve as an advocate for one client in the matter against any of the other clients, as a consequence of which each client must be willing to make independent decisions without the lawyer's advice to resolve issues that arise among the clients concerning the matter; and

(iii) may be required to withdraw from representing some or all of the clients before the matter is completed due to events that occur during the representation; and

(3) as soon as reasonably practicable after making the disclosures required by (a)(2), the lawyer obtains each client's informed consent, confirmed in writing, to the representation.

~~(b) While acting as intermediary, the lawyer shall consult with each client concerning the decision to be made and the considerations relevant in making them, so that each client can make adequately informed decisions.~~

~~(c) A lawyer shall withdraw as intermediary if any of the clients so requests, or if any of the conditions stated in paragraph (a) is no longer satisfied. Upon withdrawal, the lawyer shall not continue to represent any of the clients in the matter that was the subject of the intermediation.~~

~~(d) Within the meaning of this Rule, a lawyer acts as intermediary if the lawyer represents two or more parties with potentially conflicting interests.~~

(b) When a lawyer represents multiple clients in a matter pursuant to a court order or appointment, and the court requires or permits the lawyer to conduct the representation in accordance with standards that differ from those set out in this Rule, the lawyer may comply with those different standards notwithstanding this Rule.

(ec) ~~If~~ When a lawyer ~~would be~~ is personally prohibited by this Rule from ~~engaging in particular conduct, no other lawyer while a member of or associated with that lawyer's firm may engage in that conduct~~ representing a person in a matter, no lawyer who is affiliated with the personally prohibited lawyer, and who knows or reasonably should know of the prohibition, shall represent that person in that matter.

Terminology: See Rule 1.00 for the definitions of "affiliated," "confirmed in writing," "informed consent," "knows," "person," "personally prohibited," "reasonably," "reasonably should know," "represents," and "writing."

Rule 1.08. Conflicts of Interest: Prohibited Transactions

(a) A lawyer shall not enter into a business transaction with a client, other than a standard commercial transaction between the lawyer and the client for products or services that the client generally markets to others, unless:

(1) the lawyer reasonably believes that the terms of the transaction ~~and terms on which~~ between the lawyer ~~acquires~~ and the ~~interest~~ client:

(i) are fair and reasonable to the client; and

(ii) if known to the lawyer and not known to the client ~~and~~, are fully disclosed in a manner ~~which~~ that can be reasonably understood by the client;

(2) ~~the client is given~~ the lawyer advises the client of the desirability of seeking, and gives the client a reasonable opportunity to seek, the advice of independent legal counsel ~~in~~ on the transaction; and

(3) the client ~~consents in writing thereto~~ provides informed consent, confirmed in a writing signed by the client, to the material terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

(b) A lawyer shall ~~not~~ neither prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer ~~as a parent~~ any substantial gift, ~~child, sibling, or spouse~~ nor solicit any substantial gift from a client, ~~including a testamentary gift, except where the client~~ for the lawyer or for a person related to the lawyer, unless the lawyer or other person is related to the ~~donee~~ client. For the purposes of this paragraph, related persons include a spouse, child, grandchild, parent, grandparent, and other relative or individual with whom the lawyer or the client maintains a close, familial relationship.

(c) ~~Prior to~~ Before the conclusion of all aspects of the matter giving rise to ~~the~~ a lawyer's employment, a lawyer shall not make or negotiate an agreement with a client, prospective client, or former client ~~giving~~, or anyone acting on that person's behalf, that gives the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.

(d) A lawyer shall not provide financial assistance to a client in connection with ~~pending or~~ contemplated ~~litigation~~ or ~~administrative~~ pending proceedings before a tribunal, except that:

(1) a lawyer may advance or guarantee ~~court~~ the costs; and expenses of ~~litigation or administrative~~ such proceedings, and reasonably necessary medical and living expenses, the repayment of which may be contingent on the outcome of the matter; and

(2) a lawyer representing an indigent client may pay ~~court~~ costs and expenses of ~~litigation~~ such proceedings on behalf of the client.

(e) A lawyer shall not accept compensation for representing a client from one other than the client unless:

(1) the client, if not represented by a court-appointed lawyer or a lawyer employed by a legal service program incorporated as a nonprofit entity under the Business Organizations Code, ~~consents~~ provides informed consent;

(2) ~~there is no interference with the lawyer's independence of~~ the lawyer reasonably believes that the lawyer's exercise of independent professional judgment ~~or with~~n behalf of the ~~client-lawyer relationship~~ client will not be affected; and

(3) information relating to representation of ~~a~~ the client is protected as required by Rule 1.05.

(f) ~~A~~Except as otherwise authorized by law, a lawyer who represents two or more clients shall not ~~participate in making~~ make an aggregate settlement of the claims of or against ~~the~~ that lawyer's clients, or in a criminal case an aggregated agreement to guilty or nolo contendere pleas, unless ~~each client has consented after consultation, including disclosure of~~ the lawyer obtains the informed consent of each client, confirmed in writing, after advising each client of:

(1) the total amount of the settlement or result of the agreement;

(2) the existence and nature of ~~all the~~ material claims, defenses, or pleas involved ~~and of~~;

(3) the nature and extent of ~~the~~ each client's participation ~~of each person~~ in the settlement or agreement, whether by contribution to payment, share of receipts, or resolution of criminal charges;

(4) the total fees, costs, and expenses to be paid to the lawyer from the proceeds, or by an opposing party or parties; and

(5) the method by which the costs and expenses are to be apportioned to each client.

(g) A lawyer shall not:

(1) make an agreement with a client prospectively limiting the lawyer's liability to a client for malpractice ~~unless permitted by law and the client is independently represented~~ or professional misconduct unless the client is represented by independent legal counsel in making the agreement~~, or~~;

(2) make an agreement with a client that requires a dispute between the lawyer and client to be referred to binding arbitration unless either:

(i) the client is represented by independent legal counsel in making the agreement; or

(ii) the lawyer discloses to the client, in a manner that can reasonably be understood by the client, the scope of the issues to be arbitrated, that the client will waive a trial before a judge or jury on these issues, and that the rights of appeal may be limited; or

(3) settle a claim or potential claim for ~~such liability~~ malpractice or professional misconduct with ~~an unrepresented~~ a client or former client ~~with out first advising~~ of the lawyer not represented by independent legal counsel with respect to that claim unless the lawyer advises that person in writing ~~that independent representation is appropriate~~ of the desirability of seeking, and gives a reasonable opportunity to seek, the advice of independent legal counsel in connection therewith.

(h) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation in which the lawyer is ~~conducting for~~ representing a client, except that the lawyer may:

(1) acquire a lien granted by law to secure the lawyer's fee or expenses; and

(2) contract in a civil case with a client for a contingent fee that is permissible under Rule 1.04.

(i) ~~If a~~ When a lawyer ~~would be~~ is personally prohibited by this Rule from engaging in particular conduct, no ~~other lawyer while a member of or associated with that lawyer's firm may~~ lawyer who is affiliated with the personally prohibited lawyer, and who knows or reasonably should know of the prohibition, shall engage in that conduct.

~~(j) As used in this Rule, "business transactions" does not include standard commercial transactions between the lawyer and the client for products or services that the client generally markets to others.~~

Terminology: See Rule 1.00 for the definitions of "affiliated," "confirmed in writing," "informed consent," "known," "knows," "person," "personally prohibited," "reasonable," "reasonably," "reasonably believes," "reasonably should know," "represents," "substantial," "tribunal," and "writing."

Rule 1.09. Conflicts of Interest: Former Client

(a) ~~Without prior consent,~~ Unless the former client provides informed consent, confirmed in writing:

(1) a lawyer who personally has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client; and

(2) if a lawyer personally prohibited by (a)(1) has left the firm with which the lawyer was affiliated at the time the lawyer personally represented the former client, no lawyer who is presently affiliated with that firm, and who knows or reasonably should know of the prohibition, shall represent another person in the same or a substantially related matter in which the formerly affiliated lawyer represented the client if any lawyer remaining in the firm has information protected by Rule 1.05 or 1.09(d) that is material to the matter.

(b) Unless the former client provides informed consent, confirmed in writing, a lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was affiliated previously represented a client:

(1) whose interests are materially adverse to the interests of that person; and

(2) about whom the lawyer acquired information protected by Rule 1.05 or 1.09(d) that is material to the matter.

(c) Unless the former client provides informed consent, confirmed in writing:

(1) a lawyer who personally has formerly represented a client in a matter shall not thereafter represent another person in a matter adverse to the former client: ~~(1)~~ in which such other person questions the validity of the lawyer's services or work product for the former client; and

(2) if a lawyer personally prohibited by (c)(1) has left the firm with which the lawyer was affiliated at the time the lawyer provided the services or work product to the former client, no lawyer who is presently affiliated with that firm, and who knows or reasonably should know of the prohibition, shall represent a person in a matter that requires a challenge to the formerly affiliated lawyer's services or work product for the former client.

~~(2) if the representation in reasonable probability will involve a violation of Rule 1.05; or~~

~~(3) if it is the same or a substantially related matter.~~

~~(b) Except to the extent authorized by Rule 1.10, when lawyers are or have become members of or associated with a firm, none of them shall knowingly represent a client if any one of them practicing alone would be prohibited from doing so by paragraph (a).~~

~~(c) When the association of a lawyer with a firm has terminated, the lawyers who were then associated with that lawyer shall not knowingly represent a client if the lawyer whose association with that firm has terminated would be prohibited from doing so by paragraph (a)(1) or if the representation in reasonable probability will involve a violation of Rule 1.05.~~

(d) A lawyer who personally has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former client except as these Rules provide, or when the information is or becomes generally known or is readily obtainable from sources generally available to the public; or

(2) disclose information relating to the representation except as these Rules provide.

(e) When a lawyer is personally prohibited by this Rule from representing a person in a matter, no lawyer who is affiliated with the personally prohibited lawyer, and who knows or reasonably should know of the prohibition, shall represent that person in that matter.

Terminology: See Rule 1.00 for the definitions of "affiliated," "confirmed in writing," "firm," "informed consent," "knowingly," "known," "knows," "person," "personally prohibited," "reasonably should know," "represents," and "writing."

Rule 1.10. ~~Successive Government and Private Employment~~ Special Conflicts of Interest: Former and Current Government Officers and Employees

(a) Except as law may otherwise expressly permit, a lawyer shall not represent a private client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government entity provides informed consent, confirmed in writing, to the representation ~~agency consents after consultation~~.

