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HISTORY

History. These rules replace the Vermont Code of Professional Responsibility, adopted by the Court on February 10, 1971, and amended thereafter. These rules apply to lawyer conduct after September 1, 1999. The Code of Professional Responsibility continues to apply to conduct prior to September 1, 1999. These rules were adopted by Supreme Court Order dated March 9, 1999.

Introductory Reporter's Note—2009 Amendments

The Vermont Rules of Professional Conduct are amended to incorporate comprehensive and significant changes to the American Bar Association's Model Rules of Professional Conduct that were adopted by the ABA House of Delegates in 2001-2003.

The changes to the Model Rules were initially proposed by the ABA's Commission on the Evaluation of the Rules of Professional Conduct (the "Ethics 2000" Commission) established by the Board of Governors in 1997 to conduct the first comprehensive review of the Model Rules since their initial adoption in 1983. The review was designed to address the lack of uniformity in state adoptions of the Model Rules, as well as the rapidly changing climate of the practice of law produced by the impact of technology and the changing dynamic of the legal profession. The Commission sought to produce amendments within the existing framework of the Model Rules that would be "a balanced blend of traditional precepts and forward-looking provisions that are responsive to modern developments." Chair's Introduction, ABA Model Rules of Professional Conduct (2002). Those "modern developments" included the promulgation in 1998 of the American Law Institute's Restatement of the Law Governing Lawyers, a comprehensive statement and analysis of the entire legal framework governing the legal profession and the practice of law that can serve as a guide to understanding and application of the principles underlying the Model Rules.

The present amendments to the Vermont Rules were recommended by the Supreme Court's Advisory Committee on Rules of Civil Procedure. They include amendments to the Model Rules proposed by the Ethics 2000 Commission and adopted by the House of Delegates in August 2001 and February 2002 with a number of further amendments. The present Vermont amendments also include additional amendments to Model Rules 7.2 and 7.5 proposed by the ABA Standing Committee on Ethics and Professional Responsibility, and to Model Rules 5.5 and 8.5, proposed by the ABA Commission on Multijurisdictional Practice, adopted in August 2002. Included also are further amendments to Model Rules 1.6 and 1.13 proposed by the ABA Task Force on Corporate Responsibility and the Standing Committee on Ethics and Professional Responsibility and adopted in August 2003. The present Vermont amendments do not include subsequent amendments to Model Rules 5.5 Comment (2007), 3.8 (2008), 1.0 Comment (2009), and 1.10 (2009) because they have not yet been reviewed by the Advisory Committee.

The Vermont Supreme Court adopted the Vermont Rules of Professional Conduct by order of March 9, 1999, effective September 1, 1999, in order to provide standards for lawyer conduct that reflected current national trends in the field and offered substantial uniformity with most other states as well as ready access to their decisions on key issues. Thus, the Vermont Rules in large measure incorporated the language and form of the ABA Model Rules and amendments to them that had been adopted prior to the adoption of the Vermont Rules. In a few areas, however, the Vermont Rules differed from the Model Rules, either to preserve an existing Vermont rule or practice or because the ABA rule had proven unsatisfactory in other jurisdictions. The Reporter's Notes to the Vermont Rules as promulgated in 1999 highlight those differences. Because uniformity with the national model remains an important goal, the present Vermont amendments incorporate virtually all of the 2001-2003 ABA amendments. Nevertheless, most of the distinctive Vermont variations adopted in 1999 have been retained in the present amendments, and those amendments also differ in specific respects from the amended Model Rules where Vermont practice calls for a different approach. The Reporter's Notes to the present amendments point out and explain these differences.

The basic goal of national uniformity is well on the way to attainment, but state variations persist. As of May 14, 2009, 40 states and the District of Columbia had adopted amended rules based on the ABA amendments with many individual variations; in an additional seven states (including Vermont) review committees had published revised rules for consideration, also with variations; in the remaining three states, committee review was under way. See Charlotte K. Stretch and Susan M. Campbell, *State Committees Review and Respond to Model Rules Amendments*, 15 No. 1 Prof. Law. 14 (2004, updated November 30, 2007), available at http://www.abanet.org/cpr/jclr/review_art.pdf, where the principal variations are summarized. Links to detailed charts maintained by the ABA Center for Professional Responsibility Policy Implementation Committee showing the current status of state adoptions and variations may be found on the Center's website at <http://www.abanet.org/cpr/jclr/mrpc.html>. In sum, the amended Model Rules continue to provide a basic framework common to all states that have adopted them, but there are significant variations among those state rules in particular details.

The present text consists of the amended rules themselves, the amended ABA Comments on each rule (also adapted to Vermont differences), and Reporter's Notes designed to explain the reasons for which the Model Rules were changed, as well as the basis for any Vermont variations. For uniformity and ease of reference, the amendments adopt the paragraph numbering system of the ABA Comments throughout. As with the 1999 promulgation of the Vermont Rules, "the Comments are intended as guides to interpretation, but the text of each Rule is authoritative." See "Scope," below. In preparing the Reporter's Notes, the Reporter has drawn heavily upon the Ethics 2000 Commission's "Reporter's Explanation of Changes to Model Rules," prepared by Reporters Nancy J. Moore, Thomas D. Morgan, and Carl A. Pierce, available at <http://www.abanet.org/cpr/e2k/10-85rem.pdf> (hereinafter ABA Reporter's Explanation). Where the ABA Reporter's Explanation does not reflect Vermont variations, differences are noted in bracketed insertions. The current Reporter's Notes should be read in conjunction with the Reporter's Notes that accompanied the 1999 promulgation and with the principal Vermont Supreme Court cases applying the Vermont Rules since 1999 that have been cited in the current Notes. As always,

the Reporter's Notes are advisory. For additional interpretive guidance, see ABA Center for Professional Responsibility, Annotated Model Rules of Professional Conduct (6th ed. 2007 and subsequent editions); ABA/BNA, Lawyers' Manual on Professional Conduct (1984-date); American Law Institute, Restatement of the Law: The Law Governing Lawyers (2000, and annual supps. to date).

The Advisory Committee was asked by the Supreme Court in 2003 to undertake a full review of the 2001-2003 Model Rules amendments and to make recommendations concerning their adoption for Vermont. To conduct its review, the Committee appointed a subcommittee consisting of Committee Chair William E. Griffin and members Joseph E. Frank and Jean Brewster Giddings, and the following distinguished members of the Vermont Bar: former ABA Delegate Richard T. Cassidy, former Judicial Conduct Board Chair Christopher L. Davis, and Vermont Bar Association Professional Responsibility Committee Chair Sheila M. Ware. The subcommittee had the advice and assistance of Wendy Collins, Bar Counsel to the Professional Responsibility Program, and the undersigned, Reporter to the Advisory Committee. After discussion of the subcommittee's draft of the proposed amendments at the October 2004 annual meeting of the Vermont Bar Association, a full draft with Reporter's Notes was sent out for public comment on March 4, 2005, and discussed at the VBA's March 2005 mid-year meeting. See <http://www.vermontjudiciary.org/rules/Library/PDF/resources/VRPC-030205.pdf>. A draft of revisions reflecting comments received was circulated for further public comment at the request of the Court on February 16, 2007. See <http://www.vermontjudiciary.org/rules1/VRPCprop2-2007.pdf>. On January 28, 2008, the Advisory Committee recommended that the Court promulgate the amended Rules as originally circulated, with the February 2007 revisions and additional revisions based on the Committee's review of further comments. The Court is now promulgating the recommended Rules with a few additional revisions resulting from the Court's substantial review of the recommendation.

The Reporter would like to thank the following individuals without whose insights and assistance this project could not have been completed: The special subcommittee of the Advisory Committee that reviewed the Model Rules and prepared the original draft; the other members of the Advisory Committee; Robert D. Rachlin of the Vermont Bar, who carefully proofread the entire document; all members of the Vermont bench and bar who offered comments on the proposed rules; former Court Administrator Lee Suskin and staff members Deb Laferriere and Larry A. Abbott, who provided essential administrative support; and Vermont Law School Lawyer Librarian Cynthia Lewis and Caroline Lefebure, VLS Class of 2010, for research assistance.

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I. Preamble and Scope

Preamble: A Lawyer's Responsibilities

[1] A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.

[2] As a representative of clients, a lawyer performs various functions. As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system. As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealings with others. As an evaluator, a lawyer acts by examining a client's legal affairs and reporting about them to the client or to others.

[3] In addition to these representational functions, a lawyer may serve as a third-party neutral, a nonrepresentational role helping the parties to resolve a dispute or other matter. Some of these rules apply directly to lawyers who are or have served as third-party neutrals. See, e.g., Rules 1.12 and 2.4. In addition, there are rules that apply to lawyers who are not active in the practice of law or to practicing lawyers even when they are acting in a nonprofessional capacity. For example, a lawyer who commits fraud in the conduct of a business is subject to discipline for engaging in conduct involving dishonesty, fraud, deceit or misrepresentation. See Rule 8.4.

[4] In all professional functions a lawyer should be competent, prompt and diligent. A lawyer should maintain communication with a client concerning the representation. A lawyer should keep in confidence information relating to representation of a client except so far as disclosure is required or permitted by the Rules of Professional Conduct or other law.

[5] A lawyer's conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer's business and personal affairs. A lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others. A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials. While it is a lawyer's duty, when necessary, to challenge the rectitude of official action, it is also a lawyer's duty to uphold legal process.

[6] As a public citizen, a lawyer should seek improvement of the law, access to the legal system, the administration of justice and the quality of service rendered by the legal profession. As a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients, employ that knowledge in reform of the law and work to strengthen legal education. In addition, a lawyer should further the public's understanding of and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority. A lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance. Therefore, all lawyers should devote professional time and resources and use civic influence to ensure equal access to our system of justice for all those who because of economic or social barriers cannot afford or secure adequate legal counsel. A lawyer should aid the legal profession in pursuing these objectives and should help the bar regulate itself in the public interest.

[7] Many of a lawyer's professional responsibilities are prescribed in the Rules of Professional Conduct, as well as substantive and procedural law. However, a lawyer is also guided by personal conscience and the approbation of professional peers. A lawyer should strive to attain the highest level of skill, to improve the law and the legal profession and to exemplify the legal profession's ideals of public service.

[8] A lawyer's responsibilities as a representative of clients, an officer of the legal system and a public citizen are usually harmonious. Thus, when an opposing party is well represented,

a lawyer can be a zealous advocate on behalf of a client and at the same time assume that justice is being done. So also, a lawyer can be sure that preserving client confidences ordinarily serves the public interest because people are more likely to seek legal advice, and thereby heed their legal obligations, when they know their communications will be private.

[9] In the nature of law practice, however, conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system and to the lawyer's own interest in remaining an ethical person while earning a satisfactory living. The Rules of Professional Conduct often prescribe terms for resolving such conflicts. Within the framework of these rules, however, many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the rules. These principles include the lawyer's obligation zealously to protect and pursue a client's legitimate interests, within the bounds of the law, while maintaining a professional, courteous and civil attitude toward all persons involved in the legal system.

[10] The legal profession is largely self-governing. Although other professions also have been granted powers of self-government, the legal profession is unique in this respect because of the close relationship between the profession and the processes of government and law enforcement. This connection is manifested in the fact that ultimate authority over the legal profession is vested largely in the courts.

[11] To the extent that lawyers meet the obligations of their professional calling, the occasion for government regulation is obviated. Self-regulation also helps maintain the legal profession's independence from government domination. An independent legal profession is an important force in preserving government under law, for abuse of legal authority is more readily challenged by a profession whose members are not dependent on government for the right to practice.

[12] The legal profession's relative autonomy carries with it special responsibilities of self-government. The profession has a responsibility to assure that its regulations are conceived in the public interest and not in furtherance of parochial or self-interested concerns of the bar. Every lawyer is responsible for observance of the Rules of Professional Conduct. A lawyer should also aid in securing their observance by other lawyers. Neglect of these responsibilities compromises the independence of the profession and the public interest which it serves.

[13] Lawyers play a vital role in the preservation of society. The fulfillment of this role requires an understanding by lawyers of their relationship to our legal system. The Rules of Professional Conduct, when properly applied, serve to define that relationship.

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Scope

[14] The Rules of Professional Conduct are rules of reason. They should be interpreted with reference to the purposes of legal representation and of the law itself. Some of the rules are imperatives, cast in the terms "shall" or "shall not." These define proper conduct for purposes of professional discipline. Others, generally cast in the term "may," are permissive and define areas under the rules in which the lawyer has discretion to exercise professional judgment. No disciplinary action should be taken when the lawyer chooses not to act or acts within the bounds of such discretion. Other rules define the nature of relationships between the lawyer and others. The rules are thus partly obligatory and disciplinary and partly constitutive and descriptive in that they define a lawyer's professional role. Many of the comments use the term "should." Comments do not add obligations to the rules but provide guidance for practicing in compliance with the rules.

[15] The rules presuppose a larger legal context shaping the lawyer's role. That context includes court rules and statutes relating to matters of licensure, laws defining specific obligations of lawyers and substantive and procedural law in general. The Comments are sometimes used to alert lawyers to their responsibilities under such other law.

[16] Compliance with the rules, as with all law in an open society, depends primarily upon understanding and voluntary compliance, secondarily upon reinforcement by peer and public opinion and finally, when necessary, upon enforcement through disciplinary proceedings. The rules do not, however, exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules. The rules simply provide a framework for the ethical practice of law.

[17] Furthermore, for purposes of determining the lawyer's authority and responsibility, principles of substantive law external to these rules determine whether a client-lawyer relationship exists. Most of the duties flowing from the client-lawyer relationship attach only after the client has requested the lawyer to render legal services and the lawyer has agreed to do so. But there are some duties, such as that of confidentiality under Rule 1.6, that attach when the lawyer agrees to consider whether a client-lawyer relationship shall be established. See Rule 1.18. Whether a client-lawyer relationship exists for any specific purpose can depend on the circumstances and may be a question of fact.

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

[19] Failure to comply with an obligation or prohibition imposed by a rule is a basis for invoking the disciplinary process. The rules presuppose that disciplinary assessment of a lawyer's conduct will be made on the basis of the facts and circumstances as they existed at the time of the conduct in question and in recognition of the fact that a lawyer often has to act upon uncertain or incomplete evidence of the situation. Moreover, the rules presuppose that whether or not discipline should be imposed for a violation, and the severity of a sanction, depend on all the circumstances, such as the willfulness and seriousness of the violation, extenuating factors and whether there have been previous violations.

[20] Whether violation of a rule gives rise to a cause of action or creates a presumption that a legal duty has been breached is a question of substantive law beyond the scope of the rules. The rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability. The purpose of the rules can be subverted when they are invoked by opposing parties as procedural weapons. The fact that a rule is a just basis for a lawyer's self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the rule. Accordingly, nothing in the rules should be deemed to augment or diminish any substantive legal duty of lawyers or the extradisciplinary consequences of violating such a duty.

[21] The comment accompanying each rule explains and illustrates the meaning and purpose of the rule. The preamble and this note on scope provide general orientation. The

comments are intended as guides to interpretation, but the text of each rule is authoritative. The “Correlation Tables” in the Annotated Model Rules of Professional Conduct (5th ed. 2003 and subsequent editions), published by the Center for Professional Responsibility of the American Bar Association, provide a comparison with the previous ABA Model Code. —Amended June 17, 2009, eff. Sept. 1, 2009.

Reporter’s Notes — 2009 Amendment

The Preamble and Scope sections of the Vermont Rules of Professional Conduct are amended to conform to the changes in the Model Rules, which combined preliminary sections I, Preamble, and II, Scope, as two parts of a single preliminary section and moved preliminary section III, Terminology, to a new Rule 1.0. See Reporter’s Notes to V.R.P.C. 1.0.

In paragraph [18], a sentence found in former paragraph [16] stating that government lawyers may represent the public interest, though deleted as inaccurate in the ABA amendments, has been retained as accurately reflecting Vermont practice. Paragraph [20] (formerly the final paragraph of V.R.P.C., II, Scope) and the final sentence of paragraph [21] are unique to the Vermont Rules. See Reporter’s Notes to V.R.P.C., II, Scope (1999). In *Northern Security Insurance Co. v. Mitrec Electronics, Ltd.*, 2008 VT 96, 16 n.3, 184 Vt. 303, 965 A.2d 447, the Court, in criticizing a lawyer’s briefs for lack of “professional tone” and not advancing “the quality of justice in Vermont,” pointedly quoted language of V.R.P.C. Preamble (continued in amended paragraphs [1], [5]), declaring the lawyer’s responsibilities “to demonstrate respect for the legal system and for those who serve in it.”

The ABA Reporter’s Explanation of the amended Preamble and Scope sections provides in pertinent part as follows:

PREAMBLE:

[1] This addition reflects the resolution that was adopted by the ABA House of Delegates at its Annual Meeting in New York in August 2000.

[2] The reference to the lawyer as intermediary was deleted in accordance with the Commission’s decision to delete [former] Rule 2.2. The change in the last sentence is stylistic only and conforms the style of this sentence to that of the preceding sentences.

[3] This is an entirely new paragraph. It addresses the lawyer’s role as third-party neutral, a role that is now addressed in Rules 1.12 and 2.4. In addition, it reminds lawyers that there are other rules that apply to lawyers when they are not active in the practice of law or to practicing lawyers when they are acting in a nonprofessional capacity.

[6] The additions regarding the lawyer’s duty to promote improved access to justice reflect the resolution that was adopted by the ABA House of Delegates at its Annual Meeting in New York in August 2000. The addition regarding the lawyer’s duty to further the public’s understanding of and confidence in law reflects the resolution that was adopted by the ABA House of Delegates at the Midyear Meeting in Dallas in February 2000.

[9] The change from “upright” to “ethical” is stylistic. The remainder of the changes reflect the Commission’s belief that the Rules do not always prescribe terms for resolving conflicts between a lawyer’s competing responsibilities and interests, although they often do. The last sentence is an attempt to give lawyers further guidance in how the basic principles underlying the Rules may help resolve such conflicts.

SCOPE:

[14] The change in the third sentence is designed to clarify what is meant by “professional discretion.”

[15] The addition describes material that was added to a number of Comments throughout the Rules. Given the growth in the law governing lawyers, the Commission believes that these references are helpful to practicing lawyers, particularly where the obligations under such law are more onerous than the obligations reflected in the Rules.

[16] The prior paragraph [ie, [15]] was split to better reflect the two separate thoughts in each paragraph.

[17] Under Rule 1.18 it is now clear that there are duties under these Rules that attach prior to the formation of the client-lawyer relationship. [The two paragraphs following what is now paragraph [19]] were deleted because they merely repeat what is stated elsewhere in the Rules, primarily in the Comment to Rule 1.6.

Reporter’s Notes

The Model Rules Scope Note has been revised to reflect more accurately the relationship between the rules and substantive law. The rules as adopted by the Supreme Court under its inherent power over the legal profession are intended only as a guide to conduct and a basis for discipline. Nevertheless, the Court in an adversary proceeding could hold that the rules do set forth standards of civil liability. See *Estate of Kelley v. Moguls, Inc.*, 160

Vt. 531, 632 A.2d 360 (1993); cf. *In re Vermont Electric Power Producers*, 165 Vt. 282, 683 A.2d 716 (1996). Moreover, under general principles of tort law, violation of a rule may be prima facie evidence of malpractice, and the rules are presumably admissible as evidence of the standard of care in a malpractice action. See *Bacon v. Lascelles*, 165 Vt. 214, 678 A.2d 902 (1996); *Smith v. Blow & Cote*, 124 Vt. 64, 196 A.2d 489 (1963). Conversely, the courts in procedural or transactional contexts may fashion and apply pragmatic standards for assessing the conduct of lawyers that are designed to effectuate the purposes of the body of law involved. These standards may be less onerous than those of the rules, as in the tests for vicarious disqualification that may be applied on a motion to disqualify, or more onerous, as in the case of obligations to disclose client information that may be imposed by criminal or tort law. See *In re Vermont Electric Power Producers*, supra; cf. *Peck v. Counseling Service*, 146 Vt. 61, 499 A.2d 422 (1985).

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Rules

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 entity or 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 any other entity or 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 and all ancillary court proceedings such as depositions and hearings before a referee or master, 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 e-mail. A “signed” writing includes an electronic sound, symbol or process attached to or logically associated with a writing and executed or adopted by a person with the intent to sign the writing.—Amended June 17, 2009, eff. Sept. 1, 2009.

(o) “Advance,” “advance payment of fees,” or “retainer” means a payment by a client in anticipation of the future rendition of services that is not earned until such services are rendered and that is to be credited toward the fees earned when such future services are rendered. **Amended March 7, 2016; eff. May 9, 2016.**

(p) “Nonrefundable fee” means a fee paid to an attorney and earned by the attorney before professional services are rendered. Such a nonrefundable fee may be in exchange for retaining the attorney’s availability alone or may be in exchange also for the right to receive specified services in the future for no additional fee, or for a stated fee. **Amended March 7, 2016; eff. May 9, 2016.**

Comment

Confirmed in Writing

[1] If it is not feasible to obtain or transmit a written confirmation at the time the client gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter. If a lawyer has obtained a client’s informed consent, the lawyer may act in reliance on that consent so long as it is confirmed in writing within a reasonable time thereafter.

Firm

[2] Whether two or more lawyers constitute a firm within paragraph (c) can depend on the specific facts. For example, two practitioners who share office space and occasionally consult or assist each other ordinarily would not be regarded as constituting a firm. However, if they present themselves to the public in a way that suggests that they are a firm or conduct themselves as a firm, they should be regarded as a firm for purposes of the rules. The terms of any formal agreement between associated lawyers are relevant in determining whether they are a firm, as is the fact that they have mutual access to information concerning the clients they serve. Furthermore, it is relevant in doubtful cases to consider the underlying purpose of the rule that is involved. A group of lawyers could be regarded as a firm for purposes of the rule that the same lawyer should not represent opposing parties in litigation, while it might not be so regarded for purposes of the rule that information acquired by one lawyer is attributed to another.

[3] With respect to the law department of an organization, including the government, there is ordinarily no question that the members of the department constitute a firm within the meaning of the Rules of Professional Conduct. There can be uncertainty, however, as to the identity of the client. For example, it may not be clear whether the law department of a corporation represents a subsidiary or an affiliated corporation, as well as the corporation by which the members of the department are directly employed. A similar question can arise concerning an unincorporated association and its local affiliates.

[4] Similar questions can also arise with respect to lawyers in legal aid and legal services organizations, including public defenders. Depending upon the structure of the organization, the entire organization or different components of it may constitute a firm or firms for purposes of these rules.

Fraud

[5] When used in these rules, the terms “fraud” or “fraudulent” refer to conduct that is characterized as such under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive. This does not include merely negligent misrepresentation or negligent failure to apprise another of relevant information. For purposes of these rules, it is not necessary that anyone has suffered damages or relied on the misrepresentation or failure to inform.

Informed Consent

[6] Many of the Rules of Professional Conduct require the lawyer to obtain the informed consent of a client or other person (e.g., a former client or, under certain circumstances, a prospective client) before accepting or continuing representation or pursuing a course of conduct. See, e.g., Rules 1.2(c), 1.6(a) and 1.7(b). The communication necessary to obtain such consent will vary according to the rule involved and the circumstances giving rise to the need to obtain informed consent. The lawyer must make reasonable efforts to ensure that the client or other person possesses information reasonably adequate to make an informed decision. Ordinarily, this will require communication that includes a disclosure of the facts and circumstances giving rise to the situation, any explanation reasonably necessary to inform the client or other person of the material advantages and disadvantages of the proposed course of conduct and a discussion of the client’s or other person’s options and alternatives. In some circumstances it may be appropriate for a lawyer to advise a client or other person to seek the advice of other counsel. A lawyer need not inform a client or other person of facts or implications already known to the client or other person; nevertheless, a lawyer who does not personally inform the client or other person assumes the risk that the client or other person is inadequately informed and the consent is invalid. In determining whether the information and explanation provided are reasonably adequate, relevant factors include whether the client or other person is experienced in legal matters generally and in making decisions of the type involved, and whether the client or other person is independently represented by other counsel in giving the consent. Normally, such persons need less information and explanation than others, and generally a client or other person who is independently represented by other counsel in giving the consent should be assumed to have given informed consent. Of course, the information and explanation adequate to establish informed consent by a non-client may be confidential information of a client that is protected by Rule 1.6. In such a case, the consent of the non-client cannot be obtained unless the affected client gives informed consent to disclosure of the necessary information and explanation, or the nature of that information and explanation can be conveyed to the non-client in a way that protects the client’s confidential information. ALI, Restatement Third: The Law Governing Lawyers, § 122, comment c(i). Cf. Rule 1.9, Comment [3].

[7] Obtaining informed consent will usually require an affirmative response by the client or other person. In general, a lawyer may not assume consent from a client’s or other person’s silence. Consent may be inferred, however, from the conduct of a client or other person who has reasonably adequate information about the matter. A number of rules require that a person’s consent be confirmed in writing. See Rules 1.7(b) and 1.9(a). For a definition of “writing” and “confirmed in writing,” see paragraphs (n) and (b). Other Rules require that a client’s consent be obtained in a writing signed by the client. See, e.g., Rules 1.8(a) and (g). For a definition of “signed,” see paragraph (n).

Screened

[8] This definition applies to situations where screening of a personally disqualified lawyer is permitted to remove imputation of a conflict of interest under Rules 1.10, 1.11, 1.12 or 1.18.

[9] The purpose of screening is to assure the affected parties that confidential information known by the personally disqualified lawyer remains protected. The personally disqualified lawyer should acknowledge the obligation not to communicate with any of the other lawyers in the firm with respect to the matter. Similarly, other lawyers in the firm who are working on the matter should be informed that the screening is in place and that they may not communicate with the personally disqualified lawyer with respect to the matter. Additional screening measures that are appropriate for the particular matter will depend on the circumstances. To implement, reinforce and remind all affected lawyers of the presence of the screening, it may be appropriate for the firm to undertake such procedures as a written undertaking by the screened lawyer to avoid any communication with other firm personnel and any contact with any firm files or other materials relating to the matter, written notice and instructions to all other firm personnel forbidding any

communication with the screened lawyer relating to the matter, denial of access by the screened lawyer to firm files or other materials relating to the matter and periodic reminders of the screen to the screened lawyer and all other firm personnel.

[10] In order to be effective, screening measures must be implemented as soon as practical after a lawyer or law firm knows or reasonably should know that there is a need for screening.

Historical Citation

Amended June 17, 2009, eff. Sept 1, 2009; November 22, 2011, eff. January 23, 2012; March 7, 2016; eff. May 9, 2016.

Reporter's Notes—2016 Amendment

Rules 1.0(o) and (p) are added to define terms used in the simultaneous amendments adding Rules 1.5(f) and (g).

Reporter's Notes—2012 Amendment

The amendment to Rule 1.0, Comment [8], implements the simultaneous amendment of Rule 1.10 to the list of rules to which the definition of screening applies.

Reporter's Notes — 2009 Amendment

V.R.P.C. 1.0 is adopted to conform to the Model Rules amendments in moving former preliminary section III, "Terminology," to a new Rule 1.0. See Reporter's Notes to simultaneous amendments of Preamble and Scope. "The purpose of this change is to give the defined terms greater prominence and to permit the use of Comments to further explicate some of the provisions." ABA Reporter's Explanation of Model Rule 1.0.

The ABA Reporter's Explanation further provides as follows:

1. Delete "consult" or "consultation"

The Commission recommends deletion of the term "consent after consultation" in favor of "informed consent," which is defined in paragraph (e). This change is being made throughout the Rules. No change in substance is intended.

2. Paragraph (b): "Confirmed in writing"

The Commission has proposed requiring a lawyer to obtain the informed consent of a client or other person, "confirmed in writing," in some circumstances. See, e.g., Rule 1.7. The term "writing" is defined in paragraph (n).

3. Paragraph (c): "Firm" or "law firm"

These changes conform the definition to the changes made in the Comment to Rule 1.10. The Commission is also recommending that the material presently in the Rule 1.10 Comment be moved to the Comment under this Rule. See Comments [2] -[4]. The phrase "including the government" has been added to Comment [3] to clarify that legal departments of government entities are included within the definition of "firm." The reference to "other association authorized to practice law" was added to encompass lawyers practicing in limited liability entities. No change in substance is intended.

4. Paragraph (d): Clarify that "fraud" refers to conduct characterized as fraudulent under other applicable law

The [former] definition is ambiguous because it does not clearly state whether, in addition to the intent to deceive, the conduct must be fraudulent under applicable substantive or procedural law. In other words, it is possible that conduct might be considered "fraudulent" merely because it involves an intention to deceive, even if it does not violate any other law. The Commission recommends clarifying that the conduct must be fraudulent under applicable substantive or procedural law.

5. Paragraph (e): "Informed consent"

The Commission recommends that throughout the Rules the phrase "consent after consultation" be replaced with "gives informed consent." The Commission believes that "consultation" is a term that is not well understood and does not sufficiently indicate the extent to which clients must be given adequate information and explanation in order to make reasonably informed decisions. The term "informed consent," which is familiar from its use in other contexts, is more likely to convey to lawyers what is required under the Rules. No change in substance is intended.

6. Paragraph (2): "Partner": Added reference to "member of an association authorized to practice law"

As with the change to paragraph (c), this reference was added to encompass lawyers practicing in limited liability entities.

7. Paragraph (k): "Screened"

The current Model Rules do not impute conflicts of interest in certain situations when the personally disqualified lawyer is screened from any participation in the matter. See Rules 1.11(b) (former government lawyers) and 1.12(c)(1) (former judges). The Commission is proposing similar treatment of other situations involving a conflict of interest on the part of one lawyer in a firm. See Rules 1.12(c)(1) (former third-party neutrals) and 1.18(d)(1) (discussions with prospective clients). The Commission is recommending that the requirements of an effective screen be set forth in this paragraph and in the accompanying Comments.

8. Paragraph (m): “Tribunal”

This term was not previously defined. The Commission recommends including a definition and including not only courts but also binding arbitration and legislative bodies, administrative agencies or other bodies acting in an adjudicative capacity. [For clarity, language has been added to specify that “court” includes ancillary proceedings such as depositions or master’s or referee’s hearings.]

9. Paragraph (n): “Writing” or “written”

Given the Commission’s recommendation that writings be required in more circumstances, it also recommends that the term be defined and that the definition include tangible or electronic records. With respect to electronic records, the paragraph provides a definition of “signed” that includes methods intended as the equivalent of a traditional signature. The electronic signature provisions are modeled on the Uniform Electronic Transactions Act.

COMMENT:

[1] This new Comment was added to clarify that if it is not feasible to obtain or transmit a writing at the time a person gives informed consent, a lawyer may undertake or continue representation based on the oral informed consent, so long as the writing is obtained or transmitted within a reasonable time thereafter.

[2] This paragraph was taken from the Comment to Rule 1.10. It is unchanged, except for the addition of a reference to paragraph (c).

[3] This paragraph was taken from the Comment to Rule 1.10. The only change is stylistic, and no substantive change is intended.

[4] This paragraph was taken from the Comment to Rule 1.10. The Commission concluded that the [former] Comment is confusing. The revision is intended to clarify that organizational structure will determine whether the entire organization or different components will constitute a firm or firms for purposes of these Rules.

[5] Under applicable substantive law, “fraud” may not be actionable unless someone relied on a misrepresentation or failure to inform and consequently suffered damages. This paragraph makes it clear that reliance is not required for purposes of the disciplinary rules, which focus entirely on the nature of the conduct in question.

[6] This new Comment provides cross-references to Rules requiring the lawyer to obtain the informed consent of the client or another person within the meaning of this Rule. It also explains the requirements of lawyer communication under the Rule. [Language has been added to ABA Comment [6] clarifying the application of the definition of “informed consent” in Rule 1.0(e) when disclosure of confidential client information may be necessary to obtain the consent.]

[7] This new Comment explains what is required in order to constitute a manifestation of consent by the client.

[8] -[10] These new Comments provide cross-references to Rules that provide for screening and explain in more detail what measures may be adequate to assure an effective screen.

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CLIENT-LAWYER RELATIONSHIP

Rule 1.1. COMPETENCE

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.—Amended June 17, 2009, eff. Sept. 1, 2009.

Comment

Legal Knowledge and Skill

[1] In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer’s general experience, the lawyer’s training and experience in the field in question, the preparation and study the lawyer is able to give the matter and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of

established competence in the field in question. In many instances, the required proficiency is that of a general practitioner. Expertise in a particular field of law may be required in some circumstances.

[2] A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. A newly admitted lawyer can be as competent as a practitioner with long experience. Some important legal skills, such as the analysis of precedent, the evaluation of evidence and legal drafting, are required in all legal problems. 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. A lawyer can provide adequate representation in a wholly novel field through necessary study. Competent representation can also be provided through the association of a lawyer of established competence in the field in question.

[3] 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. 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] A lawyer may accept representation where the requisite level of competence can be achieved by reasonable preparation. This applies as well to a lawyer who is appointed as counsel for an unrepresented person. See also Rule 6.2.

Thoroughness and Preparation

[5] 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. It also includes adequate preparation. 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. 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).

Maintaining Competence

[6] To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.

Reporter's Notes — 2009 Amendment

No changes are made in the text of V.R.P.C. 1.1. The ABA Reporter's Explanation concerning changes in the Comment is as follows:

[5] The Commission recommends the addition of a sentence indicating that a Rule 1.2(c) agreement to limit the scope of a representation will limit the scope of the matters for which the lawyer is responsible. Given the increase in the number of occasions in which lawyers and clients agree to a limited representation, the Commission thought it important to call attention to the relationship between Rules 1.1 and 1.2(c). No change in substance is intended. A minor change was made to make explicit that the duty to be prepared and thorough varies with the complexity of the matter as well as what is at stake. No change in substance is intended.

[6] The changes in the first sentence are intended to identify three distinct aspects of continuing education that are needed to maintain the knowledge and skill requisite for the competent representation of clients. The second sentence has been deleted because it is a precatory aspiration rather than a specification of conduct thought necessary for the competent representation of a client. No change in substance is intended.

Reporter's Notes — 1999 Amendment

This rule goes farther than the Vermont Code's prohibitions of incompetence and neglect of a client's matter by affirmatively requiring competence of every lawyer. As stated in the reporter's note to the scope note, though the rules are not designed to be a basis for civil liability, the Court could so hold in an adversary proceeding. "Moreover," as that reporter's note points out, "under general principles of tort law, violation of a rule may be prima facie evidence of malpractice, and the rules are presumably admissible as evidence of the standard of care in a malpractice action."

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Rule 1.2. SCOPE OF REPRESENTATION AND ALLOCATION OF AUTHORITY BETWEEN CLIENT AND LAWYER

(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.—Amended June 17, 2009, eff. Sept. 1, 2009.

Comment

Allocation of Authority between Client and Lawyer

[1] 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. The decisions specified in paragraph (a), such as whether to settle a civil matter, must also be made by the client. See Rule 1.4(a)(1) for the lawyer's duty to communicate with the client about such decisions. 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) 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. 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. 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. 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. Other law, however, may be applicable and should be consulted by the lawyer. The lawyer should also consult with the client and seek a mutually acceptable resolution of the disagreement. 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] At the outset of a representation, the client may authorize the lawyer to take specific action on the client's behalf without further consultation. Absent a material change in circumstances and subject to Rule 1.4, a lawyer may rely on such an advance authorization. The client may, however, revoke such authority at any time.

[4] 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.

Independence from Client's Views or Activities

[5] 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.

Agreements Limiting Scope of Representation

[6] 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. 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. A limited representation may be appropriate because the client has limited objectives for the representation. In addition, the terms upon which representation is undertaken may exclude specific means that

might otherwise be used to accomplish the client's objectives. Such limitations may exclude actions that the client thinks are too costly or that the lawyer regards as repugnant or imprudent.

[7] Although this rule affords the lawyer and client substantial latitude to limit the representation, the limitation must be reasonable under the circumstances. If, for example, a client's objective is limited to securing general information about the law the client needs in order to handle a common and typically uncomplicated legal problem, the lawyer and client may agree that the lawyer's services will be limited to a brief telephone consultation. Such a limitation, however, would not be reasonable if the time allotted was not sufficient to yield advice upon which the client could rely. Although an agreement for a limited representation does not exempt a lawyer from the duty to provide competent representation, the limitation is a factor to be considered when determining the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. See Rule 1.1.

[8] 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. Criminal, Fraudulent and Prohibited Transactions

[9] Paragraph (d) prohibits a lawyer from knowingly counseling or assisting a client to commit a crime or fraud. This prohibition, however, does not preclude the lawyer from giving an honest opinion about the actual consequences that appear likely to result from a client's conduct. 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. 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] When the client's course of action has already begun and is continuing, the lawyer's responsibility is especially delicate. 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. 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). 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.

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

[12] Paragraph (d) applies whether or not the defrauded party is a party to the transaction. Hence, a lawyer must not participate in a transaction to effectuate criminal or fraudulent avoidance of tax liability. Paragraph (d) does not preclude undertaking a criminal defense incident to a general retainer for legal services to a lawful enterprise. 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] 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).

Reporter's Notes — 2009 Amendments

V.R.P.C. 1.2 is amended to conform to the changes in the Model Rule. In *State v. Tribble*, 2005 VT 132, ¶ 34, 179 Vt. 235, 892 A.2d 232, the Court held that “[t]he decision to raise an insanity defense is in effect a decision about entering a plea, which lies with the defendant” under the last sentence of V.R.P.C. 1.2(a). See also *In re Quinn*, 174 Vt. 562, 816 A.2d 425 (2002) (mem.) (coerced guilty plea not the client's own, citing V.R.P.C. 1.2(a)).

The ABA Reporter's Explanation is as follows:

TEXT:

1. Modify caption

The caption has been amended to more accurately describe the subjects addressed by the Rule.

2. Paragraph (a): Move “subject to paragraphs (c) and (d)” to beginning of paragraph (a).

The phrase “subject to paragraphs (c) and (d)” has been moved to clarify that all of the actions a lawyer may take pursuant to paragraph (a) are properly subject to the restrictions of paragraph (d) and some of them may be subject to the limitation in paragraph (c). In the current Rule, the limitations of paragraphs (c) and (d) only apply to the lawyer's obligation to abide by the client's decisions concerning the representation.

3. Paragraph (a): Modify to require consultation about means “as required by Rule 1.4”

The Commission recommends the addition of a cross-reference to Rule 1.4, which requires a lawyer to “reasonably consult with the client about the means by which the client's objectives are to be accomplished.” The Commission believes that the current formulation is flawed because it might be read to always require consultation before the lawyer takes action. These changes also reflect the Commission's decision that the lawyer's duty to communicate with the client should be addressed in Rule 1.4 rather than in Rule 1.2.

4. Paragraph (a): Add sentence acknowledging lawyer’s implied authority to take action to carry out representation

The Commission believes that current paragraph (a) is flawed because the reference to the lawyer’s duty to consult about means can be read to imply that the lawyer always must consult in order to acquire authority to act for the client. The Commission has added a sentence to clarify that “A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation” and has added a new Comment [2] that addresses the resolution of disagreements with clients about the means to be used to accomplish the client’s objectives. The new sentence in paragraph (a) parallels the reference in Rule 1.6(a) to the lawyer’s implied authority to reveal information relating to the representation. The scope of the lawyer’s implied authority is to be determined by reference to the law of agency. The Commission believes that this formulation strikes the right balance between respect for the lawyer’s expertise and the preservation of the client’s autonomy by allowing the lawyer to exercise professional discretion on behalf of the client, subject to consultation with the client as required by Rule 1.4(a)(2), but leaving open the possibility that a client might revoke such implied authority.

5. Paragraph (a): No general duty to abide by client instructions

Other than acknowledging the power of the client to revoke a lawyer’s implied authority, the Commission has not attempted to specify the lawyer’s duties when the lawyer and client disagree about the means to be used to accomplish the client’s objectives. As explained in Comment [2], the Commission believes that disagreements between a lawyer and client about means must be worked out by the lawyer and client within a framework defined by the law of agency, the right of the client to discharge the lawyer and the right of the lawyer to withdraw from the representation if the lawyer has a fundamental disagreement with the client.

6. Paragraph (a): Replace “whether to accept an offer of settlement” with “whether to settle”

The reference in the current Rule to “accept an offer of settlement” is under-inclusive because it does not include making a settlement offer.

7. Paragraph (c): Permitting “reasonable” limitations on the “scope” of a lawyer’s representation

The Commission recommends that paragraph (c) be modified to more clearly permit, but also more specifically regulate, agreements by which a lawyer limits the scope of the representation to be provided to a client. Although lawyers enter into such agreements in a variety of practice settings, this proposal in part is intended to provide a framework within which lawyers may expand access to legal services by providing limited but nonetheless valuable legal service to low or moderate-income persons who otherwise would be unable to obtain counsel.

a. Replace “objectives of the representation” with “scope of the representation”

The Commission has replaced the current reference to limiting the “objectives of the representation” with limiting the “scope of the representation.” Only the client can limit the client’s objectives. As indicated in Comment [6], the scope of a representation may be limited either by limiting the subject matter for which the lawyer will assume responsibility or the means the lawyer will employ.

b. Add requirement that limitation be “reasonable under the circumstances”

Unlike the [former] Rule, proposed paragraph (c) specifically precludes a limited representation that would not be “reasonable under the circumstances.” Comment [7] discusses this limitation. In cases in which the limitation is reasonable, the client must give informed consent as defined in Rule 1.0(e). Because a useful limited representation may be provided over the telephone or in other situations in which obtaining a written consent would not be feasible, the proposal does not require that the client’s informed consent be confirmed in writing. Comment [8], however, reminds lawyers who are charging a fee for a limited representation that a specification of the scope of the representation will normally be a necessary part of the lawyer’s written communication with the client pursuant to Rule 1.5(b).

c. Replace “consents after consultation” with “gives informed consent”

The Commission is recommending that throughout the Rules the phrase “consent after consultation” be replaced with “gives informed consent,” as defined in Rule 1.0(e). No substantive change is intended.

8. Delete paragraph (e)

The Commission recommends that the substance of paragraph (e) be placed in a new paragraph (a)(5) in Rule 1.4. Comment [14] will serve as a cross-reference to Rule 1.4. The change is consistent with the Commission’s recommendation that the lawyer’s duty to communicate with the client be addressed in Rule 1.4 with appropriate cross-references in the Comment to Rule 1.2.

COMMENT:

Caption. The current caption does not accurately describe Comments [1] -[3], which relate to the allocation of decision-making authority between lawyer and client.

[1] Current Comment [1] has been modified to reinforce the three main points in paragraph (a) and to provide appropriate cross-references to Rule 1.4(a)(1) and (a)(2). The second to the last sentence in [former] Comment [1] has been incorporated into Comment [2].

[2] Comment [2] is new and addresses the situation in which lawyer and client disagree about the means to be used to accomplish the client’s objectives. The Comment explains why Rule 1.2 leaves such disagreements to be

resolved by the lawyer and client with reference to the law of agency, the right of the client to discharge the lawyer and the right of the lawyer to withdraw in the event of a fundamental disagreement with the client.

[3] Comment [3] is new and recognizes the legitimacy of the lawyer's reliance on advance authorization from the client. It also specifies that an advance authorization can be revoked by the client and that such an authorization will not be considered effective if there has been a material change in circumstances.

Caption. The caption has been modified to reflect the change to paragraph (c).

[6] Paralleling changes to paragraph (c), [former] Comment [4] has been modified to explain that a client's decision to seek limited objectives may be relevant to determining the reasonableness of a limitation on the scope of the representation under the circumstances. Cost has been added as a factor that might justify limitation.

[7] This new Comment explains the requirement in paragraph (c) that a limitation on the scope of a representation must be reasonable under the circumstances. It also explains the relationship between a limitation on the scope of a representation and the lawyer's duty of competence under Rule 1.1.

[8] This new Comment alerts the lawyer who is charging a fee for a limited representation that a specification of the scope of the representation will normally be a necessary part of the lawyer's written communication with the client pursuant to Rule 1.5(b).

[9] The Commission has modified [former] Comment [5] to serve as a general reminder that all agreements between lawyers and their clients must conform with the Rules of Professional Conduct. No change in substance is intended.

[10] The Commission has made minor editorial changes to [former] Comment [6]. No change in substance is intended.

[11] The Commission has added language to [former] Comment [7] to provide more guidance to lawyers about what they must do to avoid assisting a client to commit a crime or fraud. Also added is a cross-reference to Rule 4.1, which specifies a lawyer's duties in circumstances in which remaining silent will assist a client to commit a crime or fraud. No change in substance is intended.

[12] [no paragraph 12 in original].

[13] [Former] Comment [9] has been modified to eliminate the ambiguous reference to a "sham" transaction and to replace "should" with "must." This provides a more precise example of a situation in which a lawyer will violate Rule 1.2(d) even though the defrauded person is not a party to the transaction.

[14] New Comment [14] has been added to provide a cross-reference to Rule 1.4(a)(5), which is substantively identical to deleted paragraph 1.2(e).

ANNOTATIONS

1. Plea bargaining. While lawyers often face difficult situations when counseling their clients regarding plea bargaining, the plea entered still must ultimately be the client's decision, and the attorney must abide by that decision. In re Quinn (2002) 174 Vt. 562, 816 A.2d 425 (mem.).

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Rule 1.3. DILIGENCE

A lawyer shall act with reasonable diligence and promptness in representing a client.—Amended June 17, 2009, eff. Sept. 1, 2009.

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. See Rule 24, Rules Governing Professional Responsibility Program (A.O. 9) (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).

Reporter's Notes — 2009 Amendment

No changes are made in the text of V.R.P.C. 1.3.

