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Proposed Conflict of Interest and Confidentiality Rules.

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UPDATE

PROPOSED CONFLICT OF INTEREST AND CONFIDENTIALITY RULES*

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INTRODUCTION

The ambiguous nature of professional responsibility in the legal industry often encumbers a lawyer's ability to effectively represent clients. In response to recent ethical issues, the Texas Disciplinary Rules Committee ("Committee") recommends modification of the Rules of Professional Conduct 1.05-1.13, which deal primarily with two areas—attorney confidentiality and attorney conflict of interest.[1] The Committee reviews substantive disciplinary rules rather than procedural disciplinary rules, which are examined by other bodies. Although Texas is not governed by these proposed rules until their adoption by both the Supreme Court of Texas and the State Bar of Texas, to the extent that issues arise related to the existing conflict and confidentiality rules, these proposals and commentaries should be persuasive in interpreting the present rules.

Historically, the Rules of Professional Conduct have been applied not only as a means of disciplining attorneys, but also to disqualify lawyers

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* The Proposed Rules are a product of the Committee on Disciplinary Rules of Professional Conduct of the State Bar of Texas. The Committee is comprised of a wide field of approximately thirty individuals in the legal industry, including professors, defense and plaintiff lawyers, practitioners of both large and small firms, judicial representatives, and various experts. Development and collation of the text of these rules encompasses a five-year process. These Rules are not enforceable until further action by the State Bar Board of Directors.

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1. During the time the Committee worked to draft and adopt these Rules, the American Bar Association ("A.B.A.") independently addressed many of the same concerns, and has largely been on a parallel course.

from cases and deal with trial issues, sometimes to the prejudice of the client. Unlike procedural rules, the Rules of Professional Conduct engender a greater degree of subjectivity in their interpretation. These recommended Rules set a floor, below which a lawyer may be subject to discipline. In other words, while the Committee discusses the standard for attorneys in particular circumstances, the Rules, by their very nature, do not offer bright lines for deciding questions of law, ethics, or fairness.

While this Update providing the suggested changes to the Rules of Professional Conduct ("Update") recommends amendment to nine specific rules, practically it addresses three larger issues. First, Amendment 1A concentrates on eight commonly used terms of art in the lexicon of legal conflict of interest. By promoting the usage of consistent terminology, many client issues regarding identification, representation, and scope of representation can be obviated.

Second, proposed Rule 1.05 provides a guide as to the scope and limitation of attorney-client confidentiality. Specifically, it addresses certain obligations, such as the impropriety of a lawyer using confidential information to the strategic disadvantage of a client, and exceptions to confidentiality when dealing with information in the public domain.

Finally, the proposal addresses a range of issues with regard to conflict of interest, beginning with Rule 1.06, the general rule regarding conflict of interest – the duty of loyalty by a lawyer to the client. Rules 1.07–1.09 concentrate on specific transactions where conflicts of interest often arise, such as the representation of multiple clients in a single or related matters (Rule 1.07), business transactions that a lawyer is prevented from engaging in with a client (Rule 1.08), and interaction with former clients (Rule 1.09). Rules 1.10-1.13 deal with conflict of interest from a more general perspective, beginning with Rule 1.10, the general rule that a lawyer should not further client or firm interests by exerting influence in the lawyer's role as a public employee or government agent. The proposal also addresses the issues of judicial law clerks that subsequently work for private interests (Rule 1.11), the duty of a lawyer to the organization she represents (Rule 1.12), and the responsibility of a lawyer not to act contrary to the interests of charitable organizations she represents (Rule 1.13).

THE PROPOSED CONFLICT OF INTEREST AND CONFIDENTIALITY RULES

AMENDMENT 1A

Create New Defined Terms for Conflict of Interest Rules

Defined Terms For Rules 1.05 Through 1.13

As used in these definitions and in Rules 1.05 through 1.13, the following terms have the meanings set out below.

Affiliated with a Firm/Affiliated Firm: A lawyer is "affiliated with a firm" (and the firm is an "affiliated firm") in connection with a matter if either the lawyer or his or her professional entity is a shareholder, partner, or member of, or an associate in, that firm.

Affiliated with Another Lawyer/Affiliated Lawyer: A lawyer is "affiliated with another lawyer" (and the other lawyer is an "affiliated lawyer") in connection with a matter if each lawyer or his or her professional entity is a shareholder, partner, or member of, or an associate in the same law firm as the other lawyer or professional entity.

Apportioned No Part of the Fee: A lawyer is "apportioned no part of the fee" earned in a matter if the lawyer's compensation (including any salary, draw, partnership share, dividend, or bonus) either:

(i) is not based directly on that fee; or

(ii) is calculated pursuant to an agreement reached independent of the receipt of or prospect of receiving that fee, except for any portion of that agreement that would compensate the lawyer for originating that matter.

Client: A person is a "client" of a lawyer in a matter if that client is personally represented in that matter by that lawyer or by an affiliated lawyer.

Former Client: A person is a "former client" of a lawyer in a matter if that person was once a client of the lawyer in that matter.

Matter: A "matter" is a specific existing, proposed, or contemplated transaction or adjudicatory proceeding, or a specific legal topic, about which a lawyer either exercises or is consulted about exercising legal skill or judgment on behalf of a client or prospective client. It does not include a general retainer to assure a lawyer's availability to represent a client in unspecified matters as they arise.

Personally Represents a Client: A lawyer "personally represents a client" in a matter if the lawyer represents the client and personally exercises legal skill or judgment on behalf of the client in connection with that matter.

Represents a Client: A lawyer "represents a client" in a matter if the client is personally represented in that matter by that lawyer or by an affiliated lawyer.

Comment: Terminology For Rules 1.05-1.13

Overview

1. In the past, there have been a considerable number of problems with interpreting the Texas conflict-of-interest rules. Many of those problems can be alleviated by clear and consistently used terminology. There are four broad area where terminology alone can be

helpful. The first concerns the proper identification of clients. The second concerns whose conflicts of interest a lawyer must be concerned with for disciplinary purposes other than his or her own. The third concerns whose representation of clients a lawyer must be concerned with for disciplinary purposes other than his or her own. The fourth concerns the scope of the representation of a client.

"Client" and "Former Client"

2. One area of possible confusion for a lawyer is who should be considered a "client" or "former client" of that lawyer. There are two aspects of this problem: (1) clarifying who among a number of related persons involved in a matter the lawyer is personally representing; and (2) deciding who besides persons the lawyer is *personally* representing should be considered to be *represented* by the lawyer for disciplinary purposes only.

3. One possible way to simplify these issues would be to say that the only person who is a client of a lawyer in a matter is one whom that lawyer is personally representing in that matter. The definition of "client" utilized in these Rules, however, rejects that approach. Instead, a lawyer's "client" in a matter is any person who is "personally represented in that matter by that lawyer *or by an affiliated lawyer*." A detailed discussion of who is considered to be an "affiliated lawyer" of another lawyer is contained in comments 5-6. For now, however, it is enough to note that it includes each lawyer who is a shareholder, partner, or member of, or an associate in, the same law firm as the given lawyer or that lawyer's professional entity. In other words, a lawyer's clients include every person who is personally represented by that lawyer or by another lawyer in that lawyer's firm. This is the traditional view that has been taken of this issue for many years, including in the former Texas Code of Professional Responsibility. It is based on the principle that every lawyer in a law firm owes the full range of duties of loyalty and confidentiality to every client being personally represented by any lawyer in that firm.

4. Once the definition of a "client" is clarified, that of a "former client" is as well. A "former client" of a lawyer in a matter is any person who "was once a client of the lawyer in that matter." Under this definition, the lawyer need not have formerly *personally* represented a person for that person to be a former client of the lawyer. Former personal representation by a lawyer then affiliated with that lawyer is sufficient.

"Affiliated" Lawyers and Firms

5. For purposes of determining whether acceptance of a representation would create a conflict of interest, a lawyer is obliged to consider not only the clients he or she is personally representing but also

those of his or her colleagues or of the firm with which the lawyer (or his or her professional entity) practices. The definitions of "affiliated [with a] lawyer" and "affiliated [with a] firm" define these other lawyers or firms more precisely, but in a common sense fashion.

6. Thus a lawyer is "affiliated with" another lawyer (and the other lawyer is an "affiliated lawyer") in connection with a matter if each lawyer or his or her professional entity is a shareholder, partner, or member of, or an associate in the same law firm as the other lawyer or professional entity. Under this definition, lawyers practicing in their individual capacities within a firm are affiliated with one another. So are lawyers practicing in the form of a P.C., with the P.C. rather than the lawyer personally serving as a partner, shareholder, or the like within the firm. Similarly, a lawyer is "affiliated with a firm" (and the firm is an "affiliated firm") in connection with a matter if either the lawyer or his or her professional entity is a shareholder, partner, or member of, or an associate in, that firm. Under this definition, a lawyer is affiliated with his or her own professional entity, as well as with any entity of which either the lawyer personally or his or her professional entity is a partner, shareholder, or the like.

"Representing" and "Personally Representing" Clients

7. The importance of the definitions of "affiliated lawyer" and "affiliated firm" just discussed is that consistent use of those terms, along with the terms "representing a client" and "personally representing a client" discussed immediately below, greatly simplifies and shortens the conflict-of-interest rules. In that regard a lawyer "represents a client" in a matter if the client is represented in that matter by the lawyer personally, by his or her professional entity, or by another affiliated lawyer or firm. Thus when the rules provide that a lawyer may not "represent a client" absent certain circumstances, the lawyer is deemed to represent not only those clients to whom he or she is personally providing legal services, but also those similarly served by any affiliated lawyer or firm. As a consequence, it is no longer necessary to include a provision in each conflict-of-interest rule concerning the effect of the rule on those attorneys not personally involved in representing a client. Since every attorney in a firm is deemed to represent every client represented by any other attorney in that firm or by the firm itself, stating that a lawyer "shall not represent" a client automatically imposes a firm-wide ban on undertaking that representation.

8. On the other hand, there are some circumstances in which a lawyer should be disciplined for personally undertaking a representation that could be agreed to appropriately by an affiliated lawyer

or firm. For example, a member of a law firm might have such strong beliefs in favor of capital punishment that he or she could not in good conscience undertake an appeal by a defendant in a death penalty case. If, however, there were other members of that lawyer's firm who did not hold such beliefs and who could represent the defendant competently and diligently notwithstanding their colleague's sentiments, they should be able to accept that representation. The proposed rules identify such situations by forbidding only "*personal* representation" of a client as opposed to "*representation*" of that client. *See* proposed Rules 1.06(a)(2), (a)(3), (a)(4), 1.09(a), (b), (c). Under the proposed rules a lawyer "personally represents a client" in a matter if the lawyer represents the client and personally exercises legal skill or judgment on behalf of the client in connection with that matter.

9. Because a lawyer can "represent a client" in a matter despite not having any personal knowledge of or involvement in that matter, sanctioning a lawyer for "representing" a person could result in disciplinary liability without fault. To prevent that from occurring, these Rules consistently discipline lawyers only for "*knowingly* representing" such persons.

A "Matter"

10. The scope of a lawyer's representation of a client and, as a consequence, the scope of the lawyer's duties to that client, may be unduly vague. Such uncertainty is undesirable, especially for purposes of discipline. As a consequence, these Rules generally speak in terms of a lawyer's representation (or personal representation) of a client "in a matter." A "matter," in turn, is defined as "a specific existing, proposed, or contemplated transaction or adjudicatory proceeding, or a specific legal topic, about which a lawyer either exercises or is consulted about exercising legal skill or judgment on behalf of a client or prospective client." This definition is meant to include most varieties of legal representation, whether in a litigation context, in conjunction with contractual or transaction matters, or merely consultation seeking legal advice or the preparation of legal instruments.

11. One situation specifically excluded from the definition of "matter" is "a general retainer to assure a lawyer's availability to represent a client in unspecified matters as they arise." The concern over considering such an arrangement to be a "matter" is that it could create extremely sweeping conflicts of interest for lawyers considering undertaking a representation adverse to the interests of clients offering such retainers. That in turn could allow wealthy

persons in less populated areas to severely impair the ability of adverse parties to secure legal representation by local law firms.

"Apportioned No Part of the Fee"

12. The definition of "apportioned no part of the fee" is relevant in determining whether a lawyer or firm affiliated with a particular lawyer may undertake a representation that particular lawyer could not undertake under these Rules. See Rules 1.09, 1.10, 1.11. The concern in such cases is that the personally prohibited lawyer might be tempted to breach obligations of confidentiality and loyalty to the adverse party by the prospect of receiving a share of a large fee generated by that representation. To discourage such behavior, these Rules provide that a personally prohibited lawyer may be "apportioned no part of the fee" generated by the matter.

13. The definition of that phrase permits two general forms of compensation. The first is one where the lawyer's compensation is not based directly on the fee. An example of this would be where the lawyer is to receive a fixed salary and a bonus based solely on years of practice. The second possibility is where the lawyer's salary is "calculated pursuant to an agreement reached independent of the receipt or prospect of receiving that fee, except for any portion of that agreement that would compensate the lawyer for originating that matter." By way of illustration, if such an arrangement were to include a specified salary, a bonus based on the fees generated by business originated by the lawyer, and a second bonus based on a fixed share of the firm's net profits, the lawyer could receive the salary and the bonus based on a fixed share of the firm's net profits but not any portion of the origination-of-business bonus attributable to the fee generated by the matter.

RULE 1.05 CONFIDENTIALITY OF INFORMATION

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

(1) Reveal confidential information of a client, a former client, or other person who in good faith sought representation by the lawyer, if the lawyer knows or should know that information is confidential; or

(2) Use confidential information of a client, a former client, or other person who in good faith sought representation by the lawyer, to the disadvantage of that present or former client or other person, if the lawyer knows or should know that information is confidential.

(b) A lawyer may disclose or use confidential information notwithstanding paragraph (a):

(1) When the client instructs or authorizes the lawyer to do so in order to carry out the representation;
(2) When the lawyer reasonably believes that it is appropriate to do so to carry out the representation effectively, except when otherwise specifically instructed;
(3) When the client, former client, or other person who in good faith sought representation by the lawyer gives informed consent to do so after reasonable disclosure;
(4) In communicating with representatives of the client, former client, or other person who in good faith sought representation by the lawyer, except when otherwise specifically instructed;
(5) In communicating with any affiliated lawyer, or any employees of the lawyer personally or of any affiliated lawyer or firm, except when otherwise specifically instructed;
(6) When the lawyer has reason to believe it is necessary to do so in order to comply with a court order, a Texas Disciplinary Rule of Professional Conduct, or other law;
(7) 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, former client, or other person who in good faith sought representation by the lawyer;
(8) To the extent reasonably necessary to respond to a criminal charge, civil claim, administrative action or disciplinary complaint against the lawyer or an affiliated lawyer or firm based upon conduct involving the client, former client, or other person who in good faith sought representation by the lawyer or involving the representation of or consultation with any of them;
(9) When the lawyer has reason to believe it is necessary to do so in order to prevent the client, former client, or other person who in good faith sought representation by the lawyer from committing a criminal or fraudulent act;
(10) To the extent revelation reasonably appears necessary to rectify the consequences of a client's or former client's criminal or fraudulent act in the commission of which the lawyer's services had been used;
(11) When the lawyer knows that the information that the lawyer proposes to use or disclose is that of a former client or other person who in good faith sought representation by the lawyer and that:

(i) the information was protected as confidential only by subparagraphs (e)(1) or (e)(3) when initially acquired by the lawyer;
(ii) the information has since become widely known or readily obtainable from sources generally available to the public in substantially the same form or compilation as that which the lawyer proposes to use or disclose; and

(iii) the lawyer has not caused that information to become publicly available in violation of these rules or other law, or caused or encouraged another to do so, with the intent of making that information available for use or disclosure adverse to the former client or other person;

(12) When the lawyer knows that:

(i) the client, former client or other person who in good faith sought representation by the lawyer whose information the lawyer proposes to use or disclose has freely, knowingly, and voluntarily caused that information to become widely known or readily obtainable from sources generally available to the public in substantially the same form or compilation as it would be disclosed or used by the lawyer; and

(ii) the lawyer has not caused or encouraged the client, former client or other person who in good faith sought representation by the lawyer to do so with the intent of making that information available for use or disclosure adverse to that person;

(13) When the lawyer knows that:

(i) the information is protected as confidential only by subparagraph (e)(3)(ii); and

(ii) the use or disclosure of the information would not adversely affect a current or former representation of the client.

(c) A lawyer shall reveal confidential information if necessary when the lawyer has information clearly establishing that a client is likely to commit an act that, if committed, is reasonably certain to result in death or substantial bodily harm to another person, to the extent revelation reasonably appears necessary to prevent the client from committing the act.

(d) A lawyer shall reveal confidential information if necessary when and to the extent required to do so by Rules 1.02(g), 1.07, 3.03(a)(2), 3.03(b), or 4.01(b).

(e) "Confidential information" is:

(1) except as provided in subparagraph (4), all factual information directly related to the proposed representation of a person seeking representation in good faith by the lawyer or by an affiliated lawyer or firm, even though that representation is not accepted, that the person seeking representation wants held in confidence or that in reasonable probability would be detrimental or embarrassing to that person if revealed to, or used for the benefit of, another person, provided that information was furnished to the lawyer or to an affiliated lawyer or firm by or on behalf of that person; or

(2) the content of communications that a client or former client is privileged to prevent from being disclosed by the attorney client privilege under applicable law; or

(3) except as provided in subparagraph (4), all other factual information directly relating to a current or former representation of a client, that the client wants held in confidence or that in reasonable probability would be detrimental or embarrassing to the client if revealed to, or used for the benefit of, another person, if that information was either:

(i) furnished to the lawyer or to an affiliated lawyer or firm by or on behalf of the client, no matter when that information was acquired by the lawyer; or

(ii) acquired by the lawyer or by an affiliated lawyer or firm in furtherance of the representation of the client.

(4) Notwithstanding subparagraphs (1) and (3), information provided to or obtained by a lawyer in the course of or by reason of representing a client is not confidential if, at the time the lawyer first acquired it, the information was widely known or readily obtainable from sources generally available to the public in substantially the same form or compilation as it was acquired by the lawyer, unless, at the time the lawyer first acquired it, the information was within the scope of subparagraph (2).

Comment: Rule 1.05

Confidentiality Generally

1. Both the fiduciary relationship existing between lawyer and client and the proper functioning of the legal system require the preservation by the lawyer of confidential information of one who has employed or sought in good faith to employ the lawyer. Free discussion should prevail between lawyer and client in order for the lawyer to be fully informed and for the client to obtain the full benefit of the legal system. The ethical obligation of the lawyer to protect the confidential information of the client not only facilitates the proper representation of the client but also encourages potential clients to seek early legal assistance. This Rule subjects a lawyer to discipline for certain disclosures or uses of "confidential information." See paragraphs (a), (e). Tort law regulates similar conduct. The conduct prohibited by this Rule, however, and that which is actionable in tort are not necessarily the same. Thus a prudent lawyer contemplating a disclosure or use of confidential information should assess his or her obligations both as a matter of discipline under this Rule and as a matter of tort law under relevant legal authorities separately.

Information Protected as Confidential

2. This Rule protects three categories of factual information as confidential. The first category is certain factual information of a person who in good faith sought representation by the lawyer or by an affiliated lawyer or firm but whom that lawyer or affiliated lawyer

or firm ended up not representing. See subparagraph (e)(1). The requirement that the lawyer's services be sought "in good faith" is to forestall tactical efforts by a person to disqualify counsel from representing another person having opposing interests with respect to a matter by pretending to seek the lawyer's advice or representation concerning that matter beforehand.

3. In addition to requiring that the person seeking representation do so in good faith, to be entitled to the protection afforded by subparagraph (e)(1) the information at issue must satisfy three additional requirements. The first is that it "directly relate" to the representation of a client. Information of a more general character, such as the client's internal organization or decision-making structure, or the client's general attitude towards resolving disputes, generally do not satisfy this requirement. The second standard the information must satisfy is either that the client wants it held in confidence or that in reasonable probability its revelation would be detrimental or embarrassing to the client. Thus innocuous or laudatory information concerning a client will not normally qualify as confidential information. The third is that the information must have been furnished to the lawyer or to an affiliated lawyer or firm by or on behalf of the person seeking representation during the course of consultations with that person. Information concerning the possible representation acquired by the lawyer from other sources through independent investigation is not considered confidential information under this paragraph, but would be if representation were accepted. See subparagraph (e)(3)(ii). Certain information satisfying these three requirements, however, is nonetheless not considered to be confidential to the extent it falls within the exception created by subparagraph (e)(4). See comment 8.

4. An additional category of confidential information is the content of communications that are protected in the law of evidence by the attorney-client privilege. See subparagraph (e)(2). The attorney-client privilege, developed through many decades, provides the client a right to prevent certain confidential communications from being revealed. Subject to certain exceptions established by the law of evidence, the attorney-client privilege protects the client's privileged information and communications both during the attorney-client relationship and after it has ended, and continues in force despite the death of the client. These same exceptions and principles apply in determining whether client communications should be considered as confidential information within the meaning of subparagraph (e)(2).

5. The final category of information protected as confidential by this Rule is described in paragraph (e)(3). To qualify for that protection, the information must satisfy several standards. The first two are identical to the first two requirements for protecting information as confidential under subparagraph (e)(1). See comment 3. In addition, the information must either have been furnished to the lawyer or to an affiliated lawyer or firm by or on behalf of the client (see subparagraph (e)(3)(i)) or have been acquired by the lawyer or by an affiliated lawyer or firm in furtherance of the representation of the client. See subparagraph (e)(3)(ii). Conceivably, information could satisfy both requirements. Communications between a client and non-lawyer employees of a law firm that otherwise satisfy the requirements of subparagraph (e)(3) are also considered "confidential." As is true with respect to subparagraph (e)(1), certain information satisfying these three requirements is nonetheless not considered to be confidential to the extent it falls within the exception created by subparagraph (e)(4). See comment 8.

6. Within the meaning of subparagraph (e)(3)(i), information communicated "by or on behalf of the client" includes both communications from the client or the client's representatives and communications by third parties—such as the client's treating physicians, accountants, or other experts—made at the direction of the client. Such communications typically are made both before and during the representation, but it is not unheard of for them to occur after it is concluded as well. As long as those communications directly relate to the representation and would be detrimental or embarrassing to the client if used by or revealed to another person, they retain their confidential character. See subparagraph (e)(3)(i).

7. Subparagraph (e)(3)(ii) is concerned primarily with information acquired by the lawyer through independent effort from sources other than the client or other persons made available to the lawyer by the client. As long as that information is obtained in furtherance of the representation and meets the other requirements for protection set out in subparagraph (e)(3), it is confidential without regard to when the information was acquired. See subparagraph (e)(3)(ii). Thus, information obtained by the lawyer through independent inquiry before formal acceptance of the representation but that was acquired in furtherance of it, is considered confidential. It is also possible, however, for a lawyer to obtain information concerning a representation that has concluded that is confidential under that subparagraph as well, as when the lawyer conducts an investigation to determine if there has been a subsequent breach of the agreement settling a matter by the opposing party. It also might be possible to

consider the information acquired by the lawyer through such an inquiry as related to a new representation of the client to enforce the original settlement agreement. In any event, whether information obtained by the lawyer qualifies for protection under subparagraph (e)(3)(ii) often will involve fact questions to be determined on a case-by-case basis.

