Ethics of Estate Administration

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Preparation and Review

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The Sources of the Rules of Ethical Conduct

A. Attorneys
   2. The Restatement (Third) Law Governing Lawyers - The duties of lawyers are also addressed in the Restatement (Third), Law Governing Lawyers published by the American Law Institute.

B. CPAs
   1. The AICPA Code of Professional Conduct - Expresses the profession’s recognition of its responsibilities to the public, to clients, and to colleagues. They guide members in the performance of their professional responsibilities and express the basic tenets of ethical and professional conduct. The Principles call for an unswerving commitment to honorable behavior, even at the sacrifice of personal advantage.
   2. The Statements on Standards for Tax Services (SSTS) - SSTS 1 applies to all tax services provided by a member of the AICPA in all jurisdictions in which he or she practices. It prescribes the standard for CPAs to apply in determining whether a tax position taken by a client is supported by law. Unless a tax reporting position satisfies the standards of SSTS 1, a CPA may not sign the return as tax preparer.
   3. The Statement on Standards for Consulting Services No. 1. - CPAs performing consulting services are subject to the specific guidance set forth in the AICPA’s Statement on Standards for Consulting Services No. 1. SSCS 1 was issued by the AICPA Management Consulting Services Executive Committee, the senior technical committee designated by the Council to establish standards for consulting services under the Compliance with Standards Rule of the Code of Professional Conduct.

C. Both Attorneys and CPAs

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1 California is the only state that has not adopted the ABA Model Rules, while Puerto Rico is the only inhabited U.S. Territory that has not adopted them but instead has its own Código de Ética Profesional.
The Internal Revenue Code (I.R.C.) and regulations. The I.R.C. and regulations apply to all CPAs in the preparation of federal income tax returns under Sec. 6694(a), and Sec. 6694(b).

2. Treasury Circular 230 – Regulations Governing Practice before the Internal Revenue Service - Circular 230 provides rules of conduct and an enforcement scheme for practice before the IRS.

II. The Estate Planning Process

A. The First Meeting

B. Getting the Complete Information

1. Complete Financial Information
2. Complete Family Information
3. The Existing Estate Planning Documents
4. Additional Information

C. Determine the Plan of Disposition

1. Probate v. Non Probate Assets
2. The Proper Disposition of the Probate Assets
3. Disposing of Non-Probate Assets
4. Other Issues to Address
   a. Who Should be Appointed as Fiduciaries Under the Will?
   b. Who Should be Appointed Your Agent under Financial and Medical Powers of Attorney?
   c. Does the Client Want a Living Will?

D. Draft the Documents

E. Follow Up.

III. The Estate Administration Process

A. Before Probate

B. The Probate Process

C. For Immediate Attention after Probate.

D. Steps to Organize Administration.

E. Inventory Probate and Non-Probate Assets

K. Final Steps—Termination.
UNIT TWO - THE MODEL RULES
OF PROFESSIONAL CONDUCT FOR ATTORNEYS

RULE 1.1 – COMPETENCE

1. The Rule

“A lawyer shall provide competent representation to a client. Competent representation requires the (i) legal knowledge, (ii) skill, (iii) thoroughness and (iv) preparation reasonably necessary for the representation.”

2. The Comment

[1] Determining whether a lawyer employs the requisite knowledge and skill in a particular matter

a. In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include:

(1) The relative complexity and specialized nature of the matter,
(2) The lawyer's general experience,
(3) The lawyer's training and experience in the field in question,
(4) The preparation and study the lawyer is able to give the matter and
(5) Whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question.

b. In many instances, the required proficiency is that of a general practitioner.

c. Expertise in a particular field of law may be required in some circumstances.

[2] Is Special Training or Prior Experience Required?

a. A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar.

b. A newly admitted lawyer can be as competent as a practitioner with long experience.

c. Some important legal skills, such as the analysis of precedent, the evaluation of evidence and legal drafting, are required in all legal problems.

d. Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge.

e. A lawyer can provide adequate representation in a wholly novel field through necessary study.
f. Competent representation can also be provided through the association of a lawyer of established competence in the field in question.

[3] Emergencies

a. In an emergency a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required where referral to or consultation or association with another lawyer would be impractical.

b. Even in an emergency, however, assistance should be limited to that reasonably necessary in the circumstances, for ill-considered action under emergency conditions can jeopardize the client's interest.

[4] Reasonable Preparation

a. A lawyer may accept representation where the requisite level of competence can be achieved by reasonable preparation.

b. This applies as well to a lawyer who is appointed as counsel for an unrepresented person. See also Rule 6.2.

[5] Thoroughness and Preparation

a. Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners.

b. It also includes adequate preparation.

c. The required attention and preparation are 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.

d. An agreement between the lawyer and the client regarding the scope of the representation may limit the matters for which the lawyer is responsible. See Rule 1.2(c).

[6] Retaining or Contracting With Other Lawyers

a. Before a lawyer retains or contracts with other lawyers outside the lawyer's own firm to provide or assist in the provision of legal services to a client, the lawyer should ordinarily obtain informed consent from the client and must reasonably believe that the other lawyers' services will contribute to the competent and ethical representation of the client.

See also Rules 1.2 (allocation of authority), 1.4 (communication with client), 1.5(e) (fee sharing), 1.6 (confidentiality), and 5.5(a) (unauthorized practice of law).
b. The reasonableness of the decision to retain or contract with other lawyers outside the lawyer’s own firm will depend upon (i) the circumstances, including the education, experience and reputation of the non-firm lawyers; (ii) the nature of the services assigned to the non-firm lawyers; and (iii) the legal protections, professional conduct rules, and ethical environments of the jurisdictions in which the services will be performed, particularly relating to confidential information.

[7] Lawyers from More than One Firm

a. When lawyers from more than one law firm are providing legal services to the client on a particular matter, the lawyers ordinarily should consult with each other and the client about the scope of their respective representations and the allocation of responsibility among them. See Rule 1.2.

b. When making allocations of responsibility in a matter pending before a tribunal, lawyers and parties may have additional obligations that are a matter of law beyond the scope of these Rules. The same valued client has asked you to prepare a dynasty trust with a situs in Delaware, an irrevocable trust to hold life insurance including split-dollar policies owned by a number of companies, an offshore trust to which he can transfer assets to avoid creditors, and a "GRUT" and "GRAT." He tells you he knows nothing about any of these techniques, but an insurance salesman and a close friend represented by a huge law firm have recommended them to him. You have never drafted such documents—not that you will admit that to your client—and you have never seen them. Do you agree to prepare the documents?

[8] Maintaining Competence

a. To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice.

b. This should include the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.”

RULE 1.2 DEFINING THE SCOPE OF REPRESENTATION AND ALLOCATION OF AUTHORITY BETWEEN CLIENT & LAWYER

1. The Rule

“(a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client’s decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued.

A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation.

A lawyer shall abide by a client's decision whether to settle a matter.
In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

(b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.

(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

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

2. The Comment

[1] Allocation of Authority between Client and Lawyer

a. Paragraph (a) confers upon the client the ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations.

b. The decisions specified in paragraph (a), such as whether to settle a civil matter, must also be made by the client.

c. See Rule 1.4(a)(1) for the lawyer's duty to communicate with the client about such decisions.2

d. With respect to the means by which the client's objectives are to be pursued, the lawyer shall consult with the client as required by Rule 1.4(a)(2)3 and may take such action as is impliedly authorized to carry out the representation.

[2] On occasion, however, a lawyer and a client may disagree about the means to be used to accomplish the client's objectives.

a. Clients normally defer to the special knowledge and skill of their lawyer with respect to the means to be used to accomplish their objectives, particularly with respect to technical, legal and tactical matters.

b. Conversely, lawyers usually defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected.

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2 (a) A lawyer shall: (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;

3 (a) A lawyer shall: (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;
c. Because of the varied nature of the matters about which a lawyer and client might disagree and because the actions in question may implicate the interests of a tribunal or other persons, this Rule does not prescribe how such disagreements are to be resolved.

d. Other law, however, may be applicable and should be consulted by the lawyer.

e. The lawyer should also consult with the client and seek a mutually acceptable resolution of the disagreement.

f. If such efforts are unavailing and the lawyer has a fundamental disagreement with the client, the lawyer may withdraw from the representation. See Rule 1.16(b)(4). Conversely, the client may resolve the disagreement by discharging the lawyer. See Rule 1.16(a)(3).

[3] Actions without Consultation

a. At the outset of a representation, the client may authorize the lawyer to take specific action on the client's behalf without further consultation.

b. Absent a material change in circumstances and subject to Rule 1.4, a lawyer may rely on such an advance authorization. The client may, however, revoke such authority at any time.

[4] Diminished Capacity

In a case in which the client appears to be suffering diminished capacity, the lawyer's duty to abide by the client's decisions is to be guided by reference to Rule 1.14.

[5] Independence from Client's Views or Activities

Legal representation should not be denied to people who are unable to afford legal services, or whose cause is controversial or the subject of popular disapproval. By the same token, representing a client does not constitute approval of the client's views or activities.

[6] Agreements Limiting Scope of Representation

a. The scope of services to be provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer's services are made available to the client.

b. When a lawyer has been retained by an insurer to represent an insured, for example, the representation may be limited to matters related to the insurance coverage.

c. A limited representation may be appropriate because the client has limited objectives for the representation.

d. In addition, the terms upon which representation is undertaken may exclude specific means that might otherwise be used to accomplish the client's objectives.
e. Such limitations may exclude actions that the client thinks are too costly or that the lawyer regards as repugnant or imprudent.

[7] Reasonable Limitations
a. Although this Rule affords the lawyer and client substantial latitude to limit the representation, the limitation must be reasonable under the circumstances.

b. If, for example, a client's objective is limited to securing general information about the law the client needs in order to handle a common and typically uncomplicated legal problem, the lawyer and client may agree that the lawyer's services will be limited to a brief telephone consultation.

c. Such a limitation, however, would not be reasonable if the time allotted was not sufficient to yield advice upon which the client could rely.

d. Although an agreement for a limited representation does not exempt a lawyer from the duty to provide competent representation, the limitation is a factor to be considered when determining the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. See Rule 1.1.

[8] Compliance with the Rules

All agreements concerning a lawyer's representation of a client must accord with the Rules of Professional Conduct and other law. See, e.g., Rules 1.1, 1.8 and 5.6.

[9] Criminal, Fraudulent and Prohibited Transactions
a. Paragraph (d) prohibits a lawyer from knowingly counseling or assisting a client to commit a crime or fraud.

b. This prohibition, however, does not preclude the lawyer from giving an honest opinion about the actual consequences that appear likely to result from a client's conduct.

c. Nor does the fact that a client uses advice in a course of action that is criminal or fraudulent of itself make a lawyer a party to the course of action.

d. There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity.

[10] What if the Course of Action Has Already Begun?

a. When the client's course of action has already begun and is continuing, the lawyer's responsibility is especially delicate.

b. The lawyer is required to avoid assisting the client, for example, by drafting or delivering documents that the lawyer knows are fraudulent or by suggesting how the wrongdoing might be concealed.
c. A lawyer may not continue assisting a client in conduct that the lawyer originally supposed was legally proper but then discovers is criminal or fraudulent. The lawyer must, therefore, withdraw from the representation of the client in the matter. See Rule 1.16(a).

d. In some cases, withdrawal alone might be insufficient. It may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm any opinion, document, affirmation or the like. See Rule 4.1.


Where the client is a fiduciary, the lawyer may be charged with special obligations in dealings with a beneficiary.

[12] Application of Paragraph (d)

a. Paragraph (d) applies whether or not the defrauded party is a party to the transaction.

b. Hence, a lawyer must not participate in a transaction to effectuate criminal or fraudulent avoidance of tax liability.

c. Paragraph (d) does not preclude undertaking a criminal defense incident to a general retainer for legal services to a lawful enterprise.

d. The last clause of paragraph (d) recognizes that determining the validity or interpretation of a statute or regulation may require a course of action involving disobedience of the statute or regulation or of the interpretation placed upon it by governmental authorities.

[13] Assistance Not Permitted by the Rules of Professional Conduct or Other Law

If a lawyer comes to know or reasonably should know that a client expects assistance not permitted by the Rules of Professional Conduct or other law or if the lawyer intends to act contrary to the client's instructions, the lawyer must consult with the client regarding the limitations on the lawyer's conduct. See Rule 1.4(a)(5)."

RULE 1.3 - DILIGENCE AND PROMPTNESS

1. The Rule

A lawyer shall act with reasonable diligence and promptness in representing a client.

2. The Comment

[1] A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf. A lawyer is not bound, however, to press for every advantage that might be realized for a client. For example, a lawyer may have authority to exercise professional discretion in determining the means by which a matter should be pursued. See Rule 1.2. The
lawyer’s duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect.

[2] A lawyer's work load must be controlled so that each matter can be handled competently.

[3] Perhaps no professional shortcoming is more widely resented than procrastination. A client's interests often can be adversely affected by the passage of time or the change of conditions; in extreme instances, as when a lawyer overlooks a statute of limitations, the client's legal position may be destroyed. Even when the client's interests are not affected in substance, however, unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness. A lawyer's duty to act with reasonable promptness, however, does not preclude the lawyer from agreeing to a reasonable request for a postponement that will not prejudice the lawyer's client.

[4] Unless the relationship is terminated as provided in Rule 1.16, a lawyer should carry through to conclusion all matters undertaken for a client. If a lawyer's employment is limited to a specific matter, the relationship terminates when the matter has been resolved. If a lawyer has served a client over a substantial period in a variety of matters, the client sometimes may assume that the lawyer will continue to serve on a continuing basis unless the lawyer gives notice of withdrawal. Doubt about whether a client-lawyer relationship still exists should be clarified by the lawyer, preferably in writing, so that the client will not mistakenly suppose the lawyer is looking after the client's affairs when the lawyer has ceased to do so. For example, if a lawyer has handled a judicial or administrative proceeding that produced a result adverse to the client and the lawyer and the client have not agreed that the lawyer will handle the matter on appeal, the lawyer must consult with the client about the possibility of appeal before relinquishing responsibility for the matter. See Rule 1.4(a)(2). Whether the lawyer is obligated to prosecute the appeal for the client depends on the scope of the representation the lawyer has agreed to provide to the client. See Rule 1.2.

[5] To prevent neglect of client matters in the event of a sole practitioner's death or disability, the duty of diligence may require that each sole practitioner prepare a plan, in conformity with applicable rules, that designates another competent lawyer to review client files, notify each client of the lawyer's death or disability, and determine whether there is a need for immediate protective action. Cf. Rule 28 of the American Bar Association Model Rules for Lawyer Disciplinary Enforcement (providing for court appointment of a lawyer to inventory files and take other protective action in absence of a plan providing for another lawyer to protect the interests of the clients of a deceased or disabled lawyer).”

3. The Duty Due Diligence

a. Even when the client's interests are not affected in substance, unreasonable delay in the preparation of estate planning documents can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness.4

b. The failure to file a timely tax return or refund claim may result in disciplinary action against a lawyer.5

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4 In, People v. James,120 a lawyer who had been censured on two prior occasions was disbarred for failing, for eight months, to prepare a will for an anguished elderly client.
c. Circular 230 §10.22 requires persons admitted to practice before the IRS to exercise due diligence in: (1) preparing, approving, and filing returns and other documents; (2) determining the correctness of representations they make to the Department of the Treasury; and (3) determining the correctness of representations made by their clients regarding any matter before the IRS.

d. Under Rule 1.4, the duty cannot be waived by the client.

e. This is true even when the client's refuses to pay the lawyer's fees.

f. In these situations, the attorney may withdraw from representation only after taking reasonable steps to protect her client's interests. 6

4. Special Rule for Sole Practitioners

Comment 5 to the Rule provides that the duty of diligence may require that a sole practitioner prepare a plan to prevent neglect of client matters in the event of a sole practitioner's death or disability, that designates another competent lawyer to review client files, notify each client of the lawyer's death or disability, and determine whether there is a need for immediate protective action.

**RULE 1.4 - COMMUNICATION**

1. The Rule

(a) A lawyer shall:

(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;

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

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

(4) promptly comply with reasonable requests for information; and

(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

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

2. The Comment

5 In re Lawrence Robertson, 612 A.2d 1236 (D.C. App. 1992) (lawyer suspended for 90 days for failure, for several years, to file income tax returns for client); In re Frank T. D’Onofrio, 618 N.Y.S.2d 829 (1994) (New York lawyer censured for several violations, including failure to file estate inventory and New York state estate tax return within time required). The same lawyer was later suspended for two years for other violations. In re Frank T. D’Onofrio, 672 N.Y.S.2d 889 (1998).

6 Rule 1.16(b)(5) & (d). DR 2-110(A)(2) & (C)(1)(f).
[1] **Reasonable Communication**

Reasonable communication between the lawyer and the client is necessary for the client effectively to

[2] **Decisions in re: Representation be Made by the Client**

a. If these Rules require that a particular decision about the representation be made by the client, paragraph (a)(1) requires that the lawyer *promptly consult with and secure the client's consent* prior to taking action unless prior discussions with the client have resolved what action the client wants the lawyer to take.

b. *For example, a lawyer who receives from opposing counsel an offer of settlement in a civil controversy or a proffered plea bargain in a criminal case must promptly inform the client of its substance unless the client has previously indicated that the proposal will be acceptable or unacceptable or has*

[3] **Reasonable Consultation**

a. Paragraph (a)(2) requires the lawyer to reasonably consult with the client about the means to be used to accomplish the client's objectives.

   (1) In some situations — depending on both the importance of the action under consideration and the feasibility of consulting with the client — this duty will require consultation *prior to taking action*.

   (2) In other circumstances, such as during a trial when an immediate decision must be made, *the exigency of the situation may require the lawyer to act without prior consultation*.

b. In such cases the lawyer must nonetheless act reasonably to inform the client of actions the lawyer has taken on the client's behalf.

c. Additionally, paragraph (a)(3) requires that the lawyer keep the client reasonably informed about the status of the matter, such as significant developments affecting the timing or the substance of the representation.