The Supreme Court addressed issues under V.R.P.C. 1.3 in *In re PRB Docket No. 2006-167, 2007 VT 50, 181 Vt. 625, 925 A.2d 1026* (mem.) (PRB could reasonably find that, in the circumstances, single instance of missed appellate deadline in criminal matter did not violate rule), and *In re Andres, 2004 VT 71, 177 Vt. 511, 857 A.2d 803* (mem.) (PRB could reasonably find that failure to attend pretrial conference and file response to motion for summary judgment in post-conviction relief proceeding did violate rule). In *In re Sealed Documents, 172 Vt. 152, 165 n.10, 772 A.2d 518, 529 n.10* (2001), the Court noted that allowing lawyers to participate in an *in camera* review subject to a requirement not to reveal information to their clients would undermine the principle expressed in the requirement of V.R.P.C. 1.3 Comment (amended paragraph [1]) that a lawyer "act with commitment and dedication to the interests of the client."

The ABA Reporter's Explanation concerning changes in the Comment is as follows:

[1] Several changes have been made to Comment [1] to clarify the lawyer's authority and duty to take certain actions on behalf of the client. No change in substance is intended.

[1] and [3] New material has been added to comments [1] and [3] to provide some support for the bar's civility initiatives. No change in substance is intended.

[2] This new Comment contains the substance of the last sentence in [former] Comment [1], with the reference to "should" being replaced with "must" because Rule 1.1 requires that a lawyer provide competent representation. No change in substance is intended.

[4] [Former] Comment [3] has been modified to sharpen its discussion of a lawyer's responsibilities with respect to taking an appeal from an adverse decision. No change in substance is intended.

[5] This new Comment has been added to alert sole practitioners to the need to have a plan in place to prevent client matters from being neglected in the event of the sole practitioner's death or disability. It also calls attention to the recommendation of the Senior Lawyers Division approved by the [ABA] House of Delegates in 1997 that "urges state, local and territorial jurisdictions, that do not now have programs in place, to address the issue of the death or disability of lawyers and to develop and implement through court rule or other appropriate means effective procedures for the protection of clients' interests and property and the ethical closure or disposition of the practices." It is also consistent with [ABA] Formal Ethics Opinion 92-369.

ANNOTATIONS

1. Violations. Admonishment was appropriate for an attorney who had failed to promptly and fully comply with discovery, in violation of the rules regarding diligence and expediting litigation. The attorney's conduct did not result in actual substantial harm to his client, the public, the legal system, or the profession; his violations resulted from disorganization, overreliance on his client, and lack of experience in complex litigation, not from an intent to conceal documents; and he had no prior disciplinary record and fully cooperated in the disciplinary proceedings. *In re PRB File No. 2007-003, 2009 VT 82A, 186 Vt. 588, 987 A.2d 273* (mem.).

Where attorney filed his client's notice of appeal after the deadline, resulting in dismissal of the appeal, the hearing panel correctly held that this single isolated act of negligence without any further acts compounding the error did not breach the standard of this rule. In re PRB Docket No. 2006-167, 2007 VT 50, 181 Vt. 625, 925 A.2d 1026 (mem.).

Attorney violated this rule by failing to attend a pretrial hearing and to respond to a motion for summary judgment. In re Andres, 2004 VT 71, 177 Vt. 511, 857 A.2d 803 (mem.).

2. Sanctions. Attorney who failed to act with reasonable diligence and promptness upon being paid in full by three bankruptcy clients, but who had mitigating factors in his favor, including no prior disciplinary history and an expression of remorse, was publicly reprimanded. In re Scholes, 2012 VT 56, 192, VT 623, 54 A.3d 520 (mem.).

Two concurrent six-month suspensions were proper for an attorney who failed to cooperate with the disciplinary system, failed to communicate with her client and to return his papers, and practiced law where doing so violated the regulation of the legal profession. Furthermore, when respondent sought reinstatement, she would have to provide a detailed explanation for her lack of participation over the course of these proceedings. In re Hongisto, 2010 VT 51, 188 Vt. 553, 998 A.2d 1065 (mem.).

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Rule 1.4. COMMUNICATION

(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.—Amended June 17, 2009, eff. Sept. 1, 2009.

Comment

[1] Reasonable communication between the lawyer and the client is necessary for the client effectively to participate in the representation.

Communicating with Client

[2] 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. 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 authorized the lawyer to accept or to reject the offer. See Rule 1.2(a).

[3] Paragraph (a)(2) requires the lawyer to reasonably consult with the client about the means to be used to accomplish the client's objectives. 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. 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. In such cases the lawyer must nonetheless act reasonably to inform the client of actions the lawyer has taken on the client's behalf. 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] A lawyer's regular communication with clients will minimize the occasions on which a client will need to request information concerning the representation. 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. Client telephone calls should be promptly returned or acknowledged.

Explaining Matters

[5] 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. Adequacy of communication depends in part on the kind of advice or assistance that is involved. 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. On the other hand, a lawyer ordinarily will not be expected to describe trial or negotiation strategy in detail. 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. 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] Ordinarily, the information to be provided is that appropriate for a client who is a comprehending and responsible adult. However, fully informing the client according to this standard may be impracticable, for example, where the client is a child or suffers from diminished capacity. See Rule 1.14. 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. Where many routine matters are involved, a system of limited or occasional reporting may be arranged with the client.

Withholding Information

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

Reporter's Notes — 2009 Amendment

V.R.P.C. 1.4 is amended to conform to changes in the Model Rule. The ABA Reporter's Explanation is as follows:

TEXT:

1. Paragraph (a): Clarify lawyer's duty to communicate with client

Two aspects of the lawyer's duty to communicate with the client were previously contained in Rule 1.2. The Commission is recommending that all rules imposing a general duty to communicate with a client be located in Rule 1.4. To clarify the lawyer's important duties to communicate with a client, the Commission has modified paragraph (a) to specifically identify five different aspects of the duty to communicate.

2. Paragraph (a)(1): Add duty to communicate about decisions that require client consent

Paragraph (a)(1) is new and addresses the lawyer's duty to communicate with the client about decisions that require the client's consent. To the extent that current Rule 1.2(a) and paragraph (b) of this Rule implicitly require such communication, no change in substance is intended.

3. Paragraph (a)(2): Add duty to consult about means to accomplish client's objectives

Paragraph (a)(2) is taken from Model Rule 1.2(a), which now contains a textual cross-reference to this Rule. The word "reasonably" has been added to preclude a reading of the Rule that would always require consultation in advance of the lawyer taking any action on behalf of the client, even when such action is impliedly authorized under Rule 1.2(a). The Commission believes that lawyers have commonly understood current Rule 1.2(a) to require only reasonable consultation; therefore, no change in substance is intended.

4. Paragraph (a)(3): Relocate duty to keep client reasonably informed about status of matter

Paragraph (a)(3) is the same as the first half of current Rule 1.4(a). No change in substance is intended.

5. Paragraph (a)(4): Relocate duty to comply with reasonable requests for information

Paragraph (a)(4) is the same as the second half of current Rule 1.4(a). No change in substance is intended.

6. Paragraph (a)(5): Add duty to consult with the client about limitations on the lawyer's conduct

Paragraph (a)(5) contains the substance of [former] Rule 1.2(e). The Commission deleted Rule 1.2(e) and added paragraph (a)(5) to Rule 1.4 so that all rules imposing general duties to communicate with a client will be located in Rule 1.4. No change in substance is intended.

COMMENT:

[1] This new Comment describes in very general terms the reason for the various duties in Rule 1.4.

Caption. A new caption, “Communicating with Client,” has been added to distinguish the issue discussed in Comments [2] through [4]—when the lawyer must communicate with the client—from the subsequent discussion in Comments [5] and [6] about the adequacy of the information provided to the client.

[2] This new Comment refers to decisions where the client’s consent is required by the Rules and explains the application of paragraph (a)(1) in such circumstances. The Comment also explains that prior communications with the client or a grant of authority by the client may make it unnecessary for the lawyer to communicate with the client prior to taking an action that requires client consent.

[3] This new Comment explains the paragraph (a)(2) duty to reasonably consult with the client about the means used to accomplish the client’s objectives. The key issue is whether consultation is required before or after the lawyer takes action on behalf of the client. To call attention to the difference between the duty to reasonably consult about means and the duty in paragraph (a)(3) to keep the client reasonably informed about the status of the matter, the last sentence provides an example of the latter duty.

[4] This new Comment discusses the paragraph (a)(4) requirement that a lawyer promptly reply to reasonable requests for information. The Commission thought that emphasis should be given to promptly returning or at least acknowledging receipt of phone calls.

Caption. The new caption “Explaining Matters” alerts lawyers that Comments [5] and [6] relate to the adequacy of the information provided to the client.

[5] This Comment includes points made in [former] Comments [1] and [2]. The deleted text relates to matters now discussed in Comment [2]. Language has been added to alert lawyers to keep the client advised about the cost implications of tactical decisions made by the lawyer. The final sentence alerts lawyers that in some cases they will be required to secure the client’s informed consent, as defined in Rule 1.0(e).

[6] This Comment is the same as [former] Comment [3], except that the last sentence has been deleted because its point is made in proposed Comment [3].

[7] This Comment is the same as [former] Comment [4] except that the third sentence has been broadened to more comprehensively alert lawyers that decisions to withhold information are subject to the lawyer’s duty of loyalty.

Reporter’s Notes

The consequences of a lack of diligence and failure to communicate represent the great majority of disciplinary complaints with which the Professional Conduct Board deals. There is however no specific rule in the existing Vermont Code which imposes an affirmative duty upon the lawyer to communicate with the client. Rule 1.4 should assist in clarifying the importance of communication.

ANNOTATIONS

1. Sanctions. Two concurrent six-month suspensions were proper for an attorney who failed to cooperate with the disciplinary system, failed to communicate with her client and to return his papers, and practiced law where doing so violated the regulation of the legal profession. Furthermore, when respondent sought reinstatement, she would have to provide a detailed explanation for her lack of participation over the course of these proceedings. In re Hongisto, 2010 VT 51, 188 Vt. 553, 998 A.2d 1065 (mem.).

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Rule 1.5. FEES

(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 spousal maintenance or support, or property settlement in lieu thereof. Contingent fees are not forbidden in domestic relations matters which involve the collection of:

(i) spousal maintenance or property division due after a final judgment is entered or
(ii) child support and maintenance supplement arrearages due after final judgment, provided that the court approves the reasonableness of the fee agreement.

(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.—Amended June 17, 2009, eff. Sept. 1, 2009.

(f) A lawyer may enter into an agreement for a client to pay a nonrefundable fee that is earned before any legal services are rendered. The amount of such an earned fee must be reasonable, like any fee, in light of all relevant circumstances. A lawyer cannot accept a nonrefundable fee, or characterize a fee as nonrefundable, unless the lawyer complies with the following conditions:

(1) The lawyer confirms to the client in writing before or within a reasonable time after commencing representation (i) that the funds will not be refundable, and (ii) the scope of availability and/or services the client is entitled to receive in exchange for the nonrefundable fee.

(2) A lawyer shall not solicit or make any agreement with a client that prospectively waives the client's right to challenge the reasonableness of a nonrefundable fee, except that a lawyer can enter into an agreement with a client that resolves an existing dispute over the reasonableness of a nonrefundable fee, if the client is separately represented or if the lawyer advises the client in writing of the desirability of seeking independent counsel and the client is given a reasonable opportunity to seek such independent counsel.

(3) Where it accurately reflects the terms of the parties' agreement, and where such an arrangement is reasonable under all of the relevant circumstances and otherwise complies with this rule, a fee agreement may describe a fee as "nonrefundable," "earned on receipt," a "guaranteed minimum," "payable in guaranteed installments," or other similar description indicating that the funds will be deemed earned regardless of whether the client terminates the representation. **Added March 7, 2016; eff. May 9, 2016.**

(g) A nonrefundable fee that complies with the requirements of (f)(1)-(2) above constitutes property of the lawyer that should not be commingled with client funds in the lawyer's trust account. Any funds received in advance of rendering services that do not meet the requirements of (f)(1)-(3) constitute an advance that must be deposited in the lawyer's trust account in accordance with Rule 1.15(c) until such funds are earned by rendering services. **Added March 7, 2016; eff. May 9, 2016.**

Comment

Reasonableness of Fee and Expenses

[1] Paragraph (a) requires that lawyers charge fees that are reasonable under the circumstances. The factors specified in (1) through (8) are not exclusive. Nor will each factor be relevant in each instance. Paragraph (a) also requires that expenses for which the client will be charged must be reasonable. 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.

Basis or Rate of Fee

[2] 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. In a new client-lawyer relationship, however, an understanding as to fees and expenses must be promptly established. 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. A written statement concerning the terms of the engagement reduces the possibility of misunderstanding.

[3] Contingent fees, like any other fees, are subject to the reasonableness standard of paragraph (a) of this rule. 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. 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. Applicable law also may apply to situations other than a contingent fee, for example, government regulations regarding fees in certain tax matters.

Terms of Payment

[4] A lawyer may require advance payment of a fee, but is obliged to return any unearned portion. See Rule 1.16(d). 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). 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] 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. 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. Otherwise, the client might have to bargain for further assistance in the midst of a proceeding or transaction. However, it is proper to define the extent of services in light of the client's ability to pay. A lawyer should not exploit a fee arrangement based primarily on hourly charges by using wasteful procedures.

Prohibited Contingent Fees

[6] 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. Exceptions to this provision permit 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.

Division of Fee

[7] 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. 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. 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. Contingent fee agreements must be in a writing signed by the client and must otherwise comply with paragraph (c) of this rule. 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] 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

[9] If a procedure for resolution of fee disputes, such as arbitration or mediation, has been established in the representation agreement, the lawyer must comply with the procedure when it is mandatory, and, even when it is voluntary, the lawyer should submit to it if the client requests. 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. The lawyer entitled to such a fee and a lawyer representing another party concerned with the fee should comply with the prescribed procedure.

Reporter's Notes—2016 Amendment

Rules 1.5(f) and (g) are added to clarify the conditions that apply to a lawyer's acceptance of a nonrefundable fee. The provisions are based on Maine Rule of Professional Conduct Rule 1.5(h)-(i), adopted in June 2014.

Rule 1.5(f) provides that nonrefundable fees are permissible, subject to the requirement of reasonableness that applies to all fees pursuant to Rule 1.5(a). Paragraph (f)(1) requires certain safeguards to ensure the client's informed consent in order to avoid a client's confusing a nonrefundable fee with an advance. Paragraph (f)(2) prohibits a lawyer from securing a client's advance waiver of the right to challenge the reasonableness of a fee. A client's written agreement to a fee is a factor in the determination of its reasonableness under Rule 1.5(a). A lawyer should not press further and request or require the client to waive the client's right to have the reasonableness of a nonrefundable fee determined in accordance with law. Paragraph (f)(3) provides examples of terminology in the agreement that will indicate that the conditions of the rule are satisfied.

Rule 1.5(g) provides that, without the client's informed consent to nonrefundability in accordance with Rule 1.5(f)(1), the lawyer must treat the funds as an advance to be credited against future bills for services, must keep such funds in a trust account in accordance with Rule 1.15A until future services are rendered, and must refund the unearned portion of any such funds upon termination of representation pursuant to Rule 1.16. Subdivision (g) also provides that if conditions (f)(1) and (f)(2) are met, nonrefundable fees cannot be deposited in the lawyer's trust account as those nonrefundable fees are not the property of the client.

Reporter's Notes — 2009 Amendment

V.R.P.C. 1.5 is amended to conform to changes in Model Rule 1.5 but retains the current Vermont provisions of Rule 1.5(d)(1) that permit contingent fees in certain domestic relations matters. See Reporter's Notes to V.R.P.C. 1.5(d) (1999).

In *In re Sinnott*, 2004 VT 16, 176 Vt. 596, 845 A.2d 373 (mem.), the Court held that the PRB could reasonably find that a fee charged pursuant to a boilerplate agreement without regard to work to be performed was not "reasonable" under V.R.P.C. 1.5(a) without the need to consider the factors provided by the rule. In *State v. Homeside Lending, Inc.*, 2003 VT 17, ¶ 33, 175 Vt. 239, 826 A.2d 997, finding that notice in a class action was inadequate, the Court referred to the requirement of ABA Model Rule 1.5(c) (also found in V.R.P.C. 1.5(c)) that a contingent fee agreement must "state the method by which the fee is to be determined."

The ABA Reporter's Explanation is as follows in pertinent part:

TEXT:

1. Paragraph (a): Substitute Model Code standard

The current rule requires that a lawyer's fee be reasonable, but it does not state a corollary prohibition of a fee that is larger than reasonable. The omission thus makes it harder than necessary to impose discipline for

excessive fees. The Commission substituted the language of the Model Code prohibition for the [former] first sentence of (a). No change in substance is intended.

2. Paragraph (a): Add explicit prohibition on unreasonable expenses

Although ethics committee opinions have assumed that lawyers are prohibited from charging unreasonable expenses, as well as unreasonable fees, the [former] Rule does not say so explicitly. The Commission added language clarifying the lawyer's obligation, in order both to better educate lawyers as to their duties and to facilitate the imposition of discipline, where applicable. No change in substance is intended.

4. Paragraph (b): Add scope of representation and expenses to written notice

As a practical matter, a statement about fees is rarely complete without a corresponding statement of what the lawyer is expected to do for the fee. Further, the Commission believes that issues about expenses are often at least as controversial as those about fees. Indeed, clients often do not distinguish between fees and expenses. Thus, proposed paragraph (b) includes statements about the scope of the representation and client responsibility for expenses as well as fees in the ... agreement. Changes in the basis or rate of the fee or expenses must also be communicated ... but not changes in the scope of the representation, which may change frequently over the course of the representation.

6. Paragraph (c): Clarify that contingent fee agreement must be signed by client

The Commission is proposing a number of revisions to the Rules that would require the lawyer to document certain communications or agreements in writing. The Commission believes that it should be clear in all instances what type of writing is required, particularly whether the writing needs to be signed by the client. Certain terms are defined in Rule 1.0, including "writing." Because there are only a few instances in which a client's signature is required, the Commission is recommending that those instances be clearly stated in the text of the Rule. Thus, while the Commission believes that paragraph (c) already requires that a contingent fee agreement be signed by the client, this requirement is now being made explicit. No change in substance is intended.

7. Paragraph (c): Additional notification regarding expenses in contingent fee agreements

Unlike the Model Code, the Model Rules permit lawyers to advance litigation expenses, with repayment contingent on the client prevailing. Nevertheless, lawyers are not required to make such repayment contingent. The Commission believes that clients may be misled without a clear statement, in the contingent fee agreement, that there are expenses for which the client will be liable whether or not the client is the prevailing party.

8. Paragraph (e): Division of fees

The Commission recommends retaining the current text of this Rule, with the sole exception that the client must agree, and the agreement must be confirmed in writing, to the participation of each lawyer, including the share of the fee that each lawyer will receive.

COMMENT:

[1] This Comment is entirely new. It introduces paragraph (a) by stating that lawyers must charge both fees and expenses that are reasonable under the circumstances. It explains that the factors set forth in paragraphs (a)(1) through (8) are not exclusive and that not all factors will be relevant in each instance. It further states the method by which lawyers may properly charge for services performed or incurred in-house, along the lines suggested in ABA Standing Committee on Ethics and Professional Responsibility Formal Opinion 93-379 (Billing for Professional Fees, Disbursements and Other Expenses).

[3] This Comment is entirely new. It confirms that contingent fees, like other fees, are subject to the reasonableness standard of paragraph (a), including consideration of all of the factors that are relevant under the circumstances. It further refers to applicable law, which may impose limitations on contingent fees or require a lawyer to offer clients an alternative basis for the fee. (This is a revision of the last sentence in former ABA [Comment [3] [third paragraph of former Vermont Comment], revised to include an additional reference to ceilings on the percentage allowable under law.) It also refers to applicable law that may govern situations other than a contingent fee.

[4] This amendment to [former ABA] Comment [2] [second paragraph of former Vermont Comment] eliminates the vague "special scrutiny" language and substitutes a cross-reference to the Rule 1.8(a) requirements for business transactions with a client when a fee is to be paid in property instead of money. Rule 1.8(a) treatment is not stated in absolute terms, but the possibility is strongly suggested. The recent ABA Business Law Section report on alternative billing practices agreed that Rule 1.8(a) treatment should be given to fees paid in stock or property.

[5] The Commission proposes to delete the next to the last sentence of [former ABA] Comment [3] because the statement is merely advisory, given that the requirement of offering an alternative type of fee is not stated or implied in any textual provision. If the contingent fee is reasonable, then lawyers need not offer an alternative fee nor need they inform clients that other lawyers might offer an alternative. [6] A number of ethics committee opinions have interpreted the current Model Rule to permit contingent fees in post-decree family law matters, i.e., collecting arrearages that have been reduced to judgment, because such fee arrangements do not implicate the same policy matters that are implicated when fees are contingent upon securing a divorce or on the amount of alimony, support or property order. [The former Vermont provisions permitting this practice are retained.]

[7] The changes reflect the changes made to paragraph (e). The Commission proposes revising the explanation of “joint responsibility” to entail legal responsibility, including financial and ethical responsibility, as if the lawyers were associated in a partnership. This is the interpretation that has been given to the term according to ABA Informal Opinion 85-1514, as well as a number of state ethics opinions.

[8] This new Comment seeks to eliminate a misunderstanding that might arise about whether the requirements of paragraph (e)(1) must be satisfied when a lawyer leaving a law firm and the firm agree to share some part of a fee to be received in the future. Technically, the future division would be between lawyers who were no longer members of the same law firm. None of the usual reasons for requiring the client’s agreement to the arrangement apply to such fee divisions, however, and this Comment is intended to make that clear.

[9] The proposed change highlights that lawyers must comply with fee arbitration or mediation procedures in jurisdictions where they are mandatory.

Reporter’s Notes

This rule substitutes a prescription that a lawyer’s fee be reasonable for the former Code’s proscription of illegal or clearly excessive fees. In addition, the rule provides that where the lawyer has not regularly represented the client, the fee basis shall be communicated to the client, preferably in writing, before or within a reasonable time after the representation has begun. The rule also differs from the Code by requiring rather than merely recommending that contingent fee agreements be in writing.

Subsection (d) departs from the former Code and the ABA Model Rules in specifically allowing contingent fees in certain domestic relations matters. The change was prompted by the study committee’s concern that, in many instances, there is no practical way for families to recover support and maintenance arrearages due unless lawyers are allowed to take these cases on a contingency basis. An ethical issue is raised if a custodial parent, in order to collect any support dollars, contracts away a portion of those dollars which are due for the benefit of the child. By requiring court approval of such contingency fees, as is presently allowed in personal injury cases involving minors, it is expected that the interests of the child will be fairly protected.

Subsection (e) permits fee division between lawyers not in the same firm, as long as the fee is reasonable, the client consents, and the fee is in proportion to the services performed or in proportion to the responsibility assumed by each lawyer. The Vermont Code permits such division, so long as the fee is reasonable, the client consents, and the fee is in proportion to services performed and in proportion to the responsibility assumed. Thus under the rules, but not under the Code, a referral fee is permitted in limited situations.

The comment calls for arbitration of fee disputes. Lawyers may fulfill this aspirational directive by submitting a dispute to the Vermont Bar Association’s Fee Arbitration Committee or by seeking arbitration under the Vermont Arbitration Act, 12 V.S.A. §§ 5651-5681.

ANNOTATIONS

1. Written fee agreement. Respondent committed professional misconduct in failing to put a contingent fee agreement in writing. Although the complainant was physically unable to sign one, no signature was required under the rule at the time; even if a signature had been required, there were avenues available to obtain some kind of written approval from the complainant; and there was much concerning the fee agreement that was unclear to both respondent and the complainant. In re Fink, 2011 VT 42, 189 Vt. 470, 22 A.3d 461.

2. Excessive fee. Facts supported the panel’s finding that respondent, however erroneously, believed that he would contribute to a greater degree to complainant’s case. Because he was not consciously aware that he would do very little work for a large fee, his actions in charging an excessive fee were negligent. In re Fink, 2011 VT 42, 189 Vt. 470, 22 A.3d 461.

Respondent’s agreement to a 12 percent contingent fee for facilitating communication between the complainant and another attorney was misconduct. Respondent’s role did not require a large investment of time or labor; his tasks did not require specialized legal knowledge or legal experience; and facilitating communication would not preclude respondent from accepting other employment. In re Fink, 2011 VT 42, 189 Vt. 470, 22 A.3d 461.

In determining that respondent charged an excessive contingent fee, it was irrelevant that respondent did not actually bill the complainant for the contingent fee. In contracting with the complainant for 12 percent of the complainant’s recovery, respondent attempted to violate the directive that lawyers charge a reasonable fee, which was a violation of the rule stating that it was unprofessional conduct for a lawyer to attempt to violate the Rules of Professional Conduct. In re Fink, 2011 VT 42, 189 Vt. 470, 22 A.3d 461.

3. Sanctions. Public reprimand was an appropriate sanction for an attorney who knowingly failed to put a contingent fee agreement in writing and who negligently attempted to charge an unreasonable 12 percent contingent fee for facilitating communication between the complainant and another attorney. In re Fink, 2011 VT 42, 189 Vt. 470, 22 A.3d 461.

Cited. Cited in *In re Sinnott*, 2004 VT 16, 176 Vt. 596, 845 A.2d 373 (mem.).

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Rule 1.6. CONFIDENTIALITY OF INFORMATION

(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 required by paragraph (b) or permitted by paragraph (c).

(b) A lawyer must reveal information relating to the representation of a client when required by other provisions of these rules or to the extent the lawyer reasonably believes necessary:

(1) to prevent the client or another person from committing a criminal act that the lawyer reasonably believes is likely to result in the death of, or substantial bodily harm to, a person other than the person committing the act; or

(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; or

(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.

(c) A lawyer may reveal information relating to the representation of a client, though disclosure is not required by paragraph (b), when permitted under these rules or required by another provision of law or by court order or when the lawyer reasonably believes that disclosure is necessary:

(1) to prevent the client from committing a crime in circumstances other than those in which disclosure is required by paragraph (b) or to prevent the client or another person from committing an act that the lawyer reasonably believes is likely to result in the death of, or substantial bodily harm to, the person committing the act;

(2) to secure legal advice about the lawyer's compliance with these rules; or

(3) 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.—Amended June 17, 2009, eff. Sept. 1, 2009.

Comment

[1] 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. See Rule 1.18 for the lawyer's duties with respect to information provided to the lawyer by a prospective client, 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 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.

[2] 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. This contributes to the trust that is the hallmark of the client-lawyer relationship. 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. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. 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. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld.

[3] 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. The attorney-client privilege and work product doctrine 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. The rule of client-lawyer confidentiality

applies in situations other than those where evidence is sought from the lawyer through compulsion of law. 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. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law. See also Scope.

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

Authorized Disclosure

[5] 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. 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. 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.

Disclosure Adverse to Client

[6] 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 important exceptions. The provisions of Rule 1.6(b) set forth exceptions designed to bring the mandates of the Rules of Professional Conduct into line with those of the common or statutory law of torts and crimes. Paragraph (b)(1) recognizes the overriding value of life and physical integrity and requires disclosure reasonably necessary to prevent a criminal act that is likely to cause death or substantial bodily harm. Such harm is likely 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. Thus, a lawyer who knows that a client has discharged toxic waste into a town's water supply must 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. There is an exception to the disclosure requirement when the likelihood of death or harm is only to the person (whether the client or another) threatening the act. While the lawyer may disclose such information pursuant to paragraph (c)(1), disclosure is not required under paragraph (b)(1) as a matter of respect for personal autonomy and privacy.

[7] Paragraph (b)(2) requires disclosure of information relating to the representation 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. Such a serious abuse of the client-lawyer relationship by the client forfeits the protection of this rule. The client can, of course, prevent such disclosure by refraining from the wrongful conduct, and the lawyer may not counsel or assist the client in conduct the lawyer knows is criminal or fraudulent. See Rule 1.2(d). 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), concerning the lawyer's responsibilities when the client is an organization.

[8] Paragraph (b)(3) addresses the situation in which the lawyer does not learn of the client's fraud until after it has been consummated. 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. In such situations, the lawyer must 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] Paragraph (c) permits, but does not require, disclosures not required by paragraph (b) when these rules permit it, or when another provision of law or a court order requires it. Whether another provision of law supersedes Rule 1.6 is a question of law beyond the scope of these rules. 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. If, however, the other law supersedes this rule and requires disclosure, paragraph (c) permits the lawyer to make such disclosures as are necessary to comply with the law. When a lawyer is 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, the lawyer, absent informed consent from the client to do otherwise, should assert on behalf of the client all nonfrivolous 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. 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 (c) permits the lawyer to comply with the court's order. Both provisions are permissive, however, allowing a lawyer to follow the dictates of

conscience in cases where disclosure is not required by paragraph (b) by suffering the consequences of nondisclosure.

[10] Paragraph (c)(1) permits a lawyer to reveal information relating to the representation as necessary to prevent the client from committing any crime even though the conduct is not such as to require disclosure under paragraph (b), and to reveal information, disclosure of which is not required by paragraph (b)(1), when, in the lawyer's judgment, the client or another person should be prevented from committing a suicidal or other act harmful to the actor. Cf. Rule 1.14(c).

[11] 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. In most situations, disclosing information to secure such advice will be impliedly authorized for the lawyer to carry out the representation. Even when the disclosure is not impliedly authorized, paragraph (c)(2) permits such disclosure because of the importance of a lawyer's compliance with the Rules of Professional Conduct.

[12] 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. The same is true with respect to a claim involving the conduct or representation of a former client. 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. The lawyer's right to respond arises when an assertion of such complicity has been made. Paragraph (c)(3) 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. The right to defend also applies, of course, where a proceeding has been commenced.

[13] A lawyer entitled to a fee is permitted by paragraph (c)(3) to prove the services rendered in an action to collect it. 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.

[14] Paragraphs (b) and (c) require or permit disclosure, respectively, only to the extent the lawyer reasonably believes the disclosure is necessary to accomplish one of the purposes specified. 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. 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.

[15] Paragraph (c) permits but does not require the disclosure of information relating to a client's representation to accomplish the purposes specified in paragraphs (c)(1) through (c)(3). 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. A lawyer's decision not to disclose as permitted by paragraph (c) does not violate this rule. Disclosure may be required, however, by other rules and thus by paragraph (b). See Rules 1.2(d), 3.3(b), 4.1(b), 8.1 and 8.3.

Acting Competently to Preserve Confidentiality

[16] A lawyer must act competently to safeguard information relating to the representation of a client 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.

[17] 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. 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. 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. 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.

Former Client

[18] 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.

V.R.P.C. 1.6 is amended to blend unique features of the Vermont rule as adopted in 1999 with the language and format of the changes to Model Rule 1.6.

The original Vermont rule differed significantly from Model Rule 1.6 in a number of respects. The Vermont rule required disclosure of client information when required by other rules, when necessary to prevent a crime that involved the risk of death or substantial bodily harm, and when necessary to avoid assisting a criminal or fraudulent act by a client. The rule permitted disclosure when permitted under other rules, when required by law or court order, or when necessary to reveal the client's intention to commit a crime not involving death or bodily injury or to defend against claims or charges arising out of the representation. See Reporter's Notes to V.R.P.C. 1.6 (1999). Model Rules 1.6(b) and 4.1(b) made disclosures to prevent death or bodily harm, or for defense of the lawyer's interests, permissive only and prohibited other disclosures. Model Rule 1.6, as amended in 2002 and again, on the recommendation of the Task Force on Corporate Responsibility and the Standing Committee on Ethics and Professional Responsibility, in 2003, makes language changes and adds to the list of permissive disclosures those necessary to prevent or rectify substantial financial injury caused by the client's fraud in which the lawyer's services were used, to secure legal advice about compliance with the rules, and to comply with other law or court order.

The present amendments retain the mandatory disclosure requirements of the prior Vermont rule with changes in language and structure intended to incorporate the form of the amended ABA rule and to address confusion that had arisen concerning the meaning of the prior Vermont Rule. The ABA Comments have been adapted to the Vermont changes.

Amended V.R.P.C. 1.6(a), like other amendments, substitutes "gives informed consent" for "consents after consultation." See amended Rule 1.0(e) and Reporter's Notes. The amendment also makes clear that both required and permitted disclosures are exceptions to the basic rule of confidentiality set forth in the paragraph.

Amended V.R.P.C. 1.6(b) continues the Vermont requirement of disclosure but adopts in modified form the language of the permissive provisions of amended Model Rule 1.6(b)(1)-(3) to describe the three key situations in which disclosure is required by the Vermont rule. The ABA rule has been further modified, in view of the mandatory character of the Vermont rule, to continue to confine the required disclosure to criminal acts and, as the Vermont modifications to Comment [6] state, to create an exception for disclosure of the intention of a client or another person to commit suicide or otherwise engage in behavior harmful to her-or himself. The lawyer is permitted to disclose such an intention pursuant to Rule 1.6(c)(1), however, when in the lawyer's judgment the best interests of the person involved require it. (The exception for the intention of another person covers the situation in which the information comes to the lawyer through the confidential communication of a client other than that person—for example, a treating psychologist or guardian.)

Amended V.R.P.C. 1.6(c), like the original Vermont rule, lists permissive disclosures, making clear that the provision applies to information other than that for which disclosure is required under V.R.P.C. 1.6(b). The provision in the first sentence permitting disclosure when required by law or court order is carried forward from the original rule and has been added to the Model Rules as Rule 1.6(b)(6). The disclosure continues to be permissive in the amended Vermont rule so that "A lawyer willing to take the risk of contempt or other legal penalties on behalf of a client should not also be subject to professional discipline for nondisclosure." Reporter's Notes to V.R.P.C. 1.6(c) (1999).

Amended V.R.P.C. 1.6(c)(1) makes clear that a lawyer may, but is not required to, disclose client information to prevent a crime other than one threatening likely death or substantial bodily harm. There is no general permission to disclose merely tortious conduct. As the Vermont additions to Comment [10] explain, however, there is such an exception where the noncriminal conduct is a threat of suicide or other serious harm to the potential actor. Cf. Rule 1.14(c). In making a decision to disclose under this provision, competent representation would call for a lawyer to seek appropriate professional consultation if available. See Comment [16]. V.R.P.C. 1.6(c)(2), which is new, adopts Model Rule 1.6(b)(4).

Former V.R.P.C. 1.6(c)(2), redesignated as (3), is unchanged and continues to track former Model Rule 1.6(b)(2), which has been redesignated as (5). The ABA Reporter's Explanation of the amendments to Model Rules 1.6(b) is as follows in pertinent part:

Paragraph (b)(1): Modify to permit [require in the Vermont rule] disclosure to "prevent [likely] death or substantial bodily harm"

... This change is in accord with Section 66 of the American Law Institute's Restatement of the Law Governing Lawyers. The Rule replaces "imminent" with ["likely"] to include a present and substantial threat that a person will suffer such injury at a later date, as in some instances involving toxic [discharges].

Paragraph (b)(2): Add paragraph permitting [requiring in the Vermont rule] disclosure to prevent client crimes or frauds reasonably certain to cause substantial economic injury and in which client has used or is using lawyer's services

The Commission recommends that a lawyer be permitted [required in the Vermont rule] to reveal information relating to the representation to the extent necessary to prevent the client from committing a crime or fraud reasonably certain to result in substantial economic loss, but only when the lawyer's services have been or are

being used in furtherance of the crime or fraud. Use of the lawyer's services for such improper ends constitutes a serious abuse of the client-lawyer relationship. The client's entitlement to the protection of the Rule must be balanced against the prevention of the injury that would otherwise be suffered and the interest of the lawyer in being able to prevent the misuse of the lawyer's services. Moreover, with respect to future conduct, the client can easily prevent the harm of disclosure by refraining from the wrongful conduct. See also Comment [7].

Support for the Commission's proposal can be found in the eight jurisdictions that permit disclosure 56 when clients threaten crimes or frauds likely to result in substantial injury to the financial or property interests of another and the 25 jurisdictions that permit a lawyer to reveal the intention of a client to commit any crime. The Commission's proposal is also in accord with Section 67 of the American Law Institute's Restatement of the Law Governing Lawyers.

Paragraph (b)(3): Add paragraph permitting [requiring in the Vermont rule] disclosure to prevent, mitigate or rectify substantial economic loss resulting from client crime or fraud in which client has used lawyer's services

The rationale for this exception is the same as that for paragraph (b)(2), the only difference being that the client no longer can prevent disclosure by refraining from the crime or fraud. See also Comment [8]. The Commission believes that the interests of the affected persons in mitigating or recouping their substantial losses and the interest of the lawyer in undoing a wrong in which the lawyer's services were unwittingly used outweigh the interests of a client who has so abused the client-lawyer relationship. Support for the Commission's proposal can be found in the 13 jurisdictions that permit disclosure to rectify the consequences of a crime or fraud in the commission of which the client used the lawyer's services. The proposal is also in accord with Section 67 of the American Law Institute's Restatement of the Law Governing Lawyers.

The ABA Reporter's Explanation of Model Rule 1.6(b)(4) is as follows:

Questions have been raised regarding the propriety of a lawyer revealing confidential information in order to secure legal advice regarding the lawyer's obligations under the Rules, including the lawyer's duty not to counsel or assist clients in crimes or frauds. In most instances, disclosing information to secure such advice is impliedly authorized. Nevertheless, in order to clarify that such disclosures are proper even when not impliedly authorized, the Commission recommends that such disclosures be explicitly permitted under this Rule.

It is of overriding importance, both to lawyers and to society at large, that lawyers be permitted to secure advice regarding their legal obligations. Moreover, clients are adequately protected by the requirement that such disclosures be made only when protected by the attorney-client evidentiary privilege. See also [Vermont Comment [11]].

The ABA Reporter's Explanation of the amendments to Comments [1]-[5] is as follows:

The points made in these Comments [first three paragraphs of former Vermont Comments] have been incorporated into Comment [2]. No change in substance is intended.

[1] This new Comment provides cross-references to the other Rules that protect clients, prospective clients and former clients against the disclosure or adverse use of information relating to the representation.

[2] This modification of [former ABA] Comment [4] combines material in [former ABA] Comments [1] through [4] into a single Comment setting forth the rationale for the confidentiality duty. No change in substance is intended.

[3] [Former ABA] Comment [5] has been edited slightly to clarify that the work-product doctrine is separate from the attorney-client evidentiary privilege. No change in substance is intended. Given that Rule 1.6 contains no suggestion that there might be an exception for government lawyers who disagree with government policy, the Commission recommends the deletion of [former ABA] Comment [6] as unnecessary.

[4] This new Comment reminds lawyers that the prohibition applies even when the disclosure does not itself reveal protected information but could lead to the discovery of such information, including the use of a hypothetical that poses an unreasonable risk that the listener will ascertain protected information. No change in substance is intended.

[5] This Comment combines and makes minor stylistic changes to [former ABA] Comments [7] and [8]. No change in substance is intended.

Amended ABA Comments [6] and [7] have been modified in the Vermont amendments to reflect the mandatory nature of the disclosures required by V.R.P.C. 1.6(b). The intent of the last three sentences of Comment [6] is described in the ABA Reporter's Explanation as follows: "This new Comment ... states the rationale for the exception recognized in paragraph (b)(1)-disclosures to prevent reasonably certain death or substantial bodily harm. It also explains when such harm is reasonably certain, providing an illustration." The intent of Comment [7] is to provide "the rationale for paragraph (b)(2)-disclosure to prevent future crimes or frauds threatening substantial economic harm. It also provides a cross-reference to Rules 1.2 and 1.16, which govern the lawyer's conduct regardless of whether the lawyer chooses to exercise the lawyer's discretion to disclose. *Id.*

The paragraphs between Comments [6] and [7] (former ABA Comments [10]-[17]) have been deleted because their "substance has been included in various new Comments [e.g., Comments [6], [7]]. The caption "Withdrawal" has also been deleted. *Id.*

The intent of Comment [8] is described in the ABA Reporter's Explanation as follows: "This new Comment provides the rationale for the exception recognized in paragraph (b)(3) disclosure to prevent, mitigate or rectify substantial economic loss resulting from a client's past crimes or frauds in the furtherance of which the client has used the lawyer's services."

Comment [9] incorporates the language of amended ABA Comments [12] and [13] in the context of explaining the permissive nature of the disclosures covered by V.R.P.C. 1.6(c). The final sentence in the Vermont Comment reflects the distinction between disclosures required by these Rules and those required by other law or court order found in V.R.P.C. 1.6(b), (c), discussed above. The ABA Reporter's Explanation notes that the subject of both comments is covered in former ABA Comments [20] and [21] (deleted following Vermont Comment [15] and that "No change in substance is intended."

Comment [10] explains V.R.P.C. 1.6(c)(1) and carries forward the essence of the fourth paragraph deleted between Comments [6] and [7].

Comment [11] "provides the rationale for the exception recognized in paragraph [(c)(2)]securing confidential legal advice about the lawyer's personal responsibility to comply with the Rules." ABA Reporter's Explanation to ABA Comment [9]. "The caption ['Dispute Concerning a Lawyer's Conduct'] has been deleted as no longer necessary." *Id.*

Amended Comment [12] "is derived from [former] Comment [18]. The new third sentence is taken from [former ABA] Comment [19]. The deleted last sentence has been incorporated into [Vermont] Comment [14]. No change in substance is intended." *Id.*

Amended Comment [13] "contains the core of [former ABA] Comment [19] that addresses disclosure necessary to collect a lawyer's fees. The deleted second sentence has been included in [Vermont Comment [12]] and the deleted last sentence has been incorporated into [Vermont] Comment [14]. No change in substance is intended." *Id.*

[14] The ABA Reporter's Explanation of Comment [14] is as follows: "Combining points made in [former ABA] Comments [14], [18] and [19], this new Comment explains the Rule 1.6(b) requirement that disclosure be limited to information the lawyer reasonably believes is needed to accomplish the purpose for which disclosure is permitted. It emphasizes remonstrating with the client to take appropriate action, disclosing no more than necessary and, where appropriate, seeking protective orders against further dissemination of the information. No change in substance is intended."

[15] This Comment differs from ABA Comment [15] in order to reflect the distinction between mandatory and permissive disclosure in V.R.P.C. 1.6(b), (c). The ABA Reporter's Explanation of Comment [15] is as follows: "This new Comment incorporates the substance of [former ABA] Comment [14] [deleted between Vermont Comments [6] and [7]]. A new introductory sentence has been added, and the beginning of the second sentence has been revised for stylistic reasons. The last [sentence provides] a cross-reference to other Model Rules that may require disclosure."

The caption and the two paragraphs between Comments [15] and [16] have been deleted because these matters are now discussed in Comment [9].

The ABA Reporter's Explanation of Comments [16] and [17] is as follows:

Caption. This new caption has been added to call attention to the two new Comments that discuss the requirement that lawyers act competently and diligently to preserve confidentiality.

[16] This new Comment cross-references Rules 1.1, 5.1 and 5.3, calling attention to the responsibility of the lawyer to act competently to safeguard information relating to the representation. A number of states have retained the formulation of ABA Model Code of Professional Responsibility DR 4-101(D), "A lawyer shall exercise reasonable care to prevent the lawyer's employees, associates and others whose services are utilized by the lawyer from disclosing or using confidences or secrets of a client, except that a lawyer may reveal the information allowed by DR 4-101(C) through an employee." Much of the recent discourse about confidentiality has focused on the lawyer's duty to act competently to prevent disclosure. The Commission believes this issue is important and ought to be flagged in the Comment. No change in substance, however, is intended.

[17] This new Comment addresses the lawyer's duty of care when transmitting confidential information. Although much of the current debate concerns the use of unencrypted e-mail, the Comment speaks more generally in terms of special security measures and reasonable expectations of privacy. It takes a case-by-case approach to the problem. The Commission believes this Comment is consistent with the prevailing resolution of this issue in recent ethics committee decisions.

Comment [18] is identical to ABA Comment [18] and to the last sentence of the original Vermont Comment, "with the addition of cross-references to Rule 1.9(c)(1) and (2)." ABA Reporter's Explanation.

Reporter's Notes

This rule represents a significant departure from the Vermont Code. It imposes a duty of confidentiality concerning information relating to the representation regardless of whether it is acquired before or after the

relationship existed. The information must be kept confidential regardless of whether the client indicates a desire for confidentiality or whether disclosure of particular information might be embarrassing or detrimental.

The rule further departs from both the Vermont Code and the Model Rule by requiring a lawyer to disclose information necessary to prevent a crime that involves the risk of death or substantial bodily harm. A similar modification of the Model Rules has been adopted in a number of states. See, e.g., Ariz. R. Prof. Conduct, Rule 1.6(b); Conn. R. Prof. Conduct, Rule 1.6(b); Ill. R. Prof. Conduct, Rule 1.6(b). The proposed rule reflects a judgment that the values underlying client confidentiality are outweighed by the need to protect human life. See A.J. Taylor, “Work in Progress: The Vermont Rules of Professional Conduct,” 20 Vt. L. Rev. 901, 905-10 (1996). In any event, there may be a common-law duty to disclose in such circumstances. Cf. *Peck v. Counseling Service*, 146 Vt. 61, 499 A.2d 422 (1985).

The proposed rule also departs from the Model Rule by carrying forward the express exceptions from present DR 4-101 for disclosures required by other provisions of the rules, by other law, or by court order. Disclosures required by other rules are mandatory under Rule 1.6(b), as noted in the comment, to avoid any implication that the requirements of those provisions are subject to Rule 1.6. To avoid confusion, a disclosure obligation contained in Model Rule 4.1(b) for information that would avoid assisting a criminal or fraudulent act by a client is placed here in paragraph (b)(2) and is made absolute. See Reporter’s Note to Rule 4.1. All other disclosures required by other law or by court order are permissive under Rule 1.6(c). A lawyer willing to take the risk of contempt or other legal penalties on behalf of the client should not also be subject to professional discipline for nondisclosure.