(b) ~~No lawyer in a firm with which a lawyer subject to paragraph (a) is associated may knowingly undertake or continue representation in such a~~ When a lawyer is personally prohibited by (a) from representing a private client in a matter, no lawyer who is affiliated with the personally prohibited lawyer, and who knows or reasonably should know of the prohibition, shall represent that private client in that matter unless:

(1) ~~T~~the personally prohibited lawyer ~~subject to paragraph (a)~~ is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(2) written notice is ~~given with reasonable promptness~~ promptly given to the appropriate government ~~agency~~ entity disclosing the affiliation of the personally prohibited lawyer and the screening measures adopted to ensure compliance with this Rule.

(c) Except as law may otherwise expressly permit, a lawyer having information that the lawyer knows ~~or should know~~ is confidential government information about a person ~~or other legal entity~~ acquired when the lawyer was a public officer or employee ~~may~~ shall not represent a private client whose interests are adverse to that person ~~or legal entity.~~ in a matter in which the lawyer knows or reasonably should know the information could be used to the material disadvantage of that person. As used in this Rule, the term "confidential government information" means information that has been obtained under government authority and that, at the time this Rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose and that is not otherwise available to the public.

(d) ~~After learning that a lawyer in the firm is subject to paragraph (c) with respect to a particular matter, a firm may undertake or continue representation~~ When a lawyer is personally prohibited by (c) from representing a private client in a matter, no lawyer who is affiliated with the personally prohibited lawyer, and who knows or reasonably should know of the prohibition, shall represent that private client in that matter ~~only if that disqualified~~ unless the personally prohibited lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom.

(e) Except as law may otherwise expressly permit, a lawyer currently serving as a public officer or employee shall not:

(1) ~~P~~participate in a matter involving a former private client ~~when the lawyer had represented that client in the same matter~~ if doing so would violate Rule 1.09;

(2) participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless ~~under applicable law no one is, or by lawful delegation may be, authorized to act in the lawyer's stead in the matter~~ the appropriate government entity provides informed consent, confirmed in writing; or

(~~2~~3) ~~N~~negotiate for private employment with any person who is involved as a party or as ~~attorney~~ a lawyer for a party in a matter in which the lawyer is participating personally and substantially, except that a court lawyer to an adjudicatory official may negotiate for private employment in accordance with Rule 1.11.

(f) As used in this rRule, the term "matter" ~~does not include regulation-making or rule-making proceedings or assignments, but~~ includes:

(1) ~~A~~any adjudicatory proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest, or other ~~similar,~~ comparable particular action or transaction involving a specific party or parties, but not regulation-making or rule-making proceedings or assignments; and

(2) any other action or transaction covered by ~~the~~ conflicts-of-interest statutes or by conflicts-of-interest rules of the appropriate government ~~agency~~ entity.

(g) As used in this rRule, the term ~~"confidential government information" means information which has been obtained under governmental authority and which, at the time this rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose, and which is not otherwise available to the public~~ "private client" means any person, including a government entity, who is represented by the lawyer when the lawyer is engaged in the private practice of law.

(h) As used in this Rule, ~~"Private Client" includes not only a private party but also a governmental agency if the lawyer is not a public officer or employee of that agency.~~the term "screened" means that the law firm:

(1) has instituted measures adequate to prevent participation of the personally prohibited lawyer in the matter and to protect from disclosure information that the personally prohibited lawyer is obligated to protect under applicable law or these Rules; and

(2) can demonstrate that the personally prohibited lawyer did not disclose the information described in (h)(1) before the law firm implemented the screening measures described in (h)(1).

~~(i) A lawyer who serves as a public officer or employee of one body politic after having served as a public officer of another body politic shall comply with paragraphs (a) and (c) as if the second body politic were a private client and with paragraph (e) as if the first body politic were a private client.~~

Terminology: See Rule 1.00 for the definitions of "adjudicatory official," "adjudicatory proceeding," "affiliated," "confirmed in writing," "informed consent," "knows," "law firm," "person," "personally prohibited," "reasonably should know," "represents," "substantially," "writing," and "written."

Rule 1.11. Special Conflicts of Interest: Adjudicatory Officials, ~~or~~ Third-Party Neutrals, and Court Lawyers ~~Clerk~~

(a) A lawyer shall not represent ~~anyone~~ person in connection with a matter in which the lawyer ~~has passed upon the merits or otherwise~~ participated personally and substantially as an adjudicatory official or a court lawyer ~~clerk~~ to an adjudicatory official, or as a third-party neutral in a nonbinding proceeding, unless all parties to the proceeding provide informed consent ~~after disclosure~~, confirmed in writing.

(b) A lawyer ~~who is an adjudicatory official~~ shall not negotiate for employment with any person who is involved as a party or as ~~attorney~~ lawyer for a party in a pending matter in which ~~that official~~ the lawyer is participating personally and substantially as an adjudicatory official, or as a third-party neutral in a nonbinding proceeding. A lawyer serving as a court lawyer ~~clerk~~ to an adjudicatory official may negotiate for employment with a party or ~~attorney~~ lawyer involved in a pending matter in which the ~~clerk~~ court lawyer is participating personally and substantially, but only after the ~~clerk~~ court lawyer has notified the adjudicatory official.

(c) ~~If paragraph (a) is applicable to a lawyer, no other lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in the~~ When a lawyer is personally

prohibited by (a) from representing a person in a matter, no lawyer who is affiliated with the personally prohibited lawyer, and who knows or reasonably should know of the prohibition, shall represent that person in that matter unless:

(1) the personally prohibited lawyer ~~who is subject to paragraph (a) is~~ timely screened from any participation in the matter in accordance with Rule 1.10(h) and is apportioned no part of the fee therefrom; and

(2) written notice is promptly given to the ~~other parties to the proceeding.~~ parties and any appropriate tribunal disclosing the affiliation of the personally prohibited lawyer and the screening measures adopted to ensure compliance with this Rule.

(d) For purposes of this Rule, "court lawyer" includes law clerks, briefing attorneys, and staff attorneys, whether or not assigned to a particular adjudicatory official, as well as persons who were not yet licensed as lawyers at the time they began providing services to a tribunal.

Terminology: See Rule 1.00 for the definitions of "adjudicatory official," "affiliated," "confirmed in writing," "informed consent," "knows," "person," "personally prohibited," "reasonably should know," "represents," "substantially," "tribunal," "writing," and "written."

Rule 1.12. Organization as a Client

(a) ~~A~~Notwithstanding that a lawyer ~~employed or retained by~~ reports to and takes direction from an ~~organization represents the entity. While the lawyer in the ordinary course of working relationships may report to, and accept direction from, an entity's~~ organization's duly authorized constituents, ~~in the situations described in paragraph (b) the lawyer~~ a lawyer employed or retained to provide legal services for an organization represents that organization and shall proceed as reasonably necessary in the best legal interest of ~~the~~ that organization ~~without involving unreasonable risks of disrupting the organization and of revealing information relating to the representation to persons outside the organization~~ at all times, including the situations described in (d).

(b) A lawyer shall explain that the lawyer represents the organization rather than a constituent of the organization when the lawyer knows or reasonably should know the organization's interests are adverse to the interests of that constituent, or when an explanation appears reasonably necessary to avoid misunderstanding on the part of that constituent.

(c) A lawyer shall not jointly represent the organization and a constituent of the organization in a matter unless the joint representation is in conformity with Rule 1.07.

(~~b~~d) A lawyer ~~representing~~ who represents an organization shall ~~must~~ take reasonable remedial actions whenever the lawyer ~~learns or knows~~ has information clearly establishing that:

(1) ~~an officer, employee, or other person associated with~~ constituent of the organization has committed or intends to commit a violation of a legal obligation to the organization or a violation of law ~~which~~ that reasonably ~~might~~ may be imputed to the organization;

(2) the violation is likely to result in substantial injury to the organization; and

(3) the violation is related to a matter within the scope of the lawyer's representation of the organization.

(~~c~~e) ~~Except where prior disclosure to persons outside the organization is~~ Unless otherwise required by law or these ~~other~~ Rules, ~~a lawyer shall first attempt to resolve a violation by taking measures within the organization. In determining the internal procedures, actions or measures that are reasonably necessary in order to comply with paragraphs (a) and (b), a lawyer shall give due consideration to the seriousness of the violation and its consequences, the scope and nature of the lawyer's representation, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters, and any other relevant considerations. Such procedures, actions and measures~~ reasonable remedial actions may include, but are not limited to, one or more of the following:

(1) asking for reconsideration of the matter;

(2) advising that a separate legal opinion on the matter be sought for presentation to an appropriate authority ~~in~~ within the organization; and

(3) referring the matter to a higher authority ~~in~~ within the organization, including, if warranted by the seriousness of the matter, referral to the highest authority that can act ~~in~~ on behalf of the organization as determined by applicable law.

(f) If, despite the lawyer's initiation of reasonable remedial action, the organization continues to pursue, or fails to address in a timely and appropriate manner, a matter called to its attention by the lawyer pursuant to (d) and (e), then the lawyer may disclose confidential information to the extent permitted by Rule 1.05.

(~~d~~g) ~~Upon a lawyer's resignation or termination of the relationship in compliance with Rule 1.15~~ A lawyer who resigns or is terminated from representing an organization shall comply with Rule 1.16. Upon doing so, a lawyer is excused from ~~further~~ proceeding further as ~~required by paragraphs~~ set out in (a~~d~~), (~~b~~e), and (~~e~~f)~~, and~~. Rule 1.05 governs any further obligations ~~of the lawyer are determined by Rule 1.05~~ regarding confidential information.

~~(e) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when it is apparent that the~~

~~organization's interests are adverse to those of the constituents with whom the lawyer is dealing or when explanation appears reasonably necessary to avoid misunderstanding on their part.~~

Terminology: See Rule 1.00 for the definitions of "knows," "reasonable," "reasonably," "reasonably should know," "represents," and "substantial."

~~**Rule 1.13. Conflicts: Public Interests Activities**~~

~~A lawyer serving as a director, officer or member of a legal services, civic, charitable or law reform organization, apart from the law firm in which the lawyer practices, shall not knowingly participate in a decision or action of the organization:~~

~~(a) if participating in the decision would violate the lawyer's obligations to a client under Rule 1.06; or~~

~~(b) where the decision could have a material adverse effect on the representation of any client of the organization whose interests are adverse to a client of the lawyer.~~

Rule 1.13. Prohibited Sexual Relations

(a) A lawyer shall not condition the representation of a client or prospective client, or the quality of such representation, on having any person engage in sexual relations with the lawyer.

(b) A lawyer shall not solicit or accept sexual relations as payment of fees or expenses.

(c) A lawyer shall not have sexual relations with a client that the lawyer is personally representing unless the lawyer and client are married to each other, or are engaged in an ongoing consensual sexual relationship that began before the representation.

Terminology: See Rule 1.00 for the definitions of "person" and "represents."

Rule 1.14. Diminished Capacity

(a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment, or for another reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial, or other harm unless action is taken, and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action. Such action may include, but is not limited to, consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, attorney ad litem, amicus attorney, or conservator, or submitting an information letter to a court with jurisdiction to initiate guardianship proceedings for the client.