8. Subparagraph (e)(4) provides an exception to the protections extended to information that otherwise would be confidential pursuant to subparagraphs (e)(1) or (e)(3). The exception includes information that, at the time the lawyer first acquired it, was either widely known or readily obtainable from sources generally available to the public in substantially the same form or compilation as it was acquired by the lawyer, as long as the information cannot be considered "privileged" within the meaning of subparagraph (e)(2). For example, a client could not make the contents of a widely publicized scientific work confidential merely by furnishing it to the lawyer in the course of the lawyer's representation of the client. The basis for this exception is that the information in question is not deserving of the protection traditionally accorded client confidences and secrets.

9. All of the information defined as confidential by paragraph (e) is *factual.* Consequently neither that paragraph nor paragraph (a) places any restrictions on a lawyer's disclosure or use of *legal* skills or *legal* knowledge acquired during the course of or by reason of a particular representation, as long as the particular disclosure or use being contemplated would not also result in an unauthorized disclosure or use of related *factual* information protected by paragraph (e). Thus, for example, in the absence of a violation of some other of these Rules, a lawyer is free to utilize legal knowledge acquired in representing one client to assist other clients in connection with legally similar matters otherwise unrelated to the work done for the first client. By contrast, the lawyer would not be free to reveal the content of the specific legal advice the lawyer furnished a client (see subparagraphs (e)(2), (a)(1)), or to attack the work product or other services the lawyer personally performed for that client. See Rules 1.06, 1.09.

10. Whether particular information is confidential may vary at different points in time or from one type of representation to another. For example, the fact that a person consulted with a lawyer concerning a possible lawsuit is no longer confidential once that lawyer institutes suit on the person's behalf. On the other hand, that information may well have been confidential until after the decision to file suit had been made and litigation actually instituted. Similarly, although the identity of a client frequently is not viewed as

confidential, it can be in particular cases. Again by way of illustration, a lawyer might wish to present a tax question involving a client to the Internal Revenue Service without revealing the client's identity, or make an anonymous payment to the Service on the client's behalf to cut off the accumulation of penalties and interest on the client's tax liability. In such cases, the lawyer would have an obligation to protect the identity of the client.

11. Whether information must be treated as confidential also can be influenced by the conduct of the lawyer. It is not improper, for example, for a lawyer to condition participation in a prospective client's "beauty contest" on that person's clear agreement not to treat information disclosed as part of that process as confidential. If the prospective client nonetheless decides to disclose information to that lawyer despite having been advised of the lawyer's position, the lawyer could be entitled to treat that information as not being subject to this rule. Any such proposed limitation on the lawyer's normal obligations of confidentiality, however, should be made known to the prospective client, at the latest, as soon as the lawyer realizes that otherwise protectable information will be or is being disclosed, so that person can make an informed decision whether to continue to consult with the lawyer on those terms.

Obligations with Respect to Confidential Information

12. Subject to certain exceptions set out in paragraphs (b), (c), and (d) discussed below, paragraph (a) imposes two obligations on a lawyer with respect to confidential information as defined in paragraph (e). The first is not to disclose such information. See subparagraph (a)(1). The second is not to use that information to the disadvantage of the client, former client, or person who in good faith sought representation by the lawyer whose information it is. See subparagraph (a)(2).

13. An unauthorized revelation or use of confidential information does not subject a lawyer to discipline, however, unless the lawyer knew or should have known that the information is confidential. There are two reasons why the lawyer may have doubts on that score. The first is that the expectations of confidentiality of a person imparting information to a lawyer are not always clear. The second is that the confidential nature of the information at issue may not be known to the lawyer because the matter to which it relates was handled by an affiliated lawyer rather than by the lawyer personally. Thus, whether particular information was or is confidential and, if so, whether the lawyer knew or should have known it was, may involve fact issues.

14. In doubtful situations, however, a prudent lawyer normally should err on the side of treating information as confidential. An unauthorized disclosure or use of confidential information often could be damaging to the person involved and could readily lead to controversy and recriminations. Consequently, a lawyer who is aware that the information in question might be confidential even though the lawyer does not know it to be, should make reasonable inquiry under the circumstances to clarify the situation.

15. The protections afforded confidential information by paragraph (a) survive termination of the attorney-client relationship and, in the case of a natural person, the death of the client. Under the law of evidence, however, courts have concluded that in certain circumstances the attorney-client privilege of an organization can pass to a successor entity or to a person who has assumed management and control of the organization, such as a trustee in bankruptcy. Whether such circumstances exist in a particular case involves questions of fact and law beyond the scope of these rules.

16. A former version of this Rule also prohibited a lawyer from using the privileged information of a client for the advantage of the lawyer or of a third person, unless the client consented after consultation, even though the client would not be harmed in any way by that activity. While that limitation is not retained as a standard of discipline under this Rule, a prudent lawyer should note that the *use* of a client's confidential information for the benefit of the lawyer or another might also harm the lawyer's client. If so, the lawyer's use of that information could subject the lawyer to discipline under subparagraph (a)(2). In addition, *revealing* confidential information is prohibited by subparagraph (a)(1) whether or not the person whose information is revealed is harmed by that disclosure.

Discretionary Exceptions to Confidentiality Obligations—General Considerations

17. A lawyer's obligations to protect the confidential information of a client against unauthorized disclosure and to ensure that information is not utilized to the detriment of the client are fundamental aspects of the attorney-client relationship. Nonetheless, those obligations are not absolute. Rather, exceptions to them traditionally have been authorized or even required in a number of circumstances. This Rule recognizes those exceptions. See paragraphs (b), (c), and (d).

Discretionary Exceptions to Confidentiality Obligations Based on Furthering the Client's Interests

18. Several sound exceptions to a lawyer's obligations of confidentiality under this Rule exist. A number of these either stem from the

nature of the representation itself or are a necessary consequence of the structure or operation of law firms. For example, in the absence of specific instructions to the contrary, a lawyer may disclose confidential information to the client's representatives (see subparagraph (b)(4)) or to affiliated lawyers or other employees of that lawyer's firm. See subparagraph (b)(5). Probably the most common use of the subparagraph (b)(5) exception is to permit a division of responsibility for handling a particular matter within a law firm. However, it also provides a basis for a limited disclosure of confidential client information within the firm in order to permit an appropriate check for possible conflicts of interest before agreeing to undertake a particular representation.

19. Similarly, a client may instruct or authorize a lawyer to disclose confidential information in order to carry out the representation (see subparagraph (b)(1)). Since any such instruction, if directing the lawyer to engage in lawful conduct, would be binding (see Rule 1.02(a)(1)), the lawyer may make the particular disclosure.

20. Situations can arise, however, where a lawyer reasonably believes that it is necessary to use or disclose confidential information in order to carry out the representation of a client effectively, but the lawyer cannot reasonably obtain the client's instruction or authorization before doing so. In negotiations, for example, in an exercise of professional judgment, a lawyer may believe that it is appropriate to make a disclosure of confidential information at that very moment in order to further the client's interests. Subparagraph (b)(2) permits the lawyer to do so, except when the lawyer had been previously specifically instructed to the contrary. 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 attorney specialist concerning certain aspects of the representation, but the client cannot be reached. Once again, subparagraph (b)(2) would permit the lawyer to do so, except when previously specifically instructed to the contrary.

21. The exception provided in subparagraph (b)(2) is relatively narrow. It applies only to the use or disclosure of confidential information related to the representation of a client. Use or disclosure made for other reasons should occur only with the informed consent of the client after reasonable disclosure (see subparagraph (b)(3)) or pursuant to other provisions of paragraphs (b), (c), or (d) of this Rule. Moreover, even if a particular use or disclosure of confidential information does relate to the representation of a client, that use or disclosure still is not authorized by subparagraph (b)(2) unless it is appropriate in order to carry out the representation effectively. This

exception contemplates that, after reasonable reflection under the circumstances, the lawyer has determined that it is reasonably likely to be in the client's best interests to make the contemplated use or disclosure. It is not necessary for the lawyer to have determined that the use or disclosure is the best or only practicable course to follow.

22. A lawyer also may use or disclose confidential information when the person whose information is involved gives informed consent to do so after reasonable disclosure. See subparagraph (b)(3). This provision, which includes but is not limited to a disclosure or use of confidential information in connection with the representation of a client, is premised on the person having received suitable advice concerning any reasonably foreseeable advantages or disadvantages in using or disclosing the confidential information as contemplated.

Discretionary Exceptions to Confidentiality Obligations Based on Competing Considerations

23. Other exceptions to a lawyer's obligations of confidentiality involve balancing legitimate competing interests. For example, when a lawyer has reason to believe that it is necessary to disclose confidential information in order to comply with a court order, these Rules or other law, the lawyer may do so. See subparagraph (b)(6). The "other law" provision in this exception permits a lawyer to make disclosures required by applicable rules of practice or procedure, such as by producing confidential but unprivileged client information in response to valid discovery requests. Where privileged information is involved, subparagraph (b)(6) requires the lawyer to invoke, for the client, the applicable privilege; but if the court denies the privilege, the lawyer may turn over the disputed documents or testify as ordered by the court, or may test the ruling as permitted by Rule 3.04(d), as the client directs.

24. Exceptions to a lawyer's confidentiality obligations are also provided for when reasonably necessary to establish a claim or assert a defense on behalf of the lawyer in a controversy between the lawyer and the client. See subparagraph (b)(7). This exception is based on the notion that the lawyer would be at an unfair disadvantage in such a dispute if only the client could use or reveal such confidential information. The right to use or disclose confidential information in such circumstances, however, only extends to such information as is "reasonably necessary" for the purpose at hand. Unreasonably broad disclosures of confidential information, or threats of such disclosures, are not within the scope of this exception.

25. A similar exception exists where use or disclosure of confidential information is needed to establish a defense to a criminal charge, civil claim or disciplinary complaint filed against the lawyer person-

ally or against an affiliated lawyer or firm based upon conduct involving the lawyer's client or the representation of the client. See subparagraph (b)(8). This exception is intended to apply only where such charges, claims or complaints are raised by someone other than the lawyer's client. It is justified on many of the same grounds underlying the exception in subparagraph (b)(7), but with one important difference. Because the lawyer's client has not questioned the lawyer's services in situations covered by subparagraph (b)(8), the lawyer's right to use or disclose confidential information is more limited. Consequently subparagraph (b)(8) provides that the lawyer's right to disclose or use confidential information does not arise until after proceedings against the lawyer are actually commenced.

26. Two further exceptions to a lawyer's confidentiality obligations concern the lawyer's options after becoming aware of a client's past or ongoing criminal or fraudulent conduct. In becoming privy to information about a client, a lawyer may foresee that the client intends serious and perhaps irreparable harm. To the extent a lawyer is prohibited from making disclosure, the interests of the potential victim are sacrificed in favor of holding the client's information in confidence, even though the client's purpose is wrongful. On the other hand, a client who knows or believes that a lawyer is required or permitted to disclose a client's wrongful purposes may be inhibited from revealing facts which would enable the lawyer to counsel effectively against wrongful action. Rule 1.05 thus involves balancing the interests of one group of potential victims against those of another. The criteria provided by the Rule for doing so are discussed below.

27. Applicable rules of evidence indicate the underlying public policy of furnishing no protection to client information where the client seeks or uses the services of the lawyer to aid in the commission of a crime or fraud. That public policy has been adopted by Rule 1.05 as well. Where the client is planning or engaging in criminal or fraudulent conduct without the lawyer's knowledge by utilizing the lawyer's services, or where the lawyer is culpably involved in that misconduct, full protection of client information is not justified.

28. Several other situations must be distinguished. First, the lawyer may not counsel or assist a client in conduct that is criminal or fraudulent. See Rule 1.02(b). As noted in the Comment to that Rule there can be situations where the lawyer may have to reveal information relating to the representation in order to avoid assisting a client's criminal or fraudulent conduct, and subparagraph (b)(6) permits doing so. A lawyer's duty under Rule 3.03(a)(5) not to knowingly use false or fabricated evidence is a special instance of the duty prescribed in Rule 1.02(b) to avoid assisting a client in criminal

or fraudulent conduct, and subparagraph (b)(6) permits revealing information necessary to comply with Rule 3.03(b). The same is true of compliance with Rule 4.01. See also paragraph (d) (mandating disclosure in some such cases).

29. Second, the lawyer may have been innocently involved in past conduct by the client that was criminal or fraudulent. In such a situation the lawyer has not violated Rule 1.02(b), because to "counsel or assist" criminal or fraudulent conduct requires knowing that the conduct is of that character. Since the lawyer's services were used to further the client's crime or fraud, however, the lawyer has legitimate interests both in rectifying the consequences of such conduct and in avoiding charges that the lawyer's participation was culpable. Subparagraph (b)(8) and (10) give the lawyer professional discretion to reveal confidential information in order to serve those interests.

30. Third, the lawyer may learn that a client intends prospective conduct that would be criminal or fraudulent. The lawyer's knowledge of the client's purpose may enable the lawyer to prevent commission of the prospective crime or fraud. When the threatened injury is grave, the lawyer's interest in preventing the harm may be more compelling than the interest in preserving confidentiality of information. As stated in subparagraph (b)(9), the lawyer has professional discretion, based on reasonable appearances, to reveal confidential information in order to prevent the client's commission of any criminal or fraudulent act. In some situations of this sort, disclosure is mandatory. See paragraphs (c) and (d) and comments 41-46.

31. The lawyer's exercise of discretion under paragraph (b) 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 by the client, the lawyer's own involvement in the transaction, and factors that may extenuate the client's conduct in question. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer believes necessary to the purpose. Although preventive action is permitted by paragraph (b), failure to take preventive action does not violate that paragraph. But see paragraphs (c) and (d). Moreover, because these Rules do not define standards of civil liability for lawyers, paragraph (b) does not impose a duty in tort on a lawyer to make any disclosure permitted by that paragraph, and no civil liability is intended to arise solely from the lawyer's failure to do so.

Client Under a Disability

32. In some situations, Rule 1.02(g) requires a lawyer who is representing a client under a disability to seek the appointment of a legal representative for the client or to seek other orders for the protection of the client. The client may or may not, in a particular matter, have the ability to effectively give informed consent to the lawyer's revealing to the court confidential information reasonably necessary to secure the necessary appointment or order. Nevertheless, the lawyer is authorized by paragraph (b)(6) to reveal such information in order to comply with Rule 1.02(g). See also comment 5 to Rule 1.03.

Discretionary Exceptions to Confidentiality Obligations Based on Information Being in Public Domain

33. Information that a lawyer was originally obliged to consider confidential as defined in subparagraphs (e)(1) or (e)(3) by reason of having previously represented or been approached in good faith to represent a person whom the lawyer did not represent, may later come to be widely known. Subparagraph (b)(11) provides that a lawyer is not subject to discipline for using or disclosing such information, including using or disclosing it in a manner adverse to that former client or other person whom the lawyer declined to represent, in certain limited circumstances. This exception does not permit use or disclosure with respect to a current client. See subparagraph (b)(11)(i). A lawyer who withdraws from representing a client prior to and in anticipation of disclosing or using that person's confidential information based on subparagraph (b)(11) should not be permitted to utilize that exception. Instead, the lawyer's now-former client should be treated as if it were a current client.

34. In order to utilize this exception, a lawyer must know that four things are true. The first is that the information is not a protected privileged communication under subparagraph (e)(2). The second is that the information in question has since become widely known or readily obtainable from sources generally available to the public. See subparagraph (b)(11)(ii). As used in this Rule, the phrase "sources generally available to the public" would include widely accessible materials, such as public records or published materials (including materials available on the Internet). It also would include, however, other materials that, while not as widely known, nonetheless are readily accessible to interested lawyers, such as documents or other evidence made public in the course of litigation and not protected against further use or disclosure by any court order or presently enforceable agreement.

35. The third condition is that the lawyer must know that the information involved is obtainable in substantially the same form or com-

pilation as that in which the lawyer proposes to use or disclose it. See subparagraph (b)(11)(ii). Thus, if the confidential information were furnished to the lawyer in a particularly useful or well organized format differing appreciably from that contained in sources generally available, to the public, subparagraph (b)(11) would not authorize the lawyer to disclose or utilize it.

36. The fourth condition is that the information cannot have become public because of culpable conduct attributable to the lawyer proposing to use or disclose it. Thus, if the lawyer caused that information to become publicly available in violation of these rules or other law, or caused or encouraged another to do so, with the intent of making that information available for use or disclosure adverse to the former client or other person, the exception is not available.

37. Use or disclosure of confidential information, including adverse use or disclosure, in the limited circumstances set out in subparagraph (b)(11) is permitted because under those conditions the lawyer would not have an unfair advantage in undertaking a representation adverse to the person whose confidential information is involved as compared to any other lawyer handling the matter. Where that does not appear to be the case, however, the basic rationale for the exception is not present and representation should be declined. For example, if subparagraph (b)(11) were to permit a lawyer to use or disclose certain confidential information of a former client, but the lawyer also possessed additional confidential information whose use or disclosure would not be subject to that or any other exception and that other information would provide the lawyer with a material and substantial advantage over other attorneys in undertaking the matter adverse to the lawyer's former client, the representation must be declined. See Rule 1.09(b) and (c).

38. A second exception to a lawyer's obligation to treat information as confidential based on it having become widely known from publicly available sources arises when the lawyer knows that the client, former client, or other person who in good faith sought representation by the lawyer, even though that representation was declined, whose information is involved has freely, knowingly, and voluntarily caused the information to become widely known or readily obtainable from sources generally available to the public in substantially the same form or compilation as it would be used or disclosed by the lawyer. See subparagraph (b)(12)(i). More is required to invoke this exception than a disclosure that is technically sufficient to constitute a waiver of an otherwise applicable privilege. For example, the exception would not apply merely because a client disclosed the substance of a communication with the client's lawyer

to a close friend or confidante. Instead, what is required to invoke this exception is a widespread, uncoerced dissemination of the material by the client in substantially the same form or compilation as that which the lawyer intends to use or disclose in circumstances clearly demonstrating an intent on the client's part to no longer treat the information involved as confidential.

39. A lawyer may not utilize this exception, however, if the lawyer either caused or encouraged the person whose information is involved to make that information publicly available so that it would be accessible for subsequent disclosure or use by the lawyer. See subparagraph (b)(12)(ii). The exception only permits the lawyer to use or disclose whatever information the client has decided for its own reasons no longer needs to be protected as confidential.

More Limited Protection for Confidential Information Developed Independently by Lawyer

40. The final discretionary exception to a lawyer's obligations imposed by paragraph (a) to protect confidential information applies where that information is protectable as confidential solely by subparagraph (e)(3)(ii)—that is, to information "acquired by the lawyer or by an affiliated lawyer or firm in furtherance of the representation of the client." This exception is not available to permit disclosure of information furnished to the lawyer or to an affiliated lawyer or firm by or at the direction of the client and otherwise protected as confidential by subparagraph (e)(3)(ii), because such information is also protected as confidential by subparagraph (e)(3)(i) and possibly by paragraphs (e)(1) or (e)(2) as well. Because information treated as confidential solely by subparagraph (e)(3)(ii) does not consist of client confidences and is developed by counsel largely if not entirely independently of any such confidences, this exception permits the lawyer to use or disclose it whenever it would not adversely affect a current or former representation of the client to do so. See subparagraph (b)(13)(ii).

Mandatory Disclosure Adverse to Client

41. Rules 1.05(c) and (d) place upon a lawyer professional obligations in certain situations to make disclosure to the extent that reasonably appears necessary in order to prevent acts by a client that, if committed, are reasonably certain to result in death or serious bodily harm to another person. While a lawyer's normal obligation is to take reasonable measures to try to dissuade the client from committing an unlawful act, (see Rule 1.02 (d)), because of the possibly serious danger to the lawyer that could result from confronting the client and the serious threat to the client's intended victim if preventive

measures are not undertaken promptly, the lawyer is excused from that obligation in the situations described in paragraph (c).

42. Because it is very difficult for a lawyer to know if a client's apparent purpose to cause death or serious bodily harm actually will be carried out, the lawyer is required by paragraph (c) to act only if the lawyer has information "clearly establishing" the likelihood of such acts and consequences. If the information shows clearly that the client's apparently contemplated conduct, if committed, is likely to result in death or serious bodily injury, the lawyer must seek to avoid those lamentable results by revealing information necessary to prevent the act from occurring. Precisely who should be notified in order to forestall the client's act necessarily will vary from case to case, but the lawyer's goal remains the same. That goal should be to avoid the harm contemplated by the client while doing as little damage as possible to the client's legitimate interests involved in the lawyer's representation. Thus, while paragraph (c) provides that the lawyer "shall" reveal "confidential" information to prevent the client's harmful act from occurring, if that act can be prevented by revealing non-confidential information instead, the lawyer normally should do so.

43. When a client's contemplated act could create some risk of death or serious bodily harm to another person, but those consequences are unlikely to occur or are remote or problematic, the lawyer nonetheless has the discretion to make disclosures necessary to prevent its occurrence, if the client's conduct would constitute a crime or fraud. This is true as well where the client's criminal or fraudulent conduct is likely to result in injury to the financial interests or property of another, but without creating any appreciable risk of physical injury. See subparagraph (b) (8). See also paragraph (d); Rule 1.02 (d) and (e); and Rule 3.03 (a) and (b).

44. Determining whether the situation of which a lawyer is aware provides the lawyer with the discretion to decide whether or not to disclose the client's future misconduct or instead is of the more serious nature described in paragraph (c) where disclosure is mandatory requires the exercise of sound, informed judgment by the lawyer. For example, a client who is considering pouring a pint of a highly toxic chemical on a remote part of a plant site in violation of a criminal statute presents the lawyer with a very different problem than a client who is considering disposing of several thousand gallons of the same chemical in the water supply for a nearby town.

45. A careful assessment of all the facts and circumstances known to the lawyer is called for before coming to a decision. Whether such an assessment occurred normally will depend on the facts of each

case. Thus, although a violation of paragraph (c) will subject a lawyer to disciplinary action, the lawyer's decisions concerning 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. This is because paragraph (c) bases the lawyer's affirmative duty to act on how the situation "reasonably appears" to the lawyer.

46. Certain other of these Rules require a lawyer to disclose information even though those disclosures will be adverse to the lawyer's client. Paragraph (d) refers to those Rules and ensures that there is no conflict between the obligations they impose and a lawyer's normal obligations of confidentiality. A failure to make a disclosure called for by paragraph (d) subjects a lawyer to discipline, however, only when the lawyer "knows" that the circumstances referred to in that paragraph exist.