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Rule 1.7. CONFLICT OF INTEREST: CURRENT CLIENTS

(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.—Amended June 17, 2009, eff. Sept. 1, 2009.

Comment

General Principles

[1] Loyalty and independent judgment are essential elements in the lawyer’s relationship to a client. 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. 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 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. 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] 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). 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. Ignorance caused by a failure to institute such procedures will not excuse a lawyer's violation of this rule. As to whether a client-lawyer relationship exists or, having once been established, is continuing, see Comment to Rule 1.3 and Scope.

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

Identifying Conflicts of Interest: Directly Adverse

[6] Loyalty to a current client prohibits undertaking representation directly adverse to that client without that client's informed consent. 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. 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. 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. 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. 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] Directly adverse conflicts can also arise in transactional matters. For example, if a lawyer is asked to represent the seller of a business in negotiations with a buyer represented by the lawyer, not in the same transaction but in another, unrelated matter, the lawyer could not undertake the representation without the informed consent of each client.

Identifying Conflicts of Interest: Material Limitation

[8] 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. 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. The conflict in effect forecloses alternatives that would otherwise be available to the client. The mere possibility of subsequent harm does not itself require disclosure and consent. The critical questions are the likelihood that a difference in interests will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client.

Lawyer's Responsibilities to Former Clients and Other Third Persons

[9] 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.

Personal Interest Conflicts

[10] The lawyer's own interests should not be permitted to have an adverse effect on representation of a client. 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. 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. 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. 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] When lawyers representing different clients in the same matter or in substantially related matters are closely related by blood, marriage or civil union, 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. 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. Thus, a lawyer related to another lawyer, e.g., as parent, child, sibling, spouse or civil union partner, ordinarily may not represent a client in a matter where that lawyer is representing another party, unless each client gives informed consent. 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] These rules do not expressly prohibit a lawyer from engaging in a sexual relationship with a client, but such relationships could give rise to a variety of violations of specific provisions of the rules. See Rule 1.8, Comment [17].

Interest of Person Paying for a Lawyer's Service

[13] 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. 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.

Prohibited Representations

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

[15] 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. 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] Paragraph (b)(2) describes conflicts that are nonconsentable because the representation is prohibited by applicable law. 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] 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. Whether clients are aligned directly against each other within the meaning of this paragraph requires examination of the context of the proceeding. 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).

Informed Consent

[18] 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). The information required depends on the nature of the conflict and the nature of the risks involved. 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).

[19] Under some circumstances it may be impossible to make the disclosure necessary to obtain consent. 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. 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. 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

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

[21] 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. 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

[22] 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. 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. 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. 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. 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. In any case, advance consent cannot be effective if the circumstances that materialize in the future are such as would make the conflict nonconsentable under paragraph (b).

Conflicts in Litigation

[23] Paragraph (b)(3) prohibits representation of opposing parties in the same litigation, regardless of the clients' consent. On the other hand, simultaneous representation of parties whose interests in litigation may conflict, such as coplaintiffs or codefendants, is governed by paragraph (a)(2). 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. 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. 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] Ordinarily a lawyer may take inconsistent legal positions in different tribunals at different times on behalf of different clients. 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. 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. 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. 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] 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. 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. 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.

Nonlitigation Conflicts

[26] 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 [7]. 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. The question is often one of proximity and degree. See Comment [8].

[27] For example, conflict questions may arise in estate planning and estate administration. 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. 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] 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. 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. The lawyer seeks to resolve potentially adverse interests by developing the parties' mutual interests. Otherwise, each party might have to obtain separate representation, with the possibility of incurring additional cost, complication or even litigation. Given these and other relevant factors, the clients may prefer that the lawyer act for all of them.

Special Considerations in Common Representation

[29] 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. 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. 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. 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. 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] A particularly important factor in determining the appropriateness of common representation is the effect on client-lawyer confidentiality and the attorney-client privilege. With regard to the attorney-client privilege, the prevailing rule is that, as between commonly represented clients, the privilege does not attach. 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] 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. 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. 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. 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. 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] 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. 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] 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.

Organizational Clients

[34] 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). 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] 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. The lawyer may be called on to advise the corporation in matters involving actions of the directors. 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. 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. 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.

Reporter's Notes — 2009 Amendment

V.R.P.C. 1.7 is replaced by Model Rule 1.7 as completely revised by the ABA in 2002 to eliminate confusion created by the form and language of the original rule.

The Supreme Court addressed issues under former V.R.P.C. 1.7 in *Deptula v. Kane*, 2008 WL 4906905 (Vt.) (unpub. entry order, Nov. 5, 2008) (trial court correctly ruled that expert evidence was necessary to establish plaintiff's legal malpractice claims, which included alleged violation of V.R.P.C. 1.7), and *Smedberg v. Detlef's Custodial Service, Inc.*, 2007VT99, 182 Vt. 349, 940 A.2d 674 (argument "unpersuasive" that plaintiff's lawyer's prior representation of employer would have been a conflict under V.R.P.C. 1.7(b) if plaintiff were a real party in interest in claim against workers' compensation carrier after settlement of plaintiff's claim).

The ABA Reporter's Explanation is as follows:

TEXT:

1. Change caption to "Conflict of Interest: Current Clients"

Rule 1.7 does not purport to define or regulate all types of conflicts but rather only those that arise with respect to current clients. The proposed change will more accurately reflect the limited scope of this Rule. No change in substance is intended.

2. Create single paragraph defining "conflict of interest"

The relationship between [former] paragraphs (a) (directly adverse conflicts) and (b) (material limitation conflicts) is not well understood. Lawyers frequently become confused attempting to determine what constitutes a "directly adverse" conflict when it may not matter because, even when not "directly adverse," the representation may still involve a conflict under paragraph (b)'s "material limitation" standard.

In addition, [former] paragraph (a) is conceptually confusing since, in most "directly adverse" conflicts, common representation is likely to affect both the relationship with the current client and the representation of the new client. For example, when the lawyer seeks to represent a new client suing an existing client represented by the lawyer in an unrelated matter, [former] paragraph (a) looks to the effect of the new representation on the existing client, while paragraph (b) applies to the effect of the existing relationship on the representation of the new client. Thus, most cases involving directly adverse conflicts need to be analyzed under both paragraphs (a) and (b). There appears to be no reason why both conflicts cannot be analyzed under a single paragraph that defines and prohibits the representation unless informed consent is properly obtained

Under the proposed new structure, paragraph (a) sets forth the basic prohibition against representation involving currently conflicting interests, including the definition of a conflict of interest. Conflict of interest is defined to include both directly adverse conflicts and material limitation conflicts.

Unlike [former] paragraph (b), in which a conflict exists if the representation "may be" materially limited by the lawyer's interests or duties to others, proposed paragraph (a)(2) limits conflicts to situations in which there

is “a significant risk” that the representation will be so limited. This proposed change is not substantive but rather reflects how [former] paragraph (b) is presently interpreted by courts and ethics committees.

Proposed paragraph (a)(2) specifically identifies “former clients” as nonclients to whom the lawyer may owe duties, as distinct from “other persons” to whom the lawyer may owe duties, such as those arising from the lawyer’s role as fiduciary or corporate director. These changes are proposed to make it easier for lawyers to recognize these conflicts when they arise.

The introductory phrases in both paragraphs (a) and (b) are designed to clarify the relationship between the two paragraphs.

The purpose of these proposed changes is to clarify the text and to better educate lawyers regarding the complex subject of conflict of interest. No change in substance is intended.

3. Create single paragraph on consent ability and informed consent

The proposed Rule makes clear that in certain situations a conflict may not be waived by the client. That is, the representation may not go forward even with the client’s consent. Unlike the [former] Rule, the proposed Rule contains a single standard of consentability and informed consent, applicable both to directly adverse and material-limitation conflicts. This standard is set forth in a separate paragraph, both to reflect the separate steps required in analyzing conflicts (i.e., first identify potentially impermissible conflicts, then determine if the representation is permissible with the client’s consent) and to highlight the fact that not all conflicts are consentable.

Under the [former] Rule, consentability turns on a determination that the conflict will “not adversely affect the representation.” The difficulty with this standard is that in order to determine that a conflict exists in the first place, the lawyer must have already determined that the lawyer’s duties or interests are likely to “materially limit” the representation. There is a difference between “material limitation” and “adverse affect on” the representation, but the difference is subtle. As a result, lawyers are understandably confused regarding the circumstances under which consent may be sought.

Paragraph (b) breaks down consentability into three components. The first and most common is modeled after the [former] Rule, in which the goal is to protect clients in situations where the representation is likely to be inadequate. The proposal is to replace the phrase “adverse effect on the representation” with an explicit statement of what that phrase was intended to mean, i.e., that it is unlikely that the lawyer will be able to provide “competent and diligent representation to each affected client.” The terms “competent” and “diligent” are already defined and are generally well understood, thus providing a relatively clear standard that lawyers can apply in making the determination whether to go ahead and seek the client’s consent. The term “reasonably” makes clear that, as under the [former] Rule, the consent ability standard is an objective one.

Paragraphs (b)(2) and (b)(3) articulate situations in which courts and ethics committees have found certain conflicts to be nonconsentable, not only because they may be harmful to clients, but also because there are other interests, for example, the interests of courts, that need to be protected. Paragraph (b)(2) refers to representation “prohibited by law,” that is, law other than the Rules of Professional Conduct. (For example, substantive law in some jurisdictions provides that the same lawyer may not represent more than one defendant in a capital case or both the buyer and seller in a real estate transaction.)

Paragraph (b)(3) describes conflicts that are nonconsentable because of the institutional interest in adequate development of each client’s position when the clients are aligned directly against each other in the same litigation. Thus, these conflicts are nonconsentable even if the lawyer reasonably believed that the representation would be competent and diligent. It has been suggested that there may be similar institutional interests in separate representation in contexts outside litigation. Since it is not possible to describe such situations in language that preserves this paragraph’s bright-line test, the Commission believes that these other situations can be adequately addressed under paragraphs (b)(1) and (b)(2).

Finally, paragraph (b)(4) substitutes “informed consent” of the client for “consent after consultation.” It was felt that “consultation” did not adequately convey the requirement that the client receive full disclosure of the nature and implications of a lawyer’s conflict of interest. The term “informed consent” was chosen because it already has a fairly well-accepted meaning in other contexts. That term, which is used throughout the Rules in place of “consent after consultation,” is defined in Rule 1.0(e). In each Rule where the term is used, there will be a cross-reference in the Comment to the definition in Rule 1.0(e), as well as language in the Comment providing specialized guidance.

The purpose of these proposed changes is to clarify the text and better educate lawyers regarding the complex subject of conflict of interest. No change in substance is intended.

4. New requirement that informed consent be “confirmed in writing”

The Commission was urged to require some form of writing, for the benefit of both the lawyer and the client. Some states have done so, and experience indicates that the requirement is not overly burdensome or impractical.

Under the Commission’s proposal, it is not necessary that the client’s agreement be obtained in a writing signed by the client. Rather, the term “confirmed in writing” is defined by proposed Rule 1.0(b) to denote informed consent that is either given in writing by the person or a writing that a lawyer promptly transmits to the person

confirming an oral informed consent. A writing is required in all instances, but the Comment allows for flexibility when there is not time to memorialize the consent before proceeding with the representation. See Comment [20].

COMMENT:

Conflict of interest doctrine is complicated, and the Commission believes that lawyers are in need of additional guidance. Therefore, the Commission is recommending substantial changes to the Comment to Rule 1.7. The changes are designed to clarify basic conflicts doctrine and to address a number of recurring situations. The proposed organization provides an introduction (Comments [1] through [5]), a general roadmap to conflicts analysis (Comments [6] through [22]) and finally an elaboration of conflicts involving litigation (Comments [23] through [25]), nonlitigation (Comments [26] through [28]), common representation (Comments [29] through [33]) and organizational clients (Comments [34] and [35]).

General Principles

Caption. The caption has been changed to better reflect the subject of the following Comments.

[1] Comment [1] retains and modifies the first sentence of [former] Comment [1] but is otherwise new. It states the rationale for the basic prohibition of representation involving conflicts of interest—to avoid compromising loyalty and independent judgment. It then adds cross-references to Rules 1.8 and 1.9.

[2] This entirely new Comment outlines a fourstep process for recognizing and resolving conflict-of-interest problems.

[3] This Comment incorporates much of the remainder of [former] Comment [1]. Changes in the first sentence reflect the dual requirements of paragraphs (a) and (b) that the lawyer recognize a conflict and decline representation unless the requirements of paragraph (b) have been met. The Comment adds a cross-reference to the Rule 5.1 Comment, which states the requirement that lawyers with managerial authority within a law firm make reasonable efforts to establish internal systems for determining conflicts of interest. The last sentence is identical to the last sentence in [former] Comment [2].

[4] This Comment incorporates much of [former] Comment [2]. Changes are designed to more clearly state the requirements of the Rule where a conflict arises after a representation has commenced and, in addition, to indicate the type of analysis required to determine whether a lawyer must withdraw from representing one of several clients represented concurrently by the lawyer or, in some cases, from representing all of them.

[5] This new Comment addresses the problem of conflicts that arise after a representation has commenced as a result of unforeseeable developments, such as a merger or acquisition by a corporate client. In the disqualification context, courts have often recognized that it is unreasonable to require the lawyer to withdraw from representing both clients and have permitted the lawyer to withdraw from one of the two representations in order to avoid the conflict (something that is ordinarily not permitted under the so-called “hot potato” doctrine). The Comment specifies that the lawyer may be permitted to withdraw from one of the representations in order to avoid the conflict. The Comment requires the lawyer to comply with Rule 1.16, including seeking court approval where necessary. The Comment further reminds lawyers that they continue to owe the now former client the duty to keep confidential any information gained during the course of the representation.

Identifying Conflicts of Interest: Directly Adverse

Caption. The caption has been added to better reflect the following Comments.

[6] This Comment incorporates much of [former] Comment [3]. It addresses the conflicts defined in paragraph (a)(1), i.e., “directly adverse” conflicts. It provides the rationale for the Rule, addresses the question of whether the Rule applies when a lawyer will have to cross-examine a present client and explains how “directly adverse” conflicts also pose “material limitation” conflicts with respect to the lawyer’s existing client.

[7] This new Comment explains how directly adverse conflicts may arise in some transactional matters.

Identifying Conflicts of Interest: Material Limitation

Caption. The caption has been added to better reflect the following Comment.

[8] This Comment incorporates much of [former] Comment [4]. It addresses the conflicts defined in paragraph (a)(2), i.e., “material limitation” conflicts. The changes are designed to clarify the relationship between paragraphs (a)(1) and (a)(2) and to address the question of how likely the risk of harm must be before a conflict of interest is determined to exist.

Lawyer’s Responsibilities to Former Clients and Other Third Persons

Caption. The caption has been modified to better reflect the subject of the Comment.

[9] This new Comment explains the variety of ways conflicts arise other than from duties to existing or prospective clients, including a specification of some of the ways in which a lawyer’s duties to third persons may interfere with the representation of present clients. It specifies that such third persons include former clients and provides a cross-reference to Rule 1.9. This Comment should help clarify that when there is a conflict between a prospective client and a former client, the representation may be undertaken only if the requirements of both Rules 1.7 and 1.9 are met.

Personal Interest Conflicts

Caption. The caption has been added to better reflect the following Comments.

[10] This Comment addresses conflicts arising from a lawyer's self-interest and retains most of [former] Comment [6]. The sentence regarding fees has been deleted on the ground that conflicts between lawyers and prospective clients regarding fee arrangements are typically addressed not by "conflict of interest" rules but rather by Rule 1.5, which regulates fees directly. The third sentence is intended to incorporate ABA Formal Opinion 96-400, which addresses a lawyer negotiating for employment with opposing counsel, which might lead to a lawyer switching to the law firm opposing the lawyer's client in the middle of a representation. The last two sentences add cross-references to Rules 1.8 and 1.10.

[11] This new Comment addresses conflicts arising from a lawyer's family relationships, a topic that was previously addressed in Rule 1.8(i). (For a discussion of the reasons why the Commission is proposing to delete Rule 1.8(i) and address a lawyer's family relationships in the Rule 1.7 Comment, see the Reporter's Explanation on Rule 1.8.) This Comment explains how conflicts arise under Rule 1.7(b) when lawyers representing different clients are closely related. The cross-reference to Rule 1.10 reminds lawyers that these personal interest conflicts ordinarily will not be imputed to members of the disqualified lawyer's firm.

[12] Vermont Comment [12] differs from the Model Rules Comment, which referred to Model Rule 1.8(j) prohibiting lawyers from engaging in sexual relationships with clients, which has not been adopted in the Vermont Rules. Interest of Person Paying for a Lawyer's Service

[13] This Comment modifies [former] Comment [10] by eliminating the specific illustrations and explaining the relationship between Rules 1.7 and 1.8(f). The Commission is recommending a specific reference in Rule 1.8(f), Comment [12], to compliance with the requirements of Rule 1.7 when third-party payment involves a conflict of interest. The examples involving insurance defense and corporate constituents have been deleted on the grounds that these examples involve a number of complex questions that cannot adequately be addressed in this Comment.

Prohibited Representations

Caption. The caption has been changed in order to highlight and then focus on the fact that there are some representations that are prohibited, even with the informed consent of the client.

[14] This Comment modifies [former] Comment [5] in order to more clearly articulate the fact that some conflicts are nonconsentable, meaning that the lawyer may not undertake the representation even with the client's informed consent.

[15] This new Comment addresses the standard by which consent ability is determined under paragraph (b)(1), i.e., when the concern is for the client's own protection.

[16] This new Comment describes the standard by which consentability is determined under paragraph (b)(2), i.e., when the representation is prohibited by applicable law, and provides some examples.

[17] This new Comment describes the standard by which consentability is determined under paragraph (b)(3), i.e., when the clients are aligned directly against each other in the same litigation, and explains that the rationale is to protect institutional interests in vigorous development of each client's position.

Informed Consent

Caption. The caption has been changed to reflect the substantive change in the text from "consent after consultation" to "informed consent."

[18] This new Comment explains what is required to meet the requirement that the lawyer obtain the client's informed consent and provides cross-references both to Rule 1.0(e) and to the more detailed paragraphs of this Comment on the implications of common representation.

[19] This new Comment addresses circumstances when it may be impossible to make the disclosures required to obtain consent.

Consent Confirmed in Writing

Caption. The caption has been added to set off the new Comment.

[20] This new Comment addresses the new requirement under paragraph (b)(4) that the informed consent of the client be confirmed in writing. It states that it is not necessary in all instances that the writing be obtained or provided at the time the client gives informed consent. If it is not feasible to do so because of the exigencies of the circumstances, then the lawyer may confirm the consent in writing within a reasonable time thereafter.

Revoking Consent

Caption. The caption has been added to set off the new Comment.

[21] This new Comment explains that, while a client may always revoke consent and terminate the lawyer's representation of the client, whether or not the revocation will preclude the lawyer from continuing to represent other clients will depend on the circumstances, including the nature of the conflict.

Consent to a Future Conflict

[22] This new Comment addresses a question that has arisen frequently in practice, i.e., the effectiveness of consent to future conflicts. The Comment states that whether such consent is effective is determined by the test of

paragraph (b), specifically whether the conflict is consentable and whether the client has given truly informed consent.

Conflicts in Litigation

[23] This Comment maintains [former] Comment [7] with only a few modifications reflecting textual changes. The Commission recommends deleting [former] Comment [8] because the material here is now addressed in Comment [6].

The Commission recommends deleting [former] Comment [9] because the material here is now addressed in Comment [24].

[24] This new Comment replaces [former] Comment [9] on “positional conflicts.” It focuses primarily, not on whether such conflicts are consentable, but rather on the more important and troubling question of whether the clients need to be consulted. The [former] Comment has been uniformly criticized for making too much of the distinction between trial and appellate courts. This Comment uses an analysis similar to that used for other conflicts, i.e., whether there is a significant risk that the lawyer’s duties in one representation are likely to materially limit the lawyer’s duties in the other representation. It must be kept in mind, however, that it may be difficult to detect some positional conflicts. Moreover, there is a need to avoid giving clients too much veto power over what types of representation a lawyer or law firm may handle.

[25] This new Comment addresses the application of paragraph (a)(1) to lawyers involved in class-action lawsuits.

Nonlitigation Conflicts

Caption. The caption has been changed to reflect the emphasis in these Comments on nonlitigation conflicts.

[26] This Comment maintains [former] Comment [11] with a few modifications designed to clarify the application of conflict-of-interest doctrine to nonlitigation situations.

[27] This Comment maintains [former] Comment [13] with a few stylistic changes.

[28] This Comment maintains [former] Comment [12] with an expanded discussion of nonconsentability in the context of transactional representation. The expanded discussion is taken from the Comment to [former] Rule 2.2.

Special Considerations in Common Representation

These Comments are taken primarily from the Comment to [former] Rule 2.2, which the Commission is recommending be deleted on the grounds that the relationship between Rules 2.2 and 1.7 is confusing, the role of lawyer as “intermediary” has not been well understood and the Rule has not proved helpful in clarifying conflict-of-interest doctrine for lawyers. (See [Reporter’s Notes] regarding proposed deletion of Rule 2.2.) The Commission believes that situations intended to be encompassed within Rule 2.2 can be adequately dealt with under Rule 1.7 and its Comment.

Caption. The caption has been added to set off the new Comments.

[29] This new Comment combines Comments [4] and [7] to [former] Rule 2.2. “Intermediation” has been changed to “common representation.” In addition, in keeping with the general standard of Rule 1.7(b)(1), the Comment states that common representation is improper, not only when impartiality “cannot” be maintained, but also when it is “unlikely” that the lawyer can do so. The Comment also makes clear that a lawyer may be required to withdraw from the representation entirely, depending upon the outcome of the analysis described in Comment [4].

[30] This Comment and Comment [31] are a modified version of Comment [6] to [former] Rule 2.2. The discussions of evidentiary privilege and the rule of confidentiality have been separated. This Comment addresses the privilege.

[31] This Comment is a modified version of the portion of Comment [6] to [former] Rule 2.2 that addresses the effect of the obligation of confidentiality on common representation. Unlike [former] Comment [6], this Comment gives more explicit guidance to lawyers, emphasizing that they should discuss confidentiality at the outset of the representation and that in most cases the common representation will be proper only if the clients have agreed that the lawyer will not maintain confidences between them.

[32] This Comment combines and substantially modifies Comments [8] and [9] to [former] Rule 2.2 and addresses the requirement of informed consent. It specifies that, when seeking to establish or adjust a relationship between clients, the lawyer must explain how such a role differs from the partisan role expected in other circumstances. It further requires the lawyer to explain the implications of the changed role on the client’s responsibility for making decisions.

[33] This new Comment is a slightly modified version of Comment [10] to [former] Rule 2.2. The changes are stylistic.

Organizational Clients

Caption. The caption has been added to set off the new Comments.

[34] This new Comment addresses the application of paragraph (a) to situations involving corporate or other organizational affiliates. The language is largely drawn from the conclusions of ABA Standing Committee on Ethics and Professional Responsibility Formal Opinion 95-390, although the Commission believes that there will

be more situations in which the lawyer will be prohibited from undertaking representation than may have been reflected in that opinion.

[35] This Comment maintains [former] Comment [14] with modifications designed to reflect that, when problems arise with a lawyer-director, the lawyer may either resign as director or cease acting as the corporation's lawyer, and to advise the lawyer of the possible consequences of discussing matters at board meetings while the lawyer is present in the capacity of director. The Commission proposes to delete [former] Comment [15] and the associated caption because it addresses questions outside the disciplinary context.

ANNOTATIONS

1. Conflict of Interest. Attorney who concealed the continuation of her romantic relationship with the husband of a client of the firm that she worked for, which was a clear conflict of interest, acted deceitfully and her conduct reflected adversely on her fitness to practice law. *In re Strouse*, 2011 VT 77, 190 Vt. 170, 34 A.3d 329.

2. Conflict not found. Trial court did not err in failing to disqualify defendant's attorney based on a conflict of interest. First, plaintiff had not produced a transcript of the hearing below, which would allow the court to determine whether the trial could had an appropriate factual basis for making its ruling; second, the representation was not directly adverse. *Lasek v. Vermont Vapor, Inc.*, 2014 VT 33, 196 Vt 243, 95 A.3d 447.

In a termination of parental rights case, the father's attorney had no personal interest in the outcome of the case that prevented her from providing the father with adequate representation. Counsel had not represented the Department of Children and Families (DCF) in the past and had no current or past relationship to DCF beyond counsel's adoption five years previously of a child who had been in DCF custody; moreover, the record did not support the father's suggestion that his lawyer's presumed sympathy for DCF undermined her zeal in representing him. *In re K.F.*, 2013 VT 39, 194 Vt. 64, 72 A.3d 908.

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Rule 1.8. CONFLICT OF INTEREST: CURRENT CLIENTS: SPECIFIC RULES

(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 or guarantee court costs and expenses of litigation, including expenses of investigation, expenses of medical examination, and costs of obtaining and

presenting evidence, 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.

(j) 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.—Amended June 17, 2009, eff. Sept. 1, 2009.

Comment

Business Transactions Between Client and Lawyer

[1] 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. 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. 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. It also applies to lawyers purchasing property from estates they represent. 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. 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] 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. Paragraph (a)(2) requires that the client also be advised, in writing, of the desirability of seeking the advice of independent legal counsel. 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. 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).

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

Use of Information Related to Representation

[5] 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. 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. 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. 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.

Gifts to Lawyers

[6] A lawyer may accept a gift from a client, if the transaction meets general standards of fairness. For example, a simple gift such as a present given at a holiday or as a token of appreciation is permitted. 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. 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] 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. The sole exception to this rule is where the client is a relative of the donee.

[8] 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. 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. 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.

Literary Rights

[9] 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. Measures suitable in the representation of the client may detract from the publication value of an account of the representation. 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).

Financial Assistance

[10] 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. These dangers do not warrant a prohibition on a lawyer lending a client court costs and litigation expenses, including the expenses of investigation and 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. Similarly, exceptions allowing lawyers representing indigent clients to pay court costs and litigation expenses regardless of whether these funds will be repaid are warranted.

Person Paying for a Lawyer's Services

[11] Lawyers are frequently asked to represent a client under circumstances in which a third person will compensate the lawyer, in whole or in part. The third person might be a relative or friend, an indemnitor (such as a liability insurance company) or a co-client (such as a corporation sued along with one or more of its employees). Because third-party payers frequently have interests that differ from those of the client, including interests in minimizing the amount spent on the representation and in learning how the representation is progressing, lawyers are prohibited from accepting or continuing such representations unless the lawyer determines that 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] 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. If, however, the fee arrangement creates a conflict of interest for the lawyer, then the lawyer must comply with Rule 1.7. 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). 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 nonconsentable under that paragraph. Under Rule 1.7(b), the informed consent must be confirmed in writing.

Aggregate Settlements

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

Limiting Liability and Settling Malpractice Claims

[14] 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. 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. 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. 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. 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 settling a claim or a potential claim for malpractice are not prohibited by this rule. 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.

Acquiring Proprietary Interest in Litigation

[16] 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.

Client-Lawyer Sexual Relationship

[17] 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. For all of these reasons, lawyers are cautioned that sexual relations with a current client could give rise to claims of incompetence under Rule 1.1, of lack of diligence under Rule 1.3, of a conflict with the lawyer's personal interests under Rule 1.7(a)(2), of using client information to the client's disadvantage under Rule 1.8(b), of conduct involving dishonesty or the like under Rule 8.4(c), or of conduct prejudicial to the administration of justice under Rule 8.4(d).

Imputation of Prohibitions

[18] Under paragraph (j), 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.

Reporter's Notes — 2009 Amendment

V.R.P.C. 1.8 is amended to conform to changes in Model Rule 1.8. Amended V.R.P.C. 1.8(e)(1) continues to differ from the Model Rule by retaining language adopted in 1999 that specifies certain litigation expenses included among those that the lawyer may guarantee or advance. This language, evidently derived from DR 5-103(B) of the Vermont Code of Professional Responsibility, is similar to that in new Comment [10], discussed below. In amended V.R.P.C. 1.8(e)(2), consistent with the Model Rule, language permitting a lawyer to pay expenses of a party to a class action has been deleted. This provision, added to DR 5-103(B) of the Vermont Code of Professional Responsibility in 1988 and carried forward in 1999, creates the risk of a conflict with the lawyer's interests in certain class action situations. Lawyer advances or payment of litigation expenses in a class action would be permissible when appropriate under amended V.R.P.C. 1.8(e). See 5 Newberg on Class Actions § 15.21 (4th ed. 2002).

ABA Model Rule 1.8(j) has been omitted from the amendments to the Vermont rule. This omission is based on the grounds that an absolute prohibition of lawyer-client sexual relations is both an invasion of privacy and a duplication of the effect of other rules requiring loyal and competent representation, as noted in the revised text of Comment [17]. Model Rule 1.8(k) has been renumbered as V.R.P.C. 1.8(j) and Comment [20] has been renumbered as [18] to reflect the omission of Model Rule 1.8(j)

The ABA Reporter's Explanation of the revised rule and Comment is as follows:

Caption

Change to "Conflict of Interest: Current Clients: Specific Rules"

The caption has been changed to parallel the change in Rule 1.7 and to more accurately reflect the scope of the Rule.

Rule 1.8(a): Business Transactions between Client and Lawyer

TEXT:

1. Paragraph (a)(1): Stylistic changes

The changes to this paragraph are grammatical and stylistic. No change in substance is intended.

2. Paragraph (a)(2): Client to be advised in writing of desirability of seeking counsel

The Commission recommends adding a requirement that the client be advised in writing of the desirability of seeking the advice of independent legal counsel, in addition to affording the client a reasonable opportunity to seek such counsel. A number of jurisdictions have adopted such a requirement. The Commission believes these additional requirements are necessary for the protection of clients; moreover, some are already imposed by common-law decisions providing for the voidability of such transactions by clients.

3. Paragraph (a)(3): Informed consent to essential terms of transaction and lawyer's role

The Commission recommends clarifying the nature of the consent to be given by the client under this paragraph. Lawyers have reported considerable confusion regarding its meaning. Several states have specified that the consent refers to the essential terms of the transaction. Case law in some jurisdictions goes further and requires disclosure regarding the risks of the transaction. The Commission recommends informed consent to both the terms of the transaction and the lawyer's role, including whether the lawyer is representing the client in the transaction.

4. Paragraph (a)(3): Informed consent in writing signed by client

The Commission is proposing a number of revisions to the Rules that would require the lawyer to document certain communications or agreements in writing. The Commission believes that it should be clear in all instances what type of writing is required, particularly whether the writing needs to be signed by the client. Certain terms are defined in Rule 1.0, including the term "writing." Because there are only a few instances in which a client's signature is required, the Commission is recommending that those instances be clearly stated in the text of the Rule. The Commission believes that, because of the risk of overreaching in business transactions between lawyers and clients, the client's informed consent to both the essential terms of the transaction and the lawyer's role should be obtained in a writing signed by the client.

COMMENT:

Caption. "Business" was added to the caption to clarify its meaning.

[1] This Comment was revised to state the rationale for the Rule and to clarify which transactions are covered.

[2] This new Comment emphasizes that the lawyer must comply with the requirements of all three subparagraphs. It also elaborates on the nature of the disclosure the lawyer must make under paragraph (a)(3), including a cross-reference to Rule 1.0(e), which gives the general definition of informed consent.

[3] This new Comment clarifies the relationship between Rules 1.8(a) and 1.7, which has not been well understood by lawyers. Both Rules apply whenever the client reasonably expects that the lawyer is representing the client in the transaction itself or when the lawyer's financial interest in the transaction otherwise creates a significant risk to the lawyer's representation of the client in another matter. Thus, Rule 1.8(a) focuses on the risks of the transaction itself, whereas Rule 1.7 focuses on the risks of the representation.

[4] This new Comment clarifies how paragraph (a) applies when the client is represented by independent counsel in the transaction.

Rule 1.8(b): Use of Information Related to Representation

TEXT:

1. Replace "consent after consultation" with "gives informed consent"

The Commission is recommending that throughout the Rules the phrase "consent after consultation" be replaced with "gives informed consent," as defined in Rule 1.0(e). No change in substance is intended.

2. Replace "Rule 1.6 or Rule 3.3" with "these Rules"

The Commission recommends that the enumeration of applicable Rules should be in commentary rather than in text. No change in substance is intended.

COMMENT:

Caption. The caption was added to set off new Comment [5].

[5] This new Comment states the rationale for the Rule and gives examples of both prohibited and permissible uses of information relating to the representation.

Rule 1.8(c): Gifts to Lawyers

TEXT:

1. Add prohibition on lawyer solicitation of substantial gifts

The Commission recommends adding a prohibition on a lawyer soliciting a substantial gift from a client, in order to avoid the danger of overreaching. The current Rule has been criticized for regulating gifts made by instrument but not those made in other ways.

2. Change in definition of relationships that fall within the exception for lawyers related to client or donee

The Commission has retained the exception for related lawyers. It is recommending changes to clarify that the same degree of relatedness applies in determining whether the donee is related to both the lawyer and the client and to adopt the more expansive and flexible definition of the ABA Model Code of Judicial Conduct (defining "member of the judge's family").

COMMENT:

Caption. The caption has been added to set off the following Comments.

[6] [Former] Comment [2] has been revised to reflect the Commission's decision to prohibit lawyer solicitation of nontestamentary gifts, except when such gifts are insubstantial. It also reminds lawyers that, while the Rule does not prohibit lawyers from accepting substantial gifts not solicited by the lawyer, such gifts may be voidable by the client under the doctrine of undue influence.

[7] This Comment is also based on [former] Comment [2]. The changes are stylistic. No change in substance is intended.

[8] This new Comment clarifies a present ambiguity by addressing the question of whether appointment of the lawyer or the lawyer's firm as executor constitutes a "substantial gift" within the meaning of this Rule. The Commission believes that such appointments are not "gifts" but that they may create a conflict of interest between the client and the lawyer that would be governed by Rule 1.7.

Rule 1.8(d): Literary Rights

TEXT

No change recommended.

COMMENT:

[9] The sole revision to [former] Comment [3] adds an additional cross-reference to Rule 1.8(a).

Rule 1.8(e): Financial Assistance

TEXT:

No change recommended. [Variations with the Model Rule discussed above.]

COMMENT:

Caption. The caption has been added to set off the new Comment.

[10] This new Comment states the rationale for the Rule, explains that it covers both making and guaranteeing loans and indicates more specifically the kind of expenses that lawyers are permitted to advance [or pay, with variations from the Model Rule Comment reflecting the difference between V.R.P.C. 1.8(e) and the Model Rule discussed above]. No change in substance is intended.

Rule 1.8(f): Person Paying for Lawyer's Services

TEXT:

Change "consents after consultation" to "gives informed consent."

The Commission is recommending that throughout the Rules the phrase "consent after consultation" be replaced with "gives informed consent," as defined in Rule 1.0(e). No change in substance is intended.

COMMENT:

[11] This new Comment replaces [former] Comment [4]. It presents a more detailed explanation of the rationale for and requirements of the Rule. It also clarifies that a client who pays for the representation of a co-client is governed by this Rule. Finally, it adds a cross-reference to Rule 5.4(c).

[12] This new Comment explains the relationship between this Rule and Rule 1.7.

Rule 1.8(g): Aggregate Settlements

TEXT:

1. Replace "consents after consultation" with "gives informed consent"

The Commission is recommending that throughout the Rules the phrase "consent after consultation" be replaced with "gives informed consent," as defined in Rule 1.0(e). No change in substance is intended.

2. Client consent required to be "in a writing signed by the client"

The Commission is proposing a number of revisions to the Rules that would require the lawyer to document certain communications or agreements in writing. The Commission believes that it should be clear in all instances what type of writing is required, particularly, whether the writing needs to be signed by the client. Certain terms are defined in Rule 1.0, including the term "writing." Because there are only a few instances in which a client's signature is required, the Commission is recommending that those instances be clearly stated in the text of the Rule. The Commission believes that because aggregate settlements entail settlement offers posing potentially serious conflicts of interest between the clients, each client's informed consent should be obtained in a writing signed by the client.

COMMENT:

Caption. The caption has been added to set off the new Comment.

[13] This new Comment states the rationale for the Rule, which is an application of Rules 1.7 and 1.2. In addition, it reminds lawyers involved in class actions that, while this Rule does not apply, lawyers must comply with procedural requirements regarding notification of the class.

Rule 1.8(h): Limiting Liability and Settling Malpractice Claims

TEXT:

1. Break Rule into two paragraphs

The purpose of this change is to clarify the two separate obligations under this Rule. No change in substance is intended.

2. Paragraph (h)(1): Delete "unless permitted by law"

The Commission is unaware of any statute or case law that addresses the question of whether such agreements should be permitted. Given that the phrase "unless permitted by law" appears to play no significant role in addressing these conflicts, the Commission is recommending that such agreements be permitted when the client is independently represented. The Commission believes that there may be good reasons to permit a lawyer to limit liability prospectively and that the client is adequately protected when represented by independent counsel.

3. Paragraph (h)(2): Add “potential claim”

The purpose of this change is to clarify that the Rule applies even when the client has not actually asserted a claim, for example, when the lawyer asks the client to sign a release as part of settling a dispute over legal fees.

4. Paragraph (h)(2): Reword advice to obtain independent counsel

The purpose of this change is to conform the language to that used in Rule 1.8(a). No change in substance is intended.

COMMENT:

Caption. The caption has been changed to better reflect the two separate obligations in the Rule.

[14] This new Comment states the rationale for paragraph (h)(1). It also addresses three questions that frequently arise concerning the application of the Rule – whether the Rule prohibits agreements requiring arbitration of a legal malpractice claim, whether the Rule applies to lawyers practicing in limited-liability entities and whether the Rule prohibits agreements limiting the scope of the representation.

[15] This new Comment states the rationale for paragraph (h)(2).

Deletion of Current Rule 1.8(i): Family Relationships between Lawyers

TEXT

At the time this Rule was first enacted, there was concern that lawyer-spouses would be unable to find employment in different firms in the same city because of the fear that one spouse’s conflicts would result in the disqualification of the other spouse’s law firm. Thus, the primary purpose for treating such conflicts under Rule 1.8 rather than Rule 1.7 was to avoid the imputation of the conflict under Rule 1.10. The Rule, however, is both under and over-inclusive. It is under-inclusive because it does not address personal-interest conflicts arising from close family or family-like relationships other than those enumerated in the Rule, such as couples who live together in a relationship approximating marriage. Moreover, it is limited to directly adverse conflicts and does not include material limitation conflicts, for example when lawyer-spouses represent coplaintiffs or codefendants with significantly different positions in the litigation. The Rule is over-inclusive because it permits the representation with the consent of the client, regardless of whether the conflict would otherwise be deemed nonconsentable under Rule 1.7. Moreover, while imputation is unnecessary in most cases, in some instances it may be indicated. Under the changes proposed for Rule 1.10, personal interest conflicts are not imputed unless they present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm. As a result of these changes, the Commission is recommending deletion of this Rule and the addition of a Comment to Rule 1.7 addressing conflicts of interest arising from a lawyer’s family relationships. See Rule 1.7, Comment [11].

COMMENT:

The Commission is proposing deleting this Comment and the associated caption along with the text.

Rule 1.8 (i): Acquiring Proprietary Interest in Litigation

TEXT:

Substitute “authorized by law” for “granted by law”

The purpose of this change is to clarify that the exemption applies to all liens authorized by substantive law, including those liens that are contractual in nature.

COMMENT:

Caption. The caption has been changed to better reflect the meaning of the Rule.

[16] This expanded Comment further explains the rationale for the Rule and adds a cross-reference to Rule 1.8(a), which will apply when a lawyer acquires by contract a security interest in property other than that recovered through the lawyer’s effort in the litigation.

Rule 1.8(j): Client-Lawyer Sexual Relationships

[Note that, as discussed above, Model Rule 1.8(j) and related Comments have not been adopted.]

Paragraph (k): Imputation of Prohibitions

[Note that, as discussed above, Model Rule 1.8(k) has been renumbered as V.R.P.C. 1.8(j) and Comment [20] has been renumbered as [18].]

TEXT:

1. Treat imputation under Rule 1.8 rather than 1.10

The Commission is recommending that imputation of the prohibitions in Rule 1.8 be addressed by Rule 1.8 rather than by Rule 1.10. Under paragraph (k), an associated lawyer may not necessarily proceed with the informed consent of the client (as the lawyer could under Rule 1.10); moreover, there is no exception here (as there is in Rule 1.10) for personal-interest conflicts of the individually disqualified lawyer.

2. Impute all prohibitions except paragraph (j)

Under current Rule 1.10, only the prohibition of paragraph (c) (gifts to lawyers) is imputed to other lawyers in a firm. The Commission recommends that the prohibition of all paragraphs except (j) be so imputed.

COMMENT:

Caption. The caption has been added to set off the new Comment.

[20] This new Comment explains the rationale for paragraph (k).

Reporter's Notes

This rule differs from the Vermont Code in several significant respects:

(a) *Business transactions with the client.* The rule requires the terms of any proposed business arrangement with a client to be transmitted to the client in writing in a manner the client can understand. The Vermont Code does not require the lawyer to inform the client in writing.

(b) *Use of Client Information.* Where the Code prohibits a lawyer from making any personal use of the client's information, the rule prohibits the use only if it is to that client's disadvantage.

(c) *Gifts prohibited.* This is implicit in the Code, but is explicit in the rule.

(e) *Financial assistance to a client.* This paragraph prohibits general financial support of any client. Out-of-pocket costs and expenses of litigation, however, may be advanced or guaranteed for any client, though the advance or guarantee may be subject to repayment from the proceeds of a favorable result. If the client is indigent or is party to a class action, the lawyer may pay such costs or expenses on the lawyer's own account. In such a case, any repayment would be dependent upon an award to the lawyer by the court. The rule also eliminates the requirement of the present Code that the client remain ultimately liable for all expenses when the lawyer has advanced court costs and expenses of litigation. This change in policy is designed to achieve more access to courts by indigent clients.

(i) *Related lawyers.* While the practice in Vermont has been that lawyers married to other lawyers decline to take cases which create a conflict with their spouse, the rule of specifically prohibits such representation without client consent.

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Rule 1.9. DUTIES TO FORMER CLIENTS

(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.—Amended June 17, 2009, eff. September 1, 2009.

Comment

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

[2] The scope of a “matter” for purposes of this rule depends on the facts of a particular situation or transaction. The lawyer’s involvement in a matter can also be a question of degree. 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. 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. Similar considerations can apply to the reassignment of military lawyers between defense and prosecution functions within the same military jurisdictions. 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] 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. 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. 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; 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. Information that has been disclosed to the public or to other parties adverse to the former client ordinarily will not be disqualifying. 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. 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. 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.

Lawyers Moving Between Firms

[4] 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. There are several competing considerations. First, the client previously represented by the former firm must be reasonably assured that the principle of loyalty to the client is not compromised. Second, the rule should not be so broadly cast as to preclude other persons from having reasonable choice of legal counsel. 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. 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] 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). 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. See Rule 1.10(b) for the restrictions on a firm once a lawyer has terminated association with the firm.

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

[7] 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] 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. 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] 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). See Rule 1.0(e). With regard to the effectiveness of an advance waiver, see Comment [22] to Rule 1.7. With regard to disqualification of a firm with which a lawyer is or was formerly associated, see Rule 1.10.

Reporter's Notes — 2009 Amendment

V.R.P.C. 1.9 is amended to conform to changes in Model Rule 1.9.

The Supreme Court considered former V.R.P.C. 1.9 in a number of cases: *State v. Baker*, 2007 VT 84, 182 Vt. 583, 934 A.2d 820 (mem.) (on motion to disqualify prosecutor on ground of representation of co-defendant as defense attorney in a prior case, held matters not substantially related and appearance of impropriety alone not sufficient); *Cody v. Cody*, 2005 VT 116, 179 Vt. 90, 889 A.2d 733 (on motion to disqualify where plaintiff alleged that law firm had represented him while he was employee of defendants, remanded for evidentiary hearing on existence of attorney-client relationship); *In re Gadbois*, 173 Vt. 59, 786 A.2d 393 (2001) (conduct that would have violated V.R.P.C. 1.9(a) held not ground for discipline under provisions of Code of Professional Responsibility, which applied to the case); *Stowell v. Bennett*, 169 Vt. 630, 739 A.2d 1210 (1999) (mem.) (on motion to disqualify for prior representation of defendant in unrelated criminal matter, standards of V.R.P.C. 1.9, though not yet in effect, were applied, together with “appearance of impropriety” standard from former Code).

The ABA Reporter's Explanation of the changes is as follows

TEXT:

1. New caption

Because paragraph (c) addresses confidentiality, the [former] caption is under-inclusive.

2. Paragraphs (a) and (b): Substitute “informed consent, confirmed in writing” for “consents after consultation”

In paragraphs (a) and (b), the phrase “consents after consultation” has been changed to “gives informed consent to the representation, confirmed in writing.” This change is consistent with a similar change in Rule 1.7 and reflects a judgment of the Commission that both lawyers and their former clients benefit when the lawyer is required to secure the former client's informed consent, confirmed in writing, to a representation that is materially adverse to the former client in the same or a substantially related matter. See Rule 1.0(e) for the definition of “informed consent” and Rule 1.0(b) for the definition of “confirmed in writing.”

3. Paragraph (c): Replace “Rule 1.6 or Rule 3.3” with “these Rules”

This change was made because there are Rules other than Rule 3.3 that may require disclosure (at least when disclosure is permitted by Rule 1.6) -see Rules 1.2(d), [1.6(b),] 4.1(b), 8.1 and 8.3.