[4] **Regular Communication**

a. A lawyer's regular communication with clients will minimize the occasions on which a client will need to request information concerning the representation.

b. When a client makes a reasonable request for information, however, paragraph (a)(4) requires prompt compliance with the request, or if a prompt response is not feasible, that the lawyer, or a member of the lawyer's staff, acknowledge receipt of the request and advise the client when a response may be expected.

c. A lawyer should promptly respond to or acknowledge client communications.

[5] **Explaining Matters**
a. The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so.

b. Adequacy of communication depends in part on the kind of advice or assistance that is involved.

(1) For example, when there is time to explain a proposal made in a negotiation, the lawyer should review all important provisions with the client before proceeding to an agreement. In litigation a lawyer should explain the general strategy and prospects of success and ordinarily should consult the client on tactics that are likely to result in significant expense or to injure or coerce others.

(2) On the other hand, a lawyer ordinarily will not be expected to describe trial or negotiation strategy in detail.

(3) The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests, and the client's overall requirements as to the character of representation.

(4) In certain circumstances, such as when a lawyer asks a client to consent to a representation affected by a conflict of interest, the client must give informed consent, as defined in Rule 1.0(e).

[6] Children and Clients with Diminished Capacity

a. Ordinarily, the information to be provided is that appropriate for a client who is a comprehending and responsible adult.

b. However, fully informing the client according to this standard may be impracticable, for example, where the client is a child or suffers from diminished capacity. See Rule 1.14.

c. When the client is an organization or group, it is often impossible or inappropriate to inform every one of its members about its legal affairs; ordinarily, the lawyer should address communications to the appropriate officials of the organization. See Rule 1.13.

d. Where many routine matters are involved, a system of limited or occasional reporting may be arranged with the client.

[7] Withholding Information

a. In some circumstances, a lawyer may be justified in delaying transmission of information when the client would be likely to react imprudently to an immediate communication.

b. Thus, a lawyer might withhold a psychiatric diagnosis of a client when the examining psychiatrist indicates that disclosure would harm the client.
c. A lawyer may not withhold information to serve the lawyer's own interest or convenience or the interests or convenience of another person.

d. Rules or court orders governing litigation may provide that information supplied to a lawyer may not be disclosed to the client. Rule 3.4(c) directs compliance with such rules or orders.”

RULE 1.6 - CONFIDENTIALITY OF INFORMATION

1. The Rule

“(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm;

(2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;

(3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

(4) to secure legal advice about the lawyer's compliance with these Rules;

(5) 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;

(6) to comply with other law or a court order; or

(7) to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.”

2. The Comment

[1] The Rule Governs Disclosure by the Lawyer
a. This Rule governs the disclosure by a lawyer of information relating to the representation of a client during the lawyer’s representation of the client.

b. Other Relevant Rules –

(1) See Rule 1.18 for the lawyer’s duties with respect to information provided to the lawyer by a prospective client;

(2) Rule 1.9(c)(2) for the lawyer’s duty not to reveal information relating to the lawyer’s prior representation of a former client, and

(3) Rules 1.8(b) and 1.9(c)(1) for the lawyer’s duties with respect to the use of such information to the disadvantage of clients and former clients.


a. A fundamental principle in the client-lawyer relationship is that, in the absence of the client’s informed consent, the lawyer must not reveal information relating to the representation. See Rule 1.0(e) for the definition of informed consent.

b. This contributes to the trust that is the hallmark of the client-lawyer relationship.

   (1) The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter.

   (2) The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct.

   (3) Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct.

   (4) Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld.

[3] The Principle is Given Legal Effect

a. The principle of client-lawyer confidentiality is given effect by related bodies of law: the attorney-client privilege, the work product doctrine and the rule of confidentiality established in professional ethics.

b. The attorney-client privilege⁷ and work product doctrine⁸ apply in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client.

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⁷“A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client.”

⁸The work product consists of tangible material or its intangible equivalent in unwritten or oral form, other than underlying facts, prepared by a lawyer for litigation then in progress or in reasonable anticipation of future
c. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law.

(1) The confidentiality rule, for example, applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source.

(2) A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law. See also Scope.


a. Paragraph (a) prohibits a lawyer from revealing information relating to the representation of a client.

b. This prohibition also applies to disclosures by a lawyer that do not in themselves reveal protected information but could reasonably lead to the discovery of such information by a third person.

c. A lawyer's use of a hypothetical to discuss issues relating to the representation is permissible so long as there is no reasonable likelihood that the listener will be able to ascertain the identity of the client or the situation involved.


a. Except to the extent that the client's instructions or special circumstances limit that authority, a lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation.

b. In some situations, for example, a lawyer may be impliedly authorized to admit a fact that cannot properly be disputed or to make a disclosure that facilitates a satisfactory conclusion to a matter.

c. Lawyers in a firm may, in the course of the firm's practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers.

[6] Disclosure Adverse to Client

a. Although the public interest is usually best served by a strict rule requiring lawyers to preserve the confidentiality of information relating to the representation of their clients, the confidentiality rule is subject to limited exceptions.

Litigation. Opinion work product consists of the opinions or mental impressions of a lawyer; all other work product is ordinary work product. Except for material which by applicable law is not so protected, work product is immune from discovery or other compelled disclosure to the extent stated in §§ 88 (ordinary work product) and 89 (opinion work product) when the immunity is invoked as described in § 90.
b. Paragraph (b)(1) recognizes the overriding value of life and physical integrity and permits disclosure reasonably necessary to prevent reasonably certain death or substantial bodily harm.

   (1) Such harm is reasonably certain to occur if it will be suffered imminently or if there is a present and substantial threat that a person will suffer such harm at a later date if the lawyer fails to take action necessary to eliminate the threat.

   (2) Thus, a lawyer who knows that a client has accidentally discharged toxic waste into a town's water supply may reveal this information to the authorities if there is a present and substantial risk that a person who drinks the water will contract a life-threatening or debilitating disease and the lawyer's disclosure is necessary to eliminate the threat or reduce the number of victims.

[7] Limited Exception
a. Paragraph (b)(2) is a limited exception to the rule of confidentiality that permits the lawyer to reveal information to the extent necessary to enable affected persons or appropriate authorities to prevent the client from committing a crime or fraud, as defined in Rule 1.0(d), that is reasonably certain to result in substantial injury to the financial or property interests of another and in furtherance of which the client has used or is using the lawyer's services.

b. Such a serious abuse of the client-lawyer relationship by the client forfeits the protection of this Rule.

   (1) The client can, of course, prevent such disclosure by refraining from the wrongful conduct.

   (2) Although paragraph (b)(2) does not require the lawyer to reveal the client's misconduct, the lawyer may not counsel or assist the client in conduct the lawyer knows is criminal or fraudulent. See Rule 1.2(d).

   (3) See also Rule 1.16 with respect to the lawyer's obligation or right to withdraw from the representation of the client in such circumstances, and Rule 1.13(c), which permits the lawyer, where the client is an organization, to reveal information relating to the representation in limited circumstances.

[8] After Consummation of the Crime
a. Paragraph (b)(3) addresses the situation in which the lawyer does not learn of the client's crime or fraud until after it has been consummated.

   (1) Although the client no longer has the option of preventing disclosure by refraining from the wrongful conduct, there will be situations in which the loss suffered by the affected person can be prevented, rectified or mitigated.

   (2) In such situations, the lawyer may disclose information relating to the representation to the extent necessary to enable the affected persons to prevent or mitigate reasonably certain losses or to attempt to recoup their losses.
Paragraph (b)(3) does not apply when a person who has committed a crime or fraud thereafter employs a lawyer for representation concerning that offense.

[9] Personal Responsibility to Comply with the Rules

a. A lawyer’s confidentiality obligations do not preclude a lawyer from securing confidential legal advice about the lawyer’s personal responsibility to comply with these Rules.

b. In most situations, disclosing information to secure such advice will be impliedly authorized for the lawyer to carry out the representation.

c. Even when the disclosure is not impliedly authorized, paragraph (b)(4) permits such disclosure because of the importance of a lawyer’s compliance with the Rules of Professional Conduct.

[10] Defense of Misconduct Charges

a. Where a legal claim or disciplinary charge alleges complicity of the lawyer in a client’s conduct or other misconduct of the lawyer involving representation of the client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense.

b. The same is true with respect to a claim involving the conduct or representation of a former client.

c. Such a charge can arise in a civil, criminal, disciplinary or other proceeding and can be based on a wrong allegedly committed by the lawyer against the client or on a wrong alleged by a third person, for example, a person claiming to have been defrauded by the lawyer and client acting together.

d. The lawyer’s right to respond arises when an assertion of such complicity has been made.

e. Paragraph (b)(5) does not require the lawyer to await the commencement of an action or proceeding that charges such complicity, so that the defense may be established by responding directly to a third party who has made such an assertion.

f. The right to defend also applies, of course, where a proceeding has been commenced.


a. A lawyer entitled to a fee is permitted by paragraph (b)(5) to prove the services rendered in an action to collect it.

b. This aspect of the rule expresses the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary.

[12] Disclosure to Other Lawyers

a. Other law may require that a lawyer disclose information about a client. Whether such a law supersedes Rule 1.6 is a question of law beyond the scope of these Rules.
b. When disclosure of information relating to the representation appears to be required by other law, the lawyer must discuss the matter with the client to the extent required by Rule 1.4.

c. If, however, the other law supersedes this Rule and requires disclosure, paragraph (b)(6) permits the lawyer to make such disclosures as are necessary to comply with the law.

[13] Detection of Conflicts of Interest

a. Paragraph (b)(7) recognizes that lawyers in different firms may need to disclose limited information to each other to detect and resolve conflicts of interest, such as when a lawyer is considering an association with another firm, two or more firms are considering a merger, or a lawyer is considering the purchase of a law practice. See Rule 1.17, Comment [7].

b. Under these circumstances, lawyers and law firms are permitted to disclose limited information, but only once substantive discussions regarding the new relationship have occurred.

c. Any such disclosure should ordinarily include no more than the identity of the persons and entities involved in a matter, a brief summary of the general issues involved, and information about whether the matter has terminated.

(1) Even this limited information, however, should be disclosed only to the extent reasonably necessary to detect and resolve conflicts of interest that might arise from the possible new relationship.

(2) Moreover, the disclosure of any information is prohibited if it would compromise the attorney-client privilege or otherwise prejudice the client (e.g., the fact that a corporate client is seeking advice on a corporate takeover that has not been publicly announced; that a person has consulted a lawyer about the possibility of divorce before the person’s intentions are known to the person’s spouse; or that a person has consulted a lawyer about a criminal investigation that has not led to a public charge).

(3) Under those circumstances, paragraph (a) prohibits disclosure unless the client or former client gives informed consent. A lawyer’s fiduciary duty to the lawyer’s firm may also govern a lawyer’s conduct when exploring an association with another firm and is beyond the scope of these Rules.

[14] Detection or Resolution of Conflicts

a. Any information disclosed pursuant to paragraph (b)(7) may be used or further disclosed only to the extent necessary to detect and resolve conflicts of interest.

b. Paragraph (b)(7) does not restrict the use of information acquired by means independent of any disclosure pursuant to paragraph (b)(7).

c. Paragraph (b)(7) also does not affect the disclosure of information within a law firm when the disclosure is otherwise authorized, see Comment [5], such as when a lawyer in a firm discloses information to another lawyer in the same firm to detect and resolve conflicts of interest that could arise in connection with undertaking a new representation.
[15] Information Relating to the Representation of a Client by a Court or by Another Tribunal or Governmental Entity

a. A lawyer may be ordered to reveal information relating to the representation of a client by a court or by another tribunal or governmental entity claiming authority pursuant to other law to compel the disclosure.

b. Absent informed consent of the client to do otherwise, the lawyer should assert on behalf of the client all non-frivolous claims that the order is not authorized by other law or that the information sought is protected against disclosure by the attorney-client privilege or other applicable law.

c. In the event of an adverse ruling, the lawyer must consult with the client about the possibility of appeal to the extent required by Rule 1.4. Unless review is sought, however, paragraph (b)(6) permits the lawyer to comply with the court's order.

[16] Extent of Disclosure

a. Paragraph (b) permits disclosure only to the extent the lawyer reasonably believes the disclosure is necessary to accomplish one of the purposes specified.

b. Where practicable, the lawyer should first seek to persuade the client to take suitable action to obviate the need for disclosure. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to accomplish the purpose.

c. If the disclosure will be made in connection with a judicial proceeding, the disclosure should be made in a manner that limits access to the information to the tribunal or other persons having a need to know it and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.

[17] Disclosure Specified in Paragraphs (b)(1) through (b)(6)

a. Paragraph (b) permits but does not require the disclosure of information relating to a client's representation to accomplish the purposes specified in paragraphs (b)(1) through (b)(6).

b. In exercising the discretion conferred by this Rule, the lawyer may consider such factors as the nature of the lawyer's relationship with the client and with those who might be injured by the client, the lawyer's own involvement in the transaction and factors that may extenuate the conduct in question.

c. A lawyer's decision not to disclose as permitted by paragraph (b) does not violate this Rule.

d. Disclosure may be required, however, by other Rules. Some Rules require disclosure only if such disclosure would be permitted by paragraph (b). See Rules 1.2(d), 4.1(b), 8.1 and 8.3. Rule 3.3, on the other hand, requires disclosure in some circumstances regardless of whether such disclosure is permitted by this Rule. See Rule 3.3(c).

[18] Acting Competently to Preserve Confidentiality
a. Paragraph (c) requires a lawyer to act competently to safeguard information relating to the representation of a client against unauthorized access by third parties and against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer’s supervision. See Rules 1.1, 5.1 and 5.3.

b. The unauthorized access to, or the inadvertent or unauthorized disclosure of, information relating to the representation of a client does not constitute a violation of paragraph (c) if the lawyer has made reasonable efforts to prevent the access or disclosure.

c. Factors to be considered in determining the reasonableness of the lawyer’s efforts include, but are not limited to, the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer’s ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use).

d. A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to forgo security measures that would otherwise be required by this Rule.

e. Whether a lawyer may be required to take additional steps to safeguard a client’s information in order to comply with other law, such as state and federal laws that govern data privacy or that impose notification requirements upon the loss of, or unauthorized access to, electronic information, is beyond the scope of these Rules.

f. For a lawyer’s duties when sharing information with nonlawyers outside the lawyer’s own firm, see Rule 5.3, Comments [3]-[4].

[19] Transmission of Information

a. When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients.

b. This duty, however, does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions.

c. Factors to be considered in determining the reasonableness of the lawyer’s expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement.

d. A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to the use of a means of communication that would otherwise be prohibited by this Rule.
e. Whether a lawyer may be required to take additional steps in order to comply with other law, such as state and federal laws that govern data privacy, is beyond the scope of these Rules.

[20] Former Client

The duty of confidentiality continues after the client-lawyer relationship has terminated. See Rule 1.9(c)(2). See Rule 1.9(c)(1) for the prohibition against using such information to the disadvantage of the former client.

RULE 1.5 – FEES

1. The Rule

(a) A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee include the following:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) whether the fee is fixed or contingent.

(b) The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated to the client.

(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. A contingent fee agreement shall be in a writing signed by the client and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal; litigation and other expenses to be deducted from the recovery; and whether such expenses are to
be deducted before or after the contingent fee is calculated. The agreement must clearly notify the client of any expenses for which the client will be liable whether or not the client is the prevailing party. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

(d) A lawyer shall not enter into an arrangement for, charge, or collect:

(1) any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony or support, or property settlement in lieu thereof; or

(2) a contingent fee for representing a defendant in a criminal case.

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

(1) the division is in proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the representation;

(2) the client agrees to the arrangement, including the share each lawyer will receive, and the agreement is confirmed in writing; and

(3) the total fee is reasonable.

2. The Comment

[1] Reasonableness of Fee and Expenses

a. Paragraph (a) requires that lawyers charge fees that are reasonable under the circumstances.

b. The factors specified in (1) through (8) are not exclusive. Nor will each factor be relevant in each instance.

c. Paragraph (a) also requires that expenses for which the client will be charged must be reasonable.

d. A lawyer may seek reimbursement for the cost of services performed in-house, such as copying, or for other expenses incurred in-house, such as telephone charges, either by charging a reasonable amount to which the client has agreed in advance or by charging an amount that reasonably reflects the cost incurred by the lawyer.

[2] Basis or Rate of Fee

a. When the lawyer has regularly represented a client, they ordinarily will have evolved an understanding concerning the basis or rate of the fee and the expenses for which the client will be responsible.
b. In a new client-lawyer relationship, however, an understanding as to fees and expenses must be promptly established.

c. Generally, it is desirable to furnish the client with at least a simple memorandum or copy of the lawyer’s customary fee arrangements that states the general nature of the legal services to be provided, the basis, rate or total amount of the fee and whether and to what extent the client will be responsible for any costs, expenses or disbursements in the course of the representation.

d. A written statement concerning the terms of the engagement reduces the possibility of misunderstanding.

[3] Contingent Fees

a. Contingent fees, like any other fees, are subject to the reasonableness standard of paragraph (a) of this Rule.

b. In determining whether a particular contingent fee is reasonable, or whether it is reasonable to charge any form of contingent fee, a lawyer must consider the factors that are relevant under the circumstances.

c. Applicable law may impose limitations on contingent fees, such as a ceiling on the percentage allowable, or may require a lawyer to offer clients an alternative basis for the fee.

d. Applicable law also may apply to situations other than a contingent fee, for example, government regulations regarding fees in certain tax matters.

[4] Terms of Payment

a. A lawyer may require advance payment of a fee, but is obliged to return any unearned portion. See Rule 1.16(d).

b. A lawyer may accept property in payment for services, such as an ownership interest in an enterprise, providing this does not involve acquisition of a proprietary interest in the cause of action or subject matter of the litigation contrary to Rule 1.8(i).

c. However, a fee paid in property instead of money may be subject to the requirements of Rule 1.8(a) because such fees often have the essential qualities of a business transaction with the client.