Withdrawal

47. If a lawyer knows that the lawyer's services will be used by the client in materially furthering a course of criminal or fraudulent conduct, the lawyer must withdraw, as stated in Rule 1.15(a)(1). After withdrawal, a lawyer's conduct continues to be governed by Rule 1.05, including the obligation to make any disclosures required by paragraphs (c) and (d). Neither this Rule nor Rule 1.15 prevents the lawyer from giving notice of the fact of withdrawal, and no Rule forbids the lawyer to withdraw or disaffirm any opinion, document, affirmation, or the like.

Special Circumstances—Organization as Client

48. If the client is an organization, a lawyer also should refer to Rule 1.12 to determine the appropriate conduct in connection with this Rule. For example, the fact that an organization is the lawyer's client can bear on who has the right to identify or insist that particular information be considered confidential, as well as who may authorize or permit disclosure or use of such information pursuant to paragraph (b).

Other Rules and Other Law

49. Various other Rules permit or require a lawyer to disclose information relating to the representation, even over the client's objection. See Rules 1.02(g), 1.07, 3.03 and 4.01. See also Rules 1.12 and 2.02. There is no conflict between a lawyer's obligations under those Rules and under this one. In addition to these provisions, a lawyer may be obligated by statutes or other law to use or disclose information about a client. Whether another provision of law supersedes Rule 1.05 is a matter of interpretation beyond the scope of these

Rules, but subparagraph (b)(6) protects the lawyer from discipline who discloses confidential information if the lawyer has a reason to believe that disclosure was necessary in order to comply with that statute or other law.

AMENDMENT 1: CREATE A NEW RULE 1.06

1.06 Conflicts of Interest—General Rule

Paragraph (a): Prohibited Representations Even with the Informed Consent of All Affected Persons After Reasonable Disclosure

(a) Even with the informed consent of all affected persons after reasonable disclosure, a lawyer shall not:

(1) knowingly represent opposing parties in the same matter before a tribunal;

(2) personally represent a client in a matter when the lawyer knows or reasonably should know that the lawyer's representation of the client in that matter is or will be materially adversely affected by:

(i) a professional obligation under these Rules owed by the lawyer personally to another person; or

(ii) that lawyer's own interests or concern for the interests of any person;

(3) personally represent a client in a matter when the lawyer knows that representation would be directly adverse to a client the lawyer represents in one or more other matters, unless that lawyer could concurrently personally undertake both representations without violating subparagraphs (a)(2);

(4) personally represent a client in a matter when the lawyer knows that an affiliated lawyer is personally representing another client in the same matter, and that a single lawyer could not personally represent both clients without violating subparagraphs (a)(1) or (a)(2) or Rule 1.07; or

(5) knowingly undertake any representation prohibited by Rules 1.09(a), 1.09(b) or 1.09(c).

Paragraphs (b), (c), (d), (e), And (f): Prohibited Representations Except with the Informed Consent of All Affected Persons After Reasonable Disclosure Representing Multiple Clients in a Matter

(b) A lawyer shall not undertake or continue to represent two or more clients in a matter, whether or not that matter involves some other person not represented by that lawyer, if the proposed representation would violate Rule 1.07.

Other Representations Requiring Informed Consent by All Affected Persons After Reasonable Disclosure

(c) A lawyer shall not personally represent a client where the lawyer knows that the lawyer's personal professional obligations under these Rules to that client or to another person whom the lawyer currently represents will or is reasonably likely to be adversely limited if the personal representation of the client is undertaken, unless:

(1) the lawyer reasonably believes that the personal representation would not violate paragraph (a); and

(2) each affected person gives informed consent after reasonable disclosure.

(d) A lawyer shall not personally represent a client where the lawyer knows that the lawyer's professional obligations to that client will or are reasonably likely to be adversely limited by the lawyer's own interests or concern for the interests of any other person if the representation is undertaken, unless:

(1) the lawyer reasonably believes that the personal representation would not violate paragraph (a); and

(2) each affected person gives informed consent after reasonable disclosure.

(e) For purposes of paragraphs (c) and (d), an affected person's consent is informed if that person has first been:

(1) advised that independent representation is appropriate in deciding whether to consent to the representation, and given a reasonable opportunity to seek the advice of independent counsel concerning that decision;

(2) advised in a manner, reasonably expected by the lawyer to be understood by that person, of the reasonably foreseeable adverse consequences on the lawyer's exercise of independent professional judgment that will or reasonably could occur due to the lawyer's professional obligations or other interests or concerns, if the lawyer undertakes the representation; and

(3) advised that other counsel could be employed who would not be subject to those other interests or concerns or professional obligations under these Rules.

(f) A lawyer shall not personally represent a client in a matter when the lawyer knows that either the lawyer personally or an affiliated lawyer is concurrently representing another client in a different matter and that successfully asserting a legal position on behalf of any client the lawyer is personally representing reasonably could materially adversely affect a legal position of the other client in the other matter unless:

(1) the lawyer reasonably believes that no personal representation being undertaken by that lawyer would violate paragraph (a);

(2) the lawyer's exercise of independent professional judgment on behalf of each client that the lawyer is personally representing will not be adversely affected; and
(3) each client gives its informed consent to each representation after reasonable disclosure, including disclosure of the existence of the other representation and of its reasonably foreseeable effects on the outcome of the representation of that client.

Paragraph (g): Resolving Conflicts of Interest

(g) A lawyer shall not resolve a conflict of interest under this Rule by:
(1) limiting the scope of the representation of a client except as permitted by Rules 1.02(b) and 1.03; or
(2) withdrawing from the representation of one or more clients involved but continuing to represent others unless:
(i) the withdrawal is required by Rule 1.15(a) or can be undertaken in conformity with Rule 1.15(b)(1); and
(ii) any remaining representation that the withdrawal was intended to allow can be undertaken or continued without violating any of these rules.

Comment: Rule 1.06

Overview

Loyalty to a Client—In General

1. Loyalty is an essential element in a lawyer's relationship with a client. Breaches of a lawyer's duty of loyalty can subject a lawyer to both tort and disciplinary liability. However, this Rule, as well as other of these rules concerned with conflicts of interest, are intended only as standards for lawyer discipline. Thus, discussions in their comments of conduct that would violate a lawyer's "duty of loyalty" or that would constitute a prohibited "conflict of interest" are using those terms in a disciplinary context only. They are not meant to suggest that the lawyer's behavior under discussion would also give rise to tort liability.

2. With that in mind, for disciplinary purposes, a conflict of interest prohibited by these rules may exist before representation is undertaken, in which event the representation should be declined. If such a conflict arises after representation has been undertaken, the lawyer must take effective action to eliminate the conflict, including withdrawal if necessary to rectify the situation. See also Rule 1.15. When more than one client is involved and the lawyer withdraws because a conflict arises after representation has commenced, whether the lawyer may continue to represent any of the other clients is determined by this Rule and Rules 1.05 and 1.09. See also

Rule 1.07. Under this Rule, any conflict that prevents a particular lawyer from "representing" a client also prevents any other lawyer or firm affiliated with that lawyer from doing so. See Terminology ("represents a client"). On the other hand, any conflict that prevents a particular lawyer from "personally representing" a client prevents only that particular lawyer from doing so. See Terminology ("personally represents a client").

Conflict with Lawyer's Own Interests

3. Loyalty to a client can be impaired when a lawyer may not be able to consider, recommend or carry out an appropriate course of action for one client because of the lawyer's own interests. The conflict in effect forecloses alternatives that would otherwise be available to the client. Subparagraph (a)(2)(i) and paragraphs (d) and (e) address that problem in general terms. Rule 1.08 reflects similar concerns in regulating a number of specific situations.

Conflict with Lawyer's Concern for the Interests of Others: Interest of Person Paying for a Lawyer's Services to Another

4. A common situation that can create a conflict between the lawyer's own interests or the lawyer's concern for the interests of others on the one hand and those of the client on the other arises when the lawyer is paid from a source other than the client. Subparagraph (a)(3) does not prohibit such an arrangement however, as long as Rule 1.08(e) is not violated. See Rule 1.08, comments 12-15.

Conflict of Interest Arising from Lawyer's Professional Obligations Under These Rules to Persons Other Than Client

5. Conflicts of interest can arise because the lawyer may owe professional obligations to one client that are inconsistent with those that the lawyer owes to another client. Subparagraphs (a)(1), (a)(2)(i) and (a)(4) and paragraph (b) address different facets of this issue in the context of a lawyer representing or personally representing more than one client in the same matter. Similar conflicts of interest can arise because of the lawyer's representation or personal representation of different clients in different matters. Subparagraphs (a)(2)(i) and (a)(3) and paragraphs (c), (d), (e), and (f) address such conflicts.

Office Practice Conflict Situations

6. Conflicts of interest can arise in office practice just as they can in litigation and, when they do, they can be just as severe. If the conflicts involved in an office practice setting rise to the level of those set out in subparagraphs (a)(2), (a)(3), (a)(4) or (a)(5), the representation must be declined, even if the clients involved are will-

ing to give or do give their informed consent after reasonable disclosure.

Meaning of Materially Adversely Affected

7. Subparagraphs (a)(2), (a)(3), and (a)(4) prohibit certain personal representations by a lawyer who knows that those representations will be "materially adversely affected" by certain factors. Within the meaning of those subparagraphs, the representation of a person is "materially adversely affected" if the lawyer's independent judgment on behalf of that person or the lawyer's ability or willingness to consider, recommend or carry out a course of action on behalf of that person will be, should be or is reasonably likely to be adversely affected, and a reasonable person, after reasonable disclosure concerning the limitations on the lawyer's ability to act on that person's behalf, would consider those limitations to be material. A materially adverse effect could occur, for example, if a lawyer who was personally representing a client found the client's cause so repugnant that the lawyer would be unable to advocate it appropriately. See subparagraph (a)(2)(ii). It also could occur if a lawyer's jointly represented clients could reasonably expect, as part of the lawyer's duties of competent and diligent representation, for the lawyer to espouse positions in the same matter that are materially adverse to one another. See subparagraphs (a)(2)(i), (a)(4). It also could occur if a lawyer's assertion of a position on behalf of one client in a matter would materially adversely affect the likelihood of successfully asserting a contrary position on behalf of another client in a different matter. See subparagraphs (a)(2)(i), (a)(3) and paragraph (f). On the other hand, simultaneous representation in unrelated matters of clients whose interests are only generally adverse, such as competing economic enterprises, normally could be conducted without a material adverse effect on either client's interests at stake in those representations. If so, this Rule would not prevent a lawyer from undertaking those representations.

Avoiding and Resolving Conflicts of Interest

8. Except in limited circumstances, under this Rule a lawyer is subject to discipline only for knowingly undertaking or continuing a representation in violation of the Rule's requirements. Even an unknowing conflict of interest, however, can be damaging to a client, and some courts have concluded that a lawyer can be disqualified for undertaking a representation involving a conflict of interest without regard to the lawyer's knowledge of the conflict. For these reasons, a prudent lawyer would be well advised to make reasonable efforts to determine whether the lawyer has any conflicts of interest before

agreeing to undertake a representation. Of course a lawyer must abide by these Rules in the event such a conflict is discovered.

9. The duties imposed under this Rule continue after a representation is accepted. Thus, a lawyer must properly respond to a conflict of interest that is either first discovered, or that first arises, after a representation has begun. The nature of that response depends primarily on the type of conflict of interest involved, the effect that conflict of interest will or reasonably could have on the lawyer's representation of any clients involved and the lawyer's professional obligations to any other persons. In some cases, withdrawal could be mandatory. See paragraph (a). In others, reasonable disclosure of the nature of the conflict and the informed consent of all affected persons could permit the representation to continue. See paragraphs (b), (c), (d), (f). See also paragraph (e) (describing the minimal communications necessary to constitute "reasonable disclosure" for purposes of paragraphs (c) and (d)).

10. Determining and implementing a reasonable response to a previously unknown conflict of interest can take time, because the legitimate interests of one or more clients of the lawyer could be jeopardized by any decision the lawyer might make. This circumstance entitles the lawyer to proceed cautiously in deciding on a proper course of action and formulating an approach that will minimize any harm to those client interests. Because such a careful approach should be encouraged, a lawyer generally should be able to take a reasonable period to determine what course of action to follow to resolve a conflict of interest without being subject to discipline for knowingly continuing a particular representation in the interim. Whether the amount of time taken was reasonable and the course of action settled upon was appropriate usually will raise fact issues.

Specific Provisions

Paragraph (a): Representations Prohibited Even with the Informed Consent of All Affected Persons After Reasonable Disclosure

11. Paragraph (a) prohibits a lawyer from undertaking or continuing representations involving certain conflicts of interest, even with the informed consent of all affected persons after reasonable disclosure. Those conflicts referred to in subparagraph (a)(5) are set out in Rule 1.09, but are incorporated in this Rule for completeness.

12. Paragraph (a) describes five conflicts of interest that can arise. Subparagraph (a)(1) applies to certain conflicts arising exclusively in matters before a tribunal. Subparagraphs (a)(2) through (a)(5), however, concern conflicts that can arise either before tribunals or in office practice. All representations described in paragraph (a) are prohibited, even with the informed consent of all affected parties af-

ter reasonable disclosure. The principal reasons for this are either that a lawyer confronted with the conflicts described can not possibly conduct the contemplated representations so as to avoid a material adverse effect on the interests at stake in the representations of one or more of the clients involved or because the representation involves unacceptable risks to both lawyer and clients of breaching the lawyer's duty of loyalty to one or more of those clients.

13. The harm that subparagraphs (a)(1)-(5) prevent can arise at any time during the course of a representation. Consequently, it would violate this Rule to undertake or continue such a representation knowing that the conditions set out in those subparagraphs exist. Similarly, it would violate this Rule to accept a representation knowing that a conflict of interest of a type described in subparagraphs (a)(1)-(5) inevitably will arise, even though it has not done so when the representation commences. Finally, it would violate this Rule to continue a representation properly undertaken, after learning that a conflict of interest of a type described in subparagraphs (a)(1)-(5) has developed.

Subparagraph (a)(1)

14. One obvious example of an unwaivable conflict recognized by subparagraph (a)(1) is that a lawyer may not represent opposing parties before a tribunal. This prohibition applies to all phases of a matter that necessarily must be brought before a tribunal for resolution, not just to the portion of that dispute actually presented to the tribunal. Thus, for example, it would violate subparagraph (a)(1) to represent both spouses in the out-of-court activities involved with obtaining an "uncontested" divorce.

15. The concept of "opposing parties" in subparagraph (a)(1) is a narrower one than adversity in fact. As used there, two persons are not "opposing parties" in a matter unless one freely files a pleading or otherwise formally asserts a position adverse to the other. Consequently, joint representation of parties before a tribunal, such as co-plaintiffs or co-defendants, is governed primarily by subparagraphs (a)(2) and (a)(4), and paragraph (b) of this Rule and by Rule 1.07.

16. Thus, by way of illustration, it does not violate subparagraph (a)(1) to represent multiple claimants to a limited fund that is clearly insufficient to satisfy all of their claims in full or to represent parties, such as parents and minor children, in prosecuting claims when one or more of the minors is or will be represented by a guardian ad litem or attorney ad litem. Similarly, the fact that one of several defendants in a matter denies liability for any harm suffered by the plaintiff does not, standing alone, make that co-defendant an opposing party with respect to other defendants in that matter. Likewise, it

does not violate subparagraph (a)(1) to represent multiple defendants in a matter who have viable cross-claims against one another, where those defendants have made an informed decision not to prosecute those claims in the present proceeding in order to present a united front to the plaintiff. Finally, the concept of "opposing parties" does not embrace a situation where a tribunal "deems filed" all cross claims between multiple defendants or where it requires all such claims to be filed despite the parties' desires not to do so. Whether a lawyer can continue to represent multiple defendants when they are "deemed" to have filed such claims against one another, even though they have not actually chosen to do so, is governed by paragraph (b) and Rule 1.07.

17. Lawyers should remain aware of the possibility that in both civil and criminal cases conflicts of interest between jointly represented clients may exist or develop by reason of substantial discrepancies 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. When such conflicts appear reasonably likely to develop, a lawyer should discuss them with the clients involved. See Rule 1.03. If the conflicts grow out of representing multiple clients in a single matter, Rule 1.07 controls.

Subparagraph (a)(2)

18. Subparagraph (a)(2) provides that if a lawyer knows or reasonably should know that the lawyer's representation of a client is or will be materially adversely affected by the lawyer's professional obligations to another person or by the lawyer's own interests or concerns for the interests of any person, the representation must be declined. The only "professional obligations" whose breach subjects a lawyer to discipline under subparagraph (a)(2)(i) are those arising under these Rules. The "is or will be" phrase points out that it is as improper to ignore an ethical obligation to one client in acting on behalf of another client as it is to respect that obligation and thereby damage the other client. As used in subparagraph (a)(2)(ii), "any person" includes present or former clients of the lawyer, but it is not limited to such persons. It also includes, for example, a lawyer who knows that he or she can not vigorously advocate a client's cause out of concern for the negative attitudes of the lawyer's colleagues were the lawyer to do so.

19. An example of a situation within the scope of this subparagraph is a lawyer personally representing different clients in different matters when the lawyer knows that successfully representing one of them would necessarily preclude successfully representing the other.

Thus, for example, a lawyer may not personally represent each of two clients in their competing efforts to purchase the same property.

Subparagraph (a)(3)

20. Subparagraph (a)(3) is concerned with situations where a lawyer who is (or is considering) personally representing a person in a matter knows that personal representation is or would be directly adverse to that of another client represented by that lawyer in a different matter. It prohibits the lawyer from doing so unless the lawyer could also concurrently *personally* undertake the representation of the other client involved without violating subparagraph (a)(2)—that is, without materially adversely affecting the representation of either client due either to a professional obligation owed to the other under these Rules or to a concern for the lawyer's own interests or those of any other person. The subparagraph applies to all directly adverse representations, whether or not they involve representation before a tribunal.

21. For purposes of this provision, a lawyer may not accept a new representation if the lawyer knows that by doing so the lawyer has created a conflict of interest prohibited by subparagraph (a)(2), and then use the existence of that conflict as the basis for withdrawing from the representation of the original client. Likewise, a lawyer who withdraws from representing a client prior to and in anticipation of undertaking a representation adverse to that client on behalf of another person should be treated as remaining subject to subparagraph (a)(2), with the now-former client being treated as if it were a current client. On the other hand, it would not violate subparagraph (a)(3) for a lawyer or firm to offer financial or other assistance upon withdrawing from representing a person in order to forestall a material adverse effect on that person that otherwise would be occasioned by the withdrawal.

22. A conflict of interest between two clients being represented by affiliated lawyers may arise due to action taken by one of the clients. For example, a firm may be representing two clients when one of them, utilizing different counsel, sues the other, who then turns to the firm for representation. In that situation, the firm generally may withdraw from representing one client and accept the defense of the other client, as long as the withdrawal can be accomplished without violating Rule 1.15 and no other of these Rules would be violated by accepting the tendered representation.

Subparagraph (a)(4)

23. Subparagraph (a)(4) addresses joint representation of multiple clients in the same matter who have conflicts of interest between them with respect to the subject of the proposed representation. It

provides that if a single lawyer could not personally undertake the representation of all of those clients without violating subparagraphs (a)(1) or (a)(2) or Rule 1.07, then the representation also can not be undertaken by having two or more affiliated lawyers personally represent only those clients who do not have such conflicts among themselves.

24. On the other hand, joint or simultaneous representation of persons having conflicting interests is not prohibited by these Rules in certain circumstances. Except as provided in subparagraphs (a)(1) or (a)(2), joint representation of persons in connection with the same matter is proper if the requirements of paragraph (b) and Rule 1.07 are met. Similarly, except as provided in subparagraphs (a)(2) and (a)(3), simultaneous representation of different clients in different matters having conflicting interests is also proper if those representations can be conducted without violating paragraphs (c), (d), (e), and (f).

Subparagraph (a)(5)

25. Subparagraph (a)(5) prevents lawyers from undertaking or continuing any personal representation prohibited by paragraphs (a), (b) or (c) of Rule 1.09. Because those provisions prohibit certain representations even with the informed consent after reasonable disclosure of all affected parties, for completeness they are referred to in this Rule. For a discussion of those prohibitions, see the comments to Rule 1.09.

Conflicts of Interest in Criminal Cases Prohibited Even with Informed Consent

26. When conflicts of interest arise in criminal cases, they often have such dire consequences that a lawyer must decline to represent more than one accused. Because constitutional rights of the accused can be implicated by representations involving conflicts of interest, both lawyers and tribunals must be extremely vigilant to prevent such conflicts from occurring. Similarly, because such conflicts are endemic in multiple defendant cases, courts should be hesitant in appointing one lawyer to represent more than one defendant.

27. In criminal matters, subparagraph (a)(2) and (a)(4) describes situations raising impermissible conflicts of interest when a lawyer represents either codefendant in a single case. A typical example of such a conflict is where each defendant denies guilt and blames the other for committing the crime with which both are charged. Subparagraphs (a)(2) and (a)(3) apply when the conflicts arise due to the lawyer simultaneously representing different defendants in different matters. This can occur, for example, when a defendant the lawyer represents in one case is offered leniency for testifying against an-

other client the lawyer represents in a different case. In each instance, the resulting conflicts are unwaivable.

Provisions Similar to Paragraph (a) in Other Rules

28. In some cases, representations set out in other of these rules are proper in some circumstances with informed consent after reasonable disclosure, but not in others. For example, Rule 1.07 does not prohibit joint representation of clients in the same matter if the proposed clients give their informed consent after receiving the disclosures specified in that Rule. See Rule 1.07(b)(2), (b)(3). Such joint representations, however, are prohibited, even with the consent of all affected persons after reasonable disclosure, if the lawyer determines that the prerequisites to undertaking them set out in Rule 1.07(b)(1) are not present. In a similar vein, many of the transactions and activities set out in Rule 1.08 bear a strong resemblance to unwaivable conflicts of interest set out in this Rule, in that Rule 1.08 either regulates or prohibits those transactions or activities without providing for client consent to alternative arrangements. See Rule 1.08 (b), (c), (d), (h).

Paragraphs (b), (c), (d), (e) and (f): Representations Prohibited Except with the Consent of All Affected Persons After Reasonable Disclosure Paragraph (b)

29. Paragraph (b) is included in this Rule solely to direct a lawyer to Rule 1.07 for the lawyer's obligations when considering representing or actually representing two or more persons in a matter. This Rule does not impose any obligations on a lawyer in that setting that are not included in Rule 1.07.

Paragraphs (c), (d), (e) and (f): Overview

30. Paragraphs (c), (d) and (f) address the representation of a client where, for reasons set out in those paragraphs, the lawyer may not proceed without first obtaining the informed consent after reasonable disclosure of both the client and all other persons (collectively termed "affected persons") to whom the lawyer owes professional obligations under these rules that will or are reasonably likely to be adversely limited by that representation. Each of those three paragraphs requires that the lawyer make "reasonable disclosure" to all affected persons. For disciplinary purposes only, with respect to matters within the scope of paragraph (c) and paragraph (d), paragraph (e) describes what constitutes reasonable disclosure.