(c) When taking protective action pursuant to (b), the lawyer may disclose the client's confidential information to the extent the lawyer reasonably believes is necessary to protect the client's interests, unless otherwise prohibited by law.

Terminology: See Rule 1.00 for the definitions of "consult," "reasonably," "reasonably believes," "represents," and "substantial."

Rule 1.145. Safekeeping Property

(a) ~~A lawyer shall hold funds and other property belonging in whole or in part to clients or third persons that are in a lawyer's possession~~ When, in connection with a representation, a lawyer receives property that belongs in whole or in part to a client or third person, the lawyer shall safeguard the property and hold it in trust separately from the lawyer's own property. ~~Such funds shall be kept in a separate account, designated as a "trust" or "escrow" account~~ In addition, the lawyer shall:

(1) deposit any funds into one or more accounts designated as trust accounts, maintained in the state where the lawyer's office is situated, or elsewhere with the informed consent of the client or third person. ~~Other client property shall be identified as such and appropriately safeguarded.~~;

(2) identify any other property as such and safeguard it appropriately; and

(3) ~~Complete~~ create and maintain complete records of ~~such account~~ all trust-account funds and other property ~~shall be kept by the lawyer~~ and ~~shall be preserved~~ preserve those records for ~~a period of~~ five years after termination of the representation.

(b) Upon receiving ~~funds or other~~ the property described in (a) ~~which a client or third person has an interest, a~~, the lawyer shall ~~promptly~~ with reasonable promptness:

(1) notify the client of the receipt and proposed distribution of such property; ~~or third person. Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that~~

~~the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.~~

(2) notify the third person of the receipt of such property the lawyer knows belongs to the third person;

~~(c) When in the course of representation a lawyer is in possession of funds or other property in which both the lawyer and other person claim interests, the property shall be kept separate by the lawyer until there is an accounting and severance of their interest. All funds in a trust or escrow account shall be disbursed only to those persons~~

(3) distribute to the client or third person such property the client or third person is entitled to receive ~~them by virtue of the representation or by law. If~~, except as otherwise specifically provided by this Rule or law;

(4) upon the client's request or when otherwise specifically required by these Rules, render a full accounting to the client as to such property the lawyer is holding in trust; and

(5) upon the third person's request, render an accounting to the third person as to such property the lawyer knows belongs to the third person.

(c) When, in the course of representation, a lawyer possesses property to which the lawyer knows two or more persons, one of whom may be the lawyer, claim a right and a dispute arises concerning their ~~respective interests, the portion in dispute shall be kept separated by the lawyer until~~ rights, the lawyer shall, unless the lawyer reasonably believes the claim giving rise to the dispute is ~~resolved, and the undisputed portion shall be distributed appropriately.~~ not valid, retain disputed funds in a trust account and continue to safeguard other property appropriately, deposit disputed funds or other property into the registry of a court, or otherwise safeguard the disputed funds or other property in a manner agreeable to those claiming a right. When the dispute has been resolved, the lawyer shall with reasonable promptness distribute the property in the lawyer's possession to persons entitled to the property.

(d) A lawyer shall deposit unearned fees and advanced expenses into a client trust account, to be withdrawn by the lawyer only as fees are earned or expenses are incurred.

(e) Notwithstanding (a), a lawyer may deposit the lawyer's own funds into a client trust account for the purpose of paying service charges on that account.

Terminology: See Rule 1.00 for the definitions of "informed consent," "knows," "person," "reasonable," "reasonably believes," and "represents."

Rule 1.156. Declining or Terminating Representation

(a) ~~A~~Except as stated in (c), a lawyer shall ~~decline to~~ not represent a client or, where~~n~~ representation has commenced, shall withdraw~~, except as stated in paragraph (c),~~ from the representation of a client, if:

(1) the representation will result in violation of ~~Rule 3.08, other applicable rules of professional conduct or other~~ law or these Rules;

(2) the lawyer's physical~~;~~ or mental ~~or psychological~~ condition materially impairs the lawyer's fitness to represent the client; or

(3) the lawyer is discharged~~, with or without good cause~~.

(b) Except as required by ~~paragraph~~ (a), a lawyer shall not withdraw from representing a client unless:

(1) withdrawal can be accomplished without material adverse effect on the interests of the client;

(2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes ~~may be~~ is criminal or fraudulent;

(3) the client has used the lawyer's services to perpetrate a crime or fraud;

(4) a client insists upon pursuing an objective or taking action that the lawyer considers repugnant or imprudent or with which the lawyer has fundamental disagreement;

(5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services, including an obligation to pay the lawyer's fee as agreed, and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;

(6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or

(7) other good cause for withdrawal exists.

(c) A lawyer shall comply with these Rules, applicable rules of practice or procedure, and applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, ~~such as~~ including giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled, and refunding any advance payments of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by ~~other~~ law only if such retention will not prejudice the client in the subject matter of the representation.

Terminology: See Rule 1.00 for the definitions of "fitness," "reasonable," "reasonably," "reasonably believes," "represents," "substantially," and "tribunal."

Rule 1.17. Prospective Clients

(a) A person who in good faith discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.

(b) A lawyer shall not use or disclose confidential information provided by the prospective client, except as provided in Rule 1.05 or (d)(2).

(c) A lawyer who has received confidential information from a prospective client shall not represent a person with interests materially adverse to those of the prospective client in the same or a substantially related matter, except as provided in (d)(1) or (d)(2). When a lawyer is personally prohibited by this paragraph from representing a person in a matter, no lawyer who is affiliated with the personally prohibited lawyer, and who knows or reasonably should know of the prohibition, shall represent that person in that matter.

(d) When a lawyer has received confidential information from a prospective client, representation of a client with interests materially adverse to those of the prospective client in the same or a substantially related matter is permissible if:

(1) the prospective client has provided informed consent, confirmed in writing, to the representation; or

(2) the lawyer conditioned the discussion with the prospective client on the prospective client's informed consent that no information disclosed during the discussion would be confidential or prohibit the lawyer from representing a different client in the matter.

Terminology: See Rule 1.00 for the definitions of "affiliated," "confirmed in writing," "informed consent," "knows," "person," "personally prohibited," "reasonably should know," "represents," and "writing."

SECTION II. COUNSELOR

Rule 2.01. Advisor

In ~~advising or otherwise~~ representing a client, a lawyer shall exercise independent professional judgment and ~~render~~ give candid advice.

Terminology: See Rule 1.00 for the definition of "represents."

Rule 2.02. Evaluation for Use by Third Persons

A lawyer shall not ~~undertake~~ provide an evaluation of a matter affecting a client for the use of someone other than the client unless:

(a) the lawyer reasonably believes that making the evaluation is compatible with other aspects of the lawyer's relationship with the client; and

(b) the client ~~consents after consultation~~ provides informed consent.

Terminology: See Rule 1.00 for the definitions of "informed consent," "person," and "reasonably believes."

SECTION III. ADVOCATE

Rule 3.01. Meritorious Claims and Contentions

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless the lawyer reasonably believes ~~that~~ there is a nonfrivolous basis for doing so ~~that is not frivolous~~.

Terminology: See Rule 1.00 for the definition of "reasonably believes."

Rule 3.02. Minimizing the Burdens and Delays of Litigation

In the course of litigation, a lawyer shall not take a position that unreasonably increases the costs or other burdens of the case or that unreasonably delays resolution of the matter.

Terminology: See Rule 1.00 for the definition of "reasonably."

Rule 3.03. Candor Toward ~~the~~ a Tribunal

(a) A lawyer shall not knowingly:

(1) make a false statement of material fact or law to a tribunal;

(2) fail to ~~disclose a fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act~~correct a false statement of material fact or law previously made to the tribunal by the lawyer;
(3) ~~in an ex parte proceeding, fail to disclose to the tribunal an unprivileged fact which the lawyer reasonably believes should be known by that entity for it to make an informed decision;~~
~~(4)~~ fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or
(5~~4~~) offer or use evidence that the lawyer knows to be false.

(b) Notwithstanding any other of these Rules, a lawyer may refuse to offer or use evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes, but does not know, is false.

(c) If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered or used material evidence and the lawyer comes to know of its falsity, the lawyer shall make a ~~good faith~~ reasonable effort to persuade the client to authorize the lawyer to correct or withdraw the false evidence. If ~~such~~ those efforts are unsuccessful, the lawyer shall take other reasonable remedial measures, including, if necessary, disclosure of the ~~true facts~~ falsehood to the tribunal.

(d) A lawyer who represents a client in an adjudicatory proceeding and who knows that a person intends to engage, is engaging, or has engaged in criminal or fraudulent conduct related to the proceeding, shall take reasonable remedial measures, including, if necessary, disclosure of the falsehood to the tribunal.

(e) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts that are known to the lawyer, whether or not the facts are adverse, and that the lawyer reasonably believes are necessary to enable the tribunal to make an informed decision.

(c~~f~~) The ~~duties~~ obligations stated in ~~paragraphs (a) and (b)~~ this Rule continue until remedial legal measures are no longer reasonably possible.

Terminology: See Rule 1.00 for the definitions of "adjudicatory proceeding," "knowingly," "known," "knows," "person," "reasonable," "reasonably," "reasonably believes," "represents," and "tribunal."

Rule 3.04. Fairness in Adjudicatory Proceedings

A lawyer shall not:

(a) unlawfully obstruct another party's access to evidence; in anticipation of a dispute, unlawfully alter, destroy, or conceal a document or other material that a ~~competent~~ lawyer would reasonably believe has potential or actual evidentiary value; or counsel or assist another person to do any such act~~.~~;

(b) falsify evidence, counsel or assist a witness to testify falsely, or pay, offer to pay, or acquiesce in the offer or payment of compensation to a witness or other entity contingent upon the content of the testimony of the witness or the outcome of the case. But ~~a~~ the lawyer may advance, guarantee, or acquiesce in the payment of:

(1) expenses reasonably incurred by a witness in attending or testifying;

(2) reasonable compensation to a witness for ~~his~~ loss of time in attending or testifying; and

(3) a reasonable fee for the professional services of an expert witness~~.~~;

(c) except as stated in ~~paragraph~~ (d), in representing a client before a tribunal:

(1) habitually violate an established rule of procedure or ~~of~~ evidence;

(2) state or allude to any matter that the lawyer does not reasonably believe is relevant to such proceeding or that will not be supported by admissible evidence, or assert personal knowledge of facts in issue except when testifying as a witness;

(3) state a personal opinion as to the justness of a cause, ~~the~~ credibility of a witness, ~~the~~ culpability of a civil litigant, or ~~the~~ guilt or innocence of an accused, except that ~~a~~ the lawyer may argue ~~on his~~ the lawyer's analysis of the evidence and other permissible considerations for any position or conclusion with respect to the matters stated ~~herein~~ in this Rule;

(4) ask any question intended to degrade a witness or other person except ~~where~~n the lawyer reasonably believes that the question will lead to relevant and admissible evidence; or

(5) engage in conduct intended to disrupt the proceedings~~.~~;

(d) knowingly disobey, or advise the client to disobey, an obligation under the standing rules of or a ruling by a tribunal, except for an open refusal based either on an assertion that no valid obligation exists or on the client's willingness to accept any sanctions arising from such disobedience~~.~~; or

(e) request a person other than ~~a~~ the client to refrain from voluntarily giving relevant information to another party unless:

(1) the person is a relative or an employee or other agent of ~~a~~ the client; and

(2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

Terminology: See Rule 1.00 for the definitions of "adjudicatory proceeding," "knowingly," "person," "reasonable," "reasonably," "reasonably believes," "represents," and "tribunal."