[5] Fee Structure to Induce the Lawyer to Curtail Services or Perform Services in a Way Contrary to the Client's Interest

a. An agreement may not be made whose terms might induce the lawyer improperly to curtail services for the client or perform them in a way contrary to the client's interest.
b. For example, a lawyer should not enter into an agreement whereby services are to be provided only up to a stated amount when it is foreseeable that more extensive services probably will be required, unless the situation is adequately explained to the client.

c. Otherwise, the client might have to bargain for further assistance in the midst of a proceeding or transaction.

d. However, it is proper to define the extent of services in light of the client's ability to pay.

e. A lawyer should not exploit a fee arrangement based primarily on hourly charges by using wasteful procedures.

[6] Prohibited Contingent Fees

a. Paragraph (d) prohibits a lawyer from charging a contingent fee in a domestic relations matter when payment is contingent upon the securing of a divorce or upon the amount of alimony or support or property settlement to be obtained.

b. This provision does not preclude a contract for a contingent fee for legal representation in connection with the recovery of post-judgment balances due under support, alimony or other financial orders because such contracts do not implicate the same policy concerns.

[7] Division of Fee

a. A division of fee is a single billing to a client covering the fee of two or more lawyers who are not in the same firm.

b. A division of fee facilitates association of more than one lawyer in a matter in which neither alone could serve the client as well, and most often is used when the fee is contingent and the division is between a referring lawyer and a trial specialist.

c. Paragraph (e) permits the lawyers to divide a fee either on the basis of the proportion of services they render or if each lawyer assumes responsibility for the representation as a whole. In addition, the client must agree to the arrangement, including the share that each lawyer is to receive, and the agreement must be confirmed in writing.

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

e. Joint responsibility for the representation entails financial and ethical responsibility for the representation as if the lawyers were associated in a partnership. A lawyer should only refer a matter to a lawyer whom the referring lawyer reasonably believes is competent to handle the matter. See Rule 1.1.

[8] Future Work
Paragraph (e) does not prohibit or regulate division of fees to be received in the future for work done when lawyers were previously associated in a law firm.

**Disputes over Fees**

a. If a procedure has been established for resolution of fee disputes, such as an arbitration or mediation procedure established by the bar, the lawyer must comply with the procedure when it is mandatory, and, even when it is voluntary, the lawyer should conscientiously consider submitting to it.

b. Law may prescribe a procedure for determining a lawyer's fee, for example, in representation of an executor or administrator, a class or a person entitled to a reasonable fee as part of the measure of damages.

c. The lawyer entitled to such a fee and a lawyer representing another party concerned with the fee should comply with the prescribed procedure.

**RULE 1.7 - CONFLICTS OF INTEREST: CURRENT CLIENTS**

1. **The Rule**

   (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

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

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

   (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

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

   (2) the representation is not prohibited by law;

   (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

   (4) each affected client gives informed consent, confirmed in writing.

2. **The Comment**

   [1] **General Principles**

   a. Loyalty and independent judgment are essential elements in the lawyer's relationship to a client.
b. Concurrent conflicts of interest can arise from the lawyer's responsibilities to another client, a former client or a third person or from the lawyer's own interests. For specific Rules regarding certain concurrent conflicts of interest, see Rule 1.8.

c. For former client conflicts of interest, see Rule 1.9. For conflicts of interest involving prospective clients, see Rule 1.18. For definitions of "informed consent" and "confirmed in writing," see Rule 1.0(e) and (b).

[2] Resolution of Conflicts of Interest

a. Resolution of a conflict of interest problem under this Rule requires the lawyer to:
   
   (1) Clearly identify the client or clients;

   (2) Determine whether a conflict of interest exists;

   (3) Decide whether the representation may be undertaken despite the existence of a conflict, i.e., whether the conflict is consentable; and

   (4) If so, consult with the clients affected under paragraph (a) and obtain their informed consent, confirmed in writing.

b. The clients affected under paragraph (a) include both of the clients referred to in paragraph (a)(1) and the one or more clients whose representation might be materially limited under paragraph (a)(2).

[3] Conflicts Existing Before the Representation Begins

a. A conflict of interest may exist before representation is undertaken, in which event the representation must be declined, unless the lawyer obtains the informed consent of each client under the conditions of paragraph (b).

b. To determine whether a conflict of interest exists, a lawyer should adopt reasonable procedures, appropriate for the size and type of firm and practice, to determine in both litigation and non-litigation matters the persons and issues involved. See also Comment to Rule 5.1.

c. Ignorance caused by a failure to institute such procedures will not excuse a lawyer's violation of this Rule.

d. As to whether a client-lawyer relationship exists or, having once been established, is continuing, see Comment to Rule 1.3 and Scope.

[4] Conflicts Existing After the Representation Begins

a. If a conflict arises after representation has been undertaken, the lawyer ordinarily must withdraw from the representation, unless the lawyer has obtained the informed consent of the client under the conditions of paragraph (b). See Rule 1.16.
b. Where more than one client is involved, whether the lawyer may continue to represent any of the clients is determined both by the lawyer's ability to comply with duties owed to the former client and by the lawyer's ability to represent adequately the remaining client or clients, given the lawyer's duties to the former client. See Rule 1.9. See also Comments [5] and [29].

[5] Unforeseeable Developments

a. Unforeseeable developments, such as changes in corporate and other organizational affiliations or the addition or realignment of parties in litigation, might create conflicts in the midst of a representation, as when a company sued by the lawyer on behalf of one client is bought by another client represented by the lawyer in an unrelated matter.

b. Depending on the circumstances, the lawyer may have the option to withdraw from one of the representations in order to avoid the conflict.

c. The lawyer must seek court approval where necessary and take steps to minimize harm to the clients. See Rule 1.16. The lawyer must continue to protect the confidences of the client from whose representation the lawyer has withdrawn. See Rule 1.9(c).

[6] Identifying Conflicts of Interest: Directly Adverse

a. Loyalty to a current client prohibits undertaking representation directly adverse to that client without that client's informed consent.

b. Thus, absent consent, a lawyer may not act as an advocate in one matter against a person the lawyer represents in some other matter, even when the matters are wholly unrelated.

c. The client as to whom the representation is directly adverse is likely to feel betrayed, and the resulting damage to the client-lawyer relationship is likely to impair the lawyer's ability to represent the client effectively.

d. In addition, the client on whose behalf the adverse representation is undertaken reasonably may fear that the lawyer will pursue that client's case less effectively out of deference to the other client, i.e., that the representation may be materially limited by the lawyer's interest in retaining the current client.

e. Similarly, a directly adverse conflict may arise when a lawyer is required to cross-examine a client who appears as a witness in a lawsuit involving another client, as when the testimony will be damaging to the client who is represented in the lawsuit.

f. On the other hand, simultaneous representation in unrelated matters of clients whose interests are only economically adverse, such as representation of competing economic enterprises in unrelated litigation, does not ordinarily constitute a conflict of interest and thus may not require consent of the respective clients.

[7] Conflicts in Transactional Matters
a. Directly adverse conflicts can also arise in transactional matters.

b. For example, if a lawyer is asked to represent the seller of a business in negotiations with a buyer represented by the lawyer, not in the same transaction but in another, unrelated matter, the lawyer could not undertake the representation without the informed consent of each client.

[8] Identifying Conflicts of Interest: Material Limitation

a. Even where there is no direct adverseness, a conflict of interest exists if there is a significant risk that a lawyer's ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer's other responsibilities or interests.

b. For example, a lawyer asked to represent several individuals seeking to form a joint venture is likely to be materially limited in the lawyer's ability to recommend or advocate all possible positions that each might take because of the lawyer's duty of loyalty to the others.

c. The conflict in effect forecloses alternatives that would otherwise be available to the client.

d. The mere possibility of subsequent harm does not itself require disclosure and consent.

e. The critical questions are the likelihood that a difference in interests will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client.

[9] Lawyer's Responsibilities to Former Clients and Other Third Persons

In addition to conflicts with other current clients, a lawyer's duties of loyalty and independence may be materially limited by responsibilities to former clients under Rule 1.9 or by the lawyer's responsibilities to other persons, such as fiduciary duties arising from a lawyer's service as a trustee, executor or corporate director.

[10] Personal Interest Conflicts

a. The lawyer's own interests should not be permitted to have an adverse effect on representation of a client.

b. For example, if the probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice.

c. Similarly, when a lawyer has discussions concerning possible employment with an opponent of the lawyer's client, or with a law firm representing the opponent, such discussions could materially limit the lawyer's representation of the client.

d. In addition, a lawyer may not allow related business interests to affect representation, for example, by referring clients to an enterprise in which the lawyer has an undisclosed financial interest.
e. See Rule 1.8 for specific Rules pertaining to a number of personal interest conflicts, including business transactions with clients. See also Rule 1.10 (personal interest conflicts under Rule 1.7 ordinarily are not imputed to other lawyers in a law firm).

[11] Representing Different Clients in the Same Matter or in Substantially Related Matters

a. When lawyers representing different clients in the same matter or in substantially related matters are closely related by blood or marriage, there may be a significant risk that client confidences will be revealed and that the lawyer's family relationship will interfere with both loyalty and independent professional judgment.

b. As a result, each client is entitled to know of the existence and implications of the relationship between the lawyers before the lawyer agrees to undertake the representation.

c. Thus, a lawyer related to another lawyer, e.g., as parent, child, sibling or spouse, ordinarily may not represent a client in a matter where that lawyer is representing another party, unless each client gives informed consent.

d. The disqualification arising from a close family relationship is personal and ordinarily is not imputed to members of firms with whom the lawyers are associated. See Rule 1.10.

[12] Engaging in Sexual Relationships

A lawyer is prohibited from engaging in sexual relationships with a client unless the sexual relationship predates the formation of the client-lawyer relationship. See Rule 1.8(j).

[13] Interest of Person Paying for a Lawyer's Service

a. A lawyer may be paid from a source other than the client, including a co-client, if the client is informed of that fact and consents and the arrangement does not compromise the lawyer's duty of loyalty or independent judgment to the client.

b. See Rule 1.8(f). If acceptance of the payment from any other source presents a significant risk that the lawyer's representation of the client will be materially limited by the lawyer's own interest in accommodating the person paying the lawyer's fee or by the lawyer's responsibilities to a payer who is also a co-client, then the lawyer must comply with the requirements of paragraph (b) before accepting the representation, including determining whether the conflict is consentable and, if so, that the client has adequate information about the material risks of the representation.

[14] Prohibited Representations

a. Ordinarily, clients may consent to representation notwithstanding a conflict. However, as indicated in paragraph (b), some conflicts are nonconsentable, meaning that the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent.

b. When the lawyer is representing more than one client, the question of consentability must be resolved as to each client.
[15]  Consent

a. Consentability is typically determined by considering whether the interests of the clients will be adequately protected if the clients are permitted to give their informed consent to representation burdened by a conflict of interest.

b. Thus, under paragraph (b)(1), representation is prohibited if in the circumstances the lawyer cannot reasonably conclude that the lawyer will be able to provide competent and diligent representation. See Rule 1.1 (competence) and Rule 1.3 (diligence).

[16]  Nonconsentable Conflicts

a. Paragraph (b)(2) describes conflicts that are nonconsentable because the representation is prohibited by applicable law.

b. For example, in some states substantive law provides that the same lawyer may not represent more than one defendant in a capital case, even with the consent of the clients, and under federal criminal statutes certain representations by a former government lawyer are prohibited, despite the informed consent of the former client. In addition, decisional law in some states limits the ability of a governmental client, such as a municipality, to consent to a conflict of interest.

[17]  Institutional Interests

a. Paragraph (b)(3) describes conflicts that are nonconsentable because of the institutional interest in vigorous development of each client's position when the clients are aligned directly against each other in the same litigation or other proceeding before a tribunal.

b. Whether clients are aligned directly against each other within the meaning of this paragraph requires examination of the context of the proceeding.

c. Although this paragraph does not preclude a lawyer's multiple representation of adverse parties to a mediation (because mediation is not a proceeding before a "tribunal" under Rule 1.0(m)), such representation may be precluded by paragraph (b)(1).

[18]  Informed Consent

a. Informed consent requires that each affected client be aware of the relevant circumstances and of the material and reasonably foreseeable ways that the conflict could have adverse effects on the interests of that client. See Rule 1.0(e) (informed consent).

b. The information required depends on the nature of the conflict and the nature of the risks involved.

c. When representation of multiple clients in a single matter is undertaken, the information must include the implications of the common representation, including possible effects on loyalty, confidentiality and the attorney-client privilege and the advantages and risks involved. See Comments [30] and [31] (effect of common representation on confidentiality).
Disclosure May be Impossible

a. Under some circumstances it may be impossible to make the disclosure necessary to obtain consent.

b. For example, when the lawyer represents different clients in related matters and one of the clients refuses to consent to the disclosure necessary to permit the other client to make an informed decision, the lawyer cannot properly ask the latter to consent.

c. In some cases the alternative to common representation can be that each party may have to obtain separate representation with the possibility of incurring additional costs.

d. These costs, along with the benefits of securing separate representation, are factors that may be considered by the affected client in determining whether common representation is in the client's interests.

Consent Confirmed in Writing

a. Paragraph (b) requires the lawyer to obtain the informed consent of the client, confirmed in writing.

b. Such a writing may consist of a document executed by the client or one that the lawyer promptly records and transmits to the client following an oral consent. See Rule 1.0(b). See also Rule 1.0(n) (writing includes electronic transmission).

c. If it is not feasible to obtain or transmit the writing at the time the client gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter. See Rule 1.0(b).

d. The requirement of a writing does not supplant the need in most cases for the lawyer to talk with the client, to explain the risks and advantages, if any, of representation burdened with a conflict of interest, as well as reasonably available alternatives, and to afford the client a reasonable opportunity to consider the risks and alternatives and to raise questions and concerns.

e. Rather, the writing is required in order to impress upon clients the seriousness of the decision the client is being asked to make and to avoid disputes or ambiguities that might later occur in the absence of a writing.

Revoking Consent

a. A client who has given consent to a conflict may revoke the consent and, like any other client, may terminate the lawyer's representation at any time.

b. Whether revoking consent to the client's own representation precludes the lawyer from continuing to represent other clients depends on the circumstances, including the nature of the conflict, whether the client revoked consent because of a material change in circumstances, the reasonable expectations of the other client and whether material detriment to the other clients or the lawyer would result.

Consent to Future Conflict
a. Whether a lawyer may properly request a client to waive conflicts that might arise in the future is subject to the test of paragraph (b). The effectiveness of such waivers is generally determined by the extent to which the client reasonably understands the material risks that the waiver entails.

b. The more comprehensive the explanation of the types of future representations that might arise and the actual and reasonably foreseeable adverse consequences of those representations, the greater the likelihood that the client will have the requisite understanding.

c. Thus, if the client agrees to consent to a particular type of conflict with which the client is already familiar, then the consent ordinarily will be effective with regard to that type of conflict.

d. If the consent is general and open-ended, then the consent ordinarily will be ineffective, because it is not reasonably likely that the client will have understood the material risks involved.

e. On the other hand, if the client is an experienced user of the legal services involved and is reasonably informed regarding the risk that a conflict may arise, such consent is more likely to be effective, particularly if, e.g., the client is independently represented by other counsel in giving consent and the consent is limited to future conflicts unrelated to the subject of the representation.

f. In any case, advance consent cannot be effective if the circumstances that materialize in the future are such as would make the conflict non-consentable under paragraph (b).

[23] Conflicts in Litigation

a. Paragraph (b)(3) prohibits representation of opposing parties in the same litigation, regardless of the clients' consent.

b. On the other hand, simultaneous representation of parties whose interests in litigation may conflict, such as co-plaintiffs or co-defendants, is governed by paragraph (a)(2).

c. A conflict may exist by reason of substantial discrepancy in the parties' testimony, incompatibility in positions in relation to an opposing party or the fact that there are substantially different possibilities of settlement of the claims or liabilities in question.

d. Such conflicts can arise in criminal cases as well as civil. The potential for conflict of interest in representing multiple defendants in a criminal case is so grave that ordinarily a lawyer should decline to represent more than one codefendant.

e. On the other hand, common representation of persons having similar interests in civil litigation is proper if the requirements of paragraph (b) are met.

[24] Representation in Different Cases

a. Ordinarily a lawyer may take inconsistent legal positions in different tribunals at different times on behalf of different clients.

b. The mere fact that advocating a legal position on behalf of one client might create precedent adverse to the interests of a client represented by the lawyer in an unrelated matter does not create a conflict of interest.
c. A conflict of interest exists, however, if there is a significant risk that a lawyer's action on behalf of one client will materially limit the lawyer's effectiveness in representing another client in a different case; for example, when a decision favoring one client will create a precedent likely to seriously weaken the position taken on behalf of the other client.

d. Factors relevant in determining whether the clients need to be advised of the risk include: where the cases are pending, whether the issue is substantive or procedural, the temporal relationship between the matters, the significance of the issue to the immediate and long-term interests of the clients involved and the clients' reasonable expectations in retaining the lawyer.

e. If there is significant risk of material limitation, then absent informed consent of the affected clients, the lawyer must refuse one of the representations or withdraw from one or both matters.

[25] Class of Plaintiffs

a. When a lawyer represents or seeks to represent a class of plaintiffs or defendants in a class-action lawsuit, unnamed members of the class are ordinarily not considered to be clients of the lawyer for purposes of applying paragraph (a)(1) of this Rule.

b. Thus, the lawyer does not typically need to get the consent of such a person before representing a client suing the person in an unrelated matter.

c. Similarly, a lawyer seeking to represent an opponent in a class action does not typically need the consent of an unnamed member of the class whom the lawyer represents in an unrelated matter.

[26] Non-litigation Conflicts

a. Conflicts of interest under paragraphs (a)(1) and (a)(2) arise in contexts other than litigation. For a discussion of directly adverse conflicts in transactional matters, see Comment

b. Relevant factors in determining whether there is significant potential for material limitation include the duration and intimacy of the lawyer's relationship with the client or clients involved, the functions being performed by the lawyer, the likelihood that disagreements will arise and the likely prejudice to the client from the conflict.

c. The question is often one of proximity and degree. See Comment [8].