31. Reasonable disclosure and informed consent are not mere formalities. Only if they are treated as matters of substance, as this Rule requires, will the vital and legitimate of interests of both client and lawyer be adequately protected. In the context of concurrently

representing two clients, to make the disclosures called for by paragraphs (c) and (d), it may be necessary for the lawyer to reveal confidential information of one client to the other. However, unless an exception to a lawyer's normal obligations of confidentiality applies (see Rules 1.05(b)-(d)), a lawyer must obtain informed consent to reveal a client's confidential information. A client is not obliged to give that consent. As a consequence, there may be circumstances where it would violate Rule 1.05 for a lawyer to make the reasonable disclosure necessary to obtain the informed client consents required by paragraphs (c) and (d). In such cases, the contemplated simultaneous representation must be declined.

Reasonable Disclosure

32. To the extent reasonably practicable, disclosure should be tailored to the intelligence and sophistication of the person to whom it is made. A disclosure sufficient for sophisticated clients may not be sufficient to permit less sophisticated clients to provide truly informed consent. Thus, one aspect of any reasonable disclosure is that it communicate information in a manner that the lawyer reasonably believes is likely to be understood by the person to whom the communication is directed.

33. A second aspect of a reasonable disclosure is that the information communicated must be "sufficient to permit the client to appreciate the significance of the matter in question." See Terminology (definition of "consult" or "consultation"). Generally this would involve advising each party to whom disclosure is to be made of the nature, reasonably foreseeable implications, and probable adverse consequences of any reasonably foreseeable conflicts of interest arising from the contemplated representation. In this regard, however, the conflicts of interest with which the lawyer must be concerned are only those that could affect the lawyer's professional obligations to persons under these rules arising out of the lawyer's involvement in particular matters. Thus, **the fact that such persons have quite substantial conflicts of interest with respect to issues not within the scope of the lawyer's professional obligations to those persons under these rules does not trigger disclosure obligations on the lawyer's part.**

34. A third aspect of a reasonable disclosure is that the client be given a reasonable amount of information to make an informed judgment concerning the significant issues raised by the lawyer's disclosure. While the lawyer's obligations to provide such information are substantial, they are limited by three important considerations. The first is that in many instances it may not be possible for the lawyer to provide more than informed speculation to the client concern-

ing possible adverse effects of a perceived possible conflict of interest, because the conflict does not presently exist, may never come to pass, and, if it does, may manifest itself in a variety of forms with widely differing consequences. The second limiting factor is that the lawyer's disclosures need only be reasonable. A complete recitation of every possible contingency is not required. The third limiting consideration is that what disclosure is reasonable necessarily depends on many circumstances that vary from case to case. At one extreme, for example, a lawyer might undertake a representation that is extremely unlikely to cause a conflict with professional duties owed by the lawyer to another person and, should a conflict arise, its impact is unlikely to be significant to any affected party. In such a case, it is conceivable that no disclosure would be required. At the other extreme, a lawyer might undertake a representation where the likelihood of it causing a conflict with the lawyer's professional obligations to another person is recognized and the impact of that conflict is certain to be very harsh for one or more of the affected persons. Assuming that representation could be properly undertaken at all, an explicit and detailed disclosure clearly would be required.

35. For all of these reasons, then, the scope and detail of a lawyer's reasonable disclosure can vary substantially from one case to another. Compare Rules 1.03, 1.07(b)(2), and 2.01. Consequently, in judging whether a particular disclosure was reasonable, careful consideration should be given to what the lawyer knew or reasonably should have known about the situation giving rise to the need for disclosure, how likely it appeared or should have appeared to the lawyer that the conflict of interest would actually arise, and how severe the consequences of that conflict were likely to be to a person to whom the lawyer should have made disclosure.

Disclosures Going Beyond Those Required by the Rule

36. It is important to note that the reasonable disclosures and informed consents called for by paragraphs (c) and (d) only apply to situations where a lawyer will or reasonably could limit a *professional* obligation under these rules that a lawyer owes to a person, and the disclosures and consents that are required in that situation need only be made to and obtained from those persons who could be affected by any limitation on the lawyer's *professional* conduct. In other words, the only "persons" who are "affected" within the meaning of paragraphs (c) and (d)—and thus the only persons to whom a reasonable disclosure must be made and from whom an informed consent must be obtained—are those persons to whom the lawyer owes a *professional* obligation under these rules that could be ad-

versely limited if the lawyer were to properly discharge a *professional* obligation under those same rules owed to another person.

37. As a matter of prudence or as a business decision, however, the lawyer might decide to make a disclosure comparable to that called for by paragraphs (c), (d), and (e), even though not required by this Rule to do so. For example, if a lawyer were considering representing a client in a matter where the lawyer will be taking a position that is generally adverse to the interests of a former client of the lawyer, the lawyer would not have to advise the new client of that fact under paragraph (c) unless the lawyer knew that his or her representation of the new client "will or reasonably could be adversely limited . . . by the lawyer's own interests or concern for the interests of [the former client]," because the lawyer has no *professional* obligation under these rules not to advocate a position generally adverse to the interests of a former client. If the lawyer did believe such an adverse limitation would or reasonably could arise, however, the lawyer would have an obligation to make a reasonable disclosure to the new client of that fact in accordance with subparagraphs (e)(1)-(3) and obtain that client's informed consent before undertaking the representation. Such a disclosure would not have to be made to the former client, however, because there would not be any possibility of the lawyer adversely limiting a *professional* obligation under these rules to that person as required by paragraph (c), and because the former client would not be presently represented by the lawyer as required to trigger paragraph (d).

38. On the other hand, in the situation described above, even where the lawyer is satisfied that there will be no adverse effect on the lawyer's professional obligations under these rules to the new client, a prudent and cautious lawyer might decide that it is best to advise the new client in general terms of the lawyer's former representation of his or her former client and of the general adversity between the interests of that former client and those being put forward on behalf of the new client. The reason for doing so would be to prevent recriminations and unjustified suspicions later, in the event the new representation did not turn out favorably to the client. Similarly, solely as a matter of business relations, the lawyer might choose to advise the lawyer's former client of the lawyer's decision to undertake the new representation, even though not required by paragraph (c) to do so.

Informed Consent

39. Informed consent is more than consent in fact. Informed consent contemplates that the consenting person's consideration of an issue is based on information provided through a reasonably ade-

quate disclosure of the most pertinent known or reasonably knowable factual and legal considerations bearing on it. Under this standard, a lawyer must give each person to whom disclosure must be made informed and disinterested advice, based on an adequate consideration by the lawyer of the pertinent information available through reasonable effort. See Rules 1.03, 2.01.

40. While this standard is a demanding one, it is not meant to place a lawyer in the position of guaranteeing that a particular decision made by the person to whom disclosure is made is prudent or reasonable. Thus, for example, a lawyer could implement a decision made by a client of apparently sound mind to give her entire fortune to charity, leaving no provision for her own continued welfare, once the lawyer was satisfied that the client was fully advised concerning the risks and consequences of doing so. The fact that a particular decision, in hindsight, seems to have been ill-advised or unduly altruistic does not mean that the consent given to it necessarily was "uninformed."

41. Because of the critical importance of informed consent and the desirability of reducing uncertainty as to what issues should be brought to a client's attention in order for the lawyer's disclosures to be "reasonable" and any resulting client consent to be deemed "informed," for disciplinary purposes only, paragraph (e) specifies information that will be deemed sufficient. The first requirements are that the client be advised that independent representation is appropriate in deciding whether to consent to the proposed representation and be given a reasonable opportunity to seek such advice. See subparagraph (e)(1). The second required disclosure is to inform the client of the reasonably foreseeable adverse consequences on the lawyer's exercise of independent professional judgment that will or reasonably could be expected to arise from the lawyer's other professional obligations or concerns. See subparagraph (e)(2). In this regard, the lawyer's explanation is to be made "in a manner[ ] reasonably expected by the lawyer to be understood by [the] person" to whom disclosure is being made. Id. Finally, the lawyer also must advise that person that other counsel could be utilized who would not be subject to those other conflicting professional obligations or concerns. See subparagraph (e)(3).

42. While paragraphs (c) and (d) require "reasonable disclosure" and "informed consent," they do not require either that disclosure or that consent to be in writing. But while written disclosure and written consent are not needed to avoid disciplinary liability, a prudent and cautious lawyer might proceed in that manner to memorialize that the requisite disclosure was made and consent obtained.

Paragraphs (c) and (e)

43. Paragraph (c) addresses the lawyer who is (or is considering) personally representing a client and who knows that he or she also personally has a professional obligation under these Rules to another person in connection with a different matter or representation and that either the lawyer's exercise of independent professional judgment on behalf of the client or the lawyer's professional obligations under these Rules to the other person "will or reasonably could be adversely limited" by the other. Paragraph (c) provides that in such circumstances the lawyer may not proceed unless the lawyer reasonably believes that the lawyer's representation would not violate paragraph (a) and each affected person gives informed consent after reasonable disclosure. What constitutes minimally adequate reasonable disclosure for disciplinary purposes is set out in paragraph (e). Paragraphs (c) and (e) only apply where the lawyer's conflict of interest involves two different representations or matters. Conflicts arising from the lawyer's representation of two or more persons in the same matter is addressed by Rule 1.07.

44. The use of the phrase "will or reasonably could be" adversely limited points out that it is not necessary for a lawyer to be certain that his or her independent professional judgment or other professional obligations under these Rules will be compromised before reasonable disclosures become necessary. Proceeding without making the appropriate disclosures and obtaining the necessary informed consents where there is "reasonably likely to be" an adverse limitation on the lawyer's discharge of a professional obligation under those Rules also violates paragraph (c). The reason for this is that in cases where there reasonably could be an adverse limitation on a lawyer's professional obligations to a person, that person must be given the opportunity to decide whether to accept the risk that that limitation will arise.

45. For paragraph (c) to be applicable, it is not necessary for the lawyer in question to be involved *personally* in multiple representations. Instead, it is sufficient that the lawyer *personally has a professional* obligation under these Rules to do or refrain from doing certain acts due to the activities of a presently or formerly affiliated lawyer or firm. By way of example, if one lawyer while affiliated with a firm successfully prosecuted a patent application on behalf of one client of the firm, a second lawyer while affiliated with that same firm could not bring suit for a second client of the firm attacking the validity of that patent, even though the second lawyer had nothing to do with prosecuting the patent, unless the conditions of paragraph (c) were satisfied.

46. The first requirement for undertaking a representation described by paragraph (c) is that the adverse limitation on the lawyer's exercise of independent professional judgment on behalf of the lawyer's client or on the lawyer's professional obligation under these rules to another person not be so severe as to materially adversely affect the representation in a manner prohibited by paragraph (a). See subparagraph (c)(1). Typically, subparagraphs (a)(2)(i) or (a)(5) would be potentially implicated by a representation contemplated by paragraph (c). This requirement reflects the view that some adverse limitations on a lawyer's professional obligations can have such severe consequences that the adversely affected person can not be asked to assent to them.

47. The second requirement for undertaking a representation described by paragraph (c) is that each affected person give informed consent to the representation after reasonable disclosure. See subparagraph (c)(2). The rule sets out three disclosures that must be made to each such person in order for the disclosure to be considered "reasonable" and any resulting consent to be "informed." See subparagraphs (e)(1)-(3). These include advising the person of the appropriateness of consulting with independent counsel concerning whether to go forward with the representation, the reasonably foreseeable adverse consequences that could arise from having the lawyer undertake the representation due to the lawyer's other obligations or concerns, and the fact that other lawyers could be utilized by the client who would not have those other conflicting obligations or concerns. For disciplinary purposes only, adequately complying with these three requirements prevents a lawyer from being disciplined for failing to make "reasonable" disclosures or for obtaining "uninformed" consents to undertaking a representation.

Paragraphs (d) and (e)

48. Paragraph (d) applies where a potential adverse limitation on a lawyer's exercise of independent professional judgment on behalf of a client will or reasonably could be triggered "by the lawyer's own interests or a concern for the interests of any other person." That concern could involve an "other person" who is a former client of the lawyer, in which case Rule 1.09 provides further guidance. It could, however, also involve any other person having the ability to adversely affect the lawyer's discharge of his or her professional obligations, such as a senior member of the lawyer's firm or a non-client paying the lawyer's fees.

49. In each situation, if that other person's influence on the lawyer "will or reasonably could" adversely limit the lawyer's exercise of independent professional judgment on behalf of the client, the law-

yer must decline the representation unless the remaining conditions of paragraph (d) are satisfied. Those additional conditions are that the contemplated representation would not violate paragraph (a) (typically subparagraphs (a)(2)(ii) or (a)(5)) and that each affected person give informed consent after reasonable disclosure. See subparagraphs (d)(1) and (d)(2). These "reasonable disclosure" requirements are the same as those applicable to subparagraphs (c)(1) and (c)(2) discussed in comments 46-47.

Paragraph (f): Asserting Antagonistic Legal Positions

50. Paragraph (f) addresses a lawyer who is personally representing a client in a matter, who knows that either he or she or an affiliated lawyer is personally representing another client in a different matter, and who also knows that the successful assertion of a legal position on behalf of one of those clients by one lawyer could materially adversely affect a legal position being asserted on behalf of the other client by the other lawyer. The fact that lawyers affiliated with a single law firm are knowingly taking antagonistic legal positions on behalf of different clients concurrently is not considered to be a circumstance, in and of itself, requiring imposition of discipline on the lawyers involved. The situation, however, could put clients' legitimate interests at risk unless appropriate safeguards are followed.

51. To protect those client interests, where the lawyer knows that a material adverse effect could occur, paragraph (f) requires that no such multiple representation be undertaken or continued unless three conditions are satisfied. The first is that the lawyer must reasonably believe that the representation or representations that the lawyer is personally undertaking will not violate paragraph (a). See subparagraph (f)(1). The second is that the exercise of independent professional judgment on behalf of the client by each lawyer personally representing that client will not be adversely affected. See subparagraph (f)(2). The third is that each client gives informed consent to the firm's continued involvement in the other representations after reasonable disclosure. See subparagraph (f)(3). If that consent cannot be obtained from all of the affected clients, the lawyer's further options are governed by paragraph (g).

52. On the other hand, if it reasonably appears to the lawyer that any adverse effect on the representation that the lawyer is handling personally due to the existence of the other representation is not reasonably likely to be "material," for disciplinary purposes, neither disclosure to nor consent by any potentially affected person is required. In making that assessment, however, paragraph (f) *requires* the lawyer to assume that the position being advocated by the lawyer himself or by an affiliated lawyer in the other representation that is

adverse to that of the client the lawyer is personally representing will prevail and, *on that assumption*, determine whether that outcome could reasonably materially adversely affect the outcome in the lawyer's own case. If so, the procedures called for by paragraph (f) must be followed. This is so even if the lawyer's honest and reasonable assessment is that the position being advocated in the other representation will *not* be successful.

53. Distinguishing between a "material adverse effect" that requires the lawyer to follow the procedures set out in paragraph (f) and a less serious "adverse effect" that does not impose that requirement is not a task that can be reduced to a formula. At one extreme are situations where the effect of one matter on another is outcome determinative, as where the forum in which one legal position is being argued is a court that the forum in which the contrary legal position is being presented will have to follow in resolving that issue. Clearly this situation could involve a *material* adverse effect. Occupying an intermediate position would be a situation where contrary legal positions are being taken in different courts at the same level of a single judicial system, such as two courts of appeals. Depending on the novelty of the issue, the outcome in one case could certainly *adversely* affect and conceivably *materially* adversely affect the outcome in the other. At the opposite extreme, one can envision a firm taking contrary legal positions on the same legal question under the law of two different states or nations, where the likelihood of either matter having *any* adverse effect on the outcome of the other could be vanishingly small, so that no disclosures or consents would be required. Each case should be resolved on its own facts as they reasonably appear to the lawyer at the time the lawyer had to decide what course to follow. In doubtful cases, a prudent lawyer might decide that making a reasonable disclosure and seeking informed consent, even though arguably not necessary, is the safest practice.

Paragraph (g): Attempting to Resolve Conflicts of Interest by Limiting the Scope of Representation or by Withdrawal

54. There are two principal ways in which a lawyer faced with a conflict of interest could try to eliminate it, while continuing to represent at least some of the clients involved. The first would be to limit the scope of one or both representations, so that they no longer involved the subject matter giving rise to the conflict. The second would be to withdraw from one or more of the representations and continue with the remaining ones.

55. Paragraph (g) makes it clear that the limitations on a lawyer's engaging in such conduct imposed by other of these rules apply to such efforts to resolve conflicts of interest. In particular, Rules

1.02(b) and 1.03 restrict a lawyer's freedom to unduly limit the scope of a representation and require that any otherwise proper limitation be communicated to the client. Subparagraph (g)(1) incorporates those limitations into this setting.

56. Similarly, Rule 1.15 limits the circumstances in which a lawyer may withdraw from representing a client. Because withdrawal could be detrimental to the clients involved, subparagraph (g)(2)(i) further limits the circumstances in which a lawyer may withdraw from one representation in order to continue with another to those situations in which either withdrawal is mandatory (see Rule 1.15(a)(1)-(3)) or withdrawal can be accomplished without material adverse effect on the interests of the client at stake in the representation. See Rule 1.15(b)(1). In addition, subparagraph (g)(2)(ii) recognizes that other of these rules can limit the circumstances in which the lawyer may undertake a representation adverse to the lawyer's now-former client. In that regard, typically the lawyer would have to be most concerned with whether a representation can be continued without violating Rules 1.05 and 1.09. Subparagraph (g)(2)(ii) incorporates those limitations into this setting as well.

57. As a matter of harmonious client relations and sound business practices, it may not be advisable for a lawyer to act as an advocate for one client in a matter against another client the lawyer represents in some other matter, even if the two matters are wholly unrelated and none of these rules would be violated by doing so. However, a lawyer is not subject to discipline for undertaking such a representation, merely because it was ill-advised to do so.

AMENDMENT 2: SUBSTITUTION OF REVISED RULE 1.07

Rule 1.07. Conflict of Interest: Representing Multiple Clients in a Matter.

(a) A lawyer shall not undertake or continue to represent two or more clients in a matter, whether or not the matter involves some other person not represented by that lawyer, if the proposed representation would violate this rule or any other of these rules.

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

(1) the lawyer reasonably believes that:

(i) the representation does not violate Rule 1.06(a);

(ii) the clients can agree among themselves to a resolution of any issue concerning the matter;

(iii) each client is capable of understanding what is in that client's best interests and making informed decisions, free of coercion, du-

ress, or undue influence, concerning whether and, if so, to what extent to forego those interests if the lawyer conducts the representation in accordance with this Rule;

(iv) the lawyer can deal impartially with each of the clients; and

(v) there is little risk of material prejudice to the interests of any of the clients if the contemplated resolution is unsuccessful; and

(2) prior to undertaking the representation or as soon as practicable thereafter, the lawyer discloses and consults with the clients concerning the following aspects of joint representation in the matter:

(i) that the client might gain some advantage if represented by separate counsel;

(ii) that the lawyer can not serve any of the clients as a partisan advocate in the matter against any of the other clients, but instead must assist all of them in pursuing their common purposes, as a consequence of which each must be willing to make independent decisions concerning whether to agree to any proposed resolution of any issues concerning the matter;

(iii) that the lawyer must deal impartially with each of the clients;

(iv) that information received by the lawyer or by any affiliated lawyer or firm from or on behalf of any jointly represented client concerning the representation is not confidential as between those clients;

(v) that the lawyer will be required to disclose information concerning the joint representation known to the lawyer and received from or on behalf of any jointly represented client to any other jointly represented client if the lawyer knows that information would likely materially affect the position of that other client, even if requested not to do so;

(vi) that the lawyer will be required to disclose information concerning the joint representation known to the lawyer and received from any other source that the lawyer may disclose without violating these rules or any court order or agreement then in force to any jointly represented client if the lawyer knows that information would likely materially affect the position of that client, even if requested not to do so;

(vii) that the lawyer will be required to correct any false or misleading material statement or material omission concerning the joint representation made by or on behalf of any client represented in the matter, if the lawyer knows failure to do so would likely materially affect the position of any other such client, even if requested not to do so;

(viii) that the lawyer will be required to withdraw from representing one or more of the clients in the circumstances set out in paragraph (d), and will not be able thereafter to represent any

remaining client with respect to the matter giving rise to the representation if doing so would violate any of these Rules; and
(ix) that while the representation of all clients by a single lawyer or firm could expedite handling of the matter and reduce associated attorneys' fees and expenses if successful, it could result in delays and increased attorneys' fees and expenses if unsuccessful; and

(3) the lawyer obtains each client's informed written consent to the representation after making the determinations called for by subparagraph (b)(1) and as soon as reasonably practicable after making the reasonable disclosures called for by subparagraph (b)(2).

(c) A lawyer representing two or more clients in a matter shall, with respect to that matter:

(1) comply with Rule 1.03;

(2) not serve as a partisan advocate on behalf of any of the clients against any other of those clients;

(3) deal impartially with each of the clients;

(4) disclose information concerning the joint representation known to the lawyer and received from or on behalf of any jointly represented client to any other jointly represented client after that client has received the disclosures required by subparagraph (b)(2), if the lawyer knows that information would likely materially affect the position of that other client, even if requested not to do so;

(5) disclose information concerning the joint representation known to the lawyer and received from any other source that the lawyer may disclose without violating these rules or any court order or agreement then in force to any jointly represented client if the lawyer knows that information would likely materially affect the position of that client, even if requested not to do so;

(6) correct any false or misleading material statement or material omission concerning the joint representation made by or on behalf of any client represented in the matter after that client has received the disclosures required by subparagraph (b)(2), if the lawyer knows failure to do so would likely materially affect the position of any other such client, even if requested not to do so; and,

(7) not withdraw from representing the clients without making any disclosures the lawyer knows are required by subparagraphs (4), (5), and (6).

(d) A lawyer representing two or more clients in a matter must withdraw from representing any of those clients who so requests or when continued representation would violate paragraphs (b)(1) or (c). After withdrawing from representing a client who requested that the lawyer do so, the lawyer shall not continue to represent any of the remaining clients with respect to that matter if the continued representation would violate these rules.

(e) If a lawyer is prohibited from undertaking or continuing a representation of two or more persons in a matter, no lawyer or firm affiliated with that lawyer may do so, if the representation by that other lawyer or firm would violate Rule 1.06(a).

(f) A lawyer may represent two or more clients in a matter in accordance with standards that differ from paragraphs (a)-(e) if:

(1) (i) the multiple clients lack legal capacity to retain a lawyer;
(ii) the lawyer represents those clients before a tribunal pursuant to a valid appointment;
(iii) the tribunal authorizes or requires the lawyer to represent those clients in accordance with those other standards; and
(iv) the lawyer advises the court if the lawyer can not make any of the determinations called for by subparagraphs (i), (iv), and (v) of subparagraph (b)(1); or

(2) (i) the lawyer represents multiple clients who are unknown, unascertained, or not yet in being:
(ii) the requirements of subparagraphs (i), (iv) and (v) of subparagraph (b)(1) are satisfied with respect to the multiple representation;
(iii) the lawyer represents the multiple clients before a tribunal; and
(iv) the tribunal authorizes or requires the lawyer to represent those clients in accordance with those other standards; or

(3) the lawyer represents multiple parties who have filed a class action, and:
(i) the multiple representation of those parties complies with paragraphs (b) and (c) of this Rule; and
(ii) the lawyer otherwise conducts the representation in accordance with all statutes, rules, and court orders applicable to the class action; or

(4) the lawyer represents a single party who has filed a class action and the lawyer conducts the representation in accordance with all statutes, rules, and court orders applicable to the class action.

