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PROFESSIONAL RESPONSIBILITY

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I. REGULATORY CONTROLS OVER ATTORNEYS AND UNAUTHORIZED PRACTICE

A. GENERAL SOURCES OF REGULATION

Practice within state courts is regulated by the courts, legislature, and bar of each state. Practice in the federal courts is regulated by the rules of each district court and circuit court of appeals, rules promulgated by the Supreme Court of the United States, and rules passed by Congress.

1. State Regulation

a. State Legislatures

The relative powers of the legislature and courts of a state with respect to regulation of the legal profession have never been clearly defined through legislation or case law. It is generally assumed that the legislature establishes standards as aids to the judicial branch, but that the courts may fashion more stringent rules.

b. State Courts

The inherent authority to regulate practice within the courts of a state is vested in the ***highest court*** of the jurisdiction. Final decisionmaking power with respect to such regulation is usually assumed by these courts.

c. State Bar Associations

Two general classes of state bar associations can be distinguished: integrated bar associations and voluntary bar associations. Integrated bar associations require all attorneys within the state to join and thereby subject themselves to the rules promulgated by the association. They are usually formed under the authority of state legislatures, state courts, or in some cases, by the state courts under general powers and instructions created by the state legislature. Voluntary bar associations do not encompass the entire community of practicing lawyers within a state unless they all voluntarily join. Still, these voluntary associations have often been in the forefront of proposing ethical standards and attempting to regulate the unauthorized practice of law.

2. Federal Regulation

a. Federal Courts

Each federal district and appellate court promulgates its own rules independent of those that exist for the state courts in the jurisdiction where the federal court sits.

1) Requirements for Admission

Most federal courts require only that the attorney seeking admission be a member of the bar of the state in which the court sits and make formal application for admission to the federal bar.

2) Interstate Federal Practice

Under limited circumstances, an attorney who is a member of the bar in one state and admitted to practice before a federal court in that state may be permitted to appear in a federal court in another state.

a) "Pro Hac Vice" Appearances

An attorney who is a member of the bar in one state may be allowed to appear "pro hac vice" in federal court in another state to argue or try a particular case. In such instances, the state in which the federal court sits cannot limit the attorney's rights.

Example: An attorney who specializes in antitrust law and is a member of the bar in State A appears in federal court in State B on a complex antitrust matter. State B cannot limit the attorney's right to practice in federal court on the ground that he is not licensed to practice in State B.

b) Continuous Federal Practice

A different result is reached when an attorney attempts to conduct a full-time federal practice within a state in which he has not been admitted to the bar. Under such circumstances the state is fully within its rights in limiting the attorney's access to the courts even though he has limited himself exclusively to federal matters.

b. Federal Administrative Agencies

In most instances, the only requirement for practice before a federal administrative agency is that the attorney be a member of the bar of the state in which the agency sits. Certain specialized agencies, such as the United States Patent Office, also require that the attorney pass a special examination to test his expertise. In addition, it has been recognized that federal law may totally preempt an area in such a manner so as to allow anyone who meets specific qualifications to practice law in that field regardless of whether he is admitted to practice in a particular jurisdiction.

Example: An attorney or nonlawyer "agent" may be admitted to practice law before the Patent Office provided he has passed a special examination. A state cannot prohibit a qualified patent agent from practicing patent law in that state on the basis that he is not admitted to that state's bar and is thereby engaged in the unauthorized practice of law. [Sperry v. State of Florida *ex rel.* Florida Bar, 373 U.S. 379 (1963)]

Most federal administrative agencies have a procedure whereby an attorney may be suspended or disbarred from practice before the agency.

c. Federal Government Attorneys

A federal government attorney is subject to state ***ethics*** laws and rules (as well as local federal court rules) governing attorney conduct in each state in which the attorney engages in her duties. [28 U.S.C. §530B(a); 28 C.F.R. §§77.2, .3]

3. American Bar Association

The American Bar Association ("ABA") is a voluntary national organization which, since its inception, has performed many important advisory functions relating to the regulation of the legal profession, including promulgating the Model Rules of Professional Conduct ("RPC"), which have been adopted by a majority of states. Note that in 2002, the ABA revised the Model Rules, and this outline is based on the Rules as revised.

B. ADMISSION TO THE LEGAL PROFESSION

In regulating admission to practice, each jurisdiction has formulated certain prerequisites. While the details of satisfying these will vary by state and federal district, the applicant normally must meet educational requirements, pass (except where waived if from another jurisdiction) a bar examination, and show that she is a person of good moral character. To satisfy constitutional standards of equal protection of the laws, any prerequisite to admission must bear a ***rational relationship*** to the applicant's fitness or capacity. [Schware v. Board of Bar Examiners of New Mexico, 353 U.S. 232 (1957)]

1. Citizenship Requirements

A state may not require that an applicant be a citizen of the United States. [*In re* Griffiths, 413 U.S. 717 (1973)]

2. Residency Requirements

State residency requirements for bar admission violate the Privileges and Immunities Clause of the United States Constitution. [Supreme Court of New Hampshire v. Piper, 470 U.S. 274 (1985)] *Rationale:* The right to practice law is a "fundamental" right. States may discriminate against nonresidents only where their reasons are ***substantial*** and the difference in treatment bears a close or ***substantial relation*** to those reasons.

a. Admission on Motion

A state residency requirement for admission to the state's bar without examination (on motion) is unconstitutional. Requiring nonresidents to sit for a bar examination while residents may be admitted on motion violates the Privileges and Immunities Clause. [Supreme Court of Virginia v. Friedman, 487 U.S. 59 (1988)]

b. Residency for Federal Court Practice

The Supreme Court has also struck down a local rule of a federal district court that required, in addition to bar membership in the state in which the court sits, that applicants to the court's bar also live or maintain an office in that state. The Court found this requirement unnecessary and irrational. [Frazier v. Heebe, 482 U.S. 641 (1987)]

3. Character Requirements

Every jurisdiction places on each applicant the burden of showing that he possesses "good moral character."

a. Applicant's Procedure

Each applicant is usually required to answer a detailed background questionnaire and to furnish references. The refusal to furnish such information is grounds for rejection of the applicant.

Example: An applicant who refuses to answer questions concerning his possible membership in the Communist Party may be rejected because such inquiries are merely a prelude to an investigation into his moral character. [Konigsberg v. State Bar of California, 366 U.S. 36 (1961)]

b. Procedural Protections

An applicant is entitled to procedural due process with regard to actions taken by the bar representatives reviewing his application. This includes the right to a ***hearing*** before the bar committee and ***confrontation of adverse witnesses,*** as well as the right to

judicial review of the denial of an application based on bad moral character. [Willner v. Committee on Character and Fitness, 373 U.S. 96 (1963)]

c. Conduct Failing the "Good Moral Character" Test

The purpose of the bar committee's investigation into the background of an applicant is to determine if there is anything in his past that reflects adversely upon his honesty and integrity. The general benchmark used to measure this is whether any of the applicant's past conduct involved "moral turpitude," i.e., acts that involve intentional dishonesty or are repugnant to accepted moral standards. Any conduct or charges against the applicant involving such crimes as bribery, perjury, theft, murder, rape, etc., would fall within the definition of "moral turpitude," but a variety of illegal acts, such as draft evasion and possession of marijuana for personal use, may or may not be acts involving "moral turpitude," depending upon the nature of the offense and the intent of the individual.

Example: An applicant who had used aliases to hide his Jewish background from employers and who had been arrested along with other discontented laborers was found not to have committed an act of "moral turpitude." [Schware v. Board of Bar Examiners of New Mexico, *supra*]

d. Constitutional Limitations on Regulatory Authorities

Although a state regulatory agency may establish criteria that must be met by persons seeking admission to practice law within the state, there must be a ***nexus*** between the requirements for admission and an applicant's fitness to practice law. For instance, the state regulatory authority may not reject an applicant solely because of ***membership in a political organization,*** as opposed to active and knowing participation in the organization with the intent to advance specific goals.

Nor may rejection be based on the ***personal beliefs*** of an applicant where those beliefs are not translated into an illegal advocacy to action. In this context, the Supreme Court rulings in bar admission proceedings have tracked the development of standards for the invocation of free speech and associational rights under the First Amendment.

Example: An applicant may not be rejected merely on the basis of his membership in the Communist Party where there is no showing that he ever engaged in, or even advocated, actions to overthrow the government by force or violence. [Schware v. Board of Bar Examiners of New Mexico, *supra*]

e. Attorney's Duty to Cooperate with Character Investigations

An ***applicant*** for admission to the bar, or an ***attorney*** in connection with a bar admission application or in connection with a disciplinary matter, must not: (i) knowingly make a false statement of material fact; or (ii) fail to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter, or knowingly fail to respond to a lawful demand for information from an admissions or disciplinary authority. This rule does not require disclosure of information otherwise protected by RPC 1.6 (relating to confidentiality). [RPC 8.1]

C. DISCIPLINARY PROCESS

1. General Substantive Standards

The Model Rules list six general prohibitions, the violation of which may, as do violations of

the specific prohibitions in the Rules, lead to disciplinary measures. Under these prohibitions, a lawyer may not:

(i) Violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or use the acts of another to commit a violation;

(ii) Commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects;

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

(iv) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation;

(v) Engage in conduct prejudicial to the administration of justice; or

(vi) Knowingly assist a judge or judicial officer in conduct that violates applicable rules of judicial conduct or other law.

[RPC 8.4]

2. Disciplinary Procedure

While the details of disciplinary procedure vary from state to state, there is a general procedural scheme along the following lines:

a. Complaint

The disciplinary proceeding is initiated by a complaint to the state bar, which may be filed by a dissatisfied client, a member of the bar, or any other interested party. The filing of a complaint is generally considered a ***privileged communication*** and the complainant is usually protected from subsequent action by the attorney for defamation or malicious prosecution as a matter of public policy.

b. Screening and Hearing

The complaint will be examined in a preliminary screening process conducted by a panel appointed by the grievance committee of the state bar.

1) Commencement of Hearing

If a decision is made to pursue the complaint, a nonpublic hearing will usually be held before the grievance committee after notice to the attorney under investigation.

2) Procedural Protections

The Due Process Clauses of the Fourteenth Amendment and relevant state constitutions are applicable to state disciplinary proceedings. Thus, while the specific procedures vary by jurisdiction, a lawyer subject to a disciplinary hearing retains the basic ***rights to counsel and to cross-examination of witnesses*** at the hearing. [*In re* Ruffalo, 390 U.S. 544 (1968)] He also has the absolute right to invoke, without penalty, the Fifth Amendment ***protection against self-incrimination*** under the Supreme Court's ruling in *Spevack v. Klein,* 385 U.S. 511 (1967).

3. Forms of Disciplinary Sanction

The most common penalties for engaging in unethical or unprofessional conduct are: (i) ***disbarment*** (permanent revocation of an attorney's license); (ii) ***suspension*** (temporary revocation of an attorney's right to practice); and (iii) ***public or private censure*** by the courts or bar associations.

4. Effect of Disciplinary Action on Other Court Systems

Each state and federal court system is considered a separate, autonomous unit for discipline as well as admission of attorneys. Thus, disciplinary proceedings by the state courts located within the federal district have no binding effect on the attorney's ability to practice before the federal courts in that district. Similarly, foreign state courts must make their own independent evaluation of an attorney's conduct when he has been disciplined in a sister state. However, most states give some effect to the sister state's determination during their own proceedings on the basis of "full faith and credit" or "comity."

5. Practice in Multiple States—Choice of Law

A lawyer is subject to the regulation of the state in which she is admitted, regardless of where her conduct occurs. The disciplinary authority of a state includes lawyers not admitted in the state who provide or offer to provide legal services in the state. Note that a lawyer may be disciplined in more than one state based on the same conduct. [RPC 8.5(a)]

a. Choice of Law

A tribunal considering conduct connected with a matter pending before it will apply the Rules of Professional Conduct of the state in which it sits, unless the tribunal's rules provide otherwise. Regarding any other conduct, the tribunal will apply: (i) the rules of the state in which the conduct occurs; or (ii) the rules of another state in which occurred the ***predominant effect*** of the conduct. A safe harbor is provided for a lawyer whose conduct conforms to the rules of a state in which the lawyer reasonably believes the predominant effect will occur. [RPC 8.5(b)] Thus, if the lawyer is reasonably mistaken about the place of predominant effect, she will not be subject to discipline under the rules of the state where the predominant effect actually occurs. Regarding conflicts of interest only, a lawyer and client may enter into a written agreement specifying the "predominant effect" jurisdiction—e.g., "Client and Lawyer anticipate that the predominant effect of the lawyer's conduct will be in Ohio and agree that the Ohio Rules of Professional Conduct and Ohio law relating to conflicts of interest should govern Lawyer's work on this matter." [RPC 8.5, comment 5]

D. UNAUTHORIZED PRACTICE OF LAW

In addition to regulating the admission and discipline of lawyers, each jurisdiction has sought to prevent the unauthorized practice of law. This prohibition is predicated upon the public's need for integrity and competence of those persons purporting to render "legal" services. It is not unauthorized practice, however, for a layperson to represent herself.

1. Definition of Unauthorized Practice

The Rules do not attempt to set forth a single definition of those activities that constitute the unauthorized practice of law. They adopt instead a functional definition. The Rules do, however, prohibit a lawyer from practicing law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction or assisting another person in doing so. [RPC 5.5(a)]

2. Limited Exception Where Professional Judgment Not Required
Where the professional judgment of a lawyer is not involved, nonlawyers such as court clerks, abstracters, and many government officials are authorized to engage in occupations even if they require a special knowledge of law in certain areas.

3. Definition Applied to Specific Activities
The actual determination of what constitutes unauthorized practice has been left to the state supreme court. Some states have attempted to define the practice of law in connection with specific activities, but in large measure the distinctions between such practice and proper lay activities are based on the particular circumstances of each case.

a. Preparation of Documents

1) Real Estate Brokers
Real estate brokers may not draft contracts but may fill in the blanks on standard contracts as long as separate fees are not charged for such services.

2) Title Insurance and Escrow Companies
Title insurance and escrow companies are permitted to fill in standardized mortgage and deed forms in certain jurisdictions but are restrained from doing so in others.

3) Lay Tax Advisers
In theory, lay tax advisers may not counsel individuals as to the legal implications of their conduct but may, if qualified (i.e., by accountancy training), prepare tax returns for clients.

Example: Client goes to see his tax accountant to consult with him concerning tax shelters for his large income. The accountant may not give advice to Client on tax shelters because such advice requires the professional judgment of a lawyer as to the legality of specific action under the tax laws.

4) Estate Planners
Estate planners may not draft wills or prepare plans for specific individuals but may disseminate general information to the public through commercial or noncommercial means.

Example: An estate planner published a book entitled *How to Avoid Probate*, which was in effect a "do-it-yourself" probate kit. He was subsequently charged with practicing law without a license. The court ruled that he was merely disseminating information to the public to enable individuals to represent themselves. [New York County Lawyers' Association v. Dacey, 287 N.Y.S.2d 422 (1967)]

b. Representation of Clients

1) Corporations
Corporations, other than nonprofit legal service groups or recognized professional corporations, generally may not represent a client directly in judicial proceedings or provide representation through their attorney-employees.

2) Collection Agencies
Collection agencies in a number of jurisdictions may not bring suit directly to enforce a debt assigned to them for collection. However, a state statute defining debt collection as the practice of law, thus limiting debt collection activities to members of that state's bar, was held to be an unconstitutional imposition on interstate commerce. [National Revenue Corp. v. Violet, 807 F.2d 285 (1st Cir. 1986)]

3) Representation "In Propria Persona"
Individuals (not corporations) have the right to represent themselves even if they are not attorneys.

4. Multi-Jurisdictional Practice
A lawyer who is not licensed to practice in a state must not: (i) open a law office in that state, (ii) represent that she is admitted to practice in that state, or (iii) establish a "systematic and continuous presence" in that state without becoming licensed there. [RPC 5.5]

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

1) Association with Active Local Lawyer
The out-of-state lawyer who is not admitted in a state may practice there on a temporary basis if she associates a local lawyer who actively participates in the matter. [RPC 5.5(c)(1)]

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

2) Special Permission to Practice in Local Tribunal
An out-of-state lawyer may request special permission from a local court, administrative agency, or other tribunal to handle a matter in that tribunal. [RPC 5.5(c)(2)] In a court, such permission is commonly called admission "pro hac vice," which means admission for purposes of this matter only. An out-of-state lawyer who reasonably expects to be admitted pro hac vice may engage in preliminary activities in the state, such as meeting with clients, reviewing documents, and interviewing witnesses.

3) Mediation or Arbitration Arising Out of Practice in Home State
An out-of-state lawyer may mediate, arbitrate, or engage in another form of alternative dispute resolution in a state if her services arise out of, or are reasonably related to, her practice in the state in which she is admitted. [RPC 5.5(c)(3)]

Example: Attorney A is admitted to practice in Utah only. She represents a Utah client in a contract dispute, and the contract states that all such disputes will be submitted to arbitration in Arizona. A may represent her client in the Arizona arbitration, and the same would be true of a mediation or other form of alternative dispute resolution.

4) Other Temporary Practice Arising Out of Practice in Home State
RPC 5.5(c)(4) is a catch-all category that permits an out-of-state lawyer to temporarily practice in a state if the practice is reasonably related to the lawyer's home-state practice.

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

b. Permissible Types of Permanent Multi-Jurisdictional Practice
A lawyer who is admitted in one jurisdiction, and who is not disbarred or suspended from practice in any jurisdiction, may provide legal services through an office or other systematic and continuous presence in a state in which she is not admitted in two narrowly limited situations:

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

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

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

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

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

c. Informing the Client
An out-of-state lawyer who: practices on a temporary basis, is a salaried employee of his only client, or is authorized to practice by federal or local law may under some circumstances be required to inform the client that he is not licensed in the state; e.g., when the representation occurs primarily in the state where the lawyer is not licensed and requires knowledge of that state's law. [RPC 5.5, comment 20]

d. Disciplinary Consequences of Multi-Jurisdictional Practice
A lawyer who engages in multi-jurisdictional practice in a state is subject to that state's disciplinary authority. [RPC 5.5, comment 19]

5. Judges and Court Officers
Full-time judges and court officers (including clerks) may not practice law, nor may law students represent clients except where authorized to do so under the supervision of a licensed attorney.

6. Lawyers Aiding Lay Practitioners
A lawyer may not practice law in association with, or otherwise share fees with, a layperson and may be disciplined for aiding a nonlawyer in the unauthorized practice of law.

7. Law Firms and Nonlawyers
Law firms, whether in the form of professional corporations or associations, may not be set up in such a way that a nonlawyer owns an interest therein (except for a fiduciary representative during the administration of an estate), a nonlawyer is a corporate officer or director thereof, or a nonlawyer has the right to direct or control a lawyer's professional judgment. [RPC 5.4(d)]

E. LAW-RELATED (ANCILLARY) SERVICES

Lawyers are permitted to provide law-related services to clients. Law-related services (often referred to as ancillary services) are services that might reasonably be performed in conjunction with (and are related to) the provision of legal services and that are not prohibited as unauthorized practice of law when provided by a nonlawyer. Examples of law-related services include financial planning, accounting, trust services, real estate counseling, and tax return preparation. A lawyer is subject to the Rules of Professional Conduct with respect to the provision of law-related services if she provides those services under circumstances that are not distinct from her provision of legal services to clients. [RPC 5.7(a)(1)]

1. Services Provided by Entity Controlled by Lawyer
When the law-related services are provided by a separate entity controlled in whole or in part by a lawyer, the lawyer is subject to the Rules of Professional Conduct with respect to those services unless she takes reasonable measures to ensure that the recipient of the services knows that the services provided by the entity are not legal services and that the protections of the lawyer-client relationship do not apply. [RPC 5.7(a)(2)]

II. ESTABLISHING A LEGAL PRACTICE

A. FORMS OF PRACTICE

Lawyers have the opportunity to practice law in myriad ways. The most prevalent of these various forms are sole practitioners; law firms; lawyers involved in the executive, legislative, and judicial aspects of government; legal services organizations; and counsel to special interest groups and business enterprises, most notably corporations, banks, and insurance companies.

1. Law Firms

a. Relationship of Lawyers Within the Firm
Law firms range in size from two to over 1,000 lawyers, and their activities encompass the entire ambit of legal services. Three categories of practitioners generally are distinguished within the firm framework: partners, associates, and attorneys of counsel. Partners are those lawyers who share responsibility and liability for the activities of the firm. In many jurisdictions, a firm may not be designated as a partnership unless the "partners" share in the profits as well as the expenses of the firm. Associates do not share full responsibility or liability for the firm's work and are often limited in their contact with clients due to the organizational characteristics of the firm. "Of counsel" denotes a lawyer who has a continuing relationship with a law firm, other than as a partner or associate.

b. Designation of "General Counsel"
"General counsel" or a similar professional reference may be used by a law firm that devotes a substantial amount of professional time to the representation of a client.

c. Protecting Client's Interests
Whatever the structure of the firm, a lawyer in practice must ensure that the interests of the client are paramount to the interests of the firm and that the client's problems are handled with competence and care.

d. Naming the Law Firm
A lawyer must not use a firm name, letterhead, or other professional designation that is false or misleading. A private practitioner may use a trade name that does not imply a connection with a government agency or with a public or charitable legal services organization. [RPC 7.5(a)]

1) Firm Members in Public Service
The name of a lawyer holding a public office must not be used in the name of a law firm, or in communications on its behalf, during any substantial period

in which the lawyer is not actively and regularly practicing with the firm. [RPC 7.5(c)]

2) Offices in Other Jurisdictions
A law firm with offices in more than one jurisdiction may use the same firm name or other professional designation in each jurisdiction. However, when identifying its lawyers in an office of the firm, the firm must list the jurisdictional limitations of those lawyers not licensed to practice in the jurisdiction where the office is located. [RPC 7.5(b)]

3) Partnerships and Business Entities
Lawyers may not imply that they practice in a partnership or other organization if they do not. [RPC 7.5(d)]

2. Lawyers in Association with Nonlawyers

a. Partnerships with Laypersons that Involve Legal Practice
A lawyer may not be a partner with a nonlawyer if any of the partnership activities consists of the practice of law. [RPC 5.4(b)]

b. No Sharing of Legal Fees
A lawyer or law firm must not share legal fees with a nonlawyer, except that: (i) an agreement by a lawyer with the lawyer's firm, partner, or associate may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate, or to one or more specified persons; (ii) a lawyer who purchases the practice of a deceased, disabled, or disappeared lawyer may pay to the estate or other representative of that lawyer the agreed-upon purchase price (*see* E., *infra*, for sale of a law practice discussion); (iii) a lawyer or law firm may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement; and (iv) a lawyer may share court-awarded legal fees with a nonprofit organization that employed, retained, or recommended her employment in the matter. [RPC 5.4(a)]

c. Lawyer Must Exercise Independent Judgment
A lawyer must not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services. [RPC 5.4(c)]

3. Legal Corporations
Due to favorable tax treatment for corporate pension and profit-sharing plans, all 50 states and the District of Columbia allow lawyers to incorporate into highly regulated special business structures known by various titles such as professional corporations and professional associations. The liability of the lawyer to the client may not be limited in a legal corporation.

4. Legal Services Organizations

a. Legal Aid and Public Defenders
Legal aid offices and public defender services provide legal assistance for the poor.

They are usually operated or sponsored by an accredited law school, a nonprofit community organization, a government agency, or a bar association representative.

b. Military Legal Assistance Offices
Military legal assistance offices provide legal services to military personnel and their families.

c. Lawyer Referral Services
Lawyer referral services maintain lists of lawyers who are willing to accept new clients. The individual seeking help is referred by the service to a lawyer for an initial consultation at a prearranged low fee. Further arrangements are left to the lawyer and the client. If the client is unhappy with the lawyer, he may return to the service for another referral.

d. Group Legal Service Plans
Group legal service plans are plans designed to provide various legal services to members of a specific group. Such groups may consist of union members, members of an association, and participants in prepaid legal insurance programs.

e. Advertising by Legal Service Plans
The preceding legal service plans may advertise their availability to the public, but such advertisements must conform to the Rules of Professional Conduct (*see* III.B., *infra*). [RPC 7.2, comment 7]

f. Membership in Legal Services Organizations
A lawyer may serve as a director, officer, or member of a legal services organization, other than the law firm with which the lawyer practices, notwithstanding that the organization serves persons having interests adverse to a client of the lawyer. However, the lawyer must not knowingly participate in a decision or action of the organization:

(i) If participating in the decision would be incompatible with the lawyer's obligations to a client under RPC 1.7 (relating to conflicts of interest); or

(ii) Where the decision could have a material adverse effect on the representation of a client of the organization whose interests are adverse to a client of the lawyer.

[RPC 6.3]

B. RESPONSIBILITIES OF A PARTNER OR SUPERVISORY LAWYER

1. Law Firm Must Ensure Member Lawyers Conform to RPC
A partner in a law firm, and a lawyer who individually or together with other lawyers has comparable managerial authority, must make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct. [RPC 5.1(a)]

2. Supervisory Lawyers Have Comparable Responsibility
A lawyer having direct supervisory authority over another lawyer must make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct. [RPC

5.1(b)] A lawyer having direct supervisory authority over a nonlawyer must make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer. [RPC 5.3(b)] This responsibility applies to nonlawyers within the firm (e.g., legal assistants) and outside the firm (e.g., document management companies, private investigators).