[27] Estate Planning and Estate Administration

a. For example, conflict questions may arise in estate planning and estate administration.

b. A lawyer may be called upon to prepare wills for several family members, such as husband and wife, and, depending upon the circumstances, a conflict of interest may be present. In estate administration the identity of the client may be unclear under the law of a particular jurisdiction.

c. Under one view, the client is the fiduciary; under another view the client is the estate or trust, including its beneficiaries. In order to comply with conflict of interest rules, the lawyer should make clear the lawyer's relationship to the parties involved.

[28] Consent Depends of the Circumstances
a. Whether a conflict is consentable depends on the circumstances. For example, a lawyer may not represent multiple parties to a negotiation whose interests are fundamentally antagonistic to each other, but common representation is permissible where the clients are generally aligned in interest even though there is some difference in interest among them.

b. Thus, a lawyer may seek to establish or adjust a relationship between clients on an amicable and mutually advantageous basis; for example, in helping to organize a business in which two or more clients are entrepreneurs, working out the financial reorganization of an enterprise in which two or more clients have an interest or arranging a property distribution in settlement of an estate.

c. The lawyer seeks to resolve potentially adverse interests by developing the parties' mutual interests.

d. Otherwise, each party might have to obtain separate representation, with the possibility of incurring additional cost, complication or even litigation.

e. Given these and other relevant factors, the clients may prefer that the lawyer act for all of them.

[29] Special Considerations in Common Representation

a. In considering whether to represent multiple clients in the same matter, a lawyer should be mindful that if the common representation fails because the potentially adverse interests cannot be reconciled, the result can be additional cost, embarrassment and recrimination.

b. Ordinarily, the lawyer will be forced to withdraw from representing all of the clients if the common representation fails. In some situations, the risk of failure is so great that multiple representation is plainly impossible.

c. For example, a lawyer cannot undertake common representation of clients where contentious litigation or negotiations between them are imminent or contemplated. Moreover, because the lawyer is required to be impartial between commonly represented clients, representation of multiple clients is improper when it is unlikely that impartiality can be maintained.

d. Generally, if the relationship between the parties has already assumed antagonism, the possibility that the clients' interests can be adequately served by common representation is not very good.

e. Other relevant factors are whether the lawyer subsequently will represent both parties on a continuing basis and whether the situation involves creating or terminating a relationship between the parties.

[30] Effect on Confidentiality

a. A particularly important factor in determining the appropriateness of common representation is the effect on client-lawyer confidentiality and the attorney-client privilege.

b. With regard to the attorney-client privilege, the prevailing rule is that, as between commonly represented clients, the privilege does not attach.
c. Hence, it must be assumed that if litigation eventuates between the clients, the privilege will not protect any such communications, and the clients should be so advised.

[31] Client’s Request Not to Disclose

a. As to the duty of confidentiality, continued common representation will almost certainly be inadequate if one client asks the lawyer not to disclose to the other client information relevant to the common representation.

b. This is so because the lawyer has an equal duty of loyalty to each client, and each client has the right to be informed of anything bearing on the representation that might affect that client's interests and the right to expect that the lawyer will use that information to that client's benefit. See Rule 1.4.

c. The lawyer should, at the outset of the common representation and as part of the process of obtaining each client's informed consent, advise each client that information will be shared and that the lawyer will have to withdraw if one client decides that some matter material to the representation should be kept from the other.

d. In limited circumstances, it may be appropriate for the lawyer to proceed with the representation when the clients have agreed, after being properly informed, that the lawyer will keep certain information confidential.

e. For example, the lawyer may reasonably conclude that failure to disclose one client's trade secrets to another client will not adversely affect representation involving a joint venture between the clients and agree to keep that information confidential with the informed consent of both clients.

[32] Client Responsibility

a. When seeking to establish or adjust a relationship between clients, the lawyer should make clear that the lawyer's role is not that of partisanship normally expected in other circumstances and, thus, that the clients may be required to assume greater responsibility for decisions than when each client is separately represented.

b. Any limitations on the scope of the representation made necessary as a result of the common representation should be fully explained to the clients at the outset of the representation. See Rule 1.2(c).

[33] Each Client's Right

Subject to the above limitations, each client in the common representation has the right to loyal and diligent representation and the protection of Rule 1.9 concerning the obligations to a former client. The client also has the right to discharge the lawyer as stated in Rule 1.16.

[34] Organizational Clients

a. A lawyer who represents a corporation or other organization does not, by virtue of that representation, necessarily represent any constituent or affiliated organization, such as a parent or subsidiary. See Rule 1.13(a).
b. Thus, the lawyer for an organization is not barred from accepting representation adverse to an affiliate in an unrelated matter, unless the circumstances are such that the affiliate should also be considered a client of the lawyer, there is an understanding between the lawyer and the organizational client that the lawyer will avoid representation adverse to the client's affiliates, or the lawyer's obligations to either the organizational client or the new client are likely to limit materially the lawyer's representation of the other client.

[35] Dual Roles

a. A lawyer for a corporation or other organization who is also a member of its board of directors should determine whether the responsibilities of the two roles may conflict.

b. The lawyer may be called on to advise the corporation in matters involving actions of the directors.

c. Consideration should be given to the frequency with which such situations may arise, the potential intensity of the conflict, the effect of the lawyer's resignation from the board and the possibility of the corporation's obtaining legal advice from another lawyer in such situations.

d. If there is material risk that the dual role will compromise the lawyer's independence of professional judgment, the lawyer should not serve as a director or should cease to act as the corporation's lawyer when conflicts of interest arise.

e. The lawyer should advise the other members of the board that in some circumstances matters discussed at board meetings while the lawyer is present in the capacity of director might not be protected by the attorney-client privilege and that conflict of interest considerations might require the lawyer's recusal as a director or might require the lawyer and the lawyer's firm to decline representation of the corporation in a matter.

RULE 1.8 - CONFLICTS OF INTEREST – SPECIFIC RULES

1. The Rule

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:

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

(2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and

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

(b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules.
(c) A lawyer shall not solicit any substantial gift from a client, including a testamentary gift, or prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift unless the lawyer or other recipient of the gift is related to the client. For purposes of this paragraph, related persons include a spouse, child, grandchild, parent, grandparent or other relative or individual with whom the lawyer or the client maintains a close, familial relationship.

(d) Prior to the conclusion of representation of a client, a lawyer shall 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.

(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

1. a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and

2. a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

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

1. the client gives informed consent;

2. there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and

3. information relating to representation of a client is protected as required by Rule 1.6.

(g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client gives informed consent, in a writing signed by the client. The lawyer's disclosure shall include the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

(h) A lawyer shall not:

1. make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client is independently represented in making the agreement; or

2. settle a claim or potential claim for such liability with an unrepresented client or former client unless that person is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel in connection therewith.

(i) A lawyer shall 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:

1. acquire a lien authorized by law to secure the lawyer's fee or expenses; and

2. contract with a client for a reasonable contingent fee in a civil case.
A lawyer shall not have sexual relations with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced.

While lawyers are associated in a firm, a prohibition in the foregoing paragraphs (a) through (i) that applies to any one of them shall apply to all of them.

2. The Comment

[1] Business Transactions Between Client and Lawyer

a. A lawyer's legal skill and training, together with the relationship of trust and confidence between lawyer and client, create the possibility of overreaching when the lawyer participates in a business, property or financial transaction with a client, for example, a loan or sales transaction or a lawyer investment on behalf of a client.

b. The requirements of paragraph (a) must be met even when the transaction is not closely related to the subject matter of the representation, as when a lawyer drafting a will for a client learns that the client needs money for unrelated expenses and offers to make a loan to the client.

c. The Rule applies to lawyers engaged in the sale of goods or services related to the practice of law, for example, the sale of title insurance or investment services to existing clients of the lawyer's legal practice. See Rule 5.7.

d. It also applies to lawyers purchasing property from estates they represent.

e. It does not apply to ordinary fee arrangements between client and lawyer, which are governed by Rule 1.5, although its requirements must be met when the lawyer accepts an interest in the client's business or other nonmonetary property as payment of all or part of a fee.

f. In addition, the Rule does not apply to standard commercial transactions between the lawyer and the client for products or services that the client generally markets to others, for example, banking or brokerage services, medical services, products manufactured or distributed by the client, and utilities' services. In such transactions, the lawyer has no advantage in dealing with the client, and the restrictions in paragraph (a) are unnecessary and impracticable.

[2] Fairness and Communication

a. Paragraph (a)(1) requires that the transaction itself be fair to the client and that its essential terms be communicated to the client, in writing, in a manner that can be reasonably understood.

b. Paragraph (a)(2) requires that the client also be advised, in writing, of the desirability of seeking the advice of independent legal counsel.

c. It also requires that the client be given a reasonable opportunity to obtain such advice. Paragraph (a)(3) requires that the lawyer obtain the client's informed consent, in a writing signed by the client, both to the essential terms of the transaction and to the lawyer's role.

d. When necessary, the lawyer should discuss both the material risks of the proposed transaction, including any risk presented by the lawyer's involvement, and the existence of reasonably available
alternatives and should explain why the advice of independent legal counsel is desirable. See Rule 1.0(e) (definition of informed consent).


a. The risk to a client is greatest when the client expects the lawyer to represent the client in the transaction itself or when the lawyer's financial interest otherwise poses a significant risk that the lawyer's representation of the client will be materially limited by the lawyer's financial interest in the transaction.

b. Here the lawyer's role requires that the lawyer must comply, not only with the requirements of paragraph (a), but also with the requirements of Rule 1.7. Under that Rule, the lawyer must disclose the risks associated with the lawyer's dual role as both legal adviser and participant in the transaction, such as the risk that the lawyer will structure the transaction or give legal advice in a way that favors the lawyer's interests at the expense of the client.

c. Moreover, the lawyer must obtain the client's informed consent. In some cases, the lawyer's interest may be such that Rule 1.7 will preclude the lawyer from seeking the client's consent to the transaction.

[4] **Independent Representation**

a. If the client is independently represented in the transaction, paragraph (a)(2) of this Rule is inapplicable, and the paragraph (a)(1) requirement for full disclosure is satisfied either by a written disclosure by the lawyer involved in the transaction or by the client's independent counsel.

b. The fact that the client was independently represented in the transaction is relevant in determining whether the agreement was fair and reasonable to the client as paragraph (a)(1) further requires.

[5] **Use of Information Related to Representation**

a. Use of information relating to the representation to the disadvantage of the client violates the lawyer's duty of loyalty. Paragraph (b) applies when the information is used to benefit either the lawyer or a third person, such as another client or business associate of the lawyer.

b. For example, if a lawyer learns that a client intends to purchase and develop several parcels of land, the lawyer may not use that information to purchase one of the parcels in competition with the client or to recommend that another client make such a purchase.

c. The Rule does not prohibit uses that do not disadvantage the client. For example, a lawyer who learns a government agency’s interpretation of trade legislation during the representation of one client may properly use that information to benefit other clients.

d. Paragraph (b) prohibits disadvantageous use of client information unless the client gives informed consent, except as permitted or required by these Rules. See Rules 1.2(d), 1.6, 1.9(c), 3.3, 4.1(b), 8.1 and 8.3.

[6] **Gifts from a Client**

a. A lawyer may accept a gift from a client, if the transaction meets general standards of fairness.
b. For example, a simple gift such as a present given at a holiday or as a token of appreciation is permitted. If a client offers the lawyer a more substantial gift, paragraph (c) does not prohibit the lawyer from accepting it, although such a gift may be voidable by the client under the doctrine of undue influence, which treats client gifts as presumptively fraudulent.

c. In any event, due to concerns about overreaching and imposition on clients, a lawyer may not suggest that a substantial gift be made to the lawyer or for the lawyer's benefit, except where the lawyer is related to the client as set forth in paragraph (c).

[7] Legal Instruments
a. If effectuation of a substantial gift requires preparing a legal instrument such as a will or conveyance the client should have the detached advice that another lawyer can provide.

b. The sole exception to this Rule is where the client is a relative of the donee.

[8] Executors and Other Positions
a. This Rule does not prohibit a lawyer from seeking to have the lawyer or a partner or associate of the lawyer named as executor of the client's estate or to another potentially lucrative fiduciary position.

b. Nevertheless, such appointments will be subject to the general conflict of interest provision in Rule 1.7 when there is a significant risk that the lawyer's interest in obtaining the appointment will materially limit the lawyer's independent professional judgment in advising the client concerning the choice of an executor or other fiduciary.

c. In obtaining the client's informed consent to the conflict, the lawyer should advise the client concerning the nature and extent of the lawyer's financial interest in the appointment, as well as the availability of alternative candidates for the position.

[9] Literary Rights
a. An agreement by which a lawyer acquires literary or media rights concerning the conduct of the representation creates a conflict between the interests of the client and the personal interests of the lawyer.

b. Measures suitable in the representation of the client may detract from the publication value of an account of the representation.

c. Paragraph (d) does not prohibit a lawyer representing a client in a transaction concerning literary property from agreeing that the lawyer's fee shall consist of a share in ownership in the property, if the arrangement conforms to Rule 1.5 and paragraphs (a) and (i).

a. Lawyers may not subsidize lawsuits or administrative proceedings brought on behalf of their clients, including making or guaranteeing loans to their clients for living expenses, because to do so would encourage clients to pursue lawsuits that might not otherwise be brought and because such assistance gives lawyers too great a financial stake in the litigation.
b. These dangers do not warrant a prohibition on a lawyer lending a client court costs and litigation expenses, including the expenses of medical examination and the costs of obtaining and presenting evidence, because these advances are virtually indistinguishable from contingent fees and help ensure access to the courts.

c. Similarly, an exception allowing lawyers representing indigent clients to pay court costs and litigation expenses regardless of whether these funds will be repaid is warranted.

[11] Person Paying for a Lawyer’s Services

a. Lawyers are frequently asked to represent a client under circumstances in which a third person will compensate the lawyer, in whole or in part.

b. The third person might be a relative or friend, an indemnitor (such as a liability insurance company) or a co-client (such as a corporation sued along with one or more of its employees).

c. Because third-party payers frequently have interests that differ from those of the client, including interests in minimizing the amount spent on the representation and in learning how the representation is progressing, lawyers are prohibited from accepting or continuing such representations unless the lawyer determines that there will be no interference with the lawyer’s independent professional judgment and there is informed consent from the client. See also Rule 5.4(c) (prohibiting interference with a lawyer’s professional judgment by one who recommends, employs or pays the lawyer to render legal services for another).

[12] Consent of Client

a. Sometimes, it will be sufficient for the lawyer to obtain the client’s informed consent regarding the fact of the payment and the identity of the third-party payer.

b. If, however, the fee arrangement creates a conflict of interest for the lawyer, then the lawyer must comply with Rule 1.7.

c. The lawyer must also conform to the requirements of Rule 1.6 concerning confidentiality. Under Rule 1.7(a), a conflict of interest exists if there is significant risk that the lawyer’s representation of the client will be materially limited by the lawyer’s own interest in the fee arrangement or by the lawyer’s responsibilities to the third-party payer (for example, when the third-party payer is a co-client).

d. Under Rule 1.7(b), the lawyer may accept or continue the representation with the informed consent of each affected client, unless the conflict is non-consentable under that paragraph. Under Rule 1.7(b), the informed consent must be confirmed in writing.


a. Differences in willingness to make or accept an offer of settlement are among the risks of common representation of multiple clients by a single lawyer.

b. Under Rule 1.7, this is one of the risks that should be discussed before undertaking the representation, as part of the process of obtaining the clients’ informed consent.
c. In addition, Rule 1.2(a) protects each client's right to have the final say in deciding whether to accept or reject an offer of settlement and in deciding whether to enter a guilty or nolo contendere plea in a criminal case.

d. The rule stated in this paragraph is a corollary of both these Rules and provides that, before any settlement offer or plea bargain is made or accepted on behalf of multiple clients, the lawyer must inform each of them about all the material terms of the settlement, including what the other clients will receive or pay if the settlement or plea offer is accepted.

e. See also Rule 1.0(e) (definition of informed consent).

f. Lawyers representing a class of plaintiffs or defendants, or those proceeding derivatively, may not have a full client-lawyer relationship with each member of the class; nevertheless, such lawyers must comply with applicable rules regulating notification of class members and other procedural requirements designed to ensure adequate protection of the entire class.

[14] Limiting Liability and Settling Malpractice Claims

a. Agreements prospectively limiting a lawyer's liability for malpractice are prohibited unless the client is independently represented in making the agreement because they are likely to undermine competent and diligent representation.

b. Also, many clients are unable to evaluate the desirability of making such an agreement before a dispute has arisen, particularly if they are then represented by the lawyer seeking the agreement.

c. This paragraph does not, however, prohibit a lawyer from entering into an agreement with the client to arbitrate legal malpractice claims, provided such agreements are enforceable and the client is fully informed of the scope and effect of the agreement.

d. Nor does this paragraph limit the ability of lawyers to practice in the form of a limited-liability entity, where permitted by law, provided that each lawyer remains personally liable to the client for his or her own conduct and the firm complies with any conditions required by law, such as provisions requiring client notification or maintenance of adequate liability insurance.

e. Nor does it prohibit an agreement in accordance with Rule 1.2 that defines the scope of the representation, although a definition of scope that makes the obligations of representation illusory will amount to an attempt to limit liability.

[15] Agreements to Settle Claims

a. Agreements settling a claim or a potential claim for malpractice are not prohibited by this Rule.

b. Nevertheless, in view of the danger that a lawyer will take unfair advantage of an unrepresented client or former client, the lawyer must first advise such a person in writing of the appropriateness of independent representation in connection with such a settlement. In addition, the lawyer must give the client or former client a reasonable opportunity to find and consult independent counsel.

[16] Acquiring Proprietary Interest in Litigation
Paragraph (i) states the traditional general rule that lawyers are prohibited from acquiring a proprietary interest in litigation.

Like paragraph (e), the general rule has its basis in common law champerty and maintenance and is designed to avoid giving the lawyer too great an interest in the representation. In addition, when the lawyer acquires an ownership interest in the subject of the representation, it will be more difficult for a client to discharge the lawyer if the client so desires.

The Rule is subject to specific exceptions developed in decisional law and continued in these Rules.

The exception for certain advances of the costs of litigation is set forth in paragraph (e). In addition, paragraph (i) sets forth exceptions for liens authorized by law to secure the lawyer’s fees or expenses and contracts for reasonable contingent fees.