Comment: Rule 1.07

Scope

1. Except as provided in paragraph (f), this Rule applies to all representations of multiple clients in the same matter, whether or not the matter involves litigation. A "matter" includes a particular transaction or law suit, but does not include the continuous representation of a client pursuant to a general retainer in multiple matters as they arise. See Terminology (definition of "matter"). The Rule applies when the matter involves some person other than the multiple represented clients, as when a lawyer is representing two or more plain-

tiffs or defendants against opposing parties in litigation, or two or more parties in negotiations with other persons. See paragraph (a) and Rule 1.06(b). It also applies when the lawyer represents all the parties to a particular transaction, as when two or more persons wish to establish a business or participate in some joint activity. See paragraph (a). It also applies whether or not the lawyer believes there are any differing or conflicting interests among the multiple represented clients with respect to the representation. Finally, the Rule applies to situations where two or more persons wish to form an entity, even if the lawyer states or believes that he or she will only represent and bill the entity, unless those persons are also represented by separate counsel with respect to the matter. That is so for two reasons. The first is that the possible differing interests between those persons could be as acute and as damaging to them whether the lawyer represents them personally or just the entity they intend to create. The second is that until that entity is created, the lawyers' clients of necessity must be those persons seeking the lawyer's services for that purpose.

2. This Rule imposes detailed requirements on a lawyer before that lawyer may properly agree to or undertake representation of multiple clients in a single matter. See paragraph (b). **There are three reasons for these detailed procedures, even in apparently straightforward cases. First, conflicts of interest among the multiple represented clients with respect to the subject of the joint representation occur quite frequently, even if not evident at the outset of the engagement. Second, the lawyer is not serving in the usual protective advocate's role with respect to such conflicts of interest among those clients, should they arise. Third, representation of multiple clients in the same matter can depart markedly from traditional single-client representation in a number of important ways that are not apt to be known to those clients. All of these difficulties can arise whether the matter concerns only the clients themselves or involves others as well. Consequently, Rule 1.07 must be followed in all multiple representations, even if the lawyer reasonably believes that no conflict of interest among the clients is likely to arise.**

Topics Not Covered by Rule

3. The Rule does not apply to a lawyer acting as arbitrator or mediator between or among parties who are not clients of the lawyer or of an affiliated lawyer or firm, even where the lawyer has been appointed with the concurrence of the parties. In performing such a role the lawyer may be subject to applicable codes of ethics, such as the Code of Ethics for Arbitration in Commercial Disputes prepared by a joint Committee of the American Bar Association and the

American Arbitration Association or comparable provisions under state law.

General Considerations

4. In considering whether to undertake the representation of multiple clients in a matter, a lawyer should be mindful that if the representation fails the result can be additional cost and recrimination. In some situations, the risk of failure or the apparent unsuitability of the matter for multiple representation for other reasons can be so great that that representation is plainly inappropriate.

5. Because a lawyer representing multiple clients in a matter may need to function in ways that differ substantially from those existing when the lawyer represents only one party in that matter, it is important for the lawyer to carefully consider whether to undertake that joint representation, and to advise the lawyer's clients of the lawyer's role and the additional demands that role may place on them should they decide that multiple representation is appropriate. Paragraph (b) sets out those considerations in detail.

Preliminary Determinations

6. The lawyer considering representation of multiple clients in the same matter must first reasonably believe that five things are true. See subparagraphs (b)(1)(i)-(v). The first is that the representation would not violate Rule 1.06(a), concerning conflicts of interest prohibited even with informed client consent. See subparagraph (b)(1)(i).

7. The second is that the clients can agree among themselves to a resolution of any issues concerning the matter. See subparagraph (b)(1)(ii). Thus, if the lawyer believes that the relationship between the parties is extremely antagonistic, and it appears extremely unlikely that they will be able to agree on a mutually acceptable resolution of their differences, multiple representation should be declined. This requirement focuses on the suitability of the *matter* for multiple representation.

8. The third condition that a lawyer must reasonably believe will be satisfied before agreeing to undertake a multiple representation is that each of the clients will be able to understand what is in that client's best interests if adequately informed concerning the matter and make informed, uncoerced decisions concerning whether or to what extent to forego those interests, provided the lawyer conducts the multiple representation in accordance with this Rule. See subparagraph (b)(1)(iii). This requirement focuses on the suitability of each *client* to participate in the matter while represented by a lawyer who, because of the multiple representation, will not be able to serve as a partisan advocate on that party's behalf. Thus, for example, if a

lawyer believes that a prospective jointly represented client is under the complete domination of another such client, or lacks the sophistication or independence necessary to appreciate the consequences of important decisions apt to arise in the course of the representation, multiple representation must be declined in favor of allowing that person to be represented in the matter by separate counsel.

9. The fourth circumstance that a lawyer must reasonably believe exists before undertaking the representation of multiple clients in a matter is that the lawyer can deal impartially with each of the clients. See subparagraph (b)(1)(iv). This provision focuses on the suitability of the particular *lawyer* to serve as the joint representative of the clients involved. Thus, for example, if a lawyer were to believe that the lawyer would favor one client over others in order to further the lawyer's personal or financial interests, the multiple representation must be declined.

10. The final circumstance that the lawyer must reasonably believe exists before undertaking representation of multiple clients in a matter is that there is little risk of material prejudice to the interest of any of the clients if the contemplated resolution is not achieved. See subparagraph (b)(1)(v). This requirement is primarily concerned with the suitability of the *matter* for multiple representation, but to a lesser extent it is concerned with the *clients'* suitability as well.

Required Disclosures

11. Assuming the lawyer reasonably believes that the five conditions to undertaking representation of multiple clients in a matter set out in paragraph (b)(1) are satisfied, the lawyer must next make the disclosures required by subparagraphs (b)(2)(i)-(ix) to each person who would be represented by the lawyer, were that representation to proceed. These disclosures are necessary so those persons can make informed decisions whether to participate in the contemplated joint representation. See Rule 1.03. A predecessor to this Rule, dealing with a lawyer serving as an intermediary, addressed some of these disclosures in general terms. That approach was rejected in drafting this Rule in favor of one in which the pertinent disclosures are set out explicitly and in detail. This was done so that, for disciplinary purposes only, subparagraphs (b)(2)(i)-(ix) actually set out the disclosures necessary to constitute "reasonable disclosure." Thus they serve as a "safe harbor" for lawyers when advising persons contemplating entering into a multiple representation. Except to the extent provided in paragraph (f), these disclosures must be made and adhered to in every representation of multiple clients in the same matter.

12. Important factors for persons considering entering into a multiple representation to be aware of are its effects on client-lawyer confidentiality and the attorney-client privilege. In a multiple representation, the lawyer is still required to keep each client adequately informed concerning the subject of the representation. See subparagraphs (b)(1)(iii) and (c)(1). With regard to the attorney-client privilege, the general rule is that as between multiple clients represented in the same matter, the privilege does not attach. Hence, if litigation eventuates between the clients, the privilege will not protect any such communications, and the persons to be represented should be so advised. Moreover, in conducting the multiple representation itself, information received by the lawyer personally providing that representation or by any affiliated lawyer or firm from or on behalf of any jointly represented client and concerning the joint representation is not confidential as between the jointly represented clients. See subparagraphs (b)(2)(iv) and Rule 1.03. Because of the multiple representation, a lawyer's normal duty to maintain confidentiality is overridden. Thus, whenever the lawyer knows that information concerning the representation that one party wishes held in confidence would materially affect the position of any other jointly represented client with respect to the outcome of the representation, the lawyer must disclose the information to that other client, even if requested not to do so. See subparagraphs (b)(2)(v), (vi), and (c)(4), (5). Similarly, a lawyer must correct any material false or misleading statement or omission when the lawyer knows failure to do so would materially affect the position of any other such client, even if requested not to do so. See subparagraphs (b)(2)(vii) and (c)(6). These obligations complement those imposed by Rules 1.02, 1.05, 3.03 and 4.01 when a lawyer knows that a client's behavior involves criminal or fraudulent conduct.

13. Before entering into a multiple representation, the proposed clients also must be advised that the lawyer cannot serve as a partisan advocate on behalf of any of them against any other jointly represented client with respect to that representation. See subparagraphs (b)(2)(ii) and (c)(2). As a consequence, each of the jointly represented clients ordinarily may need to assume greater responsibility for decisions than when each of them is independently represented. This limitation, however, does not prevent the lawyer from serving as a partisan advocate on behalf of all jointly represented clients against other persons not represented by the lawyer, as long as such conduct does not violate other of these Rules.

14. Another feature of a multiple representation is that the lawyer is required to be impartial in representing the multiple clients. See

subparagraphs (b)(1)(iii), (b)(2)(iii) and (c)(3). The impartiality requirement also places an additional burden on those clients to make their own decisions without partisan advice from the lawyer, a burden of which they should be made aware before agreeing to participate in the contemplated multiple representation. See subparagraphs (b)(2)(ii) and (c)(2). Many factors, such as prior or ongoing personal, attorney-client, or other business or financial relationships with one or more of the multiple clients, or the hope or expectation of creating such relationships in the future, could affect a lawyer's ability to be impartial. So too could materially different fee agreements with different multiple clients with respect to the representation, especially if the lawyer would benefit substantially more if one client achieved certain objectives in the representation than if another did. If such considerations actually do affect the lawyer's ability to be impartial, the multiple representation must be declined.

15. A lawyer also should consider that appearances of partiality can cause a dissatisfied multiple client to question whether the lawyer's representation of that client was impartial. This risk is especially high where the circumstances giving rise to that suspicion were not disclosed at or prior to the onset of the representation. While this Rule does not require a lawyer to disclose information that might lead a client to question that lawyer's ability to be impartial in connection with the matter, a lawyer might decide to disclose such information anyhow in order to prevent subsequent misunderstandings.

Written Consent Required

16. If a lawyer has made the preliminary determinations called for by subparagraph (b)(1) and made the nine disclosures called for by subparagraph (b)(2), the lawyer should consult with the potential multiple clients as to whether they wish to participate in the contemplated representation. If they do, the lawyer must obtain their consent to do so in writing as soon as practicable. See subparagraph (b)(3).

Conducting Joint Representation

17. Paragraph (c) discusses the manner in which a lawyer who has agreed to jointly represent clients in a matter must conduct the resulting joint representation. Essentially it requires that the lawyer conduct that representation in accordance with the disclosures the lawyer previously made to the multiple clients as set out in subparagraph (b)(2). See subparagraphs (b)(2)(ii)-(vii), (c)(1)-(6). In addition, paragraph (c) also requires that the lawyer not withdraw from the representation without making any disclosures that the lawyer knows are required by subparagraphs (c)(4), (c)(5), or (c)(6). See

subparagraph (c)(7). Subparagraphs (c)(4) and (c)(6) provide, however, that information, statements, or omissions of the kinds described therein need not be disclosed by the lawyer unless they were revealed to the lawyer "after that client has received the disclosures required by subparagraph (b)(2)." The reasons for this limitation are that, absent such disclosures, the lawyer's revelation could be contrary to the prospective client's reasonable expectations and so be seen as a betrayal of the lawyer's obligations to protect that person's confidential information. See Rule 1.05(e)(1). If such a person will not consent to the lawyer's making the disclosures called for by subparagraphs (c)(4) and (c)(6), however, the lawyer must decline the joint representation.

Withdrawal

18. A lawyer must withdraw from representing any of the multiple clients who so requests, or when continued representation of one or more of those clients would violate paragraphs (b)(1) or (c). See paragraph (d). When the lawyer has withdrawn only from representing a particular client or clients who requested that the lawyer do so, the lawyer may not continue to represent the remaining clients if that representation would violate these Rules. Id. The rules most likely to be implicated in any such subsequent representation are Rules 1.05, 1.06, and 1.09. If the subsequent representation is itself a multiple representation, it too must comply with this Rule.

Affiliated Lawyers and Firms; Screening

19. If a lawyer is prohibited from undertaking or continuing representation of multiple clients in a matter, no lawyer or firm affiliated with that lawyer may do so, if representation by that other lawyer or firm would violate Rule 1.06(a). See paragraph (e). Certain conflicts of interest described in Rules 1.06(a)(2) and 1.06(a)(5) that prohibit a particular lawyer from personally undertaking a representation can be accepted by another lawyer or a law firm affiliated with that lawyer in certain circumstances. See Terminology (definition of "personally represents a client"), Rules 1.06(a)(3) and 1.09(d)-(e). However, conflicts of interest involving violations of Rule 1.06(a)(1)that affect a particular lawyer also apply to all lawyers or law firms affiliated with that lawyer. See Terminology (definition of "represents a client").

Exceptions to the Requirements of Paragraphs (a)-(e)

20. Paragraph (f) sets out certain exceptions to the requirements of paragraphs (a)-(e). These exceptions are based on exigent circumstances making compliance with paragraphs (a)-(e) either difficult or impossible. They are permitted only because well defined alternate

procedures accomplishing the objectives of this Rule are both available and utilized, and compliance with those procedures is monitored by a tribunal. The stated exceptions are intended to be exhaustive.

21. By way of illustration, subparagraph (f)(1) would apply to a lawyer's representation of multiple minor children in child neglect or child custody cases. Similarly, subparagraph (f)(2) would apply to such situations as a lawyer's representation of multiple civil defendants or multiple heirs cited by publication, or to a lawyer's representation of unborn potential beneficiaries of a trust in a suit to construe or to amend the trust in a way that would adversely affect the unborn beneficiaries' interests. Finally, subparagraphs (f)(3) and (f)(4) acknowledge the authority of a tribunal to regulate the time, manner, and content of a lawyer's communications with a class the lawyer represents. Those subparagraphs are not intended to impose additional restrictions on a lawyer's ability to communicate with such a class beyond those imposed by court order or other law.

Compliance with Other Rules

22. Multiple representations otherwise proper under this Rule also must conform with any other applicable rules, including those regulating other forms of conflict of interest.

AMENDMENT 3: SUBSTITUTION OF REVISED RULE 1.08

Rule 1.08 Conflict of Interest: Prohibited Transactions

(a) A lawyer shall not enter into a business transaction with a client unless:

(1) (i) based on all the information known to the lawyer at the time the transaction is entered into, the lawyer reasonably believes that its terms are fair and reasonable to the client;

(ii) the lawyer advises the client whether the lawyer is representing the client in connection with the matter;

(iii) the lawyer discloses any conflicts of interest between the lawyer and the client with respect to the transaction;

and either:

(2) the client is independently represented with respect to the transaction; or

(3) if the client is not independently represented with respect to the transaction:

(i) the client is advised that independent representation is appropriate in connection with the transaction and given a reasonable opportunity to seek the advice of independent counsel concerning it;

(ii) the lawyer makes reasonable disclosure in a manner reasonably calculated to be understood by the client of the following, if known to the lawyer and not known to the client:

(A) all material terms of the transaction;

(B) anything of value that the lawyer anticipates receiving as a result of the transaction other than those benefits explicitly set out in its terms;

(C) if applicable, the possible material adverse consequences to the attorney-client relationship if the lawyer represents the client in connection with the transaction; and

(iii) the client gives written consent after receiving all required disclosures.

(b) A lawyer shall not assist a donor who is not independently represented in connection with the matter in giving any substantial gift, including a testamentary gift, directly or indirectly to the lawyer or the lawyer's parent, child, sibling, or spouse, except where the donor is related to the lawyer, the lawyer's spouse or the donee.

(c) Prior to the conclusion of all aspects of the matter giving rise to a lawyer's representation of a person, the lawyer shall not make or negotiate an agreement or understanding with that person, or anyone acting on that person's behalf, that, directly or indirectly, gives the lawyer, any person related to the lawyer as parent, child, sibling, or spouse, or any person affiliated with the lawyer, literary or other 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 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 is informed of the arrangement and consents to it after reasonable disclosure;

(2) the lawyer knows or reasonably should know that the lawyer's exercise of independent professional judgment on behalf of the client will not be materially adversely 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:

(1) a lawyer who represents two or more clients with civil claims shall not make an aggregate settlement of the claims of or against that lawyer's clients, whether those clients are jointly represented in the same matter or separately represented in different matters, unless each settling client has consented to the settlement after reasonable disclosure to all clients offered the opportunity to participate in the settlement of the existence and nature of all the claims involved in the settlement, the gross amount paid or received by each client with respect to those claims, and the nature and extent of any other obligations assumed or benefits received by each client as a result of the settlement. Additionally, if the clients are jointly represented in the same matter, the disclosure must also include the manner in which the attorneys fees, expenses, and costs of suit were calculated for each jointly represented client.

(2) A lawyer who represents two or more clients in connection with possible or pending criminal charges, whether those clients are jointly represented with respect to related criminal episodes or separately represented with respect to unrelated criminal episodes, shall not:

(i) propose or enter into a plea bargain or other agreement or understanding on behalf of one client that would adversely affect the interests of the other client; or

(ii) propose or enter into a plea bargain or other agreement or understanding on behalf of one client that would adversely affect the interests of that client and benefit the interests of the other client unless the adversely affected client has consented after reasonable disclosure of any obligations assumed by or sanctions to be imposed on that client, and any benefits to be bestowed upon the other client in return for the adversely affected client's agreement.

(g)(1) A lawyer shall not make an agreement with a client prospectively limiting the liability of the lawyer or of an affiliated lawyer or firm to the client for malpractice or other professional misconduct unless:

(i) the agreement is permitted by law and the client is independently represented in making the agreement, or,

(ii) the agreement is authorized by law.

(2) A lawyer shall not settle a claim for malpractice or other professional misconduct with a client or former client of the lawyer or of an affiliated lawyer or firm not independently represented with respect to that claim without first advising that client or former client in writing that independent representation is appropriate 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) Whenever one lawyer is prohibited by this Rule from engaging in particular conduct, no affiliated may knowingly engage in that conduct.

(j) As used in this Rule, the term "business transactions" does not include a standard commercial transaction between the lawyer and the client for products or services that the client offers to other members of the public, provided the lawyer does not represent the client in connection with the transaction.

Comment: Rule 1.08

Transactions Between Client and Lawyer

1. A business transaction between a lawyer and a client presents potential for misunderstandings and recriminations between them. Consequently, paragraph (a) regulates such a transaction in a number of ways. The first is to require that the lawyer reasonably believes that the terms of the transaction are fair and reasonable to the client, based on the information known to the lawyer at the time the transaction is entered into. See subparagraph (a)(1)(i). Whether or not a lawyer's client is represented by independent counsel, the lawyer should not enter into a business transaction with that client if the lawyer is not satisfied that it is fair and reasonable to the client. The second protection for a client is to require the lawyer to advise the client that the lawyer does not represent the client in connection with the matter if that is in fact the case. See subparagraph (a)(1)(ii). The third is to require the lawyer to disclose any conflicts of interest known to the lawyer between the interests of the lawyer and the client with respect to the transaction. See subparagraph (a)(1)(iii). These disclosures provide the client with valuable information bearing on whether to seek independent representation with respect to the matter.

2. Once a lawyer has satisfied his or her obligations under paragraph (a)(1), for disciplinary purposes only, if the lawyer's client is represented by independent counsel concerning the transaction, the lawyer's professional obligations to the client with respect to the transaction are concluded. See subparagraph (a)(2). In that regard, however, counsel is not "independent" if affiliated with the lawyer entering into the transaction or that lawyer's firm, or if his or her advice to the client regarding the transaction reasonably could be adversely affected by that lawyer or by any other person aligned with that lawyer. On the other hand, if the client is not represented by

independent counsel, substantial additional requirements are imposed on the lawyer. See subparagraph (a)(3). These standards are not intended to affect those that would be applicable in a tort action brought against the lawyer growing out of the transaction.

3. Initially, subparagraph (a)(3) recognizes that in any transaction between a lawyer and the lawyer's client, a review by independent counsel on behalf of the client is always appropriate. Subparagraph (a)(3)(i) requires the lawyer to advise the client of that fact and to give the client a reasonable opportunity to secure such advice if desired. Next, subparagraph (a)(3) requires the lawyer to disclose to the client a number of facts or circumstances that the client might consider to be material in deciding whether to enter into the transaction or to consult with independent counsel before doing so. See subparagraph (a)(3)(ii). Because a client may originate a business transaction with its attorney and so know much more about it than the lawyer does, the disclosures set out in subparagraph (a)(3)(ii) are only required when the relevant information is "known to the lawyer and not known to the client." Those disclosures, when required, include all material terms of the transaction (subparagraph (a)(3)(ii)(A)), anything of value the lawyer anticipates receiving as a result of the transaction other than the benefits explicitly set out in its terms (subparagraph (a)(3)(ii)(B)), and, if applicable, any material adverse consequences to any attorney-client relationship between lawyer and client concerning the transaction due to the fact that the lawyer is acting both as a business associate and as an attorney. See subparagraph (a)(3)(ii)(C). Typically, the possible adverse impacts on the client in this regard could be a loss of the attorney-client privilege and the resulting possibility of having to reveal certain information that otherwise would be protected against disclosure. All disclosures mandated by subparagraph (a)(3)(ii) must be made in a manner "reasonably calculated to be understood by the client." See subparagraph (a)(3)(ii). In many circumstances, it is advantageous to both the lawyer and the client to make those disclosures in writing, but, for disciplinary purposes, the Rule does not require that be done. Finally, subparagraph (a)(3) requires the client to have given informed written consent to the transaction. See subparagraph (a)(3)(iii).

4. Paragraph (a) does not, however, apply to standard commercial transactions between the lawyer and the 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, as long as the lawyer does not represent the client in connection with the transaction itself.

See paragraph (j). In such circumstances, the lawyer has no advantage in dealing with the client, and the restrictions in paragraph (a) are unnecessary and impracticable.

5. If a business relationship with a client lasting beyond the conclusion of the matter giving rise to the representation is intended to serve as the lawyer's fee for that representation, the lawyer is required to advise the client concerning that agreement in accordance with paragraph (a) in addition to complying with Rule 1.04. An obligation to pay a lawyer's fee in the future in cash, whether or not secured by a lien, normally does not create an ongoing business relationship within the meaning of this Rule.

Gifts

6. A lawyer is not subject to discipline for allowing the lawyer or a member of the lawyer's family to accept a gift from a donor without first urging or insisting that the donor consult independent counsel before doing so, provided the lawyer has not assisted the donor in making the gift. If a substantial gift to either the lawyer or to another person related to the lawyer as parent, child, sibling or spouse is involved, however, the donor normally should have the detached advice that another, disinterested lawyer can provide. Paragraph (i) prevents any lawyer affiliated with the lawyer who is to receive the gift (or whose parent, child, sibling or spouse is to do so) from serving as such a "disinterested" lawyer.