3. When Lawyer Responsible for Another Lawyer's Violation of RPC
A lawyer will be responsible for another lawyer's violation of the Rules of Professional Conduct if: (i) the lawyer ***orders or, with knowledge of the specific conduct, ratifies the conduct*** involved; or (ii) the lawyer is a partner or similar manager in the law firm in which the other lawyer practices, or has ***direct supervisory authority*** over the other lawyer, ***and knows of the conduct*** at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action. [RPC 5.1(c)] Similar rules apply with respect to a lawyer's responsibility for a nonlawyer's violation of the Rules of Professional Conduct. [RPC 5.3]

C. RESPONSIBILITIES OF A SUBORDINATE LAWYER

A lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person. A subordinate lawyer does not violate the Rules of Professional Conduct if he acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty. [RPC 5.2]

D. RESTRICTIONS ON RIGHT TO PRACTICE

A lawyer must not participate in offering or making: (i) a partnership, shareholders', operating, employment, or other similar agreement that restricts the rights of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement; or (ii) an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a client controversy. [RPC 5.6] This rule does not apply to prohibit restrictions included in the terms of the sale of a law practice pursuant to RPC 1.17 (*see* below).

E. SALE OF A LAW PRACTICE

A lawyer or law firm may sell or purchase a law practice or an area of practice, including goodwill, if: (i) the seller ceases to engage in private practice, or an area of practice that has been sold, in either the geographic area or the state in which the practice has been conducted (whether the area of practice includes the geographic area or the entire state is at the discretion of each state); (ii) the entire practice or area of practice is sold to one or more lawyers or law firms; (iii) the fees charged to clients do not increase because of the sale; and (iv) the seller gives written notice to each client of the sale and the client's right to retain other counsel or to take possession of her file. [RPC 1.17]

III. INFORMATION ABOUT LEGAL SERVICES

A. BACKGROUND OF ADVERTISING AND SOLICITATION RULES

1. Definitions—Advertising vs. Solicitation
"Advertising" generally refers to a lawyer's communication with the public at large or a segment of the public. In contrast, "solicitation" generally refers to individual contact with a

layperson, initiated by a lawyer (or lawyer's agent), that is designed to entice the layperson to hire the lawyer. A blatant form of solicitation is "ambulance chasing," in which a lawyer (or lawyer's agent) seeks out injured people and urges them to hire the lawyer to represent them.

2. First Amendment Protection

The United States Supreme Court has recognized that lawyer advertising is commercial speech protected by the First and Fourteenth Amendments. These Amendments allow commercial speech to be totally prohibited ***only if*** false or misleading. [*See* Bates v. State Bar of Arizona, 433 U.S. 350 (1977)] Otherwise, commercial speech must be allowed, but ***may be limited*** by regulations that:

(i) Serve a ***substantial government interest;***

(ii) ***Directly and materially advance*** that interest; and

(iii) Are ***narrowly tailored*** to serve the substantial interest (i.e., the means chosen reasonably fit the ends sought).

[Florida Bar v. Went For It, Inc., 515 U.S. 618 (1995)—*citing* Central Hudson Gas & Electric Corp. v. Public Service Commission of New York, 447 U.S. 557 (1980)] Moreover, the government may require attorneys to make disclosures to prevent misleading advertisements as long as the disclosures are not unduly burdensome and are reasonably related to the state's interest in preventing deception. [Milavetz, Gallop & Milavetz, P.A. v. United States, 559 U.S. 229 (2010)—lawyers (and other "debt relief agencies") could be required to include information about their legal status and the nature of the assistance provided, as well as the possibility of the debtor's filing for bankruptcy]

Example: After conducting a two-year study on the effect of lawyer advertising on public opinion, Florida adopted a rule prohibiting lawyers from sending targeted, direct-mail solicitations to victims and their relatives ***for 30 days following an accident or disaster.*** The regulation was upheld: (i) the state has a substantial interest in protecting the privacy and tranquility of its citizens as well as in protecting the reputation of the legal profession; (ii) the study showed that the public was offended by targeted solicitations sent shortly after an accident or disaster and that the 30-day ban directly advances the state interests; and (iii) the rule is narrowly tailored (30-day ban) to achieve the desired results. [Florida Bar v. Went For It, Inc., *supra*]

Compare: 1) Missouri could not prohibit lawyers from advertising the jurisdictions in which they are licensed nor prohibit the general mailing of cards announcing the opening of an office, as there was no showing that these advertisements were misleading or difficult to supervise. [*In re* R.M.J., 455 U.S. 191 (1982)]

2) An attorney could not be reprimanded for placing an ad offering to represent "drunk drivers" or one including a picture of a specific (allegedly defective, intrauterine) medical device. Ads cannot be banned simply because they are aimed at specific potential plaintiffs or because they are viewed as undignified. [Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio, 471 U.S. 626 (1985)]

3) Kentucky could not flatly prohibit lawyers from sending letters to potential clients faced with particular legal problems. [Shapero v. Kentucky Bar Association, 486 U.S. 466 (1988)—lawyer could not be prohibited from sending truthful, nondeceptive letters to people facing foreclosure]

a. In-Person Solicitation May Be Banned
The Supreme Court has found that in-person solicitation is likely to result in overreaching or misleading a layperson. Therefore, states may adopt prophylactic rules to forbid in-person solicitation for profit. [Ohralik v. Ohio State Bar Association, 436 U.S. 447 (1978)]

B. ADVERTISING

1. Basic Rule—Communications Must Be True and Not Misleading
A lawyer must not make a false or misleading communication about the lawyer or the lawyer's services. "False or misleading" includes material misrepresentations of law or fact, and omissions of fact that are necessary to make a statement, considered as a whole, not materially misleading. [RPC 7.1]

2. Truthful but Misleading Communications
A truthful communication is misleading if: (i) there is a substantial likelihood that the communication will lead a reasonable person to reach a conclusion about the lawyer or her services for which there is no reasonable foundation; (ii) it reports the lawyer's achievements on behalf of clients and is presented in a manner that would lead a reasonable person to form an unjustified expectation of receiving the same results in a similar matter, without reference to the specific circumstances of each client's case; or (iii) it contains an unsubstantiated comparison of the lawyer's services or fees with those of other lawyers and is presented with such specificity as to lead a reasonable person to conclude that the comparison can be substantiated. [RPC 7.1, comments 2, 3]

3. Limits on Advertising
RPC 7.2(a) gives lawyers broad latitude in advertising their services in a true and nonmisleading manner. They may advertise in written, recorded, or electronic communication, including public media. However, even true, nonmisleading advertisements are subject to the following limits:

a. Identification of Advertiser
An advertisement must contain the name and office address of at least one lawyer or firm responsible for its content. [RPC 7.2(c)]

b. Payments for Recommending a Lawyer's Services
A lawyer must not give ***anything of value*** for a person's recommendation of the lawyer's services. However, a lawyer may:

(i) Pay the reasonable costs of permitted advertisements (e.g., broadcast airtime, directory listings, or newspaper ads);

(ii) Pay the usual charges of a legal service plan or a not-for-profit or qualified lawyer referral service, i.e., one that has been approved by an appropriate regulatory authority;

(iii) Pay for purchase of a law practice pursuant to RPC 1.17 (*see* II.E., *supra*); or

(iv) Refer clients to another lawyer or a nonlawyer professional pursuant to an agreement not otherwise prohibited by the Rules of Professional Conduct that provides for the other person to refer clients or customers to the lawyer. Any such reciprocal referral agreement ***must not be exclusive***, and the client must be informed of the existence and nature of the agreement.

[RPC 7.2(b)] If a lawyer accepts assignments or referrals from a legal service plan or a lawyer referral service, she must act reasonably to assure that the activities of the plan or service are compatible with her professional obligations; e.g., a communication with prospective clients by the plan or service must not be false or misleading. [RPC 7.2, comment 7] Similarly, a lawyer may pay others for generating client leads (e.g., a bankruptcy lawyer may pay to be listed on an informational bankruptcy website that offers to connect each visitor with a lawyer) but the lead generator's communications must not be false or misleading, and the lead generator must not recommend the lawyer. [RPC 7.2, comment 5]

4. Types of Information that May Be Disseminated
The following are among the types of information that a lawyer may publicly disseminate: (i) information concerning the name of the lawyer or her firm, and the lawyer's or firm's address, e-mail address, website, and telephone number; (ii) the kinds of services the lawyer will undertake; (iii) the basis on which fees are determined, including prices for specific services and payment and credit arrangements; (iv) the lawyer's foreign language ability; (v) the names of references; and (vi) other information that might invite the attention of persons seeking legal assistance. [RPC 7.2, comment 2]

C. SOLICITATION

A solicitation is a ***targeted communication initiated by the lawyer*** that is directed to a specific person and that offers to provide, or can reasonably be understood as offering to provide, legal services. However, a communication generally is ***not*** a solicitation if it: (i) is directed to the ***general public*** (e.g., through a billboard, website, television commercial, or Internet banner advertisement); (ii) ***responds to a request*** for information; or (iii) is ***automatically generated*** in response to an Internet search.

1. In-Person, Live Telephone, or Real-Time Electronic Contact Generally Prohibited
Subject to the exceptions below, a lawyer must not, by in-person, live telephone, or real-time electronic contact, solicit professional employment when a significant motive for the lawyer's doing so is the lawyer's ***pecuniary gain*** (i.e., offers to provide legal services for free are generally permissible). [RPC 7.3(a)]

a. Exceptions

1) Close Personal or Prior Professional Relationship
Subject to the limitations in 3., below, a lawyer is generally not prohibited from initiating personal contact with (i) another lawyer; or (ii) a person with whom the lawyer has a family, close personal, or prior professional relationship.

2) Prepaid or Group Plans
A lawyer is permitted to participate in a prepaid or group legal service plan that uses in-person or telephone contact to solicit memberships for the plan from persons who are not known to need legal services in a particular matter covered by the plan. However, the lawyer must not own or direct the organization that operates the plan. [RPC 7.3(d)]

2. Written, Recorded, or Electronic Communications Generally Permitted
Generally, a lawyer is not prohibited from sending truthful, nondeceptive communications to persons known to face a specific legal problem. [RPC 7.3]

a. Notification that Communication Is Advertising
If a lawyer uses a written, recorded, or electronic communication to solicit employment from someone known to be in need of legal services for a particular matter, the communication must include the words "Advertising Material" on the outside envelope, if any, and at the beginning and end of any recorded or electronic communication. [RPC 7.3(c)] This labeling requirement is not necessary when the recipient of the communication is another lawyer or is in a family, close personal, or prior professional relationship with the lawyer making the communication.

3. Circumstances Rendering All Contacts Impermissible
A lawyer is prohibited from soliciting professional employment, regardless of what method is used, if:

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

(ii) The solicitation involves ***coercion, duress, or harassment***.

[RPC 7.3(b)] Note that federal law prohibits lawyers from communicating with victims of an airplane accident, or their families, until 45 days after the accident. [49 U.S.C. §1136(g)(2)]

4. Use of Agents to Solicit
RPC 8.4(a) prohibits a lawyer from using an agent to do that which the lawyer must not do, e.g., violate a law or disciplinary rule. Thus, a lawyer must not use an agent (sometimes called a "runner" or "capper") to contact prospective clients in a manner that would violate RPC 7.3.

5. Supreme Court Cases on Solicitation
Just to recap, the Supreme Court has held that states ***may*** ban in-person solicitation, but they ***cannot*** impose a total ban on media advertisements or direct mail letters merely because they target potential clients with a particular problem. (*See* A., *supra*.)

D. COMMUNICATION OF FIELDS OF PRACTICE

A lawyer may communicate the fact that she does or does not practice in particular fields of law. A lawyer who is admitted to patent practice before the United States Patent and Trademark Office may use the designation "Patent Attorney" or a substantially similar designation. Similarly, a lawyer engaged in admiralty practice may use the designation "Admiralty," "Proctor in

Admiralty," or a substantially similar designation. A lawyer may not state or imply that she is certified as a specialist in a particular field of law, unless:

(i) The lawyer has been certified as a specialist by an organization approved by an appropriate state authority or accredited by the ABA; and

(ii) The name of the certifying organization is clearly identified in the communication.

[RPC 7.4]

IV. ENTERING INTO THE LAWYER-CLIENT RELATIONSHIP

A. CREATING THE LAWYER-CLIENT RELATIONSHIP

A lawyer-client relationship arises when:

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

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

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

[Restatement of the Law (Third) Governing Lawyers (hereinafter "Restatement") §14]

1. Implied Assent and Reasonable Reliance

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

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

2) Client Casey calls lawyer Lisa's office asking that Lisa represent him in a court proceeding relating to his arrest for driving under the influence ("DUI"). Lisa is out of the office. Casey tells Lisa's secretary that he understands that Lisa handles many DUI cases and hopes that she will take the case even though the court date is only 10 days away. The secretary tells Casey to send over all papers relevant to the proceeding. She does not tell him that Lisa will decide whether to take the case only after reviewing the papers. One day before Casey's court date, Lisa phones Casey and declines to represent him. Here, it would likely be found that an attorney-client relationship existed because Casey's reliance was reasonable. Lisa regularly handled DUI cases,

her agent responded to his request for help by asking him to send the papers, and the imminence of the hearing made it appropriate for Lisa to decline while there was still time for Casey to get another lawyer. [Restatement §14, illus. 4]

B. BASIC RESPONSIBILITY TO RENDER PUBLIC INTEREST LEGAL SERVICE

A lawyer should aspire to render a specified minimum number of hours of pro bono publico legal services per year. The Model Rules suggest 50 hours of such service per year. A substantial majority of the hours should be devoted without fee to poor persons or to organizations in matters that are designed primarily to address the needs of poor persons. Other services should be provided through: (i) delivery of legal services for free or at a substantially reduced fee to persons or groups seeking to secure civil or public rights; (ii) delivery of legal services at a substantially reduced fee to poor persons; or (iii) participation in activities to improve the law, legal system, or legal profession. Also, a lawyer should voluntarily contribute financially to organizations that provide legal services to poor persons. [RPC 6.1]

1. Law Reform Activities Affecting Client Interests

A lawyer may participate in law reform activities even if such reform may affect the interests of any of her clients. However, when the lawyer knows that a client's interests may materially benefit due to a decision in which the lawyer participates, the lawyer must disclose that fact to the reform organization (but need not identify the client). [RPC 6.4]

C. ACCEPTING APPOINTMENTS

A lawyer must not seek to avoid appointment by a tribunal to represent a person except for good cause, such as: (i) representing the client is likely to result in a violation of the RPC or other law; (ii) representing the client is likely to result in an unreasonable financial burden on the lawyer; or (iii) the client or the cause is so repugnant to the lawyer as to be likely to impair the lawyer-client relationship or the lawyer's ability to represent the client. [RPC 6.2]

D. CLIENT WITH DIMINISHED CAPACITY

When a client's capacity to make adequately considered decisions in connection with the representation is diminished, whether because of minority, mental impairment, or some other reason, the lawyer must, as far as reasonably possible, maintain a normal lawyer-client relationship with the client. A lawyer may seek the appointment of a guardian or take other protective action with respect to a client with diminished capacity if the lawyer reasonably believes that the client cannot adequately act to protect herself from substantial physical, financial, or other harm. If the lawyer takes protective action, he is impliedly authorized under RPC 1.6(a) to reveal information about the client to the extent reasonably necessary to protect the client's interests. [RPC 1.14]

E. EMERGENCY LEGAL ASSISTANCE TO NONCLIENT WITH DIMINISHED CAPACITY

Where the health, safety, or financial interest of a person with ***seriously*** diminished capacity is threatened with ***imminent and irreparable harm***, a lawyer may take legal action on behalf of the person. This is true even though the impaired person is unable to establish a lawyer-client relationship or to make or express considered judgments about the matter. However, the impaired person (or someone acting on her behalf) must have consulted the lawyer before he may undertake legal action on her behalf. [RPC 1.14, comment 9]

1. Limits on Lawyer's Ability to Render Emergency Legal Assistance
Even in an emergency, a lawyer should not act unless he reasonably believes the impaired person has no other lawyer or representative available. When the lawyer acts, he should act only to the extent reasonably necessary to avoid imminent and irreparable harm, and, in this situation, the lawyer owes the same duties to the impaired person as he would with respect to a client, including the duty of confidentiality. Furthermore, the lawyer should take steps to regularize the relationship, or implement other protective solutions, as soon as possible.

2. No Compensation for Emergency Legal Assistance
Normally, a lawyer should not seek compensation for emergency actions taken on behalf of an impaired person.

F. AVOIDING CONFLICTS OF INTEREST

A lawyer must be careful not to enter into a relationship where there is a potential conflict of interest that is likely to adversely affect his ability to exercise independent and professional judgment. After accepting employment, a lawyer should carefully refrain from acquiring a property right or assuming a position that would tend to make his judgment less protective of the interests of his client unless the client consents.

1. Concurrent Conflicts of Interest
Except on the conditions stated in a., below, a lawyer must not represent a client if the representation creates a concurrent conflict of interest. A concurrent conflict of interest exists when: (i) the representation of a client will be ***directly adverse*** to the interests of another client; or (ii) there is a ***significant risk*** that the representation of a client will be ***materially limited*** by the lawyer's personal interests or by his responsibilities to another client, former client, or third person. [RPC 1.7(a)]

a. Client Consent to Concurrent Conflicts
Despite a concurrent conflict of interest, a lawyer ***may*** undertake a representation if the following four conditions are satisfied:

(i) The lawyer reasonably believes that he ***can competently and diligently represent each*** affected client, despite the concurrent conflict;

(ii) The representation is ***not prohibited by law*** (e.g., a state statute prohibits the lawyer from switching from the prosecution side to the defense side of a criminal case);

(iii) The representation ***does not involve the assertion of a claim by one client against another client*** who is represented by the lawyer in the same case pending before a court or other tribunal; and

(iv) Each affected client gives ***informed consent, confirmed in writing.***

[RPC 1.7(b)] Note that condition (i), above, creates a "reasonable lawyer" standard—i.e., if a reasonable lawyer looking at the facts would have to advise an affected client not to consent, then the conflict is "unconsentable," and client consent will not resolve the conflict. [RPC 1.7, comment 14] Note also that the rule requires "informed" consent,

which means that each affected client must understand how the conflict could harm her. [RPC 1.7, comment 18] Sometimes a lawyer's duty of confidentiality to one client prevents him from disclosing information that another client needs in order to understand the conflict of interest. In this situation, the conflict is unconsentable. [RPC 1.7, comment 19] Consent also must be "confirmed in writing," which means either of two things: (i) the client executes a writing, or (ii) the lawyer promptly records and transmits a confirmatory writing to the client after the client orally consents to the conflict. Under the RPC, a "writing" includes electronic transmissions (e.g., e-mail). [RPC 1.7, comment 20]

1) Consent to Future Conflicts

Whether a client may effectively consent to conflicts that may arise in the future depends on the test in a., above. Such a waiver is more likely to be valid if it is comprehensive and specific—i.e., the lawyer explains the types of future representations that might arise and the actual and reasonably foreseeable adverse consequences of those representations. Thus, if the client agrees to consent to a particular type of conflict with which the client is already familiar, the consent is likely to be valid. Open-ended, general waivers are likely to be ineffective because it is not reasonably likely that the client will have understood the material risks involved. [RPC 1.7, comment 22]

b. Representation of Multiple Parties in a Single Matter

A common issue arises when two or more parties ask a single lawyer to represent them in a matter. The advantages of having a single lawyer are obvious: the cost will probably be lower than having two lawyers, and the single lawyer can present a united front for both clients. The disadvantages are also obvious: the interests of the two clients may be mostly harmonious but partly or potentially in conflict (e.g., one personal injury plaintiff may need money badly and may therefore be anxious to accept a joint settlement offer that the other plaintiff thinks is too low).

1) Criminal Litigation

The Sixth Amendment guarantees every criminal defendant the right to effective assistance of counsel. Because the interests of criminal co-defendants are very likely to diverge, ordinarily a lawyer should not try to defend two people in a criminal case. [RPC 1.7, comment 23]

2) Civil Matters

In civil litigation and in nonlitigation matters, one lawyer ***may*** represent two parties or clients whose interests are potentially in conflict if, after analyzing the facts and applicable law, the lawyer concludes that she can effectively represent both clients. (If the clients' positions are already antagonistic, the lawyer generally should not take on the representation.) The lawyer must obtain the clients' consent as described in a., above. In doing so, the clients must be advised that if litigation arises between them regarding the matter, neither of them can claim the attorney-client privilege for their communications with that lawyer. Therefore, the lawyer should ordinarily make clear to all clients at the outset that whatever one client discloses will be shared with all of the other clients. If the potential conflict eventually ripens into a present conflict, the lawyer must analyze the situation

again and re-address the conflict, which may involve repeating the steps in a., above. However, if a reasonable lawyer would have to advise either of the two clients not to consent, the lawyer must withdraw. [RPC 1.7 and comments] The lawyer may continue to represent one consenting client, but only if the client who is dropped provides informed consent, confirmed in writing. [*See* RPC 1.9(a)]

c. Specific Kinds of Conflicts

RPC 1.8 augments the foregoing general rule on concurrent conflicts by identifying specific conflict situations. As you will see, some of the situations can be solved by obtaining the affected clients' informed consents, and others cannot.

1) Ownership or Financial Interest Adverse to Client

A lawyer must not enter into a business transaction with a client or knowingly acquire an ownership or other pecuniary interest adverse to a client unless:

(i) The transaction and terms under which the lawyer acquires the interest are ***fair and reasonable*** to the client and are ***fully disclosed*** and transmitted in writing to the client in a manner that can be reasonably understood by the client;

(ii) The client is informed in writing of the desirability of seeking, and is given a reasonable chance to seek, the ***advice of independent legal counsel*** on the transaction; and

(iii) The client understands the lawyer's role in the transaction, including whether the lawyer is representing the client, and the client gives ***informed consent in a signed writing***.

[RPC 1.8(a)]

a) Exception for Standard Commercial Transactions

The prohibition against entering into a business transaction with a client does not 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. The reason for this exception is that the lawyer has no advantage in dealing with the client in such situations. [RPC 1.8, comment 1]

2) Improper Use of Information Adverse to Client

A lawyer must not use information relating to the representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by the Rules of Professional Conduct. [RPC 1.8(b)]

3) Designating Oneself as a Beneficiary

A lawyer must not solicit a substantial gift from a client or prepare an instrument giving the lawyer or a person related to the lawyer any substantial gift from a client, including a testamentary gift, except when the client is related to the donee. [RPC 1.8(c)] For purposes of this rule, "related" means a spouse, child, grandchild, parent,

grandparent, or other person with whom the lawyer or client has a close, familial relationship.

4) Literary or Media Rights Based on Representation
Prior to the conclusion of representation of a client, a lawyer must not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based, in substantial part, on information relating to the representation. [RPC 1.8(d)]

5) Financial Assistance to Client
A lawyer must not provide financial assistance to a client in connection with pending or contemplated litigation, except that: (i) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and (ii) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client. [RPC 1.8(e)]

6) Compensation from Party Other than Client
A lawyer must not accept compensation for representing a client from someone other than the client unless: (i) the client gives informed consent, (ii) there is no interference with the lawyer's independence of professional judgment or with the lawyer-client relationship, and (iii) information relating to the representation of the client is protected as required by RPC 1.6 (relating to confidentiality of information). [RPC 1.8(f)]

7) Aggregate Settlement or Agreement in Multiple Representation
A lawyer who represents two or more clients must not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregate agreement as to guilty or no contest pleas, unless each client gives informed consent in a signed writing. The lawyer's disclosure must explain the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement or agreement. [RPC 1.8(g)]

8) Limiting Liability for Malpractice
A lawyer must not make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client is independently represented in making the agreement. [RPC 1.8(h)]

9) Settling Malpractice Claim with Unrepresented Client or Former Client
A lawyer must not settle a claim or potential claim for malpractice liability with an unrepresented client or former client without advising that person in writing that independent counsel is desirable ***and*** giving that person a reasonable chance to consult with independent counsel. [RPC 1.8(h)]

10) Proprietary Interest in the Cause of Action
A lawyer must not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may: (i) acquire a lien authorized by law to secure the lawyer's fee or expenses, and (ii) contract with a client for a reasonable contingent fee in a civil case. [RPC 1.8(i)]

11) Sexual Relations Between Lawyer and Client
A lawyer must not have a sexual relationship with a client. This rule applies even if the relationship is consensual, and even if the client is not harmed. The sole exception to the rule is when the lawyer and client had a consensual sexual relationship before the lawyer-client relationship began. [RPC 1.8(j)] Even if there was a preexisting consensual relationship, the lawyer should make sure that his ability to represent the client will not be affected by the relationship. [RPC 1.8(j), comment 18] Similarly, a lawyer who represents an organization (either as outside or inside counsel) must not have a sexual relationship with a constituent of the organization who supervises the lawyer's work or consults the lawyer about the organization's legal matters. [RPC 1.8(j), comment 19] A conflict caused by a sexual relationship is not imputed to other lawyers in the lawyer's firm.