COMMENT:

[1] Comment [1] has been amended to make clear that this rule applies when common clients have had a falling out and one or more of them has dismissed the lawyer. The Comment has also been amended to make the important point that Rule 1.11 now determines when Rule 1.9 is applicable to present and former government lawyers. No change in substance is intended as to how Rule 1.9 applies to lawyers who do not or have not worked for the government. [Thus, in addition to the examples in the Comment, the principles of V.R.P.C. 1.7 will still guide a determination of material adversity, despite the elimination of an express reference to that provision in the amended Comment.]

[2] These changes are designed to further refine and cabin the concept of substantial relationship, particularly as it affects the potential disqualification of former lawyers for an organization, including the government.

[3] This new Comment explains when matters are “substantially related.” That term has been the subject of considerable case law, and this definition and suggestions about applying it are an effort to be helpful to lawyers in complying with the rule and courts in construing it. No change in substance is intended.

These Comments have been deleted as no longer helpful to the analysis of questions arising under this rule. No change in substance is intended.

[5] This Comment has been modified to correct the erroneous reference to paragraph (b) in the first sentence.

[6] This Comment combines [former] Comments [6] and [7] in an effort to increase the clarity of each. No change in substance is intended.

[7] Because this sentence addresses confidentiality rather than disqualification, the reference to Rule 1.9 has been narrowed to a reference to Rule 1.9(c). No change in substance is intended.

This Comment has been deleted as no longer helpful to the analysis of questions arising under this rule. No change in substance is intended.

[8] A minor wording change was made for clarification. No change in substance is intended.

[9] This Comment combines [former] Comments [12] and [13] and adds a cross-reference to the Comment in Rule 1.7 that addresses advance waivers of conflicts of interest.

Reporter's Notes

This rule prohibits serial representation of adverse interests in the same or substantially related matters unless the former client consents after consultation. There is no specific counterpart to this rule in the Vermont Code. Similar results were reached under case law, however. See *In re Vermont Electric Power Producers*, 165 Vt. 282, 683 A.2d 716 (1996); *In re Themelis*, 117 Vt. 119, 83 A.2d 507 (1951).

ANNOTATIONS

1. Purpose. This rule is designed to ensure that a lawyer does not use confidential information acquired from a former client against that client, and to avoid even an appearance of impropriety. *Cody v. Cody*, 2005 VT 116, 179 Vt. 90, 889 A.2d 733.

2. Attorney-client relationship. For purposes of this rule, the intent and conduct of the parties are relevant considerations in determining if an attorney-client relationship exists. *Cody v. Cody*, 2005 VT 116, 179 Vt. 90, 889 A.2d 733.

Cited. Cited in *Stowell v. Bennett* (1999) 169 Vt. 630, 739 A.2d 1210 (mem.).

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Rule 1.10. IMPUTATION OF CONFLICTS OF INTEREST: GENERAL 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 in a matter in which the disqualified lawyer did not participate personally or substantially, 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.—Amended June 17, 2009, eff. Sept. 1, 2009; Nov. 22, 2011, eff. Jan. 23, 2012.

Comment

Definition of “Firm”

[1] For purposes of the Rules of Professional Conduct, the term “firm” denotes lawyers in a law partnership, professional corporation, sole proprietorship or other entity or association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation or other organization. See Rule 1.0(c). Whether two or more lawyers constitute a firm within this definition can depend on the specific facts. See Rule 1.0, Comments [2] - [4].

Principles of Imputed Disqualification

[2] 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. 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. Paragraph (a)(1) operates only among the lawyers currently associated in a firm. 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] The rule in paragraph (a) does not prohibit representation where neither questions of client loyalty nor protection of confidential information are presented. 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. 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] 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 nonlawyer, such as a paralegal or legal secretary. 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 while a law student, including work as a judicial intern or in a law school clinic. 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 nonlawyers and the firm have a legal duty to protect. See Rules 1.0(k) and 5.3.

[5] 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. The rule applies regardless of when the formerly associated lawyer represented the client. 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. 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] 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. 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. 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] 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. Instead, it requires in language adapted from Rule 1.11 that a lawyer disqualified under Rule 1.9 be one who “did not participate personally and substantially” in the matter giving rise to the conflict and that the procedures laid out in sections (a)(2)(i)-(iii) be followed. A description of effective screening mechanisms appears in Rule 1.0(k). 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] 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] 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. 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. The notice is intended to enable the former client to evaluate and comment upon the effectiveness of the screening procedures.

[10] 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. If compliance cannot be certified, the certificate must describe the failure to comply.

[11] 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. 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] 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.

Reporter's Notes—2012 Amendment

Rule 1.10(a) of the Vermont Rules of Professional Conduct is amended to incorporate in slightly revised form an amendment of ABA Model Rule 1.10(a) adopted in February 2009. The amended rule permits screening of lawyers whose former representation, or whose former firm's previous representation, of a client would bar the lawyer's present firm from representation. Simultaneous ABA amendments to the Comments to Model Rules 1.10 and 1.0 are also adapted for Vermont.

The amendment reflects growing awareness that large law firms face difficult or intractable conflict issues when an attorney proposes to move from one such firm to another under the present strict rule that all such prior conflicts are imputed to all lawyers in the new firm. There are now several relatively large Vermont firms that are increasingly in this position. A realistic screening procedure facilitates freedom of movement by individual lawyers. Without such a procedure, a lawyer wishing to move from one Vermont firm to another may be denied his or her choice simply because of the unamended Rule 1.10. Large firms unable to hire a particular lawyer can always hire someone else. The one most impacted by the prohibition of the rule is the individual lawyer. A recent survey indicates that 24 states have adopted a screening rule.

Amended Rule 1.10(a)(2) has three salient provisions: (1) Screening of a disqualified lawyer must be timely, must extend to any participation in the matter involving the conflict, and must receive no part of the fee that the firm receives from the matter. (2) Any affected former client must be given prompt written notice that will enable the client to evaluate the degree of compliance with the rule and pursue objections to the representation. (3) The screened lawyer and the firm must provide periodic certifications of compliance to the client upon request and upon termination of the screening. Additionally, amended V.R.Pr.C. 1.10(a)(2) provides a further safeguard, adapted from the existing screening provisions of Rules 1.11(a)(2), (d)(2)(i) concerning lawyers moving between government and private practice and not found in the Model Rule: The prohibition to which screening will be applied must arise out of a matter "in which the disqualified lawyer did not participate personally and substantially."

New Comments [7] and [8] added by the amendment emphasize that client consent is not required but that compliance is to be measured by the three provisions summarized above, that screening is defined in Rule 1.0(k), and that the rule does not prohibit compensation of the screened lawyer under a general employment agreement not tied to the matter in question. Comment [7] also emphasizes the effect of the Vermont substantial-participation qualification described above. New Comments [9] and [10] elaborate on the notice and certification provisions of the rule.

Reporter's Notes — 2009 Amendment

V.R.P.C. 1.10 is amended to conform to changes in Model Rule 1.10.

In *State v. Baker*, 2007 Vt. 84, 182 Vt. 583, 934 A.2d 820 (mem.), the Court held that where there was no basis to disqualify a deputy state's attorney under V.R.P.C. 1.9, there was no basis for disqualifying the entire state's attorney's office under V.R.P.C. 1.10.

The ABA Reporter's Explanation of the changes is as follows in pertinent part:

TEXT:

1. Paragraph (a): Eliminate imputation of conflicts under Rule 1.8(c) and [former Rule] 2.2

The reference to [former] Rule 2.2 has been deleted because the Commission is recommending elimination of that Rule. The reference to Rule 1.8(c) has been deleted because the Commission is recommending that imputation of the prohibitions in Rule 1.8 be addressed by Rule 1.8 rather than by Rule 1.10. Under [proposed]

Rule 1.8(k) the prohibitions set forth in paragraphs 1.8(a) through (i), but not (j), are imputed to other lawyers with whom the personally disqualified lawyer is associated.

2. Paragraph (a): Eliminate imputation of “personal interest” conflicts

The proposed reference to “personal interest” conflicts at the end of Rule 1.10(a) would eliminate imputation in the case of conflicts between a lawyer’s own personal interest (not interests of current clients, third parties or former clients) and the interest of the client, at least where the usual concerns justifying imputation are not present. The exception applies only where the prohibited lawyer does not personally represent the client in the matter and no other circumstances suggest the conflict of the prohibited lawyer is likely to influence the others’ work. This is a substantive change in the Rule as written, but the Commission believes that the proposed Rule provides clients with all the protection they need, given that the exception applies only when there is no significant risk that the personal-interest conflict will affect others in the lawyer’s firm.

....

6. Paragraph (d): Relationship of this Rule to Rule 1.11

This paragraph clarifies that Rule 1.11 is intended to be the exclusive Rule governing the imputation of conflicts of interests of current or former government lawyers.

COMMENT:

Definition of “Firm”

The Commission is recommending adoption of a definition of “firm” in Rule 1.0(c). That definition will apply not only for purposes of imputing conflicts under this Rule, but also for addressing the supervisory obligations of lawyers under Rules 5.1 -5.3. The definition in Rule 1.0(c) and the Comments to that Rule were based on the [former] Comment to Rule 1.10. As a result, the Commission is recommending deleting that material in this Comment.

[1] This Comment modifies the first two sentences in the [former] Comment to reflect what is now in Rule 1.0(c). Cross-references to that Rule and its Comment have been added. The remainder of the Comment is deleted because the material has been moved to the Comment to Rule 1.0.

The material in these Comments has been moved to the Comment to Rule 1.0. [Former] Comment [5] has been deleted because the conflicts arising from moving between government and a private firm are discussed in Rule 1.11.

[3] This entirely new Comment deals with the elimination of imputation of a lawyer’s “personal-interest” conflicts to others in the firm because there is no risk to loyal and effective representation of the client. The Comment also provides illustrations of when this exception to imputation might and might not apply.

[4] This entirely new Comment explains how this Rule applies to persons who are nonlawyers, e.g., secretaries, or who obtained their disqualifying information while a nonlawyer, e.g., while a law student. Such persons are disqualified personally, but the conflict is not imputed so long as they are screened from participation in the matter so as to protect the confidential information. This Comment represents a substantive change from the current text of Rule 1.10, but it represents the overwhelming state of the current case law and is intended to give guidance to lawyers about important practical questions.

...

[6] This entirely new Comment deals directly with the availability of and conditions for consent, a subject heretofore largely ignored in this Rule...

[7] The minor proposed amendments to [former] Comment [4] are designed to make clear that in the case of current and former government lawyers, imputation is governed by Rule 1.11. Under the [former] Rules, the application of Rule 1.10 to such lawyers is unclear.

[8] Historically lawyers have relied on paragraph (a) of Rule 1.10 for a complete list of the conflict Rule numbers and paragraph references that trigger imputed disqualification. All references to Rule 1.8 have been removed from Rule 1.10(a) because none of the Rule 1.8 paragraphs fit logically or grammatically in Rule 1.10(a). The Commission added this new Comment for the assistance of lawyers who look to Rule 1.10 to determine if the prohibitions of Rule 1.8 apply to other lawyers in the firm.

Reporter’s Notes

This rule carries forward the imputed disqualifications rule for lawyers currently in a firm as set forth in the Vermont Code, and incorporates additional provisions dealing with lawyers moving from one firm to another. The rule further differs from the Vermont Code by providing specific guidance in given situations.

ANNOTATIONS

1. City attorney. In a breach of fiduciary duty brought by a city manager against the city attorney, the trial court was correct in construing the city charter as obligating the city attorney to represent the city’s interests only. Though the charter of Winooski, Vermont, designates the city attorney as legal advisor to the city manager, it

is settled in Vermont and other states that the actual client of the city attorney is the municipality. *Handverger v. City of Winooski*, 2011 VT 134, ___ Vt. ___, 38 A.3d. 1158.

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Rule 1.11. SPECIAL CONFLICTS OF INTEREST FOR FORMER AND CURRENT GOVERNMENT OFFICERS AND EMPLOYEES

(a) Except as law may otherwise expressly permit, a lawyer who has formerly served as a public officer or employee of the government:

(1) is subject to Rule 1.9(c); and

(2) shall not otherwise represent a client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency gives its informed consent, confirmed in writing, to the representation.

(b) When a lawyer is disqualified from representation under paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless:

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

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

(c) Except as law may otherwise expressly permit, a lawyer having information that the lawyer knows is confidential government information about a person acquired when the lawyer was a public officer or employee may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person. As used in this rule, the term “confidential government information” means information that has been obtained under governmental authority and which, at the time this rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose and which is not otherwise available to the public. A firm with which that lawyer is associated may undertake or continue representation in the matter only if the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom.

(d) Except as law may otherwise expressly permit, a lawyer currently serving as a public officer or employee:

(1) is subject to Rules 1.7 and 1.9; and

(2) shall not:

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

(ii) negotiate for private employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially, except that a lawyer serving as a law clerk to a judge, other adjudicative officer or arbitrator may negotiate for private employment as permitted by Rule 1.12(b) and subject to the conditions stated in Rule 1.12(b).

(e) As used in this rule, the term “matter” includes:

(1) any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties, and

(2) any other matter covered by the conflict of interest rules of the appropriate government agency.—Amended June 17, 2009, eff. Sept. 1, 2009.

Comment

[1] A lawyer who has served or is currently serving as a public officer or employee is personally subject to the Rules of Professional Conduct, including the prohibition against concurrent conflicts of interest stated in Rule 1.7. In addition, such a lawyer may be subject to statutes and government regulations regarding conflict of interest. Such statutes and regulations may circumscribe the extent to which the government agency may give consent under this rule. See Rule 1.0(e) for the definition of informed consent.

[2] Paragraphs (a)(1), (a)(2) and (d)(1) restate the obligations of an individual lawyer who has served or is currently serving as an officer or employee of the government toward a former government or private client. Rule 1.10 is not applicable to the conflicts of interest addressed by this rule. Rather, paragraph (b) sets forth a special imputation rule for former government lawyers that provides for screening and notice. Because of the special problems raised by imputation within a government agency, paragraph (d) does not impute the conflicts of a lawyer currently serving as an officer or employee of the government to other associated government officers or employees, although ordinarily it will be prudent to screen such lawyers.

[3] Paragraphs (a)(2) and (d)(2) apply regardless of whether a lawyer is adverse to a former client and are thus designed not only to protect the former client, but also to prevent a lawyer from exploiting public office for the advantage of another client. For example, a lawyer who has pursued a claim on behalf of the government may not pursue the same claim on behalf of a later private client after the lawyer has left government service, except when authorized to do so by the government agency under paragraph (a). Similarly, a lawyer who has pursued a claim on behalf of a private client may not pursue the claim on behalf of the government, except when authorized to do so by paragraph (d). As with paragraphs (a)(1) and (d)(1), Rule 1.10 is not applicable to the conflicts of interest addressed by these paragraphs.

[4] This rule represents a balancing of interests. On the one hand, where the successive clients are a government agency and another client, public or private, the risk exists that power or discretion vested in that agency might be used for the special benefit of the other client. A lawyer should not be in a position where benefit to the other client might affect performance of the lawyer's professional functions on behalf of the government. Also, unfair advantage could accrue to the other client by reason of access to confidential government information about the client's adversary obtainable only through the lawyer's government service. On the other hand, the rules governing lawyers presently or formerly employed by a government agency should not be so restrictive as to inhibit transfer of employment to and from the government. The government has a legitimate need to attract qualified lawyers as well as to maintain high ethical standards. Thus a former government lawyer is disqualified only from particular matters in which the lawyer participated personally and substantially. The provisions for screening and waiver in paragraph (b) are necessary to prevent the disqualification rule from imposing too severe a deterrent against entering public service. The limitation of disqualification in paragraphs (a)(2) and (d)(2) to matters involving a specific party or parties, rather than extending disqualification to all substantive issues on which the lawyer worked, serves a similar function.

[5] When a lawyer has been employed by one government agency and then moves to a second government agency, it may be appropriate to treat that second agency as another client for purposes of this rule, as when a lawyer is employed by a city and subsequently is employed by a federal agency. However, because the conflict of interest is governed by paragraph (d), the latter agency is not required to screen the lawyer as paragraph (b) requires a law firm to do. The question of whether two government agencies should be regarded as the same or different clients for conflict of interest purposes is beyond the scope of these rules. See Rule 1.13 Comment [6].

[6] Paragraphs (b) and (c) contemplate a screening arrangement. See Rule 1.0(k) (requirements for screening procedures). These paragraphs do not prohibit a lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly relating the lawyer's compensation to the fee in the matter in which the lawyer is disqualified.

[7] Notice, including a description of the screened lawyer's prior representation and of the screening procedures employed, generally should be given as soon as practicable after the need for screening becomes apparent.

[8] Paragraph (c) operates only when the lawyer in question has knowledge of the information, which means actual knowledge; it does not operate with respect to information that merely could be imputed to the lawyer.

[9] Paragraphs (a) and (d) do not prohibit a lawyer from jointly representing a private party and a government agency when doing so is permitted by Rule 1.7 and is not otherwise prohibited by law.

[10] For purposes of paragraph (e) of this rule, a "matter" may continue in another form. In determining whether two particular matters are the same, the lawyer should consider the extent to which the matters involve the same basic facts, the same or related parties, and the time elapsed.

Reporter's Notes — 2009 Amendment

V.R.P.C. 1.11 is amended to conform to the changes in Model Rule 1.11. The ABA Reporter's Explanation of the changes is as follows in pertinent part:

TEXT:

1. Change caption to read “Special Conflicts of Interest for Former and Current Government Officers and Employees”

The change in caption reflects the fact that the Rule has traditionally been applied not only to lawyers moving from government service to private practice (and vice versa) but also to lawyers moving from one government agency to another.

2. Paragraph (a): Clarify that individual lawyer who formerly served as public officer or government employee is subject only to this Rule and not to Rule 1.9

There has been disagreement whether individual lawyers who have served as government officials or employees are subject to Rule 1.9 regarding their obligations to former clients or whether their obligations under Rule 1.11(a) are exclusive. The question is an important one, for the individual lawyer, for the lawyer's firm, and for the government. The Commission decided that representation adverse to a former government client is better determined under Rule 1.11(a), which also addresses representation in connection with any other matter in which the lawyer previously participated personally and substantially as a public officer or employee. In order not to inhibit transfer of employment to and from the government, the Commission believes that disqualification resulting from representation adverse to the former government client should be limited to particular matters in which the lawyer participated personally and substantially, which is also the standard for determining disqualification regarding from prior participation as a public officer or employee. The meaning of the term “matter” is clarified in new Comment [10].

Paragraph (a)(1) further clarifies that former government lawyers are subject to Rule 1.9(c) regarding the confidentiality of information relating to the former representation of a government client.

3. Paragraph (a): Delete “private”

The text of [former] Rule 1.11(a) suggests that the disqualification under that paragraph applies only when the lawyer moves from government service to private practice. [Former] Comment [4], however, states that “[w]hen the client is an agency of one government, that agency should be treated as a private client for purposes of this Rule.” To avoid any possible confusion, the Commission determined that the text should be changed to conform to the Comment.

4. Paragraph (a)(2): Change from “consent after consultation” to “gives its informed consent to the representation”

The Commission is recommending that throughout the Rules the phrase “consent after consultation” be replaced with “gives informed consent,” as defined in Rule 1.0(e). No change in substance is intended.

5. Paragraphs (a) and (d): Consent to be “confirmed in writing”

The Commission recommends requiring that the consent here be confirmed in writing, as with other conflict-of-interest Rules. “Confirmed in writing” is defined in Rule 1.0(b).

6. Paragraph (b): Clarify that conflicts under paragraph (a) —including former client conflicts —are not imputed to other associated lawyers when individual lawyer is properly screened

There is no change in the basic rule of imputation for situations governed under former Rule 1.11(a). The change is intended for situations that previously might have been governed by Rule 1.9 rather than 1.11(a). Although former client conflicts under Rule 1.9 are imputed to associated lawyers under Rule 1.10, this paragraph states clearly that when the conflict arises from the individually disqualified lawyer's service as a public officer or employee of the government, the conflict is governed by paragraphs (a) and (b) of this Rule and is not imputed if the lawyer is screened and the appropriate government agency is notified of representation. The Commission believes that this result is necessary in order to continue to encourage lawyers to work in the public sector without fear that their service will unduly burden their future careers in the private sector. (Conflicts are not imputed under either the current or the proposed Rule when the move is from one government agency to another.)

....

8. Paragraphs (b)(1) and (c): Add “timely”

The Commission is recommending a definition of “screened” that includes a requirement that the lawyer be “timely” isolated from participation in the matter. Nevertheless, the Commission believes that the timeliness requirement is so important that it should appear in the text as well. This change is being recommended for all of the Rules that address screening. See Rules 1.12 and 1.18.

9. Paragraph (c): Include definition of “confidential government information” from [former] paragraph (e)

The material in what is now paragraph (c) [was formerly] in paragraph (b). The Commission is recommending that [former] paragraph (e) be deleted and the definition of “confidential government information” be moved to paragraph (c), where the defined term is now used. This change is for purposes of clarification only, and no change in substance is intended.

10. Paragraph (d): Clarify relationship between this Rule and Rules 1.9 and 1.10

This paragraph is intended to clarify that individual lawyers may not undertake representation adverse to former clients when to do so would violate Rule 1.9, even when the representation was not in the same matter but rather was in a substantially related matter in which it is likely that the lawyer received confidential client information. These conflicts, however, are not imputed to lawyers associated in a government agency, even when formal screening mechanisms are not instituted. The lack of imputation presently applies to disqualifications under [former] Rule 1.11(c) but not necessarily to disqualifications of a current government lawyer under Rule 1.9, in which Rule 1.10 otherwise would apply. Screening is not required for public agencies because it may not be practical in some situations. Nevertheless, Comment [2] states the expectation that such lawyers will in fact be screened where it is practical to do so.

11. Paragraph (d)(1): Add reference to Rule 1.7

The Commission determined that it made sense to address in Rule 1.11, not only the imputation of former client conflicts, but also the imputation of current conflicts of interest under Rule 1.7. As with former-client conflicts, the Commission decided that these conflicts should not be imputed to lawyers associated in a government agency, even when formal screening mechanisms are not instituted. Screening is not required in the disciplinary context because it may not be practical in some situations. Nevertheless, as with Rule 1.9 conflicts, Comment [2] states the expectation that such lawyers will in fact be screened where it is practicable to do so.

12. Paragraph (d)(2): Substitute “informed consent” of the client for exception where “under applicable law no one is, or by lawful delegation may be, authorized to act in the lawyer’s stead in the matter”

The interests of the former client are protected under Rule 1.9, and, under that Rule, the former client may effectively consent to a subsequent adverse representation. The interests of the government agency itself are protected under paragraph (d)(2). These interests are similar to those protected under paragraph (a)([2]), where the former government agency may effectively consent to the subsequent representation. If a government agency can effectively consent under paragraph (a)([2]), the Commission sees no reason why it cannot similarly consent to representation otherwise prohibited by paragraph (d)(2). This would include (but not be limited to) situations where “under applicable law no one is, or by lawful delegation may be, authorized to act in the lawyer’s stead in the matter.”

13. Delete [former] paragraph (e)

As set forth above, the Commission proposes to delete [former] paragraph (e) and move its material unchanged to paragraph (c).

COMMENT:

The Commission recommends deleting [former] Comment [1] and expanding upon the rationale for the Rule in Comment [4].

[1] The reference to Rule 1.9 has been deleted because the relationship between Rules 1.9 and 1.11 is now addressed in Comment [2]. The remainder of the changes are stylistic, and no change in substance is intended.

[2] This entirely new Comment explains the relationship between Rules 1.9, 1.10 and 1.11 as stated in the text of paragraphs (a)(1), (a)(2) and (d)(1).

[3] This new Comment provides the rationale for the obligations of the individual lawyer under paragraphs (a)([2]) and (d)(2), which are the obligations of former and present government lawyers aside from those imposed by Rule 1.9. Unlike Rule 1.9, these obligations are designed to protect against abuse of public office generally, not necessarily obligations owed to former clients of the lawyer.

[4] This Comment modifies slightly the provisions of [former] Comment [3]. First, it avoids using the term “private,” given the applicability of the Rule to successive representation between distinct government agencies. It also makes minor stylistic changes and adds a sentence at the end to explain the rationale for limiting the disqualification in paragraphs (a)([2]) and (d)(2) to a narrower range of “matter” than is typically covered by conflict-of-interest rules. (See paragraph (e).)

[5] The changes reflect the change in text to delete the reference to “private” clients. The last sentence explains how imputation works when the successive clients are both government agencies.

[6] This Comment provides a cross-reference to the screening requirements in Rule 1.0(k) and further elaborates on the prohibition on fee apportionment in language identical to that used in the Comment to the other screening Rules. See Rules 1.12 and 1.18.

[7] This entirely new Comment elaborates on the notice requirement, in language identical to that in the Comment to the other screening Rules. See Rules 1.12 and 1.18. [Former] Comment [6] has been deleted because its content is covered in Comment [7]. The current Comment has been deleted. Its content now appears in Comment [2].

[10] This new Comment clarifies that two particular matters may constitute the same matter for purposes of paragraph (a)(2), depending on the circumstances. The language is drawn from but is not identical to the definition of “matter” as it is used in the federal conflicts of interest statute. Cf. 5 C.F.R. 2637.201(c)(4).

Reporter's Notes

This rule is similar to its Code counterpart in prohibiting lawyers from representing private clients in connection with matters in which the lawyer participated personally and substantially, unless the government consents after consultation. However, the rule goes substantially further than the Vermont Code in several respects.

First, the rule permits associates of a disqualified lawyer to avoid imputed disqualification if the lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom. If the disqualification concerns a former government lawyer, the government agency must also be given notice so that it may ascertain compliance with the rule.

Second, the rule provides for disqualification and screening of a former government lawyer from private representation where the lawyer acquired relevant confidential government information from prior employment, even though the lawyer did not participate personally and substantially in the matter.

Third, the rule provides for the disqualification of a government lawyer from matters in which the lawyer participated personally and substantially while in nongovernmental employment. The rule also prohibits such a lawyer from negotiating for private employment with a person who is a party to a matter in which the lawyer is representing the government.

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Rule 1.12. FORMER JUDGE, ARBITRATOR, MEDIATOR OR OTHER THIRD-PARTY NEUTRAL

(a) Except as stated in paragraph (d), a lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as a judge or other adjudicative officer or law clerk to such a person or as an arbitrator, mediator or other third-party neutral, unless all parties to the proceeding give informed consent, confirmed in writing.

(b) A lawyer shall not negotiate for employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially as a judge or other adjudicative officer or as an arbitrator, mediator or other third-party neutral. A lawyer serving as a law clerk to a judge or other adjudicative officer may negotiate for employment with a party or lawyer involved in a matter in which the clerk is participating personally and substantially, but only after the lawyer has notified the judge or other adjudicative officer.

(c) If a lawyer is disqualified by paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in the matter unless:

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

(2) written notice is promptly given to the parties and any appropriate tribunal to enable them to ascertain compliance with the provisions of this rule.

(d) An arbitrator selected as a partisan of a party in a multi-member arbitration panel is not prohibited from subsequently representing that party.—Amended June 17, 2009, eff. Sept. 1, 2009.

Comment

[1] This rule generally parallels Rule 1.11. The term “personally and substantially” signifies that a judge who was a member of a multi-member court, and thereafter left judicial office to practice law, is not prohibited from representing a client in a matter pending in the court, but in which the former judge did not participate. So also the fact that a former judge exercised administrative responsibility in a court does not prevent the former judge from acting as a lawyer in a matter where the judge had previously exercised remote or incidental administrative responsibility that did not affect the merits. Compare the comment to Rule 1.11. The term “adjudicative officer” includes such officials as acting judges, referees, special masters, hearing officers and other para-judicial officers, and also lawyers who serve as part-time judges. Compliance Canons A(2), B(2) and C of the Model Code of Judicial Conduct provide that a part-time judge, acting judge or retired judge recalled to active service may not “act as a lawyer in any proceeding in which he served as a judge or in any other proceeding related thereto.” Although phrased differently from this rule, those rules correspond in meaning.

[2] Like former judges, lawyers who have served as arbitrators, mediators or other third-party neutrals may be asked to represent a client in a matter in which the lawyer participated personally and substantially. This rule forbids such representation unless all of the parties to the proceedings give their informed consent, confirmed in writing. See Rule 1.0(e) and (b). Other law or codes of ethics governing third-party neutrals may impose more stringent standards of personal or imputed disqualification. See Rule 2.4.

[3] Although lawyers who serve as third-party neutrals do not have information concerning the parties that is protected under Rule 1.6, they typically owe the parties an obligation of confidentiality under law or codes of ethics governing third-party neutrals. Thus, paragraph (c) provides that conflicts of the personally disqualified lawyer will be imputed to other lawyers in a law firm unless the conditions of this paragraph are met.

[4] Requirements for screening procedures are stated in Rule 1.0(k). Paragraph (c)(1) 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.

[5] Notice, including a description of the screened lawyer's prior representation and of the screening procedures employed, generally should be given as soon as practicable after the need for screening becomes apparent.

Reporter's Notes — 2009 Amendment

V.R.P.C. 1.12 is amended to conform to the changes in Model Rule 1.12. The ABA Reporter's Explanation is as follows:

TEXT:

1. Caption: Change to "Former Judge, Arbitrator, Mediator or Other Third-Party Neutral"

In the caption and thereafter throughout the Rule, terminology is modified to encompass a more expansive category of neutrals that participate in court-based and private dispute resolution.

2. Paragraph (a): Add other third-party neutrals

This paragraph has been modified to add mediators and other third-party neutrals. The term "arbitrator" was moved because arbitrators, like mediators and other third-party neutrals, typically do not have law clerks.

3. Paragraph (a): Change from "consent after consultation" to "give informed consent"

The Commission is recommending that throughout the Rules the phrase "consent after consultation" be replaced with "give informed consent," as defined in Rule 1.0(e). No change in substance is intended.

4. Paragraph (a): Consent "confirmed in writing"

The Commission recommends requiring that the consent here be confirmed in writing, as with other conflict-of-interest Rules. "Confirmed in writing" is defined in Rule 1.0(b).

5. Paragraph (b): Add references to other third-party neutrals

As with paragraph (a), the Commission has added references to mediators and other third-party neutrals and deleted "arbitrator" from the sentence addressing law clerks.

6. Paragraph (c): Nonconsensual screening of other third-party neutrals

Under the [former] Rule, the individual disqualification of a former judge or arbitrator under this Rule is not imputed to associated lawyers in a law firm if the conditions in (c)(1) and (2) are satisfied. The Commission determined that mediators and other third-party neutrals should be treated in the same manner because 1) there is typically less confidential information obtained in these proceedings than when the lawyer represents clients in a client-lawyer relationship and 2) although the third-party neutral usually owes a duty of confidentiality to the parties, it is not the same duty of confidentiality owed under Rule 1.6. The Commission also heard testimony that third-party neutrals do not share information with other lawyers in the firm in the same way that lawyers representing clients do. Finally, the Commission was concerned that failure to permit screening might inhibit the extent to which lawyers serve as third-party neutrals, particularly in voluntary, court-based alternative dispute resolution programs.

7. Paragraph (c)(1): Add "timely"

The Commission is recommending a definition of "screened" that includes a requirement that the lawyer be "timely" isolated from participation in the matter. Nevertheless, the Commission believes that the timeliness requirement is so important that it should appear in the text as well. This change is being recommended for all of the Rules that provide for screening. See Rules ... 1.11 and 1.18.

COMMENT:

[2] This Comment has been added to explain the textual addition to paragraph (a) of the Rule, i.e., its applicability to arbitrators, mediators and other third-party neutrals.

[3] This entirely new Comment explains the rationale for imputing the conflicts of a personally disqualified lawyer unless the requirements of paragraph (c) are met.

[4] This entirely new Comment addresses the requirements of paragraph (c)(1) and has a cross-reference to the definition of "screened" in Rule 1.0(k).

[5] This entirely new Comment addresses the requirements of paragraph (c)(2).

Reporter's Notes

This rule parallels Rule 1.11 but applies specifically to conflicts arising from prior employment in a judicial or para-judicial capacity. It also correlates to provisions in the ABA Code of Judicial Conduct. The rule carries forward the general disqualification rule used in Vermont but applies it more broadly to include all adjudicative officers, arbitrators and judicial law clerks. The rule also adds provisions regarding negotiating for employment while serving in a judicial or para-judicial capacity, screening of disqualified lawyers, and multi-member arbitration panels.

The drafters recognize that the Court has also adopted a Law Clerk Code of Conduct which may be more or less restrictive than Rule 1.11(c)(2) and Rule 1.12(b). However, the committee believes that all lawyers, regardless of whether they are employed as judicial law clerks, should be governed by these Rules of Professional Conduct.

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Rule 1.13. ORGANIZATION AS CLIENT

(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is reasonably certain to result in harm that would require a disclosure of information relating to the representation under Rule 1.6(b), or that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and is likely to result in substantial injury to the organization, then the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances, to the highest authority that can act on behalf of the organization as determined by applicable law, unless the lawyer reasonably believes that

(1) a disclosure required by Rule 1.6(b) is necessary to prevent harm pursuant to that rule before a referral can be made or acted upon;

(2) a referral is otherwise not feasible in the circumstances, considering the best interests of the organization; or

(3) a referral is not necessary in the best interests of the organization.

(c) Except as provided in paragraph (d), if, despite the lawyer's efforts in accordance with paragraph (b), the highest authority that can act on behalf of the organization insists upon or fails to address in a timely and appropriate manner an action, or a refusal to act, that is reasonably certain to result in harm that would require a disclosure of information relating to the representation under Rule 1.6(b) or is clearly a violation of law and is likely to result in substantial injury to the organization, and

(1) the lawyer reasonably believes that the action or refusal to act is reasonably certain to result in harm that would require a disclosure under Rule 1.6(b), then the lawyer must reveal the information, but only if and to the extent the lawyer reasonably believes necessary to prevent the harm; or

(2) the lawyer reasonably believes that the action or refusal to act is a violation of law that is reasonably certain to result in substantial injury to the organization, then the lawyer may reveal information relating to the representation whether or not Rule 1.6 requires or permits such disclosure, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.

(d) Except for disclosures required by Rule 1.6(b), paragraph (c) shall not apply with respect to information relating to a lawyer's representation of an organization to investigate an alleged violation of law, or to defend the organization or an officer, employee or other constituent associated with the organization against a claim arising out of an alleged violation of law.

(e) A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to paragraphs (b) or (c), or who withdraws under circumstances that require or permit the lawyer to take action under either of those paragraphs, shall proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal.

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

(g) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.—Amended June 17, 2009, eff. Sept. 1, 2009.

Comment

The Entity as the Client

[1] An organizational client is a legal entity, but it cannot act except through its officers, directors, employees, shareholders and other constituents. Officers, directors, employees and shareholders are the constituents of the corporate organizational client. The duties defined in this comment apply equally to unincorporated associations. "Other constituents" as used in this comment means the positions equivalent to officers, directors, employees and shareholders held by persons acting for organizational clients that are not corporations.

[2] When one of the constituents of an organizational client communicates with the organization's lawyer in that person's organizational capacity, the communication is protected by Rule 1.6. Thus, by way of example, if an organizational client requests its lawyer to investigate allegations of wrongdoing, interviews made in the course of that investigation between the lawyer and the client's employees or other constituents are covered by Rule 1.6. This does not mean, however, that constituents of an organizational client are the clients of the lawyer. The lawyer may not disclose to such constituents information relating to the representation except for disclosures explicitly or impliedly authorized by the organizational client in order to carry out the representation or as otherwise required or permitted by Rule 1.6.

[3] When constituents of the organization make decisions for it, the decisions ordinarily must be accepted by the lawyer even if their utility or prudence is doubtful. Decisions concerning policy and operations, including ones entailing serious risk, are not as such in the lawyer's province. However, different considerations arise when the lawyer knows that the action or inaction of an officer or other constituent of the organization may cause harm to a third party or to the organization. The lawyer may know that such action or inaction is reasonably certain to result in one of the harms to prevent which Rule 1.6(b) requires disclosure of information relating to the representation, or that the organization is likely to be substantially injured by such action or inaction that violates a legal obligation to the organization or is a violation of law that might be imputed to the organization. In such a case, the lawyer must refer the matter to higher authority in the organization unless the circumstances set forth in subparagraphs (1)-(3) dictate otherwise. As defined in Rule 1.0(f), knowledge can be inferred from circumstances, and a lawyer cannot ignore the obvious.

[4] In determining how to proceed under paragraph (b), the lawyer should give due consideration to the seriousness of the violation and its consequences, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters, and any other relevant considerations. Ordinarily, referral to a higher authority in the organization would be necessary. When a harm requiring disclosure under Rule 1.6(b) is threatened, the lawyer may have to act rapidly to prevent the harm and may not be able to undertake such a referral. If rapid action is not required, or the constituent's action is a violation of law, it may be appropriate for the lawyer to ask the constituent to reconsider the matter; for example, if the circumstances involve a constituent's innocent misunderstanding of law and subsequent acceptance of the lawyer's advice, the lawyer may conclude that the best interest of the organization does not require that the matter be referred to higher authority. If a constituent persists in conduct contrary to the lawyer's advice, it will be necessary for the lawyer to take steps to have the matter reviewed by a higher authority in the organization. If the matter is of sufficient seriousness and importance or urgency to the organization, referral to a higher authority in the organization may be necessary even if the lawyer has not communicated with the constituent. Any measures taken should, to the extent practicable, minimize the risk of revealing information relating to the representation to persons outside the organization. Even in circumstances where a lawyer is not obligated by Rule 1.13 to proceed, a

lawyer may bring to the attention of an organizational client, including its highest authority, matters that the lawyer reasonably believes to be of sufficient importance to warrant doing so in the best interest of the organization.

[5] Paragraph (b) also makes clear that when it is reasonably necessary, and feasible, to enable the organization to address the matter in a timely and appropriate manner, the lawyer must refer the matter to higher authority, including, if warranted by the circumstances, the highest authority that can act for the organization under applicable law. The organization's highest authority to whom a matter may be referred ordinarily will be the board of directors or similar governing body. However, applicable law may prescribe that under certain conditions the highest authority reposes elsewhere, for example, in the independent directors of a corporation.

Relation to Other Rules

[6] The authority and responsibility provided in this rule are concurrent with the authority and responsibility provided in other rules. In particular, this rule does not limit or expand the lawyer's responsibility under Rule 1.8, 1.16, 3.3 or 4.1. Paragraph (c) of this rule supplements Rule 1.6(c) by providing an additional basis upon which the lawyer may reveal information relating to the representation, but does not otherwise modify, restrict or limit the provisions of Rule 1.6(b) or (c). Under paragraph (c) of this rule, unless Rule 1.6(b) harms are threatened, the lawyer may reveal such information only when the organization's highest authority insists upon or fails to address threatened or ongoing action that is clearly a violation of law, and then only to the extent the lawyer reasonably believes necessary to prevent reasonably certain substantial injury to the organization. It is not necessary that the lawyer's services be used in furtherance of the violation, but it is required that the matter be related to the lawyer's representation of the organization. If the lawyer's services are being used by an organization to further a crime or fraud by the organization, Rule 1.6(b)(2) and 1.6(b)(3) may require the lawyer to disclose confidential information. In such circumstances, Rule 1.2(d) may also be applicable, in which event, withdrawal from the representation under Rule 1.16(a)(1) may be required.

[7] Paragraph (d) makes clear that, unless Rule 1.6(b) is involved, the authority of a lawyer to disclose information relating to a representation in circumstances described in paragraph (c) does not apply with respect to information relating to a lawyer's engagement by an organization to investigate an alleged violation of law or to defend the organization or an officer, employee or other person associated with the organization against a claim arising out of an alleged violation of law. This is necessary in order to enable organizational clients to enjoy the full benefits of legal counsel in conducting an investigation or defending against a claim.

[8] A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to paragraph (b) or (c), or who withdraws in circumstances that require or permit the lawyer to take action under either of those paragraphs, must proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal.

Government Agency

[9] The duty defined in this rule applies to governmental organizations. Defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context and is a matter beyond the scope of these rules. See Scope [18]. Although in some circumstances the client may be a specific agency, it may also be a branch of government, such as the executive branch, or the government as a whole. For example, if the action or failure to act involves the head of a bureau, either the department of which the bureau is a part or the relevant branch of government may be the client for purposes of this rule. Moreover, in a matter involving the conduct of government officials, a government lawyer may have authority under applicable law to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances. Thus, when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful act is prevented or rectified, for public business is involved. In addition, duties of lawyers employed by the government or lawyers in military service may be defined by statutes and regulation. This rule does not limit that authority. See Scope.

Clarifying the Lawyer's Role

[10] There are times when the organization's interest may be or become adverse to those of one or more of its constituents. In such circumstances the lawyer should advise any constituent, whose interest the lawyer finds adverse to that of the organization of the conflict or potential conflict of interest, that the lawyer cannot represent such constituent, and that such person may wish to obtain independent representation. Care must be taken to assure that the individual understands that, when there is such adversity of interest, the lawyer for the organization cannot provide legal representation for that constituent individual, and that discussions between the lawyer for the organization and the individual may not be privileged.

[11] Whether such a warning should be given by the lawyer for the organization to any constituent individual may turn on the facts of each case.

Dual Representation

[12] Paragraph (g) recognizes that a lawyer for an organization may also represent a principal officer or major shareholder.

Derivative Actions

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

[14] The question can arise whether counsel for the organization may defend such an action. The proposition that the organization is the lawyer's client does not alone resolve the issue. Most derivative actions are a normal incident of an organization's affairs, to be defended by the organization's lawyer like any other suit. However, if the claim involves serious charges of wrongdoing by those in control of the organization, a conflict may arise between the lawyer's duty to the organization and the lawyer's relationship with the board. In those circumstances, Rule 1.7 governs who should represent the directors and the organization.

Reporter's Notes – 2009 Amendment

V.R.P.C. 1.13 is amended to conform to changes in Model Rule 1.13 that were made by a 2003 amendment recommended by the Task Force on Corporate Responsibility and the Standing Committee on Ethics and Professional Responsibility. That amendment was designed to clarify the lawyer's responsibilities to an organizational client in light of recent corporate scandals and the response of Congress and the SEC in the Sarbanes-Oxley Act of 2002 and related regulations. See "Report of the American Bar Association Task Force on Corporate Responsibility," March 31, 2003, http://www.abanet.org/buslaw/corporateresponsibility/final_report.pdf. Amended V.R.P.C. 1.13, like the original Vermont rule, differs from the Model Rule where necessary to reflect the fact that certain disclosures of information relating to the representation may be required or permitted by V.R.P.C. 1.6 and not by Model Rule 1.6. See Reporter's Notes to 2009 amendment of V.R.P.C. 1.6.

V.R.P.C. 1.13(a) is unchanged and is identical to the Model Rule. It states the basic proposition that underlies the rule: The client to whom all of the lawyer's duties of loyalty run is the organization, not a constituent, such as the board of directors or management, or an individual officer or employee with whom the lawyer works. In most instances, it can be presumed that the interests of the client organization and of those constituents are identical, so the question of where loyalty is owed does not arise. Rule 1.13 prescribes a course of conduct to be followed by the lawyer when those interests diverge and the interests of the organization must be protected. Throughout the rule, "organization" includes an unincorporated association or other entity. See Comment [1].

V.R.P.C. 1.13(b) adopts the most important change in the Model Rule: The lawyer now *must* "go up the ladder" from the officer or other constituent whose action or inaction threatens or has caused one of the harms described in paragraph (b) to "higher authority within the organization," which if necessary could be the board of directors or other authority provided by law. See Comment [5]. Of course, neither the amended nor the original rule precludes such action on the part of the lawyer even when it is not required. See Comment [4].

In other respects, V.R.P.C. 1.13(b) departs significantly from the amended Model Rule in order to accommodate the requirement of V.R.P.C. 1.6(b) that client information be disclosed if the lawyer reasonably believes disclosure is necessary to prevent reasonably certain death or substantial bodily harm; or to prevent client fraud or crime, in which the lawyer's services have been used, that will cause reasonably certain substantial financial injury; or to prevent, mitigate, or rectify consequences of such client crime or fraud reasonably certain to result in substantial financial injury. If a lawyer "knows," as that term is defined in V.R.P.C. 1.0(f), that the action or inaction of an officer or other constituent of an organization "is reasonably certain to" give rise to any of the harms that would require disclosure under V.R.P.C. 1.6(b), the lawyer must refer the matter to higher authority in the organization unless the lawyer reasonably believes that the immediate threat of harm would render such a referral moot; then Rule 1.13(b)(1) provides that the lawyer must make disclosure as necessary to prevent the harm without going to higher authority. Consistent with the purpose of V.R.P.C. 1.6(b) to prefer the public interest in preventing certain harms over the interest in assuring client confidentiality, the lawyer's duties when such harms are threatened arise whether or not the threat is to the organization or a third party and whether or not the conduct in question could be imputed to the organization.

Other constituent actions that require the lawyer to refer a matter to higher authority are violations of law that could substantially injure the organization and could reasonably be imputed to the organization. Here, unless the action or inaction also involves an immediate threat pursuant to V.R.P.C. 1.6(b), the lawyer must refer the matter to higher authority, with two exceptions. If, after consideration of the best interest of the organization, the lawyer reasonably believes that referral is either not feasible or not necessary, that step need not be taken. If, for example, as Comment [4] suggests, the constituent has agreed not to take the threatened action, referral may serve no purpose. Similarly, if the threat of an action that does not require disclosure to forestall is immediate, the lawyer may have to take other preventive action before referral can be made or acted upon. The second and third sentences of V.R.P.C. 1.13(b) as originally adopted, which suggested factors to guide the lawyer's judgment in deciding how to proceed, are now incorporated in Comment [4]. The terms "reasonable," "reasonably," "reasonable

belief,” and “reasonably believes,” as defined in Rule 1.0(h), (i), imply a range within which the lawyer’s conduct will satisfy the requirements of Rule 1.13. In determining what is reasonable in the best interest of the organization, the circumstances at the time of determination are relevant.