The law of each jurisdiction determines which liens are authorized by law.

These may include liens granted by statute, liens originating in common law and liens acquired by contract with the client.

When a lawyer acquires by contract a security interest in property other than that recovered through the lawyer’s efforts in the litigation, such an acquisition is a business or financial transaction with a client and is governed by the requirements of paragraph (a). Contracts for contingent fees in civil cases are governed by Rule 1.5.

[17] Client-Lawyer Sexual Relationships

The relationship between lawyer and client is a fiduciary one in which the lawyer occupies the highest position of trust and confidence.

The relationship is almost always unequal; thus, a sexual relationship between lawyer and client can involve unfair exploitation of the lawyer’s fiduciary role, in violation of the lawyer’s basic ethical obligation not to use the trust of the client to the client's disadvantage.

In addition, such a relationship presents a significant danger that, because of the lawyer’s emotional involvement, the lawyer will be unable to represent the client without impairment of the exercise of independent professional judgment.

Moreover, a blurred line between the professional and personal relationships may make it difficult to predict to what extent client confidences will be protected by the attorney-client evidentiary privilege, since client confidences are protected by privilege only when they are imparted in the context of the client-lawyer relationship.

Because of the significant danger of harm to client interests and because the client’s own emotional involvement renders it unlikely that the client could give adequate informed consent, this Rule prohibits the lawyer from having sexual relations with a client regardless of whether the relationship is consensual and regardless of the absence of prejudice to the client.

[18] Relationships that Predate
a. Sexual relationships that predate the client-lawyer relationship are not prohibited. Issues relating to the exploitation of the fiduciary relationship and client dependency are diminished when the sexual relationship existed prior to the commencement of the client-lawyer relationship.

b. However, before proceeding with the representation in these circumstances, the lawyer should consider whether the lawyer's ability to represent the client will be materially limited by the relationship. See Rule 1.7(a)(2).

[19] Client Organization
a. When the client is an organization, paragraph (j) of this Rule prohibits a lawyer for the organization (whether inside counsel or outside counsel) from having a sexual relationship with a constituent of the organization who supervises, directs or regularly consults with that lawyer concerning the organization's legal matters.

[20] Imputation of Prohibitions
a. Under paragraph (k), a prohibition on conduct by an individual lawyer in paragraphs (a) through (i) also applies to all lawyers associated in a firm with the personally prohibited lawyer. For example, one lawyer in a firm may not enter into a business transaction with a client of another member of the firm without complying with paragraph (a), even if the first lawyer is not personally involved in the representation of the client.

b. The prohibition set forth in paragraph (j) is personal and is not applied to associated lawyers.

RULE 1.9 - DUTY TO FORMER CLIENT

1. The Rule
(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client
(1) whose interests are materially adverse to that person; and
(2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter;

unless the former client gives informed consent, confirmed in writing.

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:
(1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or
(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

2. The Comment

[1] After Termination of the Relationship

a. After termination of a client-lawyer relationship, a lawyer has certain continuing duties with respect to confidentiality and conflicts of interest and thus may not represent another client except in conformity with this Rule.

b. Under this Rule, for example, a lawyer could not properly seek to rescind on behalf of a new client a contract drafted on behalf of the former client. So also a lawyer who has prosecuted an accused person could not properly represent the accused in a subsequent civil action against the government concerning the same transaction.

c. Nor could a lawyer who has represented multiple clients in a matter represent one of the clients against the others in the same or a substantially related matter after a dispute arose among the clients in that matter, unless all affected clients give informed consent.

d. See Comment [9]. Current and former government lawyers must comply with this Rule to the extent required by Rule 1.11.


a. The scope of a "matter" for purposes of this Rule depends on the facts of a particular situation or transaction.

b. The lawyer's involvement in a matter can also be a question of degree.

c. When a lawyer has been directly involved in a specific transaction, subsequent representation of other clients with materially adverse interests in that transaction clearly is prohibited.

d. On the other hand, a lawyer who recurrently handled a type of problem for a former client is not precluded from later representing another client in a factually distinct problem of that type even though the subsequent representation involves a position adverse to the prior client.

e. Similar considerations can apply to the reassignment of military lawyers between defense and prosecution functions within the same military jurisdictions.

f. The underlying question is whether the lawyer was so involved in the matter that the subsequent representation can be justly regarded as a changing of sides in the matter in question.

[3] Substantially Related Matters

a. Matters are "substantially related" for purposes of this Rule if they involve the same transaction or legal dispute or if there otherwise is a substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter.
b. For example, a lawyer who has represented a businessperson and learned extensive private financial information about that person may not then represent that person's spouse in seeking a divorce.

c. Similarly, a lawyer who has previously represented a client in securing environmental permits to build a shopping center would be precluded from representing neighbors seeking to oppose rezoning of the property on the basis of environmental considerations.

d. However, the lawyer would not be precluded, on the grounds of substantial relationship, from defending a tenant of the completed shopping center in resisting eviction for nonpayment of rent.

e. Information that has been disclosed to the public or to other parties adverse to the former client ordinarily will not be disqualifying.

f. Information acquired in a prior representation may have been rendered obsolete by the passage of time, a circumstance that may be relevant in determining whether two representations are substantially related. In the case of an organizational client, general knowledge of the client's policies and practices ordinarily will not preclude a subsequent representation; on the other hand, knowledge of specific facts gained in a prior representation that are relevant to the matter in question ordinarily will preclude such a representation.

g. A former client is not required to reveal the confidential information learned by the lawyer in order to establish a substantial risk that the lawyer has confidential information to use in the subsequent matter.

h. A conclusion about the possession of such information may be based on the nature of the services the lawyer provided the former client and information that would in ordinary practice be learned by a lawyer providing such services.

[4] Lawyers Moving Between Firms

a. When lawyers have been associated within a firm but then end their association, the question of whether a lawyer should undertake representation is more complicated.

b. There are several competing considerations.

(1) First, the client previously represented by the former firm must be reasonably assured that the principle of loyalty to the client is not compromised.

(2) Second, the rule should not be so broadly cast as to preclude other persons from having reasonable choice of legal counsel.

(3) Third, the rule should not unreasonably hamper lawyers from forming new associations and taking on new clients after having left a previous association. In this connection, it should be recognized that today many lawyers practice in firms, that many lawyers to some degree limit their practice to one field or another, and that many move from one association to another several times in their careers.

c. If the concept of imputation were applied with unqualified rigor, the result would be radical curtailment of the opportunity of lawyers to move from one practice setting to another and of the opportunity of clients to change counsel.
[5] **Actual Knowledge**

a. Paragraph (b) operates to disqualify the lawyer only when the lawyer involved has actual knowledge of information protected by Rules 1.6 and 1.9(c).

b. Thus, if a lawyer while with one firm acquired no knowledge or information relating to a particular client of the firm, and that lawyer later joined another firm, neither the lawyer individually nor the second firm is disqualified from representing another client in the same or a related matter even though the interests of the two clients conflict.

c. See Rule 1.10(b) for the restrictions on a firm once a lawyer has terminated association with the firm.

[6] **Particular Facts**

a. Application of paragraph (b) depends on a situation's particular facts, aided by inferences, deductions or working presumptions that reasonably may be made about the way in which lawyers work together.

b. A lawyer may have general access to files of all clients of a law firm and may regularly participate in discussions of their affairs; it should be inferred that such a lawyer in fact is privy to all information about all the firm's clients.

c. In contrast, another lawyer may have access to the files of only a limited number of clients and participate in discussions of the affairs of no other clients; in the absence of information to the contrary, it should be inferred that such a lawyer in fact is privy to information about the clients actually served but not those of other clients.

d. In such an inquiry, the burden of proof should rest upon the firm whose disqualification is sought.

[7] **Continuing Duty of Confidentiality**

Independent of the question of disqualification of a firm, a lawyer changing professional association has a continuing duty to preserve confidentiality of information about a client formerly represented. See Rules 1.6 and 1.9(c).

[8] **Subsequent Information**

a. Paragraph (c) provides that information acquired by the lawyer in the course of representing a client may not subsequently be used or revealed by the lawyer to the disadvantage of the client.

b. However, the fact that a lawyer has once served a client does not preclude the lawyer from using generally known information about that client when later representing another client.

[9] **Waiver by Client**

a. The provisions of this Rule are for the protection of former clients and can be waived if the client gives informed consent, which consent must be confirmed in writing under paragraphs (a) and (b).
b. See Rule 1.0(e). With regard to the effectiveness of an advance waiver, see Comment [22] to Rule 1.7.

c. With regard to disqualification of a firm with which a lawyer is or was formerly associated, see Rule 1.10.

**RULE 1.10 - IMPUTATION OF CONFLICT**

1. **The Rule**

   (a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, unless

   (1) the prohibition is based on a personal interest of the disqualified lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm; or

   (2) the prohibition is based upon Rule 1.9(a) or (b) and arises out of the disqualified lawyer’s association with a prior firm, and

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

   (ii) written notice is promptly given to any affected former client to enable the former client to ascertain compliance with the provisions of this Rule, which shall include a description of the screening procedures employed; a statement of the firm’s and of the screened lawyer’s compliance with these Rules; a statement that review may be available before a tribunal; and an agreement by the firm to respond promptly to any written inquiries or objections by the former client about the screening procedures; and

   (iii) certifications of compliance with these Rules and with the screening procedures are provided to the former client by the screened lawyer and by a partner of the firm, at reasonable intervals upon the former client's written request and upon termination of the screening procedures.

   (b) 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:

   (1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and

   (2) any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9(c) that is material to the matter.

   (c) A disqualification prescribed by this rule may be waived by the affected client under the conditions stated in Rule 1.7.

   (d) The disqualification of lawyers associated in a firm with former or current government lawyers is governed by Rule 1.11.

2. **The Comment**
[1] Definition of “Firm”

a. For purposes of the Rules of Professional Conduct, the term “firm” denotes lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation or other organization.

b. See Rule 1.0(c). Whether two or more lawyers constitute a firm within this definition can depend upon the specific facts. See Rule 1.10, Comments [2] - [4].

[2] Principles of Imputed Disqualification

a. The rule of imputed disqualification stated in paragraph (a) gives effect to the principle of loyalty to the client as it applies to lawyers who practice in a law firm.

b. Such situations can be considered from the premise that a firm of lawyers is essentially one lawyer for purposes of the rules governing loyalty to the client, or from the premise that each lawyer is vicariously bound by the obligation of loyalty owed by each lawyer with whom the lawyer is associated.

c. Paragraph (a)(1) operates only among the lawyers currently associated in a firm.

d. When a lawyer moves from one firm to another, the situation is governed by Rules 1.9(b) and 1.10(a)(2) and 1.10 (b).

[3] No Prohibition Where No Questions of Client loyalty Nor Protection of Confidential Information

a. The rule in paragraph (a) does not prohibit representation whether neither questions of client loyalty nor protection of confidential information are presented.

b. Where one lawyer in a firm could not effectively represent a given client because of strong political beliefs, for example, but that lawyer will do no work on the case and the personal beliefs of the lawyer will not materially limit the representation by others in the firm, the firm should not be disqualified.

c. On the other hand, if an opposing party in a case were owned by a lawyer in the law firm, and others in the firm would be materially limited in pursuing the matter because of loyalty to that lawyer, the personal disqualification of the lawyer would be imputed to all others in the firm.

[4] Other Lawyers in the Same Firm

a. The rule in paragraph (a) also does not prohibit representation by others in the law firm where the person prohibited from involvement in a matter is a non-lawyer, such as a paralegal or legal secretary.

b. Nor does paragraph (a) prohibit representation if the lawyer is prohibited from acting because of events before the person became a lawyer, for example, work that the person did as a law student.

c. Such persons, however, ordinarily must be screened from any personal participation in the matter to avoid communication to others in the firm of confidential information that both the non-lawyers and the firm have a legal duty to protect. See Rules 1.0(k) and 5.3.

[5] Certain Adverse Representation Permitted
a. Rule 1.10(b) operates to permit a law firm, under certain circumstances, to represent a person with interests directly adverse to those of a client represented by a lawyer who formerly was associated with the firm.

b. The Rule applies regardless of when the formerly associated lawyer represented the client.

c. However, the law firm may not represent a person with interests adverse to those of a present client of the firm, which would violate Rule 1.7.

d. Moreover, the firm may not represent the person where the matter is the same or substantially related to that in which the formerly associated lawyer represented the client and any other lawyer currently in the firm has material information protected by Rules 1.6 and 1.9(c).

[6] **Imputation Removed with Informed Consent**

a. Rule 1.10(c) removes imputation with the informed consent of the affected client or former client under the conditions stated in Rule 1.7.

b. The conditions stated in Rule 1.7 require the lawyer to determine that the representation is not prohibited by Rule 1.7(b) and that each affected client or former client has given informed consent to the representation, confirmed in writing.

c. In some cases, the risk may be so severe that the conflict may not be cured by client consent. For a discussion of the effectiveness of client waivers of conflicts that might arise in the future, see Rule 1.7, Comment [22]. For a definition of informed consent, see Rule 1.0(e).

[7] **Imputation Removed without Informed Consent**

a. Rule 1.10(a)(2) similarly removes the imputation otherwise required by Rule 1.10(a), but unlike section (c), it does so without requiring that there be informed consent by the former client.

b. Instead, it requires that the procedures laid out in sections (a)(2)(i)-(iii) be followed.

c. A description of effective screening mechanisms appears in Rule 1.0(k).

d. Lawyers should be aware, however, that, even where screening mechanisms have been adopted, tribunals may consider additional factors in ruling upon motions to disqualify a lawyer from pending litigation.

[8] **Prior Independent Agreements**

Paragraph (a)(2)(i) does not prohibit the screened lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly related to the matter in which the lawyer is disqualified.

[9] **Notice Requirement**

a. The notice required by paragraph (a)(2)(ii) generally should include a description of the screened lawyer’s prior representation and be given as soon as practicable after the need for screening becomes apparent.
b. It also should include a statement by the screened lawyer and the firm that the client's material confidential information has not been disclosed or used in violation of the Rules.

c. The notice is intended to enable the former client to evaluate and comment upon the effectiveness of the screening procedures.

[10] Certification Requirement

a. The certifications required by paragraph (a)(2)(iii) give the former client assurance that the client’s material confidential information has not been disclosed or used inappropriately, either prior to timely implementation of a screen or thereafter.

b. If compliance cannot be certified, the certificate must describe the failure to comply.


a. Where a lawyer has joined a private firm after having represented the government, imputation is governed under Rule 1.11(b) and (c), not this Rule.

b. Under Rule 1.11(d), where a lawyer represents the government after having served clients in private practice, nongovernmental employment or in another government agency, former client conflicts are not imputed to government lawyers associated with the individually disqualified lawyer.

[12] Other Lawyers in the Same Firm

Where a lawyer is prohibited from engaging in certain transactions under Rule 1.8, paragraph (k) of that Rule, and not this Rule, determines whether that prohibition also applies to other lawyers associated in a firm with the personally prohibited lawyer.

RULE 1.14 CLIENT WITH DIMINISHED CAPACITY

1. The Rule

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

(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.

(c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

2. The Comment
[1] **General Principles**

a. The normal client-lawyer relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters.

b. When the client is a minor or suffers from a diminished mental capacity, however, maintaining the ordinary client-lawyer relationship may not be possible in all respects. In particular, a severely incapacitated person may have no power to make legally binding decisions.

c. Nevertheless, a client with diminished capacity often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being.

d. For example, children as young as five or six years of age, and certainly those of ten or twelve, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody.

e. So also, it is recognized that some persons of advanced age can be quite capable of handling routine financial matters while needing special legal protection concerning major transactions.

[2] **Lawyers Obligations**

a. The fact that a client suffers a disability does not diminish the lawyer’s obligation to treat the client with attention and respect.

b. Even if the person has a legal representative, the lawyer should as far as possible accord the represented person the status of client, particularly in maintaining communication.

[3] **Participation of Others**

a. The client may wish to have family members or other persons participate in discussions with the lawyer.

b. When necessary to assist in the representation, the presence of such persons generally does not affect the applicability of the attorney-client evidentiary privilege.

c. Nevertheless, the lawyer must keep the client's interests foremost and, except for protective action authorized under paragraph (b), must look to the client, and not family members, to make decisions on the client's behalf.

[4] **Legal Representatives**

a. If a legal representative has already been appointed for the client, the lawyer should ordinarily look to the representative for decisions on behalf of the client. In matters involving a minor, whether the lawyer should look to the parents as natural guardians may depend on the type of proceeding or matter in which the lawyer is representing the minor.

b. If the lawyer represents the guardian as distinct from the ward, and is aware that the guardian is acting adversely to the ward's interest, the lawyer may have an obligation to prevent or rectify the guardian's misconduct. See Rule 1.2(d).

[5] **Taking Protective Action**
a. If a lawyer reasonably believes that a client is at risk of substantial physical, financial or other harm unless action is taken, and that a normal client-lawyer relationship cannot be maintained as provided in paragraph (a) because the client lacks sufficient capacity to communicate or to make adequately considered decisions in connection with the representation, then paragraph (b) permits the lawyer to take protective measures deemed necessary.

b. Such measures could include: consulting with family members, using a reconsideration period to permit clarification or improvement of circumstances, using voluntary surrogate decision making tools such as durable powers of attorney or consulting with support groups, professional services, adult-protective agencies or other individuals or entities that have the ability to protect the client.

c. In taking any protective action, the lawyer should be guided by such factors as the wishes and values of the client to the extent known, the client's best interests and the goals of intruding into the client's decision making autonomy to the least extent feasible, maximizing client capacities and respecting the client's family and social connections.

[6] **Balancing Factors**

In determining the extent of the client's diminished capacity, the lawyer should consider and balance such factors as: the client's ability to articulate reasoning leading to a decision, variability of state of mind and ability to appreciate consequences of a decision; the substantive fairness of a decision; and the consistency of a decision with the known long-term commitments and values of the client. In appropriate circumstances, the lawyer may seek guidance from an appropriate diagnostician.