2. Conflict of Interest Regarding Former Client

A lawyer who formerly represented a client in a matter may not thereafter represent another person in the same or a substantially related matter if that person's interests are materially adverse to those of the former client, unless the former client gives informed consent, confirmed in writing. [RPC 1.9(a)] Also, a lawyer is prohibited from knowingly representing a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client: (i) whose interests are materially adverse to that person; and (ii) about whom the lawyer had acquired information protected by RPC 1.6 (relating to confidentiality of information) and RPC 1.9(c) (relating to using or revealing information) that is material to the matter, unless the former client gives informed consent, confirmed in writing. [RPC 1.9(b)]

a. Using or Revealing Information

A lawyer who has formerly represented a client in a matter or whose present or former firm has done so may not thereafter: (i) use information relating to the representation to the disadvantage of the former client, except as permitted or required by the RPC (e.g., relating to confidentiality of information), or when the information has become generally known; or (ii) reveal information relating to the representation except as permitted or required by the RPC. [RPC 1.9(c)]

3. Duties to Prospective Client

A prospective client is a person who ***consults*** with a lawyer about the possibility of ***forming a client-lawyer relationship*** with respect to a matter. [RPC 1.18(a)] The attorney-client privilege protects confidential communications between a lawyer and a prospective client. Also, the ethical duty of confidentiality applies to such consultations. Thus, the lawyer must not reveal or use information learned during the consultations, unless an exception to the duty of confidentiality applies. [RPC 1.18(b)]

a. Consultation

Whether communications constitute a consultation making a person a prospective client depends on the circumstances. It is likely that a consultation has occurred when:

(i) A lawyer, either in person or through advertising, ***specifically requests*** or invites the submission of ***information about a potential representation without clear warnings*** that limit the lawyer's obligations; and

(ii) A person ***provides information*** in response.

However, a consultation does ***not*** occur when a person provides information to a lawyer in response to an advertisement that merely consists of the lawyer's biographical information, areas of practice, contact information, or legal information of general interest. Furthermore, someone who contacts the attorney in an effort to disqualify the attorney (i.e., by creating a conflict of interest) is not a prospective client. [RPC 1.18, comment 2]

b. Lawyer's Duty Concerning Conflict of Interest

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

c. How to Overcome a Prospective Client Conflict

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

(i) Demonstrate that the lawyer who held consultations with the prospective client took care to ***avoid exposure to more confidential information than was necessary*** to determine whether to represent the prospective client;

(ii) Demonstrate that the disqualified lawyer is ***timely screened from any participation in the matter*** and will not share the fee; and

(iii) Give ***written notice*** to the prospective client.

[RPC 1.18(d)(2)]

4. Problems with Testifying for Client

An attorney ordinarily may not represent a client in litigation where the attorney is likely to be a necessary witness. (*Note:* An attorney ***may*** act as advocate in a trial in which another attorney in the attorney's firm is likely to be called as a witness unless precluded from doing so by the rules relating to conflict of interest.) If an attorney is likely to be a necessary witness, the attorney should refuse employment or, if he has already been retained, should withdraw from the case. There are ***three recognized exceptions*** to this prohibition noted below. [RPC 3.7]

a. Uncontested Issue

If the attorney's testimony will relate solely to an uncontested issue, representation is not prohibited.

Example: In a proceeding concerning an uncontested will, an attorney may testify as to the testamentary capacity of the decedent.

b. Nature and Value of Legal Services
If an attorney's testimony will concern only the nature and value of legal services rendered to the client, the attorney will not be prohibited from representing the client.
Example: B's suit against C includes a legitimate cause of action for attorneys' fees. Attorney X may testify as to the value of the services that he has rendered to B.

c. Substantial Hardship
If the withdrawal of the attorney for the purpose of testifying would result in substantial hardship to the client (e.g., because of the ***distinctive value*** of the attorney or firm to the case), the attorney may continue to represent the client.
Example: X represents B in a highly complex case that is in the middle of trial. Defendant C attempts to bribe X. X's testimony becomes highly relevant to the case at this point, but he cannot withdraw from the case because B would not be able to secure adequate replacement representation on such notice. X should be permitted to testify and to continue to represent B.

5. Conflicts in Corporate Representation
A special problem of multiple representation occurs when a lawyer is asked to represent both an entity such as a corporation and its labor force or a corporation and its governing components (i.e., its directors and officers). [RPC 1.13]

a. Lawyer Represents Organization
A lawyer employed or retained to represent an organization represents the organization acting through its duly authorized constituents.

b. Lawyer Must Act in Best Interest of Organization
If a lawyer for an organization knows that an officer, employee, or other person associated with the organization is engaged in action, intends to act, or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and is likely to result in substantial injury to the organization, the lawyer must proceed as is reasonably necessary in the best interest of the organization.

1) Duty to Report to Higher Authority in the Organization
In the situation described above, the lawyer must ordinarily report the violation to a higher authority in the organization (e.g., a corporation's president). If necessary, the lawyer must report it to the organization's highest authority (e.g., a corporation's outside directors). RPC 1.13(b) does, however, give the lawyer a narrow range of discretion—she need not report a violation to a higher authority if she reasonably believes that the organization's best interest does not require the violation to be reported.

2) Duty to Report Outside the Organization
If the lawyer reports the violation to the organization's highest authority, but the highest authority fails to take timely, appropriate action, the lawyer ***may*** report the relevant information to appropriate persons outside of the organization. This is true even if the information would otherwise be protected by the duty of confidentiality

(*see* V.B.2., *infra*). [RPC 1.13(c)] However, the lawyer's authority to report to outsiders applies only if, and to the extent that, the lawyer reasonably believes that reporting is necessary to prevent ***substantial injury*** to the organization. The authority to report to outsiders does not apply to a lawyer who is hired by the organization to investigate an alleged violation of law or to defend the organization or its constituents against a claimed violation of law. [RPC 1.13(d)]

Example: Attorney A's corporate client C produces frozen chicken pies. C's production process creates large quantities of liquid waste, which C is supposed to pump into recycling tanks. C's manufacturing vice president sometimes orders his workers to dump the waste into a ditch that drains into some neighboring wetlands; the dumping is cheaper and quicker, but it gradually destroys the wetlands in violation of state and federal environmental laws. When A learned about the dumping, she reported it to C's president and warned him that C will be fined millions of dollars if it gets caught. C's president ignored A's warning, so A reported the matter to the highest authority in the company—the audit committee of the board of directors. The audit committee did nothing. If A reasonably believes that the company will be substantially injured if the dumping continues, A ***may*** report the relevant information to the appropriate environmental enforcement authority, even if some of that information would otherwise be protected by the duty of confidentiality. [*See* RPC 1.13(c)]

3) Whistleblower Protection

A lawyer who reasonably believes that she has been fired because of actions she took pursuant to RPC 1.13(b) or (c), or who withdraws when circumstances require or permit her to do so, must proceed as she reasonably believes necessary to inform the organization's highest authority of her firing or withdrawal. [RPC 1.13(e)]

c. Explaining Identity of Client

In dealing with an organization's directors, officers, employees, members, shareholders, or other constituents, a lawyer must explain the identity of the client when she knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing. [RPC 1.13(f)]

d. Multiple Representation Permissible

A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders, or other constituents, subject to the provisions of RPC 1.7 (relating to conflict of interest—disclosure and consent requirements). If the organization's consent to the dual representation is required, the consent must be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders. [RPC 1.13(g)]

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

In the Sarbanes-Oxley Act of 2002, Congress instructed the Securities and Exchange Commission ("SEC") to make rules for securities lawyers who discover their clients

violating federal or state securities laws or similar laws. The SEC rules [*see* 17 C.F.R. §§205.1 *et seq.*] apply to "securities lawyers," meaning not only lawyers who practice before the SEC, but also lawyers who advise clients about documents that will be filed with the SEC or who advise clients about whether information must be filed with the SEC.

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

2) **CLO's Duty to Investigate and Obtain "Appropriate Response" from Client**
The CLO must investigate the situation to find out whether a violation occurred. If the CLO concludes that no violation occurred, he must report that conclusion to the securities lawyer. If the CLO concludes that a violation did occur, is occurring, or is about to occur, the CLO must take all reasonable steps to get the client to make an "appropriate response." Roughly stated, that means that the client must stop or remedy the violation and make sure that it does not happen again. The CLO must report those results to the securities lawyer.

3) **Securities Lawyer's Duty If CLO Fails to Obtain "Appropriate Response"**
If the securities lawyer believes that the CLO did not achieve an appropriate response from the client, the securities lawyer ***must*** then report the evidence to one of the following: (i) the client's entire board of directors, (ii) the audit committee of the board, or (iii) a committee made up of outside directors (directors who are not beholden to the client). Notice that the Sarbanes-Oxley reporting rule is mandatory, unlike RPC 1.13, which gives the lawyer some discretion about whether to report a violation to a higher authority in the organization.

4) **Securities Lawyer May Alert the SEC**
The Sarbanes-Oxley rules permit, but do not require, the securities lawyer to reveal to the SEC, without the client's consent, any confidential information that is reasonably necessary: (i) to stop the client from committing a violation that will cause substantial financial injury to the client or its investors; (ii) to rectify such a financial injury if the lawyer's services were used to further the violation; or (iii) to prevent the client from committing or suborning perjury in an SEC matter or lying in any matter within the jurisdiction of any branch of the federal government. A securities lawyer who acts in accordance with the Sarbanes-Oxley rules cannot be held civilly liable for doing so and cannot be disciplined under any inconsistent state rule. [*See* 17 C.F.R. §§205.6(c), 205.7]

5) **Protection for Securities Lawyer's Job**
If a securities lawyer is fired for doing what the Sarbanes-Oxley rules require, she may report the firing to the client's board of directors (thus setting up the client for an expensive wrongful termination suit).

6. Imputation of Conflicts

a. Prohibition of One Lawyer Imputed to Entire Firm

While lawyers are associated in a firm, none of them may knowingly represent a client when any one of them practicing alone would be prohibited from doing so by RPC 1.7 (relating to conflict of interest with current client) or RPC 1.9 (relating to conflict of interest duties owed to former clients), unless: (i) the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm; or (ii) the disqualified lawyer is timely screened from any participation in the matter (i.e., does not discuss the case with others at the firm, does not have access to case files), the disqualified lawyer is apportioned no part of the fee from the matter (but receiving a previously established salary is allowed), and the former client is given notice. [RPC 1.10(a)]

b. Effect of Lawyer's Termination with Firm

When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm ***unless***: (i) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and (ii) any lawyer remaining in the firm has information protected by RPC 1.6 (relating to confidentiality) and RPC 1.9(c) (relating to using or revealing information pertaining to the representation) that is material to the matter. [RPC 1.10(b)]

c. Waiver of Imputed Disqualification

A disqualification may be waived by the affected client. [RPC 1.10(c)]

7. Successive Government and Private Employment

a. Prior Public Legal Employment May Create Conflict of Interest

Except as otherwise expressly permitted by law, a lawyer who formerly worked as a public officer or government employee must not represent a private client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency gives informed consent, confirmed in writing, to the representation. Also, the lawyer is subject to RPC 1.9(c) (relating to using or revealing information relating to the representation of a former client). For purposes of this rule, a "matter" is one that involves a specific party or parties. Thus, researching or drafting legislation is not a "matter" giving rise to a conflict. [RPC 1.11(a), (e)]

b. Lawyer's Conflict of Interest Not Necessarily Imputed to Firm

No lawyer in a firm with which the former government lawyer is associated may knowingly undertake or continue representation in a matter in which the lawyer participated personally and substantially as a public officer or employee unless:

(i) The disqualified lawyer is timely ***screened*** from any participation in the matter and is apportioned no part of the fee therefrom; and

(ii) ***Written notice*** is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this rule.

[RPC 1.11(b)]

c. Conflict of Interest May Arise If Lawyer Has Confidential Information
Except as law may otherwise expressly permit, a lawyer having information that the lawyer knows is confidential government information about a person, acquired when the lawyer was a public officer or employee, may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person. A firm with which that lawyer is associated may undertake or continue representation in the matter only if the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom. [RPC 1.11(c)]

d. Prohibited Actions of Public Law Officer or Employee
Except as otherwise expressly permitted by law, a lawyer ***currently*** serving as a public officer or employee may not: (i) participate in a matter in which she participated personally and substantially while in private practice or nongovernmental employment, unless the appropriate government agency gives informed consent, confirmed in writing; or (ii) negotiate for private employment with any person who is a party or a lawyer for a party in a matter in which the lawyer is participating personally and substantially, except that a lawyer who is a law clerk to a judge or arbitrator may negotiate for private employment after so notifying the judge or arbitrator. [RPC 1.11(d)]

8. Former Judge, Arbitrator, Mediator, or Other Third-Party Neutral
A lawyer must not represent anyone in connection with a matter in which the lawyer participated personally and substantially as a judge or other adjudicative officer, or law clerk to such a person, or as an arbitrator, mediator, or other third-party neutral (*see infra*) unless all parties to the proceeding give informed consent, confirmed in writing. However, an arbitrator selected as a partisan of a party in a multimember arbitration panel is not prohibited from subsequently representing that party. [RPC 1.12] If a lawyer is disqualified pursuant to this rule, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in the matter unless: (i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and (ii) written notice is promptly given to the parties and any appropriate tribunal to enable them to ascertain compliance with this rule.

9. Lawyer Serving as a Third-Party Neutral
A third-party neutral is a person who assists two or more other persons in resolving a dispute between them. [RPC 2.4] Arbitrators and mediators are examples of third-party neutrals. A third-party neutral is often a nonlawyer. When a lawyer serves as a third-party neutral, the lawyer does not represent any of the parties as clients, and the lawyer must make that fact clear to parties who are not represented by their own lawyers. If an unrepresented party is a novice at this form of dispute resolution, the lawyer who acts as a third-party neutral should explain the differences between the role of a third-party neutral and the role of a lawyer who represents a client (e.g., the absence of the attorney-client privilege). [RPC 2.4, comment 3]

10. Nonprofit and Court-Annexed Limited Legal Service Programs
Under a program sponsored by a nonprofit organization or court, a lawyer may provide short-term limited legal services to a client without any expectation of a continuing representation in the matter. In such circumstances, the lawyer is subject to RPC 1.7 (relating to conflicts of interest with current clients) and RPC 1.9(a) (relating to conflict of interest duties owed to former clients) only if she knows that representation of the short-term client involves a conflict. The lawyer is subject to RPC 1.10 (relating to imputed conflicts) only if she knows that another lawyer associated with her in a firm is disqualified by RPC 1.7 or RPC 1.9(a) with respect to the matter. [RPC 6.5]

G. ESTABLISHING COMPENSATION FOR LEGAL SERVICES

The fee arrangement for representation of a client is a matter left for the individual attorney and client. There are, however, certain principles governing the setting of fees and the forms of compensation.

1. Duty to Avoid Fee Misunderstandings
Before or within a reasonable time after commencing the representation of a client, the lawyer must communicate to the client the scope of the representation, the basis or rate of the fee, and any expenses for which the client will be responsible. The communication would preferably be in writing and need not be given when the lawyer is charging a regularly represented client on the same basis or rate. Any changes in the basis, rate, or expenses must also be communicated to the client. [RPC 1.5(b)]

2. Fee Must Be Reasonable
A lawyer must not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses. Among the factors to be considered in determining the reasonableness of a fee are:

(i) The time and labor required;

(ii) The novelty and difficulty of the questions involved;

(iii) The skill required to perform the legal service;

(iv) The likelihood, if apparent to the client, that acceptance of the particular employment will preclude other employment;

(v) The customary fee within the locality for similar work;

(vi) The amount involved and the result obtained;

(vii) The nature and length of the relationship between the parties;

(viii) The experience, ability, and reputation of the attorney;

(ix) The time limitations imposed by the client or the circumstances; and

(x) Whether the fee is fixed or contingent.

[RPC 1.5(a)]

3. Minimum and Maximum Fee Schedules

a. Minimum Fees Violate Antitrust Laws

In *Goldfarb v. Virginia State Bar,* 421 U.S. 773 (1975), the United States Supreme Court declared that the imposition of minimum fee schedules by state bar associations was a violation of the federal antitrust laws.

b. Regulation of Maximum Fees

Maximum fees for certain types of legal work have been imposed in a number of jurisdictions either by statute, court rules, or court decisions. Areas affected by such regulation include workers' compensation claims, claims by soldiers against the government, probate and guardianship matters, Social Security claims, representation of indigents in criminal proceedings, and contingent fee arrangements. Such maximums are strictly enforced, although procedures may exist for additional compensation in unusual cases. Under the reasoning of the Court in *Arizona v. Maricopa County Medical Society,* 457 U.S. 332 (1982), an agreement by members of a bar association to follow a schedule of maximum fees would probably violate the antitrust laws.

4. Contingent Fees

A contingent fee is a fee that is dependent on the successful resolution of a client's case and payable from the judgment proceeds. Usually, such fees take the form of a set percentage of the recovery, the fee being zero if there is no recovery. The RPC approve of contingent fees within certain limits.

a. Disclosure Requirements

A contingent fee agreement must be in writing, signed by the client, and state the method by which the fee is to be determined, including: (i) the percentage or percentages that accrue to the lawyer in the event of settlement, trial, or appeal; (ii) litigation and other expenses to be deducted from the recovery; and (iii) whether such expenses are to be deducted before or after the contingent fee is calculated. Also, the agreement must clearly notify the client of any expenses for which the client will be liable regardless of whether the client prevails. Upon conclusion of a contingent fee matter, the lawyer must provide the client with a written statement of the outcome of the matter. Such statement must also show any remittance to the client and the method of its determination. [RPC 1.5(c)]

b. Offer of Other Fee Arrangement

If there is any doubt as to whether a contingent fee is consistent with the client's best interest, the lawyer should offer the client alternative bases for the fee and explain their implications. [ABA Formal Op. 94-389 (1994)] A contingent fee does not become improper simply because the client can afford to pay on some other basis or the case is a clear winner, but in those situations the lawyer should give the client a chance to make an informed choice as to the fee arrangement. [ABA Formal Op. 94-389 (1994)]

c. When Contingent Fee Is Prohibited

1) Criminal Cases

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

2) Domestic Relations Cases

A lawyer is also subject to discipline for using a contingent fee in a domestic relations case when the contingency is based on the securing of a divorce, the amount of alimony or support, or the amount of a property settlement. [RPC 1.5(d)(1)] However, a lawyer ***may*** use a contingent fee in a suit to recover money that is ***past due*** under an alimony or support decree.

d. Discharge of a Lawyer on Contingency

A client retains the authority to discharge a lawyer hired on a contingency basis at any stage of the proceedings. Usually, but not always, the lawyer will be entitled to the reasonable value of the services performed up to the time of the discharge.

5. Referral Fees Are Unethical

"Referral fees," whereby the primary attorney pays a portion of his fee to a second attorney who suggested him to the client, are clearly unethical. An attorney may ethically divide fees with an outside attorney only if: (i) the division is proportional to the services performed by each attorney or each attorney assumes joint responsibility for the representation; and (ii) the client agrees in writing to this arrangement, including the share allotted to each lawyer. [RPC 1.5(e)] In all cases, the total fee must be reasonable.

V. THE LAWYER'S RESPONSIBILITIES TO THE CLIENT

A. THE BASIC OBLIGATIONS OF COMPETENCE AND CARE

Once having entered into a lawyer-client relationship, a lawyer must act competently and with care in handling legal matters for that client. There are several facets to these related obligations.

1. Competent Representation

Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation. [RPC 1.1]

a. Knowledge and Skill

In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter, and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question. In many instances, the required proficiency is that of a general practitioner. Expertise in a particular field of law may be required in some circumstances.

1) Retaining Other Lawyers to Assist in the Matter

Before a lawyer retains or contracts with lawyers outside her firm to assist in the provision of legal services to the client, she should: (i) reasonably believe that the services of the outside lawyers will contribute to the competent and ethical representation of the client, and (ii) obtain the client's informed consent. [RPC 1.1, comment 6] When lawyers from more than one firm provide legal services to

a client on a particular matter, they should consult with each other and with the client regarding the scope of their respective representations and the allocation of responsibility among them. [RPC 1.1, comment 7]

b. Thoroughness and Preparation
Adequate preparation is determined in part by what is at stake. Major litigation and complex transactions ordinarily require more extensive treatment than matters of lesser complexity and consequence.

2. Diligence
A lawyer must act with reasonable diligence and promptness in representing a client. [RPC 1.3] A lawyer's workload must be controlled so that each matter can be handled competently. [RPC 1.3, comment 2]

3. Communication
A lawyer must keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information. A lawyer must explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation. When the lawyer knows that the client expects assistance not permitted by the RPC or other law, the lawyer must consult with the client about any relevant limitation on the lawyer's conduct. [RPC 1.4]

B. THE DUTY TO PRESERVE CONFIDENTIALITY OF INFORMATION

1. Attorney-Client Privilege
Generally, the attorney-client privilege allows a client to refuse to testify and prevent his attorney from testifying in court about communications between the two. It applies to confidential communications made by an individual to an attorney who is sought out for the purpose of obtaining legal advice. The theory behind the rule is to promote full disclosure between the client and the attorney so that the attorney can most capably represent the client. A client is a person or entity seeking legal services from an attorney.

a. Corporate Client—Attorney-Employee Communications
When the client is a corporation, the privilege covers confidential communications between the attorney and a high-ranking corporate official. It also covers communications between the attorney and other corporate employees if:

(i) The employee communicates with the attorney ***at the direction of the employee's superior;***

(ii) The ***employee knows*** that the communication is to help the corporation get legal advice; and

(iii) The communication concerns a ***subject within the scope of the employee's duties*** for the corporation.

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

b. Privilege Limited to Communications Between Parties
The attorney-client privilege is limited to communications between the parties; the privilege does not apply to anything the attorney discovers on her own. If the substance of the communication is revealed to another who is not a party to the privileged relationship, the privilege is destroyed. However, an ***exception*** is made for those individuals, such as law clerks and secretaries, who are necessary to enable the attorney to properly perform her duties. In such situations, the privilege extends to communications made in the presence of such essential third parties.

c. Duration of Privilege
The attorney-client privilege continues indefinitely. Termination of the attorney-client ***relationship*** does not terminate the privilege. The attorney-client privilege even survives the death of the client. *Rationale:* Knowing that communications will remain confidential even after death encourages the client to communicate fully and frankly with his attorney. [Swidler & Berlin v. United States, 524 U.S. 399 (1998)]

2. Duty of Confidentiality
Except as noted below, a lawyer must not reveal information relating to the representation of a client. [RPC 1.6] The duty of confidentiality applies to ***all information*** "relating to the representation," regardless of when or where it was acquired, whether the client asked for it to be kept in confidence, and whether revealing it might harm or embarrass the client. The duty of confidentiality continues to apply even after the lawyer-client relationship has terminated. Note that the duty of confidentiality is broader than the attorney-client privilege, which covers only confidential communications between the attorney and the client, or their respective agents. Note also that an attorney must not make disclosures that could reasonably lead to discovery of confidential information by a third person.

a. Exceptions to Duty

1) Disclosure with Consent or Implied Authority
A lawyer may reveal information relating to the representation of a client if the client gives informed consent or if the disclosure is impliedly authorized in order to carry out the representation. [RPC 1.6(a)]

2) Disclosure to Prevent Death or Substantial Bodily Harm
A lawyer may reveal information to the extent that she reasonably believes necessary to prevent reasonably certain death or substantial bodily harm. [RPC 1.6(b)(1)]

3) Disclosure to Prevent or Rectify Substantial Financial Loss
To the extent she reasonably believes necessary, a lawyer may disclose information relating to the representation of a client to prevent the client from committing a crime or fraud that is reasonably certain to cause ***substantial financial loss*** to a person if the client is using or has used the lawyer's services to commit the crime or fraud. The same is true if disclosure is necessary to rectify or mitigate the financial loss. [RPC 1.6(b)(2), (3)]

4) Disclosure Required by Court, Ethics Rules, or Law
To the extent she reasonably believes necessary, a lawyer must comply with a court

order or other law requiring the lawyer to give information about a client. Note that there are also circumstances under which the ethical rules permit or require the lawyer to disclose information relating to the representation (e.g., when false evidence is introduced in court). Lastly, there may be statutes requiring the lawyer to reveal information in certain circumstances. [RPC 1.6]

5) Disclosure Necessary to Collect a Fee or Protect Lawyer
A lawyer may reveal information to the extent the lawyer reasonably believes necessary to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client. [RPC 1.6(b)(5)]

6) Disclosure to Obtain Legal Ethics Advice
To the extent she reasonably believes necessary, a lawyer may also disclose confidential information to obtain confidential legal advice about the lawyer's personal duty to comply with legal ethics rules. [RPC 1.6(b)(4)]

7) Disclosure Necessary to Address Conflicts of Interest
A lawyer may reveal information to the extent she reasonably believes necessary to detect and resolve conflicts of interest arising from her change of employment or from changes in a law firm's composition or ownership (e.g., merger or purchase of a law practice). However, the lawyer must not reveal information that would compromise the attorney-client privilege or otherwise prejudice the client. [RPC 1.6(b)(7)]

b. Acting Competently to Preserve Confidentiality
A lawyer must make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to a client's representation. [RPC 1.6(c)] The reasonableness of the lawyer's efforts would depend on such factors as: the sensitivity of the information, the likelihood of disclosure absent appropriate safeguards, the cost and difficulty of implementing such safeguards, and the extent to which the safeguards adversely affect the lawyer's ability to represent clients. [RPC 1.6, comment 18]

3. Evaluation for Use by Third Persons
A lawyer may provide an evaluation of a matter affecting a client for use by someone other than the client if:

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

(ii) The lawyer obtains the ***client's informed consent*** if the evaluation is likely to materially harm the client's interests.

[RPC 2.3] Such evaluation may include, for example, an opinion concerning the title of property rendered at the behest of a vendor for the information of a prospective purchaser, or at the behest of a borrower for the information of a prospective lender. In some situations, the evaluation may be required by a government agency.

Except as disclosure is required in connection with a report of an evaluation, information relating to the evaluation is otherwise protected by the confidentiality of information rules.