V.R.P.C. 1.13(c) also adapts the Model Rule changes to the circumstances created by the required and permitted disclosures of V.R.P.C. 1.6(b) and (c). If the organization’s highest authority declines or fails to act in the matter referred to it, under subparagraph (1) the lawyer must disclose any information required under V.R.P.C. 1.6(b) that has not been previously disclosed to meet an immediate threat. Under subparagraph (2), the lawyer may disclose any information reasonably necessary to prevent substantial injury to the organization, whether or not it is information that may be disclosed pursuant to V.R.P.C. 1.6(c). See Comment [6]. In both cases, the rule specifies that the disclosures must be limited to those necessary to achieve the purpose. The reference in the original rule to the lawyer’s ability to resign under Rule 1.16 has been omitted in the amendment, but exists independently. See Comment [6].

V.R.P.C. 1.13(d) is a new provision making clear that the permissive disclosure provided in Rule 1.13(c) does not apply when a lawyer is acting on behalf of the organization to investigate or defend against a claimed violation of law. The paragraph differs from Model Rule 1.13(d) in making an exception for the disclosures required by V.R.P.C. 1.6(b). Again, the rule is consistent with the purpose of V.R.P.C. 1.6(b) to prefer the public interest in preventing certain harms over the interest in assuring client confidentiality.

V.R.P.C. 1.13(e) is a new provision identical to Model Rule 1.13. Both state that a lawyer who is discharged or withdraws because of activities under paragraphs (b) or (c) must take steps to inform the organization’s highest authority.

V.R.P.C. 1.13(f), like Model Rule 1.13(f), is identical to former Rule 1.13(d), substituting “the lawyer knows or reasonably should know” for “it is apparent.” The purpose is conformity with the terminology of Rule 1.0 and usage elsewhere in the rules. See ABA Reporter’s Explanation.

V.R.P.C. 1.13(g), like Model Rule 1.13(g), carries forward former Rule 1.13(e).

Comments [1] and [2] are unchanged and are identical to Model Rules Comments [1] and [2], with the exception of the addition of a reference to “required” disclosures in the last sentence of Comment [2].

Comment [3] incorporates changes from Model Rules Comment [3] with revisions to accommodate the required disclosures of V.R.P.C. 1.6(b) and the consequent changes in V.R.P.C. 1.13(b).

Comment [4] incorporates changes from Model Rules Comment [4] with revisions to accommodate the required disclosures of V.R.P.C. 1.6(b) and the consequent changes in V.R.P.C. 1.13(b). The Comment adapts language formerly found in Rule 1.13(b) and deemed more appropriate for the Comment. The language deleted from the Comment is no longer appropriate in light of the mandatory nature of the lawyer’s obligation to refer the matter to higher authority. The final sentence makes clear what was implicit in the original rule, i.e., that it is not intended to preclude a lawyer from bringing to higher authority concerns other than those specified in the rule.

Comment [5] incorporates changes from Model Rules Comment [5] reflecting the mandatory nature of the lawyer’s obligation to refer the matter to higher authority.

Comment [6] incorporates changes from Model Rules Comment [6] with revisions to accommodate the required and permitted disclosures of V.R.P.C. 1.6(b) and (c) and the consequent changes in V.R.P.C. 1.13(c).

Comments [7] and [8] are new. They incorporate Model Rules Comments [7] and [8], with a reference in Comment [7] to accommodate the required disclosures of V.R.P.C. 1.6(b) and the consequent changes in V.R.P.C. 1.13(b).

Comment [9] (formerly Comment [6]) incorporates changes from Model Rules Comment [9] designed to reflect more accurately the state of the law concerning identity of a government client and to provide guidance for that determination. See ABA Reporter’s Explanation.

Comments [10]-[14] (formerly Comments [7]-[11]) are unchanged and are identical to Model Rules Comments [10]-[14].

Reporter’s Notes

This rule has no counterpart in the Vermont Code. It clarifies the lawyer’s role when representing an entity and establishes a mechanism for operation within that role. The rule in section (a) makes clear that the entity, not its constituents, is the client. The constituents of the entity, its officers, directors, employees and shareholders, like the lawyer, merely act for the entity. In sections (b) through (e) the rule fleshes out the duties of the lawyer for the entity with regard to conflicts of interest within the entity, communications, and confidentiality.

The drafters modified the ABA’s version of this rule by adding a clause to paragraph (c) to require or allow the lawyer for an organization to disclose the client-organization’s intent to commit a crime as provided in Rule 1.6. The ABA version omitted such a provision.

ANNOTATIONS

1. City attorney. In a breach of fiduciary duty suit brought by a city manager against the city attorney, the trial court was correct in construing the city charter as obligating the city attorney to represent the city's interests only. Though the charter of Winooski, Vermont, designates the city attorney as legal advisor to the city manager, it is settled in Vermont and other states that the actual client of the city attorney is the municipality. *Handverger v. City of Winooski*, 2011 VT 134, *_Vt._*, 38 A.3d 1158.

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Rule 1.14. CLIENT WITH DIMINISHED CAPACITY

(a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for 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) or (d), 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.

(d) 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 the person even though the person is unable to establish a client-lawyer relationship or to make or express considered judgments about the matter, provided that the following conditions exist:

(1) The person or another person acting in good faith in that person's behalf has consulted with the lawyer.

(2) The lawyer reasonably believes that the person has no other lawyer, agent or other representative available.

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. A lawyer acting under this paragraph has the same duties under these rules that the lawyer would have with respect to a client. The lawyer should take steps to regularize the relationship or implement other protective solutions as soon as possible.—Amended June 17, eff. Sept. 1, 2009.

Comment

[1] The normal client-lawyer relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters. 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. 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. 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. 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] The fact that a client suffers a disability does not diminish the lawyer's obligation to treat the client with attention and respect. 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] The client may wish to have family members or other persons participate in discussions with the lawyer. When necessary to assist in the representation, the presence of such persons generally does not affect the applicability of the attorney-client evidentiary privilege. 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] 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. 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).

Taking Protective Action

[5] 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. 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. 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] 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] 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. 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. 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. 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.

Disclosure of the Client's Condition

[8] Disclosure of the client's diminished capacity could adversely affect the client's interests. For example, raising the question of diminished capacity could, in some circumstances, lead to proceedings for involuntary commitment. Information relating to the representation is protected by Rule 1.6. Therefore, unless authorized to do so, the lawyer may not disclose such information. When taking protective action pursuant to paragraph (b) or (d), the lawyer is impliedly authorized to make the necessary disclosures, even when the client directs the lawyer to the contrary. 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. 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.

Emergency Legal Assistance

[9] A lawyer who acts on behalf of a person with seriously diminished capacity in an emergency pursuant to paragraph (d) 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. The lawyer should disclose to any tribunal involved and to any other counsel involved the nature of his or her relationship with the person. Normally, a lawyer would not seek compensation for such emergency actions taken.

Reporter's Notes — 2009 Amendment

V.R.P.C. 1.14 is amended to conform to changes in Model Rule 1.14, retaining as V.R.P.C. 1.14(d) the provision for emergency action originally adopted as V.R.P.C. 1.14(c) that is not in the Model Rule text but is found

in what is now ABA Comments [9] and [10]. See Reporter's Notes to V.R.P.C. 1.14 (1999). As noted below, the amendment to Model Rule 1.14(b) provides a mechanism for such action. V.R.P.C. 14(d) has been amended for consistency with changes in ABA Comment [9].

The ABA Reporter's Explanation is as follows:

TEXT:

1. Caption: Change to "Client with Diminished Capacity"

In the caption and thereafter throughout the Rule, terminology referencing a client's capacity is changed to focus on and more accurately express the continuum of a client's capacity.

2. Paragraph (a): Terminology change

The change in terminology in this paragraph is grammatical and reflective of the change of focus of the Rule to the continuum of a client's capacity.

3. Paragraph (b): Add protective measures lawyer may take short of request for guardian and requiring risk of substantial harm unless action is taken

The Commission recommends adding guidance for lawyers regarding "protective action" the lawyer may take short of seeking a guardian, which is generally deemed appropriate only in extreme circumstances. The revision permits the lawyer to "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." The Commission believes the recommended change offers the lawyer flexibility when a client faces substantial risk of harm or when emergency legal assistance is required as [provided in V.R.P.C. 1.14(d) and] described in Comments [9] and [10].

4. Paragraph (c): Add limitation on "protective action"

The Commission recommends addition of a new paragraph (c) to specify the means by which "protective action" should be limited to avoid client harm. The proposal explicitly recognizes the relationship of Rule 1.14(b) to Rule 1.6. Specifically, it states that Rule 1.6 allows disclosure of information under Rule 1.14(b) [or (d)] only as "reasonably necessary to protect the client's interests."

COMMENT:

[1] This Comment has been revised with collateral language changes to reflect the Rule's focus on degrees of a client's capacity.

[2] This Comment has been revised to delete the sentence, "If the person has no guardian or legal representative, the lawyer often must act as de facto guardian." The Commission views as unclear, not only what it means to act as a "de facto guardian," but also when it is appropriate for a lawyer to take such action and what limits exist on the lawyer's ability to act for an incapacitated client. The other revision to the Comment is a grammatical and stylistic change.

[3] This new Comment includes additional discussion of the potential risk in the common practice of having family members or other persons participate in the lawyer's representation of a client with diminished capacity. The change is recommended to encourage lawyers to seek such involvement since this practice may be of assistance to the representation. The Comment also points out potential risk to the extent that family members may be guided, consciously or unconsciously, by their own interests instead of the interests of the client.

[4] This revision of [former] Comment [3] includes additional discussion indicating that parents as natural guardians may have the same rights as legal guardians to make decisions regarding their children, depending on the nature of the matter or proceeding. (Whether and when parents have rights to make decisions on their children's behalf is a matter of substantive law that is not addressed here.)

The discussion in [former] Comment [3] on the issue of whether the lawyer should seek appointment of a guardian has been moved, with modification, to new Comment [7]. Finally, [former] Comment [4] is now the last sentence of proposed Comment [4] in order to provide a single Comment on the lawyer's role when the client of diminished capacity already has a legal representative.

Caption "Taking Protective Action" has been added to highlight and focus on action the lawyer may take during representation of a client with diminished capacity.

[5] This new Comment sets forth the rationale for paragraph (b) and gives additional detail on the circumstances that might trigger the lawyer's permission to consult with family members, adult-protective agencies or other individuals or entities that have the authority to protect the client.

[6] This new Comment provides guidance on determining the extent of a client's diminished capacity.

[7] This new Comment addresses the issue of whether a lawyer should seek appointment of a guardian. Discussion of this issue in [former] Comment [3], with modification, is relocated here. The modification clarifies that, while it "may" be necessary to have a legal representative appointed to complete a transaction, it is not "ordinarily" required to the extent that a client with some degree of capacity may be able to execute a power of attorney. In addition, the discussion in [former] Comment [5] regarding rules of procedure requiring a guardian or next friend has been moved to this Comment. A new final sentence serves as a useful reference to other law that may impose a requirement that the lawyer take the least restrictive action under the circumstances.

[8] This is a revision of [former] Comment [5]. The first sentence has been moved to Comment [7]. The majority of the language is essentially new and refers to the limitations in paragraph (c) on the disclosure of information relating to the representation and clarifies the relationship between Rules 1.14 and 1.6. The last sentence of the current Comment has been deleted because the issue of whether a lawyer may seek guidance from a diagnostician is addressed in Comment [6].

[9] and [10] The changes reflect the Rule's new focus on degrees of a client's capacity.

Former ABA Comment [6] (now ABA Comment [9]) was not appended to V.R.P.C. 1.14 and is not included in these amendments, because, as noted above, its language has been incorporated in the rule. Changes in ABA Comment [9] are reflected in what is now V.R.P.C. 1.14(d). ABA Comment [10] is V.R.P.C. Comment [9]. A sentence that was incorporated in V.R.P.C. 1.14(d) continues to be omitted from that Comment.

Reporter's Notes

This rule has no counterpart in the Vermont Code. It requires the lawyer to try to maintain a client-lawyer relationship which is as normal as possible with the client whose ability to make decisions is impaired, and permits the lawyer to seek protective action regarding the client only when the lawyer reasonably believes the client cannot adequately act in the client's own interest. Rule 1.14(c) is based on paragraph [6] and part of paragraph [7], added to the Comment by the ABA House of Delegates in February 1997. The provision is included in the Vermont rule because it imposes the equivalent of a limited client-lawyer relationship on the lawyer. The final paragraph of the Comment contains the remainder of paragraph [7], also added by the February 1997 action of the House of Delegates.

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Rule 1.15. SAFEKEEPING PROPERTY

(a)(1) 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 accordance with Rules 1.15A and B. 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 six years after termination of the representation.

(2) For purposes of these rules, property held "in connection with a representation" means funds or property of a client or third party that is in the lawyer's possession as a result of a representation in a lawyer-client relationship or as a result of a fiduciary relationship that arises in the course of a lawyer-client relationship or as a result of a court appointment. "Fiduciary relationship" includes, but is not limited to, agent, attorney-in-fact, conservator, guardian, executor, administrator, personal representative, special administrator, or trustee.

(b) A lawyer may deposit the lawyer's own funds in an account in which client funds are held for the sole purpose of paying service charges or fees on that account, but only in an amount reasonably necessary for that purpose. **Amended March 7, 2016; eff. May 9, 2016.**

(c) Unless a lawyer has entered into a nonrefundable fee agreement that complies with Rule 1.5(f), a lawyer shall deposit legal fees and expenses that have been paid in advance into an account in which funds are held that are in the lawyer's possession as a result of a representation in a lawyer-client relationship. Such funds are to be withdrawn by the lawyer only as fees are earned or expenses incurred. **Amended March 7, 2016; eff. May 9, 2016.**

(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.

(f) Except as provided in paragraph (g):

(1) a lawyer shall not disburse funds held for a client or third person unless the funds are “collected funds.” For purposes of this rule, “collected funds” means funds that a lawyer reasonably believes have been deposited, finally settled, and credited to the lawyer’s trust account.

(2) a lawyer shall not use, endanger, or encumber money held in trust for a client or third person for purposes of carrying out the business of another client or person without the permission of the owner given after full disclosure of the circumstances.

(g) In the following circumstances, a lawyer may disburse trust account funds deposited for or on behalf of a client or third person in reliance on that deposit even though the deposit does not constitute collected funds if the lawyer reasonably believes that the instrument or instruments deposited will clear and will constitute collected funds in the lawyer’s trust account within a reasonable period of time:

(1) When the deposit is either a certified check, cashier’s check, money order, official check, treasurer’s check, or other such check issued by, or drawn on, a federally insured bank, savings bank, savings and loan association, or credit union, or of any holding company or wholly owned subsidiary of any of the foregoing; or

(2) When the deposit is a check drawn on the IOLTA account of an attorney licensed to practice law in the State of Vermont or on the IORTA account of a real estate broker licensed under 26 V. S. A. Chapter 41; or

(3) When the deposit is a check issued by the United States of America or any agency thereof, or by the State of Vermont or any agency or political subdivision thereof; or

(4) When the deposit is a personal check or checks in an aggregate amount that does not exceed \$1,000 per transaction; or

(5) When the deposit is a check or draft issued by an insurance company, title insurance company, or title insurance agency, licensed to do business in Vermont.

(h) If an uncollected deposit in reliance upon which a lawyer has disbursed trust account funds fails, the lawyer, upon obtaining knowledge of the failure, shall immediately act to protect the funds or other property of the lawyer’s other clients or third persons held by the lawyer in accordance with this rule.—Amended Dec. 21, 2004, eff. March 1, 2005; June 17, 2009, eff. Sept. 1, 2009.

Comment

[1] A lawyer should hold property of others with the care required of a professional fiduciary. Securities should be kept in a safe deposit box, except when some other form of safekeeping is warranted by special circumstances. 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 separate accounts. Separate accounts are to be used when administering estate monies or acting in similar fiduciary capacities. A lawyer should maintain on a current basis books and records in accordance with generally accepted accounting practice and comply with the provisions of Rules 1.15A and B.

[2] 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 service charges or other fees on that account. Accurate records must be kept regarding which part of the funds are the lawyer’s.

[3] 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. However, a lawyer may not hold funds to coerce a client into accepting the lawyer’s contention. 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. The undisputed portion of the funds shall be promptly distributed.

[4] 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. A lawyer may have a duty under applicable law to protect such third-party claims against wrongful

interference by the client. 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. 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] The obligations of a lawyer under this rule are independent of those arising from activity other than rendering legal services. 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] 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.

Reporter's Notes—2016 Amendment

Rule 1.15(b) is amended to provide that the funds that a lawyer may keep in a client trust account to cover service charges is that amount "reasonably" necessary for that purpose, making clear that the rules do not provide a fixed amount or percentage but will be applied on a case-by-case basis.

Rule 1.15(c) is amended for consistency with the simultaneous addition of Rules 1.5(f) and (g).

Reporter's Notes — 2009 Amendment

V.R.P.C. 1.15 is amended in part to conform to changes in Model Rule 1.15, retaining a reference in V.R.P.C. 1.15(a) to V.R.P.C. 1.15A and B, for which there are no Model Rules equivalents, and incorporating as V.R.P.C. 1.15(f)-(h) the 2005 amendment adding V.R.P.C. 1.15(d)-(f) concerning client trust funds against which checks may be drawn. See Reporter's Notes to V.R.P.C. 1.15 (1999); Reporter's Notes to 2005 amendment of V.R.P.C. 1.15.

The Supreme Court addressed issues under V.R.P.C. 1.15 in *In re Farrar*, 2008 VT 31, 183 Vt. 592, 949 A.2d 438 (mem.) (admitted commingling of client funds contrary to V.R.P.C. 1.15(a) requires public reprimand in light of importance of protecting client funds and potential for actual injury to client, despite lawyer's unawareness that conduct violated rule), and *In re Sinnott*, 2004 VT 16, ¶ 18, 176 Vt. 596, 845 A.2d 373 (mem.) (former V.R.P.C. 1.15(c) [now (d)] did not apply to fees paid directly to the lawyer by the client).

Rule 1.15(a)(2), unique to the Vermont rule, is added as part of a group of amendments to Rules 1.15A and B intended to clarify the applicability of Rules 1.15, 1.15A and B to funds held by a lawyer other than in a professional capacity. "Property held in connection with a representation," the key phrase in what is now Rule 1.15(a)(1) that determines the applicability of those rules, is now limited to property held in connection with a representation in a lawyer-client relationship or a fiduciary relationship that arises out of a lawyer-client relationship or a court appointment. Rule 1.15A(a) as amended makes clear that these rules govern both "trust" accounts, in which client funds arising from a representation are held, and "fiduciary" accounts, in which funds arising from a fiduciary relationship are held.

Note that new Rule 1.15(c) requires deposit in a lawyer's trust account of any fees or expenses paid in advance, no matter how designated, if the funds are to be applied as compensation for services subsequently rendered or reimbursement for expenses subsequently incurred. The rule does not require deposit in the trust account of a "pure" retainer, a flat fee paid to assure the lawyer's availability and not for performing services. If services are also to be performed, an additional agreement at a specified rate for those services is required, and any advance payment under that agreement must be deposited in the trust account. Either form of agreement is, of course, subject to the overriding requirement of Rule 1.5(a) that fees must be reasonable.

The ABA Reporter's Explanation is as follows:

TEXT:

1. Paragraph (b): Deposits to minimize bank charges

The Commission heard testimony that in some jurisdictions lawyers are unable to avoid bank charges unless they are permitted to deposit money in a client trust account to cover such charges. The addition of this new paragraph is designed to address that problem.

2. Paragraph (c): Advance payment of fees and expenses

This new paragraph provides needed practical guidance to lawyers on how to handle advance deposits of fees and expenses. The Commission is responding to reports that the single largest class of claims made to client protection funds is for the taking of unearned fees.

3. Paragraph (e): Expand to cover all instances of disputed funds

[Former] Rule 1.15(c) is presently written to cover disputes between the lawyer and “another person,” usually the client. The change proposed recognizes that at least three kinds of disputes are in far more general language, tightens the first two sentences into one and reiterates the lawyer’s duty to pay over undisputed sums. The final additional sentence clarifies the lawyer’s duty to promptly distribute all portions of the property that are not subject to dispute.

COMMENT:

[1] Consistent with the Commission’s action with respect to Rule 1.18, a phrase has been added to make clear that prospective clients are included among the third parties to whom the lawyer owes a duty to protect property pursuant to this Rule.

While the black letter of this Rule is written in mandatory terms, the Comments are often permissive. Sometimes that may be appropriate, as where a safe deposit box is suggested unless something else is warranted by the circumstances. When the issue is close, permissive language has been retained. However, Rule 1.15(a) clearly requires that client property, including money, be kept separate from the lawyer’s own, and the Comment has been changed to make that clear. A sentence has been added to provide guidance to lawyers regarding the proper maintenance of trust accounts [in accordance with V.R.P.C. 1.15A and B].

[2] This new Comment addresses new paragraph (b).

[3] This Comment deals with handling client funds that may be set aside for payment of fees. The [former] language refers only to funds received from third parties, whereas the usual payer will be the client. Further, the lawyer should not have to show that the client is in fact likely to leave town if, pursuant to agreement, the lawyer is entitled to have the security of funds paid over before the fee is actually earned.

In addition, as in Comment [1], the clear Rule 1.15(a) and (e) requirements that disputed client funds be kept in a separate account is made mandatory rather than permissive.

[4] This Comment deals with a practical problem in which a client’s creditor tries to get at funds in the hands of the lawyer. There is no doubt that, as a matter of substantive law, in some cases the lawyer would be required to make the creditor whole if the lawyer remitted property to the client to which the creditor was found entitled. In those, but only those, cases, paragraph (e) mandates a lawyer’s refusal to remit the funds to the client until the dispute is resolved, while this Comment reinforces and tries to explain this sometimes controversial point. The Comment further explains that the lawyer’s duty to protect client creditors only exists when the creditor has a claim against specific funds being held by the lawyer and that the lawyer’s duty to protect the third party exists only when there is a nonfrivolous claim under applicable law. 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] These changes clarify that when a lawyer holds funds in a capacity other than as a lawyer representing a client, this Rule does not apply.

[6] The change to “lawyers’ fund for client protection” reflects the current nomenclature for these funds. The new language in the second sentence indicates a lawyer has an obligation to contribute to these funds in jurisdictions where they are mandatory.

Reporter’s Notes – 2005 Amendment

Rules 1.15(d)-(f) are added to address a problem that has arisen as a result of a recent Advisory Ethics Opinion of the Vermont Bar Association’s Professional Responsibility Committee (VBA Ethics Opinion 2002-4, published April 2004). The opinion concluded that “Trust account checks can only be drawn on client funds after the deposit on which the check is drawn clears” based on the Committee’s reading of V.R.P.C. 1.15(b) and other provisions of the Rules of Professional Conduct. *Id.* While the opinion does not have binding legal effect, it is of sufficient persuasive force to put lawyers who ignore it at risk. The impact is thus significant in the many real estate closings, tort settlements, and other transactions in which funds for clients pass through lawyers’ hands. If the lawyer cannot disburse such funds until the checks with which they have been transmitted have cleared, clients will experience significant delays in receiving funds to which they are entitled, and sequential transactions, such as the simultaneous sale and purchase of real estate, will be hindered. See, generally, R. Kohn, “Trust Account Ethics Rules: Sensible, Bizarre, or a Combination?,” *30 Vt. Bar Jour.*, No. 2, pp. 20-26 (2004). The present rule is based on provisions adopted in other states to address this problem. See, e.g., Del. Lawyers’ Rules of Prof’l. Conduct, R. 1.15(n); Rules Regulating the Fla. Bar, R. 5-1.1(i).

Rule 1.15(d) sets forth two basic principles that must be adhered to unless the exceptions set forth in Rule 1.15(e) apply:

(1) A lawyer may not disburse funds unless the disbursement is drawn against “collected funds” — i.e., those that a lawyer reasonably believes have been deposited, finally settled, and credited to the lawyer’s trust account. (Under present banking practice, there is no way a lawyer can be certain that funds have been finally settled, because the bank into which the check has been deposited is only notified when a check is dishonored, not when it is honored. As of August 2004, in accordance with Federal Reserve Board Regulation CC, checks drawn on banks within the same Federal Reserve Board region are usually honored by the banks on which they are drawn

within two or three business days, and checks drawn on banks in other regions are usually honored within seven business days, except in extremely unusual circumstances. Accordingly, as of August 2004, it will usually be reasonable for a lawyer to believe that a check has been finally settled three business days after deposit for checks drawn on banks within the same Federal Reserve Board region, and seven business days for checks drawn on other United States banks.)

(2) A lawyer may not use the funds of one client or other person held in trust to serve the needs of another client or person without full disclosure and permission of the owner. VBA Ethics Opinion 2002-4 essentially stands on the ground that a check drawn against uncollected funds in a trust account is in fact drawn against the collected funds of other clients that are held in the account.

The exceptions to these basic principles set forth in Rule 1.15(e) are based on the premise that certain categories of trust account deposits carry a limited and acceptable risk of failure so that disbursements of trust account funds may be made in reliance on such deposits without disclosure to and permission of clients owning trust account funds subject to possibly being affected. Four of the five categories of deposits enumerated in paragraph (e) reflect instruments issued by or drawn on sources of assured financial stability so that the likelihood that the instrument will be dishonored or that the deposit will otherwise fail is so slight that it may be treated as presumptively “collected.” The fifth category, personal checks aggregating \$1,000 or less, covers the need for last-minute funds to cover minor and unanticipated closing costs and is a de minimis amount that can be readily repaid in the event of failure. The five categories in effect create “safe harbors” that allow the lawyer to draw against these uncollected funds, provided that the further requirement of paragraph (e) is met — that the lawyer “reasonably believes” that the instrument or instruments in question will clear and become “collected funds” in a reasonable time. (See discussion of clearance times above.) The essence of the rule is that a lawyer who draws against uncollected funds other than those within the safe harbors of paragraph (e) is in violation of the basic prohibitions of paragraph (d) and is thus subject to disciplinary action.

Rule 1.15(f) adds the further requirement that if a deposit fails, even though it was within one of the categories set forth in paragraph (e) and the lawyer’s belief that it would clear was reasonable, the lawyer must take immediate steps to protect the funds of other clients that are thus drawn upon — presumably by immediately making or securing reimbursement of the trust account to the amount of the failed deposit.

COMMENT:

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. All property which is the property of clients or third persons should be kept separate from the lawyer’s business and personal property and, if monies, in one or more trust accounts. Separate trust accounts may warranted when administering estate monies or acting in similar fiduciary capacities.

Lawyers often receive funds from third parties from which the lawyer’s fee will be paid. If there are risk that the client may divert the funds without paying the fee, the lawyer is not required to remit the portion from which the fee is to be paid. However, a lawyer may not hold funds to coerce a client into accepting the lawyer’s contention. The disputed portion of the funds should be kept in trust and the lawyer should suggest means for prompt resolution of the dispute, such as arbitration. The undisputed portion of the funds shall be promptly distributed.

Third parties, such as a client’s creditors, may have just claims against funds or other property in a lawyer’s custody. A lawyer may have a duty under applicable law to protect such third-party claims against wrongful interference by the client, and accordingly may refuse to surrender the property to the client. However, a lawyer should not unilaterally assume to arbitrate a dispute between the client and the third party.

The obligations of a lawyer under this rule are independent of those arising from activity other than rendering legal services. For example, a lawyer who serves 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.

A “client’s security fund” 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 should participate.

Reporter’s Notes

This rule was modified, and the next three rules added, in order to include mandatory IOLTA, random auditing, the financial support for random auditing, and reporting of overdrafts.

ANNOTATIONS

1. Admonition. When respondent held trust account checks payable to her firm for premiums owed to the firm without cashing the checks, thereby improperly commingling her funds with those of third parties, an admonition by Disciplinary Counsel was appropriate. No funds belonging to clients or third parties were

improperly used; there were mitigating factors of lack of selfish or dishonest motive, no prior disciplinary record; a good faith effort to rectify the consequences of the violation, a full and free disclosure to disciplinary counsel, cooperation, and remorse; and the only aggravating factor was respondent's substantial experience in the practice of law. In re PRB Docket No. 2013.160, 2015 VT 54, ___ Vt. ___, ___ 1.3d –(mem.).

Sanction for commingling personal and client funds in respondent's client trust account was reduced from a public reprimand to a private admonition when respondent went beyond what was required of him, including hiring an accountant at his own expense and disclosing far more information than was required, when other mitigating factors included absence of a prior disciplinary record, lack of selfish or dishonest motive, presence of personal problems, positive character and reputation, presence of physical disability, and remorse, and when the only aggravating factor was respondent's 30 years of experience. In re PRB Docket No. 2012.155, 2015 VT 57, ___ Vt. ___, ___ A.3d ___ (mem.).

Respondent violated the professional conduct rules regarding client funds and trust accounting systems by not fully documenting each transaction in her trust account on her check register, not having a single source to which she could go to identify all transactions, placing earned fees into her trust account, and having no documentation for a \$3,000 electronic transfer from her trust account. Admonition was a proper sanction, as respondent's negligence in the management of her trust account arose out of ignorance of the rules, no client or third party was injured, and there was little potential injury; furthermore, there were several mitigating factors and no aggravating factors. In re PRB Docket No. 2014.168, 2015 VT 9, ___ Vt. ___, 114 A.3d 480 (mem.).

Admonition was appropriate when respondent failed to regularly reconcile his trust accounts, failed to maintain a central trust accounting system, and placed unearned fees in his operating account. His mental state was one of negligence and no client had been injured; there were mitigating factors in that he lacked dishonest or selfish motive, immediately took steps to revise his trust accounting system, and had cooperated with disciplinary proceedings; and in aggravation, he had substantial experience in the practice of law and three prior disciplinary offenses that were remote in time and unrelated to the present charges. In re PRB Docket No. 2013.153, 2014 VT 35, 196 Vt. 633, 96 A.3d, 468 (mem.).

2. Bank fees. Rule allowing a lawyer to deposit his own funds into a trust account to cover bank fees provides neither an appropriate dollar amount nor a method for its calculation; before attorneys are disciplined under this rule for holding small amounts of money in their trust accounts, they need specific standards. This lack of guidance is better remedied by rule change than by panel decision. In re PRB Docket No. 2014.133, 2015 VT 63, ___ Vt., ___, ___ A.3d ___ (mem.).

Respondent had not violated the rule allowing a lawyer to deposit his own funds into a trust account to cover bank fees, as the rule provided no guidance as to what amount was proper and the panel was not prepared to find that the \$157.57 deposited here violated the rule. In re PRB Docket No. 2014.133, 2015 VT 63, ___ Vt., ___, A.3d ___ (mem.).

3. Reprimand. Based on respondent's negligent mental state, the lack of actual injury, and the low potential for injury, a public reprimand was the presumptive sanction when respondent commingled personal and client funds in his client trust account. In re PRB Docket No. 2012.155, 2015 VT 57, ___ Vt. ___, ___ A.3d ___ (mem.).

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Rule 1.15A. TRUST ACCOUNTING SYSTEM

(a) Every lawyer or law firm holding funds of clients or third persons in connection with a representation as defined in Rule 1.15(a)(2) shall hold such funds in one or more accounts in a financial institution or, in appropriate circumstances, a pooled interest-bearing trust account pursuant to Rule 1.15B. An account in which funds are held that are in the lawyer's possession as a result of a representation in a lawyer-client relationship shall be clearly identified as a "trust" account or shall be identified as a fiduciary account, such as an estate, trust, or escrow account, to distinguish such funds from the lawyer's own funds. An account in which funds are held that are in the lawyer's possession as a result of a fiduciary relationship that arises in the course of a lawyer-client relationship or as a result of a court appointment shall be clearly identified as a "fiduciary" account. The lawyer shall take all steps necessary to inform the financial institution of the purpose and identity of all accounts maintained as required in this rule. The lawyer or law firm shall maintain an accounting system for all such accounts that shall include, at a minimum, the following features: **Amended March 7, 2016; eff. May 9, 2016.**

(1) a system showing all receipts and disbursements from the account or accounts with appropriate entries identifying the source of the receipts and the nature of the disbursements;

(2) a record for each client or person for whom property is held, which shall show all receipts and disbursements and carry a running account balance;

(3) records documenting timely notice to each client or person of all receipts and disbursements from the account or accounts; and

(4) records documenting timely reconciliation of all accounts maintained as required by this rule and a single source for identification of all accounts maintained as required in this rule. “Timely reconciliation” means, at a minimum, monthly reconciliation of such accounts. **Amended March 7, 2016; eff. May 9, 2016.**

(b) A lawyer or law firm shall submit to a confidential compliance review of financial records, including trust and fiduciary accounts, by the Professional Responsibility Program’s Disciplinary Counsel. The information derived from such compliance reviews shall not be disclosed by anyone in such a way as to violate the evidentiary, statutory, or constitutional privileges of a lawyer, law firm, client, or other person, or any obligation of confidentiality imposed by these rules, except in accordance with Administrative Order No. 9. A copy of any final report shall be provided to the lawyer or law firm.

(c) The Supreme Court may at any time order an audit of financial records, including trust and fiduciary accounts, of a lawyer or law firm and take such other action as it deems necessary to protect the public.

(d) For purposes of this rule and Rule 1.15B, “financial institution” includes banks, savings and loans associations, credit unions, savings banks and any other businesses or persons that accept and hold funds held by lawyers or law firms as required in this rule.—**Amended June 17, 2009, eff. Sept. 1, 2009.**

Reporter’s Notes—2016 Amendment

Rule 1.15A(a) is amended to make clear that funds held by a lawyer in a “fiduciary account” as further defined by the amendment may be held in an IOLTA account created pursuant to Rule 1.15B “in appropriate circumstances”—that is, when the funds meet the standard of Rule 1.15B(a)(1) that they “are not reasonably expected to earn net interest or dividends” as defined in Rule 1.15B(a)(2)(i). The amendment benefits both the lawyer through saving management costs and the beneficiaries of the interest distributed to the Vermont Bar Foundation pursuant to Rule 1.15B(b)-(c).

Rule 1.15A(a)(4) is amended to require a lawyer to maintain records documenting at least monthly reconciliation of all accounts maintained pursuant to Rule 1.15A. The rule is intended to establish a bright-line meaning for “timely reconciliation.”

Reporter’s Notes — 2009 Amendment

V.R.P.C. 1.15A-1.15C as originally adopted had no equivalent in the Model Rules. They were adopted “in order to include mandatory IOLTA, random auditing, the financial support for random auditing, and reporting of overdrafts.” Reporter’s Notes to V.R.P.C. 1.15 (1999). No Vermont Comments were prepared. The present amendments are designed to clarify and strengthen these rules by eliminating Rule 1.15C and incorporating its provisions as appropriate in Rules 1.15A and 1.15B. The amendments also bring the rules in line with current practice and the terminology and format of the Rules of Professional Conduct.

Rule 1.15A(a) is amended to make clear that the obligation imposed by Rules 1.15A and 1.15B incorporates the definition of “in connection with a representation” in new Rule 1.15(a)(2) as its basis. The amended rule incorporates provisions of former Rule 1.15C(a) requiring that funds be held in a “financial institution” as defined in new Rule 1.15A(d), but Rule 1.15B(a) makes clear that the institution must be approved by the Professional Responsibility Board only if it holds a pooled interest-bearing account. Amended Rule 1.15A(a) adapts the language of Rule 1.15(a)(2) to further make clear that a “trust account” is an account in which funds directly arising from a representation are held and that a “fiduciary account” is an account in which funds held pursuant to a fiduciary relationship are held. The requirement that the financial institution be notified as to the identity of the accounts is taken from former Rule 1.15C.

Rules 1.15A(a)(1)-(4) are amended for consistency with this broader practice and to eliminate specific references to accounting systems that may be obsolete.

Rule 1.15A(b) is amended to substitute for audit of trust and fiduciary accounts by an outside accountant a confidential compliance review of these and other financial records by the Disciplinary Counsel appointed pursuant to Administrative Order 9, Rule 3. The results of this review are to remain confidential unless they become part of the record in a disciplinary proceeding and subject to disclosure pursuant to Administrative Order 9, Rule 12A or B.

Rule 1.15A(c) is amended for consistency with language changes in other provisions of the rule.

Rule 1.15A(d), taken from former Rule 1.15C(f), is made applicable to both Rules 1.15A and B. Broadened language is intended to make clear that the term includes entities in which funds may be held for investment pursuant to client instructions or fiduciary obligations as well as banks and other traditional depositories.

ANNOTATIONS

1. Sanctions. Two concurrent six-month suspensions were proper for an attorney who failed to cooperate with the disciplinary system, failed to communicate with her client and to return his papers, and practiced law where doing so violated the regulation of the legal profession. Furthermore, when respondent sought reinstatement, she would have to provide a detailed explanation of her lack of participation over the course of these proceedings. In re Hongisto, 2010 VT 51, 188 Vt. 533, 988, A.2d 1065 (mem.).

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Rule 1.15B. POOLED INTEREST-BEARING TRUST ACCOUNTS

(a)(1) Every lawyer or law firm holding funds in one or more trust accounts in accordance with Rule 1.15A(a) shall create and maintain a pooled interest-bearing trust account in a financial institution in Vermont that has been approved by the Professional Responsibility Board. Funds so held that are not reasonably expected to earn net interest or dividends, as defined in paragraph (2) of this subdivision, for the client or other person for whom they are held shall be deposited in that account. The interest or dividends accruing on this account, net of any transaction costs, as defined in paragraph (2) of this subdivision, shall be paid over to the Vermont Bar Foundation by the financial institution. No earnings of the account shall be made available to the lawyer or law firm. No lawyer may be disciplined for placing client funds in the pooled interest-bearing account if the lawyer made a good faith determination that the funds fit the provisions of this rule.

(2) For purposes of this rule,

(i) “Net interest or dividends” means the net of interest and dividends earned on a particular amount of one client’s or other person’s funds over the administrative costs, as defined in subparagraph (ii), allocable to that amount. In estimating the gross amount of interest or dividends to be earned on a particular amount of the funds of a client or other person, the lawyer or law firm shall consider the principal amount involved; available interest or dividend rates; and the time the funds are likely to be held, taking into account the likelihood of delay in any relevant proceeding or transaction.

(ii) “Administrative costs” means the portion of the following costs properly allocable to a particular amount of one client’s or other person’s funds paid to a lawyer or law firm:

(A) Financial institution service charges for opening, maintaining, or closing an account, or accounting for the deposit and withdrawal of funds and payment of interest.

(B) Reasonable charges of the lawyer or law firm for opening, maintaining, or closing an account; accounting for the deposit and withdrawal of funds and payment of interest; and obtaining information and preparing or forwarding any returns or reports that may be required by a revenue taxing agency as to the interest and dividends earned on the funds of a client or other person.

(iii) “Transaction costs” means the following costs incident on opening and maintaining a pooled interest-bearing trust account created in accordance with paragraph (1) of this subdivision: Financial institution charges for opening and

maintaining the account, or accounting for the deposit and withdrawal of funds and payment of interest or dividends to the Vermont Bar Foundation.

(b) A lawyer or law firm maintaining a pooled interest-bearing trust account created and maintained as required in this rule shall direct the financial institution:

(1) to remit interest or dividends, as the case may be, to the Vermont Bar Foundation; and

(2) to transmit with each remittance to the Foundation a statement showing the name of the lawyer or law firm for whom the remittance is sent; and

(3) to transmit to the depositing lawyer or law firm at the same time a report showing the amount paid to the Foundation.

(c) The preponderance of the interest or dividends received by the Foundation shall be used by the Foundation to support legal services for the disadvantaged. Remaining funds may be used for public education relating to the courts and legal matters.

(d) A financial institution shall be approved by the Professional Responsibility Board as a depository for pooled interest-bearing trust accounts created and maintained as required in this rule if it shall file with the Board an agreement, in a form provided by the Board, to notify Disciplinary Counsel whenever (1) any properly payable instrument is presented against such a trust account containing insufficient funds, irrespective of whether or not the instrument is honored; and (2) whenever any transaction, no matter the type, causes such an account to be overdrawn. The Supreme Court may establish rules governing approval and termination of approved status for financial institutions, and the Board shall annually publish a list of approved financial institutions. No pooled interest-bearing trust account shall be created or maintained under this rule in any financial institution that does not agree to make such reports. Any such agreement shall apply to all branches of the financial institution and shall not be canceled except upon 30 days' notice in writing to the Board.

(e) The overdraft notification agreement shall provide that all reports made by the financial institution shall be in the format described below. If an instrument presented against insufficient funds is dishonored, the report shall be made simultaneously with, and within the time provided by law, for notice of dishonor. If an instrument presented against insufficient funds is honored, the report shall be made within five banking days of the date of presentation for payment against insufficient funds. If any other transaction causes an account to be overdrawn, the report shall be made simultaneously with the forwarding of the financial institution's customary overdraft notice to the depositor.

(1) In the case of a dishonored instrument, the report shall be identical to the overdraft notice customarily forwarded to the depositor, and shall include a copy of the dishonored instrument, if such a copy is normally provided to depositors;

(2) In the case of instruments that are presented against insufficient funds but which instruments are honored, the report shall identify the financial institution, the lawyer or law firm, the account number, the date of presentation for payment and the date paid, as well as the amount of overdraft created thereby.

(3) In the case of an overdraft caused by any other transaction, the report shall be a copy of the overdraft notice sent to the depositor by the financial institution.

(f) Every lawyer practicing or admitted to practice in Vermont shall, as a condition thereof, be conclusively deemed to have consented to the reporting and production requirements mandated by this rule.

(g) Nothing herein shall preclude a financial institution from charging a particular lawyer or law firm for the reasonable cost of producing the reports and records required by this rule.

(h) "Properly payable" refers to an instrument which, if presented in the normal course of business, is in a form requiring payment under the laws of Vermont.

(i) “Notice of dishonor” refers to the notice which a financial institution is required to give, under the laws of Vermont, upon presentation of an instrument which the institution dishonors.—Amended June 17, 2009, eff. Sept. 1, 2009; Dec. 21, 2010, eff. Feb. 21, 2011.

Historical Citation

Amended June 17, 2009, eff. Sept. 1, 2009; Dec. 21, 2010, eff. Feb. 21, 2011.

Reporter’s Notes — 2011 Amendment

Rule 1.15B(d) is amended at the request of the Professional Responsibility Board to modernize and clarify the operation of the rule. The amendment makes clear that institutions must notify Disciplinary Counsel, rather than the Board, not only when an instrument presented against insufficient funds is honored or dishonored, but whenever any transaction— whether electronic, paper, wire, or other—causes an overdraft to an attorney trust account. The amendment reflects the evolving nature of banking practices and the fact that some newer types of transactions do not involve an instrument being presented against an account: for example, Automated Clearing House (ACH) transactions.

Conforming changes are made in Rule 1.15B(e).

Reporter’s Notes — 2009 Amendment

V.R.P.C. 1.15B has no equivalent in the Model Rules. The present amendments to this rule and the abrogation of former Rule 1.15C are intended to make clear that every lawyer or law firm holding client funds in a trust account pursuant to Rule 1.15A(a) must maintain a pooled interest-bearing account for “IOLTA” (Interest on Lawyers’ Trust Accounts) funds —client or third-party funds that would not earn interest or dividends net of administrative costs if separately accounted for because they are of a small amount or are held for a period of short duration. These provisions are based in part on Maine Bar Rule 3.6(e), which, with minor changes, will become Maine Rule of Professional Conduct 1.15 effective August 1, 2009.

The interest or dividends on the pooled account, which may be significant, are to be paid to the Vermont Bar Foundation pursuant to Rules 1.15B(b) and (c) to support legal services for the poor or for public education on the legal system. In *Brown v. Legal Foundation of Washington*, 538 U.S. 216 (2003), the Supreme Court in a five to four decision upheld an IOLTA program against a Fifth Amendment Takings Clause challenge because only client funds that would individually earn no net interest were involved.

Rule 1.15B makes clear that, in contrast to trust accounts that do not meet the “net interest” requirement, and to fiduciary accounts, pooled interest-bearing accounts must be maintained only in Vermont institutions that have been approved by the Professional Responsibility Board on the basis of an agreement that the institution will notify the Board of an overdraft on any such account held by it. The provisions of former Rule 1.15C(b)-(f) spelling out the details for implementation of this requirement have been adapted as Rule 1.15B(d)-(i).

The overdraft notification requirement is necessary for pooled interest-bearing accounts both because an overdraft necessarily affects the funds of clients other than the one to whose benefit an overdrawn instrument may have been written and because no single client has sufficient interest in or knowledge of the account to police its use. By contrast, a non-pooled trust account may be readily monitored and overseen by the client, and a fiduciary account is similarly subject to scrutiny by the beneficiary and other private and public parties with an interest in the funds. Compliance review and audit of such accounts pursuant to Rule 1.15B(b) or (c) provide further safeguards. From the perspective of the client or beneficiary, it is clearly preferable that the lawyer have the widest possible discretion to deposit or invest funds at the best possible terms regardless of the location and nature of the institution.

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Rule 1.15C. REPEALED. ORDER JUNE 17, 2009, EFF. SEPT. 1, 2009.

Reporter’s Notes — 2009 Amendment

Rule 1.15C, as amended in 2001, is deleted in its entirety for the reasons stated in the Reporter’s Notes to the simultaneous amendment of Rule 1.15B. Appropriate provisions of the former rule have been incorporated with necessary modifications in amended Rules 1.15A and 1.15B. See Reporter’s Notes to those amendments.