7. Consequently, in order to guard against undue influence by a lawyer over a donor, subject only to the exceptions discussed below, paragraph (b) broadly prohibits that lawyer from assisting the donor in making any substantial gift that directly or indirectly benefits the lawyer or another person related to the lawyer as parent, child, sibling or spouse. As used in paragraph (b), "assisting" the donor includes but is not limited to such activities as preparing a legal instrument such as a will, trust, or conveyance effectuating the gift. Paragraph (b) uses the term "donor" rather than "client" to make it clear that its prohibition applies whether or not a formal attorney-client relationship is established between the lawyer and the person or entity making the gift. The phrase "directly or indirectly" is designed to ensure that paragraph (b)'s prohibition covers such transactions as conveying the substantial gift to a trust of which the lawyer is a beneficiary or naming the lawyer as the beneficiary of a life insurance policy or a signatory on a joint tenancy or pay-on-death account, as well as more straightforward arrangements.

8. Paragraph (b) recognizes an exception to this general prohibition. That exception permits a lawyer to assist a donor in directly or indirectly making a gift to the lawyer or to the lawyer's parent, child,

sibling, or spouse where either (1)the donor is related to the lawyer, the lawyer's spouse or the donee, or (2) the gift is not substantial. Within the meaning of this paragraph, a person is "related" to another person if they are relatives by blood, marriage or adoption. Even if a transaction fits within this exception, however, the lawyer must comply with other applicable rules. See Rules 1.03, 1.06(a)(2)(ii), (d). To the extent that such gifts are prohibited by statute, those provisions control over this Rule.

Literary and Other Media Rights

9. Paragraph (c) broadly prohibits a lawyer from negotiating any agreement or reaching any understanding by which either the lawyer or any person related to or affiliated with the lawyer acquires literary or other media rights concerning the conduct involved in the representation, until all aspects of the matter giving rise to the representation have been concluded. This is deliberately a very broad prohibition. It forbids informal understandings as well as formal agreements, indirect arrangements (for example, vesting ownership interest of media rights in a trust of which the lawyer is the sole trustee and having the trust convey those rights to the lawyer) as well as direct transfers, the acquisition of media rights by the lawyer's relations or affiliates as well as by the lawyer personally. In that regard, a person is an affiliate of the lawyer if the person is an affiliated lawyer or firm. See Preamble: Terminology. The prohibitions set out in this paragraph last until all aspects of the underlying matter are concluded, not just those with which the lawyer is concerned. Thus, for example, a criminal defense lawyer would not be free to negotiate a media rights agreement with a former client if a separate civil suit growing out of the same alleged conduct was pending or reasonably foreseeable. These broad prohibitions are necessary because such an agreement creates severe conflicts between the interests of the client and the personal interests of the lawyer, as measures suitable for the proper representation of the client may detract from the publication value of an account of the representation. Paragraph (c) does not prohibit a lawyer whose representation of a client concerns that client's interest in or claim to media rights from agreeing that the lawyer's fee shall consist of an ownership interest in those rights, if the arrangement conforms to Rule 1.04 and to paragraphs (a) and (h) of this Rule.

Advancing Client Costs and Expenses

10. Under paragraph (d), an attorney may advance or guarantee the costs and expenses associated with a proceeding before a "tribunal." Due to the breadth of the definition of a tribunal, this authorization includes the costs and expenses associated with proceedings

before an administrative agency and those incurred in connection with an alternative dispute resolution process as well as those involved with judicial proceedings. Paragraph (d) also allows a lawyer to advance or guarantee the reasonably necessary living expenses to the lawyer's clients. If the lawyer's client is indigent, the lawyer need not require the repayment of those sums. In any case, the lawyer may make repayment of those expenses by the client contingent upon the outcome of the matter.

11. The prerogative to advance, guarantee or pay these various costs and expenses, however, may not be abused by being turned into a method of acquiring clients. It is a criminal offense in Texas to pay, give, or advance, or offer to pay, give, or advance to a prospective client money or anything of value to obtain legal representation from the prospective client, if done with the intent to obtain an economic benefit. See Texas Penal Code, section 38.12 (a)(3). Similarly, Rule 7.03(c) prohibits certain offers, payments, or advances made in order to secure professional employment. That statute and rule are unaffected by this rule, because payments authorized by paragraph (d) are not supposed to be used as a way to acquire clients. As to whether a lawyer may disclose the lawyer's willingness to make otherwise lawful payments or advances in advertisements in the public media or in solicitation communications, see Rules 7.02(a)(1), (2), 7.03(a)(2), 7.04(d), 7.05(a)(2), (3).

Person Paying for Lawyer's Services to Another

12. Paragraph (e) regulates the conditions under which a lawyer may permit one person to pay for the lawyer's services on behalf of another person. It applies to every type of representation. It does so primarily because that arrangement can create a conflict between the lawyer's own interests or the lawyer's concern for the interests of others on the one hand and those of the client on the other. In that respect, paragraph (e) complements the standard set out in Rule 1.06(a)(3), in that paragraph (e) is meant to prevent an attorney from undertaking a representation that would be prohibited by Rule 1.06(a)(3). Paragraph (e) does so by prohibiting such an arrangement unless the client is informed of and consents to it after reasonable disclosure, the arrangement does not materially adversely affect either the lawyer's exercise of independent professional judgment on behalf of the client or the lawyer's ability to represent the client appropriately, and the client's confidential information is protected in accordance with Rule 1.05. See Rule 1.08(e)(1)-(3). If the representation would be materially adversely affected by the proposed compensation arrangement, an unwaivable conflict of interest exists and the representation must be declined. See Rule 1.06(a)(3). Violations

of other of paragraph (e)'s requirements could give rise to conflicts of interest under other of these rules. See Rules 1.05(a), 1.06(b), (d), (e), and 1.07.

13. One example of a common situation to which this rule applies is when, pursuant to the terms of an insurance policy, an insurer provides and pays for counsel for its insured. In that setting, normally the insured has consented to that arrangement by the terms of an insurance contract. Although the interests of insurer and insured will not necessarily conflict, nonetheless the arrangement should assure counsel's ability to exercise professional independence on behalf of the lawyer's client, the insured. One consequence of this Rule is that the lawyer can not permit the insurer to materially adversely affect the lawyer's ability to represent the insured in a matter through the use of cost controls or any other measures. The same considerations apply when the lawyer is being paid by an insurer to represent a person other than its insured, as when the lawyer's client is a person being defended pursuant to an indemnification provision or other type of agreement between the insured and the client.

14. A lawyer also is frequently called upon to represent a client with that representation being paid for by another when a corporation and its directors or employees are involved in a controversy and the corporation provides or advances funds for separate legal representation of a director or employee. Once again, that arrangement is proper only if the individual client consents after reasonable disclosure and the arrangement ensures the lawyer's ability to exercise professional independence in representing that client. As to when the lawyer may represent both the corporation and its constituents in such circumstances, see Rules 1.07 and 1.12.

15. Paragraph (e) also applies where a lawyer, while being compensated by one person, is called upon to represent another person in estate planning or other transactional matters, or in criminal or family law cases. For example, friends or relatives of a criminal defendant may pay for that person's defense. Similarly, a third person may pay for the defense of a person charged with the possession or distribution of controlled substances. In still other situations, a lawyer may be appointed by the court to represent one or more persons in a civil or criminal matter. In those and similar settings, a lawyer must insure that the representation provided to the client is not compromised at the behest of the person or public authority authorizing payment of or paying for the lawyer's services. This same obligation applies even if the client is a juvenile and the person paying for the lawyer's services is the client's parent or guardian. In that setting, the parent or guardian does not become the lawyer's client by virtue

of having made that payment, and must not be permitted to adversely affect the lawyer's professional relationship with the juvenile.

Aggregate Settlements

16. Paragraph (f)(1) applies solely to civil matters. It generally prohibits a lawyer from making an aggregate settlement on behalf of jointly or simultaneously represented clients without first making reasonable disclosure of the matters set out in that paragraph and then obtaining each settling client's informed consent to the settlement. In the event the party opposing the lawyer's clients is not willing to include all of those clients in a proposed settlement, the lawyer's disclosure responsibilities under paragraph (f)(1) are limited to those clients included in the proposed settlement group. Settlement offers made to less than all of the lawyer's clients, however, are especially likely to create conflicts of interest between those clients who are offered the opportunity to settle and those who are not. Consequently, other of these rules may impose obligations of disclosure on a lawyer to the lawyer's clients who are jointly or simultaneously represented in the same or substantially similar matters but who are not included in the proposed settlement. See Rules 1.06B, 1.06C, and 1.07. These same rules also affect the lawyer's ability to accept the offer on behalf of those clients who consent to the settlement over the objection of other of the lawyer's clients.

17. Not every settlement simultaneously negotiated on behalf of multiple clients is an aggregate settlement. An aggregate settlement occurs only when the attorney's clients are all represented in connection with the same transaction or occurrence or series of similar transactions or occurrences and the attorney resolves the matter on behalf of those clients for a lump sum, without conducting individual negotiation on behalf of each of them. Disclosure is required even though those clients are parties to different law suits, as long as their claims are being resolved through an aggregate settlement. For purposes of this Rule, reasonable disclosure requires disclosure to each client included in the proposed settling client group of the existence and nature of all claims to be resolved by the aggregate settlement, any compensation to be paid or received by the lawyer's clients, and the nature and extent of any other benefits to be received or obligations to be assumed by each client. In addition, if the clients are jointly represented in the same matter (see Rule 1.07), the disclosure must also include the manner in which each client's share of any associated attorneys fees, expenses, and costs of suit were calculated.

18. Paragraph (f)(1) does not prohibit negotiating an aggregate settlement. It only prohibits "mak[ing]" an aggregate settlement without providing the requisite disclosures and obtaining the neces-

sary consents. Thus a lawyer representing multiple clients in connection with a matter is not subject to discipline for discussing an aggregate settlement of that matter with opposing counsel, or even proposing or expressing the lawyer's own provisional approval of such an arrangement, subject to obtaining the informed consent of the lawyer's clients. Similarly, this paragraph does not subject an attorney to discipline for proposing to opposing counsel an aggregate settlement of claims brought against the lawyer's client by multiple parties represented by that opposing attorney.

19. Paragraph (f)(1) applies to large groups of clients as well as small groups, although the form of disclosure to clients may differ depending on the size of the group and the terms of the proposed settlement. For example, where the claims of a large group of clients are to be resolved through an aggregate settlement by dividing the proposed settling group into a number of settling subgroups in which all members of a given subgroup are to be paid the same amount or according to a general formula, disclosure under this paragraph could be limited to describing what qualifies a person to be a member of each settling subgroup and what each member of that subgroup receives. Where the client is a certified class, a lawyer is not subject to discipline for failure to make paragraph (f)(1) disclosures to class members if disclosure is made to class members by court-approved and court-supervised procedures that differ in some respects from those called for by that paragraph.

20. Conduct violating paragraph (f)(1) could violate Rule 1.06 or 1.07 as well. In addition, a lawyer's simultaneous settlement of completely unrelated cases for a fixed amount, while not within the scope of paragraph (f), also could violate Rule 1.06(c), (d) or (f), unless the lawyer complies with the disclosure and consent requirements of that Rule. See Rule 1.06(e). Consequently, a lawyer considering a simultaneous settlement of cases for a fixed amount should evaluate that conduct under both paragraph (f) and any other applicable rules.

21. Paragraph (f)(2) applies only to a lawyer's representation of two or more defendants in criminal cases. The representations involved can be in the same or closely related matters or in unrelated matters. When the representations are in the same matter, the lawyer also must comply with Rule 1.07. Paragraph (f)(2)(i) generally prohibits the lawyer from proposing or entering into any agreement or understanding on behalf of one client that would adversely affect another client. By prohibiting the lawyer both from "proposing" such agreements and "entering into" them, subparagraph (f)(2)(i) highlights the importance of the lawyer's duty of loyalty to each client. This situation is a special case of an unwaivable conflict of interest

described in Rules 1.06(a)(3) or (a)(4). Subparagraph (f)(2)(i) of this Rule, however, does not prohibit prosecutors from proposing arrangements whereby one client represented by the lawyer would be offered special consideration for assisting the prosecutor in convicting another client of that lawyer. When that occurs, however, defense counsel typically would be required to withdraw from representing one or both of the clients involved. See Rules 1.06(a)(3), (a)(4), and 1.07.

22. On the other hand, subparagraph (f)(2)(ii) addresses the situation where one criminal defendant client of a lawyer is apparently willing to enter into a plea bargain or similar agreement whereby that defendant would agree to accept a sanction in return for another client of that lawyer receiving a benefit. In that situation, the attorney has two responsibilities. The first is to ascertain whether there might be a factual basis for the proposed plea or agreement, as the lawyer cannot proceed knowing there is no such basis. See Rules 3.03(a)(2), (a)(4), and (b). If satisfied on that score, the lawyer also has a duty to ensure that the defendant who is considering making the plea or entering into the agreement has a clear understanding of all material consequences of that decision and is giving informed consent to the arrangement. In light of the importance of the issues involved, a prudent lawyer might consider both advising the adversely affected client of the terms of the proposed agreement in writing and obtaining that client's written consent to accept that proposal. This Rule, however, does not require such measures for disciplinary purposes. Finally, although also not required by this Rule, the lawyer should advise the lawyer's client who stands to be benefitted by the proposal of its general terms, if permitted or required to do so by Rules 1.05 or 1.07. See Rule 1.03. Objections to the proposal by that benefitted client, however, do not prevent the lawyer from assisting the pleading or agreeing client in going forward.

Meaning of "Other Professional Misconduct"

23. Paragraph (g) addresses the problems that can arise when a lawyer attempts to exonerate himself or herself from liability for malpractice or other professional misconduct. In that regard, "other professional misconduct" is designed to reach all claims assertable by a client against the client's lawyer, whether that behavior is characterized as malpractice, breach of fiduciary duty, breach of contract, a violation of the DTPA, or any other common law or statutory cause of action. It does not include, however, charges of misconduct by the lawyer while acting as such, but brought by a non-client. Similarly, it does not include alleged misconduct occurring when the lawyer engages in wrongdoing as a private citizen.

Prospectively Limiting Liability for Malpractice or Other Professional Misconduct

24. Paragraph (g) prohibits a lawyer from entering into an agreement prospectively limiting the liability of the lawyer or of an affiliated lawyer or firm for malpractice or other professional misconduct to a client unless one of two circumstances exists. The first is that the agreement is permitted by law and the person is independently represented with respect to the decision to enter into the agreement. See subparagraph (g)(1)(i). For purposes of this Rule, an agreement is "permitted by law" if no constitutional, statutory or regulatory provision or judicial decision prohibits the practice. For purposes of this Rule, an agreement limits a lawyer's or firm's liability to a "client" if the person so affected either already is a client or is intended to become a client of the lawyer personally or of an affiliated lawyer or firm. However, an agreement appropriately limiting the scope of a lawyer's engagement for a client made pursuant to Rule 1.02(b) is not a violation of subparagraph (g)(1).

25. The second circumstance allowing an agreement prospectively limiting a lawyer's liability to a client for malpractice or other professional misconduct is where such an agreement is authorized by law. See subparagraph (g)(2)(ii). For purposes of this provision, an agreement is "authorized by law" only if a constitutional, statutory or regulatory provision or judicial decision specifically approves of making the agreement in the manner in which it was done.

26. Paragraph (g) does not apply to situations where, for example, a lawyer drafts a trust that limits the liability of the trustee in accordance with law and then serves as the trustee of that trust, or draws up a document indemnifying the directors of a corporation to the extent permitted by law and then serves as a director of that corporation. In some circumstances, however, that practice could violate other of these Rules. See Rules 1.01, 1.06(a)(3).

Settling a Claim for Malpractice or Other Professional Misconduct

27. Paragraph (g) also limits the circumstances in which a lawyer may settle a claim for malpractice or other professional misconduct involving a present or former client of that lawyer personally or of an affiliated lawyer or firm. It provides that when the present or former client is not independently represented with respect to that claim, the lawyer must advise the present or former client that independent representation would be appropriate in deciding whether or not to accept any proposed settlement. For purposes of this rule, a "claim" of malpractice or other professional misconduct exists whether or not litigation concerning that claim has been instituted or

threatened. The rule also applies whether it is the lawyer or the present or former client who first proposes the settlement.

Acquisition of Interest in Litigation

28. Paragraph (h) 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 set forth in Rule 1.04 and the exception for certain advances of the costs of proceedings before a tribunal set forth in paragraph (d).

Imputed Disqualifications

29. The prohibitions imposed on an individual lawyer by this Rule are imposed by paragraph (i) upon all affiliated lawyers. See Terminology.

AMENDMENT 4: ALTERNATIVE SUBSTITUTION OF REVISED RULE 1.09

Rule 1.09 Conflict of Interest: Former Client

(a) Except where Rule 1.10 applies, a lawyer who formerly personally represented a client in a matter shall not thereafter personally represent another person in a matter adverse to that former client, if the lawyer knows that in properly representing the other person the lawyer will or reasonably should question either the validity of the lawyer's services performed for the former client or the meaning of the lawyer's work done for the former client.

(b) After the representation of a client by a lawyer while affiliated with a firm has concluded, as long as that lawyer remains affiliated with that firm, that lawyer shall not thereafter personally represent a person in a matter adverse to that former client, if the lawyer knows the representation of that person in reasonable probability would be materially and substantially benefitted by a use or disclosure of confidential information of that former client:

(1) that was actually obtained by the lawyer during that former representation, unless that information could be used or disclosed by the lawyer in accordance with Rule 1.05(b)(3),(11), (12) or (13); or

(2) that the lawyer knows or should know exists and is in the possession, custody or control of an affiliated lawyer or firm, unless that information could be used or disclosed by the lawyer in accordance with Rule 1.05(b)(3),(11), (12) or (13).

(c) Except where Rule 1.10 applies, a lawyer who represented a client during an affiliation with a firm shall not personally represent a person in a matter adverse to that former client after that affiliation is terminated,

if the lawyer knows the representation in reasonable probability would be materially and substantially benefitted by a use or disclosure of confidential information of that former client that was actually obtained by that lawyer during that previous affiliation, unless that information could be used or disclosed by the lawyer in accordance with Rule 1.05(b)(3), (11), (12) or (13).

(d) When one or more lawyers are personally prohibited by paragraphs (a) or (c) from representing a client, no lawyer or firm affiliated with such a lawyer and who either knows of that prohibition or, by making reasonable inquiry within the lawyer's firm, would have known of it, shall personally represent that client, unless:

(1) all affected persons give their informed consent after reasonable disclosure; or

(2) each personally prohibited lawyer:

(i) did not engage in any of the work or acquire any of the information giving rise to the prohibition of that lawyer's involvement during the lawyer's affiliation with the lawyer's present firm; and

(ii) is timely screened from any participation in the matter and is apportioned no part of the fee therefrom.

(e) When one or more lawyers affiliated with a firm are personally prohibited by paragraph (b) from representing a client, as long as any of those lawyers remains affiliated with that firm, no other lawyer affiliated with that firm and who either knows of that prohibition or, by making reasonable inquiry within the lawyer's firm, would have known of it, shall personally represent a person in a matter adverse to that former client, unless:

(1) each lawyer who actually acquired confidential information of the type referred to in paragraph (b) is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(2) all affected persons give their informed consent after reasonable disclosure.

(f) Except with the prior informed consent of all affected persons after reasonable disclosure, when the affiliation of a lawyer with other lawyers or a firm has terminated, the lawyers and firm formerly affiliated with that lawyer shall not knowingly represent a client if the formerly affiliated lawyer would be prohibited from doing so by paragraph (a) due to services performed or work done during that lawyer's affiliation with the firm.

(g) As used in this Rule, the term "screened from any participation in the matter" involving a client when applied to a lawyer (the "screened lawyer") requires that:

(1) the screened lawyer has not personally represented the client in the matter while affiliated with the lawyer's present firm;

(2) neither that client nor any lawyer or firm now affiliated with the screened lawyer has obtained any confidential information related to the matter from that lawyer, either directly or indirectly; and
(3) reasonable measures have been undertaken to ensure that neither the client nor any lawyer or firm affiliated with the screened lawyer will obtain such information from the screened lawyer in the future.

Comment: Rule 1.09

Scope

1. Rule 1.09 addresses the circumstances in which a lawyer in private practice, and other lawyers who were or are affiliated with a firm in which that lawyer practiced or practices, may be disciplined for representing a client against a former client of that lawyer. Whether a lawyer, or that lawyer's present or former firm, is prohibited from representing a client in a matter by reason of the lawyer's successive government and private employment is governed by Rule 1.10 rather than by this Rule.

2. This Rule, like all of these rules, is a disciplinary standard. It is not a standard for disqualification. However, some courts have said that the disciplinary 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.

3. As a procedural decision, some courts disqualify a lawyer from representing a present client against a former client when the subject matter of the present representation is so closely related to the subject matter of the prior representation that confidences obtained from the former client might be useful in the representation of the present client. This so-called "substantial relationship" test for disqualification, however, is not a standard of discipline under this Rule (see paragraphs (a), (b), and (c)) and differs significantly from these disciplinary standards. As one example, discipline under this Rule is imposed on an attorney only for "knowing" violations, while disqualification under a "substantial relationship" test may not depend upon a showing that a lawyer knowingly engaged in particular conduct.

4. Likewise, under this Rule, discipline based on possible unauthorized disclosure or use of confidential information adverse to a former client can occur only if the lawyer knows that information "in reasonable probability" would "materially and substantially" benefit the latter representation if improperly used or disclosed. See paragraphs (b) and (c). However, disqualification has occurred where a lawyer's present representation involved an undue risk that information *likely* to have been obtained by that lawyer or that law-

yer's former colleagues or firm during the prior representation could be used against the former client. Disqualification has occurred without proof that the lawyer *actually* obtained the information, or that any information actually obtained would have materially and substantially benefitted the representation of the present client if improperly used or disclosed. See also Rule 1.05.

5. Finally, this Rule provides that in some situations lawyers affiliated with a lawyer who is personally prohibited from undertaking a particular representation by this Rule can themselves accept that same representation, even without consent, under certain circumstances without being subject to discipline, if they have properly screened the personally prohibited lawyer from any involvement in the matter and not apportioned that lawyer any part of the fee from it. See subparagraph (d)(2) and Terminology ("apportioned no part of the fee"). By contrast, some courts have disqualified both the personally prohibited lawyer and any affiliated lawyer or firm from undertaking the proffered representation in those circumstances, even though the personally disqualified lawyer was effectively screened from any involvement in the matter.

6. Whether the "substantial relationship" and "reasonable probability of violating client confidences" tests will continue to be employed outside the disciplinary context as standards for resolving procedural matters, such as disqualification, is beyond the scope of these Rules. This Rule, like all of these Rules, is a disciplinary standard that is not intended to affect a court's use of different standards for disqualification. See Preamble: Scope. In any event, because the standards for discipline and disqualification may differ, a lawyer who has properly undertaken a representation under this Rule still might be subject to disqualification. A lawyer who knows there is a substantial likelihood that such a disqualification might occur should timely communicate that information to the lawyer's client or prospective client. See Rule 1.03.