C. THE DUTY TO PROTECT A CLIENT'S PROPERTY

1. Separation of Funds

A lawyer must hold property of clients or third persons that is in the lawyer's possession in connection with a representation separate from the lawyer's own property. Funds must be kept in a separate account maintained in the state where the lawyer's office is situated, or elsewhere with the consent of the client or third person. Other property must be identified as such and appropriately safeguarded. [RPC 1.15(a)] A lawyer ***may*** deposit her own funds in a client trust account solely to pay bank service charges, but only in an amount necessary for this purpose. A lawyer ***must*** deposit into the account legal fees and expenses that were paid in advance, to be withdrawn only as fees are earned or expenses are incurred. [RPC 1.15(b), (c)]

2. Recordkeeping Requirements

Complete records of client account funds and other property must be kept by the lawyer and must be preserved for a period to be designated by individual states (typically five years) after termination of the representation. [RPC 1.15(a)]

3. Lawyer's Duty to Keep Client Informed

Upon receiving funds or other property in which a client or third person has an interest, a lawyer must promptly notify the client or third person. [RPC 1.15(d)]

4. Remittance of Funds and Property

Except as stated in RPC 1.15, or otherwise permitted by law or by agreement with the client, a lawyer must promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, must promptly render a full accounting regarding such property. [RPC 1.15(d)]

5. Property Claimed by Lawyer and Other Person

When in the course of representation a lawyer possesses property in which at least two persons (one of whom may be the lawyer) claim interests, such property must be kept separate by the lawyer until resolution of the dispute. The lawyer must promptly distribute all portions of the property that are not in dispute. [RPC 1.15(e)]

VI. THE DUTIES AND BOUNDS OF A LAWYER'S REPRESENTATION

A. DUTY AS ADVISER

In representing a client, a lawyer must exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law, but to other considerations such as moral, economic, social, and political factors that may be relevant to the client's situation. [RPC 2.1]

B. SCOPE OF REPRESENTATION

1. Lawyer Must Abide by Client's Decisions

A lawyer must abide by a client's decisions concerning the objectives of the representation and must consult with the client as to the means by which the objectives are to be pursued. A lawyer must abide by a client's decision whether to settle a matter. In a criminal case, the lawyer must abide by the client's decision, after consultation with the lawyer, as to what plea to enter, whether to waive a jury trial, and whether the client will testify. [RPC 1.2(a)] In addition, a lawyer may act on behalf of the client, as she is impliedly authorized to carry out the representation, and may reasonably limit the scope of the representation with the client's informed consent. [RPC 1.2(a),(c)]

2. Lawyer's Representation Does Not Constitute Endorsement of Client's Views

Representation of a client, including representation by appointment, does not constitute an endorsement of that client's political, economic, social, or moral views or activities. [RPC 1.2(b)]

3. Lawyer Must Act Within Bounds of Law

A lawyer must not counsel or assist a client in conduct that the lawyer knows is criminal or fraudulent. However, the lawyer may discuss the legal consequences of proposed courses of conduct, and may counsel or assist the client in a good faith effort to determine the validity, scope, meaning, or application of the law. [RPC 1.2(d)] Determining the validity of a statute may require that a client disobey the statute. [RPC 1.2, comment 12]

Example: The school board adopted a rule prohibiting public school students from wearing certain articles of religious significance while attending school. A group of concerned citizens asked Attorney how to challenge the constitutionality of the rule. Attorney may advise them of the several ways to gain legal standing, including disobedience of the rule.

a. Discussing Proposed Conduct

The fact that a client uses the lawyer's advice to carry out a crime or fraud does not by itself make the lawyer a party to the illegal conduct. [RPC 1.2, comment 9]

b. Discovering Illegal Conduct

When a lawyer originally believes that a client is engaged in lawful conduct, but then discovers that the client is using the lawyer's services to commit a crime or fraud, the lawyer must withdraw. [RPC 1.16(a)(1); 1.2, comment 10]

C. TRANSACTIONS WITH THIRD PERSONS

1. Communication with Adverse Parties and Third Persons

a. Communication with Represented Person Impermissible

In the representation of a client, a lawyer must not communicate about the subject of the representation with a person he knows to be represented by counsel in the matter unless the other counsel has granted permission or he is otherwise authorized by law or court order to make such direct communication. [RPC 4.2] This rule applies to communications with ***any person,*** even if not a party to a formal adjudicative proceeding, contract, or negotiation, who is represented by counsel concerning the matter to which the communication relates.

1) Exception—Lawyer Does Not Have Actual Knowledge of Representation
The prohibition on communications with a represented person applies only if the lawyer knows that the person is represented in the matter to be discussed. This requires ***actual knowledge*** of the representation. However, knowledge may be inferred from the circumstances. Therefore, a lawyer cannot evade the requirement of obtaining the consent of counsel by closing her eyes to the obvious. [RPC 4.2, comment 8]

2) Exception—Communication Authorized by Law
A lawyer is not prohibited from communicating with a represented person if the communication is authorized by law. Communications authorized by law include, for example, the right of a party to a controversy with a government agency to speak with government officials about the matter. Such authorized communications also include constitutionally permissible investigative activities of lawyers representing governmental entities (directly or through investigative agents), prior to commencement of criminal or civil enforcement proceedings.

3) Exception—Matters Outside the Representation
Note that RPC 4.2 does not prohibit communications with a represented person, or an employee or agent of such person, concerning matters outside the representation. Also, parties to a matter may communicate directly with each other and a lawyer having independent justification for communicating with a represented person is permitted to do so. [RPC 4.2, comment 4]

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

(i) A person who supervises, directs, or regularly consults with the organization's lawyer concerning the matter;

(ii) A person with authority to obligate the organization with respect to the matter; or

(iii) A person whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability.

However, if the person is represented in the matter by her own counsel, then consent by that counsel (rather than the organization's counsel) is sufficient. [RPC 4.2, comment 7] Note that consent is usually ***not*** needed before talking with a ***former employee***, unless the former employee has extensive knowledge of the organization's relevant privileged information. [ABA Formal Op. 91-359 (1991); Camden v. Maryland, 910 F. Supp. 1115 (D. Md. 1996)]

c. Communication with Unrepresented Person Permissible
When a person does not have counsel of his own, a lawyer representing a client may communicate with such person directly. However, when dealing with the unrepresented person, the lawyer must not state or imply that she is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the

lawyer's role in the matter, the lawyer must make reasonable efforts to correct the misunderstanding. Moreover, if the lawyer knows or reasonably should know that the interests of the unrepresented person are or have a reasonable possibility of being in conflict with the interests of the lawyer's client, the lawyer may only advise the unrepresented person to obtain counsel. No other legal advice is permitted. [RPC 4.3]

2. Respect for Rights of Third Persons

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

3. Documents Sent Inadvertently

A lawyer who receives a document (including a fax or e-mail) relating to her representation of a client that she knows or reasonably should know was sent inadvertently must promptly notify the sender. [RPC 4.4(b)] The requirement of prompt notification allows the sender to take protective measures. The rule does not address the issue of whether the recipient must take additional steps, such as returning the document. Also, any effect of the inadvertent dispatch on the document's privileged status is left unaddressed. [RPC 4.4, comment 2]

4. Truthfulness in Statements to Others

In representing a client, a lawyer must not knowingly: (i) make a false statement of material fact or law to a third person; or (ii) fail to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by RPC 1.6 (relating to confidentiality of information). [RPC 4.1]

D. THE CONDUCT OF LITIGATION

The general precepts governing a lawyer's professional responsibility obviously remain in effect during the course of an actual trial, whether judicial or administrative in nature. The RPC also set out certain specific principles governing the lawyer's zealous representation during the conduct of litigation.

1. Meritorious Claims and Contentions

A lawyer must not bring or defend a proceeding, nor assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous (e.g., a good faith argument for an extension, modification, or reversal of existing law). A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless defend a proceeding so as to require that every element of the case be established. [RPC 3.1]

a. Lawyer Must Inform Herself of Facts

A lawyer must inform herself about the facts and applicable law of the case and determine that she can make a good faith argument supportive of the client's position. It is not necessary for the lawyer to believe in the ultimate success of the action. Also, an action or defense is not frivolous merely because the facts have not first been fully substantiated or because the lawyer expects to develop vital evidence only through discovery. [RPC 3.1, comment 2]

2. Expediting Litigation

A lawyer must make reasonable efforts to expedite litigation consistent with the interests

of the client. [RPC 3.2] Delay should not be indulged merely for the convenience of the advocates or for the purpose of frustrating an opposing party's attempts to obtain rightful redress.

E. CANDOR TOWARD THE TRIBUNAL

A lawyer must not knowingly:

(i) ***Make a false statement*** of fact or law to a tribunal;

(ii) ***Fail to correct a false statement*** of material fact or law previously made to the tribunal by the lawyer;

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

(iv) ***Offer false evidence.*** If a lawyer has offered material evidence and the lawyer comes to know of its falsity, the lawyer must take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

These four duties continue to the conclusion of the proceeding—i.e., when a final judgment has been affirmed on appeal or the time for taking an appeal has passed.

1. False Evidence

a. General Rules

The following general rules apply in civil and criminal cases, and in all other kinds of proceedings that are pending before a tribunal, such as binding arbitration or an administrative agency proceeding when the agency will adjudicate the rights of the parties. These general rules also apply in ancillary proceedings, such as a deposition. The sole exception to these general rules is when a criminal defendant insists on testifying falsely (*see* b., below).

1) Lawyer Must Not Offer Evidence She Knows Is False

A lawyer ***must not*** offer evidence that she ***knows*** is false. The term "knows" means actual knowledge, but a lawyer's actual knowledge can be inferred from the surrounding circumstances. [RPC 1.0(f)] The term "evidence" includes false testimony of a client, false testimony of a third person, falsified documents, and physical evidence that the lawyer knows is not what it is represented to be. If only part of a witness's testimony is known to be false, the lawyer may allow the witness to testify to the truthful part, but not the false part. [RPC 3.3, comment 6] If a client insists that the lawyer offer evidence that the lawyer knows is false, the lawyer must first try to convince the client that the evidence should not be offered. If that fails, and if the lawyer continues to represent the client, the lawyer must refuse to offer the evidence. A lawyer whose client has put her in this unpleasant position ***may*** seek the tribunal's permission to withdraw as counsel [RPC 1.16(b)], but she is ***not required*** to withdraw unless the lawyer-client relationship has become so strained that the lawyer can no longer represent the client competently. [RPC 1.16(a)(1); RPC 3.3, comment 15]

2) Lawyer May Refuse to Offer Evidence She Believes Is False
A lawyer ***may*** refuse to offer evidence that she ***reasonably believes*** is false, except for the testimony of a defendant in a criminal case (*see* b., *infra*). [RPC 3.3(a)(3)] Notice that the permissive wording of the rule gives the lawyer a measure of discretion—because an advocate should resolve reasonable doubts in favor of her client, she may elect to offer the evidence, even though there is a reasonable ground to doubt its veracity.

3) Lawyer Must Take Reasonable Remedial Measures If False Evidence Offered
If a lawyer has offered evidence, and ***later discovers*** that it is false, the lawyer must take reasonable remedial measures, including (if necessary) disclosure of the falsity to the tribunal. The same duty applies if the falsehood takes the lawyer by surprise; e.g., if one of the lawyer's witnesses unexpectedly lies when being cross-examined by opposing counsel. Ordinarily, the first reasonable remedial measure is for the lawyer to speak confidentially with the client (or other witness), to warn that person of the lawyer's duty to reveal false evidence, and to seek that person's cooperation in withdrawing or correcting the false evidence. [RPC 3.3, comment 10] If that does not work, the lawyer ***may*** ask the tribunal's permission to withdraw as counsel. As stated in 1), *supra,* the lawyer is ***not forced*** to withdraw as counsel unless the lawyer-client relationship has become so strained that the lawyer can no longer represent the client competently. As a last resort, the lawyer ***must disclose*** enough information to the tribunal to set the matter straight, even if that means disclosing confidential information that would otherwise be protected by the attorney-client privilege or the lawyer's ethical duty of confidentiality, or both. The tribunal then decides what to do about the falsehood, such as disclose it to the trier of fact, declare a mistrial, or do nothing.

b. Criminal Defendant Who Insists on Testifying Falsely
A criminal defendant has a constitutional right to testify on his own behalf. [Rock v. Arkansas, 483 U.S. 44 (1987)] If a criminal defendant insists on testifying, the defense lawyer ***must*** allow him to testify, even if the lawyer ***reasonably believes, but does not know***, that the testimony will be false. [RPC 3.3(a)(3), comments 7 and 9] On the other hand, a criminal defendant does not have a constitutional right to commit perjury without suffering the consequences. [*See* Nix v. Whiteside, 475 U.S. 157 (1986)] If a criminal defense lawyer ***knows*** that the defendant's testimony will be false (and remember that the lawyer's knowledge can be inferred from the circumstances), then the lawyer must try to convince the defendant not to testify falsely. If that fails, the lawyer ***may*** ask the court's permission to withdraw. If attempted persuasion fails and the lawyer continues to represent the client, the lawyer must refuse to offer the false evidence.

2. Required Disclosures in Ex Parte Proceeding
In an ex parte proceeding, a lawyer must inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse to his client. [RPC 3.3(d)]

F. FAIRNESS TO OPPOSING PARTY AND COUNSEL

A lawyer must not:

(i) Unlawfully ***obstruct*** another party's ***access to evidence*** or unlawfully alter, destroy, or conceal a document or other material having potential evidentiary value, or counsel or assist another person to do any such act;

(ii) ***Falsify evidence***, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;

(iii) ***Knowingly disobey an obligation*** under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists;

(iv) In pretrial procedure, ***make frivolous discovery requests*** or fail to make reasonably diligent efforts to comply with legally proper discovery requests by an opposing party;

(v) In trial, ***allude to any matter*** that the lawyer does not reasonably believe is relevant or that will ***not*** be ***supported by admissible evidence,*** assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant, or the guilt or innocence of an accused; or

(vi) ***Request a person*** other than a client ***to refrain from voluntarily giving relevant information*** to another party unless: (i) the person is a relative or an employee or other agent of a client; and (ii) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

[RPC 3.4]

G. AVOIDING IMPROPER CONTACT WITH JURORS AND THE COURT

Based on its concern with the integrity of legal proceedings and the importance of the appearance of fairness to our legal system, the RPC forbid improper contact with jurors and the court, whether it be a judicial or administrative tribunal. Specifically, a lawyer ***must not:*** (i) ***seek to influence*** a judge, juror, prospective juror, or other official by means prohibited by law; (ii) ***communicate ex parte*** with such a person during the proceeding except as permitted by law or court order; (iii) engage in conduct intended to ***disrupt*** a tribunal; or (iv) ***communicate with a juror*** or prospective juror after discharge of the jury if prohibited from doing so by law or court order, the juror has made known a desire not to communicate, or the communication involves misrepresentation, coercion, duress, or harassment. [RPC 3.5]

H. ADVOCATE IN NONADJUDICATIVE PROCEEDINGS

A lawyer representing a client before a legislative or administrative tribunal in a nonadjudicative proceeding must disclose that the appearance is in a representative capacity. [RPC 3.9]

I. TRIAL PUBLICITY

To maintain the dignity of the profession and ensure against prejudicial publicity, the RPC provide restraints on public statements by lawyers on either side with regard to the matter at issue in a civil or criminal trial.

1. Basic Test

A lawyer who is participating or has participated in the investigation or litigation of a matter must not make an extrajudicial statement that the lawyer knows or reasonably should know

will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter. This prohibition also applies to any such lawyer's associates in a firm or government agency. [RPC 3.6(a), (d)]

2. Permitted References
A lawyer may state:

(i) The ***claim, offense, or defense*** involved and, except when prohibited by law, the ***identity*** of the persons involved;

(ii) The ***information contained in a public record;***

(iii) That an ***investigation*** of a matter is in progress;

(iv) The ***scheduling or result*** of any step in litigation;

(v) A ***request for assistance in obtaining evidence*** and information necessary thereto;

(vi) A ***warning of danger*** concerning the behavior of a person involved when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and

(vii) In a criminal case, in addition to the above, (i) the identity, residence, occupation, and family status of the accused; (ii) if the accused has not been apprehended, ***information necessary to aid in apprehension*** of that person; (iii) the fact, time, and place of arrest; and (iv) the identity of investigating and arresting officers or agencies and the length of the investigation.

[RPC 3.6(b)]

3. Areas Likely to Have Prejudicial Effect
There are certain subjects that are more likely than not to have a material prejudicial effect on a proceeding, particularly when they refer to a civil matter triable by a jury, a criminal matter, or any other proceeding that could result in incarceration. These subjects relate to:

(i) The ***character, credibility, reputation, or criminal record*** of a party, suspect in a criminal investigation, or witness; the ***identity of a witness***; or the ***expected testimony*** of a party or witness;

(ii) In a criminal case or proceeding that could result in incarceration, the ***possibility of a guilty plea*** to the offense or the existence or contents of any ***confession,*** admission, or statement given by a defendant or suspect or that person's refusal or failure to make a statement;

(iii) The performance or ***results of any examination*** or test or the refusal or failure of a person to submit to an examination or test, or the identity or nature of physical evidence expected to be presented;

(iv) Any ***opinion as to the guilt or innocence*** of a defendant or suspect in a criminal case or proceeding that could result in incarceration;

(v) ***Information*** the lawyer knows or reasonably should know is likely to be ***inadmissible as evidence*** in a trial and would, if disclosed, create a substantial risk of prejudicing an impartial trial; or

(vi) The fact that a defendant has been ***charged with a crime,*** unless there is included therein a statement explaining that the charge is merely an accusation and that the defendant is presumed innocent until and unless proved guilty.

Another relevant factor in determining prejudice is the ***nature of the proceeding***. Thus, criminal jury trials are most sensitive to extrajudicial speech, while civil trials may be less sensitive. Nonjury hearings and arbitration proceedings may be even less affected. [*See* RPC 3.6, comments 5, 6]

4. Right of Reply

A lawyer is permitted to make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or her client. Any statement made pursuant to this rule must be limited to information that is necessary to mitigate the recent adverse publicity. [RPC 3.6(c)]

VII. TERMINATION OF THE LAWYER-CLIENT RELATIONSHIP

A. IN GENERAL

Just as the Rules of Professional Conduct regulate the formation of lawyer-client relationships, they also spell out the proper procedures for withdrawal from the representation of a client. The Rules distinguish between situations where the lawyer must terminate employment (mandatory withdrawal) and situations where she is permitted to terminate employment (permissive withdrawal).

B. MANDATORY WITHDRAWAL

Withdrawal is mandatory (after obtaining permission from the tribunal if required by its rules), or representation should be declined if:

(i) The representation will result in ***violation of the Rules of Professional Conduct*** or other law;

(ii) The lawyer's ***physical or mental condition materially impairs*** the lawyer's ability to represent the client; or

(iii) The lawyer is ***discharged.***

[RPC 1.16(a)]

C. PERMISSIVE WITHDRAWAL

A lawyer may withdraw from representing a client if:

(i) Withdrawal can be accomplished ***without material adverse effect*** on the interests of the client;

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

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

(iv) A client insists upon taking action that the lawyer considers ***repugnant*** or with which the lawyer has a fundamental disagreement;

(v) The ***client fails substantially to fulfill an obligation to the lawyer*** regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;

(vi) The representation will result in an ***unreasonable financial burden*** on the lawyer or has been rendered unreasonably difficult by the client; or

(vii) Other ***good cause*** for withdrawal exists.

[RPC 1.16(b)]

D. WHEN LAWYER MUST CONTINUE REPRESENTATION

When ordered to do so by a tribunal, a lawyer must continue representation notwithstanding good cause for terminating the representation. [RPC 1.16(c)]

E. PROTECTION OF CLIENT'S INTERESTS ON TERMINATION

Upon termination of representation, a lawyer must take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled, and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by law. [RPC 1.16(d)]

VIII. THE LAWYER'S RESPONSIBILITIES TO THE LEGAL PROFESSION

A. IN GENERAL

Given the unique nature of the legal profession in society, every lawyer bears the burden of assisting in the improvement of the legal system and assuring that the profession itself is not brought into disrepute. Many of the RPC provisions discussed so far attempt to recognize the significance of this concept in the course of regulating relationships with a client and need not be restated here. However, there are other provisions of the Rules, as well as some general principles, that give further substance to the lawyer's obligations to the legal system and profession. These are set forth below.

B. LAWYER'S CONDUCT WHILE NOT IN PRACTICE

Lawyers acting in their private business or personal capacities are still bound by professional standards of conduct and can be disciplined for conduct violating such standards.

C. GENERAL GUIDELINES FOR A LAWYER'S CONDUCT

When explicit ethical guidelines do not exist to control a lawyer's conduct, he should determine

his conduct by acting in a manner that promotes public confidence in the integrity and efficiency of the legal system and profession.

D. POLITICAL CONTRIBUTIONS TO OBTAIN GOVERNMENT EMPLOYMENT

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

1. Prohibited Contributions

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

2. Excluded Employment

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

E. JUDICIAL AND LEGAL OFFICIALS

A lawyer must not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory or public legal officer, or of a candidate for election or appointment to judicial or legal office. [RPC 8.2(a)] A lawyer who is a candidate for judicial office must comply with the applicable provisions of the Code of Judicial Conduct. [RPC 8.2(b)]

F. THE SPECIAL ROLE OF THE PUBLIC PROSECUTOR

The prosecutor in a criminal case must:

(i) Refrain from prosecuting a charge that the prosecutor knows is not supported by ***probable cause;***

(ii) Make reasonable efforts to ensure that the ***accused has been advised of the right to, and the procedure for obtaining, counsel*** and has been given reasonable opportunity to obtain counsel;

(iii) ***Not seek*** to obtain from an unrepresented accused a ***waiver*** of important pretrial rights such as the right to a preliminary hearing;

(iv) Make ***timely disclosure*** to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigate the offense, and in connection

with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;

(v) Exercise ***reasonable care to prevent*** investigators, law enforcement personnel, employees, or other persons assisting or associated with the prosecutor in a criminal case from making an ***extrajudicial statement*** that the prosecutor would be prohibited from making under RPC 3.6 (relating to trial publicity) or this Rule;

(vi) ***Not subpoena a lawyer in a criminal proceeding*** to present evidence about a client unless the prosecutor reasonably believes: (i) the information is not protected by privilege; (ii) the evidence is essential to an ongoing investigation or prosecution; and (iii) there is no feasible alternative to obtain the information;

(vii) Refrain from making ***extrajudicial comments*** that have a substantial likelihood of heightening public condemnation of the accused (except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose);

(viii) ***Promptly disclose new, credible, and material evidence*** that creates a reasonable likelihood that a convicted defendant did not commit the subject offense and, if the conviction occurred in the prosecutor's jurisdiction, make a reasonable investigation into the possible wrongful conviction; and

(ix) ***Seek to remedy a conviction*** when the prosecutor knows of clear and convincing evidence that a defendant in her jurisdiction was convicted for an offense that he did not commit.

[RPC 3.8]

G. REPORTING PROFESSIONAL MISCONDUCT

A lawyer who ***knows*** that another lawyer has committed a violation of the Rules that raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects, ***must*** inform the appropriate professional authority. A lawyer who knows that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office likewise must inform the appropriate authority. This rule does not require disclosure of information otherwise protected by RPC 1.6 (relating to confidentiality of information), or information gained by a lawyer or judge while participating in an approved lawyers' assistance program dealing with substance abuse problems. [RPC 8.3]

IX. JUDICIAL ETHICS

A. SELECTION, TENURE, AND DISCIPLINE OF JUDGES

1. Selection of Judges

The constitutions of most states specify how judges are to be selected. In some states, judges are appointed by the governor or the state legislature, while in others they are elected by the voters. In still other states, judges are initially appointed and later retained or rejected by the

voters. State judges can be removed from office or otherwise disciplined in accordance with state constitutional and statutory provisions.

2. Code of Judicial Conduct

As with lawyer conduct, the ABA has provided standards for judicial conduct. In 1990, the ABA adopted the Code of Judicial Conduct ("CJC"), which was revised in 2007. The CJC is intended as a model that the states and the federal judiciary can follow in formulating their own standards of judicial conduct. The CJC has been adopted in substantial part in this state.

a. Who Is Subject to the CJC?

The CJC applies to all persons who perform judicial functions, including magistrates, court commissioners, referees, and special masters. Retired judges, part-time judges, and pro tempore part-time judges are exempted from some provisions of the CJC, as explained in G., *infra*. Judicial candidates are bound by the provisions affecting political activity explained in F., *infra*.

B. INTEGRITY, INDEPENDENCE, AND IMPARTIALITY

A judge must act in a manner that promotes the public's confidence in the independence, integrity, and impartiality of the judiciary, and must avoid impropriety and the appearance of impropriety. [CJC 1.2]

1. Conduct On the Bench

The general standard obviously applies to a judge's conduct on the bench in a judiciary capacity. Although judges must be independent, they must also comply with the law. [CJC 1.1]

Example: Judge H was an outspoken opponent of laws against prostitution, and he routinely dismissed prostitution cases despite contrary instructions from reviewing courts. Judge H is subject to discipline for repeatedly refusing to follow the law.

2. Conduct Off the Bench

The above duties also apply to a judge's behavior in her personal life. [*See* CJC 1.2, Comment (1)] A judge is subject to constant public scrutiny and must therefore accept constraints that would be burdensome to the ordinary citizen. [CJC 1.2, Comment (2)]

Examples: 1) Judge R discovered his estranged wife in an automobile with another man. The judge broke the car window (causing the other man to be cut with broken glass) and slapped his estranged wife. Judge R is subject to discipline, even though his conduct was unconnected with his judicial duties.