Rule 3.05. Maintaining the Impartiality of a Tribunal

A lawyer shall not:

(a) seek to influence a tribunal concerning a pending matter by means prohibited by law or applicable rules of practice or procedure;

(b) except as otherwise permitted by law and not prohibited by applicable rules of practice or procedure, communicate or cause another to communicate ex parte with a tribunal for the purpose of influencing ~~that entity or person~~ the tribunal concerning a pending matter other than:

(1) in the course of official proceedings in the cause;

(2) in writing if ~~he~~ the lawyer promptly delivers a copy of the writing to opposing counsel or the adverse party if ~~he~~ the adverse party is not represented by a lawyer; or

(3) orally upon adequate notice to opposing counsel or to the adverse party if ~~he~~ the adverse party is not represented by a lawyer.

(c) For purposes of this rule:

(1) "Matter" has the meanings ascribed ~~by~~ to it in Rule 1.10(f) ~~of these Rules~~;

(2) A matter is "pending" before a particular tribunal either when that entity has been selected to determine the matter or when it is reasonably foreseeable that ~~that~~ the entity will be ~~so~~ selected.

Terminology: See Rule 1.00 for the definitions of "represents," "tribunal," and "writing."

Rule 3.06. Maintaining the Integrity of the Jury System

(a) A lawyer shall not:

(1) conduct or cause another, by financial support or otherwise, to conduct a vexatious or harassing investigation of a ~~venireman~~ venire member or juror; or

(2) seek to influence a ~~venireman~~ venire member or juror concerning the merits of a pending matter by means prohibited by law or applicable rules of practice or procedure.

(b) Prior to discharge of the jury from further consideration of a matter, a lawyer connected ~~therewith~~ with the matter shall not communicate with or cause another to communicate with anyone ~~he~~ the lawyer knows to be a ~~member of the~~ venire ~~from which the jury will be selected or any~~ member, juror, or alternate juror, except in the course of official proceedings.

(c) During the trial of a case, a lawyer not connected ~~therewith~~ with the case shall not communicate with or cause another to communicate with a juror or alternate juror concerning the matter.

(d) After discharge of the jury from further consideration of a matter with which the lawyer was connected, the lawyer shall not ask questions of or make comments to a member of that jury that are calculated merely to harass ~~or embarrass~~ the juror or to influence ~~his~~ the juror's actions in future jury service.

(e) All restrictions imposed by this Rule ~~upon~~ a lawyer also apply to communications with or investigations of a venire member's ~~of a~~ juror's family ~~of a venireman or a juror~~ member.

(f) A lawyer shall reveal promptly to the court improper conduct, of which the lawyer has knowledge, by a ~~venireman~~ venire member or ~~a~~ juror, or by another toward a ~~venireman or a juror or a~~ venire member, juror, or venire member's or juror's family member ~~of his family, of which the lawyer has knowledge~~.

~~(g) As used in this Rule, the terms "matter" and "pending" have the meanings specified in Rule 3.05(c).~~

Terminology: See Rule 1.00 for the definition of "knows."

Rule 3.07. Trial Publicity

(a) ~~In the course of representing a client, a~~ A lawyer who is participating or who has participated in the investigation or litigation of a matter shall not make an extrajudicial statement ~~that a~~ the lawyer knows or reasonably~~e person would expect to~~ should know will be disseminated by means of public communication ~~if the lawyer knows or reasonably should know that it~~ and will have a substantial likelihood of materially prejudicing an adjudicatory proceeding. ~~A lawyer shall not counsel or assist another person to make such a statement.~~

~~(b) A lawyer ordinarily will violate paragraph (a), and the likelihood of a violation increases if the adjudication is ongoing or imminent, by making an extrajudicial statement of the type referred to in that paragraph when the statement refers to:~~

~~(1) the character, credibility, reputation or criminal record of a party, suspect in a criminal investigation or witness; or the expected testimony of a party or witness;~~
~~(2) in a criminal case or proceeding that could result in incarceration, the possibility of a plea of guilty to the offense; the existence or contents of any confession, admission, or statement given by a defendant or suspect; or that person's refusal or failure to make a statement;~~
~~(3) the performance, refusal to perform, or results of any examination or test; the refusal or failure of a person to allow or submit to an examination or test; or the identity or nature of physical evidence expected to be presented;~~
~~(4) any opinion as to the guilt or innocence of a defendant or suspect in a criminal case or proceeding that could result in incarceration; or~~
~~(5) information the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and would if disclosed create a substantial risk of prejudicing an impartial trial.~~

~~(c) A lawyer ordinarily will not violate paragraph (a) by making an extrajudicial statement of the type referred to in that paragraph when the lawyer merely states:~~
~~(1) the general nature of the claim or defense;~~
~~(2) the information contained in a public record;~~
~~(3) that an investigation of the matter is in progress, including the general scope of the investigation, the offense, claim or defense involved;~~
~~(4) except when prohibited by law, the identity of the persons involved in the matter;~~
~~(5) the scheduling or result of any step in litigation;~~
~~(6) a request for assistance in obtaining evidence, and information necessary thereto;~~
~~(7) a warning of danger concerning the behavior of a person involved, when there is a reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and~~
~~(8) if a criminal case:~~
~~(i) the identity, residence, occupation and family status of the accused;~~
~~(ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person;~~
~~(iii) the fact, time and place of arrest; and~~
~~(iv) the identity of investigating and arresting officers or agencies and the length of the investigation.~~

(b) This Rule does not preclude a lawyer from:
(1) responding to allegations of misconduct made against that lawyer, provided that the lawyer complies with the limitations in (a); or

(2) making a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this subparagraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.

(c) No lawyer affiliated in a firm with a lawyer subject to (a) shall make a statement prohibited by (a).

Terminology: See Rule 1.00 for the definitions of "adjudicatory proceeding," "affiliated," "believes," "firm," "knows," "reasonable," "reasonably should know," and "substantial."

Rule 3.08. Lawyer as a Witness

(a) A lawyer shall not accept or continue employment as an advocate before a tribunal in a contemplated or pending adjudicatory proceeding if the lawyer knows or ~~believes~~ reasonably should know that the lawyer is or may be a witness necessary to establish an essential fact on behalf of the lawyer's client, unless:

(1) the testimony relates to an uncontested issue;

(2) the testimony ~~will~~ relates solely to a matter of formality and there is no reason to believe that substantial evidence will be offered in opposition to the testimony;

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

(4) the lawyer is a party to the action and is appearing pro se; or

(5) the lawyer has promptly notified opposing counsel that the lawyer expects to testify in the ~~matter~~ adjudicatory proceeding and disqualification of the lawyer would work substantial hardship on the client.

(b) A lawyer shall not continue as an advocate in a pending adjudicatory proceeding if the lawyer ~~believes~~ knows or reasonably should know that the lawyer will be compelled to furnish testimony that will be substantially adverse to the lawyer's client, unless the client ~~consents after full disclosure~~ provides informed consent.

(c) Without the client's informed consent, a lawyer may not act as an advocate in an adjudicatory proceeding in which another lawyer in the lawyer's firm is prohibited by ~~paragraphs~~ (a) or (b) from serving as an advocate.

(d) If the lawyer to be called as a witness could not also serve as an advocate under this Rule, that lawyer shall not take an active role before the tribunal in the presentation of the matter.

Terminology: See Rule 1.00 for the definitions of "adjudicatory proceeding," "believes," "firm," "informed consent," "knows," "reasonably should know," "substantial," "substantially," and "tribunal."

Rule 3.09. Special Responsibilities of a Prosecutor

The prosecutor in a criminal case shall:

(a) ~~refrain from prosecuting~~ not prosecute or ~~threatening~~ threaten to prosecute a charge ~~that~~ the prosecutor knows is not supported by probable cause;

(b) ~~refrain from conducting~~ not conduct or ~~assisting~~ assist in a custodial interrogation of an accused unless the prosecutor has made reasonable efforts to be assured that the accused has been advised of any right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;

(c) not initiate or encourage efforts to obtain from an unrepresented accused a waiver of important pre-trial, trial, or post-trial rights;

(d) ~~make~~ timely disclos~~ure~~ to the defense ~~of~~ all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and ~~to the~~ tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal; and

(e) exercise reasonable care to prevent persons employed or controlled by the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.07.

Terminology: See Rule 1.00 for the definitions of "known," "knows," "person," "reasonable," and "tribunal."

Rule 3.10. Advocate in ~~Nonadjudicative~~Nonadjudicatory Proceedings

A lawyer representing a client before a legislative or administrative body in a ~~nonadjudicative~~ nonadjudicatory proceeding shall disclose that the appearance is in a representative capacity and shall conform to ~~the provisions of~~ Rules 3.04(a) through (d), 3.05(a), and 4.01.

Terminology: See Rule 1.00 for the definitions of "adjudicatory proceeding," and "represents."

SECTION IV. NON-CLIENT RELATIONSHIPS

Rule 4.01. Truthfulness in Statements to Others

In the course of representing a client, a lawyer shall not knowingly:

(a) make a false statement of material fact or law to a third person; or

(b) fail to disclose a material fact to a third person when disclosure is necessary to avoid making the lawyer a party to a criminal act or knowingly assisting a fraudulent act perpetrated by a client.

Terminology: See Rule 1.00 for the definitions of "knowingly," "person," and "represents."

Rule 4.02. Communication ~~w~~With One Represented by Counsel

(a) In representing a client, a lawyer shall not communicate or cause or encourage another to communicate about the subject of the representation with a person, organization, or ~~entity of~~ government entity the lawyer knows to be represented by another lawyer regarding that subject, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

(b) In representing a client, a lawyer shall not communicate or cause another to communicate about the subject of representation with a person or organization a lawyer knows to be employed or retained for the purpose of conferring with or advising another lawyer about the subject of the representation, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

(c) For the purpose of this rRule, "organization" or ~~entity of government" includes: (1) those~~ "government entity" means a person~~s presently having a~~ who:

(1) has managerial responsibility within an organization or ~~entity of~~ government entity that relates to the subject of the representation;; or

(2) ~~those persons presently~~ is employed by such organization or government entity and whose act or omission in connection with the subject of representation may make the organization or ~~entity of~~ government entity vicariously liable for such act or omission.