7. Whether a lawyer has ever "represented" or "personally represented" a person involves questions of fact and law that are beyond the scope of these Rules. However, a lawyer "represents" a "client" if either that lawyer or any lawyer affiliated with that lawyer personally does so during the affiliation. See Terminology (definitions of "client," "former client," "represent" and "personally represent"); Preamble: Scope. Thus it is not necessary for a lawyer to have personally exercised legal skill and judgment on behalf of a person for a "representation" to occur. On the other hand, where "personal" representation is required, it is not enough that an affiliated lawyer

or firm represented a client during the lawyer's affiliation with the firm; the lawyer must have done so personally.

Paragraph (a)—Questioning Work Product

8. Paragraph (a) 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 work product the lawyer undertook for that former client. A lawyer may not personally undertake a representation prohibited by paragraph (a), even if the lawyer receives the informed consent of all affected parties after reasonable disclosure. See Rule 1.06(a)(5). Paragraph (a) does not apply to a lawyer entering or leaving government service, whose obligations to former clients are set out in Rule 1.10.

9. Paragraph (a) prohibits two different types of representations. The first is personally representing a client who questions the validity of the lawyer's services personally performed for a former client. Thus, for example, a lawyer who drew a will would violate paragraph (a) by personally representing the testator's heirs at law in an action seeking to overturn the will. The second is personally representing a client who questions the meaning of the lawyer's work product personally undertaken for the former client. An example of such prohibited conduct would be personally representing a client against a former client in questioning the former client's interpretation of a contract previously prepared by the lawyer for that former client. See also Rule 3.08.

Paragraph (b)—Risk of Unauthorized Use or Disclosure of Information; the Concluded Representation or Migrating Client

10. Paragraph (b) applies where a client ceases to be personally represented by a lawyer affiliated with a firm—either because the representation is concluded or because the client retains an attorney at a different law firm. It provides that when the lawyer who formerly personally represented the client remains with the firm, the lawyer may not personally represent a person in a matter adverse to that former client if the contemplated representation in reasonable probability would be materially and substantially benefitted by an unauthorized use or disclosure of confidential information actually obtained by that lawyer due to the former representation.

11. As with paragraphs (a) and (c), a lawyer personally prohibited by paragraph (b) from undertaking a representation may not do so even with the informed consent of all affected parties after reasonable disclosure. However, its impact on affiliated lawyers is different. Lawyers affiliated with a lawyer personally prohibited by paragraphs (a) or (c) from undertaking a representation nonetheless may under-

take it themselves *either* by screening the personally prohibited lawyer *or* by obtaining the informed consent of all affected parties after reasonable disclosure. See paragraph (d). By contrast, where a lawyer personally prohibited by paragraph (b) is involved, other lawyers affiliated with that lawyer may not undertake the representation instead unless they *both* screen that lawyer from any involvement in the representation and apportioning that lawyer no portion of the fee *and* obtain the informed consent of all affected persons after reasonable disclosure. See paragraph (e) and comments 22-27.

12. Paragraph (b) prohibits certain representations even though any lawyer who would personally represent the prospective client has no actual knowledge of the former client's confidential information, if that lawyer either knows or should know that such confidential information exists and that it is in the "possession, custody or control" of that lawyer or of an affiliated lawyer or firm. Within the meaning of this paragraph, information is in the "possession, custody or control" of a lawyer if it is contained in the lawyer's personal records or files or in those of any affiliated lawyer or firm to which the lawyer has access. Thus, no lawyer affiliated with a firm may undertake a representation adverse to a former client of the firm while having ready access to confidential information that, if used or disclosed, could place that former client at a material and substantial disadvantage. Paragraph (b) does contain an exception to this prohibition, however, when the information in question may be used or disclosed by the lawyer pursuant to Rules 1.05(b)(3), (11), (12) or (13).

Paragraph (c)—Risk of Unauthorized Use or Disclosure of Information; the Migrating Lawyer

13. Paragraph (c) applies where a lawyer leaves one law firm and joins another, terminating the representation of a client in the process. It prohibits a lawyer from personally undertaking a new representation in a matter adverse to a person whom the lawyer previously represented at the lawyer's former firm and about whom the lawyer actually obtained confidential information, but only if the person the lawyer intends to represent would in reasonable probability be materially and substantially benefitted by an unauthorized use or disclosure of that information.

14. Paragraph (c) does not apply to a lawyer entering or leaving government service, whose obligations to former clients are set out in Rule 1.10. In addition, paragraph (c) does not apply if either the client consented to the disclosure or use of the information in question as provided for in Rule 1.05(b)(3) or if it had become "publicly available" under the conditions set out in Rule 1.05(b)(11) or (12).

To satisfy the "publicly available" standards, the information must have "become widely known or readily obtainable from sources generally available to the public in substantially the same form or compilation as that which the lawyer proposes to use or disclose." See also comments 33-39 to Rule 1.05. Finally, paragraph (b) does not apply if the lawyer knows the information is protected as confidential only by Rule 1.05(e)(3)(ii) and its use or disclosure would not adversely affect a current or former representation of the client whose information is involved. See Rule 1.05(b)(13) and comment 40 to Rule 1.05.

15. Since a lawyer "represents" every client personally represented by an affiliated lawyer or firm, the lawyer may "represent" a client but not actually obtain any confidential information concerning that person. For purposes of this Rule, knowledge of confidential information possessed by other, formerly affiliated lawyers who personally represented a client at the lawyer's former firm is not imputed to a departed lawyer. If a departed lawyer did actually obtain confidential information of such a person, however, that information is covered by this Rule without regard to whether it is privileged in an evidentiary sense, as long as it is of the nature described in paragraph (c) and is not information that the lawyer may use or disclose pursuant to Rules 1.05(b)(3) or (11)-(13). Whether the information previously obtained by the lawyer was "confidential," whether its improper use or disclosure would "in reasonable probability materially and substantially benefit" the lawyer's current or proposed personal representation if improperly used or disclosed, and whether the information has become "publicly available," typically will involve questions of fact or law that must be resolved on a case-by-case basis.

16. A lawyer need not actually use or disclose confidential information in an unauthorized manner to be subject to discipline under this Rule. Actual unauthorized use or disclosure, however, would violate Rule 1.05.

17. A lawyer's obligations under paragraph (c) are related to those imposed by Rule 1.05(a). In general, Rule 1.05(a) prohibits the unauthorized disclosure or use of certain confidential information of present or former clients of the lawyer, as well as that of persons who in good faith sought representation by the lawyer personally by an affiliated lawyer or firm, even though that representation was declined. See Rules 1.05(a)(1)-(2), (e)(1). In addition, some courts have stated that a lawyer may owe similar obligations to persons who never even sought to become clients of the lawyer. For example, a lawyer could be required to treat a person's information as confiden-

tial if the lawyer agreed to do so. This might occur, for instance, in connection with a joint defense agreement. Breach of any such broader obligation, however, does not subject a lawyer to discipline under this Rule.

18. Like paragraph (a), paragraph (c) does not permit a lawyer to personally undertake a prohibited representation even if the lawyer obtains the informed consent of all affected persons after reasonable disclosure. See Rule 1.06(a)(5). It does, however, permit other lawyers affiliated with that lawyer to do so in certain circumstances. See paragraph (d).

Paragraph (d)—Lawyers Affiliated with Another Lawyer Personally Affected by Paragraphs (a) or (c)

19. Paragraph (d) addresses when lawyers who are affiliated with a lawyer who is prohibited from personally undertaking a representation by paragraphs (a) or (c) may themselves personally undertake or continue it. It prohibits them from doing so unless either of two exceptions is satisfied.

20. The first exception is that all affected persons give their informed consent to the representation after reasonable disclosure. See subparagraph (d)(1). As used in subparagraph (d)(1), "affected persons" refers to those former clients or other persons described in paragraphs (a) or (c), as applicable to the matter involved. The second exception is available only if the personally prohibited lawyer's inability to undertake the representation is due solely to work performed or information acquired prior to that lawyer's affiliation with his or her present firm. See subparagraph (d)(2)(i). Where that is the case, a lawyer or firm affiliated with the personally prohibited lawyer may undertake or continue the proposed representation only if the lawyer personally prohibited from undertaking the representation is screened from any participation in the matter and is apportioned no part of the fee therefrom. See subparagraph (d)(2)(ii). "Screened from any participation" in a matter is defined in paragraph (g) and discussed in comments 31-39 below. "Apportioned no part of the fee" is defined in Terminology.

21. Lawyers who are affiliated with a lawyer who is prohibited by paragraphs (a) or (c) from personally undertaking or continuing a particular representation are subject to discipline for personally undertaking or continuing that representation themselves not only if they have knowledge of the prohibition affecting that lawyer but also if they would have known of it by making reasonable inquiry within their firm. See paragraph (d). Thus, a lawyer who will be personally representing a new client is expected to take reasonable steps to ascertain whether an appropriate check for conflicts of interest has oc-

curred in connection with accepting that representation and that any conflicts of interest have been addressed appropriately.

Paragraph (e)—Lawyers Affiliated with Another Lawyer Personally Affected by Paragraph (b)

22. The same limitations discussed in comment 21 apply to a representation undertaken or continued pursuant to paragraph (e) by lawyers who are affiliated with a lawyer who is prohibited by paragraph (b) from personally undertaking or continuing that representation.

23. In that regard, lawyers affiliated with a lawyer who is personally prohibited by paragraph (b) from undertaking a particular representation because he or she actually acquired confidential information as described in that paragraph may not themselves do so merely by screening the personally prohibited lawyer from any involvement in the matter and apportioning that lawyer no portion of the fee it generates. Instead, representation by those affiliated lawyers is permissible only if those steps are taken *and* all affected persons give their informed consent after reasonable disclosure.

24. There are three reasons why screening alone is rejected in this context while it is accepted under paragraph (c). First, paragraph (b) applies where a client has entrusted confidential information to a lawyer while that lawyer was affiliated with a firm, and that lawyer remains with that firm. This means that when the possible new adverse representation is presented to that firm, not only is the lawyer who once utilized that confidential information still readily accessible, so in all likelihood is all of the information acquired by that lawyer, typically in unrestricted electronic or paper files. By contrast, in cases governed by paragraph (c), the only likely source of a former client's confidential information would be that migrating lawyer's personal recollection. Thus, there is a greater risk to the legitimate interests of former clients in the circumstances addressed by paragraph (b) than in those addressed by paragraph (c).

25. Second, unlike situations covered by paragraph (c), a lawyer personally affected by paragraph (b) would not likely ever have been under an obligation to hold information concerning the former client in confidence from his or her currently affiliated lawyers or firm. See Rule 1.05(b)(5). Thus, the likelihood that the lawyer disclosed significant confidential concerning the former client to colleagues is significantly greater than in the settings covered by paragraph (c).

26. Finally, and once again unlike situations addressed by paragraph (c), in a paragraph (b) setting there probably would have been no reason to restrict the access of persons employed by the firm to the former client's confidential information. Consequently, any number of affiliated lawyers as well as non-lawyer employees of the

firm might have acquired such information either during or after the previous representation, creating an undue risk that knowledge of critical facts could not be prevented through screening.

27. Of course, such widespread access or sweeping disclosures will not have occurred in every case. Where they have not, and it is possible to satisfy the former client and all other affected persons that adequate safeguards exist, lawyers affiliated with lawyers personally prohibited by paragraph (b) may undertake such a representation adverse to a former client of a current member of the firm despite the theoretical accessibility of confidential information that would materially and substantially benefit the contemplated representation of an adverse party in the event of an unauthorized disclosure or use. Those adequate safeguards are screening of lawyers personally prohibited by paragraph (b) from undertaking the representation from any involvement in it, apportioning them no part of the fee that it generates, and obtaining the informed consent of all affected persons after reasonable disclosure. See subparagraphs (e)(1)-(2).

Paragraph (f)—Lawyers and Firms Formerly Affiliated with Personally Affected Lawyer

28. Paragraph (f) governs when a lawyer or firm affiliated with a lawyer who personally represented a client during that affiliation may undertake a representation adverse to that client once the lawyer who personally represented that client has left the affiliated firm and the client is no longer represented by it. It provides that in the absence of the informed consent of all affected persons after reasonable disclosure, those former affiliated lawyers are prohibited from undertaking any representation that the former, departed lawyer would have been prohibited from engaging in by paragraph (a), due to services performed or work product undertaken during the former association. In this context, "affected persons" includes both the former client of the firm and its proposed new client. This prohibition reflects the view that an entire firm should stand behind the work of all of its present and former attorneys.

29. The same prohibition on undertaking the representation applies if any lawyer remaining at the firm would be prohibited by paragraph (a) from undertaking the representation, due to services performed or work product undertaken during that lawyer's affiliation with his or her current firm. See subparagraph (d)(2)(i). Similarly, should any lawyers remaining with the firm be prohibited by paragraph (b) from personally engaging in that representation, the ability of other lawyers in the firm or the firm itself to undertake it is governed by paragraph (e).

30. Finally, if lawyers leave a firm that employs a lawyer personally affected by paragraphs (a), (b) or (c) without personally having come within those restrictions themselves, they thereafter may undertake a representation against that lawyer's former client, even if that lawyer would be prohibited from doing so by this Rule, unless prevented from doing so by some other of these Rules.

Paragraph (g): Screening

31. Generally speaking, paragraphs (a), (b), and (c) prohibit a lawyer from personally undertaking certain representations adverse to the lawyer's former clients. The principal reasons for prohibiting such representations are that a lawyer would breach duties of loyalty or confidentiality to the former client (paragraph (a)) or risk unauthorized disclosure or use of the former client's confidences for the benefit of a current client(paragraphs (b) and (c)). The concept behind "screening" is that, while these concerns justify prohibiting the lawyer from personally undertaking an adverse representation, in certain circumstances, other lawyers who are affiliated with that lawyer need not be prohibited from doing so, provided appropriate safeguards are employed to "screen" off that lawyer from any involvement in the new representation.

32. Those safeguards should ensure that the lawyers affiliated with a lawyer who could not personally undertake a particular representation without violating paragraphs (a), (b) or (c) not gain some unfair advantage in undertaking that representation themselves, such as by having access to confidential information known to that lawyer. To do so, three conditions must be satisfied. If more than one lawyer would be prohibited by paragraphs (a), (b) or (c) from undertaking a given representation, each must be screened in accordance with those requirements before other affiliated lawyers may undertake the matter. Lawyers of any status within the firm (shareholders, partners, associates, and the like), as well as contract lawyers and those serving as "of counsel," may be screened pursuant to paragraph (g).

33. The first requirement is that the screened lawyer not have personally represented the client in the matter while affiliated with the lawyer's present firm. See subparagraph (g)(1). The second requirement is that neither the new client nor any lawyer or firm now affiliated with the screened lawyer has obtained any confidential information from that lawyer, either directly or indirectly. See subparagraph (g)(2). The third requirement of screening is that reasonable measures have been undertaken to ensure that neither the lawyer's new client nor any affiliated lawyer or firm will obtain such information in the future. See subparagraph (g)(3).

34. With respect to subparagraph (g)(1), because an entire firm stands behind the work done for a client, screening may not be used to permit one member of a firm to attack work performed for a present or former client of the firm by some other lawyer, while that other lawyer was affiliated with the firm, unless that present or former client consents. See subparagraphs (d)(1) and (d)(2)(i). See also paragraph (f).

35. With respect to subparagraph (g)(2), the "directly or indirectly" language should be broadly construed to prevent any transfer of information, not just overt ones. For example, having the lawyer advise a person other than affiliated lawyers or the lawyer's new client of the confidential information and then having that other person pass that information on to them would be prohibited. So too would making such information available to an affiliated lawyer or the lawyer's new client but not actually furnishing it to them, such as by providing them with access to confidential client files, data bases, electronic files, e-mails or the like.

36. This prohibition, however, should not prevent screening where two or more lawyers each represented the same former client prior to joining their present firm, exchanged confidential information solely among themselves concerning that former client since becoming affiliated with that firm, and the firm now proposes to undertake a representation adverse to that former client that none of those lawyers could participate in personally without violating paragraphs (a), (b) or (c), provided each is screened in accordance with these rules and apportioned no part of the fee therefrom. If, however, the confidential information known to those lawyers has been obtained by the other lawyers or firm with whom those lawyers have become affiliated, screening no longer may be employed, even if it is broadened to include those other lawyers or firm employees who obtained the information in question. This result furthers the sound public policies of encouraging lawyers to abide by their ethical obligations with respect to confidential information in moving from one firm to another, and discouraging efforts by those at a lawyer's new firm from making inappropriate inquiries concerning such information.

37. With respect to subparagraph (g)(3), the measures that a firm must have in place to provide adequate safeguards against future violations of a properly initiated screen need not have been developed for the specific matter in which screening is under consideration. It is sufficient that the firm has general measures in place for identifying lawyers requiring screening prior to undertaking the representation of a client in a matter, that those measures appear reasonably calculated to prevent violations of subparagraphs (g)(1) and (g)(2),

and that they were followed in connection with the matter in question.

38. In developing appropriate screening procedures, among the areas that a prudent lawyer should consider are measures directed at ensuring that: (1) both lawyer and non-lawyer employees are aware of the general nature of screens, the reasons for them, and the importance of strictly abiding by them; (2) both screened lawyers and those personally involved in the new representation are aware of the existence of the screen and those personnel to whom it applies; (3) each group is advised not to communicate with the other concerning the matter or divulge information to the other that might be of assistance in representing the firm's client in that matter; and (4) all confidential information in whatever form is clearly designated as restricted and protected against access by persons not entitled to be aware of it.

39. Even though a lawyer has been properly screened from involvement in a matter, an affiliated lawyer or firm still cannot undertake that representation unless the screened lawyer is apportioned no part of the fee therefrom. See comment 20 and Terminology (definition of "apportioned no part of the fee") and comment 12 thereto for a discussion of this requirement.

Applications of the Rule

40. If a client terminates an attorney-client relationship with a lawyer or law firm, limitations on each lawyer affiliated with that lawyer or firm to personally undertake a representation adverse to that former client are provided by paragraphs (a), (b), (e), (f), and (g). Similarly, if a lawyer leaves one firm and joins a second, limitations on that lawyer's ability to personally undertake a representation against a person whom the lawyer, while at the first firm, either: (1) personally represented, or (2) represented and obtained confidential information, are set out in paragraphs (a), (c), (d), and (g). If any of those paragraphs prohibits the lawyer from personally undertaking the representation, any lawyer or firm affiliated with that lawyer is also prohibited from undertaking the representation, except in conformity with paragraphs (d), (e), (f), and (g)(1)-(3).

41. When law firms merge, former clients of each firm are treated as former clients of the new firm and current clients of each firm are treated as current clients of the new firm.

Compliance with Other Rules

42. A lawyer considering undertaking a representation permitted by this Rule also must conform to any other Rules applicable to that representation. For example, if the proposed current representation would involve the joint representation of multiple clients in the same

matter, the lawyer would have to comply with Rule 1.07 and, if applicable, paragraph (b) before agreeing to do so.

43. Rule 5.03 requires a lawyer to adopt reasonable measures to ensure that non-lawyer personnel supervised by that lawyer are aware of the professional obligations of a lawyer and conduct themselves accordingly. Insofar as this Rule is concerned, this would involve ensuring that those personnel are aware of their obligations to maintain confidences imparted to them in their prior law-related employment. A prudent lawyer should consider screening his or her non-lawyer employees from any involvement in matters in which they participated on behalf of an adverse party while employed at another law firm, because where such procedures have not been followed, some courts have concluded that the lawyer or firm employing the non-lawyer must be disqualified.

AMENDMENT 5: SUBSTITUTION OF REVISED RULE 1.10

Rule 1.10 Successive Government and Private Employment: General Rule

(a) Except as expressly authorized by law, a lawyer shall not personally represent a private client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, other than as an adjudicatory official or law clerk, unless the lawyer reasonably believes that the appropriate government agency has consented after reasonable disclosure in writing of the lawyer's proposed participation.

(b) No lawyer affiliated with a lawyer prohibited by paragraph (a) from accepting or continuing representation of a person in a matter may personally undertake or continue that representation unless that lawyer reasonably believes that:

(1) the lawyer affected by paragraph (a) is screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(2) written notice of the screening is or will be given at an appropriate time to an appropriate government official.

(c) Except as expressly authorized by law, 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 not personally represent a private client whose interests are adverse to that person or legal entity, if the representation in reasonable probability would be materially and substantially benefitted by an unauthorized use or disclosure of the information previ-

ously obtained by that lawyer and the information is not generally known.

(d) No lawyer affiliated with a lawyer prohibited by paragraph (c) from accepting or continuing representation of a person in a matter may personally undertake or continue that representation unless that lawyer reasonably believes that the lawyer affected by paragraph (c) is screened from any participation in the matter and is apportioned no part of the fee therefrom.

(e) Except as permitted by law, a lawyer serving as a public officer or employee shall not:

(1) participate in a matter involving a private client when the lawyer had personally represented that client in the same matter 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; or

(2) negotiate for private employment with any person who is involved as a party or as attorney for a party in a matter in which the lawyer is either then participating, or in reasonable likelihood will be participating, personally and substantially.

(f) 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.

(g) As used in this Rule:

(1) the term "matter" does not include regulation-making or rule-making proceedings or assignments, but does include:

(i) any adjudicatory proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other similar, particular transaction involving a specific party or parties; and

(ii) any other action or transaction covered by applicable conflict of interest statutes or by rules of the appropriate government agency.

(2) The term "confidential government information" means information that has been obtained under governmental authority and that, at the time this Rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose, and which is not otherwise available to the public.

(3) The term "private client" of a lawyer means any person, including a governmental agency, who is represented by the lawyer when the lawyer is engaged in the private practice of law;

(4) the term "screened from any participation in the matter" involving a client when applied to a lawyer (the "screened lawyer") means:

(i) the screened lawyer has not personally represented the client in the matter while affiliated with the lawyer's present firm;

(ii) with respect to paragraphs (a) and (b), neither that client nor any lawyer or firm now affiliated with the screened lawyer has obtained any confidential information related to the matter from that lawyer, either directly or indirectly, or, with respect to paragraphs (c) and (d), neither that client nor any lawyer or firm presently affiliated with that lawyer has obtained any confidential government information related to the matter from that lawyer, either directly or indirectly; and

(iii) reasonable measures have been undertaken to ensure that neither the client nor any lawyer or firm affiliated with the screened lawyer will obtain such information from the screened lawyer in the future.

Comment: Rule 1.10

1. This Rule concerns lawyers who have served or are serving in government in some capacity other than as an adjudicatory official or a law clerk to an adjudicatory official. It prevents those lawyers from exploiting public office for the advantage of a private client. Comparable restrictions on adjudicatory officials and law clerks are set out in Rule 1.11.