2) While driving under the influence of alcohol, Judge L ran a traffic signal and violated other traffic laws. Judge L is subject to discipline.

3. Personal Relationships

A judge must not allow family, social, political, or other relationships to interfere with the judge's conduct or judgments. [CJC 2.4(B)]

Example: Judge A was assigned to hear a case in which a well-known legislator was charged with a RICO violation. Judge A and the accused legislator are members of the same charitable organization and the same political party.

Judge A must not allow these relationships to influence her decisions in the case.

4. Misuse of Judicial Prestige

A judge may not lend the prestige of judicial office to advance the private interests of the judge or others. [CJC 1.3]

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

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

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

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

a. Permissible Acts

The following acts are permissible, as long as the judge is sensitive to abuse of the prestige of the judicial office [CJC 1.3, Comments]:

1) References and Recommendations

Based on personal knowledge, a judge may act as a reference or provide a recommendation for someone.

2) Judicial Selection

Judges can participate in the process of judicial selection by cooperating with appointing authorities.

3) Character Witness

When properly summoned, a judge may testify as a character witness for someone. However, judges must not appear ***voluntarily*** as character witnesses, and (except where the demands of justice require) they should discourage people from requiring them to serve as character witnesses.

5. Relationships with Discriminatory Organizations

A judge can be disciplined for ***membership in or use of*** an organization that currently practices "invidious discrimination" based on race, sex, gender, religion, national origin, ethnicity, or sexual orientation. The prohibition does not include an "intimate, purely private organization" whose membership limitations could not be constitutionally prohibited.

Further, this category does not include an organization that is "dedicated to the preservation of religious, ethnic, or cultural values of legitimate common interest to its members." [CJC 3.6 and Comments]

Examples: 1) Judge G belongs to the Slovenian League, which limits its membership to all descendants (regardless of sex or race) of persons from Slovenia, a former republic of Yugoslavia. The object of the organization is to preserve the culture and traditions of the Slovenian people. The organization does not stigmatize as inferior those who do not fall within its membership requirements. Judge G may belong to the Slovenian League because it does not practice "invidious discrimination." [*See* Moser, The 1990 ABA Code of Judicial Conduct: A Model for the Future, 4 Geo. J. Legal Ethics 731, 739-44 (1991)]

2) Judge H belongs to the Wednesday Morning Prayer Club, which limits its membership to 12 persons who are members of the Oakdale Evangelical Church. The object of the club is to meet every Wednesday morning for prayer and study of religious writings. Judge H may belong to the club because it is an intimate, purely private organization whose membership limitations could not be constitutionally prohibited. [*Id.*]

3) Judge J belongs to the Maplehurst College Alumnae Society. Maplehurst is a women's college, and membership in the Alumnae Society is limited to graduates of the college. The object of the organization is to raise money for the college and to put on college-related social events for its members. Because the organization has a rational basis for its single-sex limitation, and because it does not stigmatize nonmembers as inferior, Judge J may belong to the Alumnae Society. [*Id.*]

4) Judge K belongs to the Ashmount Golf and Tennis Club, which limits its membership to 1,200 white male Protestants. The object of the organization is to provide golf, tennis, and social facilities for its members. Conversations in the clubhouse frequently concern business and professional matters, and membership in the club offers significant business and professional advantages. Judge K is subject to discipline. Note that Judge K would be subject to discipline for ***using*** the Golf and Tennis Club (e.g., having lunch there as a guest, renting a room for a meeting there, or occasionally using the sports facilities as a guest) even if he were not a member.

a. Organizations that Discriminate in Violation of Local Law

The laws of some jurisdictions proscribe discrimination on other grounds. A judge in such a jurisdiction is subject to discipline for belonging to an organization that violates that jurisdiction's antidiscrimination laws.

b. Public Approval of Invidious Discrimination

A judge can be disciplined for publicly manifesting a knowing approval of "invidious discrimination on any basis." [CJC 3.6, Comment (1)] To warrant discipline the judge must: (i) know of the discrimination, and (ii) publicly manifest approval of it.

Example: The Pinecrest Union is an association of young business and professional men and women. Its bylaws exclude persons over age 55. Membership in the Pinecrest Union offers significant business and professional advantages, and the membership limitation has become a topic of heated public controversy. Judge O is not a member of the Pinecrest Union, but he publicly endorses its age limitation. If this age limitation constitutes "invidious discrimination," Judge O is subject to discipline.

c. Judicial Efforts to End Discrimination
When a judge learns that an organization to which she belongs practices discrimination that would bar the judge's membership under the CJC, the judge must ***promptly resign***. [CJC 3.6, Comment (3)]

C. DILIGENT, IMPARTIAL PERFORMANCE OF JUDICIAL DUTIES

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

1. Hearing and Deciding Adjudicative Matters
A judge must hear and decide all matters assigned to her, except those in which disqualification is required (*see* D., *infra*). [CJC 2.7]

2. Impartiality and Fairness
A judge must uphold and apply the law and perform all duties fairly and impartially. A judge must not be swayed by public clamor or fear of criticism. [CJC 2.2; 2.4(A)]

3. Order and Decorum in Court
A judge must require order and decorum in court proceedings. [CJC 2.8(A)]

4. Patience, Dignity, and Courteousness
A judge must be patient, dignified, and courteous to those with whom the judge deals in an official capacity, including litigants, lawyers, jurors, and witnesses. A judge shall require like behavior of lawyers, court officers and staff, and others who are under the judge's direction and control. [CJC 2.8(B)]

5. Avoidance of Bias, Prejudice, and Harassment
A judge must avoid bias, prejudice, and harassment, and require others (including lawyers) who are under the judge's direction and control to do likewise. Prejudice in this context includes, but is not limited to, prejudice based on race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, political affiliation, or socioeconomic status. Even in nonjudicial activities, a judge should avoid making demeaning remarks or jokes that play on these prejudices. [CJC 2.3]

6. Right to Be Heard
A judge must give every person who has a legal interest in a proceeding (or that person's lawyer) the right to be heard in accordance with the law. [CJC 2.6(A)]

7. Ex Parte Communications
"Ex parte" means one side only. An ex parte communication means a communication between a judge and representative from one side of a matter when no representative from

the other side is present. A judge may not initiate, permit, or consider ex parte communications except in these three situations:

a. Expressly Authorized by Law
A judge may have ex parte communications where expressly authorized by law [CJC 2.9(A)(5)], which includes court rules and case law, as well as constitutional and statutory law.

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

c. Emergencies or Administrative Matters
Finally, a judge may have an ex parte communication if the following conditions are met:

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

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

[CJC 2.9(A)(1)]

d. Inadvertent Receipt of Ex Parte Communication
The judge must promptly notify parties of his inadvertent receipt of an unauthorized ex parte communication (e.g., a misdirected fax) and provide the parties with an opportunity to respond. [CJC 2.9(B)]

8. Communications from Others
A judge may not initiate, permit, or consider communications from others made to the judge outside the presence of the parties' lawyers concerning a pending or impending matter, except in these four situations:

a. Court Personnel
A judge may consult about a matter with court personnel whose function is to aid the judge in carrying out adjudicative responsibilities (e.g., the judge's law clerk) and with other judges provided the judge does not abrogate the responsibility to personally decide the matter. [CJC 2.9(A)(3)]

b. Disinterested Legal Experts
A judge may obtain the advice of a disinterested expert on the applicable law, provided that the judge gives advance notice to the parties' lawyers regarding what expert was consulted and what the expert said, and gives the parties' lawyers a reasonable opportunity to object and to respond. [CJC 2.9(A)(2)] A common and often desirable way to get the advice of a legal expert is to invite the expert to file a brief amicus curiae.

c. Other Communications
A judge must not have communications about a matter outside the presence of the

parties' lawyers with any person not mentioned above, unless the conditions stated in 7.c., *supra*, are satisfied. [CJC 2.9(A)(1)]

Example: In the middle of a trial, juror A telephoned Judge T at home and blurted out that she had accidentally overheard a graphic radio report about the trial and felt unable to continue as a juror. Judge T calmed A and instructed her to come to court the next morning and report the incident in the presence of the lawyers for the parties. Judge T handled the matter properly.

d. Communications Between Trial and Appellate Courts

Some jurisdictions permit a trial judge to communicate with an appellate court about a proceeding. A copy of any written communication, or the substance of any oral communication, should be provided to the parties' lawyers.

9. Findings of Fact and Conclusions of Law

If a judge asks the lawyers for one side to propose findings of fact and conclusions of law, the lawyers for the other parties must be told of the request and given a chance to respond to the proposed findings and conclusions. [CJC 2.9]

10. Independent Investigation of Facts

A judge must not independently investigate the facts in a case and must consider only the evidence presented and judicially noticed facts. [CJC 2.9(C)]

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

11. Promptness, Efficiency, and Fairness

A judge must dispose of judicial matters promptly, efficiently, and fairly. This duty requires the judge to:

(i) Respect the rights of the parties, but resolve issues without unnecessary expense or delay;

(ii) Monitor cases closely to eliminate dilatory practices, avoidable delays, and unnecessary costs;

(iii) Encourage settlements, but without forcing the parties to give up their right to adjudication;

(iv) Devote adequate time to judicial duties;

(v) Be punctual in attending court;

(vi) Be expeditious in deciding matters under submission; and

(vii) Insist that the parties, lawyers, and court personnel cooperate in achieving the objectives stated above.

[CJC 2.5, Comments (3), (4)]

12. Public Comments on Cases

When a case is pending or impending in ***any*** court, a judge may not make any ***public*** comment that might reasonably be expected to affect its outcome or impair its fairness, or make any ***nonpublic*** comment that might substantially interfere with a fair trial. This duty continues through appeal and until the case is finally disposed of. The judge must require like abstention from court personnel under her control. [CJC 2.10(A), (C)]

a. Official Duties Excepted

The duty to abstain from comment does not prohibit judges from making public statements in the course of their official duties, or from publicly explaining court procedures. [CJC 2.10(D)]

b. Judge as a Party

The duty to abstain from comment does not apply if the judge is a litigant in a personal capacity. The duty does apply, however, if the judge is a litigant in an official capacity, as in writ of mandamus proceedings. [CJC 2.10(D), and Comment (2)]

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

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

14. Commentary on Jury Verdict

A judge must not commend or criticize jurors for their verdict, but a judge may thank jurors for their service. This duty does not apply to judicial commentary on a verdict in a court order or judicial opinion. [CJC 2.8(C)]

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

15. Nonpublic Information

A judge must not disclose or use, for nonjudicial purposes, any nonpublic information acquired in a judicial capacity. [CJC 3.5] Nonpublic information includes, without limitation, information that is under seal, impounded, or obtained in camera, and information obtained in grand jury proceedings, presentencing reports, dependency cases, and psychiatric reports.

16. Competence, Diligence, and Cooperation

Judges must perform their judicial and administrative duties diligently and competently. Judges also must cooperate with others in administrative matters. Judicial competence requires the judge to perform judicial duties with the necessary legal knowledge, skill, and preparation. [CJC 2.5 and Comments]

Example: Judge Q frequently hears criminal cases, but she has not kept up on changes in the law of search and seizure. She routinely decides search and seizure issues on a combination of intuition and what she learned in law school many years ago. Judge Q is subject to discipline for failing to maintain her professional competence.

17. Judicial Appointments

A judge must exercise the power of appointment impartially and on the basis of merit (*e.g.*, when appointing referees, special masters, receivers, guardians, assigned counsel, and court personnel). A judge must not make unnecessary appointments, must avoid nepotism and favoritism, and must not approve compensation for appointees beyond the fair value of their services. [CJC 2.13(A), (C)]

a. Appointments of Lawyers Making Contributions to Judge's Election Campaign

A judge who is subject to public election must not appoint a lawyer to a position if the judge either knows that the lawyer (or his spouse or domestic partner) has contributed to the judge's election campaign more than the jurisdiction's specified dollar amount within a designated number of years prior to the judge's campaign, or learns of such contribution through a timely motion by a party or other interested person. This provision does not apply if the appointed position is substantially uncompensated, the lawyer is selected in a rotation from a list of qualified and available lawyers compiled without regard to their having made political contributions, or the judge finds that no other lawyer is willing, competent, and able to accept the position. [CJC 2.13(B)]

18. Disciplinary Responsibilities

Judges have the following duties respecting misconduct by lawyers and other judges:

a. Judicial Misconduct

If Judge A ***receives information*** indicating a substantial likelihood that Judge B has violated the CJC, Judge A must take "appropriate action." What constitutes "appropriate action" depends on the situation; it could range from simply speaking directly with Judge B about the matter to reporting Judge B to the relevant disciplinary authority. If Judge A has actual ***knowledge*** that Judge B has committed a violation of the CJC that raises a substantial question about Judge B's honesty, trustworthiness, or fitness for office, then Judge A must report Judge B to the judicial disciplinary authority. [CJC 2.15(A), (C)]

b. Lawyer Misconduct

If a judge ***receives information*** indicating a substantial likelihood that a lawyer has violated the RPC, the judge must take "appropriate action," which means the same as with respect to judicial misconduct (*see supra*). If a judge has actual ***knowledge*** that a lawyer has committed a violation of the RPC that raises a substantial question about the lawyer's honesty, trustworthiness, or fitness to practice, then the judge must report the lawyer to the relevant disciplinary authority. [CJC 2.15(B), (D)]

c. Disability or Impairment of Judge or Lawyer

If a judge reasonably believes that the performance of another judge or lawyer is impaired by drugs or alcohol, or by a mental, physical, or emotional condition, the judge must take "appropriate action" (e.g., speaking to the individual or making a referral to an assistance program).

d. Cooperation with Disciplinary Authorities

A judge must cooperate with disciplinary authorities and must not retaliate against any person who assists or cooperates in the investigation of a judge or lawyer. [CJC 2.16]

19. Supervisory Duties
A judge must require court staff, officials, and others subject to his direction and control to act consistently with his duties under the CJC, and must ensure that judges under his supervisory authority properly discharge their judicial responsibilities. [CJC 2.12]

D. DISQUALIFICATION

1. General Rule—Whenever Impartiality Might Reasonably Be Questioned
A judge must disqualify himself in a proceeding in which the judge's impartiality might reasonably be questioned. [CJC 2.11(A)] Note that the rule uses the objective standard of reasonableness; a far-fetched argument or litigant's whim is not sufficient to disqualify a judge.

a. Disclosure by Judge
The judge should disclose on the record any information the judge believes that the parties or their lawyers might consider relevant to the question of disqualification, even if the judge believes there is no reasonable basis for disqualification. [CJC 2.11 and Comment (5)]

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

b. Rule of Necessity
Case law has created a rule of necessity that overrides the rules of disqualification. For example, suppose that Judge Z is the only judge available to rule on an emergency motion for a temporary restraining order. Judge Z may rule on the motion even though she might be disqualified were it not an emergency. Even in such a situation, Judge Z should disclose the ground for disqualification on the record and should use reasonable efforts to transfer the matter to a different judge as soon as possible. Further, a judge should not be disqualified for a reason that would apply equally to all other judges to whom the matter might be assigned.

Examples: 1) State trial judge A is assigned to hear a case concerning the constitutionality of a statute that will raise the salary of all trial judges in the state. Judge A may hear the case because the reason for disqualification applies equally to all other judges to whom the case might be assigned.

2) Judge B was assigned to hear a sex discrimination case, and the defendant moved to disqualify her on the sole ground that she is a woman. Because all judges are of one sex or the other, Judge B is not disqualified.

2. Bias or Personal Knowledge
A judge must disqualify himself if there is reasonable ground to believe that the judge has: (i) a personal bias or prejudice concerning a party or a party's lawyer; or (ii) personal knowledge of relevant evidentiary facts. [CJC 2.11(A)(1)] To be disqualifying, a bias must be

personal and must stem from an extrajudicial source; adverse attitudes toward a party formed on the basis of evidence presented in the case are not disqualifying.

3. Prior Involvement
A judge must disqualify himself if the judge previously:

(i) Served as a ***material witness*** in the matter;

(ii) Previously ***presided over the matter*** as a judge in another court;

(iii) Served as a ***lawyer*** in the matter;

(iv) Participated in the matter as a ***government employee***; or

(v) Was ***associated*** with a lawyer who substantially participated in the matter at the time they were associated.

[CJC 2.11(A)(6)]

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

2) In the preceding example, suppose that L did not begin representing X until C had left the practice and become a supreme court justice. Justice C need not recuse herself unless her prior association with L creates a reasonable question about her impartiality under the general rule of disqualification (*see* D.1., *supra*).

3) Before taking the bench, Judge D was a lawyer for the United States Justice Department. At that time, attorney A was also a lawyer for the Justice Department. Now Judge D is assigned to hear a case in which A represents the Justice Department. Ordinarily, a lawyer in a government agency is not "associated" with the other lawyers in the agency for purposes of the CJC. Thus, Judge D is not disqualified unless his prior work with A creates a reasonable question about his impartiality under the general rule of disqualification (*see* D.1., *supra*).

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

a. Definition of "Economic Interest"
For the purpose of this rule, the term "economic interest" has a very technical definition; it means that the judge (or judge's spouse, domestic partner, parent, child, or family member residing in the judge's household):

(i) Is an officer, director, adviser, or other active participant in the affairs of a party; or

(ii) Owns more than a de minimis legal or equitable interest in a party.

[CJC 2.11, Comment (6)]

b. Exceptions to the Definition
A judge need not disqualify himself for:

(i) Owning an interest in a ***mutual fund*** that holds securities of a party;

(ii) Being an ***officer*** of an organization that holds securities of a party;

(iii) Having a ***deposit*** at a bank, credit union, or savings association that is a party (unless the proceedings could substantially affect the value of the deposit); or

(iv) Owning ***government securities*** and the government is a party (unless the value of the securities could be substantially affected by the proceedings).

[CJC 2.11, Comment (6)]

5. Involvement of a Relative
A judge must disqualify himself if the judge has a relative involved in the case. [*See* CJC 2.11(A)(2)]

a. Meaning of "Relative"
For the purpose of this rule, the term "relative" means a person (or the spouse or domestic partner of a person) who is related within the third degree to the judge or to the judge's spouse or domestic partner. The third degree of relationship means: great-grandparents, grandparents, parents, uncles, aunts, brothers, sisters, children, grandchildren, and great-grandchildren; in short, anyone related more closely than a cousin. Remember that spouses and domestic partners are included on both ends of the calculation.

Example: Judge H is married to Mable. The third husband of Mable's Aunt Lulu is the plaintiff in a case assigned to Judge H. Judge H is disqualified.

b. Meaning of "Involved"
The term "involved" means that the relative is:

(i) A party, or an officer, director, or trustee of a party;

(ii) A lawyer in the proceedings;

(iii) Known by the judge to have more than a de minimis interest that could be substantially affected by the proceedings; or

(iv) Known by the judge to be a likely material witness in the proceedings.

Example: Judge J is assigned to hear a case in which the state Attorney General seeks suspension of the license of the Shady Acres Nursing Home until Shady Acres provides more humane living conditions for its residents. Judge J's husband's great-grandmother is a Shady Acres resident. Because the great-grandmother's interests could be substantially affected, Judge J is disqualified.

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

7. Public Statements of Judicial Commitment
A judge must disqualify himself if he, while a judge or a candidate for judicial office, has made a public statement (other than in a court proceeding, judicial decision, or opinion) that commits or appears to commit him with respect to an issue in the proceeding or the controversy in the proceeding. [CJC 2.11(A)(5)]

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

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

(ii) The lawyers consult privately with their respective clients.

(iii) All the parties and their lawyers meet, outside the presence of the judge, and agree that the judge should not be disqualified. As a practical matter, the judge may wish to have all the parties and their lawyers sign a remittal agreement.

(iv) If the judge is willing to do so, he may then proceed with the case.

[*See* CJC 2.11(C)]

E. EXTRAJUDICIAL ACTIVITIES

A judge may engage in extrajudicial activities but must not:

(i) Participate in activities that undermine the judge's independence, integrity, or impartiality;

(ii) Engage in coercive conduct;

(iii) Participate in activities that interfere with the judge's judicial duties or lead to frequent disqualification; or

(iv) Abuse the use of court resources.

[CJC 3.1]

1. Avocational Activities

A judge may speak, write, lecture, teach, and participate in nonjudicial activities that involve either legal or nonlegal subjects, provided that these activities are consistent with the duties stated elsewhere in the CJC. Because judges are in a unique position to help improve the law, they are encouraged to do so through bar associations, judicial conferences, and the like. [CJC 3.1, Comments (1), (2)]

2. Nonlegal Governmental Hearings and Consultations

A judge may not appear at a public hearing before, or otherwise consult with, an executive or legislative body or official, except on matters concerning the law, the legal system, or the administration of justice, or on matters about which the judge acquired knowledge or expertise. This duty does not apply when the judge is acting pro se in a matter that involves the judge or his interests or when acting in a fiduciary capacity. [CJC 3.2]

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

2) Judge N met privately with the Mayor of the city of Glenview to protest the city's plan to open a city dump adjacent to Judge N's property. The meeting was proper because it concerned Judge N's own interests.

3. Governmental Committees and Commissions

A judge may not accept appointment to a governmental committee, board, commission, or other governmental position ***unless*** it concerns the law, the legal system, or the administration of justice. [CJC 3.4] Such appointments are likely to be very time-consuming, can involve the judge in controversial matters, and can interfere with the independence of the judiciary. A judge may, however, represent a governmental unit on a ceremonial occasion, or in connection with a historical, educational, or cultural activity. [CJC 3.4, Comments]

Examples: 1) The governor appointed Judge O to serve on the State University Board of Directors. Judge O must decline the appointment because State University is a public school. That fact makes this a governmental appointment, and the position is not related to the law, the legal system, or the administration of justice.

2) The governor appointed Judge P to serve on the Board of Directors of the State University School of Law. Judge P may accept the appointment, even though it is a governmental appointment, because it involves the law.

3) Judge Q was appointed to serve on the Board of Directors of Butterfield University, a private school. Judge Q may accept the office because Butterfield University is not a governmental institution.

4. Law-Related Organizations and Nonprofit Organizations

A judge may participate in activities sponsored by organizations or government entities concerned with the law, the legal system, or the administration of justice and those by a nonprofit educational, religious, charitable, fraternal, or civic organization. Note that service on the board of a public educational institution other than a law school is prohibited, but service on the board of a public law school or any private educational institution would generally be permitted. [*See* CJC 3.7 and examples, *supra*]

a. Serving as Officer, Director, Trustee, or Advisor

A judge is permitted to serve as an officer, director, trustee, or nonlegal adviser of an organization ***unless*** it is likely that the organization:

(i) Will be engaged in proceedings that would ordinarily come before the judge; or

(ii) Will frequently be engaged in adversary proceedings in the court on which the judge sits or one under its appellate jurisdiction.

[CJC 3.7(A)(6)]

Examples: 1) State supreme court Justice R is invited to be a director of the Forest Protection League, a nonprofit organization that frequently brings lawsuits to block the logging of old-growth forest areas. Justice R must decline the invitation.

2) Judge S is the only trial judge who sits in Oceanside County. She is invited to be a trustee of the Oceanside Memorial Hospital, which is frequently named as a defendant in medical malpractice cases filed in Oceanside County. Judge S must decline the invitation.

b. Fund and Membership Solicitation

A judge may assist an organization with fundraising or membership solicitation but must consider whether the purposes of the organization or the nature of participation conflicts with the judge's duty to refrain from activities that compromise his independence, integrity, and impartiality. [CJC 3.7, Comment (2)] A judge may make recommendations to fund-granting sources concerning law-related projects. [CJC 3.7(A)(5)] Further, a judge may help plan fundraising for an organization, and may help manage and invest the organization's funds. [CJC 3.7(A)(1)] A judge can solicit contributions and memberships on behalf of the organization subject to the following limitations: (i) contributions can be solicited only from members of his family or from other judges over whom he does not exercise supervisory or appellate authority; (ii) memberships can be solicited only on behalf of an organization that is concerned with the law, legal system, or administration of justice. [CJC 3.7(A)]

Examples: 1) Judge T is the treasurer of International House, a nonprofit organization that serves foreign students at the local college. Each year International House puts on a fundraising event. Judge T may help plan the fundraiser, may help manage the funds thus raised, and may solicit contributions from co-equal judges and family members, but not from other people.

2) In the previous example, Judge T may sign a general contribution solicitation letter on the International House letterhead. The letterhead may list Judge T as the treasurer of International House, and it may identify him as a judge if others on the letterhead are comparably identified unless the event concerns the law, legal system, or administration of justice.

3) In the previous example, Judge T may attend the International House annual fundraising dinner, but not as a speaker or guest of honor unless the event concerns the law, legal system, or administration of justice.

c. Attending Events

A judge can participate in ***non-fundraising*** events of the organization by: (i) attending or speaking at an event, (ii) receiving an award or other recognition at an event, (iii) being featured on the program of an event, and (iv) permitting his title to be used in connection with the event. If the event serves a ***fundraising purpose***, the judge may participate in the above capacities only if the event concerns the law, legal system, or administration of justice. [CJC 3.7(A)(4)]

5. Financial and Business Activities

Unless otherwise improper under the CJC, a judge may hold and manage investments (including real estate) for himself or members of his family. [CJC 3.11(A)] A judge may not be an officer, director, manager, general partner, adviser, or employee of any business entity. A judge may, however, manage or participate in a business that is closely held by the judge or members of his family, or a business that is primarily engaged in investing the judge's or the family's financial resources. [CJC 3.11] A judge should not manage investments or participate in even a closely held family business if it interferes with judicial duties, if the business frequently appears before the court on which the judge sits, leads to frequent disqualification, or violates the CJC. [CJC 3.11(C)]

6. Gifts, Bequests, Favors, and Loans

As a general rule, a judge should not accept gifts, bequests, favors, loans, or other things of value from anyone if doing so violates the law or compromises his independence, integrity, or impartiality. A judge should urge family members who reside in the judge's household not to accept such items either. The ***exceptions*** to the general rule are as follows:

(i) Items with little intrinsic value (e.g., trophies, greeting cards);

(ii) Books, tapes, and the like, given by publishers for official use;

(iii) Rewards and prizes won in random drawings or contests that are open to persons who are not judges;

(iv) A gift, award, or benefit incident to the activities of the judge's spouse, domestic partner, or a family member living in the judge's household, that incidentally benefit the judge;

(v) Ordinary social hospitality (e.g., a dinner invitation);

(vi) A gift, bequest, favor, or loan from relatives, close personal friends, or others whose appearance or interest in a case would disqualify the judge in any event (e.g., a new car from the judge's parents);

(vii) Commercial and financial opportunities, including loans from a lending institution, made in the regular course of its business and on the same terms available to nonjudges; and

(viii) A scholarship or fellowship or similar benefit given on the same terms as to other people.