(d) When a person, organization, or ~~entity of~~ government entity that is represented by a lawyer in a matter seeks advice regarding that matter from another lawyer, the second lawyer is not prohibited by ~~paragraph~~ (a) from giving such advice without notifying or seeking consent of the first lawyer.

Terminology: See Rule 1.00 for the definitions of "knows," "person," and "represents."

Rule 4.03. Dealing With an Unrepresented Person

~~In dealing~~ A lawyer who communicates on behalf of a client with a person who is not represented by counsel~~, a lawyer~~ shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.

Terminology: See Rule 1.00 for the definitions of "knows," "person," "reasonable," "reasonably should know," and "represents."

Rule 4.04. Respect for Rights of a Third Persons

(a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to ~~embarrass~~ harass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

(b) A lawyer shall not present, participate in presenting, or threaten to present:

(1) criminal or disciplinary charges solely to gain an advantage in a civil matter; or

(2) civil, criminal, or disciplinary charges against a complainant, ~~a~~ witness, or ~~a~~ potential witness in a bar disciplinary proceeding solely to prevent participation by the complainant, witness, or potential witness in the bar disciplinary proceeding ~~therein~~.

Terminology: See Rule 1.00 for the definitions of "person," "represents," and "substantial."

SECTION V. LAW FIRMS AND ASSOCIATIONS

Rule 5.01. Responsibilities of a ~~Partner~~ Managerial or Supervisory Lawyer

A lawyer shall be subject to discipline because of another lawyer's violation of these Rules if the lawyer has managerial authority in the law firm in which the other lawyer practices or has direct supervisory authority over the other lawyer, and that managerial or supervisory lawyer ~~rules of professional conduct if~~:

(a) ~~The lawyer is a partner or supervising lawyer and~~ orders, encourages, or knowingly permits the conduct involved; or

(b) ~~The lawyer is a partner in the law firm in which the other lawyer practices, is the general counsel of a government agency's legal department in which the other lawyer is employed, or has direct supervisory authority over the other lawyer, and~~ with knowledge of the other lawyer's violation of these rRules, knowingly fails to take reasonable remedial action within the scope of the lawyer's authority to avoid or mitigate the consequences of the other lawyer's violation.

Terminology: See Rule 1.00 for the definitions of "law firm," "knowingly," and "reasonable."

Rule 5.02. Responsibilities of a Supervised Lawyer

(a) A lawyer is bound by these rRules notwithstanding that the lawyer acted ~~under~~ at the ~~supervision~~ direction of another person~~, except that a~~.

(b) A supervised lawyer does not violate these rRules if that lawyer acts in accordance with a managerial or supervisory lawyer's reasonable resolution of an arguable question of professional duty ~~conduct~~.

Terminology: See Rule 1.00 for the definitions of "person" and "reasonable."

Rule 5.03. Responsibilities Regarding ~~Nonlawyer Assistants~~Nonlawyers

~~With respect~~ A lawyer shall be subject to discipline for the conduct of a nonlawyer employed by, ~~or~~ retained by, or ~~associated~~ affiliated with a lawyer or law firm that would be a violation of these Rules if engaged in by a lawyer, if:

(a) ~~a~~ the lawyer ~~having~~ has direct supervisory authority over the nonlawyer ~~shall~~ and fails to make reasonable efforts to ensure that the ~~person's~~ nonlawyer's conduct is compatible with the lawyer's professional obligations ~~of the lawyer~~; ~~and~~

(b) ~~a lawyer shall be subject to discipline for the conduct of such a person that would be a violation of these rules if engaged in by a lawyer if:~~(1) the lawyer orders, encourages, or knowingly permits the conduct involved; or

(~~2~~c) the lawyer:

(i1) ~~is a partner~~ has managerial authority in the law firm ~~in which the person is employed, retained by, or associated with; or is the general counsel of a government agency's legal department in which the person is employed, retained by or associated with;~~ that has retained, employed, or affiliated the nonlawyer, or has direct supervisory authority over such ~~person~~ nonlawyer; and

(ii2) with knowledge of such misconduct by the nonlawyer knowingly fails to take reasonable remedial action within the scope of the lawyer's authority to avoid or mitigate the consequences of that ~~person's misconduct~~ nonlawyer's misconduct.

Terminology: See Rule 1.00 for the definitions of "affiliated," "knowingly," "law firm," and "reasonable."

Rule 5.04. Professional Independence of a Lawyer

(a) A lawyer or law firm shall not share or promise to share legal fees with a non-lawyer, except that:

(1) an agreement by a lawyer with the lawyer's firm, partner, or associate, or a lawful court order, may provide for the payment of money, over a reasonable period of time, to the lawyer's estate to or for the benefit of the lawyer's heirs or personal representatives, beneficiaries, or former spouse, after the lawyer's death or as otherwise provided by law or court order.;

(2) a lawyer who undertakes to complete unfinished legal business of a deceased lawyer may pay to the estate of the deceased lawyer that proportion of the total compensation ~~which~~ that fairly represents the services rendered by the deceased lawyer; ~~and~~

(3) a lawyer or law firm may include non-lawyer employees in a retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement.; and

(4) a lawyer may share legal fees with a lawyer referral service in accordance with law.

(b) A lawyer shall not form a ~~partnership~~ firm with a non-lawyer if any ~~of the activities~~ activity of the ~~partnership~~ firm consists of the practice of law.

(c) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

(d) A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit; if:

(1) a nonlawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration;
(2) a nonlawyer is a corporate director or officer thereof; or
(3) a nonlawyer has the right to direct or control the professional judgment of a lawyer.

Terminology: See Rule 1.00 for the definitions of "firm," "law firm," "partner," "person," and "reasonable."

Rule 5.05. Unauthorized Practice of Law

A lawyer shall not:

(a) practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction; or

(b) assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law.

Terminology: See Rule 1.00 for the definition of "person."

Rule 5.06. Restrictions on Right to Practice

A lawyer shall not participate in offering or making:

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

(b) an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a suit or controversy, except that as part of the settlement of a disciplinary proceeding against a lawyer an agreement may be made placing restrictions on the right of that lawyer to practice.

Terminology: See Rule 1.00 for the definition of "firm."

Rule 5.07. ~~[Blank]Rule 5.08.~~ Prohibited Discriminatory Activities

(a) A lawyer shall not willfully, in connection with an adjudicatory proceeding, except as provided in ~~paragraph~~ (b), manifest, by words or conduct, bias or prejudice based on race, color, national origin, religion, disability, age, sex, or sexual orientation towards any person involved in that proceeding in any capacity.

(b) Paragraph (a) does not apply to a lawyer's decision whether to represent a particular person in connection with an adjudicatory proceeding, ~~nor~~ or to the process of jury selection, ~~nor~~ or to communications protected as "confidential information" under these Rules. See Rule 1.05(a)~~;~~(b). It also does not preclude advocacy in connection with an adjudicatory proceeding involving any of the factors set out in ~~paragraph~~ (a) if that advocacy:

(~~i~~1) is necessary in order to address any substantive or procedural issues raised by the proceeding; and

(~~ii~~2) is conducted in conformity with applicable rulings and orders of a tribunal and applicable rules of practice ~~and~~ or procedure.

Terminology: See Rule 1.00 for the definitions of "adjudicatory proceeding," "person," "represents," and "tribunal."

SECTION VI. PUBLIC SERVICE

Rule 6.01. ~~Accepting~~ Appointments by a Tribunal

(a) When a tribunal appoints a lawyer to represent a person, the lawyer shall represent the person until the representation is terminated in accordance with Rule 1.16(c).

(b) A lawyer shall not seek to avoid appointment by a tribunal to represent a person except for good cause, such as:

(~~a~~1) representing the client is likely to result in violation of law or ~~r~~these Rules ~~of professional conduct~~;

(~~b~~2) representing the client is likely to result in an unreasonable financial burden on the lawyer; or

(~~c~~3) the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client.

Terminology: See Rule 1.00 for the definitions of "person," "reasonable," "represents," and "tribunal."

Rule ~~1.13~~ 6.02. ~~Conflicts: Public Interests Activities~~ Membership in Legal Services Organization

A lawyer serving as a director, officer, or member of a legal services~~, civic, charitable or law reform~~ organization, apart from the law firm in which the lawyer practices, shall not knowingly participate in a decision or an action of the organization if:

(a) ~~if~~ participating in the decision or action would violate the lawyer's obligations to a client under Rule 1.06; or

(b) ~~where~~ the decision or action could have a material adverse effect on the representation of any client of the organization whose interests are adverse to a client of the lawyer.

Terminology: See Rule 1.00 for the definitions of "knowingly," "law firm," and "represents."

Rule 6.03. Law Reform Activities Affecting Client Interests

A lawyer may serve as a director, officer, or member of an organization involved in reform of the law or its administration notwithstanding that the reform may affect the interests of a client of the lawyer. When the lawyer knows the interests of a client may be materially benefited by a decision in which the lawyer participates, the lawyer shall disclose that fact to the organization but need not identify the client.

Terminology: See Rule 1.00 for the definition of "knows."

SECTION VII. INFORMATION ABOUT LEGAL SERVICES

Rule 7.01. Firm Names and Letterhead

(a) A lawyer in private practice shall not practice under a trade name, a name that is misleading as to the identity of the lawyer or lawyers practicing under such name, or a firm name containing names other than those of one or more of the lawyers in the firm, except that the names of a professional corporation, professional association, limited liability partnership, or professional limited liability company may contain "P.C.," "L.L.P.," "P.L.L.C.," or similar symbols indicating the nature of the organization, and if otherwise lawful a firm may use as, or continue to include in, its name the name or names of one or more deceased or retired members of the firm or of a predecessor firm in a continuing line of succession. Nothing herein shall prohibit a married woman from practicing under her maiden name.

(b) A firm with offices in more than one jurisdiction may use the same name in each jurisdiction, but identification of the lawyers in an office of the firm shall indicate the jurisdictional limitations on those not licensed to practice in the jurisdiction where the office is located.

(c) The name of a lawyer occupying a judicial, legislative, or public executive or administrative position shall not be used in the name of a firm, or in communications on its behalf, during any substantial period in which the lawyer is not actively and regularly practicing with the firm.

(d) A lawyer shall not hold himself or herself out as being a partner, shareholder, or associate with one or more other lawyers unless they are in fact partners, shareholders, or associates.