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Rule 1.16. DECLINING OR TERMINATING REPRESENTATION

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

- (1) the representation will result in violation of the rules of professional conduct or other law;
- (2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or
- (3) the lawyer is discharged.

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:

- (1) withdrawal can be accomplished without material adverse effect on the interests of the client;
- (2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;
- (3) the client has used the lawyer's services to perpetrate a crime or fraud;
- (4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;
- (5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;
- (6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or
- (7) other good cause for withdrawal exists.

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

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law.—Amended June 17, 2009, eff. Sept. 1, 2009.

Comment

[1] A lawyer should not accept representation in a matter unless it can be performed competently, promptly, without improper conflict of interest and to completion. Ordinarily, a representation in a matter is completed when the agreed-upon assistance has been concluded. See Rules 1.2(c) and 6.5. See also Rule 1.3, Comment [4].

Mandatory Withdrawal

[2] A lawyer ordinarily must decline or withdraw from representation if the client demands that the lawyer engage in conduct that is illegal or violates the Rules of Professional Conduct or other law. The lawyer is not obliged to decline or withdraw simply because the client suggests such a course of conduct; a client may make such a suggestion in the hope that a lawyer will not be constrained by a professional obligation.

[3] When a lawyer has been appointed to represent a client, withdrawal ordinarily requires approval of the appointing authority. See also Rule 6.2. Similarly, court approval or notice to the court is often required by applicable law before a lawyer withdraws from pending litigation. See, e.g., V.R.C.P. 79.1(f), V.R.Cr.P. 44.2(c), V.R.F.P. 15(f), V.R.P.P. 79.1(e). Difficulty may be encountered if withdrawal is based on the client's demand that the lawyer engage in unprofessional conduct. The court may request an explanation for the withdrawal, while the lawyer may be bound to keep confidential the facts that would constitute such an explanation. The lawyer's statement that professional considerations require termination of the representation ordinarily should be accepted as sufficient. Lawyers should be mindful of their obligations to both clients and the court under Rules 1.6 and 3.3.

Discharge

[4] A client has a right to discharge a lawyer at any time, with or without cause, subject to liability for payment for the lawyer's services. Where future dispute about the withdrawal may be anticipated, it may be advisable to prepare a written statement reciting the circumstances.

[5] Whether a client can discharge appointed counsel may depend on applicable law. A client seeking to do so should be given a full explanation of the consequences. These consequences may include a decision by the appointing authority that appointment of successor counsel is unjustified, thus requiring self-representation by the client.

[6] If the client has severely diminished capacity, the client may lack the legal capacity to discharge the lawyer, and in any event the discharge may be seriously adverse to the client's interests. The lawyer should make special effort to help the client consider the consequences and may take reasonably necessary protective action as provided in Rule 1.14.

Optional Withdrawal

[7] A lawyer may withdraw from representation in some circumstances. The lawyer has the option to withdraw if it can be accomplished without material adverse effect on the client's interests. Withdrawal is also justified if the client persists in a course of action that the lawyer reasonably believes is criminal or fraudulent, for a lawyer is not required to be associated with such conduct even if the lawyer does not further it. Withdrawal is also permitted if the lawyer's services were misused in the past even if that would materially prejudice the client. The lawyer also may withdraw where the client insists on taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement.

[8] A lawyer may withdraw if the client refuses to abide by the terms of an agreement relating to the representation, such as an agreement concerning fees or court costs or an agreement limiting the objectives of the representation.

Assisting the Client upon Withdrawal

[9] Even if the lawyer has been unfairly discharged by the client, a lawyer must take all reasonable steps to mitigate the consequences to the client. The lawyer may retain papers as security for a fee only to the extent permitted by law. The availability of such a retaining lien is limited where the fee is disputed or, by the overall effect of Rule 1.16, where harm to the client could result from the lawyer's retention of the file. See Rule 1.15.

Reporter's Notes – 2009 Amendment

V.R.P.C. 1.16 is amended to conform to changes in Model Rule 1.16, retaining a sentence in Comment [9] concerning availability of a retaining lien. See Reporter's Notes to V.R.P.C. 1.16 (1999).

The ABA Reporter's Explanation is as follows:

TEXT:

1. Paragraph (b): Clarify significance of permission to withdraw "without material adverse effect on the interests of the client"

No change in substance is intended. This proposal is intended to clarify that the lawyer may withdraw for any reason if "withdrawal can be accomplished without material adverse effect on the interests of the client," or, even if there will be such material adverse effect, if the lawyer has good cause, as set forth in paragraphs (b)(2) through (6).

2. Paragraph (b)(4): Alter requirement for permissive withdrawal when client and lawyer disagree over course of representation

a. Substitute "taking action" for "pursuing an objective"

The Commission recommends that a lawyer be permitted to withdraw from representation whenever a client is insisting that the lawyer take action that the lawyer finds repugnant or, in some instances, when the lawyer has a fundamental disagreement with the action proposed by the client, regardless of whether the action concerns the client's objectives or the means of achieving those objectives.

b. Substitute "with which the lawyer has a fundamental disagreement" for "imprudent"

Allowing a lawyer to withdraw merely because the lawyer believes that the client's objectives or intended action is "imprudent" permits the lawyer to threaten to withdraw in order to prevail in almost any dispute with a client, thus detracting from the client's ability to direct the course of the representation. Nevertheless, the Commission believes that a lawyer ought to be permitted to withdraw when the disagreement over objectives or means is so fundamental that the lawyer's autonomy is seriously threatened.

c. Change first word from "a" to "the"

This is a stylistic change to conform with the other subparagraphs of (b).

3. Paragraph (c): Remind lawyers of court requirements of notice or permission to withdraw from pending litigation

Some courts require only that the lawyer notify the court of withdrawal, for example, where a substitution of counsel is being made with the consent of the client. The Commission recommends following the practice of

several states that have added the proposed first sentence in order to remind lawyers of their obligations under court rules. [See, e.g., V.R.C.P. 79.1(f), V.R.Cr.P. 44.2(c), V.R.F.P. 15(f), V.R.P.P. 79.1(e).]

4. Paragraph (d): Add reference to return of unearned fees and unexpended advanced expenses

This change corresponds to the change in Rule 1.15, which requires lawyers to segregate advanced fees and expenses in a client trust account.

COMMENT:

[1] The additional material addresses the question of when a representation is completed and crossreferences other Rules, including those in which the services are limited in scope or intended to be short-term in nature. No change in substance is intended.

[3] Three changes are proposed. None of them is substantive. The first proposal is to add a sentence regarding the possibility that a court may require either approval or notice before a lawyer withdraws from pending litigation. The second is to substitute “request” for “wish” for reasons of style. The third is to add a cross-reference to Rules 1.6 and 3.3 regarding any colloquy with a court requesting an explanation for the lawyer’s request to withdraw.

[6] These changes are proposed in light of the changes made in Rule 1.14.

[7] The proposed change tracks the proposed change to paragraph (b)(4).

[9] The Commission recommends adding a crossreference to Rule 1.15 on client property. It also recommends that the last sentence be deleted because its meaning is unclear.

Reporter’s Notes

The third sentence of the final paragraph of the comment has been added to reflect the holding of *In re Bucknam*, 160 Vt. 355, 628 A.2d 922 (1993).

ANNOTATIONS

1. Sanctions. Two concurrent six-month suspensions were proper for an attorney who failed to cooperate with the disciplinary system, failed to communicate with her client and to return his papers, and practiced law where doing so violated the regulation of the legal profession. Furthermore, when respondent sought reinstatement, she would have to provide a detailed explanation for her lack of participation over the course of these proceedings. *In re Hongisto*, 2010 VT 51, 188 Vt. 553, 998 A.2d 1065 (mem.).

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Rule 1.17. SALE OF LAW PRACTICE

A lawyer or a law firm may sell or purchase a law practice, or an area of practice, including good will, if the following conditions are satisfied:

(a) The seller ceases to engage in the private practice of law, or in the area of practice that has been sold, in the geographic area in which the practice has been conducted;

(b) The entire practice, or the entire area of practice, is sold to one or more lawyers or law firms;

(c) The seller gives written notice to each of the seller’s clients regarding:

(1) the proposed sale;

(2) the client’s right to retain other counsel or to take possession of the file; and

(3) the fact that the client’s consent to the transfer of the client’s files will be presumed if the client does not take any action or does not otherwise object within ninety (90) days of receipt of the notice.

If a client cannot be given notice, the representation of that client may be transferred to the purchaser only upon entry of an order so authorizing, by a court having jurisdiction. The seller may disclose to the court in camera information relating to the representation only to the extent necessary to obtain an order authorizing the transfer of a file.

(d) The fees charged clients shall not be increased by reason of the sale.—Amended June 17, 2009, eff. Sept. 1, 2009.

Comment

[1] The practice of law is a profession, not merely a business. Clients are not commodities that can be purchased and sold at will. Pursuant to this rule, when a lawyer or an entire firm ceases to practice, or ceases to practice in an area of law, and other lawyers or firms take over the representation, the selling lawyer or firm may obtain compensation for the reasonable value of the practice as may withdrawing partners of law firms. See Rules 5.4 and 5.6.

Termination of Practice by the Seller

[2] The requirement that all of the private practice, or all of an area of practice, be sold is satisfied if the seller in good faith makes the entire practice, or the area of practice, available for sale to the purchasers. The fact that a number of the seller's clients decide not to be represented by the purchasers but take their matters elsewhere, therefore, does not result in a violation. Return to private practice as a result of an unanticipated change in circumstances does not necessarily result in a violation. For example, a lawyer who has sold the practice to accept an appointment to judicial office does not violate the requirement that the sale be attendant to cessation of practice if the lawyer later resumes private practice upon being defeated in a contested or a retention election for the office or resigns from a judiciary position.

[3] The requirement that the seller cease to engage in the private practice of law does not prohibit employment as a lawyer on the staff of a public agency or a legal services entity which provides legal services to the poor, or as in-house counsel to a business.

[4] The rule permits a sale of an entire practice attendant upon retirement from the private practice of law within the geographic area. Its provisions, therefore, accommodate the lawyer who sells the practice upon the occasion of moving to another state.

[5] This rule also permits a lawyer or law firm to sell an area of practice. If an area of practice is sold and the lawyer remains in the active practice of law, the lawyer must cease accepting any matters in the area of practice that has been sold, either as counsel or co-counsel or by assuming joint responsibility for a matter in connection with the division of a fee with another lawyer as would otherwise be permitted by Rule 1.5(e). For example, a lawyer with a substantial number of estate planning matters and a substantial number of probate administration cases may sell the estate planning portion of the practice but remain in the practice of law by concentrating on probate administration; however, that practitioner may not thereafter accept any estate planning matters. Although a lawyer who leaves a geographical area typically would sell the entire practice, this rule permits the lawyer to limit the sale to one or more areas of the practice, thereby preserving the lawyer's right to continue practice in the areas of the practice that were not sold.

Sale of Entire Practice or Entire Area of Practice

[6] The rule requires that the seller's entire practice, or an entire area of practice, be sold. The prohibition against sale of less than an entire practice area protects those clients whose matters are less lucrative and who might find it difficult to secure other counsel if a sale could be limited to substantial fee-generating matters. The purchasers are required to undertake all client matters in the practice or practice area, subject to client consent. This requirement is satisfied, however, even if a purchaser is unable to undertake a particular client matter because of a conflict of interest.

Client Confidences, Consent and Notice

[7] Negotiations between seller and prospective purchaser prior to disclosure of information relating to a specific representation of an identifiable client no more violate the confidentiality provisions of Rule 1.6 than do preliminary discussions concerning the possible association of another lawyer or mergers between firms, with respect to which client consent is not required. Providing the purchaser access to client-specific information relating to the representation and to the file, however, requires client consent. The rule provides that before such information can be disclosed by the seller to the purchaser the client must be given actual written notice of the contemplated sale, including the identity of the purchaser, and must be told that the decision to consent or make other arrangements must be made within 90 days. If nothing is heard from the client within that time, consent to the sale is presumed.

[8] A lawyer or law firm ceasing to practice cannot be required to remain in practice because some clients cannot be given actual notice of the proposed purchase. Since these clients cannot themselves consent to the purchase or direct any other disposition of their files, the rule requires an order from a court having jurisdiction authorizing their transfer or other disposition. The court can be expected to determine whether reasonable efforts to locate the client have been exhausted, and whether the absent client's legitimate interests will be served by authorizing the transfer of the file so that the purchaser may continue the representation. Preservation of client confidences requires that the petition for a court order be considered in camera. (A procedure by which such an order can be obtained needs to be established in jurisdictions in which it presently does not exist.)

[9] All the elements of client autonomy, including the client's absolute right to discharge a lawyer and transfer the representation to another, survive the sale of the practice or area of practice.

Fee Arrangements Between Client and Purchaser

[10] The sale may not be financed by increases in fees charged the clients of the practice. Existing agreements between the seller and the client as to fees and the scope of the work must be honored by the purchaser.

Other Applicable Ethical Standards

[11] Lawyers participating in the sale of a law practice or a practice area are subject to the ethical standards applicable to involving another lawyer in the representation of a client. These include, for example, the seller's obligation to exercise competence in identifying a purchaser qualified to assume the practice and the purchaser's obligation to undertake the representation competently (see Rule 1.1); the obligation to avoid disqualifying conflicts, and to secure the client's informed consent for those conflicts that can be agreed to (see Rule 1.7 regarding conflicts and Rule 1.0(e) for the definition of informed consent); and the obligation to protect information relating to the representation (see Rules 1.6 and 1.9).

[12] If approval of the substitution of the purchasing lawyer for the selling lawyer is required by the rules of any tribunal in which a matter is pending, such approval must be obtained before the matter can be included in the sale (see Rule 1.16).

Applicability of the Rule

[13] This rule applies to the sale of a law practice by representatives of a deceased, disabled or disappeared lawyer. Thus, the seller may be represented by a nonlawyer representative not subject to these rules. Since, however, no lawyer may participate in a sale of a law practice which does not conform to the requirements of this rule, the representatives of the seller as well as the purchasing lawyer can be expected to see to it that they are met.

[14] Admission to or retirement from a law partnership or professional association, retirement plans and similar arrangements, and a sale of tangible assets of a law practice, do not constitute a sale or purchase governed by this rule.

[15] This rule does not apply to the transfers of legal representation between lawyers when such transfers are unrelated to the sale of a practice or an area of practice.

Reporter's Notes — 2009 Amendment

V.R.P.C. 1.17 is amended to conform to changes in Model Rule 1.17, retaining minor changes in Comments [4] and [5] that pertain to the use of "geographical area" rather than "jurisdiction" to define the applicability of the rule in V.R.C.P. 1.17(a).

The ABA Reporter's Explanation is as follows:

TEXT:

1. Paragraph (b): Eliminate requirement that sale be to single buyer

Paragraph (b) of the current Rule requires that the practice be sold "as an entirety" to a single lawyer or firm. The justification offered is that purchasers would otherwise take only a seller's profitable cases and leave some clients unrepresented.

The Commission believes that the present requirement is unduly restrictive and potentially disserves clients. While it remains important to ensure the disposition of the entire caseload, it is not necessary to require that all cases must be sold to a single buyer. For example, it may make better sense to allow the sale of family-law cases to a family lawyer and bankruptcy cases to a bankruptcy lawyer. Common sense would suggest the lawyer should sell the cases to the most competent practitioner and not be limited by such a "single buyer" rule, and paragraph (b) has been redrafted accordingly.

2. Paragraphs (c)(2) and (d): Eliminate buyer's right to refuse representation unless seller's clients agree to pay increased fee

Paragraph (d) of the [former] Rule states that the fees charged clients shall not be increased by reason of the sale. However, it also allows the buyer of a practice to tell the seller's clients that the buyer will not work on their cases unless they agree to pay a greater fee than they had agreed to pay the seller. The only limit is that the buyer may not charge the seller's clients more than the buyer charges the buyer's other clients for "substantially similar services." This is problematical because the seller could not unilaterally abrogate the fee agreement as a matter of contract law. The seller could have withdrawn as permitted under Rule 1.16, but the seller certainly could not have refused to continue the representation unless the client agreed to a modification of the fee contract. In this regard, the Commission thinks the buyer should stand in the shoes of the seller and has modified paragraph (d) accordingly. This proposal is in accord with the rules of California, Colorado (written contracts only), Florida, Iowa, Minnesota (must honor for one year), New Jersey, New York, North Dakota, Oregon, Tennessee (proposed rule), Virginia and Wisconsin.

The Commission proposes to delete paragraph (c)(2) in light of the modification in paragraph (d). Its only purpose was to require that notice be given to the seller's clients of the buyer's right to require increased fees under paragraph (d), which right has now been eliminated.

COMMENT:

[1] Minor wording changes have been made as part of the proposed change permitting sale of a practice to more than one lawyer or firm.

[2] Minor changes have been made as part of the proposed change permitting sale of a practice to more than one lawyer or firm and to clarify the third sentence.

[5] This Comment has been changed to explain the rationale for requiring that an entire practice be sold, albeit not to a single purchaser.

[6] Material has been deleted from the Comment because of the Commission's decision to prohibit purchasers from stating they will not continue the representation except at their usual fee.

[9] In accord with the change in the Rule text, the language explaining the right to a unilateral fee increase has been deleted. See discussion of paragraphs (c)(2) and (d).

Given the change in the Rule text, [former] Comment [10] is no longer necessary and has been deleted.

[10] The Commission is recommending that throughout the Rules the phrase "consent after consultation" be replaced with "gives informed consent," as defined in Rule 1.0(e). No change in substance is intended.

Reporter's Notes — 1999 Amendment

This represents a substantial change from present Vermont practice where it is impermissible to sell "good will" There is no counterpart to this rule in the Vermont Code.

Rule 1.18. DUTIES TO PROSPECTIVE CLIENT

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

(b) Even when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation, except as Rule 1.6 would require or permit or as Rule 1.9 would permit with respect to information of a former client.

(c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).

(d) When the lawyer has received disqualifying information as defined in paragraph (c), representation is permissible if:

(1) both the affected client and the prospective client have given informed consent, confirmed in writing, or:

(2) the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; and

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

(ii) written notice is promptly given to the prospective client.

—Added June 17, 2009, eff. Sept. 1, 2009.

Comment

[1] Prospective clients, like clients, may disclose information to a lawyer, place documents or other property in the lawyer's custody, or rely on the lawyer's advice. A lawyer's discussions with a prospective client usually are limited in time and depth and leave both the prospective client and the lawyer free (and sometimes required) to proceed no further. Hence, prospective clients should receive some but not all of the protection afforded clients.

[2] Not all persons who communicate information to a lawyer are entitled to protection under this rule. A person who communicates information unilaterally to a lawyer, such as through an unsolicited e-mail or other communication, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a

client-lawyer relationship, is not a “prospective client” within the meaning of paragraph (a). A person who participates in an initial consultation, or communicates information, with the intent to disqualify a lawyer from representing a client with materially adverse interests is not acting in good faith and is not “a prospective client” entitled to the protections of paragraph (b) or (c) of this rule. A person’s intent to disqualify may be inferred from the circumstances.

[3] It is often necessary for a prospective client to reveal information to the lawyer during an initial consultation prior to the decision about formation of a client-lawyer relationship. The lawyer often must learn such information to determine whether there is a conflict of interest with an existing client and whether the matter is one that the lawyer is willing to undertake. Paragraph (b) prohibits the lawyer from using or revealing that information, except as permitted by Rule 1.9, even if the client or lawyer decides not to proceed with the representation. The duty exists regardless of how brief the initial conference may be.

[4] In order to avoid acquiring disqualifying information from a prospective client, a lawyer considering whether or not to undertake a new matter should limit the initial interview to only such information as reasonably appears necessary for that purpose. Where the information indicates that a conflict of interest or other reason for nonrepresentation exists, the lawyer should so inform the prospective client or decline the representation. If the prospective client wishes to retain the lawyer, and if consent is possible under Rule 1.7, then consent from all affected present or former clients must be obtained before accepting the representation.

[5] A lawyer may condition conversations with a prospective client on the person’s informed consent that no information disclosed during the consultation will prohibit the lawyer from representing a different client in the matter. See Rule 1.0(e) for the definition of informed consent. If the agreement expressly so provides, the prospective client may also consent to the lawyer’s subsequent use of information received from the prospective client.

[6] Even in the absence of an agreement, under paragraph (c), the lawyer is not prohibited from representing a client with interests adverse to those of the prospective client in the same or a substantially related matter unless the lawyer has received from the prospective client information that could be significantly harmful if used in the matter.

[7] Under paragraph (c), the prohibition in this rule is imputed to other lawyers as provided in Rule 1.10, but, under paragraph (d)(1), imputation may be avoided if the lawyer obtains the informed consent, confirmed in writing, of both the prospective and affected clients. In the alternative, imputation may be avoided if the conditions of paragraph (d)(2) are met and all disqualified lawyers are timely screened and written notice is promptly given to the prospective client. See Rule 1.0(k) (requirements for screening procedures). Paragraph (d)(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.

[8] Notice, including a general description of the subject matter about which the lawyer was consulted, and of the screening procedures employed, generally should be given as soon as practicable after the need for screening becomes apparent.

[9] For the duty of competence of a lawyer who gives assistance on the merits of a matter to a prospective client, see Rule 1.1. For a lawyer’s duties when a prospective client entrusts valuables or papers to the lawyer’s care, see Rule 1.15.

Reporter’s Notes – 2009 Amendment

V.R.P.C. 1.18 is a new provision in the Vermont Rules of Professional Conduct. It adopts Model Rule 1.18, also a new provision, with the addition of “in good faith” in Rule 1.18(a) and language in Comment [2] taken from Pa. R.P.C. 1.18, Comment [2], to address the problem of the individual whose intent is to disqualify the lawyer from representing others in a matter.

The ABA Reporter’s Explanation is as follows:

Rule 1.18 is a proposed new Rule in response to the Commission’s concern that important events occur in the period during which a lawyer and prospective client are considering whether to form a client-lawyer relationship. For the most part, the current Model Rules do not address that pre-retention period.

TEXT:

1. Paragraph (a): Define prospective client

Paragraph (a) defines the limited circumstances to which this Rule applies by defining who qualifies as a “prospective client [adding a Vermont requirement of good faith in seeking representation].”

2. Paragraph (b): Duty of confidentiality owed prospective client

Paragraph (b) identifies the duty to treat all communications with a prospective client as confidential. This obligation is a well-settled matter under the law of attorney-client privilege, and the fact that Model Rule 1.9 does not now technically cover these communications is an omission that this proposal corrects.

3. Paragraph (c): Prohibit later representation adverse to prospective client

Paragraph (c) extends the application of Rule 1.9 to prohibit representation adverse to the prospective client in the same or a substantially related matter. Unlike Rule 1.9, however, this Rule does so only if the lawyer received information from the prospective client that could be “significantly harmful” to that person in the later representation.

The prospective client situation justifies that different treatment because, prior to the representation decision, there is an inevitable period in which it is in the interest of the prospective client to share enough information with the lawyer to determine whether there is a conflict of interest or simple incompatibility. The lawyer may learn very early in the consultation, for example, that the party adverse to the prospective client is a client of the lawyer’s firm. If the discussion stops before “significantly harmful” information is shared, it seems that the law firm’s regular client should not be denied counsel of its choice if a substantially related matter arises.

Paragraph (c) also extends the prohibition of this Rule to associated lawyers, except as provided in paragraph (d).

4. Paragraph (d)(1): Representation permitted with client consent

Paragraph (d)(1) makes clear that the prohibition imposed by this Rule can be waived with the informed consent, confirmed in writing, of both the former prospective client and the client on whose behalf the lawyer later plans to take action adverse to the former prospective client. The expression of this requirement is parallel to that in Rules 1.7 and 1.9.

5. Paragraph (d)(2): Screening lawyer who conferred with prospective client

In the event that “significantly harmful” information is revealed, paragraph (d)(2) provides that the lawyer who received the information may be screened from any involvement in the subsequent matter, and others in the law firm may represent the adverse party, but only if the personally disqualified lawyer acted reasonably in attempting to limit that lawyer’s exposure to potentially harmful information.

COMMENT:

[1] This Comment highlights three ways in which lawyers may assume obligations to prospective clients: disclosure of information, taking possession of documents or property and giving legal advice. It also explains the inevitably tentative quality of the initial consultation and suggests the reason for giving prospective clients somewhat less than the protection offered former clients by Rule 1.9.

[2] This Comment explains that lawyers are not disqualified when a person unilaterally communicates information to the lawyer without any reasonable expectation that the lawyer will agree to discuss the possibility of forming a client-lawyer relationship [or approaches the lawyer with the intent to disqualify her or him from representing others].

[3] This Comment explains the lawyer’s obligation to preserve confidences of the prospective client, no matter what right the lawyer or law firm may have to undertake later adverse representation.

[4] This Comment first explains that a lawyer should obtain only the information required to determine whether to undertake the representation. If a conflict of interest is found to exist, the lawyer should decline the representation or obtain the required consent from all affected clients.

[5] This Comment identifies consent in advance of the consultation as one way to avoid later concerns about adverse use of the information obtained. Such an option was expressly approved in ABA Standing Committee on Ethics and Professional Responsibility Formal Opinion 90-358.

[6] This Comment reiterates the right of a lawyer to undertake representation adverse to a prospective client from whom no “significantly harmful” information was obtained.

[7] This Comment describes how the imputation otherwise required by paragraph (c) may be avoided by either obtaining the informed consent of the prospective and affected clients under paragraph (d)(1) or by screening under the conditions stated in paragraph (d)(2).

[8] This Comment addresses the requirements of paragraph (d)(2)(i) and (ii).

[9] This Comment is a cross-reference to existing Rules that deal with two of the three issues identified in Comment [1]. Any advice a lawyer gives must be competent under Rule 1.1, and Rule 1.15 requires a lawyer to care for property of “third persons,” which would include prospective clients.

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COUNSELOR

Rule 2.1. ADVISOR

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.— Amended June 17, 2009, eff. Sept. 1, 2009.

Comment

Scope of Advice

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

[2] Advice couched in narrowly 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. It is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice. Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied.

[3] A client may expressly or impliedly ask the lawyer for purely technical advice. When such a request is made by a client experienced in legal matters, the lawyer may accept it at face value. 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] Matters that go beyond strictly legal questions may also be in the domain of another profession. Family matters can involve problems within the professional competence of psychiatry, clinical psychology or social work; business matters can involve problems within the competence of the accounting profession or of financial specialists. Where consultation with a professional in another field is itself something a competent lawyer would recommend, the lawyer should make such a recommendation. At the same time, a lawyer's advice at its best often consists of recommending a course of action in the face of conflicting recommendations of experts.

Offering Advice

[5] In general, a lawyer is not expected to give advice until asked by the client. 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. Similarly, when a matter is likely to involve litigation, it may be necessary under Rule 1.4 to advise the client of alternative forms of dispute resolution that might reasonably be pursued to attempt to resolve the legal dispute or to reach the legal objective sought. Common forms of ADR include arbitration, mediation, and early neutral evaluation. Cf. V.R.C.P. 16.3. 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.

Reporter's Notes — 2009 Amendment

The Comment to V.R.P.C. 2.1 is amended to conform to changes in the Comment to Model Rule 2.1, incorporating in Comment [5] language referring to advice about ADR methods that was not in the original Model Rules Comment. See Reporter's Notes to V.R.P.C. 2.1 (1999).

The ABA Reporter's Explanation is as follows:

TEXT:

No change is proposed to the text of this Rule.

COMMENT:

[5] The Commission has proposed an addition to this paragraph to remind lawyers that informing a client of various forms of dispute resolution may be required under Rule 1.4, i.e., when a different form of dispute resolution would constitute a reasonable alternative to litigation. This addition is proposed in recognition of the increasingly important role being played by alternative dispute resolution in litigation. [The language adapts that of the original V.R.P.C. Comment. See above.] The remaining changes are for clarification and style.

Reporter's Notes

The drafters are mindful of recent actions in some jurisdictions to include in the text of Rule 2.1 a requirement that the lawyer discuss alternative dispute resolution methods where appropriate. The majority of the drafters felt that, while ADR is an important tool, discussion of it with a client should not become an ethical mandate. Additional language was added to the comment to highlight the importance of the issue.

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Rule 2.2. REPEALED. ORDER JUNE 17, 2009, EFF. SEPT. 1, 2009.

Reporter's Notes — 2009 Amendment

V.R.P.C. 2.2 and the Comment thereto, like Model Rule 2.2 and its Comment, are entirely deleted. Issues pertaining to common representation are now covered by V.R.P.C. 1.7 and the Comment thereto. The role of the lawyer as mediator or other neutral is now covered by new V.R.P.C. 2.4 and its Comment. These changes recognize the potential confusion between “intermediation” and mediation that was created by original Model Rule 2.2, as pointed out in Reporter's Notes to V.R.P.C. 2.2 (1999).

The ABA Reporter's Explanation is as follows:

TEXT:

The Commission recommends deleting Rule 2.2 and moving any discussion of common representation to the Rule 1.7 Comment. The Commission is convinced that neither the concept of “intermediation” (as distinct from either “representation” or “mediation”) nor the relationship between Rules 2.2 and 1.7 has been well understood. Prior to the adoption of the Model Rules, there was more resistance to the idea of lawyers helping multiple clients to resolve their differences through common representation; thus, the original idea behind Rule 2.2 was to permit common representation when the circumstances were such that the potential benefits for the clients outweighed the potential risks. Rule 2.2, however, contains some limitations not present in Rule 1.7; for example, a flat prohibition on a lawyer continuing to represent one client and not the other if intermediation fails, even if neither client objects. As a result, lawyers not wishing to be bound by such limitations may choose to consider the representation as falling under Rule 1.7 rather than Rule 2.2, and there is nothing in the Rules themselves that clearly dictates a contrary result.

Rather than amending Rule 2.2, the Commission believes that the ideas expressed therein are better dealt with in the Comment to Rule 1.7. There is much in Rule 2.2 and its Comment that applies to all examples of common representation and ought to appear in Rule 1.7. Moreover, there is less resistance to common representation today than there was in 1983; thus, there is no longer any particular need to establish the propriety of common representation through a separate Rule.

COMMENT:

[1] This Comment has been deleted. The Commission believes the term “common representation” is preferable to “intermediation.”

[2] This Comment has been deleted as no longer necessary since the term “intermediation” has been eliminated.

[3] This Comment has been deleted. Some of the material may be found in the Comment to Rule 1.7.

[4] This Comment has been deleted. Some of the material may be found in the Comment to Rule 1.7.

[5] This Comment has been deleted as no longer necessary after the elimination of the term “intermediation.”

[6] This Comment has been deleted. Some of the material may be found in the Comment to Rule 1.7.

[7] This Comment has been deleted. Some of the material may be found in the Comment to Rule 1.7.

[8] This Comment has been deleted. Some of the material may be found in the Comment to Rule 1.7.

[9] This Comment has been deleted. Some of the material may be found in the Comment to Rule 1.7.

[10] This Comment has been deleted. Some of the material may be found in the Comment to Rule 1.7.

Reporter's Notes

This rule has no counterpart in the Vermont Code. Its purpose is to establish guidelines and procedures pursuant to which a lawyer may undertake joint representation of multiple clients with full disclosure and consent when the lawyer reasonably believes that there will be no adverse effect on any client's interests. The rule is thus consistent with the basic conflict provisions of Rule 1.7. It is not intended to permit representation of adverse interests in litigation. See comment to Rule 1.7. In the transactional setting, the rule provides for a case-by-case determination of the advantages and risks of joint representation. The clients and the lawyer must equally be satisfied that the advantages outweigh the risks. Under the rule, there is no longer an absolute prohibition of such forms of joint representation as representation of buyer and seller in a real estate transaction. The lawyer is free to make a determination in each case whether joint representation is permissible under the guidelines of the rule. It should be emphasized that, as the comment points out, the rule is not intended to apply in the situation where the lawyer who offers mediation or other alternative dispute resolution services is employed by two or more parties or appointed by a court to provide those services. In such a case, the lawyer does not have a client-lawyer relationship with any of the parties. The lawyer's conduct is governed by appropriate provisions of court rules or ethical codes applicable to ADR professionals. The reference in the comment to mediation and arbitration as forms of

“intermediation” permitted by the rule should be understood as describing the use of those processes as incidental features of a joint representation that has a primary purpose other than dispute resolution.

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Rule 2.3. EVALUATION FOR USE BY THIRD PERSONS

(a) A lawyer may provide an evaluation of a matter affecting a client for the use of someone other than the client if the lawyer reasonably believes that making the evaluation is compatible with other aspects of the lawyer’s relationship with the client.

(b) When the lawyer knows or reasonably should know that the evaluation is likely to affect the client’s interests materially and adversely, the lawyer shall not provide the evaluation unless the client gives informed consent.

(c) Except as disclosure is authorized in connection with a report of an evaluation, information relating to the evaluation is otherwise protected by Rule 1.6.—Amended June 17, 2009, eff. Sept. 1, 2009.

Comment

Definition

[1] An evaluation may be performed at the client’s direction or when impliedly authorized in order to carry out the representation. See Rule 1.2. Such an evaluation may be for the primary purpose of establishing information for the benefit of third parties; for example, an opinion concerning the title of property rendered at the behest of a vendor for the information of a prospective purchaser, or at the behest of a borrower for the information of a prospective lender. In some situations, the evaluation may be required by a government agency; for example, an opinion concerning the legality of the securities registered for sale under the securities laws. In other instances, the evaluation may be required by a third person, such as a purchaser of a business.

[2] A legal evaluation should be distinguished from an investigation of a person with whom the lawyer does not have a client-lawyer relationship. For example, a lawyer retained by a purchaser to analyze a vendor’s title to property does not have a client-lawyer relationship with the vendor. So also, an investigation into a person’s affairs by a government lawyer, or by special counsel employed by the government, is not an evaluation as that term is used in this rule. The question is whether the lawyer is retained by the person whose affairs are being examined. When the lawyer is retained by that person, the general rules concerning loyalty to client and preservation of confidences apply, which is not the case if the lawyer is retained by someone else. For this reason, it is essential to identify the person by whom the lawyer is retained. This should be made clear not only to the person under examination, but also to others to whom the results are to be made available.

Duties Owed to Third Person and Client

[3] When the evaluation is intended for the information or use of a third person, a legal duty to that person may or may not arise. That legal question is beyond the scope of this rule. However, since such an evaluation involves a departure from the normal client-lawyer relationship, careful analysis of the situation is required. The lawyer must be satisfied as a matter of professional judgment that making the evaluation is compatible with other functions undertaken in behalf of the client. For example, if the lawyer is acting as advocate in defending the client against charges of fraud, it would normally be incompatible with that responsibility for the lawyer to perform an evaluation for others concerning the same or a related transaction. Assuming no such impediment is apparent, however, the lawyer should advise the client of the implications of the evaluation, particularly the lawyer’s responsibilities to third persons and the duty to disseminate the findings.

Access to and Disclosure of Information

[4] The quality of an evaluation depends on the freedom and extent of the investigation upon which it is based. Ordinarily a lawyer should have whatever latitude of investigation seems necessary as a matter of professional judgment. Under some circumstances, however, the terms of the evaluation may be limited. For example, certain issues or sources may be categorically excluded, or the scope of search may be limited by time constraints or the noncooperation of persons having relevant information. Any such limitations which are material to the evaluation should be described in the report. If after a lawyer has commenced an evaluation, the client refuses to comply with the terms upon which it was understood the evaluation was to have been made, the lawyer’s obligations are determined by law, having reference to the terms of the client’s agreement and the surrounding circumstances. In no circumstances is the lawyer permitted to knowingly make a false statement of material fact or law in providing an evaluation under this rule. See Rule 4.1.

Obtaining Client’s Informed Consent

[5] Information relating to an evaluation is protected by Rule 1.6. In many situations, providing an evaluation to a third party poses no significant risk to the client; thus, the lawyer may be impliedly authorized to

disclose information to carry out the representation. See Rule 1.6(a). Where, however, it is reasonably likely that providing the evaluation will affect the client's interests materially and adversely, the lawyer must first obtain the client's consent after the client has been adequately informed concerning the important possible effects on the client's interests. See Rules 1.6(a) and 1.0(e).

Financial Auditor's Requests for Information

[6] When a question concerning the legal situation of a client arises at the instance of the client's financial auditor and the question is referred to the lawyer, the lawyer's response may be made in accordance with procedures recognized in the legal profession. Such a procedure is set forth in the American Bar Association Statement of Policy Regarding Lawyers' Responses to Auditors' Requests for Information, adopted in 1975.

Reporter's Notes – 2009 Amendment

V.R.P.C. 2.3 is amended to conform to the changes in Model Rule 2.3. The ABA Reporter's Explanation is as follows:

TEXT:

1. Restructure text to clarify circumstances in which lawyer may provide evaluation for use of third persons

The Commission recommends restructuring the Rule to clarify its application in two situations. The first is one where the evaluation poses no significant risk to the client. Here, the lawyer may be impliedly authorized to provide the evaluation, and paragraph (a) requires only that the lawyer determine that providing the evaluation is compatible with other aspects of the client-lawyer relationship. The second situation is one where there is a significant risk of material and adverse effect on the client's interests. Here, paragraph (b) provides that the lawyer may not proceed without obtaining the client's informed consent. Paragraph (c) reminds lawyers that the disclosure of information pursuant to providing an evaluation is governed by Rule 1.6, under which disclosures may be impliedly or expressly authorized.

2. Paragraph (a): Substitute "provides" for "undertakes"

This change reflects the Commission's view that it is not the undertaking that is potentially problematic but rather the actual provision of an evaluation for use by third persons.

3. Paragraph (b): Substitute "informed consent" for "consent after consultation"

The Commission is recommending that throughout the Rules the phrase "consent after consultation" be replaced with "gives informed consent," as defined in Rule 1.0(e). No change in substance is intended.

4. Paragraph (b): Material adverse effect

This paragraph clarifies that informed consent is not required in all cases but rather only those in which there is a significant risk of material adverse effect on the client's interests.

5. Paragraph (c): Substitute "authorized" for "required"

This change reflects the Commission's view that disclosures in connection with an evaluation under this Rule are not "required" but rather "authorized" and that the authorization must conform to the requirements of Rule 1.6.

COMMENT:

[1] The addition to this Comment is designed to explain the relationship between this Rule and Rule 1.2, in which the lawyer's authority to provide an evaluation may be expressly or impliedly authorized. The Commission recommends deleting this Comment on the ground that neither its meaning nor its function is clear.

Caption. The caption has been changed to reflect the context of the Comment, which addresses duties to both third persons and to clients.

[4] The Commission recommends the addition of a cross-reference to Rule 4.1 in response to expressions of concern that lawyers should not render an opinion based on stated facts when the lawyer knows the facts to be otherwise.

Caption. This new caption introduces the new material in Comment [5].

[5] This new Comment discusses and explains the requirement to obtain the informed consent of the client if there is a significant risk of material and adverse effect on the client's interests. "Informed consent" is defined in Rule 1.0(e).

Rule 2.4. LAWYER SERVING AS THIRD-PARTY NEUTRAL

(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.—Added June 17, 2009, eff. Sept. 1, 2009.

Comment

[1] 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. See V.R.C.P. 16.3 and Administrative Order 39. 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. 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.

[2] 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. See V.R.C.P. 16.3. Lawyer-neutrals may also be subject to various codes of ethics, such as the Code of Ethics for Arbitration in Commercial Disputes prepared by a joint committee of the American Bar Association and the American Arbitration Association or 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] 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. The potential for confusion is significant when the parties are unrepresented in the process. Thus, paragraph (b) requires a lawyer-neutral to inform unrepresented parties that the lawyer is not representing them. 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. 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. 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.

[4] 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.

[5] Lawyers who represent clients in alternative dispute-resolution processes are governed by the Rules of Professional Conduct. 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. Otherwise, the lawyer's duty of candor toward both the third-party neutral and other parties is governed by Rule 4.1.

Reporter's Notes

V.R.P.C. 2.4 is a new provision in the Vermont Rules of Professional Conduct. It adopts Model Rule 2.4, also a new provision.

The ABA Reporter's Explanation is as follows:

TEXT:

The role of third-party neutral is not unique to lawyers, but the Commission recognizes that lawyers are increasingly serving in these roles. Unlike nonlawyers who serve as neutrals, lawyers may experience unique ethical problems, for example, those arising from possible confusion about the nature of the lawyer's role. The Commission notes that there have been a number of attempts by various organizations to promulgate codes of ethics for neutrals (e.g., aspirational codes for arbitrators or mediators or court enacted rules governing court-sponsored mediators), but such codes do not typically address the special problems of lawyers. The Commission's proposed approach is designed to promote dispute resolution parties' understanding of the lawyer-neutral's role.

1. Paragraph (a): Define "third-party neutral"

Paragraph (a) defines the term "third-party neutral" and emphasizes assistance at the request of the parties who participate in the resolution of disputes and other matters.

2. Paragraph (b): Inform parties of nature of lawyer's role

Paragraph (b) requires the lawyer serving as a third-party neutral to inform unrepresented parties in all cases that the lawyer does not represent them. The potential for confusion is sufficiently great to mandate this requirement in all cases involving unrepresented parties. Consistent with the standard of Rule 4.3, paragraph (b) requires the lawyer to explain the differences in a lawyer's role as a third-party neutral and the role of a lawyer representing a

party in situations where the lawyer knows or reasonably should know that the unrepresented party does not understand the lawyer's role as a third-party neutral.

COMMENT:

[1] This introductory Comment describes dispute-resolution processes and notes that the specific role of the third-party neutral may depend on whether the process is court-annexed or private.

[2] This Comment cross-references other law and ethics codes applicable to lawyers serving as third-party neutrals. The Commission believes the referenced material will be helpful to lawyers unfamiliar with existing standards in this area.

[3] This Comment explains the rationale for the requirement of paragraph (b) that lawyers inform unrepresented parties that the lawyer is not representing them and, in some cases, explain the differences between the lawyer's role as neutral and the role of a lawyer representing a party.

[4] This Comment cross-references Rule 1.12, which addresses the conflicts of interest that arise when a lawyer-neutral or that lawyer's firm is asked to represent a client in a matter that is the same as a matter in which the lawyer served as a third-party neutral.

[5] This Comment distinguishes between the lawyer's duty of candor in an arbitration and in other dispute resolution proceedings. Because a binding arbitration is a "tribunal" as defined in Rule 1.0(m), the lawyer's duty of candor in such a proceeding is governed by Rule 3.3. In other dispute-resolution proceedings, the lawyer's duty of candor toward the third-party neutral and the other parties is governed by Rule 4.1.

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ADVOCATE

Rule 3.1. MERITORIOUS CLAIMS AND CONTENTIONS

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.—Amended June 17, 2009, eff. Sept. 1, 2009.

Comment

[1] The advocate has a duty to use legal procedure for the fullest benefit of the client's cause, but also a duty not to abuse legal procedure. The law, both procedural and substantive, establishes the limits within which an advocate may proceed. However, the law is not always clear and never is static. Accordingly, in determining the proper scope of advocacy, account must be taken of the law's ambiguities and potential for change.

[2] The filing of an action or defense or similar action taken for a client is not frivolous merely because the facts have not first been fully substantiated or because the lawyer expects to develop vital evidence only by discovery. What is required of lawyers, however, is that they inform themselves about the facts of their clients' cases and the applicable law and determine that they can make good faith arguments in support of their clients' positions. Such action is not frivolous even though the lawyer believes that the client's position ultimately will not prevail. The action is frivolous, however, if the lawyer is unable either to make a good faith argument on the merits of the action taken or to support the action taken by a good faith argument for an extension, modification or reversal of existing law.

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

Reporter's Notes — 2009 Amendment

V.R.P.C. 3.1 is amended to conform to the changes in Model Rule 3.1. The ABA Reporter's Explanation is as follows:

TEXT:

Add reference to "law and fact"

This change makes explicit the requirement that a claim must have a nonfrivolous basis in both law and fact. See also Comment [2]. No change in substance is intended.

COMMENT:

[2] A new sentence has been added to remind lawyers that they must act reasonably to inform themselves about the facts and law pertinent to a claim they will make on behalf of a client. The reference to a client's purpose to harass has been dropped because the client's purpose is not relevant to the objective merits of the client's claim.

[3] This new Comment acknowledges the primacy of constitutional law that might require a lawyer to take action on behalf of a criminal defendant that otherwise would violate this Rule.

Reporter's Notes

This rule departs from the Vermont Code by prohibiting the assertion of frivolous claims or contentions without regard to whether the lawyer knows or it is obvious that they are frivolous. DR 7-102. This change from a subjective to an objective standard is consistent with Vermont Rule of Civil Procedure 11. Rule 3.1 merges in "frivolous" the concepts of active bad faith in the sense of harassing or malicious action and lack of good faith as in the advancement of an unsupportable argument. Lawyers should be clear that the standard of Rule 11, and that of the present rule, require that the position advanced be both nonfrivolous and in good faith. The rule also adds a provision to the effect that in criminal cases and cases resulting in incarceration, the defense lawyer may put the prosecution to its proof even if there is no nonfrivolous basis for the defense.

ANNOTATIONS

1. Generally. Even when a meritorious claim is impossible to assert in good faith, the value of the advocate's role to the client, the court, and the system as a whole is realized in this context simply through a conscientious effort to navigate the appellate process on the client's behalf and communicate the client's impressions of injustice, even if unpersuasive. Any concern that such efforts might nevertheless expose a good faith advocate to charges of unethical conduct may be sufficiently assuaged by noting that even an arguably frivolous claim will not be deemed to violate the rule against raising frivolous claims where a court categorically refuses to grant motions to withdraw in deference to overriding state interests. In re S.C., 2014 VT 7, 195 Vt. 415, 88 A.3d 1220.