[CJC 3.13]

a. Gifts Subject to Reporting Requirements
In addition to the gifts and benefits listed above, a judge may also accept the following items provided he reports receipt of the items:

(i) Gifts incident to a public testimonial;

(ii) An invitation to the judge and his spouse, domestic partner, or guest to attend a law-related function or an event associated with the judge's educational, religious, charitable, fraternal, or civic activities; and

(iii) Gifts, bequests, loans, or other benefits from a person who has come or is likely to come before the judge.

[CJC 3.13(C)]

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

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

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

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

[CJC 3.8(A), (B)]

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

b. Conflicting Duties
When the duties of a fiduciary conflict with the judge's duties under the CJC, the judge should resign as fiduciary. [CJC 3.8, Comment (1)]

Example: Judge V is appointed as trustee of a fund for the use and benefit of his invalid brother. The trust fund includes common stock of several companies that frequently appear as litigants before Judge V. The CJC requires a judge to manage her investments in a way that minimizes

disqualifications. If the trust fund would be harmed by divestiture of those stocks, Judge V should not serve as trustee.

8. Service as Arbitrator or Mediator
A full-time judge may not act as an arbitrator, mediator, or private judge unless expressly authorized by law. This does not, of course, prevent the judge from participating in arbitration, mediation, or settlement conferences in a judicial capacity. [CJC 3.9 and Comment (1)]

9. Practice of Law
A full-time judge may not practice law. However, a judge may act pro se and may, without compensation, give legal advice to, and draft or review documents for, a member of her family. A judge must not, however, act as an advocate or negotiator for a family member in a legal matter. [CJC 3.10 and Comment (1)]

10. Outside Compensation and Expenses
The federal government and many other jurisdictions have adopted rigorous requirements concerning the receipt and reporting of a judge's outside compensation and expense reimbursement. The following rules apply only where not supplanted by more rigorous requirements.

a. General Requirements
A judge may receive compensation and reimbursement of expenses for proper outside activities if:

(i) The compensation or expense reimbursement does not undermine the judge's independence, integrity, or impartiality or influence the judge's performance of judicial duties;

(ii) The compensation is reasonable for the work done and does not exceed what would be given to a nonjudge; and

(iii) The reimbursement of expenses does not exceed actual expenses reasonably incurred by the judge and, when appropriate to the occasion, the judge's spouse, domestic partner, or guest.

[CJC 3.12; 3.14]

b. Reports of Compensation
A judge who receives compensation or reimbursement for outside activities must report: the activity, when and where it took place, the payor, and the amount. A judge must make such reports annually in a public court document, but reports for reimbursement must be made within 30 days of the event. In a community property state, compensation received by the judge's spouse is not attributed to the judge for this purpose. [CJC 3.15]

F. JUDGES AND POLITICS
The general rule is simple: Judges must not engage in political or campaign activity that compromises the independence, integrity, and impartiality of the judiciary. [CJC 4]

1. Rules Applicable to All Judges and Judicial Candidates
The following rules apply to all judges and candidates for judicial office. [CJC 4.1]

a. Definition of "Candidate"
A "candidate" is a person who seeks to obtain or retain a judicial office either by election or appointment. The same definition applies to a judge who seeks an elected or appointed nonjudicial office. A person becomes a candidate when she does any one of the following things:

1) Makes a ***public announcement*** of candidacy;

2) ***Declares or files*** as a candidate with the election or appointment authority; or

3) ***Authorizes solicitation*** or acceptance of contributions or support.

b. General Prohibitions
Except where specifically permitted by the CJC, a judge or candidate for judicial office must not:

(i) Act as a leader or hold office in a political organization;

(ii) Publicly endorse or oppose another candidate for public office;

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

(iv) Financially support a political organization or candidate, which includes soliciting funds, making contributions, paying assessments, and buying tickets for political dinners or other functions;

(v) Publicly identify herself as a candidate of a political organization and seek, accept, or use endorsements from a political organization;

(vi) Use court resources in a campaign for office; or

(vii) Personally accept or solicit campaign contributions other than through a campaign committee, or use campaign contributions for private use.

[CJC 4.1] These general prohibitions have some exceptions that are discussed in 3., *infra*.

c. Explanation of General Prohibitions
When false statements are publicly made about a judicial candidate, a judge or judicial candidate who knows the facts may make the facts public. A public officer, such as a prosecutor, may retain that office while running for an elective judicial office. A judge or judicial candidate may privately express her views on candidates for public office. A candidate does not endorse another candidate simply by running on the same political ticket. [CJC 4.1, Comment (8)]

d. Judges Who Run for Nonjudicial Office
A judge must resign from judicial office when she becomes a candidate for a nonjudicial ***elective*** office. However, a judge need not resign when she becomes a candidate for a nonjudicial ***appointive*** office or seeks to become a delegate to a state constitutional convention. [CJC 4.5]

e. Dignity, Impartiality, Integrity, and Independence
A candidate must act with the dignity, impartiality, integrity, and independence expected of a judge. [CJC 4.2(A)(1)] A candidate must encourage others to adhere to the same standards expected of the candidate when they act in support of the candidate. [CJC 4.1(B); 4.2(A)(4)]

f. Response to Attacks
Subject to the rules stated in g., below, candidates may respond to attacks on themselves or their records.

g. Statements, Promises, and Pledges
When seeking judicial office, a candidate must not:

(i) With respect to cases, controversies, or issues that are likely to come before the court, ***make pledges, promises, or commitments*** that are inconsistent with the impartial performance of the adjudicative duties of the office; or

(ii) ***Knowingly or recklessly*** make any false or misleading statement or any statement that would affect the outcome or fairness of any matter.

[CJC 4.1(A)] A candidate may make pledges or promises to improve judicial administration, and an incumbent judge may speak privately with other judges and court personnel in the performance of judicial duties. The duties stated in this section apply to any statements made in the process of securing judicial office, including statements to selection, tenure, and confirmation authorities. The judge must ensure that others acting on her behalf adhere to these standards.

Examples: 1) The United States Senate Judiciary Committee is holding a hearing to determine whether to recommend lawyer L to the Senate for confirmation as a Supreme Court Justice. A committee member asks L: "Tell us whether you believe the Blotz Anti-Conspiracy Act is constitutional." If the constitutionality of the Act is likely to come before the Court, L should decline to commit herself.

2) In the situation posed in Example 1), suppose a committee member asks: "Tell us your views on the role of stare decisis in interpreting the Bill of Rights." L should answer the question candidly, but without indicating how she would rule on any specific issue that is likely to come before the Court.

1) But Note—"Announce Clause" Is Unconstitutional
The United States Supreme Court has held that an "announce clause"—i.e., a clause prohibiting candidates for judgeships from announcing their views on disputed legal or political issues—is unconstitutional because it violates the First Amendment by prohibiting speech on the basis of content and burdening the speech of political candidates. [Republican Party of Minnesota v. White, 536 U.S. 765 (2002)]

2. Rules Applicable to Candidates for Appointed Positions
Where a judgeship or other government position is filled by appointment, a candidate must not engage in political activity to secure the appointed position, except that she ***may***:

(i) Communicate with the appointing authority and screening groups; and

(ii) Seek support from any person or organization other than a political partisan organization.

[CJC 4.3]

3. Rules Applicable to Judges and Candidates Subject to Public Election

In F., *supra*, you read some general rules that are designed to insulate judges and candidates for judicial office from routine politics. Those general rules have some exceptions that apply to positions filled by public election. The exceptions recognize the practicalities of elective politics in a democratic system. If the system is to work, the participants must be allowed some freedom to engage in politicking and campaigning. The exceptions cover three classes of persons:

(i) Judges who are subject to public election;

(ii) Candidates for a judicial position filled by public election; and

(iii) Judges who seek a nonjudicial position filled by public election.

[*See* CJC, Terminology (definition of candidate)] These three classes of persons ***may*** do the following things:

(i) Establish a campaign committee;

(ii) Speak on behalf of her candidacy, including through advertisements, websites, or other campaign literature;

(iii) Publicly endorse or oppose candidates for the same judicial office;

(iv) Seek, accept, or use endorsements from a person or organization other than a partisan political organization;

(v) Contribute to a political organization or candidate for public office; and

(vi) Buy tickets for and attend political gatherings.

[CJC 4.2]

In addition to the above, candidates in partisan public elections may identify themselves as candidates of a political organization and seek, accept, and use endorsements of a political organization. [CJC 4.2]

a. Campaign Activities

These parties may engage in campaign activities, subject to the following rules:

1) Ban on Personal Solicitation
These parties may neither personally solicit publicly stated support nor solicit or accept campaign contributions. [CJC 4.1; 4.4]

2) Campaign Committees
These parties ***may***, however, establish campaign committees, which may: (i) put on candidate forums and publish campaign literature; (ii) manage campaign funds; and (iii) solicit public support and ***reasonable*** contributions from members of the public, including lawyers. Note that if a judge knows the identity of contributing lawyers or litigants, that fact may require the judge to disqualify herself under the CJC (*see* D., *supra*). [CJC 4.4 and Comments]

a) Solicitation Time Limits
Campaign committees may solicit contributions and public support in conformance with the jurisdictional time limits. [CJC 4.4(B)(2)]

b) Excessive Campaign Contributions
A candidate must instruct the campaign committee not to accept contributions in excess of the jurisdiction's specified limits. Also, the campaign committee must file with the designated state office a report stating the name, address, occupation, and employer of each person who has made such excessive contributions. [CJC 4.4(B)(1), (3)]

G. APPLICATION OF THE CODE OF JUDICIAL CONDUCT

The CJC applies to all persons who perform judicial functions, including magistrates, court commissioners, and special masters and referees. The Application section at the beginning of the CJC contains a group of highly detailed exceptions that make various parts of the CJC inapplicable to several categories of retired and part-time judges. For bar exam purposes, we suggest that mastering the detailed exceptions is not the best use of your time, and that you be content with the following broad generalizations:

1. A ***retired judge*** subject to recall is allowed to serve as an arbitrator or mediator, and (except when acting as a judge) to serve as a fiduciary.

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

PROFESSIONAL RESPONSIBILITY MULTIPLE CHOICE QUESTIONS

INTRODUCTORY NOTE

You can use the sample multiple choice questions below to review the law and practice your understanding of important concepts that you will likely see on your law school exam. To do more questions, access StudySmart MPRE software from the BARBRI website.

Question 1

The mayor of a small city is also a licensed attorney who has a law partnership with a fellow attorney in the city. Under the city's charter, the mayor has the authority to determine what issues are to be placed upon the agenda of the city council. Several council members have told the mayor that they would like to see a particular zoning measure placed upon the agenda. This proposed ordinance would ban commercial development of a certain area within the city limits.

The mayor's law partner has been retained as attorney for a development company that has acquired land in the proposed noncommercial zoning area and has plans to construct a large shopping center there. The mayor has agreed to take no direct role in the representation, not to share any fees from the case, and not to attend any city council meetings at which the matter will be discussed.

May the mayor's law partner represent the development company in this matter?

(A) Yes, because the development company is not a client of the mayor.

(B) Yes, because the mayor will not be present at any city council meetings at which the matter is discussed.

(C) No, because of the mayor's position as mayor.

(D) No, because the mayor will have no direct role in the representation and will not share in any fees from the case.

Question 2

A sales manager testified before a federal grand jury that was investigating price-fixing in the automobile tire industry. Ultimately, the grand jury indicted the sales manager for price-fixing, a felony under the Sherman Act. After his indictment, the sales manager sought to hire a prominent attorney to represent him at his criminal trial. The sales manager is a middle class business executive with enough savings to pay for private counsel. He told his attorney in confidence that he had lied to the grand jury about several meetings he had had with competitors. Furthermore, he told her that he wanted to plead not guilty to the criminal charge and that he intended to testify at trial as he did before the grand jury.

Which of the following would be proper for the attorney to do in this situation?

(A) Decline to represent the sales manager.

(B) Agree to represent the sales manager and tell no one what he told her.

(C) Inform the sales manager that unless he pleads guilty to the criminal charge, she will tell the prosecutor about his false testimony before the grand jury.

(D) Decline to represent the sales manager and inform the prosecutor about his false testimony before the grand jury.

Question 3

A partner in a law firm has just been elected a judge of the circuit court. She has been assigned to the probate division. During her last week with the law firm, she filed a number of very routine, uncontested probate motions. At the time, she had no idea that she would be assigned to the probate division. These routine probate motions have been assigned to her courtroom by a lottery system of random assignment that the circuit court regularly employs to assign cases.

Is it proper for the judge to rule on these motions?

(A) Yes, because they are routine and uncontested.

(B) Yes, because reassignment would cause delay.

(C) No, because she has a conflict of interest.

(D) No, because judges may never rule on issues when their former law firm is involved.

Question 4

A law school graduate who is not a licensed member of the bar felt called to the ministry after he graduated from law school. He received a degree in divinity and was formally ordained as a minister of his faith. He is now the pastor of a local church, where an attorney is a member of the congregation. As pastor, he has been very disturbed about the high rates of divorce and the breakdown in American family life. Therefore, he holds frequent "family counseling sessions" where, among other things, he explains to the parishioners who attend these sessions many of the legal ramifications of divorce, alimony, child support, and child custody. These sessions are usually followed by question-and-answer periods, during which the pastor gives legal advice to parishioners who cannot afford a lawyer. The pastor knows that the legislature has passed a new marriage dissolution law that changes the law substantially from what he was taught in law school. The pastor asks the attorney who is a member of the congregation if he will prepare an outline and a memorandum fully explaining the new law so that he will be better informed for the sessions with his parishioners.

If the attorney agrees to do this, is he subject to discipline?

(A) Yes, because the pastor may bring the attorney before the State Bar Disciplinary Committee if the attorney makes any mistake of law in the memorandum.

(B) Yes, because the attorney is assisting in the unauthorized practice of law.

(C) No, because the attorney has a duty to help educate the public regarding the law.

(D) No, because marriage counseling is an important part of the pastor's duties as pastor.

Question 5

After a major airplane crash in the vicinity of an affluent island town, in which 122 passengers and crew were killed, the town's attorneys swarmed like locusts to get a "piece of the action" and the potentially huge contingent fees that were likely to arise from the case. Interested in fees himself, but also rather disgusted at the performance of some of his colleagues of the bar, one attorney placed an ad in the town's weekly legal newspaper, whose readership was almost entirely lawyers. The ad suggested that any attorneys representing plaintiffs in the airline crash matter contact him in order to consolidate lawsuits against the airline, and that legal fees would be divided in proportion to the work performed. The ad was signed by the attorney and indicated his office address and telephone number.

Was it proper for the attorney to place such an advertisement?

(A) Yes, because the ad was not misleading.

(B) Yes, because the lawyers will split the fees in proportion to work done.

(C) No, because the attorney is soliciting business.

(D) No, because the ad is in bad taste.

Question 6

A lawyer represents a defendant who is being prosecuted in a jury trial for an armed robbery and attempted murder that occurred on June 15. The accused has pleaded not guilty to the charges, but the lawyer knows that the accused is the perpetrator and that the crime occurred at approximately 10 p.m. The victim testifies that she is certain that the crime occurred at midnight. The accused has an airtight alibi for midnight. At 11:40 p.m. he was arrested on a drunk driving charge, and he was in police custody until 6 a.m. on June 16. On cross-examination, the lawyer does nothing to challenge the victim's recollection of the time of the attack. Also, as the trial unfolds, the lawyer does not introduce any evidence at her disposal that would help establish the time of the attack as 10 p.m. The lawyer calls as a witness a police officer who testifies that the accused was in fact in custody at midnight on the night in question. The accused does not testify and is acquitted.

Are the lawyer's actions proper?

(A) Yes, because her client is a criminal defendant and constitutional protections take precedence over ethical rules.

(B) Yes, because she did not present false evidence.

(C) No, because she knew that the victim's testimony was wrong and would mislead the jury as to a crucial component of the case.

(D) No, unless she notified the judge of the true facts outside the presence of the jury, and he instructed her to proceed.

Question 7

An attorney has a high-profile divorce law practice in the town in which he resides. Because of his heavy caseload, the attorney often appears before the four chancery judges of the county court. One of the chancery judges is getting married, and he sends a wedding invitation to the attorney. The attorney wishes to send the judge, as a wedding gift, an imported Italian machine that makes espresso and cappuccino coffee because he knows that the judge loves fine coffee. The coffee machine sells for $200 at the town's best cooking equipment store. The attorney sent the coffee machine to the judge, and the judge duly made a public report of the gift.

Was it proper for the attorney to send the coffee machine to the judge?

(A) Yes, because the judge would not be unduly influenced by a $200 gift.

(B) Yes, because the judge made a public report of the gift.

(C) No, because the gift was not a campaign contribution, and lawyers should not give other types of gifts to judges.

(D) No, because the value of the gift exceeded $150.

Question 8

A man walked into the law offices of a lawyer who, because she was not busy at the time, agreed to talk to the man right away. The man told the lawyer that he was concerned that he might be indicted soon. He explained the details of his predicament at length to the lawyer, but after he finished, the lawyer explained that she only handled civil matters and urged the man to consult with a friend who was a criminal lawyer. The man went on to retain the friend. A few days after her interview with the man, the lawyer read a news item announcing the man's indictment. It quoted the district attorney at some length. After reading the article, the lawyer became convinced that something the man had told her during their interview would probably exonerate him or, at the very least, lead to a reduction in the charges against him if the district attorney became aware of the information in her possession.

May the lawyer reveal the information to the district attorney?

(A) Yes, because the man did not retain the lawyer as his counsel.

(B) Yes, because the information will help the man.

(C) No, because the attorney learned the information during the course of an attorney-client relationship.

(D) No, unless the man consents to the disclosure.

Question 9

A lawyer practices in State A. State A's rules of legal ethics depart from the ABA Model Rules in one significant respect: State A has no "financial injury" exception to the lawyer's duty of confidentiality. Thus, when a State A lawyer learns in confidence that her client is about to use her legal services to inflict serious financial injury on someone, the lawyer may withdraw, but she must not reveal what she learned in confidence. The lawyer limits her practice to federal securities law, and she regularly appears before the Securities and Exchange Commission ("SEC"). One of her major clients is a company that makes and sells cotton textiles. The company's shares are traded on the New York Stock Exchange and in securities matters the company is regulated by the SEC. While working on an SEC registration statement for the company, the lawyer learned in confidence that three of the company's top executives were cooperating in a scheme to loot the company of millions of dollars. If their scheme continues, it could drive the company into insolvency. The lawyer alerted the chief legal officer of the company to the situation, but he did nothing. She then alerted the chief executive officer, who also did nothing. Finally, she alerted the six outside members of the board of directors, but they too failed to act. In disgust, the lawyer withdrew from the matter and vowed never again to represent the company.

Must the lawyer now tell the SEC about the scheme?

(A) Yes, the SEC's regulations under the Sarbanes-Oxley Act require her to alert the SEC if her other efforts have proven fruitless.

(B) No, the SEC's regulations give her discretion to either reveal or not reveal the matter to the SEC.

(C) Yes, because the shareholders could be seriously financially injured if the scheme continues.

(D) No, because State A's legal ethics rules do not allow her to reveal confidential information in this situation.

Question 10

A wife whose husband was hard-drinking and abusive went to see a lawyer about getting a divorce. However, because the wife did not work outside the home, she told the lawyer that she could not afford to pay a big legal fee. The lawyer was sure that the wife had adequate grounds for divorce in that her husband was adulterous, an alcoholic, and frequently beat her. Therefore, the lawyer told the wife that if she could put up the $200 filing fee, he would do all the work for 10% of whatever he was able to obtain in alimony and child support on her behalf. The wife was elated and immediately agreed to the arrangement, thanking the lawyer profusely. The lawyer left his office that night with a warm feeling that he had helped a fellow human being, secure in the knowledge that at least one person in the community would have something nice to say about lawyers.

Personal satisfaction aside, was the lawyer's conduct proper?

(A) Yes, because the fee is reasonable and is not excessive.

(B) Yes, because the lawyer is providing legal services to a person who might not otherwise be able to afford them.

(C) No, because a contingent fee arrangement is prohibited when the fee is based on the amount of alimony or a division of marital property.

(D) No, because the wife was indigent and the lawyer should have advanced her the filing fees.

Question 11

The driver of a car and his passenger were injured as the result of a collision with a bus. They believe the bus driver was entirely at fault, and they want to bring a negligence action against the bus company. They engage in an initial consultation with a local attorney. In the course of the consultation, the attorney realizes that the bus at issue belongs to a bus company that the attorney's firm is representing in an unrelated matter. The attorney interrupts the conversation, explains this potential conflict of interest, and obtains the written consent of both the driver and passenger to represent them.

Which of the following is not true?

(A) The attorney may not represent the car's driver and passenger because he has not obtained the written consent of the bus company.

(B) The attorney may not represent the car's driver and passenger because he did not inform the passenger that he may have a cause of action against the car driver.

(C) The attorney may represent the car's driver and passenger.

(D) The attorney may appear on the bus company's behalf at a court hearing that afternoon.

Question 12

A judge ruled in favor of a plaintiff in a civil action where the defendant was ordered to pay the plaintiff $50,000 in damages. The judge has since resigned from the bench. The defendant has refused to pay the $50,000, asserting that the verdict was obtained through improper means. The defendant asks the judge, now in private practice, if she will represent him.

Would the judge be subject to discipline if she represents the defendant?

(A) No, because the judge is no longer on the bench.

(B) No, because the judge was not a party to fraud when the original verdict was handed down.

(C) Yes, because the judge ruled on this case when she was a judge.

(D) Yes, because former judges may not engage in private practice.

ANSWERS TO MULTIPLE CHOICE QUESTIONS

Answer to Question 1

(C) If one lawyer within a firm has a conflict of interest and cannot take on a matter, no other lawyer in the firm may take on the matter either. [ABA Model Rule 1.10(a)] One situation that would create a concurrent conflict would be if there is a significant risk that the representation of a client will be materially limited by the lawyer's own interest or his responsibilities to another client, a former client, or a third person. [ABA Model Rule 1.7(a)(2)] The mayor would be prohibited from representing the development company in this matter because such representation would be materially limited by his responsibilities, as mayor, to the city. Thus, his law partner is also prohibited from such representation. Therefore, (A) and (B) are incorrect. (D) is also incorrect; it makes no difference whether the mayor has a direct role in the representation or shares any fees.

Answer to Question 2

(A) The attorney has no duty to represent the sales manager, so (A) is proper. (B) is improper because the attorney may only represent the sales manager if he does not insist on testifying falsely. [*See* ABA Model Rule 3.3(a)(3)] (C) is improper because it is a form of extortion. (D) is improper because the sales manager's confession to past perjury is protected by the duty of confidentiality. [*See* ABA Model Rule 1.6]

Answer to Question 3

(C) A judge should disqualify herself in a proceeding in which her impartiality might reasonably be questioned, including but not limited to instances where she served as lawyer in the matter in controversy. [CJC Rule 2.11(A)(6)(a)] The fact that these matters are routine or uncontested does not excuse her from this rule; thus (A) is incorrect. (B) is incorrect because avoiding delay does not allow a judge to ignore CJC Rule 2.11(A)(6)(a). (D) is incorrect because it is too broad.

Answer to Question 4

(B) Under ABA Model Rule 5.5(b), a lawyer must not aid a nonlawyer in the unauthorized practice of law. Under these facts, the attorney would improperly be assisting the pastor, who has not in fact been authorized to practice law despite his law school degree. (A) makes no sense; the pastor's potential remedy for the attorney's mistakes does not subject the attorney to discipline. (C) is incorrect because any duty a lawyer may have to educate the public does not justify a lawyer's assisting in the unauthorized practice of law. (D) is irrelevant.

Answer to Question 5

(A) This is the best answer here because nothing in this advertisement violates the ABA Model Rules. The fact that the ad is not misleading is important because neither the ABA Model Rules nor the First Amendment protects misleading or deceptive advertising. (B) is incorrect because fee splitting is a separate issue; it does not affect the propriety of the ad. (C) is incorrect because the attorney here is ***not*** soliciting business, and also because the traditional ban on all solicitation is no longer constitutional. (D) is incorrect in that the ad is ***not*** patently in bad taste, and even if it were, it would probably be protected by the First Amendment unless it was misleading or overreaching.