(e) A lawyer shall not advertise in the public media or seek professional employment by any communication under a trade or fictitious name, except that a lawyer who practices under a firm name as authorized by ~~paragraph~~ (a) ~~of this Rule~~ may use that name in such advertisement or communication but only if that name is the firm name that appears on the lawyer's letterhead, business cards, office sign, fee contracts, and with the lawyer's signature on pleadings and other legal documents.

(f) A lawyer shall not use a firm name, letterhead, or other professional designation that violates Rule 7.02(a).

Terminology: See Rule 1.00 for the definitions of "firm," "partner," and "substantial."

Rule 7.02. Communications Concerning a Lawyer's Services

(a) A lawyer shall not make or sponsor a false or misleading communication about the qualifications or the services of any lawyer or firm. A communication is false or misleading if it:

(1) contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading;

(2) contains any reference in a public media advertisement to past successes or results obtained unless:

(i) the communicating lawyer or member of the law firm served as lead counsel in the matter giving rise to the recovery, or was primarily responsible for the settlement or verdict;

(ii) the amount involved was actually received by the client;

(iii) the reference is accompanied by adequate information regarding the nature of the case or matter and the damages or injuries sustained by the client; and

(iv) if the gross amount received is stated, the attorney's fees and litigation expenses withheld from the amount are stated as well;

(3) is likely to create an unjustified expectation about results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate these rules or other law;

(4) compares the lawyer's services with other lawyers' services, unless the comparison can be substantiated by reference to verifiable, objective data;

(5) states or implies that the lawyer is able to influence improperly or upon irrelevant grounds any tribunal, legislative body, or public official;

(6) designates one or more specific areas of practice in an advertisement in the public media or in a solicitation communication unless the advertising or soliciting lawyer is competent to handle legal matters in each such area of practice; or

(7) uses an actor or model to portray a client of the lawyer or law firm.

(b) Rule 7.02(a)(6) does not require that a lawyer be certified by the Texas Board of Legal Specialization at the time of advertising in a specific area of practice, but such certification shall conclusively establish that such lawyer satisfies the requirements of Rule 7.02(a)(6) with respect to the area(s) of practice in which such lawyer is certified.

(c) A lawyer shall not advertise in the public media or state in a solicitation communication that the lawyer is a specialist except as permitted under Rule 7.04.

(d) Any statement or disclaimer required by these rRules shall be made in each language used in the advertisement or solicitation communication with respect to which such required statement or disclaimer relates; provided however, the mere statement that a particular language is spoken or understood shall not alone result in the need for a statement or disclaimer in that language.

Terminology: See Rule 1.00 for the definitions of "competent," "firm," "law firm," and "tribunal."

Rule 7.03. Prohibited Solicitations and Payments

(a) A lawyer shall not by in-person contact, or by regulated telephone or other electronic contact as defined in ~~paragraph~~ (f), seek professional employment concerning a matter arising out of a particular occurrence or event, or series of occurrences or events, from a prospective client or nonclient who has not sought the lawyer's advice regarding employment or with whom the lawyer has no family or past or present ~~attorney-~~client-lawyer relationship when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain. Notwithstanding the provisions

of this paragraph, a lawyer for a qualified nonprofit organization may communicate with the organization's members for the purpose of educating the members to understand the law, to recognize legal problems, to make intelligent selection of counsel, or to use legal services. In those situations where in-person or telephone or other electronic contact is permitted by this paragraph, a lawyer shall not have such a contact with a prospective client if:

(1) the communication involves coercion, duress, fraud, overreaching, intimidation, undue influence, or harassment;

(2) the communication contains information prohibited by Rule 7.02(a); or

(3) the communication contains a false, fraudulent, misleading, deceptive, or unfair statement or claim.

(b) A lawyer shall not pay, give, or offer to pay or give anything of value to a person not licensed to practice law for soliciting prospective clients for, or referring clients or prospective clients to, any lawyer or firm, except that a lawyer may pay reasonable fees for advertising and public relations services rendered in accordance with this Rule and may pay the usual charges of a lawyer referral service that meets the requirements of Occupational Code Title 5, Subtitle B, Chapter 952.

(c) A lawyer, in order to solicit professional employment, shall not pay, give, advance, or offer to pay, give, or advance anything of value, other than actual litigation expenses and other financial assistance as permitted by Rule 1.08(d), to a prospective client or any other person; provided however, this provision does not prohibit the payment of legitimate referral fees as permitted by (b) or by Rule 1.04(~~f~~g) ~~or by paragraph (b) of this Rule~~.

(d) A lawyer shall not enter into an agreement for, charge for, or collect a fee for professional employment obtained in violation of Rule 7.03(a), (b), or (c).

(e) A lawyer shall not participate with or accept referrals from a lawyer referral service unless the lawyer knows or reasonably believes that the lawyer referral service meets the requirements of Occupational Code Title 5, Subtitle B, Chapter 952.

(f) As used in ~~paragraph~~ (a), "regulated telephone or other electronic contact" means any electronic communication initiated by a lawyer or by any person acting on behalf of a lawyer or law firm that will result in the person contacted communicating in a live, interactive manner with any other person by telephone or other electronic means. For purposes of this Rule, a website for a lawyer or law firm is not considered a communication initiated by or on behalf of that lawyer or firm.

Terminology: See Rule 1.00 for the definitions of "firm," "fraud," "fraudulent," "knows," "law firm," "person," "reasonable," and "reasonably believes."

Rule 7.04. Advertisements in the Public Media

(a) A lawyer shall not advertise in the public media by stating that the lawyer is a specialist, except as permitted under Rule 7.04(b) or as follows:

(1) A lawyer admitted to practice before the United States Patent Office may use the designation "Patents," "Patent Attorney," or "Patent Lawyer," or any combination of those terms. A lawyer engaged in the trademark practice may use the designation "Trademark," "Trademark Attorney," or "Trademark Lawyer," or any combination of those terms. A lawyer engaged in patent and trademark practice may hold himself or herself out as specializing in "Intellectual Property Law," "Patent, Trademark, Copyright Law and Unfair Competition," or any of those terms.

(2) A lawyer may permit his or her name to be listed in lawyer referral service offices that meet the requirements of Occupational Code Title 5, Subtitle B, Chapter 952, according to the areas of law in which the lawyer will accept referrals.

(3) A lawyer available to practice in a particular area of law or legal service may distribute to other lawyers and publish in legal directories and legal newspapers (whether written or electronic) a listing or an announcement of such availability. The listing shall not contain a false or misleading representation of special competence or experience, but may contain the kind of information that traditionally has been included in such publications.

(b) A lawyer who advertises in the public media:

(1) shall publish or broadcast the name of at least one lawyer who is responsible for the content of such advertisement; and

(2) shall not include a statement that the lawyer has been certified or designated by an organization as possessing special competence or a statement that the lawyer is a member of an organization the name of which implies that its members possess special competence, except that:

(i) a lawyer who has been awarded a Certificate of Special Competence by the Texas Board of Legal Specialization in the area so advertised, may state with respect to each such area, "Board Certified, [area of specialization] — Texas Board of Legal Specialization;"; and

(ii) a lawyer who is a member of an organization the name of which implies that its members possess special competence, or who has been certified or designated by an organization as possessing special competence, may include a factually

accurate statement of such membership or may include a factually accurate statement, "Certified [area of specialization] [name of certifying organization]," but such statements may be made only if that organization has been accredited by the Texas Board of Legal Specialization as a bona fide organization that admits to membership or grants certification only on the basis of objective, exacting, publicly available standards (including high standards of individual character, conduct, and reputation) that are reasonably relevant to the special training or special competence that is implied and that are in excess of the level of training and competence generally required for admission to the Bar; and

(3) shall, in the case of infomercial or comparable presentation, state that the presentation is an advertisement:

(i) both verbally and in writing at its outset, after any commercial interruption, and at its conclusion; and

(ii) in writing during any portion of the presentation that explains how to contact a lawyer or law firm.

(c) Separate and apart from any other statements, the statements referred to in ~~paragraph~~ (b) shall be displayed conspicuously and in language easily understood by an ordinary consumer.

(d) Subject to the requirements of (a) through (c) and Rules 7.02 and 7.03 ~~and of paragraphs (a), (b), and (c) of this Rule~~, a lawyer may, either directly or through a public relations or advertising representative, advertise services in the public media, such as (but not limited to) a telephone directory, legal directory, newspaper or other periodical, outdoor display, radio, television, the internet, or electronic or digital media.

(e) All advertisements in the public media for a lawyer or firm must be reviewed and approved in writing by the lawyer or a lawyer in the firm.

(f) A copy or recording of each advertisement in the public media and relevant approval referred to in ~~paragraph~~ (e), and a record of when and where the advertisement was used, shall be kept by the lawyer or firm for four years after its last dissemination.

(g) In advertisements in the public media, any person who portrays a lawyer whose services or whose firm's services are being advertised, or who narrates an advertisement as if he or she were such a lawyer, shall be one or more of the lawyers whose services are being advertised.

(h) If an advertisement in the public media by a lawyer or firm discloses the willingness or potential willingness of the lawyer or firm to render services on a contingent fee basis, the

advertisement must state whether the client will be obligated to pay all or any portion of the court costs and, if a client may be liable for other expenses, this fact must be disclosed. If specific percentage fees or fee ranges of contingent fee work are disclosed in such advertisement, it must also disclose whether the percentage is computed before or after expenses are deducted from the recovery.

(i) A lawyer who advertises in the public media a specific fee or range of fees for a particular service shall conform to the advertised fee or range of fees for the period during which the advertisement is reasonably expected to be in circulation or otherwise expected to be effective in attracting clients, unless the advertisement specifies a shorter period; but in no instance is the lawyer bound to conform to the advertised fee or range of fees for a period of more than one year after the date of publication.

(j) A lawyer or firm who advertises in the public media ~~must~~ shall disclose the geographic location, by city or town, of the lawyer's or firm's principal office. A lawyer or firm shall not advertise the existence of any office other than the principal office unless:

(1) that other office is staffed by a lawyer at least three days a week; or

(2) the advertisement states:

(i) the days and times during which a lawyer will be present at that office; or

(ii) that meetings with lawyers will be by appointment only.

(k) A lawyer may not, directly or indirectly, pay all or a part of the cost of an advertisement in the public media for a lawyer not in the same firm unless such advertisement discloses the name and address of the financing lawyer, the relationship between the advertising lawyer and the financing lawyer, and whether the advertising lawyer is likely to refer cases received through the advertisement to the financing lawyer.

(l) If an advertising lawyer knows or should know at the time of an advertisement in the public media that a case or matter will likely be referred to another lawyer or firm, a statement of such fact shall be conspicuously included in such advertisement.

(m) No motto, slogan, or jingle that is false or misleading may be used in any advertisement in the public media.