[7] **Appointment of Legal Representative**

a. If a legal representative has not been appointed, the lawyer should consider whether appointment of a guardian ad litem, conservator or guardian is necessary to protect the client's interests.

b. Thus, if a client with diminished capacity has substantial property that should be sold for the client's benefit, effective completion of the transaction may require appointment of a legal representative.

c. In addition, rules of procedure in litigation sometimes provide that minors or persons with diminished capacity must be represented by a guardian or next friend if they do not have a general guardian. In many circumstances, however, appointment of a legal representative may be more expensive or traumatic for the client than circumstances in fact require.

d. Evaluation of such circumstances is a matter entrusted to the professional judgment of the lawyer. In considering alternatives, however, the lawyer should be aware of any law that requires the lawyer to advocate the least restrictive action on behalf of the client.

[8] **Disclosure of the Client's Condition**

a. Disclosure of the client's diminished capacity could adversely affect the client's interests. For example, raising the question of diminished capacity could, in some circumstances, lead to proceedings for involuntary commitment.

b. Information relating to the representation is protected by Rule 1.6.
c. Therefore, unless authorized to do so, the lawyer may not disclose such information.

d. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized to make the necessary disclosures, even when the client directs the lawyer to the contrary.

e. Nevertheless, given the risks of disclosure, paragraph (c) limits what the lawyer may disclose in consulting with other individuals or entities or seeking the appointment of a legal representative.

f. At the very least, the lawyer should determine whether it is likely that the person or entity consulted with will act adversely to the client's interests before discussing matters related to the client. The lawyer's position in such cases is an unavoidably difficult one.

[9] Emergency Legal Assistance

a. In an emergency where the health, safety or a 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 such a person even though the person is unable to establish a client-lawyer relationship or to make or express considered judgments about the matter, when the person or another acting in good faith on that person's behalf has consulted with the lawyer.

b. Even in such an emergency, however, the lawyer should not act unless the lawyer reasonably believes that the person has no other lawyer, agent or other representative available.

c. The lawyer should take legal action on behalf of the person only to the extent reasonably necessary to maintain the status quo or otherwise avoid imminent and irreparable harm.

d. A lawyer who undertakes to represent a person in such an exigent situation has the same duties under these Rules as the lawyer would with respect to a client.

[10] Duty of Confidentiality

a. A lawyer who acts on behalf of a person with seriously diminished capacity in an emergency should keep the confidences of the person as if dealing with a client, disclosing them only to the extent necessary to accomplish the intended protective action.

b. The lawyer should disclose to any tribunal involved and to any other counsel involved the nature of his or her relationship with the person.

c. The lawyer should take steps to regularize the relationship or implement other protective solutions as soon as possible. Normally, a lawyer would not seek compensation for such emergency actions taken.

RULE 1.15 - SAFEKEEPING OF PROPERTY

1. The Rule

(a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall 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 shall be identified as such and appropriately safeguarded. Complete records of
such account funds and other property shall be kept by the lawyer and shall be preserved for a period of [five years] after termination of the representation.

(b) A lawyer may deposit the lawyer's own funds in a client trust account for the sole purpose of paying bank service charges on that account, but only in an amount necessary for that purpose.

(c) A lawyer shall deposit into a client trust account legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses incurred.

(d) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.

(e) When in the course of representation a lawyer is in possession of property in which two or more persons (one of whom may be the lawyer) claim interests, the property shall be kept separate by the lawyer until the dispute is resolved. The lawyer shall promptly distribute all portions of the property as to which the interests are not in dispute.

2. The Comment

[1] General Principal

a. A lawyer should hold property of others with the care required of a professional fiduciary. Securities should be kept in a safe deposit box, except when some other form of safekeeping is warranted by special circumstances.

b. All property that is the property of clients or third persons, including prospective clients, must be kept separate from the lawyer's business and personal property and, if monies, in one or more trust accounts.

c. Separate trust accounts may be warranted when administering estate monies or acting in similar fiduciary capacities.

d. A lawyer should maintain on a current basis books and records in accordance with generally accepted accounting practice and comply with any recordkeeping rules established by law or court order. See, e.g., Model Rules for Client Trust Account Records.

[2] Commingling of Funds

a. While normally it is impermissible to commingle the lawyer's own funds with client funds, paragraph (b) provides that it is permissible when necessary to pay bank service charges on that account.

b. Accurate records must be kept regarding which part of the funds are the lawyer's.

[3] Fees Owed

a. Lawyers often receive funds from which the lawyer's fee will be paid. The lawyer is not required to remit to the client funds that the lawyer reasonably believes represent fees owed.
b. However, a lawyer may not hold funds to coerce a client into accepting the lawyer's contention.

c. The disputed portion of the funds must be kept in a trust account and the lawyer should suggest means for prompt resolution of the dispute, such as arbitration.

d. The undisputed portion of the funds shall be promptly distributed.


a. Paragraph (e) also recognizes that third parties may have lawful claims against specific funds or other property in a lawyer's custody, such as a client's creditor who has a lien on funds recovered in a personal injury action.

b. A lawyer may have a duty under applicable law to protect such third-party claims against wrongful interference by the client.

c. In such cases, when the third-party claim is not frivolous under applicable law, the lawyer must refuse to surrender the property to the client until the claims are resolved.

d. A lawyer should not unilaterally assume to arbitrate a dispute between the client and the third party, but, when there are substantial grounds for dispute as to the person entitled to the funds, the lawyer may file an action to have a court resolve the dispute.

[5] Independent Obligations Created

a. The obligations of a lawyer under this Rule are independent of those arising from activity other than rendering legal services.

b. For example, a lawyer who serves only as an escrow agent is governed by the applicable law relating to fiduciaries even though the lawyer does not render legal services in the transaction and is not governed by this Rule.

[6] Lawyers' Fund

A lawyers' fund for client protection provides a means through the collective efforts of the bar to reimburse persons who have lost money or property as a result of dishonest conduct of a lawyer. Where such a fund has been established, a lawyer must participate where it is mandatory, and, even when it is voluntary, the lawyer should participate.

RULE 2.1 - THE ATTORNEY AS AN ADVISOR.

1. The Rule

In representing a client, a lawyer shall 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.

2. The Comment

[1] Scope of Advice
a. A client is entitled to straightforward advice expressing the lawyer's honest assessment.
b. Legal advice often involves unpleasant facts and alternatives that a client may be disinclined to confront.
c. In presenting advice, a lawyer endeavors to sustain the client's morale and may put advice in as acceptable a form as honesty permits.
d. However, a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client.

[2] Adequacy of Advice

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

[3] Purely Technical Advice

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

[4] Beyond Legal Questions

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

[5] Offering Advice

a. In general, a lawyer is not expected to give advice until asked by the client.
b. However, when a lawyer knows that a client proposes a course of action that is likely to result in substantial adverse legal consequences to the client, the lawyer's duty to the client under Rule 1.4 may require that the lawyer offer advice if the client's course of action is related to the representation.

c. Similarly, when a matter is likely to involve litigation, it may be necessary under Rule 1.4 to inform the client of forms of dispute resolution that might constitute reasonable alternatives to litigation.

d. A lawyer ordinarily has no duty to initiate investigation of a client's affairs or to give advice that the client has indicated is unwanted, but a lawyer may initiate advice to a client when doing so appears to be in the client's interest.

RULE 2.4 - LAWYER SERVING AS THIRD-PARTY NEUTRAL

1. The Rule

(a) A lawyer serves as a third-party neutral when the lawyer assists two or more persons who are not clients of the lawyer to reach a resolution of a dispute or other matter that has arisen between them. Service as a third-party neutral may include service as an arbitrator, a mediator or in such other capacity as will enable the lawyer to assist the parties to resolve the matter.

(b) A lawyer serving as a third-party neutral shall inform unrepresented parties that the lawyer is not representing them. When the lawyer knows or reasonably should know that a party does not understand the lawyer's role in the matter, the lawyer shall explain the difference between the lawyer's role as a third-party neutral and a lawyer's role as one who represents a client.

2. The Comment

[1] Third Party Neutral

a. Alternative dispute resolution has become a substantial part of the civil justice system. Aside from representing clients in dispute-resolution processes, lawyers often serve as third-party neutrals.

b. A third-party neutral is a person, such as a mediator, arbitrator, conciliator or evaluator, who assists the parties, represented or unrepresented, in the resolution of a dispute or in the arrangement of a transaction.

c. Whether a third-party neutral serves primarily as a facilitator, evaluator or decision maker depends on the particular process that is either selected by the parties or mandated by a court.


a. The role of a third-party neutral is not unique to lawyers, although, in some court-connected contexts, only lawyers are allowed to serve in this role or to handle certain types of cases. In performing this role, the lawyer may be subject to court rules or other law that apply either to third-party neutrals generally or to lawyers serving as third-party neutrals.

b. Lawyer-neutrals may also be subject to various codes of ethics, such as the Code of Ethics for Arbitrators in Commercial Disputes prepared by a joint committee of the American Bar Association and the
American Arbitration Association or the Model Standards of Conduct for Mediators jointly prepared by the American Bar Association, the American Arbitration Association and the Society of Professionals in Dispute Resolution.

[3] Problems Unique to Lawyers

a. Unlike nonlawyers who serve as third-party neutrals, lawyers serving in this role may experience unique problems as a result of differences between the role of a third-party neutral and a lawyer's service as a client representative.

b. The potential for confusion is significant when the parties are unrepresented in the process.

c. Thus, paragraph (b) requires a lawyer-neutral to inform unrepresented parties that the lawyer is not representing them.

d. For some parties, particularly parties who frequently use dispute-resolution processes, this information will be sufficient. For others, particularly those who are using the process for the first time, more information will be required.

e. Where appropriate, the lawyer should inform unrepresented parties of the important differences between the lawyer's role as third-party neutral and a lawyer's role as a client representative, including the inapplicability of the attorney-client evidentiary privilege.

f. The extent of disclosure required under this paragraph will depend on the particular parties involved and the subject matter of the proceeding, as well as the particular features of the dispute-resolution process selected.


A lawyer who serves as a third-party neutral subsequently may be asked to serve as a lawyer representing a client in the same matter. The conflicts of interest that arise for both the individual lawyer and the lawyer's law firm are addressed in Rule 1.12.


a. Lawyers who represent clients in alternative dispute-resolution processes are governed by the Rules of Professional Conduct.

b. When the dispute-resolution process takes place before a tribunal, as in binding arbitration (see Rule 1.0(m)), the lawyer's duty of candor is governed by Rule 3.3.

c. Otherwise, the lawyer's duty of candor toward both the third-party neutral and other parties is governed by Rule 4.1.

RULE 4.1 - TRUTHFULNESS IN STATEMENTS TO OTHERS

1. The Rule

In the course of representing a client a lawyer shall not knowingly:
(a) make a false statement of material fact or law to a third person; or
(b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

2. The Comment

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

b. A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false.

c. Misrepresentations can also occur by partially true but misleading statements or omissions that are the equivalent of affirmative false statements.

d. For dishonest conduct that does not amount to a false statement or for misrepresentations by a lawyer other than in the course of representing a client, see Rule 8.4.

[2] Statements of Fact
a. This Rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances.

b. Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact.

c. Estimates of price or value placed on the subject of a transaction and a party’s intentions as to an acceptable settlement of a claim are ordinarily in this category, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud.

d. Lawyers should be mindful of their obligations under applicable law to avoid criminal and tortious misrepresentation.

[3] Crime or Fraud by Client
a. Under Rule 1.2(d), a lawyer is prohibited from counseling or assisting a client in conduct that the lawyer knows is criminal or fraudulent. Paragraph (b) states a specific application of the principle set forth in Rule 1.2(d) and addresses the situation where a client’s crime or fraud takes the form of a lie or misrepresentation.

b. Ordinarily, a lawyer can avoid assisting a client’s crime or fraud by withdrawing from the representation.

c. Sometimes it may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm an opinion, document, affirmation or the like. In extreme cases, substantive law may require a lawyer to disclose information relating to the representation to avoid being deemed to have assisted the client’s crime or fraud.
d. If the lawyer can avoid assisting a client’s crime or fraud only by disclosing this information, then under paragraph (b) the lawyer is required to do so, unless the disclosure is prohibited by Rule 1.6.

**RULE 5.3 RESPONSIBILITIES REGARDING NON-LAWYER ASSISTANCE**

1. **The Rule**

   With respect to a nonlawyer employed or retained by or associated with a lawyer:

   (a) a partner, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;

   (b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and

   (c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

      (1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

      (2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

2. **The Comment**

   [1] Supervision of Non-Lawyers

   a. Paragraph (a) requires lawyers with managerial authority within a law firm to make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that nonlawyers in the firm and nonlawyers outside the firm who work on firm matters act in a way compatible with the professional obligations of the lawyer.

   b. See Comment [6] to Rule 1.1 (retaining lawyers outside the firm) and Comment [1] to Rule 5.1 (responsibilities with respect to lawyers within a firm).

   c. Paragraph (b) applies to lawyers who have supervisory authority over such nonlawyers within or outside the firm.

   d. Paragraph (c) specifies the circumstances in which a lawyer is responsible for the conduct of such nonlawyers within or outside the firm that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer.

   [2] Nonlawyers Within the Firm

   a. Lawyers generally employ assistants in their practice, including secretaries, investigators, law student interns, and paraprofessionals.
b. Such assistants, whether employees or independent contractors, act for the lawyer in rendition of the lawyer's professional services.

c. A lawyer must give such assistants appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to representation of the client, and should be responsible for their work product.

d. The measures employed in supervising non-lawyers should take account of the fact that they do not have legal training and are not subject to professional discipline.

[3] Non-lawyers Outside the Firm

a. A lawyer may use non-lawyers outside the firm to assist the lawyer in rendering legal services to the client.

b. Examples include the retention of an investigative or paraprofessional service, hiring a document management company to create and maintain a database for complex litigation, sending client documents to a third party for printing or scanning, and using an Internet-based service to store client information.

c. When using such services outside the firm, a lawyer must make reasonable efforts to ensure that the services are provided in a manner that is compatible with the lawyer's professional obligations.

d. The extent of this obligation will depend upon the circumstances, including the education, experience and reputation of the nonlawyer; the nature of the services involved; the terms of any arrangements concerning the protection of client information; and the legal and ethical environments of the jurisdictions in which the services will be performed, particularly with regard to confidentiality.

e. See also Rules 1.1 (competence), 1.2 (allocation of authority), 1.4 (communication with client), 1.6 (confidentiality), 5.4(a) (professional independence of the lawyer), and 5.5(a) (unauthorized practice of law). When retaining or directing a nonlawyer outside the firm, a lawyer should communicate directions appropriate under the circumstances to give reasonable assurance that the non-lawyer's conduct is compatible with the professional obligations of the lawyer.


a. Where the client directs the selection of a particular non-lawyer service provider outside the firm, the lawyer ordinarily should agree with the client concerning the allocation of responsibility for monitoring as between the client and the lawyer. See Rule 1.2.

b. When making such an allocation in a matter pending before a tribunal, lawyers and parties may have additional obligations that are a matter of law beyond the scope of these Rules.

RULE 5.5 UNAUTHORIZED PRACTICE OF LAW; MULTIJURISDICTIONAL PRACTICE OF LAW

1. The Rule 5.5
(a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.

(b) A lawyer who is not admitted to practice in this jurisdiction shall not:

(1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or

(2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

(c) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that:

(1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;

(2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized;

(3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer’s practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission; or

(4) are not within paragraphs (c)(2) or (c)(3) and arise out of or are reasonably related to the lawyer’s practice in a jurisdiction in which the lawyer is admitted to practice.

(d) A lawyer admitted in another United States jurisdiction or in a foreign jurisdiction, and not disbarred or suspended from practice in any jurisdiction or the equivalent thereof, may provide legal services through an office or other systematic and continuous presence in this jurisdiction that:

(1) are provided to the lawyer’s employer or its organizational affiliates; are not services for which the forum requires pro hac vice admission; and, when performed by a foreign lawyer and requires advice on the law of this or another jurisdiction or of the United States, such advice shall be based upon the advice of a lawyer who is duly licensed and authorized by the jurisdiction to provide such advice; or

(2) are services that the lawyer is authorized by federal or other law or rule to provide in this jurisdiction.

(e) For purposes of paragraph (d), the foreign lawyer must be a member in good standing of a recognized legal profession in a foreign jurisdiction, the members of which are admitted to practice as lawyers or counselors at law or the equivalent, and are subject to effective regulation and discipline by a duly constituted professional body or a public authority.

2. The Comment

[1] Overview

a. A lawyer may practice law only in a jurisdiction in which the lawyer is authorized to practice.
b. A lawyer may be admitted to practice law in a jurisdiction on a regular basis or may be authorized by court rule or order or by law to practice for a limited purpose or on a restricted basis.

c. Paragraph (a) applies to unauthorized practice of law by a lawyer, whether through the lawyer's direct action or by the lawyer assisting another person.

d. For example, a lawyer may not assist a person in practicing law in violation of the rules governing professional conduct in that person's jurisdiction.

[2] Definition of the Practice of Law
a. The definition of the practice of law is established by law and varies from one jurisdiction to another.

b. Whatever the definition, limiting the practice of law to members of the bar protects the public against rendition of legal services by unqualified persons.

c. This Rule does not prohibit a lawyer from employing the services of paraprofessionals and delegating functions to them, so long as the lawyer supervises the delegated work and retains responsibility for their work. See Rule 5.3.

[3] Non-Lawyers
a. A lawyer may provide professional advice and instruction to nonlawyers whose employment requires knowledge of the law; for example, claims adjusters, employees of financial or commercial institutions, social workers, accountants and persons employed in government agencies.

b. Lawyers also may assist independent nonlawyers, such as paraprofessionals, who are authorized by the law of a jurisdiction to provide particular law-related services. In addition, a lawyer may counsel nonlawyers who wish to proceed pro se.

a. Other than as authorized by law or this Rule, a lawyer who is not admitted to practice generally in this jurisdiction violates paragraph (b)(1) if the lawyer establishes an office or other systematic and continuous presence in this jurisdiction for the practice of law.

b. Presence may be systematic and continuous even if the lawyer is not physically present here.

c. Such a lawyer must not hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction. See also Rules 7.1(a) and 7.5(b).