Answer to Question 6

(B) The lawyer's actions were proper because she did not offer false evidence, and she is under no duty to volunteer harmful facts. [*See* ABA Model Rule 3.3; comment 14 to ABA Model Rule 3.3] In fact, to do so would probably be a breach of ethics. (A) is incorrect because her actions were proper regardless of the constitutional protections afforded criminal defendants. (C) is incorrect because an attorney is under no obligation to volunteer harmful facts in an adversarial proceeding even if the jury will be misled by the testimony of a witness. It is up to the state to establish the time of the crime; if it cannot do so, it has not met its burden of proof. (D) is incorrect because the lawyer should not disclose the facts to anyone, not even the judge. These facts are information related to the case and cannot be disclosed or used to the client's disadvantage absent some recognized exception to the duty of confidentiality. None applies here. Had the lawyer presented a witness (other than the accused) who testified that the time was midnight when the lawyer knew it was 10 p.m., the lawyer would have had to rectify the false testimony. Here, however, the testimony came from the opponent, and the lawyer is under no obligation to rectify it.

Answer to Question 7

(B) ABA Model Rule 3.5(a) forbids a lawyer from seeking to influence a judge by means prohibited by law. CJC Rule 3.13(C)(3) permits a judge to accept a gift from someone who has come or is likely to come before the judge if the judge files a public report of the gift. (A) is wrong because there is no specific value that is tied to undue influence. (C) is wrong because campaign contributions are not the only types of gifts lawyers may make to judges. (D) is wrong because the value of the gift triggers only a reporting requirement. The gift is not improper as such.

Answer to Question 8

(D) An attorney may reveal or use confidential information if the client gives informed consent. [*See* ABA Model Rules 1.6, 1.18] (C) is incorrect because it does not take into account exceptions to the general rule of confidentiality. (A) is incorrect because the man consulted the lawyer in her capacity as an attorney, and it is irrelevant that he did not retain her. (B) is incorrect because the attorney may not reveal information, even if it will help the client, unless the client consents or the information falls into recognized exceptions to the confidentiality rule, which are not present here.

Answer to Question 9

(B) The SEC's regulations under the Sarbanes-Oxley Act ***permit***, but do not require, a securities lawyer to reveal a client's confidential information to the SEC when the lawyer reasonably thinks that doing so is necessary to prevent or rectify a securities act violation (or similar law violation) that is likely to cause substantial financial injury to the client or its shareholders. (A) and (C) are wrong because the regulation permits, but does not require, the lawyer to alert the SEC. (D) is wrong because the SEC regulations purport to preempt any inconsistent state ethics rules. [*See* 17 C.F.R. §§205.1, 205.6(c)] (It remains to be seen whether courts will uphold the SEC's effort to preempt the field and override inconsistent state ethics rules.)

Answer to Question 10

(C) ABA Model Rule 1.5(d)(1) subjects a lawyer to discipline if the fee in a domestic relations matter is contingent upon the securing of a divorce, the amount of alimony or support, or the amount of the property settlement. (A) is incorrect because the size of the fee is irrelevant because the

ABA Model Rules forbid a contingency fee in this situation no matter what the amount of the fee. Although (B) states a rationale behind contingency fees, this rationale will not support a contingency fee in this case. (D) is incorrect because a lawyer may, but is not required to, pay or advance costs to an indigent client.

Answer to Question 11

(C) The attorney may not represent both the passenger and the driver when there is a ***potential*** conflict of interest between them unless: (i) the attorney reasonably believes that he can represent both clients effectively; and (ii) the passenger and the driver give informed, written consent. The attorney must withdraw from the joint representation, however, if later discovery shows that the passenger has an actual claim against the driver. Here, there is no indication that the driver, the passenger, and the bus company all gave informed, written consent and thus (C) is not a true statement. [*See* ABA Model Rule 1.7] (A) is a true statement for the same reason. (B) is true because a lawyer must not represent a client if the representation of that client will be directly adverse to the representation of another client, unless both clients give informed, written consent. [*See* ABA Model Rule 1.7] (D) is true because the attorney already represents the bus company in the unrelated matter.

Answer to Question 12

(C) ABA Model Rule 1.12(a) provides that a lawyer must not represent anyone in connection with a matter in which the lawyer participated personally and substantially as a judge, unless all parties to the proceedings give informed, written consent. Thus, (C) is correct, and (A) and (B) are incorrect. (D) is incorrect because a judge may subsequently engage in private practice, except she may not participate in cases where she was personally and substantially involved.

APPROACH TO EXAMS

PROFESSIONAL RESPONSIBILITY

IN A NUTSHELL: Lawyers and judges are subject to various sources of ethical regulation. Most importantly, the American Bar Association has adopted the Rules of Professional Conduct ("RPC") and the Code of Judicial Conduct ("CJC"), which outline the rights and duties of lawyers and judges. Most states have rules that are patterned after the RPC and CJC. Lawyers and judges who violate these rules may be subject to discipline.

I. REGULATORY CONTROLS OVER ATTORNEYS AND UNAUTHORIZED PRACTICE OF LAW

A. Admission to Practice

1. Citizenship or residency requirements impermissible
2. Applicant must show good moral character
3. Lawyer cannot make false statements regarding applications

B. Disciplinary Process

1. General substantive standards
   - a. Violating the RPC or assisting another in doing so
   - b. Committing a criminal act that reflects adversely on lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects
   - c. Stating or implying an ability to improperly influence a government agency or official or to achieve results by means that violate the RPC or other law
   - d. Conduct involving dishonesty, fraud, deceit, or misrepresentation
   - e. Conduct prejudicial to the administration of justice
   - f. Knowingly assisting a judge or judicial officer in conduct that violates the CJC or other law
2. Common types of discipline: disbarment, suspension, and censure
3. Practice in multiple states
   - a. Lawyer is subject to the regulation of the state in which she is admitted, regardless of where her conduct occurs
   - b. Choice of law
     - 1) If conduct is related to the matter before the tribunal, tribunal will apply the local RPC
     - 2) For other conduct, tribunal will apply:
       - a) The RPC in state where conduct occurred, or
       - b) The rules of another state in which the predominant effect of the conduct occurred
         - (1) Safe harbor for lawyer who reasonably believed the predominant effect occurred elsewhere

C. Unauthorized Practice of Law

1. Nonlawyer generally may not:
   - a. Draft a real estate sales contract
   - b. Counsel on legal implication of tax laws

c. Draft wills and estate plans
2. Lawyer cannot practice in a state where she is not licensed, except:
a. Permissible temporary practice
1) Association with active local lawyer
2) Pro hac vice admission
3) Alternative dispute resolution arising out of home state practice
4) Other practice reasonably related to home state practice
b. Permissible permanent practice
1) Lawyer employed by only client (*e.g.*, in house counsel)
2) Practice in restricted branch of law (*e.g.*, federal agencies)
3. Lawyer cannot assist nonlawyer in unauthorized practice
4. Nonlawyer cannot own an interest in a law firm

II. ESTABLISHING A LEGAL PRACTICE

A. Forms of Practice
1. May not practice under a trade name or other misleading name
2. May not partner with or share legal fees with nonlawyers

B. Responsibilities of a Partner, Manager, or Supervisory Lawyer
1. Must make reasonable efforts to ensure that actions by lawyer and nonlawyer subordinates conform to the RPC
2. Supervisory lawyer responsible for subordinate's act if she:
a. Orders or ratifies act
b. Knowingly fails to take remedial action

C. Responsibilities of a Subordinate Lawyer
1. Must follow RPC even when acting at supervisor's direction
2. Can safely follow supervisor's directions regarding resolution of an arguable question of professional duty

D. Sale of a Law Practice
1. May reasonably restrict seller's private practice
2. Entire practice or practice area must be sold
3. Fees to clients must not increase as a result of the sale
4. Must give written notice to clients about the sale and provide opportunity to retain other counsel or collect their file

III. INFORMATION ABOUT LEGAL SERVICES

A. Advertising
1. Ads must not be false or misleading
a. Characteristics of misleading ads
1) Unfounded conclusions
2) Unjustified expectations of results
3) Unsubstantiated comparisons to other lawyers
2. Ad must contain the name and office address of at least one lawyer or firm responsible for its content

3. May not pay people for recommendations
   a. Exceptions
      1) Costs of permitted advertising
      2) Charges for legal service plan or nonprofit lawyer referral service
      3) Paying to purchase a law practice
      4) Reciprocal, nonexclusive referral agreements with another lawyer

B. Solicitation

1. In-person, telephonic, or real-time personal solicitation of strangers prohibited if motive is pecuniary gain
   a. Exceptions: close friends, relatives, lawyers, and former and current clients
2. May not solicit by any method if:
   a. The recipient has indicated a desire not to be contacted
   b. The solicitation involves coercion, duress, or harassment
3. Must not make unsolicited communication within 30 days of accident or disaster
4. Must not use an agent to do what lawyer is prohibited from doing

C. Identification of Practice and Specialization

1. May indicate that practice is limited to certain areas but may not identify as a specialist unless certified by an ABA-approved organization

IV. ENTERING INTO THE LAWYER-CLIENT RELATIONSHIP

A. What Creates a Lawyer-Client Relationship?

1. Lawyer agrees to provide legal services
2. Lawyer fails to make clear that he does not want to represent the person and knows or should know that the person is reasonably relying on him to provide the services
3. Lawyer is appointed by a tribunal

B. Basic Responsibility to Render Public Interest Legal Service

1. RPC suggest 50 hours of pro bono service per year
2. May participate in law reform activities even if the reform affects clients' interests

C. Client with Diminished Capacity

1. Must maintain normal lawyer-client relationship
2. May seek appointment of guardian

D. Emergency Legal Assistance to Nonclient with Diminished Capacity

1. May take legal action on behalf of the person
2. Must reasonably believe impaired person has no other representative available
3. Should not seek compensation

E. Avoiding Conflicts of Interest

1. Concurrent conflicts

a. When conflict exists
    1) Direct adversity between clients; or
    2) A significant risk that the representation will be materially limited by lawyer's personal interests or by his responsibilities to another client, former client, or third person
b. Lawyer may still accept representation if:
    1) Lawyer reasonably believes he can competently and diligently represent each client;
    2) Representation is not prohibited by law;
    3) Representation does not involve a claim by one client against the other; and
    4) Each client gives informed, written consent

2. Specific conflict situations (some waivable, some not)
    a. Business transaction with client or providing financial assistance to client
    b. Using information relating to representation to client's disadvantage
    c. Designating oneself as beneficiary or soliciting a substantial gift from client (unless client is related to lawyer)
    d. Accepting literary or media rights based on information relating to the representation or obtaining a proprietary interest in the cause of action
    e. Accepting compensation from a third person
    f. Accepting an aggregate settlement on behalf of multiple clients
    g. Agreeing to limit malpractice liability or settling such a claim
    h. Engaging in a sexual relationship with client, unless the relationship existed before the representation started
3. Conflicts regarding former client
    a. Must not represent someone whose interests are materially adverse to former client, absent former client's informed, written consent
    b. Must not use former client's confidential information to former client's disadvantage or reveal any information relating to the representation unless required by the RPC
4. Conflicts regarding prospective client
    a. If lawyer obtains confidential information that could substantially harm prospective client, he cannot represent a different person with interests materially adverse to prospective client in the same or a substantially related matter
    b. Overcoming a prospective client conflict
        1) Prospective client and current client both give informed, written consent; or
        2) Screening procedures (for imputed conflicts)
5. Lawyer may not represent client where she is likely to be a necessary witness, unless:
    a. Uncontested issue
    b. Testimony regarding the nature and value of legal services
    c. Withdrawal would result in substantial hardship
6. Conflicts in representing an organization
    a. Lawyer must act in best interest of organization
        1) Reporting violation of a legal obligation or violation of law by someone associated with the organization

a) Reporting inside organization—lawyer must report if the violation is likely to result in substantial injury to the organization
b) Reporting outside organization—lawyer may (but is not required to) report if necessary to prevent substantial injury to the organization and reporting within the organization has failed

7. Lawyer's conflict is imputed to other lawyers in the firm unless conflict is based on personal interest
   a. Can be overcome with screening procedures
8. Successive government and private employment
   a. Former government employee must not represent private client in connection with a matter in which he participated personally and substantially as a government employee
      1) Conflict not imputed to others at the firm if disqualified lawyer is screened, apportioned no part of the fee, and the government agency is provided with written notice
   b. Current government lawyer must not participate in a matter in which she personally and substantially participated in during private practice, unless government agency provides written consent
   c. Current government lawyer must not negotiate for private employment with a party in a matter in which she is participating personally and substantially (except for law clerks to judges or arbitrators)
9. Former judge, mediator, or other third party neutral in a matter must not later represent anyone in that matter unless all parties consent
10. Lawyer serving as a third party neutral must explain to unrepresented parties that he is not acting as their lawyer
11. Lawyer may provide short term limited legal services under a program sponsored by a nonprofit organization without any expectation of a continuing representation in the matter

F. Establishing Compensation for Legal Services

1. Duty to avoid fee misunderstandings
   a. Lawyer must communicate the scope of the representation, the basis or rate of the fee, and any expenses for which client will be responsible
   b. A written fee agreement is preferable but not required
2. Fees must be reasonable based on time, labor, and skill required
3. Contingent fee agreements must be in writing and are prohibited in:
   a. Criminal cases
   b. Domestic relations matters (unless the representation only involves collecting past-due balances on financial orders)
4. Referral fees are not allowed, but lawyers may divide fees with client's consent if the fee is proportionate to the work performed by each lawyer or if lawyers assume joint responsibility for the representation

V. THE LAWYER'S RESPONSIBILITIES TO THE CLIENT

A. Basic Obligations of Competence and Care

1. Competent representation requires legal knowledge, skill, thoroughness, and preparation
    a. Lawyer may gain competence with adequate research or preparation, or by consulting another lawyer

B. Duty to Preserve Confidentiality of Information

1. Attorney-client privilege—applies to testimony in court by lawyer or client regarding confidential communications
    a. Survives termination of relationship and client's death
    b. For organizational clients, privilege applies to communications with a high-ranking official and other employees who speak to lawyer at the direction of a superior about a subject within the scope of the employee's duties
2. Duty of confidentiality
    a. Duty continues to apply after relationship has terminated
    b. Exceptions—disclosure permissible when:
        1) Client consents
        2) Necessary to prevent certain death or substantial bodily harm
        3) Necessary to prevent or mitigate the results of a crime or fraud by client that is reasonably certain to cause substantial financial loss, if client has used or is using lawyer's services to commit the crime or fraud
        4) Required by law or necessary to obtain legal ethics advice
        5) Necessary to collect a fee or protect lawyer
        6) Necessary to detect and resolve conflicts of interest arising from lawyer's change of employment or change in the composition of a law firm, if attorney-client privilege is not violated and client is not prejudiced

C. Duty to Protect Client's Property

1. Must keep client's property in a separate trust account
    a. May deposit personal funds to pay bank service charges
    b. Must place advance fees in the account, to be withdrawn as fees are earned
2. Must notify client upon receipt of property in which client has an interest
3. Must maintain records of client account funds and other property
4. Must deliver property on client's request and provide an accounting
5. If lawyer possesses disputed property, the disputed portion must be kept separately until resolution of the dispute

VI. DUTIES AND BOUNDS OF REPRESENTATION

A. Duty as Adviser

1. Exercise independent judgment and render candid advice

B. Scope of Representation

1. Abide by client's decisions (*e.g.*, accepting settlement offers)
2. Act within bounds of the law

a. Must withdraw if client is using lawyer's services to commit a crime or fraud

C. Transactions with Third Persons

1. Must not communicate with person represented by counsel, unless:
   a. Lawyer has no actual knowledge of representation
   b. The communication is authorized by law
   c. Subject of the communication is outside the representation
2. May communicate with unrepresented person but must not state or imply that lawyer is disinterested
3. Must notify sender of any document or electronic information relating to representation that is inadvertently received

D. Conduct of Litigation

1. Must bring only meritorious claims and contentions
2. Must make reasonable efforts to expedite litigation

E. Candor Toward the Tribunal

1. Must not:
   a. Make false statements of fact or law
   b. Fail to correct false statements of fact or law
   c. Fail to disclose directly adverse controlling legal authority
   d. Knowingly offer false evidence
      1) Must take reasonable remedial measures if false evidence is offered

F. Fairness to Opposing Party and Counsel

1. Must not:
   a. Suppress evidence
   b. Advise or cause someone to hide or leave the jurisdiction in order to make that person unavailable as a witness
   c. Conceal or knowingly fail to disclose information lawyer is obligated to reveal
   d. Knowingly use perjured testimony or false evidence
   e. Participate in the creation or preservation of false evidence
   f. Knowingly engage in other conduct that is illegal or contrary to the RPC

G. Trial Publicity

1. Must not make extrajudicial statements likely to materially prejudice an adjudicative proceeding

VII. DECLINING AND TERMINATION OF THE ATTORNEY-CLIENT RELATIONSHIP

A. Declining Employment

1. Should not accept representation if it:
   a. Will harass or maliciously injure another
   b. Presents an unwarranted claim or defense

B. Mandatory Withdrawal
1. Continued employment will violate the RPC
2. Lawyer's physical or mental condition materially impairs ability to represent client
3. Client discharges lawyer

C. Permissive Withdrawal
1. No material adverse effect on client's interests
2. Client persists in a criminal or fraudulent course of action
3. Client used lawyer's services to perpetrate a crime or fraud
4. Lawyer considers client's course of action repugnant
5. Client fails to fulfill obligation to lawyer and has been reasonably warned that lawyer will withdraw unless it is fulfilled
6. Representation will impose unreasonable financial burden
7. Other good cause

D. Protecting Client's Interests on Termination
1. Examples include returning client's papers, allowing client time to secure other counsel, and refunding unearned fees

VIII. THE LAWYER'S RESPONSIBILITIES TO THE LEGAL PROFESSION

A. Lawyer's Conduct While Not in Practice
1. Bound by RPC even when acting privately

B. Political Contributions to Obtain Government Employment
1. "Pay to play" contributions prohibited

C. Judicial and Legal Officials
1. Must not make false or reckless statements about the qualifications or integrity of a judge, adjudicatory, or public legal officer

D. Special Role of Public Prosecutor
1. Must avoid bringing charges not supported by probable cause
2. Must make timely disclosure of exculpatory evidence to defense

E. Reporting Professional Misconduct
1. Must report lawyer who has violated the RPC if violation raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects

IX. JUDICIAL ETHICS

A. Integrity, Independence, and Impartiality
1. Judge must act in a manner that promotes the public's confidence in the judiciary, and must avoid impropriety and the appearance of impropriety
   a. This general standard applies on and off the bench
   b. Personal relationships must not interfere with conduct
   c. Must not misuse judicial prestige

1) Permitted actions
a) Recommendations or references based on personal knowledge
b) Participating in judicial selection
c) Testifying as character witness when summoned (must not volunteer)

d. Must not use, or be a member of, an organization that practices invidious discrimination
1) Exceptions: intimate, purely private organizations and organizations that preserve religious, ethnic, or cultural values of common interest to the members

e. Must not publicly manifest a knowing approval of invidious discrimination on any basis

B. Diligent, Impartial Performance

1. Must hear all matters assigned unless disqualified
2. Must be fair and impartial
3. Must require order and decorum in court
4. Must be patient and courteous and require the same of those under the judge's control
5. Must not engage in ex parte communications, except:
a. Expressly authorized by law
b. Effort to settle or mediate matter
c. Emergency or administrative matter
6. Must not initiate, permit, or consider communications from others made to the judge outside the presence of the parties' lawyers concerning a pending or impending matter, except:
a. Court personnel
b. Disinterested legal experts
c. Communications between trial and appellate courts
7. Must not independently investigate the facts in a case
8. Must dispose of judicial matters promptly, efficiently, and fairly
9. Prohibited comments about pending cases
a. Public comments that might reasonably be expected to affect the case's outcome or impair its fairness
b. Nonpublic comments that might substantially interfere with a fair trial
10. Must not commend or criticize jurors for their verdict (but may thank the jury)
11. Must not disclose nonpublic information acquired in a judicial capacity for nonjudicial purposes
12. Must perform judicial and administrative duties diligently and competently
13. Must make appointments impartially and based on merit
14. Misconduct by others
a. Other judges and lawyers
1) If judge receives information indicating a substantial likelihood that lawyer or judge has violated the RPC or CJC, judge must take "appropriate action"
2) If judge has actual knowledge of a violation, she must report the violating lawyer or judge to the relevant disciplinary authority

15. Must require court staff and others under judge's direction to act in accordance with the CJC

C. Disqualification

1. Whenever judge's impartiality might reasonably be questioned
   a. Should disclose any information that parties and lawyers might consider relevant, even if judge believes there is no basis for disqualification
2. Bias or personal knowledge of relevant evidentiary facts
3. Prior involvement in the matter
4. Sufficient economic interest in the matter
5. Relative involved in the case (related more closely than a cousin)
6. Party or party's lawyer made contributions to judge's campaign fund over a specified amount
7. Prior public statement of judicial commitment to an issue in the proceeding
8. All of the above grounds for disqualification may be remitted (waived) by the parties except personal bias or prejudice concerning a party

D. Extrajudicial Activities

1. May participate in nonjudicial activities that involve either legal or nonlegal subjects if consistent with CJC
2. Must not appear at a public hearing before, or otherwise consult with, an executive or legislative body or official, except on matters concerning the law, the legal system, or the administration of justice
3. Must not accept appointments to governmental committees or commissions unless they concern the law, the legal system, or the administration of justice
4. May participate in activities sponsored by law-related organizations and nonprofit organizations
5. May hold and manage personal or family investments
6. May not serve on the board or as an employee or adviser of a corporate entity
7. Should not accept gifts, bequests, favors, loans, or other things of value from anyone if doing so violates the law or compromises judge's independence, integrity, or impartiality
   a. Exceptions
      1) Items of little intrinsic value
      2) Prizes from random drawings open to nonjudges
      3) Gifts incident to the activities of a family member that incidentally benefit the judge
      4) Ordinary social hospitality
      5) Gifts from family and friends
   b. Gifts subject to reporting requirements
      1) Gifts incident to a public testimonial
      2) Invitation to a law-related function associated with judge's activities
      3) Gifts from a person who has or is likely to come before the judge
8. Judge may serve as an executor, guardian, etc., for family members only and in limited circumstances
9. A full-time judge may not act as a mediator, arbitrator, or private judge unless expressly authorized by law

10. A full-time judge must not practice law
11. A judge may be compensated for outside activities under certain circumstances but is subject to reporting requirements

E. Judges and Politics

1. General prohibitions on judges and judicial candidates
   a. Holding office in another political organization
   b. Publicly endorsing or opposing another candidate for public office
   c. Making speeches on behalf a political organization
   d. Financially supporting a political candidate
   e. Publicly identifying oneself as a candidate of a political organization
   f. Using court resources in a campaign for office
   g. Personally accepting or soliciting campaign contributions other than through a campaign committee
2. Judge must resign when she becomes a candidate for a nonjudicial elective office (but not an appointive office)
3. Judicial candidate must not make pledges, promises, or commitments with respect to issues likely to come before the court that are inconsistent with judicial impartiality
4. Special rules for candidates in public elections
   a. Permitted actions
      1) Establish a campaign committee
         a) Committee may publish literature and seek reasonable contributions and public support
      2) Speak on behalf of her candidacy
      3) Publicly endorse or oppose candidates for the same judicial office
      4) Seek, accept, or use endorsements from a person or organization other than a partisan political organization
      5) Contribute to a political organization or candidate for public office
      6) Buy tickets for and attend political gatherings
      7) Seek public support and reasonable contributions
   b. Must not personally solicit publicly stated support or campaign contributions

F. Application of the CJC

1. Special rules
   a. A retired judge subject to recall is allowed to serve as an arbitrator or mediator, and (except when acting as a judge) to serve as a fiduciary
   b. Continuing part-time judges, periodic part-time judges, and pro tempore part-time judges are exempt from many CJC provisions that restrict political and other activities

ESSAY EXAM QUESTIONS

INTRODUCTORY NOTE

The essay questions that follow have been selected to provide you with an opportunity to experience how the substantive law you have been reviewing may be tested in the hypothetical essay examination question context. These sample essay questions are a valuable self-diagnostic tool designed to enable you to enhance your issue-spotting ability and practice your exam writing skills.

It is suggested that you approach each question as though under actual examination conditions. The time allowed for each question is 45 minutes. You should spend 10-15 minutes spotting issues, underlining key facts and phrases, jotting notes in the margins, and outlining your answer. ***If*** you organize your thoughts well, about 30 minutes will be more than adequate for writing them down. Should you prefer to forgo the actual writing involved on these questions, be sure to give yourself no more time for issue-spotting than you would on the actual examination.

The BARBRI technique for writing a well-organized essay answer is to (i) spot the issues in a question and then (ii) analyze and discuss each issue using the "CIRAC" method:

C — State your ***conclusion*** first. (In other words, you must think through your answer ***before*** you start writing.)
I — State the ***issue*** involved.
R — Give the ***rule(s)*** of law involved.
A — ***Apply*** the rule(s) of law to the facts.
C — Finally, restate your ***conclusion***.

After completing (or outlining) your own analysis of each question, compare it with the BARBRI model answer provided herein. A passing answer does ***not*** have to match the model one, but it should cover most of the issues presented and the law discussed and should ***apply the law to the facts*** of the question. Use of the CIRAC method results in the best answer you can write.

EXAM QUESTION NO. 1

A third year law student went to interview for a job with Sam Stern, a local lawyer. The sign on the door read:

Sam Stern, Esq.
Attorney and Counselor at Law
Certified Divorce and Personal Injury Specialist
Never Settle for Second Best

Inside was a scene of chaos: telephones ringing, files stacked around randomly, and clients waiting. As the student sat in the waiting room, he could tell that the receptionist was discussing the scandalous details of one of the divorce cases in the office with a caller who had reached her on her personal cell phone. Finally lawyer Stern arrived. As he breezed by on the way to his inner office, the receptionist said, "Mrs. Barnes is holding for you on two. She said she hasn't been able to talk to you about her personal injury case for months." The lawyer paused, seemed to think about that for a second and said, "Take a number and tell her I'll get back to her this afternoon." The student watched as the receptionist wrote up a message and placed it on an old-fashioned spindle already overflowing with messages.