(n) A lawyer shall not include in any advertisement in the public media the lawyer's association with a lawyer referral service unless the lawyer knows or reasonably believes that the lawyer referral service meets the requirements of Occupational Code Title 5, Subtitle B, Chapter 952.

(o) A lawyer may not advertise in the public media as part of an advertising cooperative or venture of two or more lawyers not in the same firm unless each such advertisement:

(1) states that the advertisement is paid for by the cooperating lawyers;

(2) names each of the cooperating lawyers;

(3) sets forth conspicuously the special competency requirements required by Rule 7.04(b) of lawyers who advertise in the public media;

(4) does not state or imply that the lawyers participating in the advertising cooperative or venture possess professional superiority, are able to perform services in a superior manner, or possess special competence in any area of law advertised, except that the advertisement may contain the information permitted by Rule 7.04(b)(2); and

(5) does not otherwise violate these ~~Texas Disciplinary~~ Rules ~~of Professional Conduct~~.

(p) Each lawyer who advertises in the public media as part of an advertising cooperative or venture shall be individually responsible for:

(1) ensuring that each advertisement does not violate this Rule; and

(2) complying with the filing requirements of Rule 7.07.

(q) If these rRules require that specific qualifications, disclaimers or disclosures of information accompany communications concerning a lawyer's services, the required qualifications, disclaimers or disclosures must be presented in the same manner as the communication and with equal prominence.

(r) A lawyer who advertises on the Internet ~~must~~ shall display the statements and disclosures required by Rule 7.04.

Terminology: See Rule 1.00 for the definitions of "competence," "consultation," "firm," "law firm," "knows," "person," "reasonably," "reasonably believes," "writing," and "written."

Rule 7.05. Prohibited Written, Electronic, or Digital Solicitations

(a) A lawyer shall not send, deliver, or transmit, or knowingly permit or knowingly cause another person to send, deliver, or transmit, a written, audio, audiovisual, digital media, recorded telephone message, or other electronic communication to a prospective client for the purpose of obtaining professional employment on behalf of any lawyer or law firm if:

(1) the communication involves coercion, duress, fraud, overreaching, intimidation, undue influence, or harassment;

(2) the communication contains information prohibited by Rule 7.02 or fails to satisfy each of the requirements of Rule 7.04(a) through (c), and (g) through (q) that would be applicable to the communication if it were an advertisement in the public media; or
(3) the communication contains a false, fraudulent, misleading, deceptive, or unfair statement or claim.

(b) Except as provided in ~~paragraph~~ (f) ~~of this Rule~~, a written, electronic, or digital solicitation communication to prospective clients for the purpose of obtaining professional employment:

(1) shall, in the case of a non-electronically transmitted written communication, be plainly marked "ADVERTISEMENT" on its first page, and on the face of the envelope or other packaging used to transmit the communication. If the written communication is in the form of a self-mailing brochure or pamphlet, the word "ADVERTISEMENT" shall be:

(i) in a color that contrasts sharply with the background color; and

(ii) in a size of at least 3/8" vertically or three times the vertical height of the letters used in the body of such communication, whichever is larger;

(2) shall, in the case of an electronic mail message, be plainly marked "ADVERTISEMENT" in the subject portion of the electronic mail and at the beginning of the message's text;

(3) shall not be made to resemble legal pleadings or other legal documents;

(4) shall not reveal on the envelope or other packaging or electronic mail subject line used to transmit the communication, or on the outside of a self-mailing brochure or pamphlet, the nature of the legal problem of the prospective client or non-client; and

(5) shall disclose how the lawyer obtained the information prompting the communication to solicit professional employment if such contact was prompted by a specific occurrence involving the recipient of the communication or a family member of such person(s).

(c) Except as provided in ~~paragraph~~ (f) ~~of this Rule~~, an audio, audio-visual, digital media, recorded telephone message, or other electronic communication sent to prospective clients for the purpose of obtaining professional employment:

(1) shall, in the case of any such communication delivered to the recipient by non-electronic means, plainly and conspicuously state in writing on the outside of any envelope or other packaging used to transmit the communication, that it is an "ADVERTISEMENT";

(2) shall not reveal on any such envelope or other packaging the nature of the legal problem of the prospective client or non-client;

(3) shall disclose, either in the communication itself or in accompanying transmittal message, how the lawyer obtained the information prompting such audio, audio-visual, digital media, recorded telephone message, or other electronic communication to solicit

professional employment, if such contact was prompted by a specific occurrence involving the recipient of the communication or a family member of such person(s);
(4) shall, in the case of a recorded audio presentation or a recorded telephone message, plainly state that it is an advertisement prior to any other words being spoken and again at the presentation's or message's conclusion: and
(5) shall, in the case of an audio-visual or digital media presentation, plainly state that the presentation is an advertisement:
(i) both verbally and in writing at the outset of the presentation and again at its conclusion; and
(ii) in writing during any portion of the presentation that explains how to contact a lawyer or law firm.

(d) All written, audio, audio-visual, digital media, recorded telephone message, or other electronic communications made to a prospective client for the purpose of obtaining professional employment of a lawyer or law firm must be reviewed and either signed by or approved in writing by the lawyer or a lawyer in the firm.

(e) A copy of each written, audio, audio-visual, digital media, recorded telephone message, or other electronic solicitation communication, the relevant approval thereof, and a record of the date of each such communication; the name, address, telephone number, or electronic address to which each such communication was sent; and the means by which each such communication was sent shall be kept by the lawyer or firm for four years after its dissemination.

(f) The provisions of ~~paragraphs~~ (b) and (c) ~~of this Rule~~ do not apply to a written, audio, audio-visual, digital media, recorded telephone message, or other form of electronic solicitation communication:
(1) directed to a family member or a person with whom the lawyer had or has an ~~attorney~~ client-lawyer relationship;
(2) that is not motivated by or concerned with a particular past occurrence or event or a particular series of past occurrences or events, and also is not motivated by or concerned with the prospective client's specific existing legal problem of which the lawyer is aware;
(3) if the lawyer's use of the communication to secure professional employment was not significantly motivated by a desire for, or by the possibility of obtaining, pecuniary gain; or
(4) that is requested by the prospective client.

Terminology: See Rule 1.00 for the definitions of "firm," "fraud," "fraudulent," "knowingly," "law firm," "person," "writing," and "written."

Rule 7.06. Prohibited Employment

(a) A lawyer shall not accept or continue employment in a matter when that employment was procured by conduct prohibited by any of Rules 7.01 through 7.05, 8.04(a)(2), or 8.04(a)(9), engaged in by that lawyer personally or by any other person whom the lawyer ordered, encouraged, or knowingly permitted to engage in such conduct.

(b) A lawyer shall not accept or continue employment in a matter when the lawyer knows or reasonably should know that employment was procured by conduct prohibited by any of Rules 7.01 through 7.05, 8.04(a)(2), or 8.04(a)(9), engaged in by any other person or entity that is a shareholder, partner, or member of, an associate in, or of counsel to that lawyer's firm; or by any other person whom any of the foregoing persons or entities ordered, encouraged, or knowingly permitted to engage in such conduct.

(c) A lawyer who has not violated ~~paragraph~~ (a) or (b) in accepting employment in a matter shall not continue employment in that matter once the lawyer knows or reasonably should know that the person procuring the lawyer's employment in the matter engaged in, or ordered, encouraged, or knowingly permitted another to engage in, conduct prohibited by any of Rules 7.01 through 7.05, 8.04(a)(2), or 8.04(a)(9) in connection with the matter unless nothing of value is given thereafter in return for that employment.

Terminology: See Rule 1.00 for the definitions of "firm," "knowingly," "knows," "partner," "person," and "reasonably should know."

Rule 7.07. Filing Requirements for Public Advertisements and Written, Recorded, Electronic, or Other Digital Solicitations

(a) Except as provided in ~~paragraphs~~ (c) and (e) ~~of this Rule~~, a lawyer shall file with the Advertising Review Committee of the State Bar of Texas, no later than the mailing or sending by any means, including electronic, of a written, audio, audio-visual, digital or other electronic solicitation communication:

(1) a copy of the written, audio, audio-visual, digital, or other electronic solicitation communication being sent or to be sent to one or more prospective clients for the purpose of obtaining professional employment, together with a representative sample of the envelopes or other packaging in which the communications are enclosed;

(2) a completed lawyer advertising and solicitation communication application form; and

(3) a check or money order payable to the State Bar of Texas for the fee set by the Board of Directors. Such fee shall be for the sole purpose of defraying the expense of enforcing the rules related to such solicitations.

(b) Except as provided in ~~paragraphs~~ (e) ~~of this Rule~~, a lawyer shall file with the Advertising Review Committee of the State Bar of Texas, no later than the first dissemination of an advertisement in the public media, a copy of each of the lawyer's advertisements in the public media. The filing shall include:

(1) a copy of the advertisement in the form in which it appears or will appear upon dissemination, such as a videotape, audiotape, DVD, CD, a print copy, or a photograph of outdoor advertising;

(2) a production script of the advertisement setting forth all words used and describing in detail the actions, events, scenes, and background sounds used in such advertisement together with a listing of the names and addresses of persons portrayed or heard to speak, if the advertisement is in or will be in a form in which the advertised message is not fully revealed by a print copy or photograph;

(3) a statement of when and where the advertisement has been, is, or will be used;

(4) a completed lawyer advertising and solicitation communication application form; and

(5) a check or money order payable to the State Bar of Texas for the fee set by the Board of Directors. Such fee shall be for the sole purpose of defraying the expense of enforcing the rules related to such advertisements.

(c) Except as provided in ~~paragraphs~~ (e) ~~of this Rule~~, a lawyer shall file with the Advertising Review Committee of the State Bar of Texas no later than its first posting on the internet or other comparable network of computers information concerning the lawyer's or lawyer's firm's website. As used in this Rule, a "website" means a single or multiple page file, posted on a computer server, which describes a lawyer or law firm's practice or qualifications, to which public access is provided through publication of a uniform resource locator (URL). The filing shall include:

(1) the intended initial access page of a website;

(2) a completed lawyer advertising and solicitation communication application form; and

(3) a check or money order payable to the State Bar of Texas for the fee set by the Board of Directors. Such fee shall be for the sole purpose of defraying the expense of enforcing the rules related to such websites.