[5] Temporary Basis
a. There are occasions in which a lawyer admitted to practice in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction under circumstances that do not create an unreasonable risk to the interests of their clients, the public or the courts.

b. Paragraph (c) identifies four such circumstances.
c. The fact that conduct is not so identified does not imply that the conduct is or is not authorized. With the exception of paragraphs (d)(1) and (d)(2), this Rule does not authorize a U.S. or foreign lawyer to establish an office or other systematic and continuous presence in this jurisdiction without being admitted to practice generally here.

[6] Test

a. There is no single test to determine whether a lawyer’s services are provided on a “temporary basis” in this jurisdiction, and may therefore be permissible under paragraph (c).

b. Services may be “temporary” even though the lawyer provides services in this jurisdiction on a recurring basis, or for an extended period of time, as when the lawyer is representing a client in a single lengthy negotiation or litigation.


a. Paragraphs (c) and (d) apply to lawyers who are admitted to practice law in any United States jurisdiction, which includes the District of Columbia and any state, territory or commonwealth of the United States.

b. Paragraph (d) also applies to lawyers admitted in a foreign jurisdiction.

c. The word “admitted” in paragraphs (c), (d) and (e) contemplates that the lawyer is authorized to practice in the jurisdiction in which the lawyer is admitted and excludes a lawyer who while technically admitted is not authorized to practice, because, for example, the lawyer is on inactive status.

[8] Paragraph (c)(1)

a. Paragraph (c)(1) recognizes that the interests of clients and the public are protected if a lawyer admitted only in another jurisdiction associates with a lawyer licensed to practice in this jurisdiction.

b. For this paragraph to apply, however, the lawyer admitted to practice in this jurisdiction must actively participate in and share responsibility for the representation of the client.

[9] Pro Hac Vice

a. Lawyers not admitted to practice generally in a jurisdiction may be authorized by law or order of a tribunal or an administrative agency to appear before the tribunal or agency.

b. This authority may be granted pursuant to formal rules governing admission pro hac vice or pursuant to informal practice of the tribunal or agency.

c. Under paragraph (c)(2), a lawyer does not violate this Rule when the lawyer appears before a tribunal or agency pursuant to such authority.

d. To the extent that a court rule or other law of this jurisdiction requires a lawyer who is not admitted to practice in this jurisdiction to obtain admission pro hac vice before appearing before a tribunal or administrative agency, this Rule requires the lawyer to obtain that authority.

[10] Temporary Rendering of Service
a. Paragraph (c)(2) also provides that a lawyer rendering services in this jurisdiction on a temporary basis does not violate this Rule when the lawyer engages in conduct in anticipation of a proceeding or hearing in a jurisdiction in which the lawyer is authorized to practice law or in which the lawyer reasonably expects to be admitted pro hac vice.

b. Examples of such conduct include meetings with the client, interviews of potential witnesses, and the review of documents.

c. Similarly, a lawyer admitted only in another jurisdiction may engage in conduct temporarily in this jurisdiction in connection with pending litigation in another jurisdiction in which the lawyer is or reasonably expects to be authorized to appear, including taking depositions in this jurisdiction.


a. When a lawyer has been or reasonably expects to be admitted to appear before a court or administrative agency, paragraph (c)(2) also permits conduct by lawyers who are associated with that lawyer in the matter, but who do not expect to appear before the court or administrative agency.

b. For example, subordinate lawyers may conduct research, review documents, and attend meetings with witnesses in support of the lawyer responsible for the litigation.

[12] Admitted in Another Jurisdiction

a. Paragraph (c)(3) permits a lawyer admitted to practice law in another jurisdiction to perform services on a temporary basis in this jurisdiction if those services are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer’s practice in a jurisdiction in which the lawyer is admitted.

b. The lawyer, however, must obtain admission pro hac vice in the case of a court-annexed arbitration or mediation or otherwise if court rules or law so require.

[13] Paragraph (c)(4) permits a lawyer admitted in another jurisdiction to provide certain legal services on a temporary basis in this jurisdiction that arise out of or are reasonably related to the lawyer’s practice in a jurisdiction in which the lawyer is admitted but are not within paragraphs (c)(2) or (c)(3).

a. These services include both legal services and services that nonlawyers may perform but that are considered the practice of law when performed by lawyers.

[14] Paragraphs (c)(3) and (c)(4) require that the services arise out of or be reasonably related to the lawyer’s practice in a jurisdiction in which the lawyer is admitted. A variety of factors evidence such a relationship.

a. The lawyer’s client may have been previously represented by the lawyer, or may be resident in or have substantial contacts with the jurisdiction in which the lawyer is admitted. The matter, although involving other jurisdictions, may have a significant connection with that jurisdiction. In other cases, significant aspects of the lawyer’s work might be conducted in that jurisdiction or a significant aspect of the matter may involve the law of that jurisdiction.
b. The necessary relationship might arise when the client’s activities or the legal issues involve multiple jurisdictions, such as when the officers of a multinational corporation survey potential business sites and seek the services of their lawyer in assessing the relative merits of each.

c. In addition, the services may draw on the lawyer’s recognized expertise developed through the regular practice of law on behalf of clients in matters involving a particular body of federal, nationally-uniform, foreign, or international law.

d. Lawyers desiring to provide pro bono legal services on a temporary basis in a jurisdiction that has been affected by a major disaster, but in which they are not otherwise authorized to practice law, as well as lawyers from the affected jurisdiction who seek to practice law temporarily in another jurisdiction, but in which they are not otherwise authorized to practice law, should consult the [Model Court Rule on Provision of Legal Services Following Determination of Major Disaster].

[15] Permissible Offices

a. Paragraph (d) identifies two circumstances in which a lawyer who is admitted to practice in another United States or a foreign jurisdiction, and is not disbarred or suspended from practice in any jurisdiction, or the equivalent thereof, may establish an office or other systematic and continuous presence in this jurisdiction for the practice of law.

b. Pursuant to paragraph (c) of this Rule, a lawyer admitted in any U.S. jurisdiction may also provide legal services in this jurisdiction on a temporary basis.

c. See also Model Rule on Temporary Practice by Foreign Lawyers. Except as provided in paragraphs (d)(1) and (d)(2), a lawyer who is admitted to practice law in another United States or foreign jurisdiction and who establishes an office or other systematic or continuous presence in this jurisdiction must become admitted to practice law generally in this jurisdiction.

[16] Paragraph (d)(1) applies to a U.S. or foreign lawyer who is employed by a client to provide legal services to the client or its organizational affiliates, i.e., entities that control, are controlled by, or are under common control with the employer.

a. This paragraph does not authorize the provision of personal legal services to the employer’s officers or employees.

b. The paragraph applies to in-house corporate lawyers, government lawyers and others who are employed to render legal services to the employer.

c. The lawyer’s ability to represent the employer outside the jurisdiction in which the lawyer is licensed generally serves the interests of the employer and does not create an unreasonable risk to the client and others because the employer is well situated to assess the lawyer’s qualifications and the quality of the lawyer’s work.

d. To further decrease any risk to the client, when advising on the domestic law of a United States jurisdiction or on the law of the United States, the foreign lawyer authorized to practice under paragraph
(d)(1) of this Rule needs to base that advice on the advice of a lawyer licensed and authorized by the jurisdiction to provide it.

[17] If an employed lawyer establishes an office or other systematic presence in this jurisdiction for the purpose of rendering legal services to the employer, the lawyer may be subject to registration or other requirements, including assessments for client protection funds and mandatory continuing legal education. See Model Rule for Registration of In-House Counsel.

[18] Paragraph (d)(2) recognizes that a U.S. or foreign lawyer may provide legal services in a jurisdiction in which the lawyer is not licensed when authorized to do so by federal or other law, which includes statute, court rule, executive regulation or judicial precedent. See, e.g., Model Rule on Practice Pending Admission.

[19] **Subject to Disciplinary Rules**

A lawyer who practices law in this jurisdiction pursuant to paragraphs (c) or (d) or otherwise is subject to the disciplinary authority of this jurisdiction. See Rule 8.5(a).

[20] In some circumstances, a lawyer who practices law in this jurisdiction pursuant to paragraphs (c) or (d) may have to inform the client that the lawyer is not licensed to practice law in this jurisdiction. For example, that may be required when the representation occurs primarily in this jurisdiction and requires knowledge of the law of this jurisdiction. See Rule 1.4(b).

[21] **Advertising**

Paragraphs (c) and (d) do not authorize communications advertising legal services in this jurisdiction by lawyers who are admitted to practice in other jurisdictions. Whether and how lawyers may communicate the availability of their services in this jurisdiction is governed by Rules 7.1 to 7.5.

**Rule 1.0 - Terminology**

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

(b) "Confirmed in writing," when used in reference to the informed consent of a person, denotes informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent. See paragraph (e) for the definition of "informed consent." If it is not feasible to obtain or transmit the writing at the time the person gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.

(c) "Firm" or "law firm" denotes a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation or other organization.

(d) "Fraud" or "fraudulent" denotes conduct that is fraudulent under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive.
(e) "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.

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

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

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

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

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

(k) "Screened" denotes the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer is obligated to protect under these Rules or other law.

(l) "Substantial" when used in reference to degree or extent denotes a material matter of clear and weighty importance.

(m) "Tribunal" denotes a court, an arbitrator in a binding arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity. A legislative body, administrative agency or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a binding legal judgment directly affecting a party's interests in a particular matter.

(n) "Writing" or "written" denotes a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photostating, photography, audio or videorecording, and electronic communications. A "signed" writing includes an electronic sound, symbol or process attached to or logically associated with a writing and executed or adopted by a person with the intent to sign the writing.
UNIT THREE - STATEMENTS ON STANDARDS FOR CPAS

I. Overview

II. AICPA Code of Professional Conduct

0.300 Principles of Professional Conduct

Preface: Applicable to All Members

0.300.010 Preamble

.01 Membership in the American Institute of Certified Public Accountants is voluntary. By accepting membership, a member assumes an obligation of self-discipline above and beyond the requirements of laws and regulations.

.02 These Principles of the Code of Professional Conduct of the American Institute of Certified Public Accountants express the profession’s recognition of its responsibilities to the public, to clients, and to colleagues. They guide members in the performance of their professional responsibilities and express the basic tenets of ethical and professional conduct. The Principles call for an unswerving commitment to honorable behavior, even at the sacrifice of personal advantage. [Prior reference: ET section 51]

0.300.020 Responsibilities

.01 Responsibilities principle. In carrying out their responsibilities as professionals, members should exercise sensitive professional and moral judgments in all their activities.

.02 As professionals, members perform an essential role in society. Consistent with that role, members of the American Institute of Certified Public Accountants have responsibilities to all those who use their professional services. Members also have a continuing responsibility to cooperate with each other to improve the art of accounting, maintain the public’s confidence, and carry out the profession’s special responsibilities for self-governance. The collective efforts of all members are required to maintain and enhance the traditions of the profession. [Prior reference: ET section 52]

0.300.030 The Public Interest

.01 The public interest principle. Members should accept the obligation to act in a way that will serve the public interest, honor the public trust, and demonstrate a commitment to professionalism. .02 A distinguishing mark of a profession is acceptance of its responsibility to the public. The accounting profession’s public consists of clients, credit grantors, governments, employers, investors, the business and financial community, and others who rely on the objectivity and integrity of members to maintain the orderly functioning of commerce. This reliance imposes a public interest responsibility on members. The public interest is defined as the collective well-being of the community of people and institutions that the profession serves.
.03 In discharging their professional responsibilities, members may encounter conflicting pressures from each of those groups. In resolving those conflicts, members should act with integrity, guided by the precept that when members fulfill their responsibility to the public, clients’ and employers’ interests are best served.

.04 Those who rely on members expect them to discharge their responsibilities with integrity, objectivity, due professional care, and a genuine interest in serving the public. They are expected to provide quality services, enter into fee arrangements, and offer a range of services—all in a manner that demonstrates a level of professionalism consistent with these Principles of the Code of Professional Conduct.

.05 All who accept membership in the American Institute of Certified Public Accountants commit themselves to honor the public trust. In return for the faith that the public reposes in them, members should seek to continually demonstrate their dedication to professional excellence. [Prior reference: ET section 53]

0.300.040 Integrity

.01 Integrity principle. To maintain and broaden public confidence, members should perform all professional responsibilities with the highest sense of integrity.

.02 Integrity is an element of character fundamental to professional recognition. It is the quality from which the public trust derives and the benchmark against which a member must ultimately test all decisions.

Preface: Applicable to All Members

.03 Integrity requires a member to be, among other things, honest and candid within the constraints of client confidentiality. Service and the public trust should not be subordinated to personal gain and advantage. Integrity can accommodate the inadvertent error and honest difference of opinion; it cannot accommodate deceit or subordination of principle.

.04 Integrity is measured in terms of what is right and just. In the absence of specific rules, standards, or guidance or in the face of conflicting opinions, a member should test decisions and deeds by asking: “Am I doing what a person of integrity would do? Have I retained my integrity?” Integrity requires a member to observe both the form and the spirit of technical and ethical standards; circumvention of those standards constitutes subordination of judgment.

.05 Integrity also requires a member to observe the principles of objectivity and independence and of due care.[Prior reference: ET section 54]

0.300.050 Objectivity and Independence.

.01 Objectivity and independence principle. A member should maintain objectivity and be free of conflicts of interest in discharging professional responsibilities. A member in public practice should be independent in fact and appearance when providing auditing and other attestation services.

.02 Objectivity is a state of mind, a quality that lends value to a member’s services. It is a distinguishing feature of the profession. The principle of objectivity imposes the obligation to be impartial, intellectually honest, and free of conflicts of interest. Independence precludes relationships that may appear to impair a member’s objectivity in rendering attestation services.
Members often serve multiple interests in many different capacities and must demonstrate their objectivity in varying circumstances. Members in public practice render attest, tax, and management advisory services. Other members prepare financial statements in the employment of others, perform internal auditing services, and serve in financial and management capacities in industry, education, and government. They also educate and train those who aspire to admission into the profession. Regardless of service or capacity, members should protect the integrity of their work, maintain objectivity, and avoid any subordination of their judgment.

For a member in public practice, the maintenance of objectivity and independence requires a continuing assessment of client relationships and public responsibility. Such a member who provides auditing and other attestation services should be independent in fact and appearance. In providing all other services, a member should maintain objectivity and avoid conflicts of interest.

Although members not in public practice cannot maintain the appearance of independence, they nevertheless have the responsibility to maintain objectivity in rendering professional services. Members employed by others to prepare financial statements or to perform auditing, tax, or consulting services are charged with the same responsibility for objectivity as members in public practice and must be scrupulous in their application of generally accepted accounting principles and candid in all their dealings with members in public practice. [Prior reference: ET section 55]

0.300.060 Due Care

Due care principle. A member should observe the profession’s technical and ethical standards, strive continually to improve competence and the quality of services, and discharge professional responsibility to the best of the member’s ability.

The quest for excellence is the essence of due care. Due care requires a member to discharge professional responsibilities with competence and diligence. It imposes the obligation to perform professional services to the best of a member’s ability, with concern for the best interest of those for whom the services are performed, and consistent with the profession’s responsibility to the public.

Preface: Applicable to All Members.

Competence is derived from a synthesis of education and experience. It begins with a mastery of the common body of knowledge required for designation as a certified public accountant. The maintenance of competence requires a commitment to learning and professional improvement that must continue throughout a member’s professional life. It is a member’s individual responsibility. In all engagements and in all responsibilities, each member should undertake to achieve a level of competence that will assure that the quality of the member’s services meets the high level of professionalism required by these Principles.

Competence represents the attainment and maintenance of a level of understanding and knowledge that enables a member to render services with facility and acumen. It also establishes the limitations of a member’s capabilities by dictating that consultation or referral may be required when a professional engagement exceeds the personal competence of a member or a member’s firm. Each member is responsible for assessing his or her own competence of evaluating whether education, experience, and judgment are adequate for the responsibility to be assumed.
.05 Members should be diligent in discharging responsibilities to clients, employers, and the public. Diligence imposes the responsibility to render services promptly and carefully, to be thorough, and to observe applicable technical and ethical standards.

.06 Due care requires a member to plan and supervise adequately any professional activity for which he or she is responsible. [Prior reference: ET section 56]

0.300.070 Scope and Nature of Services.

.01 Scope and nature of services principle. A member in public practice should observe the Principles of the Code of Professional Conduct in determining the scope and nature of services to be provided.

.02 The public interest aspect of members’ services requires that such services be consistent with acceptable professional behavior for members. Integrity requires that service and the public trust not be subordinated to personal gain and advantage. Objectivity and independence require that members be free from conflicts of interest in discharging professional responsibilities. Due care requires that services be provided with competence and diligence.

.03 Each of these Principles should be considered by members in determining whether or not to provide specific services in individual circumstances. In some instances, they may represent an overall constraint on audit services that might be offered to a specific client. No hard-and-fast rules can be developed to help members reach these judgments, but they must be satisfied that they are meeting the spirit of the Principles in this regard.

.04 In order to accomplish this, members should

a. Practice in firms that have in place internal quality control procedures to ensure that services are competently delivered and adequately supervised.

b. Determine, in their individual judgments, whether the scope and nature of other services provided to an audit client would create a conflict of interest in the performance of the audit function for that client.

c. Assess, in their individual judgments, whether an activity is consistent with their role as professionals. [Prior reference: ET section 57]

III. Statements of Standards for Tax Services

A. The AICPA has designated the Tax Executive Committee as the standard-setting body for tax standards applicable to members of the AICPA. The standards issued by the Tax Executive Committee are enforceable professional obligations under AICPA Code of Professional Conduct’s General Standards Rule and Compliance with Standards Rule. The Tax Executive Committee’s standards for tax practice are codified in the Statements on Standards for Tax Services (SSTSs) and related interpretations.

The SSTS’s are the standards promulgated by the Tax Executive Committee of the AICPA. Every member of the AICPA is obligated to follow the SSTS’s by the General Standards Rule and the Compliance with Standards Rule of the AICPA Code of Professional Conduct.