2. Withdrawal. Defender General properly denied publicly funded representation in an inmate's post-conviction relief appeal because it asserted that the representation would violate the ethical and civil procedure rules. In re Bruyette, 2014 VT 30, 196 Vt. 261, 96 A.3d 1151.

Absent client consent or other compelling circumstances, withdrawal of appointed appellate counsel in a termination-of-parental-rights proceeding will not be permitted. Thus, appellate counsel was not permitted to withdraw from termination-of-parental-rights cases on the ground that continued representation would violate the rule prohibiting frivolous claims. In re S.C., 2014 VT 7, 195 Vt. 415, 88 A.3d 1220.

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Rule 3.2. EXPEDITING LITIGATION

A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.—Amended June 17, 2009, eff. Sept. 1, 2009.

Comment

[1] Dilatory practices bring the administration of justice into disrepute. Although there will be occasions when a lawyer may properly seek a postponement for personal reasons, it is not proper for a lawyer to routinely fail to expedite litigation solely for the convenience of the advocates. Nor will a failure to expedite be reasonable if done for the purpose of frustrating an opposing party's attempt to obtain rightful redress or repose. It is not a justification that similar conduct is often tolerated by the bench and bar. The question is whether a competent lawyer acting in good faith would regard the course of action as having some substantial purpose other than delay. Realizing financial or other benefit from otherwise improper delay in litigation is not a legitimate interest of the client.

Reporter's Notes — 2009 Amendment

The Comment to V.R.P.C. 3.2 is amended to conform to the changes in the Comment to Model Rule 3.2. The ABA Reporter's Explanation is as follows:

TEXT:

The Commission is not recommending any change to the Rule text.

COMMENT:

[1] The Commission concluded that the reference in the second sentence to indulging delay “merely for the convenience of the advocates” is too restrictive and modified it to recognize that there are circumstances where it is acceptable for a lawyer to request a postponement for personal reasons.

Reporter’s Notes

This rule goes further than the Vermont Code’s mere approval of punctuality. The rule places an affirmative obligation upon the lawyer to make reasonable efforts in the client’s interests to expedite litigation.

ANNOTATIONS

1. Violations. Admonishment was appropriate for an attorney who had failed to promptly and fully comply with discovery, in violation of the rules regarding diligence and expediting litigation. The attorney’s conduct did not result in actual substantial harm to his client, the public, the legal system, or the profession; his violations resulted from disorganization, overreliance on his client, and lack of experience in complex litigation, not from an intent to conceal documents; and he had no prior disciplinary record and fully cooperated in the disciplinary proceedings. In re PRB File No. 2007-003, 2009 VT 82A, 186 Vt. 588, 987 A.2d 273 (mem.).

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Rule 3.3. CANDOR TOWARD THE TRIBUNAL

(a) A lawyer shall not knowingly:

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

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

(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer’s client, or a witness called by the lawyer has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

(c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse.—Amended June 17, 2009, eff. Sept. 1, 2009.

Comment

[1] This rule governs the conduct of a lawyer who is representing a client in the proceedings of a tribunal. See Rule 1.0(m) for the definition of “tribunal.” It also applies when the lawyer is representing a client in an ancillary proceeding conducted pursuant to the tribunal’s adjudicative authority, such as a deposition. Thus, for example, paragraph (a)(3) requires a lawyer to take reasonable remedial measures if the lawyer comes to know that a client who is testifying in a deposition has offered evidence that is false.

[2] This rule sets forth the special duties of lawyers as officers of the court to avoid conduct that undermines the integrity of the adjudicative process. A lawyer acting as an advocate in an adjudicative proceeding has an obligation to present the client’s case with persuasive force. Performance of that duty while maintaining confidences of the client, however, is qualified by the advocate’s duty of candor to the tribunal. Consequently,

although a lawyer in an adversary proceeding is not required to present an impartial exposition of the law or to vouch for the evidence submitted in a cause, the lawyer must not allow the tribunal to be misled by false statements of law or fact or evidence that the lawyer knows to be false.

Representations by a Lawyer

[3] An advocate is responsible for pleadings and other documents prepared for litigation, but is usually not required to have personal knowledge of matters asserted therein, for litigation documents ordinarily present assertions by the client, or by someone on the client's behalf, and not assertions by the lawyer. Compare Rule 3.1. However, an assertion purporting to be on the lawyer's own knowledge, as in an affidavit by the lawyer or in a statement in open court, may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry. There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation. The obligation prescribed in Rule 1.2(d) not to counsel a client to commit or assist the client in committing a fraud applies in litigation. Regarding compliance with Rule 1.2(d), see the comment to that rule. See also the comment to Rule 8.4(b).

Legal Argument

[4] Legal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal. A lawyer is not required to make a disinterested exposition of the law, but must recognize the existence of pertinent legal authorities. Furthermore, as stated in paragraph (a)(2), an advocate has a duty to disclose directly adverse authority in the controlling jurisdiction which has not been disclosed by the opposing party. The underlying concept is that legal argument is a discussion seeking to determine the legal premises properly applicable to the case.

Offering Evidence

[5] Paragraph (a)(3) requires that the lawyer refuse to offer evidence that the lawyer knows to be false, regardless of the client's wishes. This duty is premised on the lawyer's obligation as an officer of the court to prevent the trier of fact from being misled by false evidence. A lawyer does not violate this rule if the lawyer offers the evidence for the purpose of establishing its falsity.

[6] If a lawyer knows that the client intends to testify falsely or wants the lawyer to introduce false evidence, the lawyer should seek to persuade the client that the evidence should not be offered. If the persuasion is ineffective and the lawyer continues to represent the client, the lawyer must refuse to offer the false evidence. If only a portion of a witness's testimony will be false, the lawyer may call the witness to testify but may not elicit or otherwise permit the witness to present the testimony that the lawyer knows is false.

[7] The duties stated in paragraphs (a) and (b) apply to all lawyers, including defense counsel in criminal cases. In some jurisdictions, however, courts have required counsel to present the accused as a witness or to give a narrative statement if the accused so desires, even if counsel knows that the testimony or statement will be false. The obligation of the advocate under the Rules of Professional Conduct is subordinate to such requirements. See also Comment [9].

[8] The prohibition against offering false evidence only applies if the lawyer knows that the evidence is false. A lawyer's reasonable belief that evidence is false does not preclude its presentation to the trier of fact. A lawyer's knowledge that evidence is false, however, can be inferred from the circumstances. See Rule 1.0(f). Thus, although a lawyer should resolve doubts about the veracity of testimony or other evidence in favor of the client, the lawyer cannot ignore an obvious falsehood.

[9] Although paragraph (a)(3) only prohibits a lawyer from offering evidence the lawyer knows to be false, it permits the lawyer to refuse to offer testimony or other proof that the lawyer reasonably believes is false. Offering such proof may reflect adversely on the lawyer's ability to discriminate in the quality of evidence and thus impair the lawyer's effectiveness as an advocate. Because of the special protections historically provided criminal defendants, however, this rule does not permit a lawyer to refuse to offer the testimony of such a client where the lawyer reasonably believes but does not know that the testimony will be false. Unless the lawyer knows the testimony will be false, the lawyer must honor the client's decision to testify. See also Comment [7].

Remedial Measures

[10] Having offered material evidence in the belief that it was true, a lawyer may subsequently come to know that the evidence is false. Or, a lawyer may be surprised when the lawyer's client, or another witness called by the lawyer, offers testimony the lawyer knows to be false, either during the lawyer's direct examination or in response to cross-examination by the opposing lawyer. In such situations or if the lawyer knows of the falsity of testimony elicited from the client during a deposition, the lawyer must take reasonable remedial measures. In such situations, the advocate's proper course is to remonstrate with the client confidentially, advise the client of the lawyer's duty of candor to the tribunal and seek the client's cooperation with respect to the withdrawal or correction of the false statements or evidence. If that fails, the advocate must take further remedial action. If withdrawal from the representation is not permitted or will not undo the effect of the false evidence, the advocate must make such disclosure to the tribunal as is reasonably necessary to remedy the situation, even if doing so requires the lawyer to reveal information that otherwise would be protected by Rule 1.6. It is for the tribunal then

to determine what should be done — making a statement about the matter to the trier of fact, ordering a mistrial or perhaps nothing.

[11] The disclosure of a client's false testimony can result in grave consequences to the client, including not only a sense of betrayal but also loss of the case and perhaps a prosecution for perjury. But the alternative is that the lawyer cooperate in deceiving the court, thereby subverting the truth-finding process which the adversary system is designed to implement. See Rule 1.2(d). Furthermore, unless it is clearly understood that the lawyer will act upon the duty to disclose the existence of false evidence, the client can simply reject the lawyer's advice to reveal the false evidence and insist that the lawyer keep silent. Thus the client could in effect coerce the lawyer into being a party to fraud on the court.

Preserving Integrity of Adjudicative Process

[12] Lawyers have a special obligation to protect a tribunal against criminal or fraudulent conduct that undermines the integrity of the adjudicative process, such as bribing, intimidating or otherwise unlawfully communicating with a witness, juror, court official or other participant in the proceeding, unlawfully destroying or concealing documents or other evidence or failing to disclose information to the tribunal when required by law to do so. Thus, paragraph (b) requires a lawyer to take reasonable remedial measures, including disclosure if necessary, whenever the lawyer knows that a person, including the lawyer's client, intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding.

Duration of Obligation

[13] A practical time limit on the obligation to rectify false evidence or false statements of law and fact has to be established. The conclusion of the proceeding is a reasonably definite point for the termination of the obligation. A proceeding has concluded within the meaning of this rule when a final judgment in the proceeding has been affirmed on appeal or the time for review has passed.

Ex Parte Proceedings

[14] Ordinarily, an advocate has the limited responsibility of presenting one side of the matters that a tribunal should consider in reaching a decision; the conflicting position is expected to be presented by the opposing party. However, in any ex parte proceeding, such as an application for a temporary restraining order, there is no balance of presentation by opposing advocates. The object of an ex parte proceeding is nevertheless to yield a substantially just result. The judge has an affirmative responsibility to accord the absent party just consideration. The lawyer for the represented party has the correlative duty to make disclosures of material facts known to the lawyer and that the lawyer reasonably believes are necessary to an informed decision.

Withdrawal

[15] Normally, a lawyer's compliance with the duty of candor imposed by this rule does not require that the lawyer withdraw from the representation of a client whose interests will be or have been adversely affected by the lawyer's disclosure. The lawyer may, however, be required by Rule 1.16(a) to seek permission of the tribunal to withdraw if the lawyer's compliance with this rule's duty of candor results in such an extreme deterioration of the client-lawyer relationship that the lawyer can no longer competently represent the client. Also see Rule 1.16(b) for the circumstances in which a lawyer will be permitted to seek a tribunal's permission to withdraw. In connection with a request for permission to withdraw that is premised on a client's misconduct, a lawyer may reveal information relating to the representation only to the extent reasonably necessary to comply with this rule or as otherwise required or permitted by Rule 1.6.

Reporter's Notes — 2009 Amendment

V.R.P.C. 3.3 is amended to conform to the changes in Model Rule 3.3. The ABA Reporter's Explanation is as follows:

The Commission has revised and reorganized this Rule to clarify a lawyer's obligation of candor to the tribunal with respect to testimony given and actions taken by the client and other witnesses. The commentary was reorganized and expanded to address some recurring situations not directly addressed in the Rule. In some particulars, the lawyer's obligations to the tribunal have been strengthened. For example, the Rule now makes clear that the lawyer must not allow the introduction of false evidence and must take remedial steps where the lawyer comes to know that material evidence offered by the client or a witness called by the lawyer is false -regardless of the client's wishes. As under the existing Rule, the lawyer's obligations to the tribunal may require the lawyer to reveal information otherwise protected by Rule 1.6. The lawyer's obligation in the existing Rule to avoid assisting client crime or fraud is replaced by a broader obligation to ensure the integrity of the adjudicative process. The lawyer must take remedial measures whenever the lawyer comes to know that any person is engaging or has engaged in criminal or fraudulent conduct related to the proceeding, such as jury tampering or document destruction.

In one special case, however, the lawyer's obligation to the client has been reaffirmed and strengthened, and that is where the lawyer represents the defendant in a criminal proceeding. For the first time the Rule text will address the special obligations of a criminal defense lawyer, providing that such a lawyer does not have the same

discretion as other lawyers regarding the client's own testimony. While a criminal defense lawyer is subject to the general rule prohibiting the offering of testimony the lawyer knows to be false, the lawyer may defend if the lawyer only reasonably believes the testimony will be false. The commentary also provides that where a court insists that a criminal defendant be permitted to testify in the defendant's defense, the lawyer commits no ethical violation in allowing the client to do so even if the lawyer knows the client intends to lie.

1. Paragraph (a)(1): Amplify lawyer's duty not to make false statements to tribunal and add obligation to correct false statements previously made

The Commission recommends deletion of the term "material" that presently qualifies the lawyer's duty not to knowingly make false statements of fact or law to a tribunal, bringing this duty into conformity with the duty not to offer false evidence set forth in paragraph (a)(3). A new phrase addresses the lawyer's duty to correct a false statement of material fact or law previously made to the tribunal, also paralleling the duty to take remedial measures in paragraph (a)(3).

2. Paragraph (a)(2): Delete existing provision on lawyer's duty to disclose client crime or fraud

The Commission is deleting current paragraph (a)(2), which provides that a lawyer shall not knowingly fail to disclose to the tribunal material facts when necessary to avoid assisting client crime or fraud. The lawyer's duty to disclose crime or fraud in connection with a proceeding before a tribunal is now addressed more comprehensively in paragraph (b). The lawyer also has disclosure obligations under paragraphs (a)(1) and (a)(3), where the lawyer comes to know of the falsity of statements previously made to the tribunal or evidence previously offered. A lawyer's general duty to avoid assisting client crime or fraud is addressed in Rules 1.2(d) and 4.1.

3. Paragraph (a)(3): Amplify duty to take remedial measures in connection with material evidence lawyer comes to know is false and include discretion to refuse to offer evidence lawyer reasonably believes is false

The Commission is amending [former] paragraph (a)(4) to extend its remedial obligations to situations where the lawyer's client or a witness called by the lawyer has offered material evidence that the lawyer subsequently comes to know is false. Required remedial measures may, if necessary, include disclosure to the tribunal.

The Commission has also transferred to this paragraph the substance of current paragraph (c), which permits a lawyer to refuse to offer evidence that the lawyer reasonably believes (but does not know) is false. This grant of discretion, however, has been limited so it will not apply to the testimony of a client who is exercising the constitutional right to testify in a criminal case.

4. Paragraph (b): Duty to preserve integrity of adjudicative process

The Commission recommends adoption of a new provision (b) addressing the lawyer's obligation to take reasonable remedial measures, including disclosure if necessary, where the lawyer comes to know that a person is engaging or has engaged in any sort of criminal or fraudulent conduct related to the proceeding. This new provision incorporates the substance of [former] paragraph (a)(2), as well as ABA Model Code of Professional Responsibility DR 7-102(B)(2) ("A lawyer who receives information clearly establishing that a person other than the client has perpetrated a fraud upon a tribunal shall promptly reveal the fraud to the tribunal.") and DR 7-108(G) ("A lawyer shall reveal promptly to the court improper conduct by a venire person or juror, or by another toward a venire person or juror or a member of the venire person's or juror's family, of which the lawyer has knowledge.").

5. Paragraph (c): Duration of duties in paragraphs (a) and (b)

The Commission is not changing the scope and duration of the lawyer's duty of candor to the tribunal but extending it to paragraph (b).

COMMENT:

[1] This new Comment explains that the duties contained in Rule 3.3 apply in all proceedings before a "tribunal" as defined in Rule 1.0(m). It explains that they also apply in ancillary proceedings conducted pursuant to a tribunal's adjudicative authority, such as a deposition.

[2] The revisions to [former] Comment [1] clarify that a lawyer has a duty to avoid conduct that undermines the integrity of the adjudicative process and in this regard must not allow the tribunal to be misled by false statements of law or fact.

Caption. The caption "Legal Argument" more accurately describes the subjects addressed in Comment [4].

[4] The change reflects paragraph renumbering in the Rule text. No change in substance is intended.

Caption. The caption "Offering Evidence" more accurately describes the subjects addressed in Comments [5] through [9].

This Comment has been replaced by Comment [5].

This Comment has been replaced and supplemented by Comment [9].

[5] This new Comment replaces [former] Comments [4] and [5] and explains that paragraph (a)(3) prohibits a lawyer from offering testimony or other evidence the lawyer knows is false, regardless of the client's wishes. Unlike the [former] Rule, paragraph (a)(3) extends to evidence provided by the client. The Comment explains that a lawyer does not violate the Rule if the lawyer knowingly elicits false testimony for the purpose of subsequently establishing its falsity.

[6] This new Comment explains the lawyer's duty where the lawyer's client intends to testify falsely or wants the lawyer to introduce false testimony. The lawyer must seek to dissuade the client and, if this is unsuccessful, must refuse to offer the false evidence.

[7] This new Comment explains that the duties in paragraphs (a) and (b) apply to defense counsel in criminal cases. Where a court requires a lawyer to permit a criminal defendant to give testimony that the lawyer knows is false, however, the obligation of the advocate under these Rules is subordinate to such a requirement.

[8] This new Comment explains that while the prohibition against offering false testimony in paragraph (a) applies only where the lawyer knows that the evidence is false, such knowledge may be inferred from the circumstances.

Caption. The caption "Refusing to Offer Proof Reasonably Believed to Be False" has been deleted because the Comment to which it referred is now subsumed under "Offering Evidence."

[9] This Comment, which revises [former] Comment [14], explains that while paragraph (a)(3) prohibits a lawyer from offering evidence that the lawyer knows is false, a lawyer may refuse to offer evidence that the lawyer only reasonably believes is false, including evidence offered by the client—except where the client is a defendant in a criminal case. Because of the special protections historically provided criminal defendants, criminal-defense counsel do not have the same latitude to refuse to offer client testimony they reasonably believe (but do not know) is false. (See also Comment [7] *supra*.)

Caption. The caption "Perjury by a Criminal Defendant" has been deleted because of the deletion of [former] Comments [7] through [10].

These Comments have been deleted as no longer helpful to the analysis of questions arising under this Rule. No change in substance is intended.

[10] This Comment revises and expands upon [former] Comment [11] to describe the remedial steps a lawyer must take if the lawyer is surprised by a witness's false testimony or where the lawyer subsequently comes to know that evidence the lawyer has offered is false. These steps include remonstrating with the client, consulting with the client about the lawyer's duty of candor to the tribunal and withdrawing from the representation. If necessary to remedy the situation, the lawyer may make disclosure to the tribunal even if doing so would require the lawyer to reveal information otherwise protected by Rule 1.6.

[11] The revisions to [former] Comment [6] are editorial in nature. No change in substance is intended.

Caption. A new caption, "Preserving Integrity of Adjudicative Process," was added to highlight the Comment [12] discussion of paragraph (b).

[12] This new Comment explains the obligations imposed by paragraph (b), where the lawyer knows that any person intends to engage, is engaging or has engaged in criminal or fraudulent conduct that undermines the integrity of the adjudicative process. Examples of such conduct are bribing, intimidating or otherwise unlawfully communicating with a witness, juror, court official or other participant in the proceeding; unlawfully destroying or concealing documents or other evidence or failing to disclose information to the tribunal when required by law to do so. This could include lies or misrepresentations by the opposing party or witnesses called by the opposing party, which are not covered by paragraph (a)(3). The obligations imposed by this paragraph will ordinarily subsume those imposed by [former] paragraph (a)(2), which has been deleted.

Caption. The caption "Constitutional Requirements" has been deleted because the discussion of constitutional requirements in [former] Comment [12] has been incorporated into Comments [7] and [9].

This Comment has been deleted because the issues it addressed are now addressed in Comments [7] and [9].

[13] Revisions to this Comment explain that the obligation of candor to the tribunal continues until a final judgment has been affirmed on appeal or the time for review has passed. Caption. The new caption "Withdrawal" sets off the discussion in new Comment [15]

[15] This new Comment explains the relationship between a lawyer's compliance with the duty of candor to the tribunal and the lawyer's obligation to withdraw from the representation under Rule 1.16. While a lawyer's compliance with the Rule does not normally require withdrawal, the lawyer may be obliged to seek the tribunal's permission to withdraw if there results "such an extreme deterioration of the client-lawyer relationship that the lawyer can no longer competently represent the client." The Comment also addresses the issue of disclosure in circumstances where withdrawal is permitted but not required.

Reporter's Notes

This rule maintains the Vermont Code's requirement that if the interests of client and tribunal conflict with regard to candor, the interests of the tribunal prevail. The rule differs from related Code provisions, however, by adding a provision which permits the lawyer to refuse to offer evidence the lawyer reasonably believes to be false. The rule also sets forth a requirement that is not present in the Code: lawyers in *ex parte* proceedings must inform the tribunal of all material relevant facts whether or not they are adverse.

Rule 3.4. FAIRNESS TO OPPOSING PARTY AND COUNSEL

A lawyer shall not:

(a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;

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

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

(d) in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party;

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

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

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

(2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.— Amended June 17, 2009, eff. Sept. 1, 2009.

Comment

[1] The procedure of the adversary system contemplates that the evidence in a case is to be marshaled competitively by the contending parties. Fair competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery procedure, and the like.

[2] Documents and other items of evidence are often essential to establish a claim or defense. Subject to evidentiary privileges, the right of an opposing party, including the government, to obtain evidence through discovery or subpoena is an important procedural right. The exercise of that right can be frustrated if relevant material is altered, concealed or destroyed. Applicable law in many jurisdictions makes it an offense to destroy material for purpose of impairing its availability in a pending proceeding or one whose commencement can be foreseen. Falsifying evidence is also generally a criminal offense. Paragraph (a) applies to evidentiary material generally, including computerized information. Applicable law may permit a lawyer to take temporary possession of physical evidence of client crimes for the purpose of conducting a limited examination that will not alter or destroy material characteristics of the evidence. In such a case, applicable law may require the lawyer to turn the evidence over to the police or other prosecuting authority, depending on the circumstances.

[3] With regard to paragraph (b), it is not improper to pay a witness's expenses or to compensate an expert witness on terms permitted by law. The common law rule in most jurisdictions is that it is improper to pay an occurrence witness any fee for testifying and that it is improper to pay an expert witness a contingent fee.

[4] Paragraph (f) permits a lawyer to advise employees of a client to refrain from giving information to another party, for the employees may identify their interests with those of the client. See also Rule 4.2.

Reporter's Notes — 2009 Amendment

V.R.P.C. 3.4 is changed by the elimination of language limiting to civil cases the exception in Rule 3.4(f) to the prohibition against advising a nonclient to refrain from giving information to another party. This limitation, not found in the original or amended Model Rule, was adopted in the 1999 Vermont Rule out of concern for its effect in criminal proceedings. Though the limitation has been eliminated as too inflexible, the warning set forth in the 1999 Reporter's Notes to V.R.P.C. 3.4 is still pertinent: In a criminal case, "Lawyers should be mindful of the risk that action permitted by this rule in a civil case might constitute obstruction of justice under applicable law. Cf. V.R.Cr.P. 16.2(a)."

The Comment to V.R.P.C. 3.4 is amended to conform to the changes in the Comment to Model Rule 3.4. The ABA Reporter's Explanation is as follows:

COMMENT:

[2] Language has been added to alert lawyers to the law governing possession of physical evidence of client crimes.

Reporter's Notes

This rule carries forward many of the Vermont Code prohibitions regarding falsifying evidence and counseling disobedience of court orders. It differs from the Vermont Code by adding a new provision prohibiting lawyers from making frivolous discovery requests or failing to comply with proper discovery requests. It also differs by adding language explicitly prohibiting lawyers from requesting nonclients to refrain from giving relevant information to other parties, unless specific conditions are met. Lawyers should be mindful of the risk that action permitted by this rule in a civil case might constitute obstruction of justice under applicable law. Cf. V.R.Cr.P. 16.2(a).

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Rule 3.5. IMPARTIALITY AND DECORUM OF THE TRIBUNAL

A lawyer shall not:

(a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law;

(b) communicate ex parte

(1) with a judge or other person acting in a judicial or quasi-judicial capacity in a pending or impending adversary proceeding, unless authorized to do so by the Code of Judicial Conduct, by other law, or by court order;

(2) with a juror or prospective juror before the court clerk has certified that the juror's term of service is complete, except by leave of court for good cause shown and under such terms as the court shall determine; or

(c) communicate with a juror or prospective juror after the court clerk has certified that the juror's term of service is complete if:

(1) the communication is prohibited by law or court order;

(2) the juror has made known to the lawyer a desire not to communicate; or

(3) the communication involves misrepresentation, coercion, duress or harassment; or

(d) engage in undignified or discourteous conduct which is degrading or disrupting to a tribunal.—Amended June 17, 2009, eff. Sept. 1, 2009.

Comment

[1] Many forms of improper influence upon a tribunal are proscribed by criminal law. Others are specified in the Vermont Code of Judicial Conduct, with which an advocate should be familiar. A lawyer is required to avoid contributing to a violation of such provisions.

[2] During a proceeding a lawyer may not communicate ex parte with persons serving in an official capacity in the proceeding, such as judges or masters, unless authorized to do so under the terms of the Code of Judicial Conduct or by other law or court order. A lawyer also may not communicate with a juror or prospective juror during the juror's term of service except with leave of court on good cause shown and on such terms as the court may determine, which should impose limits designed to protect the juror's privacy. Good cause for contact before completion of a juror's term might include independent research into the dynamics of the jury process, an attorney's desire to improve his or her trial skills, or investigation of juror misconduct.

[3] A lawyer may on occasion want to communicate with a juror or prospective juror after the juror's term is complete. The lawyer may do so unless the communication is prohibited by law or a court order but must respect the desire of the juror not to talk with the lawyer. The lawyer may not engage in improper conduct during the communication.

[4] The advocate's function is to present evidence and argument so that the cause may be decided according to law. Refraining from abusive or obstreperous conduct is a corollary of the advocate's right to speak on behalf of litigants. A lawyer may stand firm against abuse by a judge but should avoid reciprocation; the judge's

default is no justification for similar dereliction by an advocate. An advocate can present the cause, protect the record for subsequent review and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics.

[5] The duty to refrain from degrading or disruptive conduct applies to any proceeding of a tribunal, including a deposition. See Rule 1.0(m).

Reporter's Notes — 2009 Amendment

V.R.P.C. 3.5 is amended to incorporate some of the changes in the Model Rule while retaining and updating provisions of the original Vermont rule that differed from the Model Rule. See Reporter's Notes to V.R.P.C. 3.5 (1999).

V.R.P.C. 3.5(a), like Model Rule 3.5(a), is unchanged.

V.R.P.C. 3.5(b) continues to depart from the Model Rule by separating provisions concerning ex parte contact with judges and quasi-judicial officials from those concerning contact with jurors. Subparagraph (1) continues to refer expressly to the Code of Judicial Conduct and incorporates the reference to "impending" proceedings from V.C.J.C. Canon 3.B(7). The inclusion of "court order" (and the necessary stylistic change to "authorized by") are "added to alert lawyers to the availability of judicial relief in the rare instances in which an ex parte communication is needed." ABA Reporter's Explanation.

V.R.P.C. 3.5(b)(2) is amended to provide a standard for permitting communication with a juror before the court clerk certifies that the juror's term of service has ended. Such communication is prohibited except by leave of court for good cause shown and must not intrude on a juror's privacy. See Comment [2]. A juror's term of service is concluded when that juror has been summoned for voir dire three times within a two-year period pursuant to Rules 6 and 9 of the Rules for Qualification, List, Selection and Summoning of All Jurors. The clerk's certification of that date has been selected because it is an easily identifiable event and assures that a juror will be free from inappropriate communication with a lawyer during a period when there is the possibility that the juror and lawyer might both be involved in the same subsequent case.

V.R.P.C. 3.5(c) adapts New Model Rule 3.5(c), incorporating the clerk's certification of the end of a juror's service as the time after which a lawyer may communicate with a juror without leave of court. The ABA Reporter's Explanation is as follows:

Rule 3.5(b) [prohibiting ex parte communication with jurors "except as permitted by law"] has been held to be unconstitutionally overbroad when applied to post-verdict communications with jurors. See *Rapp v. Disciplinary Board of the Hawaii Supreme Court*, 916 F. Supp. 1525 (D.Hawaii, 1996). The Commission has proposed the addition of a new paragraph (c) that permits such communications unless prohibited by law or court order or the lawyer knows that the juror does not wish to be contacted. Also prohibited, of course, are communications involving misrepresentation, duress, coercion or harassment. The proposal permits more post-verdict communication with jurors than the current Rule but affords the juror greater protection than did ABA Model Code of Professional Responsibility DR 7-108(D) which provided, "After discharge of the jury from further consideration of a case with which the lawyer was connected, the lawyer shall not ask questions of or make comments to a member of that jury that are calculated merely to harass or embarrass the juror or to influence his actions in future jury service."

V.R.P.C. 3.5(d) continues to retain language from DR 7-106(C)(6) of the Vermont Code of Professional Responsibility, adding the word "disrupting" to track the Model Rule. Comments [2] and [3] are new to both the Vermont and Model Rules. They have been modified to reflect the differences between the rules discussed above. Comment [5] "makes clear that paragraph (d) applies to any proceeding of a tribunal and calls particular attention to its applicability to depositions." ABA Reporter's Explanation.

Reporter's Notes

The drafters modified ABA Model Rule 3.5(b) in order to clarify that not all ex parte communication with a judge is impermissible and to make this rule consistent with its Vermont Code counterparts. See DR 7-108 and DR 7-110(B).

The drafters also modified paragraph (c) to avoid a subjective standard of proof and to make it consistent with the Vermont Code. See DR 7-106(C)(6). The rule has also been made consistent with Canon 3B(7)(a) of the Vermont Code of Judicial Conduct.

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Rule 3.6. TRIAL PUBLICITY

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

know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

(b) Notwithstanding paragraph (a), a lawyer may state:

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

(2) information contained in a public record;

(3) that an investigation of a matter is in progress;

(4) the scheduling or result of any step in litigation;

(5) a request for assistance in obtaining evidence and information necessary thereto;

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

(7) in a criminal case, in addition to subparagraphs (1) through (6):

(i) the identity, residence, age, and occupation of the accused;

(ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person;

(iii) the fact, time and place of arrest; and

(iv) the identity of investigating and arresting officers or agencies and the length of the investigation.

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

(d) No lawyer associated in a firm or government agency with a lawyer subject to paragraph (a) shall make a statement prohibited by paragraph (a).—Amended November 19, 1999; June 17, 2009, eff. Sept. 1, 2009.

Comment

[1] It is difficult to strike a balance between protecting the right to a fair trial and safeguarding the right of free expression. Preserving the right to a fair trial necessarily entails some curtailment of the information that may be disseminated about a party prior to trial, particularly where trial by jury is involved. If there were no such limits, the result would be the practical nullification of the protective effect of the rules of forensic decorum and the exclusionary rules of evidence. On the other hand, there are vital social interests served by the free dissemination of information about events having legal consequences and about legal proceedings themselves. The public has a right to know about threats to its safety and measures aimed at assuring its security. It also has a legitimate interest in the conduct of judicial proceedings, particularly in matters of general public concern. Furthermore, the subject matter of legal proceedings is often of direct significance in debate and deliberation over questions of public policy.

[2] Special rules of confidentiality may validly govern proceedings in juvenile, domestic relations and mental disability proceedings, and perhaps other types of litigation. Rule 3.4(c) requires compliance with such rules.

[3] The rule sets forth a basic general prohibition against a lawyer's making statements that the lawyer knows or should know will have a substantial likelihood of materially prejudicing an adjudicative proceeding. Recognizing that the public value of informed commentary is great and the likelihood of prejudice to a proceeding by the commentary of a lawyer who is not involved in the proceeding is small, the rule applies only to lawyers who are, or who have been involved in, the investigation or litigation of a case, and their associates.

[4] Paragraph (b) identifies specific matters about which a lawyer's statements would not ordinarily be considered to present a substantial likelihood of material prejudice, and should not in any event be considered prohibited by the general prohibition of paragraph (a). Paragraph (b) is not intended to be an exhaustive listing of the subjects upon which a lawyer may make a statement, but statements on other matters may be subject to paragraph (a).

[5] There are, on the other hand, certain subjects which are more likely than not to have a material prejudicial effect on a proceeding, particularly when they refer to a civil matter triable to a jury, a criminal matter, or any other proceeding that could result in incarceration.

These subjects relate to:

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

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

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

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

(5) information that the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and that would, if disclosed, create a substantial risk of prejudicing an impartial trial.

[6] Another relevant factor in determining prejudice is the nature of the proceeding involved. Criminal jury trials will be most sensitive to extrajudicial speech. Civil trials may be less sensitive. Nonjury hearings and arbitration proceedings may be even less affected. The rule will still place limitations on prejudicial comments in these cases, but the likelihood of prejudice may be different depending on the type of proceeding.

[7] Finally, extrajudicial statements that might otherwise raise a question under this rule may be permissible when they are made in response to statements made publicly by another party, another party's lawyer, or third persons, where a reasonable lawyer would believe a public response is required in order to avoid prejudice to the lawyer's client. When prejudicial statements have been publicly made by others, responsive statements may have the salutary effect of lessening any resulting adverse impact on the adjudicative proceeding. Such responsive statements should be limited to contain only such information as is necessary to mitigate undue prejudice created by the statements made by others.

[8] See Rule 3.8(f) for additional duties of prosecutors in connection with extrajudicial statements about criminal proceedings.

Reporter's Notes — 2009 Amendment

V.R.P.C. 3.6 is amended to conform to changes in Model Rule 3.6. The Reporter's Notes to the Vermont Rule as originally adopted stated that the word "substantial" was deleted in Rule 3.6(b)(6) to follow the former Vermont Code and to avoid "an unwarranted chilling effect on a lawyer's speech." In the rule as promulgated, however, the word was inadvertently not deleted, but this error was subsequently cured by amendment. See Reporter's Notes to 1999 Amendment of V.R.P.C. 3.6(b). The omission of "substantial" is continued in the rule as presently amended.

The ABA Reporter's Explanation is as follows:

TEXT:

1. Paragraph (a): Replace "reasonable person" with "reasonable lawyer" As modified, paragraph (a) requires that a lawyer's assessment of the likelihood that a statement will be disseminated by means of public communication be judged from the perspective of a reasonable lawyer rather than a reasonable person. Whether a statement about legal proceedings will be publicly disseminated is an issue that may be viewed differently by lawyers and nonlawyers, and the Commission thinks that lawyers should only be subject to professional discipline when their judgments are unreasonably inconsistent with those of their professional peers.

2. Paragraph (a): Replace "would expect" with "knows or reasonably should know" The Commission thinks that the scienter requirement in Rule 3.6 should employ wording consistent with the terminology as defined in Rule 1.0(f) and (j). Thus "reason to expect" is replaced with "knows or reasonably should know." No change in substance is intended.

COMMENT:

[8] Comment [8] is new and adds a cross-reference to the paragraph in Rule 3.8 that sets forth special duties of prosecutors with respect to extrajudicial statements.

Reporter's Notes — 1999 Amendment

Rule 3.6(b)(6) has been amended by the deletion of the word "substantial" to correct an obvious error in the rules as originally promulgated. See the fourth paragraph of the original Reporter's Notes.

Reporter's Notes

This rule, amended by the ABA in 1994, differs from the Vermont Code by replacing the list of particular prohibited speech with a prohibition against speech which the lawyer knows or reasonably should know will have a substantial likelihood of materially prejudicing a trial. The rule then includes a more generalized description of communications likely to be prohibited as prejudicial.

The Vermont Code, which may be constitutionally infirm, presently allows lawyers to reveal “[a]t time of seizure, a description of the physical evidence seized, other than a confession, admission, or statement.” These revelations are described in the comment to the rule as ones which may be substantially prejudicial since the evidence may be subject to a motion to suppress.

There are some differences between the ABA Model Rule and Vermont Rule 3.6.

At 3.6(b)(6) “substantial” has been deleted as a modifier in reference to the level of harm which a person may pose to the public. The deletion makes Rule 3.6(b)(6) consistent with the former applicable Code provision and avoids an unwarranted chilling effect on a lawyer’s speech.

At 3.6(b)(7)(i) an accused’s age has been included with name, residence and occupation as the kind of nonprejudicial information which the public may have a right to know. Family status has been deleted.

The original comment has been modified to delete a subparagraph (6) which was inconsistent with the text of the rule. Since “information contained in a public record” is disclosable under Rule 3.6(b)(2), the text of the comments prohibiting disclosure of a criminal record does not follow and has been deleted. Similarly, the fact that a defendant has been charged with a crime is part of the public record and is disclosable.

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Rule 3.7. LAWYER AS WITNESS

(a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless:

- (1) the testimony relates to an uncontested issue;
- (2) the testimony relates to the nature and value of legal services rendered in the case;

or

- (3) disqualification of the lawyer would work substantial hardship on the client.

(b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer’s firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9.—
Amended June 17, 2009, eff. Sept. 1, 2009.

Comment

[1] Combining the roles of advocate and witness can prejudice the tribunal and the opposing party and can also involve a conflict of interest between the lawyer and client.

Advocate-Witness Rule

[2] The tribunal has proper objection when the trier of fact may be confused or misled by a lawyer serving as both advocate and witness. The opposing party has proper objection where the combination of roles may prejudice that party’s rights in the litigation. A witness is required to testify on the basis of personal knowledge, while an advocate is expected to explain and comment on evidence given by others. It may not be clear whether a statement by an advocate-witness should be taken as proof or as an analysis of the proof.

[3] To protect the tribunal, paragraph (a) prohibits a lawyer from simultaneously serving as advocate and necessary witness except in those circumstances specified in paragraphs (a)(1) through (a)(3). Paragraph (a)(1) recognizes that if the testimony will be uncontested, the ambiguities in the dual role are purely theoretical. Paragraph (a)(2) recognizes that where the testimony concerns the extent and value of legal services rendered in the action in which the testimony is offered, permitting the lawyers to testify avoids the need for a second trial with new counsel to resolve that issue. Moreover, in such a situation the judge has firsthand knowledge of the matter in issue; hence, there is less dependence on the adversary process to test the credibility of the testimony.

[4] Apart from these two exceptions, paragraph (a)(3) recognizes that a balancing is required between the interests of the client and those of the tribunal and the opposing party. Whether the tribunal is likely to be misled or the opposing party is likely to suffer prejudice depends on the nature of the case, the importance and probable tenor of the lawyer’s testimony, and the probability that the lawyer’s testimony will conflict with that of other witnesses. Even if there is risk of such prejudice, in determining whether the lawyer should be disqualified, due regard must be given to the effect of disqualification on the lawyer’s client. It is relevant that one or both parties could reasonably foresee that the lawyer would probably be a witness. The conflict of interest principles stated in Rules 1.7, 1.9 and 1.10 have no application to this aspect of the problem.

[5] Because the tribunal is not likely to be misled when a lawyer acts as advocate in a trial in which another lawyer in the lawyer's firm will testify as a necessary witness, paragraph (b) permits the lawyer to do so except in situations involving a conflict of interest.

Conflict of Interest

[6] In determining if it is permissible to act as advocate in a trial in which the lawyer will be a necessary witness, the lawyer must also consider that the dual role may give rise to a conflict of interest that will require compliance with Rules 1.7 or 1.9. For example, if there is likely to be substantial conflict between the testimony of the client and that of the lawyer, the representation involves a conflict of interest that requires compliance with Rule 1.7. This would be true even though the lawyer might not be prohibited by paragraph (a) from simultaneously serving as advocate and witness because the lawyer's disqualification would work a substantial hardship on the client. Similarly, a lawyer who might be permitted to simultaneously serve as an advocate and a witness by paragraph (a)(3) might be precluded from doing so by Rule 1.9. The problem can arise whether the lawyer is called as a witness on behalf of the client or is called by the opposing party. Determining whether or not such a conflict exists is primarily the responsibility of the lawyer involved. If there is a conflict of interest, the lawyer must secure the client's informed consent, confirmed in writing. In some cases, the lawyer will be precluded from seeking the client's consent. See Rule 1.7. See Rule 1.0(b) for the definition of "confirmed in writing" and Rule 1.0(e) for the definition of "informed consent."

[7] Paragraph (b) provides that a lawyer is not disqualified from serving as an advocate because a lawyer with whom the lawyer is associated in a firm is precluded from doing so by paragraph (a). If, however, the testifying lawyer would also be disqualified by Rule 1.7 or Rule 1.9 from representing the client in the matter, other lawyers in the firm will be precluded from representing the client by Rule 1.10 unless the client gives informed consent under the conditions stated in Rule 1.7.

Reporter's Notes — 2009 Amendment

V.R.P.C. 3.7 is amended to conform to the changes in the Model Rule.

In *Record v. Kempe*, 2007 VT 39, ¶¶ 23-25, 182 Vt. 17, 928 A.2d 1199, the Court held that a motion relying on V.R.P.C. 3.7 to disqualify plaintiffs' attorney whom defendant intended to call as a witness was properly denied where motion came just before jury draw and defendant was not prejudiced by ruling.

The ABA Reporter's Explanation is as follows:

TEXT:

No change in substance is proposed in the Rule text.

COMMENT:

[1] A reference to a tribunal has been added to clarify that the prohibition in paragraph (a) is for the protection of the tribunal as well as the parties.

Caption. The new caption has been added to better reflect the subject of Comments [2] through [5].

[2] and [3] References to a tribunal have been added to clarify that the prohibition in paragraph (a) is for the protection of the tribunal as well as the parties.

[4] References to a tribunal have been added to clarify that the prohibition in paragraph (a) is for the protection of the tribunal as well as the parties. The last sentence has been modified to emphasize that the advocate-witness rule is distinct from the conflict of interest principles in Rules 1.7, 1.9, and 1.10.

[5] This new Comment explains why paragraph (b) permits a lawyer to act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness, unless precluded from doing so by Rules 1.7 or 1.9.

Caption. The new caption has been added to better reflect the subject of Comments [6] and [7].

[6] The changes are intended to clarify that lawyers must be alert to the conflicts that may arise when they serve as an advocate in a matter in which they or a lawyer with whom they are associated is a necessary witness and that, if there is a conflict, it is to be resolved in accordance with Rules 1.7 or 1.9.

[7] This new Comment discusses the vicarious disqualification that may result if the lawyer-witness is precluded from serving as advocate by Rules 1.7 or 1.9.

Reporter's Notes

Under the present Vermont Code, a lawyer may not serve as an advocate in any case where "it is obvious" that the lawyer or the lawyer's associate "ought" to be called as a witness on the client's behalf. The rule gives more specific guidance. More importantly, the rule no longer automatically extends the prohibition to the lawyer's partners or associates.

ANNOTATIONS

1. Applicability. Defendants failed in their argument that the trial court erred in denying their motion to disqualify plaintiffs' attorney, which was grounded on defendants' intention to call him as a witness. The evidence solicited from plaintiffs' counsel was unnecessary and superfluous; accordingly, defendants were not prejudiced by its admission in violation of the ethical code. *Record v. Kempe*, 2007 VT 39, 182 Vt. 17, 928 A.2d 1199.

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Rule 3.8. SPECIAL RESPONSIBILITIES OF A PROSECUTOR

The prosecutor in a criminal case shall:

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

(b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;

(c) not seek to obtain unfairly from an unrepresented accused a waiver of important pretrial rights;

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

(e) not subpoena a lawyer in a grand jury, inquest, or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes:

(1) the information sought is not protected from disclosure by any applicable privilege;

(2) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution;

(3) there is no other feasible alternative to obtain the information.

(f) except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case who are in the employment or under the control of the prosecutor from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this rule.—Amended June 17, 2009, eff. Sept. 1, 2009.

Comment

[1] A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence. Precisely how far the prosecutor is required to go in this direction is a matter of debate and varies in different jurisdictions. Many jurisdictions have adopted the ABA Standards of Criminal Justice Relating to the Prosecution Function, which in turn are the product of prolonged and careful deliberation by lawyers experienced in both criminal prosecution and defense. Applicable law may require other measures by the prosecutor, and knowing disregard of those obligations or a systematic abuse of prosecutorial discretion could constitute a violation of Rule 8.4.

[2] Paragraph (c) does not apply to an accused appearing pro se with the approval of the tribunal. Nor does it forbid the lawful questioning of an uncharged suspect who has knowingly waived the rights to counsel and silence. Nor does it forbid appropriate plea negotiations with an unrepresented accused.

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

[4] Paragraph (e) is intended to limit the issuance of lawyer subpoenas in grand jury and other criminal proceedings to those situations in which there is a genuine need to intrude into the client-lawyer relationship.

[5] Paragraph (f) supplements Rule 3.6, which prohibits extrajudicial statements that have a substantial likelihood of prejudicing an adjudicatory proceeding. In the context of a criminal prosecution, a prosecutor's extrajudicial statement can create the additional problem of increasing public condemnation of the accused. Although the announcement of an indictment, for example, will necessarily have severe consequences for the accused, a prosecutor can, and should, avoid comments which have no legitimate law enforcement purpose and have a substantial likelihood of increasing public opprobrium of the accused. Nothing in this comment is intended to restrict the statements which a prosecutor may make which comply with Rule 3.6(b) or 3.6(c).

[6] Like other lawyers, prosecutors are subject to Rules 5.1 and 5.3, which relate to responsibilities regarding lawyers and nonlawyers who work for or are associated with the lawyer's office. Paragraph (f) reminds the prosecutor of the importance of these obligations in connection with the unique dangers of improper extrajudicial statements in a criminal case. In addition, paragraph (f) requires a prosecutor to exercise reasonable care to prevent persons assisting or associated with the prosecutor from making improper extrajudicial statements, even when such persons are not under the direct supervision of the prosecutor. Ordinarily, the reasonable care standard will be satisfied if the prosecutor issues the appropriate cautions to law-enforcement personnel and other relevant individuals.