2. A Texas lawyer entering government service must continue to comply with all provisions of these Rules applicable to the lawyer's former representation of private clients. In addition, such a lawyer is also subject to statutes and government regulations regarding conflict of interest. See paragraphs (e) and (f). On the other hand, when a lawyer in government service leaves it to enter private practice, the restrictions imposed on the lawyer personally and the lawyer's new employer with respect to that practice are found only in this Rule and any applicable statutes or government regulations. See paragraphs (a)-(d), (f)-(g). Such statutes and regulations may circumscribe the extent to which the government agency may give consent under paragraph (a) of this Rule.

3. Where a public agency and a private client are represented in succession by a lawyer, the risk exists that power or discretion vested in public authority might be used for the special benefit of the private client. A lawyer should not be in a position where benefit to a private client might affect performance of the lawyer's professional function on behalf of public authority. Also, unfair advantage could accrue to the private client by reason of access to confidential government information about the client's adversary obtainable only through the lawyer's government service. However, the rules governing lawyers presently or formerly employed by a government

agency should not be so restrictive as to inhibit transfer of employment to and from the government. The government has a legitimate need to attract qualified lawyers as well as to maintain high ethical standards. The provisions for screening and waiver are necessary to ensure that a lawyer does not abuse a governmental position for private gain, without imposing too severe a deterrent against entering public service. See paragraph (g)(4).

4. For policy reasons, it is possible to cure a conflict of interest created for the private employer of a lawyer moving from government service to private employment. In the case of such a lawyer personally affected by paragraph (a) this is accomplished by screening that lawyer off from all involvement in the matter, ensuring that lawyer receives no portion of the fee that it generates, and providing reasonable disclosure in writing of that screening to the lawyer's former government employer at an appropriate time. If the firm wishes to have that lawyer participate personally in the representation, it must provide reasonable disclosure in writing of that proposed participation to the lawyer's former government employer at an appropriate time and obtain that agency's consent to that arrangement. See paragraphs (a) and (b). If a lawyer and that lawyer's firm have complied with this Rule, including giving the government appropriate notice of the proposed representation, but the government has not responded to that notice within a reasonable time, it would not violate this Rule for the firm to undertake the new representation in accordance with this Rule without first having been advised of the government's position with respect to its doing so.

5. Paragraph (b)(2) does not require that notice be given to the governmental agency when premature disclosure would injure the client, but rather "at an appropriate time." This flexibility, however, does not permit a law firm to dispense with notice altogether, merely because any notice given at any time could damage the client. Instead, notice is required to be given as soon as practicable in order that the government agency or other affected person will have a reasonable opportunity to ascertain compliance with Rule 1.10 and to take appropriate action if necessary. If the giving of such a notice is incompatible with the lawyer's responsibilities to the client, the representation must be discontinued or declined. In those circumstances, the lawyer may refer the matter to another lawyer without providing any notice to the government.

6. The notices called for by paragraphs (a) and (b)(2) should be delivered either to counsel for the governmental agency involved or, if the government is not represented in the matter, to a government

official who is known or reasonably believed to have responsibility for the matter.

7. In the case of a lawyer personally affected by paragraph (c), that lawyer's firm may accept or continue a representation by screening that lawyer off from all involvement in the matter and ensuring that lawyer receives no portion of the fee that it generates. See paragraphs (c) and (d). In such cases, it is not necessary for the lawyer's private employer to provide notice of these arrangements to the lawyer's former government employer. However, the personally affected lawyer may not participate in the matter unless authorized by law to do so. As used in this Rule, the phrase "authorized by law" has the same meaning given it in Rule 1.08(g). See Rule 1.08, comment 25.

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

9. The types of compensation arrangements prohibited by paragraphs (b)(l)and (d) are defined in Terminology (definition of "apportioned no part of the fee").

10. Paragraphs (a) and (e) do not prohibit a lawyer from jointly representing a private party and a government agency when doing so is not otherwise prohibited by Rules 1.06 or 1.07, or by other law.

11. Paragraph (e)(l) does not disqualify other lawyers in the agency with which the lawyer in question has become associated. Although the rule does not require that the lawyer in question be screened from participation in the matter, the sound practice would be to screen the lawyer to the extent feasible. In any event, the lawyer in question must comply with Rule 1.05.

12. As used in paragraph (f), "one body politic" refers to one unit or level of government such as the federal government, a state government, a county, a city or a precinct. The term does not refer to different agencies within the same body politic or unit of government.

13. When the client of a lawyer in private practice is an agency of one government, that agency is a private client for purposes of this Rule. See paragraph (g)(3). If the lawyer thereafter becomes an officer or employee of an agency of another government, as when a lawyer represents a city and subsequently is employed by a federal agency, the lawyer is subject to paragraph (e). A lawyer who has been a public officer or employee of one body politic and who becomes a public officer or employee of another body politic is subject to paragraphs (a), (c), and (e). See paragraph (f). Thus, paragraph (f) protects a governmental agency without regard to whether the law-

yer was or becomes a private practitioner or a public officer or employee.

AMENDMENT 6: SUBSTITUTION OF REVISED RULE 1.11

Rule 1.11 Successive Government and Private Employment: Adjudicatory Official or Law Clerk

(a) A lawyer shall not personally represent anyone 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 law clerk to an adjudicatory official, unless all parties to the proceeding give their informed consent after reasonable disclosure.
(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 for a party in a pending matter in which that official either is, or in reasonable likelihood will be, participating personally and substantially. A lawyer serving as a law clerk to an adjudicatory official may not negotiate for employment with a party or attorney involved in a matter in which the clerk is participating personally and substantially, until after the clerk has notified the adjudicatory official.
(c) If a lawyer is prohibited by paragraph (a) from personally representing a person in a matter, no lawyer affiliated with that lawyer may personally undertake or continue representation of that person in the matter unless the lawyer reasonably believes that the lawyer who is affected by paragraph (a) is screened from participation in the matter and is apportioned no part of the fee therefrom.
(d) As used in this Rule:
(1) the term "screened from any participation in the matter" involving a client when applied to a lawyer (the "screened lawyer") has the meaning set out in Rule 1.09(g).
(2) The term "law clerk" includes briefing attorneys, staff attorneys, and research attorneys, whether or not assigned to a particular adjudicatory official, as well as persons who have not been licensed as lawyers at the time they commence or undertake service as law clerks, but who nonetheless provide services to tribunals, under supervision, comparable to those provided by lawyers.

Comment: Rule 1.11

1. This Rule generally parallels Rule 1.10. The term "personally and substantially" signifies that a judge who was a member of a multi-member court and thereafter left judicial office to practice law is not prohibited from representing a client in a matter pending in the court but in which the former judge did not participate. So also the fact that a former judge exercised administrative responsibility in

a court does not prevent the former judge from acting as a lawyer in matters where the judge had previously exercised remote or incidental administrative responsibility that did not affect the merits. Compare the comments to Rule 1.10.

2. The term "Adjudicatory Official" includes not only judges but also comparable officials serving on tribunals, such as judges pro tempore, referees, special masters, hearing officers and other parajudicial officers, as well as lawyers who serve as part-time judges. Canon 6.B(3) of the Texas Code of Judicial Conduct (concerning county judges performing judicial functions), Canon 6.C(1)(d) (concerning municipal court judges and justices of the peace), and Canon 6.E(2) (concerning judges pro tempore while acting as such) all provide that the official involved may not act "as a lawyer in a proceeding in which he or she has served as a judge or in any other proceeding related thereto." Similarly, Canon 6.D(2) of the Texas Code of Judicial Conduct (concerning part-time commissioners, masters, magistrates, and referees of courts listed in Canon 6.A) provides that those persons may not "act as a lawyer in a proceeding in which he or she served as a commissioner, master, magistrate, or referee, or in any other proceeding related thereto." Although phrased differently from this rule, those provisions correspond in meaning to paragraph (a).

3. The term "Law Clerk" is intended to be comprehensive. See paragraph (d)(2). It includes persons who have not been licensed as lawyers at the time they commence or undertake service as law clerks. Obviously, paragraph (b) cannot apply to a law clerk until the clerk has been licensed as a lawyer. Paragraph (a) applies, however, to a lawyer without regard to whether the lawyer had been licensed at the time of the service as a law clerk, and once that person is licensed as a lawyer and joins a firm, paragraph (c) applies to the firm. Under paragraph (c), a firm may represent a client in a matter, even though a lawyer in that firm would be prohibited by paragraph (a) from personally doing so without consent, if that lawyer has been screened from participation in the matter. See paragraphs (c) and (d)(1).

4. As to the forms of compensation that a lawyer personally affected by paragraph (a)is prohibited by paragraph (c) from receiving, see Terminology (definition of "apportioned no part of the fee").

AMENDMENT 7: SUBSTITUTION OF REVISED RULE 1.12

Rule 1.12 Organization as a Client

(a) When a lawyer has been retained by an organization to render legal services for that organization:

(1) In the absence of an express or implied agreement to the contrary, the lawyer represents only the organization;

(2) In dealing with a person known by the lawyer to be a constituent of the organization, the lawyer shall explain that the lawyer represents the organization rather than that constituent when it is apparent to the lawyer that 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; and

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

(b) While the lawyer in the ordinary course of working relationships may report to, and accept direction from, an entity's duly authorized constituents, in the situations described in paragraph (c) the lawyer shall proceed as reasonably necessary in the best interest of the organization without involving unreasonable risks of disrupting the organization and of revealing information relating to the representation to persons outside the organization.

(c) A lawyer who represents an organization must initiate reasonable remedial actions whenever the lawyer knows that:

(1) the lawyer represents the organization;

(2) 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 might be imputed to the organization;

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

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

(d) Reasonable remedial actions must be designed to cause disclosure of the violation to appropriate constituents of the organization. Those measures shall avoid disclosing the violation to persons other than constituents of the organization or the organization's legal representatives, except where disclosure to other persons is required by law or permitted by other of these Rules.

(e) A lawyer who resigns or is terminated from representing an organization shall comply with Rule 1.15. Upon doing so, a lawyer is excused from further proceeding as set out in paragraphs (b), (c) and (d). Any further obligations of the lawyer are determined by Rule 1.05.

Comment: Rule 1.12

Scope

1. This Rule is concerned with conflicts of interest that can develop between an already established organization, its constituents, and a lawyer representing some or all of them. It does not apply to the responsibilities of a lawyer to persons who may or may not be the lawyer's clients but who have engaged the lawyer concerning the formation of an organization. A lawyer considering or already engaged in such activities is governed by Rule 1.07.

The Entity as the Client: Overview

2. Lawyers frequently are retained to provide legal services for or to render legal advice to an organization, such as a corporation, partnership, joint venture or unincorporated association. Paragraph (a) provides that in such circumstances, absent an agreement to the contrary, a lawyer so employed or retained represents only the organization as distinct from its constituents or other agents—that is, its directors, officers, employees, members, shareholders, partners or other persons involved with the organization in similar capacities. Care must be exercised in order to avoid losing sight of this fact, however, because unlike individual clients who can speak and decide finally and authoritatively for themselves, an organization can speak and decide only through its constituents. Those constituents to whom the lawyer looks for guidance in determining the organization's desires, however, might sometimes mistakenly come to see the attorney-client relationship as being directly between the lawyer and them, either in lieu of or in addition to the relationship between the lawyer and the organization itself. Serious difficulties can arise if the lawyer becomes concerned whether one or more of those constituents legitimately represents the organizational client or is acting contrary to its best interests. Those difficulties are compounded if the constituents involved have a plausible basis for claiming that the organization's lawyer also represents them with respect to the matter in controversy. This Rule explains the lawyer's responsibilities in such cases, as well as how to proceed in order to minimize the difficulties discussed above.

Decisions by Constituents

3. When constituents of the organization make decisions for it, the decisions ordinarily must be accepted by the lawyer even if their utility or prudence is doubtful. Decisions concerning policy and operations, including ones entailing serious risk, are not as such in the lawyer's province. However, different considerations arise when the lawyer knows, in regard to a matter within the scope of the lawyer's

responsibility or that of an affiliated lawyer or firm, that the organization is likely to be substantially injured by the action of a constituent that is in violation of law or in violation of a legal obligation to the organization. In such circumstances, the lawyer must take reasonable remedial measures. See paragraphs (b),(c) and (d). In doing so, the lawyer is to proceed as reasonably necessary in the best interests of the organization, without undue disruption of its activities and so as to preserve the confidentiality of the organization with respect to the matter to the fullest extent possible. See paragraphs (b) and (d).

Clarifying the Lawyer's Role

4. Ordinarily, the lawyer's first obligation is to develop a clear understanding of the situation by discussing it with knowledgeable constituents of the organization. In such circumstances, the lawyers should advise any constituent with whom the lawyer discusses the matter and whose interests the lawyer believes are or could become adverse to those of the organization, as well as any constituent who might not understand the true situation, that the lawyer is not representing that constituent. See subparagraph (a)(2). In cases of actual or potential conflicts of interest, the lawyer also should advise that person that he or she may wish to obtain independent representation before discussing the matter further. Care should be taken to assure that the individual understands that, when there is such adversity of interest, the lawyer for the organization cannot provide legal representation for that constituent individual, and that discussions between the lawyer for the organization and the individual may not be privileged insofar as that individual is concerned, unless joint representation is later undertaken in conformity with Rule 1.07. See subparagraph (a)(3). Whether such a warning should be given by the lawyer for the organization to any particular constituent will turn on the facts of each case.

Joint Representation of Organization and Its Constituents

5. It also is possible that an organization and certain of its constituents might wish to consider having the lawyer jointly represent their interests at stake in the matter. In such circumstances, a lawyer representing the organization may also represent the constituents involved only if the joint representation can be undertaken in conformity with Rule 1.07. See subparagraph (a)(3). The organization's consent to the joint representation, should be given, if possible, by appropriate disinterested officials of the organization other than any individuals who are to be represented, or by the shareholders.

Reasonable Remedial Measures within Legal Department or Law Firm

6. When an organization is represented by several lawyers, what constitutes reasonable remedial measures by a particular lawyer may vary. If a lawyer who discovers a situation within the scope of paragraph (c) is an in-house counsel, for example, absent extraordinary circumstances, it would be appropriate for that lawyer to follow any existing procedures within the client's legal department for addressing such situations and allow the lawyer who is personally expected to bring the matter to the attention of the appropriate organizational authority to do so.

7. Where outside counsel are involved, should circumstance described in paragraph (c) come to the attention of a lawyer who knows the lawyer's firm is representing the client but who is not doing so personally, it normally would be appropriate for that lawyer to call the situation to the attention of an affiliated lawyer who is personally representing that client and allow that lawyer to take any further necessary remedial action. After advising the affiliated lawyer of the situation, the reporting lawyer's responsibilities are comparable to those of a supervised lawyer governed by Rule 5.02. On the other hand, when a lawyer who is personally representing the client becomes aware of a matter apparently within the scope of paragraph (c), it would be appropriate for the lawyer discovering the problem to advise the senior lawyer in the firm whose particular area of representation of the client is most closely involved with the questionable conduct and allow that senior lawyer to take appropriate action.

Reasonable Remedial Measures within Organization

8. Depending upon circumstances, it may be reasonably necessary for the lawyer personally responsible for bringing the problem to the attention of an appropriate constituent of the organizational client to ask that constituent to reconsider the matter. If that fails, or if the matter is of sufficient seriousness and importance to the organization, it may be reasonably necessary for the lawyer to take steps to have the matter reviewed by a higher authority in the organization. The stated policy of the organization may define circumstances and prescribe channels for such review, and a lawyer should encourage the formulation of such a policy. Even in the absence of an organization policy, however, the lawyer may have an obligation to refer a matter to higher authority within the organization, depending on the seriousness of the matter and whether the constituent in question has apparent motives to act at variance with the organization's interest.

At some point it may be useful or essential to obtain an independent legal opinion.

9. In some cases, it may be reasonably necessary for the lawyer personally responsible for bringing the problem to the attention of an appropriate constituent of the organizational client to refer the matter to the organization's highest responsible authority. Ordinarily, that is the board of directors or similar governing body. However, applicable law may prescribe that under certain conditions highest authority reposes elsewhere, such as in the independent directors of a corporation.

Reasonable Remedial Measures Outside Organization

10. Even bringing a matter before the organization's highest authority may be unsuccessful in resolving the problem in a proper fashion. In those circumstances, the ultimate and difficult ethical question is what the lawyer should do when the organization's highest authority persists in a course of action that is clearly violative of law or of a legal obligation to the organization and is likely to result in substantial injury to the organization. The lawyer's options and obligations in those situations are governed by Rules 1.02, 1.05, and 1.15; see paragraph (e). If the lawyer does not violate Rule 1.02 or Rule 1.05 by doing so, the lawyer's further remedial action, after exhausting remedies within the organization, may include revealing information relating to the representation to persons outside the organization. See paragraph (d). If the conduct of a constituent or other authority of the organization is likely to result in death or serious bodily injury to another, the lawyer may have a duty of revelation under Rule 1.05(e). The lawyer may resign, of course, in accordance with Rule 1.15, in which event the lawyer is excused from further proceeding as required by paragraphs (b), (c), and (d), with any further obligations on the lawyer's part being determined by Rule 1.05.

Scope of Remedial Obligations

11. Thus a lawyer's obligations under paragraph (c) are carefully circumscribed. First, before a lawyer is obliged to take any action, the lawyer must know that the lawyer's firm represents the client. See subparagraph (c)(1). The Rule imposes no duty of inquiry in that regard. Of course, if the lawyer is personally representing the organization, this requirement is clearly satisfied. However, since a lawyer "represents" a client if any lawyer or firm affiliated with that lawyer does (see Terminology—"represents" a client), it is conceivable that a lawyer could represent the organization without being aware of that fact. Second, even if the lawyer knows the lawyer's firm represents the client, the lawyer is under no obligation to take

or initiate remedial measures concerning a matter outside the firm's areas of legal involvement with the client. Finally, even if the lawyer realizes the situation involved is within the scope of the firm's representation of the client, the lawyer is not subject to discipline for failing to take reasonable remedial measures unless the lawyer knows that all three of the conditions set out in subparagraphs (c)(2)-(c)(4) exist.

Additional Discretionary Disclosures

12. Although not required as a matter of discipline, many attorneys would bring a wider range of problems to their client's attention than required by this Rule, because of the likely adverse impact on both the client and the firm's relations with that client should the harm to the client's interests occur. Nothing in this Rule prevents such a disclosure, as long as it can be made without violating other of these rules.

Confidentiality

13. When a client organization's constituent seeks legal advice from the organization's lawyer concerning the organization's business or affairs, the communication is protected as confidential information of the organization by Rule 1.05. Such information normally would also be privileged. See Texas Rule of Evidence 503. Depending upon the circumstances, the communication might also be protected as confidential information of the constituent. In any event, the lawyer may not use or disclose that information except as permitted by Rule 1.05. Whether the communication also is privileged against disclosure by a rule of evidence is beyond the scope of these rules.

Government Agency

14. The duties set out in this Rule apply to governmental organizations. However, when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful official act is prevented or rectified, for public business is involved. In addition, duties of lawyers employed by the government or lawyers in military service may be defined by statutes and regulations. Therefore, defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context. Although in some circumstances the client may be a specific agency, it is generally the government as a whole. For example, if the action or failure to act involves the head of a bureau, either the department of which the bureau is a part or the government as a whole may be the client for purpose of this Rule. Moreover, 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: Scope.

Derivative Actions

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

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

Inapplicability of Rule to Purely Business Relationships

17. This Rule does not govern the conduct of a lawyer who is a constituent of an organization, as long as the lawyer does not provide legal services or advice to the organization.

Relation to Other Rules

18. The discretion conferred and obligations imposed on lawyers by this Rule are both consistent with and complement that conferred and imposed by other Rules. In particular, this Rule is consistent with the lawyer's responsibilities under Rules 1.05, 1.08, 1.15, 3.03, and 4.01. If a lawyer knows or believes that the lawyer's services have been, are being, or will be used by an organization to further a crime or fraud by the organization, Rules 1.02(c), (d), (e) or (f) can be applicable.

AMENDMENT 8: SUBSTITUTION OF REVISED RULE 1.13

Rule 1.13. Conflicts: Public Interest Activities

A lawyer who is a director, officer or member of a legal services, civic, charitable or law reform organization shall not participate in a decision or action of the organization if the lawyer knows that:

(a) participation is likely to adversely affect the lawyer's representation of a client in a particular matter; or

(b) the decision is likely to have a material adverse effect on legal representation furnished by the organization to any client or member of that organization whose interests are adverse to a client the lawyer represents.

Comment: 1.13

1. This Rule assumes that a lawyer who becomes a director, officer or member of a legal services, civic, charitable, or law reform organization does not thereby also serve as an attorney for that organization or for its clients. When the attorney does represent the organization or its clients, however, the attorney must consider any conflicts of interest between those persons or entities and the attorney's other present or former clients as required by other of these rules, most commonly Rules 1.06, 1.07, and 1.09.

2. Lawyers are encouraged to serve as directors, officers or members of legal services, civic, charitable or law reform organizations. Except as prohibited by this Rule, they may do so without restriction, notwithstanding that the organization either itself has interests adverse to a client of the lawyer or else serves persons having such adverse interests. This Rule is drawn narrowly to sharply limit the circumstances in which a lawyer's professional activities and obligations require the lawyer to abstain from participating in certain activities and decisions of the organization. The Rule does not ever require a lawyer to decline to serve as an officer or director of a legal services, civic, charitable or law reform organization or to resign his or her membership in it, due to the lawyer's representation of a client.

3. For reasons of public policy, it is not generally considered a conflict of interest for a lawyer to engage in law reform activities even though such activities are adverse to the general interests of the lawyer's private clients. A lawyer's representation of a client does not constitute an endorsement of the client's political, economic, social or moral views, nor does the lawyer forego his or her own. When the lawyer knows that a decision of the organization is likely to adversely affect the lawyer's representation of a client in a matter, however, the lawyer must not participate in making that decision. See paragraph (a). A decision of the organization will "adversely affect" the lawyer's representation of a client if that decision will limit the lawyer's ability to consider, recommend or carry out an appropriate course of action for the client in that matter. See Rule 1.06, comment 7. In circumstances falling within the prohibitions of this Rule, the non-participation standard should be applied broadly. Thus, a lawyer should not lobby for or against, offer resolutions concerning,

participate in discussions of, or vote on any decision in which the lawyer may not "participate" under this Rule.

4. On the other hand, when the lawyer knows that the interests of a client may be materially benefitted by a law reform decision in which the lawyer participates, the lawyer should disclose that fact but need not either refrain from participating in the decision or identify the client.

5. When the lawyer is a director, officer or member of a legal services organization, further problems can arise when a client served by the organization has interests adverse to those of a client served by the lawyer. If the lawyer were to participate in an action or decision of the organization concerning that representation, a real danger of having the quality of the organizational client's representation being dictated by its adversary would be presented. To avoid that possibility, paragraph (b) prohibits a 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. Because civic, charitable, and law reform organizations generally do not represent clients, paragraph (b) usually will not apply to them.