Apparently reminded that he had a law student waiting for an interview, Sam Stern burst back out of his office and said, "Come with me, I'm late for a deposition. We'll talk in the car." He paused and asked his receptionist, "Can I have a check on the office account so I can take this young man to lunch?" When told that the balance was too low, he responded, "There's plenty of money in the trust account, give me one of those checks—I'll pay that account back when the Jones fee comes in."

His receptionist paused, started to say something, but then handed him a check on his trust account. "One other thing before you leave: Judge Brown is holding on line one. He wants to appoint you to serve as guardian ad litem in a divorce case." As he went through the door, Mr. Stern yelled, "I'm not going to take any of those low-paying appointments anymore. Tell him I've got a conflict—I'll think of something before I see him again."

In the car on the way to the deposition, the student overheard the lawyer make two calls on his cell phone. The first call was to Linda Larue. It was clear from the lawyer's side of the conversation that the lawyer represented Linda's husband in a divorce action and he was urging her to sign a settlement agreement. He ended the call by saying, "Have your lawyer call me."

The second call was to his receptionist. He said, "Tell Mrs. Smith I have decided to take her divorce case, but she is hard to work with so I want at least $50 an hour more than my regular rate. No, on second thought, write an engagement letter and tell her my fee will be $400 an hour. I'll earn every penny of that."

The lawyer pulled into a parking place near the office where the deposition was to occur. He commented as he got his briefcase out of the car, "This is a partition case, and I don't know anything about partition cases. I am on the slow side of this case, and I am just trying to stall." When the deposition was over, the lawyer took the law student to lunch. The law student decided not to take the job.

Identify and discuss each violation of the ABA Model Rules of Professional Conduct.

EXAM QUESTION NO. 2

Lou Lawyer represents Wanda Wife in a post-divorce proceeding in which the sole issue is Wanda's attempt to receive increased child support from Hal Husband. Lou is representing Wanda under a contingent fee arrangement based on a percentage of the amount of increased child support Lou may be able to obtain in the proceeding. Lou has never appeared before the judge presiding over the matter and knows nothing about him.

Hal Husband is an attorney who is currently under investigation by the state disciplinary administrator based on a complaint from Candy Client, alleging that she and Hal had an affair during his representation of her.

Lou called Candy Client and stated to Candy that she was investigating the disciplinary complaint against Hal. Candy assumed Lou was from the disciplinary administrator's office and told Lou all of the details of her affair with Hal during the representation.

After a motion filed by Hal's lawyer, the judge ruled that neither the disciplinary investigation nor the alleged affair would have any relevance to the determination of child support and that no evidence of either would be allowed.

Lou, furious at the judge's ruling, directed her paralegal to prepare, sign, and file a motion to disqualify the judge in the child support proceeding. The motion alleged that the judge was a woman-hater who would do anything to protect deadbeat dads in domestic proceedings regardless of the law and, therefore, should be disqualified from hearing Wanda's child support matter. The motion also included graphic details of the allegations of Candy Client regarding the alleged affair with Hal Husband. Lou leaked a copy of the motion to the local newspaper, which published the contents of the motion.

As Hal's lawyer, you have learned all of the above facts.

Note: Your only assignment is to address possible ethics issues relating to Lou, not the issues in the underlying child support case or Hal's investigation.

You need not provide the citation to any rule, but must be able to discuss the content of each rule to which you refer in your answer.

(1) Do you have any obligations under the ABA Model Rules of Professional Conduct? If so, what are those obligations?

(2) Has Lou violated any rule or rules of the ABA Model Rules of Professional Conduct? If so, provide your analysis and conclusion for each such violation.

EXAM QUESTION NO. 3

For the past 15 years, Craig has represented Trevor, the chief executive officer and founder of Computer Chips, Inc. ("Computer Chips"), a large publicly traded computer company. Trevor also develops real property, and Craig currently represents Trevor in a lawsuit regarding Trevor's ownership of real property in Anytown, USA. The lawsuit is close to being settled and, once settled, Trevor will own the property on which he plans to build a 40-story high rise condominium.

Trevor has become frustrated with how the federal government is spending his "tax dollars." One day while Trevor is in Craig's office to review the settlement documents regarding the lawsuit, Trevor tells Craig that he intends to refuse to pay any more income taxes, because he believes that his taxes should not go to support foreign countries. Craig thinks Trevor's position is ridiculous and illegal, and he wants to avoid any appearance that he endorses Trevor's beliefs. Craig tells Trevor that he has decided to terminate their relationship. Without Craig, the settlement of the lawsuit will collapse and Trevor's high rise project will be delayed for years.

After Trevor leaves the office, Craig contacts Harry, who is general counsel at Computer Chips, and informs him of Trevor's current decision not to pay his income taxes. It is Craig's belief that Trevor must be stopped, as Trevor's actions will harm Computer Chips's stock, in which Craig has invested his life's savings. Craig also tells Harry that he has begun selling his stock in Computer Chips and that he believes it is his duty to tell the press about Trevor's actions and to report Trevor's potential crime to the United States Attorney.

Before becoming general counsel of Computer Chips 15 years ago, Harry represented Trevor in Trevor's real estate holdings. Harry knows that Trevor can be a difficult client and that Trevor previously did not pay portions of his income tax in similar protest. Harry decides to call the chairman of the board of Computer Chips and inform him of what Craig has divulged and of Trevor's past actions regarding the nonpayment of income taxes.

Have Craig and/or Harry violated any of the ABA Model Rules of Professional Conduct? Explain.

EXAM QUESTION NO. 4

(1) After three years as an assistant district attorney, you decide to pursue your dream and open your own law office. During your first month, you are contacted by a potential client who was involved in an automobile accident. The case presents difficult issues regarding liability and insurance coverage. Because of your inexperience in personal injury litigation, you contact a local lawyer experienced in personal injury litigation to handle the claim. You, your client, and the other lawyer enter into a written agreement which provides that (i) both lawyers will assume joint responsibility for the case, (ii) the lawyers will receive a 35% fee based on the outcome of the case, and (iii) the lawyers will share the fee.

Have your actions been appropriate under the ABA Model Rules of Professional Conduct? Explain why or why not.

(2) A few weeks later, a longtime family friend advises you that he will soon be retiring from his employment with a large insurance company. Although your friend has no legal education or training, he has spent the last 20 years as an adjuster in the personal injury claims department. Your friend is interested in part-time employment to avoid boredom, and you are excited about the opportunity to expand your practice to include personal injury litigation. You agree to hire your friend as a legal assistant (hereinafter referred to as your "legal assistant") and to pay him an undetermined fee based on the amount of the fee generated by each personal injury case.

Your legal assistant meets with prospective personal injury clients and gathers all relevant information to support their claims. Since your criminal practice requires your frequent attendance in court, you provide your legal assistant with blank, pre-signed letters of representation on your letterhead which authorize your legal assistant to deal with the insurance companies in an effort to settle the case and pre-signed letterhead stationery otherwise blank for his use in communicating with insurance adjusters and clients regarding settlement negotiations. Many clients and insurance adjusters mistakenly believe your legal assistant is a lawyer.

After only two months on the job, your legal assistant advises you that he has successfully settled your first personal injury case for $100,000. Your client is extremely satisfied and promises to refer your firm to her friends. Your share of the settlement is $35,000. You pay your legal assistant $7,000 for a job well done.

Have your actions been appropriate under the ABA Model Rules of Professional Conduct? Explain why or why not.

ANSWERS TO ESSAY EXAM QUESTIONS

ANSWER TO EXAM QUESTION NO. 1

Sam Stern ("Stern") committed several violations of the ABA Model Rules of Professional Conduct ("RPC").

Specialization: Stern violated the RPC by having a sign on the door to his firm that reads, "Certified Divorce and Personal Injury Specialist." A lawyer may not state or imply that he is certified as a specialist in a particular field of law, unless: (i) the lawyer has been certified as a specialist by an organization approved by an appropriate state authority or accredited by the ABA; and (ii) the name of the certifying organization is clearly identified in the communication. Here, Stern stated that he was a certified specialist in certain areas of the law, but failed to provide any supporting details. Thus, he violated the RPC.

Supervising nonlawyers: Stern may have violated the RPC by allowing his receptionist to blatantly discuss scandalous details of one of the firm's divorce cases with persons outside of the firm. A lawyer having direct supervisory authority over a nonlawyer must make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer. Here, Stern was not yet present when the receptionist was speaking on her cell phone about the divorce case. However, if Stern knew the receptionist had a habit of discussing confidential information about his clients and did nothing to remedy the situation, he has violated the RPC.

Diligence: Stern violated the RPC by failing to provide his clients with timely responses to their messages. A lawyer must act with reasonable diligence and promptness in representing a client, and his workload must be controlled so that each matter can be handled competently. Here, Stern's client, Mrs. Barnes, has apparently not received a response from Stern in months. This does not seem to be an isolated incident, considering Stern also has an overflowing spindle of messages. Thus, Stern has violated his duty of diligent representation.

Trust account funds: Stern violated the RPC by improperly taking money out of his firm's client trust account. Client funds must be kept in a separate trust account maintained in the state where the lawyer's office is situated, or elsewhere with the consent of the client or third person. A lawyer must deposit into the trust account legal fees and expenses that were paid in advance, to be withdrawn only as fees are earned or expenses are incurred. Here, Stern took money out of the trust account in order to take the law student out to lunch, and this clearly violates the RPC.

Accepting appointments: Stern violated the RPC by attempting to avoid an appointment by Judge Brown. A lawyer must not seek to avoid appointment by a tribunal to represent a person except for good cause, such as: (i) representing the client is likely to result in a violation of the RPC or other law; (ii) representing the client is likely to result in an unreasonable financial burden on the lawyer; or (iii) the client or the cause is so repugnant to the lawyer as to be likely to impair the lawyer-client relationship or the lawyer's ability to represent the client. Here, Stern's motivation for not wanting to serve as a guardian ad litem in a divorce case was that it was "low paying." This does not constitute good cause, and therefore Stern has violated the RPC.

Dishonesty: In the incident above, Stern instructed his employee to lie to Judge Brown about having a conflict that would not allow him to serve as a guardian ad litem. The RPC generally prohibit conduct involving dishonesty, fraud, deceit, or misrepresentation. Thus, Stern's dishonesty may have violated the RPC.

Speaking with a represented person: Stern violated the RPC by speaking with his client's spouse regarding their divorce case. In the representation of a client, a lawyer must not communicate about the subject of the representation with a person he knows to be represented by counsel in the matter unless the other counsel has granted permission or he is otherwise authorized by law or court order to make such direct communication. Here, Stern knew that his client's wife, Linda Larue, was represented by

counsel because he said, "Have your lawyer call me." Further, he was speaking with her about settling the case, which related to the representation. Thus, Stern's conversation with Linda violated the RPC.

Reasonableness of fee: Stern may have violated the RPC by charging Mrs. Smith an unreasonable fee. A lawyer must not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses. Among the factors to be considered in determining the reasonableness of a fee are: (i) the time and labor required; (ii) the novelty and difficulty of the questions involved; (iii) the skill required to perform the legal service; (iv) the likelihood, if apparent to the client, that acceptance of the particular employment will preclude other employment; (v) the customary fee within the locality for similar work; (vi) the amount involved and the result obtained; (vii) the nature and length of the relationship between the parties; (viii) the experience, ability, and reputation of the attorney; (ix) the time limitations imposed by the client or the circumstances; and (x) whether the fee is fixed or contingent.

Here, Stern is planning to charge Mrs. Smith $400 an hour, which appears to be more than $50 higher than his normal hourly rate. There is no indication that the reason for this change is that the legal work will be particularly complex, or that it will require more skill or preclude other employment. Rather, Stern has increased the fee because he finds this client "hard to work with." Despite his assertion that he will "earn every penny" of the fee, this reasoning is suspect and indicates that the fee may be unreasonable. Thus, Stern's fee increase may violate the RPC.

Competence and duty to expedite litigation: Stern violated the RPC by failing to provide competent representation in the partition case. Once having entered into a lawyer-client relationship, a lawyer must act competently and with care in handling legal matters for that client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation. A lawyer also has a duty to expedite litigation consistent with the interests of his client.

Here, Stern has been involved in the partition case for some time, as evidenced by his statement, "I am on the slow side of this case and I am just trying to stall." He has not spent his time educating himself on this area of the law, since he still doesn't "know anything about partition cases." Thus, he has violated the RPC by failing to provide competent representation. Furthermore, depending on the interests of Stern's clients, Stern also may have violated his duty to expedite litigation by intentionally delaying the case.

ANSWER TO EXAM QUESTION NO. 2

(1) I have the ethical obligation to report Lou's misconduct under the ABA Model Rules of Professional Conduct ("RPC"). Under the RPC, an attorney who knows that another lawyer has committed a violation of the RPC that raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects, must inform the appropriate professional authority. Disclosure is not required if it requires the attorney to divulge confidential client information, but such is not the case under these facts. Accordingly, if I am of the opinion that Lou's conduct violated the RPC in any way, I am ethically obligated to report the misconduct.

(2) Lou has committed several violations of the RPC. The first ethical issue concerns the contingent fee arrangement based on a percentage of the amount of increased child support Lou may be able to obtain in the proceeding. Under the RPC, a contingent fee is a fee that is dependent on the successful resolution of a client's case and payable from the judgment proceeds. Contingent fee arrangements are permissible in some situations. However, a lawyer must not enter into a fee arrangement for a domestic relationship matter in which the fee collected is contingent upon the amount of alimony or support. Therefore, Lou's contingent fee arrangement violated the RPC.

The second ethical issue concerns Lou's communications with Candy Client. In representing a client, a lawyer must not use means that have no substantial purpose other than to embarrass, delay, or burden a third person; or use methods of obtaining evidence that violate the legal rights of such a

person. Furthermore, in representing a client, a lawyer must not knowingly make a false statement of material fact or law—or fail to disclose a material fact when disclosure is necessary to prevent misunderstanding—to a third person. In this case, Lou called Candy Client and stated to her that she was investigating the disciplinary complaint against Hal. Lou should have disclosed to Candy Client that she was not with the disciplinary administrator's office to clarify any misunderstanding, and her failure to do so violated the RPC.

The third issue concerns the unauthorized practice of law. The RPC prohibits a lawyer from practicing law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction or assisting another person in doing so. Here, when Lou authorized her paralegal to prepare, sign, and file a motion to disqualify the judge in the child support proceeding, the paralegal committed the unauthorized practice of law. Because Lou sanctioned that unauthorized practice, she violated the RPC.

The fourth issue concerns the allegations made in the motion to disqualify the judge in the child support hearing. A lawyer must not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge. Here, even though Lou knew "nothing" about the judge, he alleged that the judge was a woman-hater who would do anything to protect deadbeat dads in domestic proceedings regardless of the law. While it is appropriate to file a motion to disqualify a judge for a legitimate reason, to state such outlandish, baseless allegations is a violation of the RPC.

The fifth issue concerns the details of the alleged affair between Candy Client and Hal Husband that Lou included in the motion to disqualify the judge in the child support hearing. A lawyer must not knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists. Here, the judge ruled that neither the disciplinary investigation nor the alleged affair would have any relevance to the determination of child support and that no evidence of either would be allowed. Accordingly, when Lou included graphic details of the allegations of Candy Client regarding the alleged affair with Hal Husband in the motion, she violated the RPC.

The sixth issue concerns the leaked copy of the motion that included graphic details of the alleged affair between Candy Client and Hal Husband. A lawyer who is participating or has participated in the investigation or litigation of a matter must not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter. Here, Lou leaked a copy of the motion to the local newspaper, which published the contents of the motion. Because of the graphic details of the alleged affair, Lou must have known of the prejudicial effect this would have had on the proceeding and, therefore, violated the RPC.

ANSWER TO EXAM QUESTION NO. 3

Craig: Craig has violated the ABA Model Rules of Professional Conduct ("RPC") by withdrawing from representing Trevor, disclosing confidential information to Harry, and using confidential information to the disadvantage of Trevor.

Withdrawal: Craig violated the RPC when he terminated his relationship with Trevor. At issue is whether a lawyer may withdraw from representing a client. A lawyer may withdraw from representing a client if withdrawal can be accomplished without material adverse effect on the interests of the client. Here, Craig represents Trevor in a lawsuit that is close to being settled. The suit will not settle without Craig, thereby delaying Trevor's project for years. The multiyear delay will certainly have a material adverse effect on Trevor. Therefore, Craig violated the RPC by terminating his relationship with Trevor.

Craig may argue that he had to withdraw to avoid assisting Trevor with his crime of not paying

taxes. The RPC provide that a lawyer must not counsel or assist a client in conduct that the lawyer knows is criminal or fraudulent. However, a lawyer may discuss a proposed course of conduct with a client and explain to the client that the conduct would be unlawful. Here, Trevor is not asking Craig to assist him in any way. He is merely telling Craig what he intends to do in the future. It is proper for Craig to discuss this with Trevor and explain to him that it is illegal to not pay taxes. Continuing to represent Trevor in the condominium lawsuit would not have assisted Trevor in his intended crime.

Finally, Craig may argue that he was justified in withdrawing from the representation of Trevor because of his moral opposition to Trevor's plan. A lawyer may withdraw if the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement. Here, Craig thought Trevor's plan was "ridiculous and illegal." However, it does not seem that Trevor "insisted" on not paying taxes in the future—in fact, he made only one statement to that effect, and there is no indication that Craig tried to talk him out of it. Given that the lawsuit was about to settle, it is unlikely that Craig's indignation was proper justification for withdrawing at the last minute.

Disclosing information about Trevor: Craig violated the RPC when he disclosed confidential information about Trevor to Harry. At issue is whether a lawyer may discuss confidential information he received from a client with a third party. A lawyer must not reveal information relating to the representation of a client. A lawyer may reveal such information, however, to prevent the client from committing a crime or fraud that is reasonably certain to cause substantial financial loss to a person if the client is using or has used the lawyer's services to commit the crime or fraud. Here, Trevor told Craig that he is no longer going to pay his taxes. This information was told to Craig in confidence, but Craig then told Harry. Trevor does intend to commit tax fraud, which Craig believes could cause substantial financial harm to the stockholders of Chips, Inc. However, there is no indication that Trevor has used, or is using, Craig's services in his plan. Thus, the RPC were violated when Craig gave Harry this information.

Using information to Trevor's disadvantage: Craig violated the RPC when he used confidential client information to his client's disadvantage by unloading the stock he owned in Computer Chips, Inc. A lawyer must not use information relating to the representation of a client to the client's disadvantage unless the client consents. Here, Craig has invested his life's savings in Computer Chips, Inc.'s, stock, and he has begun to sell that stock based on Trevor's decision to not pay his income taxes. As chief executive officer and founder of the company, Trevor will undoubtedly be harmed by the sale of Craig's stock, and it was unethical for Craig to use the information to his personal advantage.

Harry: Harry violated the RPC when he divulged Trevor's past tax crime and when he failed to report Craig's professional misconduct, but not when he divulged Trevor's intent to commit the same crime in the future.

Divulging information about Trevor: Harry violated the RPC by divulging Trevor's past tax crime, but not by divulging his intent to stop paying taxes again. At issue is whether a lawyer may divulge information about a client.

A lawyer must not reveal information relating to the representation of a client, regardless of when or where it was acquired. This duty of confidentiality continues to apply even after the lawyer-client relationship has terminated. Here, Harry represented Trevor in his real estate holdings over 15 years ago. Harry knows that Trevor previously has not paid his taxes. Even though Harry no longer represents Trevor, the duty of confidentiality still applies. Thus, Harry violated the RPC when he divulged Trevor's past tax crime.

It was proper for Harry to inform the board of Trevor's intended crime. If a lawyer for an organization knows that an officer of the organization intends to act in a matter related to the representation that is likely to result in substantial injury to the organization, the lawyer must proceed as is reasonably necessary in the best interest of the organization. Here, Trevor is the CEO of Computer Chips and intends to stop paying all income taxes. If Trevor does not pay income taxes related to Computer

Chips, it will likely result in substantial injury to the organization. As general counsel for Computer Chips, it is proper for Harry to inform the board of Trevor's intended course of conduct.

Failure to report Craig's violations of the RPC: Harry probably violated the RPC when he failed to report Craig for divulging confidential client information to him. At issue is whether a lawyer must report professional misconduct. A lawyer having knowledge that another lawyer has committed a violation of the RPC that raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects, must inform the appropriate professional authority. Here, Harry knows that Craig has told him confidential information about a client. This is a violation of the RPC. It probably raises a substantial question as to Craig's fitness as a lawyer, because lawyer-client confidentiality is a cornerstone of the legal profession. Therefore, Harry should have reported this misconduct to the appropriate professional authority. His failure to do so constitutes a violation of the RPC.

ANSWER TO EXAM QUESTION NO. 4

(1) My actions in accepting representation of the client and sharing the fee with the other lawyer have been appropriate under the ABA Model Rules of Professional Conduct ("RPC"); however, my contingent fee agreement with the client was not in compliance with the RPC.

Competent representation: The RPC provide that a lawyer must act competently in handling a legal matter for a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation. In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, a relevant factor is whether it is feasible to refer the matter to, or associate with, a lawyer of established competence in the particular field. Here, I did not have experience with personal injury litigation, so I associated with a lawyer who was so experienced. Thus, by associating with an experienced personal injury lawyer, I can provide competent representation to the client, and I have not violated the RPC by accepting representation of the client.

Fee sharing: I also have not violated the RPC by entering into the written agreement with my client and the other lawyer to share the fee with the other lawyer. The RPC provide that a lawyer may ethically divide fees with an outside lawyer if the client consents and the division is in proportion to the services performed by each lawyer, or by written agreement with the client, each lawyer assumes joint responsibility for the representation. Here, there was a written agreement; the agreement provided that both lawyers will assume joint responsibility for the representation; and the client entered into the agreement, thereby consenting to it. Consequently, I did not violate the RPC by agreeing with my client and the other lawyer to share the fee with the other lawyer.

Contingent fee: I did not violate the RPC by charging my client a 35% contingent fee in the matter; but I did violate the RPC by not disclosing in the written agreement the information required by the RPC. Generally, a contingent fee is permitted in a civil case if the fee is reasonable. In determining the reasonableness of a fee, courts will consider such factors as the time and labor required for the representation, the experience of the attorney, and the amount involved and the result obtained. Moreover, a contingent fee agreement must be in a writing that states (i) the percentage(s) that accrue to the lawyer(s) in the event of settlement, trial, or appeal; (ii) litigation and other expenses to be deducted from the recovery; and (iii) whether such expenses are to be deducted before or after the contingent fee is calculated.

Here, the contingent fee agreement was in a writing. The matter involves a personal injury claim, which is a civil matter, so my charging a contingent fee was not prohibited by the RPC. Also, the 35% fee based on the outcome of the case was not unreasonable under the circumstances. I associated an experienced attorney to handle the matter, the case could very well go to trial and involve a great deal of time and labor, and the case also could be worth a lot of money. However, the written agreement did not specifically indicate the percentage(s) that would accrue to the lawyers in the event of settlement, trial, or appeal; it only stated that the lawyers will receive a 35% fee based on the outcome of the case.

Furthermore, the agreement did not discuss the litigation and other expenses to be deducted from the recovery and how they would be deducted. Therefore, the written agreement that I entered into with the client to charge the contingent fee was not proper under the RPC.

(2) My actions in sharing my fees with my legal assistant and in allowing him to handle the personal injury cases have not been appropriate under the RPC.

Fee sharing: The RPC provide that a lawyer must not share legal fees with a nonlawyer. Here, I have agreed to pay my legal assistant an undetermined fee based on the fee that I receive for each personal injury case. In fact, after my legal assistant settled my first personal injury case for $100,000, of which my fee was $35,000, I paid my legal assistant $7,000. Thus, I agreed to (and did in fact) share my legal fees with my nonlawyer legal assistant and thereby violated the RPC.

Unauthorized practice of law: My actions in allowing my legal assistant to deal with my clients and the insurance companies and their claims adjusters also violate the RPC. The RPC provide that a lawyer must not assist a person who is not a member of the bar in the performance of an activity that constitutes the unauthorized practice of law. The practice of law includes the settling of cases for clients. In this case, I have provided my legal assistant with blank, pre-signed letters and stationery that authorize him to deal with my clients and the insurance companies (and their claims adjusters) regarding settlement of my clients' personal injury cases. In fact, some of my clients and the insurance adjusters actually believe that my legal assistant is a lawyer. Thus, I have provided my ***nonlawyer*** legal assistant with the authority to settle cases for my clients, which activity constitutes the practice of law. Consequently, I have assisted my legal assistant in the unauthorized practice of law and have thereby violated the RPC.

Supervising nonlawyers: In addition, by providing my legal assistant with control over my personal injury cases, I have failed to properly supervise him. The RPC provide that a lawyer with direct supervisory authority over a nonlawyer must ensure that the nonlawyer's conduct is compatible with the professional obligations of the lawyer. Here, I have cloaked my legal assistant with the necessary authority to practice law although he is not a lawyer and his practice of law is prohibited by the RPC. Therefore, I have not ensured that my legal assistant's conduct is compatible with my professional obligations under the RPC and so have violated the RPC.