B. In addition to being enforceable standards for members of the AICPA, these standards are often referred to by courts, state boards of accountancy and other regulatory bodies as professional standards
that should guide practitioners in the performance of tax services. Thus, these statements can provide important guidance for any accountant engaged in the provision of tax services.

IV. SSTS No. 1: Tax Return Positions

A. In General

SSTS 1 applies to all tax services provided by a member of the AICPA in all jurisdictions in which he or she practices. It prescribes the standard for CPAs to apply in determining whether a tax position taken by a client is supported by law. Unless a tax reporting position satisfies the standards of SSTS 1, a CPA may not sign the return as tax preparer.

The underlying rationale for SSTS 1 is that a tax practitioner not only has a duty to the client, but also has a duty to the tax system. It recognizes that a tax return is the taxpayer's representation, not the tax preparer's, and that the taxpayer has the final responsibility for the content of the return. It also recognizes that a taxpayer has no responsibility to pay more tax than required and that the tax preparer has a duty to assist the taxpayer in achieving that goal. A tax preparer has the right and responsibility to advocate the client's tax position before the IRS.

At the same time, SSTS 1 recognizes that a tax preparer has a duty to the tax system. A tax system that is based on self-reporting will not function effectively unless all participants recognize the importance of complete and accurate reporting.

In order to achieve these dual goals, SSTS 1 establishes the basic framework that a tax preparer may sign a return only if it meets the “realistic possibility” standard. Specifically:

• The standard applies to CPAs who recommend tax return positions and prepare or sign tax returns that are filed with any taxing authority, not just the IRS. A tax return position requires a conclusion by a CPA based on a taxpayer's return and a communication about the position as to which the taxpayer has been specifically advised by a CPA.

• The standard requires that a CPA not recommend a tax position, or prepare or sign a return, unless the CPA believes in good faith that the tax position has a “realistic possibility” of being sustained if challenged judicially or administratively.

• Despite the above rule, the standard allows a CPA to recommend a tax position that does not meet the realistic possibility standard if the CPA concludes the position meets the reasonable basis standard and the CPA advises the taxpayer to appropriately disclose the position. The CPA, however, cannot prepare or sign the return in this instance unless the position is appropriately disclosed.

• When preparing or signing a tax return or recommending a tax return position, a CPA should advise the taxpayer of any penalty consequences of the tax return position and, if disclosure is an option, how to avoid the penalty through adequate disclosure. Disclosure requirements should be based upon authorities in the jurisdiction appropriate to the particular circumstances and facts in the taxpayer's case.

• A CPA should not prepare or sign a return or recommend a return position that the member knows would be used as a “mere arguing position advanced solely in order to obtain leverage” with a taxing authority
during the settlement negotiation bargaining process. No attempt should be made to recommend a position, sign, or prepare a return that includes a position that would exploit the taxing authority's audit selection process.

B. Interpretation of the Realistic Possibility Standard

1. The Standard

AICPA TS Section 9100 provides additional guidance to the tax practitioner in applying the realistic possibility standard. Specifically, it states that the realistic possibility standard is satisfied if there is approximately a 1-in-3 likelihood that the position will be upheld if challenged by a tax authority. This standard is less stringent than the substantial authority standard and the more likely than not standard in the Internal Revenue Code. It is stricter than the reasonable basis standard.

AICPA TS 9100 also provides guidance on the types of authority that may be considered in assessing the likelihood that a position will be accepted. In addition to the sources provided for under Treas. Reg. §1.6662-4(d)(3)(iii), a practitioner may consider "well-reasoned treatises, articles in recognized professional tax publications, and other reference tools and sources of tax analyses commonly used by tax advisors and preparers of returns."

Comment: Conclusions reached in treatises, articles, and similar publications are not considered authority under Treas. Reg. §1.6662-4(d)(3)(iii), but are considered such under AICPA TS 9100.

Lastly, it provides guidance on the level of diligence required of a tax practitioner in assessing the tax position. It requires that the practitioner determine the facts and relevant questions, research the authorities and reach a conclusion based on the authorities. The interpretation emphasizes the importance of weighing the authorities in light of their persuasiveness, relevance and source, giving more weight to those authorities with similar facts and thorough analysis.

2. SSTS No. 2: Answers to Questions on Returns

SSTS 2 addresses the issue of whether a CPA may sign a return on which there are unanswered questions, including questions contained in tax return instructions, regulations, or the return itself. It provides that:

- A practitioner must "make a reasonable effort to obtain from the taxpayer the information necessary to provide appropriate answers to all questions on a tax return before signing as a preparer."

- Information may be omitted if there are “reasonable grounds” for the omission. Reasonable grounds include situations in which: (1) information is not “readily available and the answer is not significant in terms of taxable income or loss or the tax liability shown on the return,” (2) “genuine uncertainty exists as to the meaning of the question in the context of the particular return”; or (3) when “the answer is voluminous” and the taxpayer indicates that the information will be provided upon request.

3. SSTS No. 3: Certain Procedural Aspects of Preparing Returns

SSTS 3 addresses the CPA's obligation “to examine or verify certain supporting data or to consider information related to another taxpayer when preparing a taxpayer's return.”
• The general rule is that CPAs may in good faith rely upon information provided by the taxpayer or a third party without independent verification. For example, a CPA may rely on lists of deductions, dividends and interest furnished by a client, or on information provided by a third party, such as a pass-through entity, without verifying the information. Thus, the CPA's declaration in a tax return that all information is “true, correct and complete to the best of the tax preparer's knowledge” does not require that the tax preparer verify any information that is included in the return. The CPA should, however, encourage the taxpayer to provide underlying information so that all of the tax implications of the transactions may be considered.

• If information provided to the CPA appears to be incorrect, incomplete, or inconsistent, the CPA is required to make “reasonable inquiry”. This duty can arise from knowledge the CPA obtains from the tax returns of other filers and encourage the taxpayer to provide the necessary underlying documentation. Whenever feasible, the CPA should review the taxpayer's returns for at least one prior year.

• Where the tax law or regulations impose any condition to a given tax treatment, the CPA should make appropriate inquiries to determine whether the condition was met.

4. SSTS No. 4: Use of Estimates

Under SSTS 4, a tax preparer may use estimates provided by the taxpayer as long as three conditions are met: (1) it is not practical to obtain exact data; (2) the tax preparer determines that the estimates are reasonable based upon known facts and circumstances; and (3) the use of estimates is not otherwise prohibited by statute or rule.

This statement applies, for example, when the taxpayer’s records do not contain sufficient detail of small expenditures, requiring that the amounts be determined by estimate.

It is not generally necessary to disclose in the tax return that a particular amount is based on an estimate. Disclosure is required, however, in unusual situations in which the return might otherwise be misleading. Examples of such unusual situation include cases in which: (1) the taxpayer has died before the filing of the return, (2) the taxpayer has not received a Schedule K-1 from a pass through entity; (3) there is litigation pending that might affect the return; or (4) the relevant records have been destroyed by fire or computer failure.

Even though disclosure of estimates typically is not required, the CPA should not present an estimate in a manner that implies the amount presented is an exact figure. For instance, the CPA should present round numbers for estimates.

SSTS 4 differentiates between estimates and approximations that are based on judgments. Examples of approximations based on judgments can be found in the tax law. For instance, sometimes a manufacturer will reimburse a retailer for advertising services. The IRS has held that an accrual-basis manufacturer may deduct amounts it approximates it owes for advertising services rendered by retailers during the year even if the retailers do not submit reimbursement claims until the following year. Such approximations are not based on inadequacies in the taxpayer’s financial records and thus are not subject to the rules in SSTS 4 regarding use of estimates.
5. SSTS No. 5: Departure From a Position Previously Concluded in an Administrative Proceeding or Court Decision

SSTS 5 establishes the standards for recommending a tax return position different from one taken on a prior return that was subject to an administrative or court proceeding. For purposes of this statement, administrative proceeding includes “an examination by a taxing authority or an appeals conference relating to a return or a claim for refund,” while court decision includes a decision made by “any court having jurisdiction over tax matters.”

When an administrative proceeding or court decision results in a determination based on a specific tax treatment on a prior tax return, a CPA will usually recommend the same treatment for subsequent years. However, a CPA may recommend a tax position that departs from the prior determination if the tax position meets the standards in SSTS 1. SSTS 5 identifies several circumstances that may justify departure from a prior position including:

- Supporting documentation becomes available or subsequent rulings are more favorable to the taxpayer's current position.
- The taxpayer yielded in the prior proceeding for settlement purposes or did not appeal an adverse decision, even though the questioned tax return position met the standards in SSTS 1. Unless the taxpayer is bound to a specified treatment in a later year (e.g., by a formal closing agreement), the CPA may recommend a different tax treatment in subsequent years.
- Court decisions, rulings, or other authorities more favorable to the recommended tax position may have developed since the prior determination.

6. SSTS No. 6: Knowledge of Error

a. Return Preparation

A CPA who discovers that a taxpayer failed to file a required tax return or that a previously filed return was erroneous should promptly inform the taxpayer and recommend measures to correct the error. A CPA should not inform the taxing authority of the error without the taxpayer's permission unless required by law. To do otherwise would violate the confidentiality obligation in the AICPA Code of Professional Conduct and relevant laws. Other important issues include:

- If, after being informed of an error, the taxpayer chooses not to file an amended return or otherwise correct the error, the CPA should consider whether to withdraw from preparing the taxpayer’s current return and whether to continue a professional or employment relationship with the taxpayer. A CPA who chooses to continue in a professional employment relationship with the taxpayer can prepare a return for the current year but should take reasonable steps to ensure that the error is not repeated. If a current return cannot be prepared without incorporating or repeating the prior error, CPAs should consider withdrawal from preparing the return.
- SSTS 6 does not address the issue of disclosure to successor preparers. However, the Confidential Client Information Rule of the Code of Professional Conduct prohibits disclosure without the client's consent. One of the Interpretations under the Confidential Client Information Rule suggests that CPAs who withdraw
from a tax engagement on discovering irregularities in the client’s tax return and are subsequently contacted by successor accountants can indirectly alert them to possible irregularities and errors on prior returns by recommending that the predecessor ask the client for permission “to discuss all matters freely with the successor.” This ruling was intended to make it more difficult to conceal fraud or other illegal acts by changing CPAs.

- Absent a showing of reasonable cause and good faith, tax preparers can incur a penalty under section 6694(a) of the Internal Revenue Code for errors that either understate tax liability or overstate refunds because of a tax return position that lacks a realistic possibility of being sustained on its merits. CPAs should consult with their own attorneys before either recommending corrective action or continuing a professional or employment relationship with the taxpayer.

- SSTS 6 does not explicitly require a CPA to inform the taxpayer of the potential consequences, including accuracy-related penalties under sections 6662 or 6662A of the Internal Revenue Code, of taking or not taking corrective action. However, SSTS 1 requires a CPA to discuss with the taxpayer any position that might lead to taxpayer penalties and any opportunities to avoid such penalties through appropriate disclosure.

Although the statement permits oral recommendations of corrective action or disclosure of errors to the taxpayer’s tax return preparer, the CPA should document in writing all notice of errors and recommend corrective action.

b. Administrative Proceedings

SSTS 6 also applies to CPAs who become aware that an error in a tax return is subject of an administrative proceeding, such as an examination by a taxing authority or an appeals conference. It does not apply in a criminal proceeding.

In representing taxpayers in administrative proceedings, SSTS 6 instructs a CPA to inform the taxpayer when an error is discovered by the CPA. The CPA should not disclose the error to taxing authorities without the taxpayer’s permission unless required by law. However, the CPA should request the taxpayer’s agreement to disclose the error to the taxing authority. If the taxpayer refuses disclosure, the CPA should consider withdrawing from continued representation in the administrative proceedings or professional or employment relationship.

SSTS 6 recommends that a CPA should advise the taxpayer to consult an attorney if the CPA believes that fraud or criminal charges could result from tax-return errors discovered during the administrative proceeding. Similarly, CPAs are advised to seek legal counsel if there is a possible conflict of interest or Confidential Client Information Rule violation for breach of confidential client relationship or privileged communication. These issues may be of greater significance when an error is discovered in a prior return that has become the subject of the administrative hearing.

7. SSTS No. 7: Form and Content of Advice to Taxpayers

SSTS 7 provides guidance regarding the form and content of advice given by a CPA. In general, because of the wide variety of circumstances that may lead to the provision of tax advice there is no single format or
rigid requirements on the form of advice. Most aspects of advising clients are left to the professional judgment of the CPA.

SSTS 7 provides some general parameters for the form and content of advice, including the following:

- Advice may be provided orally in routine or well-defined areas, but should be in writing if the area is important, complicated or unusual. In deciding upon a form of communication, the CPA should consider the following factors:
  - The importance and amount of the transaction;
  - The nature of the taxpayer’s inquiry;
  - The time available for developing and submitting advice;
  - The technical complexity involved;
  - The existence of authorities and precedents;
  - The sophistication of the taxpayer;
  - The need to seek other professional advice;
  - The type of transaction and whether it is subject to heightened reporting or disclosure requirements;
  - The potential penalty consequences of the tax return position related to the advice;
  - Whether any potential applicable penalties can be avoided through disclosure; and
  - Whether the CPA intends for the taxpayer to rely on the advice to avoid potential penalties.

When subsequent developments affect previous advice to taxpayers, a CPA generally has no duty to provide updated advice. There are two exceptions to this rule: (1) if the CPA is involved in implementing the advice previously given; or (2) if the CPA has specifically agreed to update his or her advice.

Client communications and advice should typically include precautionary language about the current state of the tax law and a summary of the transaction or facts that affect the advice given by the CPA. The CPA should inform the taxpayer that the advice reflects professional judgment based on the facts of the existing situation, that authorities are subject to change, and that subsequent developments could affect previous advice.

8. **Demonstrating Compliance With SSTSs**

By demonstrating adherence with SSTSs, a CPA will be in a better position to defend against claims in court. By showing good faith attempts at compliance, as well as due diligence in the preparation of client tax returns, a CPA may be able to mitigate preparer penalties and malpractice claims. It is essential for leaders of practice units of CPA firms to acquaint themselves and their staffs with both the content and application of tax practice standards to complex client situations. Here are some factors to consider:

- Documentation is essential to ensure compliance with tax practice responsibility standards.
• CPA firms should require both individual and business clients to complete and sign tax questionnaires and provide necessary documentation for tax compliance and planning purposes.

• A CPA should maintain detailed records of client interviews and all decisions regarding tax return positions and supporting documentation.

• Written copies of client communications should be maintained to protect the client and preparer and to create a record of what was actually communicated.

• Firms also have the responsibility to ensure that their office procedures demonstrate that tax practitioner responsibility procedures are enforced as part of the firm's quality management systems.

V. Statements on Standards for Consulting Services

A. Overview

All professional services rendered by a CPA are subject to the general standards set forth in AICPA Code of Professional Conduct Section 201, which address professional competence, due professional care, planning and supervision, and sufficient relevant data. In addition, CPAs performing consulting services are subject to the specific guidance set forth in the AICPA's Statement on Standards for Consulting Services No. 1. SSCS 1 was issued by the AICPA Management Consulting Services Executive Committee, the senior technical committee designated by the Council to establish standards for consulting services under the Compliance with Standards Rule of the Code of Professional Conduct.

B. Applicability of Standard

Under the AICPA Code, a consulting services practitioner is one who holds out as a CPA while engaged in the performance of a Consulting Service, as defined by the standards, or any other individual who is carrying out a Consulting Service for a client on behalf of the CPA or CPA firm.

Consulting Services are defined as any professional services that “employ the practitioner's technical skills, education, observations, experiences, and knowledge of the consulting process.”

Consulting Services include:

• Consultations

A CPA provides counsel to the client on matters such as technical issues, client representations, and the mutual intent of the parties. Examples include reviewing and commenting on client-prepared business plan and suggesting computer software for further client investigation. The time frame is usually short and the services are based primarily on existing knowledge of the client.

• Advisory Services

The CPA develops findings, conclusions, and recommendations for client consideration and decision making. Examples include an operational and review improvement study, analysis of an accounting system, assistance with strategic planning, and definition of requirements for an information system.

• Implementation Services
The CPA implements a client action plan, often using client personnel and resources to accomplish the implementation objectives. The CPA is responsible to the client for the conduct and management of engagement activities. Examples include computer system installation and support, executive steps to improve productivity, and assisting with the merger of organizations.

- **Transaction Services**

The CPA provides services related to specific client transactions including insolvency services, valuation services, preparation of information for obtaining financing, analysis of a potential merger or acquisition, and litigation service.

- **Staff and Other Support Services**

The CPA provides staff and other support for the client including data processing facilities management, computer programming, bankruptcy trusteeship, and controllership activities.

- **Product Services**

The CPA provides the client a product and associated professional installation services, use, and maintenance of the product. Examples include the sale and delivery of software package training programs, the sale and implementation of computer software, and the sale and installation of systems development methodologies.

The consulting services standards are not applicable to: (1) services that are subject to other AICPA Technical Standards such as Statements on Auditing Standards (SASs), Statements on Standards for Attestation Engagements (SSAEs), or Statements on Standards for Accounting and Review Services (SSARSs); or (2) engagements for tax return preparation, tax planning/advice, tax representation, personal financial planning or bookkeeping services; or (3) advice on accounting principles or financial reporting.

C. **Statement on Standards for Consulting Services**

When performing consulting services, CPAs are subject to standards under the General Standards Rule of the AICPA Code of Professional Conduct.

- **Client Interest**

The CPA should serve the client's interest while maintaining integrity and objectivity.

- **Understanding With the Client**

The CPA should “[e]stablish with the client a written or oral understanding about the responsibilities of the parties and the nature, scope, and limitations of services to be performed, and [should] modify the understanding if circumstances require a significant change during the engagement.”

- **Communications With Client**

The CPA should “[i]nform the client of (a) conflicts of interest that may occur pursuant to interpretations of [the Integrity and Objectivity Rule] of the Code of Professional Conduct, (b) significant reservations concerning the scope or benefits of the engagement, and (c) significant engagement findings or events.”
## APPENDIX

Model Rules Involved in Various Stages of the Estate Planning Process

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