(d) A lawyer who desires to secure an advance advisory opinion, referred to as a request for pre-approval, concerning compliance of a contemplated solicitation communication or advertisement may submit to the Advertising Review Committee, not less than thirty (30) days prior to the date

of first dissemination, the material specified in ~~paragraph~~ (a) or (b) or the intended initial access page submitted pursuant to ~~paragraph~~ (c), including the application form and required fee; provided however, it shall not be necessary to submit a videotape or DVD if the videotape or DVD has not then been prepared and the production script submitted reflects in detail and accurately the actions, events, scenes, and background sounds that will be depicted or contained on such videotapes or DVDs, when prepared, as well as the narrative transcript of the verbal and printed portions of such advertisement. If a lawyer submits an advertisement or solicitation communication for pre-approval, a finding of noncompliance by the Advertising Review Committee is not binding in a disciplinary proceeding or disciplinary action, but a finding of compliance is binding in favor of the submitting lawyer as to all materials actually submitted for pre-approval if the representations, statements, materials, facts, and written assurances received in connection therewith are true and are not misleading. The finding of compliance constitutes admissible evidence if offered by a party.

(e) The filing requirements of ~~paragraphs~~ (a), (b), and (c) do not extend to any of the following materials, provided those materials comply with Rule 7.02(a) through (c) and, where applicable, Rule 7.04(a) through (c):

(1) an advertisement in the public media that contains only part or all of the following information:

(i) the name of the lawyer or firm and lawyers associated with the firm, with office addresses, electronic addresses, telephone numbers, office and telephone service hours, telecopier numbers, and a designation of the profession such as "attorney," "lawyer," "law office," or "firm";

(ii) the particular areas of law in which the lawyer or firm specializes or possesses special competence;

(iii) the particular areas of law in which the lawyer or firm practices or concentrates or to which it limits its practice;

(iv) the date of admission of the lawyer or lawyers to the State Bar of Texas, to particular federal courts, and to the bars of other jurisdictions;

(v) technical and professional licenses granted by this state and other recognized licensing authorities;

(vi) foreign language ability;

(vii) fields of law in which one or more lawyers are certified or designated, provided the statement of this information is in compliance with Rule 7.02(a) through (c);

(viii) identification of prepaid or group legal service plans in which the lawyer participates;

(ix) the acceptance or nonacceptance of credit cards;

(x) any fee for initial consultation and fee schedule;
(xi) other publicly available information concerning legal issues, not prepared or paid for by the firm or any of its lawyers, such as news articles, legal articles, editorial opinions, or other legal developments or events, such as proposed or enacted rules, regulations, or legislation;
(xii) in the case of a website, links to other websites;
(xiii) that the lawyer or firm is a sponsor of a charitable, civic, or community program or event, or is a sponsor of a public service announcement;
(xiv) any disclosure or statement required by these rules; and
(xv) any other information specified from time to time in orders promulgated by the Supreme Court of Texas;

(2) an advertisement in the public media that:
(i) identifies one or more lawyers or a firm as a contributor to a specified charity or as a sponsor of a specified charitable, community, or public interest program, activity, or event; and
(ii) contains no information about the lawyers or firm other than names of the lawyers or firm or both, location of the law offices, and the fact of the sponsorship or contribution;

(3) a listing or entry in a regularly published law list;

(4) an announcement card stating new or changed associations, new offices, or similar changes relating to a lawyer or firm, or a tombstone professional card;

(5) in the case of communications sent, delivered, or transmitted to, rather than accessed by, intended recipients, a newsletter, whether written, digital, or electronic, provided that it is sent, delivered, or transmitted mailed only to:
(i) existing or former clients;
(ii) other lawyers or professionals; or
(iii) members of a nonprofit organization that meets the following conditions: the primary purposes of the organization do not include the rendition of legal services; the recommending, furnishing, paying for, or educating persons regarding legal services is incidental and reasonably related to the primary purposes of the organization; the organization does not derive a financial benefit from the rendition of legal services by a lawyer; and the person for whom the legal services are rendered, and not the organization, is recognized as the client of the lawyer who is recommended, furnished, or paid by the organization;

(6) a solicitation communication that is not motivated by or concerned with a particular past occurrence or event or a particular series of past occurrences or events, and also is not motivated by or concerned with the prospective client's specific existing legal problem of which the lawyer is aware;

(7) a solicitation communication if the lawyer's use of the communication to secure professional employment was not significantly motivated by a desire for, or by the possibility of obtaining, pecuniary gain; or
(8) a solicitation communication that is requested by the prospective client.

(f) If requested by the Advertising Review Committee, a lawyer shall promptly submit information to substantiate statements or representations made or implied in any advertisement in the public media or solicitation communication by which the lawyer seeks paid professional employment.

Terminology: See Rule 1.00 for the definitions of "competence," "firm," "law firm," "person," and "written."

SECTION VIII. MAINTAINING THE INTEGRITY OF THE PROFESSION

Rule 8.01. Bar Admission, Reinstatement, and Disciplinary Matters

An applicant for admission to the bar, a petitioner for reinstatement to the bar, or a lawyer in connection with a bar admission application, a petition for reinstatement, or a disciplinary matter, shall not:

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

(b) fail to correct a misapprehension known by the person to have arisen in the matter, or knowingly fail to respond to a lawful demand for information from an admission, reinstatement, or disciplinary authority, except that this rRule does not require disclosure of information otherwise protected by Rule 1.05.

Terminology: See Rule 1.00 for the definitions of "knowingly," "known," and "person."

Rule 8.02. Judicial and Legal Officials

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

(b) A lawyer who is a candidate for judicial office shall comply with the applicable provisions of the Texas Code of Judicial Conduct.

(c) A lawyer who is a candidate for an elective public office shall comply with the applicable provisions of the Texas Election Code.

Terminology: See Rule 1.00 for the definitions of "adjudicatory official" and "knows."

Rule 8.03. Reporting Professional Misconduct

(a) Except as permitted in ~~paragraphs~~ (c) or (d), a lawyer ~~having knowledge~~ who knows that another lawyer has committed a violation of applicable rules of professional conduct that raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects; shall inform the appropriate disciplinary authority.

(b) Except as permitted in ~~paragraphs~~ (c) or (d), a lawyer ~~having knowledge~~ who knows that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the appropriate authority.

(c) A lawyer ~~having knowledge~~ who knows or ~~suspecting~~ suspects that another lawyer or judge whose conduct the lawyer is required to report pursuant to ~~paragraphs~~ (a) or (b) ~~of this Rule~~ is impaired by chemical dependency on alcohol or drugs or by mental illness may report that person to an approved peer assistance program rather than to an appropriate disciplinary authority. If a lawyer elects that option, the lawyer's report to the approved peer assistance program shall disclose any disciplinary violations that the reporting lawyer would otherwise have to disclose to the authorities referred to in ~~paragraphs~~ (a) and (b).

(d) This rule does not require disclosure of ~~knowledge or~~ information ~~otherwise~~ protected ~~as confidential information~~ by:

(1) ~~by~~ Rule 1.05; or

(2) ~~by~~ any statutory or regulatory provisions applicable to the counseling activities of the approved peer assistance program.

(e) A lawyer shall not make, or assist a client in making, any agreement that restricts a lawyer's rights or obligations under this Rule.

(f) Within thirty (30) days of a finding of guilt or an order deferring adjudication by any court for the commission of an Intentional Crime or a Serious Crime, as defined by the Texas Rules of

Disciplinary Procedure, a lawyer licensed in Texas shall report, in writing, to the Office of the Chief Disciplinary Counsel, the finding of guilt, including any verdict of guilty, plea of guilty or no contest, or deferred adjudication for an Intentional or Serious Crime. The appeal of the finding of guilt or order of deferred adjudication does not stay the duty to report.

Terminology: See Rule 1.00 for the definitions of "fitness," "knows," "person," "substantial," and "writing."

Rule 8.04. Misconduct

(a) A lawyer shall not:

(1) violate these ~~r~~Rules, knowingly assist or induce another to do so, or do so through the acts of another, whether or not such violation occurred in the course of a client-lawyer relationship;

(2) commit a serious crime or commit any other criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects;

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

(4) engage in conduct constituting obstruction of justice;

(5) state or imply an ability to influence improperly a government ~~agency~~entity or official;

(6) knowingly assist a judge or judicial officer in conduct that is a violation of law or applicable rules of judicial conduct ~~or other law~~;

(7) violate any disciplinary or disability order or judgment;

(8) fail to timely furnish to the Chief Disciplinary Counsel's office or a district grievance committee a response or other information as required by the Texas Rules of Disciplinary Procedure, unless ~~he or she~~the lawyer in good faith timely asserts a privilege or other legal ground for failure to do so;

(9) engage in conduct that constitutes barratry as defined by the law of this state;

(10) fail to comply with ~~section 13.01 of~~ the Texas Rules of Disciplinary Procedure relating to notification of ~~an attorney's~~ a lawyer's cessation of practice;

(11) engage in the practice of law when the lawyer is on inactive status or when the lawyer's right to practice has been suspended or terminated, including but not limited to situations ~~wherein~~ which a lawyer's right to practice has been administratively suspended for failure to timely pay required fees or assessments or for failure to comply with Article XII of the State Bar Rules relating to ~~Mandatory~~Minimum Continuing Legal Education; or

(12) violate any ~~other~~ laws of this state relating to the professional conduct of lawyers and to the practice of law.

(b) As used in ~~subsection~~ (a)(2) ~~of this Rule~~, "serious crime" means barratry; any felony involving moral turpitude; any misdemeanor involving theft, embezzlement, or fraudulent or reckless misappropriation of money or other property; or any attempt, conspiracy, or solicitation of another to commit any of the foregoing crimes.

Terminology: See Rule 1.00 for the definitions of "fitness," "fraud," "fraudulent," and "knowingly."

Rule 8.05. Jurisdiction

(a) A lawyer is subject to the disciplinary authority of this state, if admitted to practice in this state or if specially admitted by a court of this state for a particular proceeding. In addition to being answerable for his or her conduct occurring in this state, any such lawyer also may be disciplined in this state for conduct occurring in another jurisdiction or resulting in lawyer discipline in another jurisdiction, if it is professional misconduct under Rule 8.04.

(b) A lawyer admitted to practice in this state is also subject to the disciplinary authority for:

(1) an advertisement in the public media that does not comply with these rules and that is broadcast or disseminated in another jurisdiction, even if the advertisement complies with the rules governing lawyer advertisements in that jurisdiction, if the broadcast or dissemination of the advertisement is intended to be received by prospective clients in this state and is intended to secure employment to be performed in this state; and

(2) a written solicitation communication that does not comply with these rules and that is mailed in another jurisdiction, even if the communication complies with the rules governing written solicitation communications by lawyers in that jurisdiction, if the communication is mailed to an addressee in this state or is intended to secure employment to be performed in this state.

Terminology: See Rule 1.00 for the definition of "written."

SECTION IX. SEVERABILITY OF RULES

Rule 9.01. Severability

If any provision of these rRules or any application of these rRules to any person or circumstances is held invalid, such invalidity shall not affect any other provision or application of these rRules that can be given effect without the invalid provision or application and, to this end, the provisions of these rRules are severable.

Terminology: See Rule 1.00 for the definition of "person."