Reporter's Notes – 2009 Amendment

V.R.P.C. 3.8 is amended to conform to the changes in the Model Rule while retaining certain variations in the Vermont rule as originally adopted. V.R.P.C. 3.8(c) adds "unfairly" to modify the nature of the prosecutor's obligation and deletes "such as the right to a preliminary hearing" at the end of the paragraph as inapplicable in Vermont. Language is added in former V.R.P.C. 3.8(e) [now (f)] concerning the prosecutor's employment of nonlawyer assistants for consistency with Rule 5.3. Former Model Rule 3.8(g) [now (f)], forbidding unnecessary statements that would heighten public condemnation of the accused, was omitted as superfluous. See Reporter's Notes to V.R.P.C. 3.8 (1999). These variations are carried forward, except that former Model Rule 3.8(g) has been incorporated in V.R.P.C. 3.8(f) both for uniformity with the Model Rules and because it is a salutary provision.

The ABA Reporter's Explanation of other changes in the rule is as follows:

TEXT:

1. Paragraph (f): Relocate [former] paragraph (e)

The text of [former] paragraph (e) has not been modified but has been moved here to consolidate in a single paragraph the prosecutor's obligations regarding extrajudicial publicity.

COMMENT:

[1] The Commission recommends deleting the cross-reference to Rule 3.3(d) in the context of grand jury proceedings, on the ground that grand jury proceedings are not ex parte adjudicatory proceedings.

[2] The proposed modifications provide a rationale for the Rule and clarify the distinctions between an unrepresented accused, an accused who is appearing pro se with the approval of the tribunal and an uncharged suspect. No change in substance is intended.

[6] This is a new Comment explaining the material relocated from [former] paragraph (e). It provides that the reasonable-care standard will be satisfied if the prosecutor issues appropriate cautions to law-enforcement personnel and other individuals assisting or associated with the prosecutor but not under the prosecutor's direct supervision. No change in substance is intended.

Reporter's Notes

This rule carries forward related Vermont Code provisions, but makes certain changes reflecting developments in constitutional law. The prosecutor is now obligated to make reasonable efforts to assure that the accused is given the opportunity to exercise the right to counsel. The prosecutor must also refrain from seeking to obtain a waiver of important pretrial rights from an unrepresented accused. The rule limits the prosecutor's discretion in subpoenaing lawyers to a grand jury to testify regarding past or present clients, a rule which has no counterpart in the Vermont Code. Finally, the rule adds a provision requiring the prosecutor to exercise reasonable supervision over lawyer and nonlawyer personnel who are within the prosecutor's control to prevent them from making prohibited extrajudicial statements.

The study committee departed somewhat from the ABA model version of this rule.

To reach a consensus on subsection (c), it was decided to include "unfairly" after the word "obtain" in that subsection and to delete the phrase "such as the right to a preliminary hearing," which has no applicability to Vermont practice. The comment was adjusted accordingly.

The changes in subsection (e) were made to make it consistent with Rule 5.3.

Subsection (f) was so modified by the ABA in August of 1995. The change was made because of a concern that this was a rule of procedure, not one of ethics. The study committee included the reference to inquests to make this rule consistent with Vermont practice.

Subsection (g), and its corresponding comment, was deleted as superfluous.

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Rule 3.9. ADVOCATE IN NONADJUDICATIVE PROCEEDINGS

A lawyer representing a client before a legislative body or administrative agency in a nonadjudicative proceeding shall disclose that the appearance is in a representative capacity and shall conform to the provisions of Rules 3.3(a) through (c), 3.4(a) through (c), and 3.5.— Amended June 17, 2009, eff. Sept. 1, 2009.

Comment

[1] In representation before bodies such as legislatures, municipal councils, and executive and administrative agencies acting in a rule-making or policy-making capacity, lawyers present facts, formulate issues and advance argument in the matters under consideration. The decision-making body, like a court, should be able to rely on the integrity of the submissions made to it. A lawyer appearing before such a body must deal with it honestly and in conformity with applicable rules of procedure. See Rules 3.3(a) through (c), 3.4(a) through (c) and 3.5.

[2] Lawyers have no exclusive right to appear before nonadjudicative bodies, as they do before a court. The requirements of this rule therefore may subject lawyers to regulations inapplicable to advocates who are not lawyers. However, legislatures and administrative agencies have a right to expect lawyers to deal with them as they deal with courts.

[3] This rule only applies when a lawyer represents a client in connection with an official hearing or meeting of a governmental agency or a legislative body to which the lawyer or the lawyer's client is presenting evidence or argument. It does not apply to representation of a client in a negotiation or other bilateral transaction with a governmental agency or in connection with an application for a license or other privilege or the client's compliance with generally applicable reporting requirements, such as the filing of income-tax returns. Nor does it apply to the representation of a client in connection with an investigation or examination of the client's affairs conducted by government investigators or examiners. Representation in such matters is governed by Rules 4.1 through 4.4.

Reporter's Notes — 2009 Amendment

V.R.P.C. 3.9 is amended to conform to the changes in the Model Rule. The ABA Reporter's Explanation is as follows:

TEXT:

The only change in the Rule text is the replacement of the reference to "legislative or administrative tribunal" with "legislative body or administrative agency." The term "tribunal" is defined in Rule 1.0(m) as denoting courts and other agencies when those agencies are acting in an adjudicative capacity. This change is necessary to make clear that Rule 3.9 applies only when the lawyer is representing a client in a nonadjudicative proceeding of a legislative body or administrative agency. No change in substance is intended.

COMMENT:

[1] The third sentence has been modified to clarify that the lawyer must, rather than merely should, act honestly and comply with procedural rules. A cross-reference to Rules 3.3(a) through (c), 3.4(a) through (c) and 3.5 was also added.

[3] The addition of the new references to official hearings or meetings at which the lawyer or the lawyer's client is presenting evidence or argument, applications for licenses, generally applicable reporting requirements and investigations or examinations is intended to clarify the limited situations in which Rule 3.9 is applicable. The Comment is consistent with the holding of ABA Standing Committee on Ethics and Professional Responsibility Formal Opinion 93-375 that Rule 3.9 is inapplicable in connection with a bank examination.

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TRANSACTIONS WITH PERSONS OTHER THAN CLIENTS

Rule 4.1. TRUTHFULNESS IN STATEMENTS TO OTHERS

In the course of representing a client a lawyer shall not knowingly make a false statement of material fact or law to a third person.—Amended June 17, 2009, eff. Sept. 1, 2009.

HISTORY

Editor’s note—2013. Comment [1] is republished to include language inadvertently omitted from the version in the bound volume.

Comment

Misrepresentation

[1] A lawyer is required to be truthful when dealing with others on a client’s behalf. A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false. Misrepresentations can also occur by partially true but misleading statements or omissions that are the equivalent of affirmative false statements. 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.

Statements of Fact

[2] This rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. 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. Lawyers should be mindful of their obligations under applicable law to avoid criminal and tortious misrepresentation.

Reporter’s Notes — 2009 Amendment

V.R.P.C. 4.1 is amended to conform to the changes in Model Rule 4.1(a). The substance of Model Rule 4.1(b), requiring disclosure of a material fact necessary to avoid assisting a criminal or fraudulent act by a client unless prohibited by Rule 1.6, was originally incorporated in V.R.P.C. 1.6(b)(2), where disclosure was made mandatory. See Reporter’s Notes to V.R.P.C. 4.1 (1999). The substance of that provision remains in amended V.R.P.C. 1.6(b)(2) and is thus not included in amended V.R.P.C. 4.1.

The ABA Reporter’s Explanation of the amendments of the Comments to Model Rule 4.1(a) is as follows:

[1] This Comment is presently quite brief, and the Commission is recommending additional guidance in the form of 1) a reference to “partially true but misleading statements”; 2) substituting “omissions that are the equivalent of affirmative false statements” for the vague “failure to act”; and 3) a cross-reference to Rule 8.4.

[2] The Commission received several requests to clarify the lawyer’s obligation of candor in negotiations. The Commission is recommending the addition of the word “ordinarily” to clarify that, under some circumstances, an estimate of price or value could constitute a false statement of fact under this Rule. In addition, the Commission recommends a reference to the lawyer’s obligations under the jurisdiction’s criminal and tort law of misrepresentation.

Reporter’s Notes

Model Rule 4.1(b) has been severely criticized for imposing a professional obligation of confidentiality in a situation where nondisclosure might impose criminal or tort liability upon the lawyer. See G. Hazard and W. Hodes, *The Law of Lawyering* §§ 4.1:301-03 (2d ed. 1990, supp. 1993). A few states have departed from the Model Rules and require disclosure. See e.g., N.J.R. Prof. Conduct, Rule 4.1; Md. Lawyer’s R. Prof. Conduct Rule 4.1. Additionally, the placement of the issue here is confusing because Rule 1.6 now imposes a disclosure obligation in certain circumstances. To avoid confusion, the subject of Model Rule 4.1(b) has been moved to Rule 1.6(b)(2). The content has been changed to make the disclosure requirement absolute and not subject to the prohibition of Rule 1.6(a) or the discretion of Rule 1.6(c). See Rule 1.6(b)(2).

ANNOTATIONS

1. Particular cases. When two attorneys believed that a potential witness would have terminated a telephone call if he had found out that he was being taped, the recording of the call was a material fact. Furthermore, the attorneys knowingly made a false statement about the recording when one stated that she was not recording the conversation, when in fact she was, and the other tried to distract the witness from the issue of recording entirely. In re PRB Docket No. 2007-046, 2009 VT 115, 187 Vt. 35, 989 A.2d 523.

2. Relation to other rules. Not all misrepresentations made by an attorney raise questions about her moral character, calling into question her fitness to practice law. If the subsection prohibiting a member of the Bar from engaging in conduct involving dishonesty, fraud, deceit or misrepresentation is interpreted to automatically prohibit “misrepresentations” in all circumstances, the rule prohibiting an attorney from knowingly making a false statement of material fact or law to a third person would be entirely superfluous. In re PRB Docket No. 2007-046, 2009 VT 115, 187 Vt. 35, 989 A.2d 523.

3. Sanctions. Private reprimand was appropriate for attorneys who falsely denied that they were recording a telephone conversation with a potential witness. The attorneys, who represented a defendant in a serious criminal matter, acted in the best interests of their client, not for any personal gain; they cooperated with disciplinary counsel and were motivated by a desire to help their client rather than advance their own selfish ends; there was no injury to the client and little damage to the public trust, the legal system, or the profession; and nothing in the record suggested a likelihood of repetition. In re PRB Docket No. 2007-046, 2009 VT 115, 187 Vt. 35, 989 A.2d 523.

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Rule 4.2. COMMUNICATION WITH PERSON REPRESENTED BY COUNSEL

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.—Amended June 17, 2009, eff. Sept. 1, 2009.

Comment

[1] This rule contributes to the proper functioning of the legal system by protecting a person who has chosen to be represented by a lawyer in a matter against possible overreaching by other lawyers who are participating in the matter, interference by those lawyers with the client-lawyer relationship and the uncounselled disclosure of information relating to the representation.

[2] This rule applies to communication with any person who is represented by counsel concerning the matter to which the communication relates.

[3] The rule applies even though the represented person initiates or consents to the communication. A lawyer must immediately terminate communication with a person if, after commencing communication, the lawyer learns that the person is one with whom communication is not permitted by this rule.

[4] This rule does not prohibit communication with a represented person, or an employee or agent of such a person, concerning matters outside the representation. For example, the existence of a controversy between a government agency and a private party, or between two organizations does not prohibit a lawyer for either from communicating with nonlawyer representatives of the other regarding a separate matter. Nor does this rule preclude communication with a represented person who is seeking advice from a lawyer who is not otherwise representing a client in the matter. A lawyer may not make a communication prohibited by this rule through the acts of another. See Rule 8.4(a). Parties to a matter may communicate directly with each, other and a lawyer is not prohibited from advising a client concerning a communication that the client is legally entitled to make. Also, a lawyer having independent justification for communicating with the other party is permitted to do so.

[5] Communications authorized by law may include communications by a lawyer on behalf of a client who is exercising a constitutional or other legal right to communicate with the government. Communication authorized by law may also include investigative activities of lawyers representing governmental entities, directly or through investigative agents, prior to the commencement of criminal or civil enforcement proceedings. When communicating with the accused in a criminal matter, a government lawyer must comply with this rule in addition to honoring the constitutional rights of the accused. The fact that a communication does not violate a state or federal constitutional right is insufficient to establish that the communication is permissible under this rule.

[6] A lawyer who is uncertain whether a communication with a represented person is permissible may seek a court order. A lawyer may also seek a court order in exceptional circumstances to authorize a communication that would otherwise be prohibited by this rule, for example, where communication with a person represented by counsel is necessary to avoid reasonably certain injury.

[7] In the case of a represented organization, this rule prohibits communications with a constituent of the organization who supervises, directs or regularly consults with the organization's lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability. Consent of the organization's lawyer is not required for communication with a former constituent. If a constituent of the organization is represented in the matter by his or her own counsel, the consent by that counsel to a communication will be sufficient for purposes of this rule. Compare Rule 3.4(f). In communicating with a current or former constituent of an organization, a lawyer must not use methods of obtaining evidence that violate the legal rights of the organization. See Rule 4.4.

[8] The prohibition on communications with a represented person only applies in circumstances where the lawyer knows that the person is in fact represented in the matter to be discussed. This means that the lawyer has actual knowledge of the fact of the representation, but such actual knowledge may be inferred from the circumstances. See Rule 1.0(f). Thus, a lawyer cannot evade the requirement of obtaining the consent of counsel by closing eyes to the obvious.

[9] In the event the person with whom the lawyer communicates is not known to be represented by counsel in the matter, the lawyer's communications are subject to Rule 4.3.

Reporter's Notes – 2009 Amendment

V.R.P.C. 4.2 is amended to conform to the changes in Model Rule 4.2. The ABA Reporter's Explanation is as follows:

TEXT:

Add reference to "court order"

Although a communication with a represented person pursuant to a court order will ordinarily fall within the "authorized by law" exception, the specific reference to a court order is intended to alert lawyers to the availability of judicial relief in the rare situations in which it is needed. These situations are described generally in Comment [4].

After consideration of concerns aired by prosecutors about the effect of Rule 4.2 on their ability to carry out their investigative responsibilities, the Commission decided against recommending adoption of special rules governing communications with represented persons by government lawyers engaged in law enforcement. The Commission concluded that Rule 4.2 strikes the proper balance between effective law enforcement and the need to protect the client-lawyer relationships that are essential to the proper functioning of the justice system.

COMMENT:

[Comment [1] is new. It] states the purposes served by Rule 4.2 and, in particular, emphasizes that the Rule is designed not merely to protect individual clients but also to enhance the proper functioning of the legal system.

[Comment [2] is former Comment [3], with a clause deleted.]

[Comment [3] is new.]

[Comment [4]] contains the substance of [former] Comment [1]. The last sentence has been deleted and its subject addressed in Comment [5]]. A new sentence clarifies that Rule 4.2 does not preclude communication with a represented person who is seeking a second opinion from a lawyer who is not representing a party in the matter. Also, material has been added from the commentary to Rule 8.4(a) emphasizing that a lawyer may not make a communication prohibited by this Rule through the acts of another. At the same time, parties are not precluded from communicating with one another, and a lawyer is not prohibited from advising a client concerning a communication that the client is legally entitled to make.

[Comment [5]] addresses when communications to or by the government may be within the Rule's "authorized by law" exception. The first sentence revises the final sentence of [former] Comment [1] and alerts lawyers to the possibility that a citizen's constitutional right to petition and the public policy of ensuring a citizen's right of access to government decisionmakers may create an exception to this Rule. [See, however, ABA Formal Opn. 97-408 (before communication on a matter in controversy with government agency, lawyer must give notice that will allow government lawyer to consult with agency.)] The remainder of the Comment substantially revises [former] Comment [2] on the applicability of the "authorized by law" exception to communications by government lawyers, directly or through investigative agents, prior to the commencement of criminal or civil enforcement proceedings. The reference in [former] Comment [2] to judicial precedent has been deleted, and the relationship between the Rule and applicable constitutional limits on government conduct has been reformulated. In place of the statement that the Rule imposes ethical restrictions that "go beyond" those imposed by constitutional provisions, the Comment explains that the fact that a communication does not violate the constitution "is insufficient to establish" that the communication is permissible under the Rule. For example, the fact that an individual has waived the constitutional right to consult the individual's lawyer at the time of arrest "is insufficient to establish" the ethical propriety of an ex parte communication by the government with that individual if the

individual's lawyer has not agreed to the communication. In reformulating the relationship between the Rule and applicable legal or constitutional requirements, the Commission intends no substantive change in the applicable standard.

[Comment [6] is new. It] explains the two circumstances in which a lawyer may seek a court order authorizing a communication: 1) where a lawyer is uncertain whether or not the communication is permitted by Rule 4.2; and 2) where a communication is prohibited by the Rule but "exceptional circumstances" nonetheless justify it. The example given is where ex parte communication with a represented person is necessary to avoid reasonably certain injury.

[Comment [7]] modifies [former] Comment [4] identifying the constituents of a represented organization with whom a lawyer may not communicate without the consent of the organization's lawyer. The [former] Comment's inclusion of all "persons having a managerial responsibility on behalf of the organization" has been criticized as vague and overly broad. As reformulated, the Comment contains the more specific reference to "a constituent of the organization who supervises, directs or regularly consults with the organization's lawyer concerning the matter or has authority to obligate the organization with respect to the matter." In focusing on the constituent's authority in the matter at issue and relationship with the organization's lawyer, the Comment provides clearer guidance than the broad general reference to "managerial responsibility."

In addition, the reference in the [former] Comment to a constituent whose act or omission in the matter may be imputed to the organization for purposes of civil or criminal liability has been retained. However, the Commission deleted the broad and potentially open-ended reference to "any other person ... whose statement may constitute an admission on the part of the organization." This reference has been read by some as prohibiting communication with any person whose testimony would be admissible against the organization as an exception to the hearsay rule.

A new sentence has been added to clarify that consent of the organization's lawyer is not required for communications with former constituents. The Commission, however, has added a warning to lawyers that Rule 4.4 precludes the use of methods of obtaining evidence that violate the legal rights of the organization.

[[8]] The penultimate sentence of [former] Comment [5] has been deleted because it suggests incorrectly that the required element of knowledge can be established by proof that the lawyer had "substantial reason to believe" that the person was represented in the matter. This is inconsistent with the definition of "knows" in Rule 1.0(t), which requires actual knowledge and involves no duty to inquire.

Comment [9] is former Comment [6].

Reporter's Notes

This rule was redrafted by the ABA in 1995 to clarify that the anti-contact rule applied to all represented persons, not merely to parties in existing litigation.

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Rule 4.3. DEALING WITH UNREPRESENTED PERSON

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.—Amended June 17, 2009, eff. Sept. 1, 2009.

Comment

[1] An unrepresented person, particularly one not experienced in dealing with legal matters, might assume that a lawyer is disinterested in loyalties or is a disinterested authority on the law even when the lawyer represents a client. In order to avoid a misunderstanding, a lawyer will typically need to identify the lawyer's client and, where necessary, explain that the client has interests opposed to those of the unrepresented person. For misunderstandings that sometimes arise when a lawyer for an organization deals with an unrepresented constituent, see Rule 1.13(d).

[2] The rule distinguishes between situations involving unrepresented persons whose interests may be adverse to those of the lawyer's client and those in which the person's interests are not in conflict with the client's. In the former situation, the possibility that the lawyer will compromise the unrepresented person's interests is so

great that the rule prohibits the giving of any advice, apart from the advice to obtain counsel. Whether a lawyer is giving impermissible advice may depend on the experience and sophistication of the unrepresented person, as well as the setting in which the behavior and comments occur. This rule does not prohibit a lawyer from negotiating the terms of a transaction or settling a dispute with an unrepresented person. So long as the lawyer has explained that the lawyer represents an adverse party and is not representing the person, the lawyer may inform the person of the terms on which the lawyer's client will enter into an agreement or settle a matter, prepare documents that require the person's signature and explain the lawyer's own view of the meaning of the document or the lawyer's view of the underlying legal obligations.

Reporter's Notes — 2009 Amendment

V.R.P.C. 4.3 is amended to conform to the changes in Model Rule 4.3. The ABA Reporter's Explanation is as follows:

TEXT:

1. Add prohibition on giving legal advice to unrepresented persons

Under the ABA Model Code of Professional Responsibility, DR 7-104(A)(2), a lawyer was prohibited from giving advice to an unrepresented person, other than the advice to secure counsel. This statement [was carried forward in the original] Comment to Model Rule 4.3. Although the cases generally perceive no change of substance in the Rule, it has been reported that, in negotiations between lawyers and unrepresented parties, the giving of legal advice (often misleading or overreaching) is not uncommon. Of the jurisdictions that have adopted the Model Rules, 11 have included a textual provision similar to the prohibition on giving legal advice in the Model Code.

The reason for the initial decision to delete the Model Code prohibition from text was the difficulty of determining what constitutes impermissible advice-giving. The Commission recommends that language be included in the Comment that addresses the application of the textual prohibition in some common situations. Although the line may be difficult to draw, it is important to discourage lawyers from overreaching in their negotiations with unrepresented persons.

2. Limit prohibition on advice-giving to situations where unrepresented person's interests may be in conflict with client

Following the practice of the majority of states that have adopted a textual prohibition on advice-giving, the Commission recommends restricting the prohibition to situations where the lawyer knows or has reason to know that the unrepresented person's interests "are or have a reasonable possibility of being in conflict with the interests of the client."

COMMENT:

[1] The Commission is proposing three changes in this paragraph. First, a sentence has been added to indicate that, in order to avoid misunderstandings, a lawyer will typically need to identify the lawyer's client and, where necessary, explain that the client has interests opposed to those of the unrepresented person. The second is the deletion of the general statement on advice-giving, in recognition that a similar statement now appears in the text. Finally, a cross-reference to Rule 1.13(d) has been added.

[2] A second Comment has been added to give guidance on what constitutes impermissible advice-giving. It first explains the rationale for limiting the prohibition to persons whose interests may be in conflict with the client's. It then attempts to distinguish between the permitted supplying of information and the impermissible giving of legal advice in negotiations and settlement discussions.

Reporter's Notes

This rule takes a somewhat different approach than does the Vermont Code. Instead of simply prohibiting the giving of substantive advice to unrepresented persons, the rule requires the lawyer to make clear to an unrepresented person that the lawyer is acting on behalf of a client, when the lawyer has reason to know the unrepresented person misunderstands the lawyer's role.

There is no direct counterpart to this rule in the Vermont Code. DR 7-104(A)(2) provided that a lawyer shall not "[g]ive advice to a person who is not represented by a lawyer, other than the advice to secure counsel."

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Rule 4.4. RESPECT FOR RIGHTS OF THIRD PERSONS

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

(b) A lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender.—Amended June 17, 2009, eff. Sept. 1, 2009.

Comment

[1] Responsibility to a client requires a lawyer to subordinate the interests of others to those of the client, but that responsibility does not imply that a lawyer may disregard the rights of third persons. It is impractical to catalogue all such rights, but they include legal restrictions on methods of obtaining evidence from third persons and unwarranted intrusions into privileged relationships, such as the client-lawyer relationship.

[2] Paragraph (b) recognizes that lawyers sometimes receive documents that were mistakenly sent or produced by opposing parties or their lawyers. If a lawyer knows or reasonably should know that a such a document was sent inadvertently, then this rule requires the lawyer to promptly notify the sender in order to permit that person to take protective measures. Whether the lawyer is required to take additional steps, such as returning the original document, is a matter of law beyond the scope of these rules, as is the question of whether the privileged status of a document has been waived. Similarly, this rule does not address the legal duties of a lawyer who receives a document that the lawyer knows or reasonably should know may have been wrongfully obtained by the sending person. For purposes of this rule, "document" includes e-mail or other electronic modes of transmission subject to being read or put into readable form.

[3] Some lawyers may choose to return a document unread, for example, when the lawyer learns before receiving the document that it was inadvertently sent to the wrong address. Where a lawyer is not required by applicable law to do so, the decision to voluntarily return such a document is a matter of professional judgment ordinarily reserved to the lawyer. See Rules 1.2 and 1.4.

Reporter's Notes — 2009 Amendment

V.R.P.C. 4.4 is amended to conform to the changes in Model Rule 4.4. The ABA Reporter's Explanation is as follows:

TEXT:

Paragraph (b): Add material on obligations of lawyer upon receipt of inadvertently sent document

Numerous inquiries have been directed to ethics committees regarding the proper course of conduct for a lawyer who receives a fax or other document from opposing counsel that was not intended for the receiving lawyer. ABA Standing Committee on Ethics and Professional Responsibility Formal Opinion 92-368 advised that the receiving lawyer is obligated to refrain from examining the materials, to notify the sending lawyer and to abide by that lawyer's instructions. That opinion has been criticized, in part because there is no provision of the Model Rules directly on point. The Commission decided that this Rule should require only that the lawyer notify the sender when the lawyer knows or reasonably should know that material was inadvertently sent, thus permitting the sending lawyer to take whatever steps might be necessary or available to protect the interests of the sending lawyer's client.

COMMENT:

[1] A phrase has been added to this Comment identifying "intrusions into privileged relationships" as among the third-party rights a lawyer must respect.

[2] This new Comment explains the obligations imposed by paragraph (b). It makes clear that the Rule does not address possible additional obligations of the lawyer that might be imposed by other law. Nor does it address the legal duties of a lawyer who receives a document that the lawyer knows or believes may have been wrongfully obtained by the sending person. Finally, the Comment explains that, for purposes of the Rule, the term "document" includes email or other electronic modes of transmission.

[3] This new Comment lends support to those lawyers who voluntarily choose to return a document unread when they know or reasonably believe that the document was inadvertently sent. The Commission believes that this is a decision ordinarily reserved to the lawyer under Rules 1.2 and 1.4 and that a lawyer commits no act of disloyalty by choosing to act in accordance with professional courtesy.

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Rule 4.5. THREATENING CRIMINAL PROSECUTION

A lawyer shall not present, participate in presenting, or threaten to present criminal charges in order to obtain an advantage in a civil matter.—Amended June 17, 2009, eff. Sept. 1, 2009.

Comment

[1] The civil adjudicative process is primarily designed for the settlement of disputes between parties, while the criminal process is designed for the protection of society as a whole. Threatening to use, or using, the criminal process to coerce adjustment of private civil claims or controversies is a subversion of that process; further, the person against whom the criminal process is so misused may be deterred from asserting the person's legal rights, and thus the usefulness of the civil process in settling private disputes is impaired. As in all cases of abuse of judicial process, the improper use of criminal process tends to diminish public confidence in our legal system.

Reporter's Notes — 2009 Amendment

There is no equivalent in the Model Rules to V.R.P.C. 4.5, which was based on the former Vermont Code of Professional Responsibility, DR 7-105 and EC 7-21. See Reporter's Notes to V.R.P.C. 4.5 (1999). The only change is the insertion of the bracketed number to designate the Comment. Note that the conduct proscribed is also an offense under 13 V.S.A. § 1701, which provides criminal penalties for maliciously threatening "to accuse another of a crime or offense, ... with intent to extort money or other pecuniary advantage, or with intent to compel the person so threatened to do an act against his will" and thus might also be a violation of Rule 8.4.

Reporter's Notes

This rule is not based upon an ABA Model Rule. The rule is identical to former Vermont DR 7-105, except that "solely" has been deleted after "charges." The comment is a reiteration of former EC 7-21.

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LAW FIRMS AND ASSOCIATIONS

Rule 5.1. RESPONSIBILITIES OF PARTNERS, MANAGERS, AND SUPERVISORY LAWYERS

(a) A partner in a law firm, 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 all lawyers in the firm conform to the Rules of Professional Conduct.

(b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.

(c) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:

(1) the lawyer orders or, with 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 other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.—Amended June 17, 2009, eff. Sept. 1, 2009.

Comment

[1] Paragraph (a) applies to lawyers who have managerial authority over the professional work of a firm. See Rules 1.0(c). This includes members of a partnership, the shareholders in a law firm organized as a professional corporation, and members of other associations authorized to practice law; lawyers having comparable managerial authority in a legal services organization or a law department of an enterprise or government agency; and lawyers who have intermediate managerial responsibilities in a firm. Paragraph (b) applies to lawyers who have supervisory authority over the work of other lawyers in a firm.

[2] Paragraph (a) requires lawyers with managerial authority within a firm to make reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance that all lawyers in the firm will conform to the Rules of Professional Conduct. Such policies and procedures include those designed to detect and

resolve conflicts of interest, identify dates by which actions must be taken in pending matters, account for client funds and property and ensure that inexperienced lawyers are properly supervised.

[3] Other measures that may be required to fulfill the responsibility prescribed in paragraph (a) can depend on the firm's structure and the nature of its practice. In a small firm of experienced lawyers, informal supervision and periodic review of compliance with the required systems ordinarily will suffice. In a large firm, or in practice situations in which difficult ethical problems frequently arise, more elaborate measures may be necessary. Some firms, for example, have a procedure whereby junior lawyers can make confidential referral of ethical problems directly to a designated senior partner or special committee. See Rule 5.2. Firms, whether large or small, may also rely on continuing legal education in professional ethics. In any event, the ethical atmosphere of a firm can influence the conduct of all its members and the partners may not assume that all lawyers associated with the firm will inevitably conform to the rules.

[4] Paragraph (c) expresses a general principle of personal responsibility for acts of another. See also Rule 8.4(a).

[5] Paragraph (c)(2) defines the duty of a partner or other lawyer having comparable managerial authority in a law firm, as well as a lawyer who has direct supervisory authority over performance of specific legal work by another lawyer. Whether a lawyer has supervisory authority in particular circumstances is a question of fact. Partners and lawyers with comparable authority have at least indirect responsibility for all work being done by the firm, while a partner or manager in charge of a particular matter ordinarily also has supervisory responsibility for the work of other firm lawyers engaged in the matter. Appropriate remedial action by a partner or managing lawyer would depend on the immediacy of the partner's that lawyer's involvement and the seriousness of the misconduct. A supervisor is required to intervene to prevent avoidable consequences of misconduct if the supervisor knows that the misconduct occurred. Thus, if a supervising lawyer knows that a subordinate misrepresented a matter to an opposing party in negotiation, the supervisor as well as the subordinate has a duty to correct the resulting misapprehension.

[6] Professional misconduct by a lawyer under supervision could reveal a violation of paragraph (b) on the part of the supervisory lawyer even though it does not entail a violation of paragraph (c) because there was no direction, ratification or knowledge of the violation.

[7] Apart from this rule and Rule 8.4(a), a lawyer does not have disciplinary liability for the conduct of a partner, associate or subordinate. Whether a lawyer may be liable civilly or criminally for another lawyer's conduct is a question of law beyond the scope of these rules.

[8] The duties imposed by this rule on managing and supervising lawyers do not alter the personal duty of each lawyer in a firm to abide by the Rules of Professional Conduct. See Rule 5.2(a).

Reporter's Notes — 2009 Amendment

V.R.P.C. 5.1 is amended to conform to the changes in Model Rule 5.1. The ABA Reporter's Explanation is as follows:

TEXT:

1. Caption

The caption has been modified to reflect the applicability of paragraph (a) to lawyers who possess managerial authority comparable to that of a partner.

2. Paragraphs (a) and (c)(2): Modify to apply to lawyers with managerial authority comparable to that of partner

This change was made to clarify in the Rule text that paragraph (a) applies to managing lawyers in corporate and government legal departments and legal services organizations, as well as to partners in private law firms. No change in substance is intended.

COMMENT:

[1] A cross-reference to the definition of a law firm in Rule 1.0(c) has been added. Also, a new sentence has been added to call attention to the difference between lawyers who possess managerial authority comparable to that possessed by law-firm partners and who are subject to paragraph (a) and supervisory lawyers who must comply with paragraph (b).

[2] This new Comment provides examples of policies and procedures that partners and managing lawyers should have in place in order to comply with paragraph (a).

[3] [Former] Comment [2] has been modified so it refers exclusively to paragraph (a). Other minor changes reflect that the policies and procedures required by paragraph (a) may vary with the structure of a firm and the nature of its practice.

[4] [Former] Comment [3] has been modified to emphasize that paragraph (c), as distinct from paragraphs (a) and (b), specifies circumstances in which a lawyer will be held personally responsible for the specific misconduct of another lawyer.

[5] [Former] Comment [6] has been modified to clarify that paragraph (c)(2) applies to partners and lawyers with comparable managerial authority, as well as to supervising lawyers.

[8] This new Comment emphasizes that the extra duties imposed on partners, managing lawyers and supervisory lawyers by Rule 5.1 [do] not alter the basic duty of each lawyer in a firm to personally comply with the Rules of Professional Conduct. Although emphasis is added, no change in substance is intended.

Reporter's Notes

There is no direct counterpart to this rule in the Vermont Code. DR 1-103(A) provided that a lawyer "possessing unprivileged knowledge of a violation of DR 1-102 shall report such knowledge to . . . authority empowered to investigate or act upon such violation."

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Rule 5.2. RESPONSIBILITIES OF A SUBORDINATE LAWYER

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

(b) A subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty.

Comment

[1] Although a lawyer is not relieved of responsibility for a violation by the fact that the lawyer acted at the direction of a supervisor, that fact may be relevant in determining whether a lawyer had the knowledge required to render conduct a violation of the rules. For example, if a subordinate filed a frivolous pleading at the direction of a supervisor, the subordinate would not be guilty of a professional violation unless the subordinate knew of the document's frivolous character.

[2] When lawyers in a supervisor-subordinate relationship encounter a matter involving professional judgment as to ethical duty, the supervisor may assume responsibility for making the judgment. Otherwise a consistent course of action or position could not be taken. If the question can reasonably be answered only one way, the duty of both lawyers is clear and they are equally responsible for fulfilling it. However, if the question is reasonably arguable, someone has to decide upon the course of action. That authority ordinarily reposes in the supervisor, and a subordinate may be guided accordingly. For example, if a question arises whether the interests of two clients conflict under Rule 1.7, the supervisor's reasonable resolution of the question should protect the subordinate professionally if the resolution is subsequently challenged.

Reporter's Notes — 2009 Amendment

There are no changes to Model Rule 5.2 or its comment. The only change in the Vermont rule is the insertion of the bracketed numbers to designate the paragraphs of the comment.

Reporter's Notes

There is no counterpart to this rule in the Vermont Code.

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Rule 5.3. RESPONSIBILITIES REGARDING NONLAWYER ASSISTANTS

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.—Amended June 17, 2009, eff. Sept. 1, 2009.

Comment

[1] Lawyers generally employ assistants in their practice, including secretaries, investigators, law student interns, and paraprofessionals. Such assistants, whether employees or independent contractors, act for the lawyer in rendition of the lawyer's professional services. 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. The measures employed in supervising nonlawyers should take account of the fact that they do not have legal training and are not subject to professional discipline.

[2] Paragraph (a) requires lawyers with managerial authority within a law firm to make reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance that nonlawyers in the firm will act in a way compatible with the Rules of Professional Conduct. See Comment [1] to Rule 5.1. Paragraph (b) applies to lawyers who have supervisory authority over the work of a nonlawyer. Paragraph (c) specifies the circumstances in which a lawyer is responsible for conduct of a nonlawyer that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer.

Reporter's Notes — 2009 Amendment

V.R.P.C. 5.3 is amended to conform to the changes in Model Rule 5.3. The ABA Reporter's Explanation is as follows:

TEXT:

Paragraphs (a) and (c)(2): Modify to apply to lawyers with managerial authority comparable to that of partner

As with Rule 5.1, this change was made to clarify in the Rule text that paragraph (a) applies to managing lawyers in corporate and government legal departments and legal service organizations, as well as to partners in private law firms. No change in substance is intended.

COMMENT:

[1] "[S]hould" has been replaced with "must" in the third sentence because the duty to give appropriate instruction and supervision is mandatory.

[2] This Comment distinguishes the responsibility to create law-firm systems imposed by paragraph (a) from the supervisory responsibility addressed in paragraph (b) and the personal responsibility of managing and supervisory lawyers for the specific misconduct of nonlawyer employees as addressed in paragraph (c).

Reporter's Notes

There is no direct counterpart to this rule in the Vermont Code. DR 4-101(D) provides that a lawyer "shall exercise reasonable care to prevent the lawyer's employees, associates, and others whose services are utilized by him from disclosing or using confidences or secrets of a client." DR 7-107(J) provides that "[a] lawyer shall exercise reasonable care to prevent the lawyer's employees and associates from making an extrajudicial statement that the lawyer would be prohibited from making under DR 7-107."

Rule 5.3 recognizes the expanding role of nonlawyers in the legal field. The rule imposes obligations in addition to those contained in the Vermont Code. In addition to merely exercising care to prevent the disclosure of client confidences or the making of prohibited extrajudicial statements by employees and associates, lawyers under the rule must also see that the firm takes measures to assure that the conduct of nonlawyers in the firm is compatible with the lawyer's professional obligations. Under certain conditions, a lawyer is responsible for the unprofessional conduct of a nonlawyer in the firm.

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Rule 5.4. PROFESSIONAL INDEPENDENCE OF A LAWYER

(a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that:

(1) an agreement by a lawyer with the lawyer's firm, partner, or associate may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;

(2) a lawyer who purchases the practice of a deceased, disabled, or disappeared lawyer may, pursuant to the provisions of Rule 1.17, pay to the estate or other representative of that lawyer the agreed-upon purchase price;

(3) a lawyer or law firm may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement; and

(4) a lawyer may share court-awarded legal fees with a nonprofit organization that employed, retained or recommended employment of the lawyer in the matter.

(b) A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.

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

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

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

(2) a nonlawyer is a corporate director or officer thereof or occupies the position of similar responsibility in any form of association other than a corporation; or

(3) a nonlawyer has the right to direct or control the professional judgment of a lawyer.—Amended June 17, 2009, eff. Sept. 1, 2009.

Comment

[1] The provisions of this rule express traditional limitations on sharing fees. These limitations are to protect the lawyer's professional independence of judgment. Where someone other than the client pays the lawyer's fee or salary, or recommends employment of the lawyer, that arrangement does not modify the lawyer's obligation to the client. As stated in paragraph (c), such arrangements should not interfere with the lawyer's professional judgment.

[2] This rule also expresses traditional limitations on permitting a third party to direct or regulate the lawyer's professional judgment in rendering legal services to another. See also Rule 1.8(f) (lawyer may accept compensation from a third party as long as there is no interference with the lawyer's independent professional judgment and the client gives informed consent).

Reporter's Notes — 2009 Amendment

V.R.P.C. 5.4 is amended to conform to the changes in the Model Rule. The ABA Reporter's Explanation is as follows:

TEXT:

1. Paragraph (a)(4): Permit sharing of court awarded legal fees with nonprofit organization

This addition is proposed to clarify that a lawyer may share court-awarded legal fees with a nonprofit organization that employed, retained or recommended employment of the lawyer in the matter. The propriety of such fee-sharing arrangements was upheld in Formal Opinion 93-374 of the ABA Standing Committee on Ethics and Professional Responsibility. Other state ethics committees, however, while agreeing with the policy underlying the ABA Opinion, found violations of state versions of Rule 5.4 because the text of the Rule appeared to prohibit such feesharing. The Commission agrees with the ABA Standing Committee that the threat to independent professional judgment is less here than in circumstances where a for-profit organization is involved and is therefore recommending this change.

2. Paragraph (d)(2): Broaden to include nonlawyers who occupy positions with responsibilities similar to those of corporate directors or officers

The current Rule is too limited because it employs terminology peculiar to corporate law, and lawyers are now practicing in professional limited liability companies. When applied to a professional limited liability company, paragraph (d)(2) is intended to preclude a nonlawyer from serving as a manager in a company that is managed by managers rather than members and from serving in a position like that of a president, treasurer or secretary of a corporation.

COMMENT:

[2] This Comment provides a cross-reference to Rule 1.8(f) on payment of a client's fee by a third person. No change in substance is intended.

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Rule 5.5. UNAUTHORIZED PRACTICE OF LAW; MULTIJURISDICTIONAL PRACTICE OF LAW

(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, and not disbarred or suspended from practice in any jurisdiction, may provide legal services in this jurisdiction that:

(1) are provided to the lawyer's employer or its organizational affiliates and are not services for which the forum requires pro hac vice admission; or

(2) are services that the lawyer is authorized to provide by federal law or other law of this jurisdiction.—Amended June 17, 2009, eff. Sept. 1, 2009.

Comment

[1] A lawyer may practice law only in a jurisdiction in which the lawyer is authorized to practice. 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. 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.

[2] The definition of the practice of law is established by law and varies from one jurisdiction to another. Whatever the definition, limiting the practice of law to members of the bar protects the public against rendition of legal services by unqualified persons. 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] 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. 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.

[4] Other than as authorized by law or this rule, a lawyer who is not admitted to practice generally in this jurisdiction violates paragraph (b) if the lawyer establishes an office or other systematic and continuous presence in this jurisdiction for the practice of law. Presence may be systematic and continuous even if the lawyer is not physically present here. 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] 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. Paragraph (c) identifies four such circumstances. 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 lawyer to establish an office or other systematic and continuous presence in this jurisdiction without being admitted to practice generally here.

[6] 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). 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.

[7] 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. The word "admitted" in paragraph (c) 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) 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. 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] 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. This authority may be granted pursuant to formal rules governing admission pro hac vice or pursuant to informal practice of the tribunal or agency. Under paragraph (c)(2), a lawyer does not violate this rule when the lawyer appears before a tribunal or agency pursuant to such authority. 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] 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. Examples of such conduct include meetings with the client, interviews of potential witnesses, and the review of documents. 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.

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

[12] 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 to practice. 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). 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. 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. 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. 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.

[15] Paragraph (d) identifies two circumstances in which a lawyer who is admitted to practice in another United States jurisdiction, and is not disbarred or suspended from practice in any jurisdiction, may establish an office or other systematic and continuous presence in this jurisdiction for the practice of law as well as provide legal services on a temporary basis. Except as provided in paragraphs (d)(1) and (d)(2), a lawyer who is admitted to practice law in another 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 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. This paragraph does not authorize the provision of personal legal services to the employer's officers or employees. The paragraph applies to in-house corporate lawyers, government lawyers and others who are employed to render legal services to the employer. 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. [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.

[18] Paragraph (d)(2) recognizes that a 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.

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

Reporter's Notes — 2009 Amendment

V.R.P.C. 5.5 is amended to conform to the changes in the Model Rule, which incorporate recommendations of the ABA's Multijurisdictional Practice Commission. The Report of the Commission, adopted by the ABA House of Delegates in August 2002, ABA Report 201B (August 2002), provided in pertinent part as follows (footnotes omitted):

Proposed Model Rule 5.5(a) would make clear that a lawyer may not assist another, whether a lawyer or nonlawyer, in the unauthorized practice of law. [Former] Rule 5.5 has two provisions: Rule 5.5(a) forbids a lawyer from engaging in the practice of law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction and Rule 5.5(b) forbids a lawyer from assisting a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law. The Commission proposes combining and refining these restrictions into a single provision, which would provide that "[a] lawyer shall not practice law in a jurisdiction, or assist another in doing so, in violation of the regulation of the legal profession in that jurisdiction." (emphasis added) However, this would not effect a substantive change to the Model Rules, since this is simply a specific application of Model Rule 8.4(a) (Misconduct), which prohibits a lawyer from "knowingly assist[ing]" another in violating the Rules of Professional Conduct.

Proposed Model Rule 5.5(b) would prohibit a lawyer from establishing an office or maintaining a systematic and continuous presence in a jurisdiction, except as authorized by the Model Rules or other law; and it

would also prohibit a lawyer from representing that the lawyer is admitted in a jurisdiction if the lawyer is not admitted. Nothing in the proposed rule would authorize lawyers to open an office or otherwise establish a permanent law practice in states where they are not licensed or otherwise authorized to do so. Nor would any part of the proposed rule permit lawyers to hold themselves out as licensed to practice law in jurisdictions where they are not in fact licensed. The amendments recommended by the Commission make these limitations clear....

Proposed Model Rule 5.5(c)(1) would allow work on a temporary basis in a state by an out-of-state lawyer who is associated in the matter with a lawyer who is admitted to practice in the jurisdiction and who actively participates in the representation. This provision would promote the client's interest in counsel of choice in many circumstances where the client has good reason to engage both a local and an out-of-state lawyer. One recurring example is where local counsel recommends engaging the assistance of a lawyer with special or particularized expertise. Another is where the client has a prior or ongoing relationship with the out-of-state lawyer in whom the client has particular confidence and whose advice is sought in evaluating the services of the local counsel. Lawyers who assist litigation counsel but who do not themselves appear in judicial proceedings would also be covered by this provision.

For this provision to apply, the lawyer admitted to practice in the jurisdiction could not serve merely as a conduit for the out-of-state lawyer, but would have to share actual responsibility for the representation. When that condition is met, the state's regulatory interest in protecting the interests of both clients and the public is adequately served. The lawyer who is licensed in the jurisdiction will have an opportunity to oversee the out-of-state lawyer's work and to assure that the work is performed competently and ethically. The local lawyer, having been found to have the requisite fitness and character to practice law in the state, is presumptively qualified to carry out this responsibility.

This provision would permit a lawyer to provide legal services on a temporary basis in an office of the lawyer's firm outside the lawyer's home state, as long as the lawyer is in a genuine co-counsel relationship with a lawyer of the firm who is licensed in the jurisdiction. However, this provision is not intended to cover associates who rotate among a law firm's offices for periods that would be longer than "temporary."

Proposed Model Rule 5.5(c)(2) would allow lawyers to provide services ancillary to pending or prospective litigation. Specifically, it would permit a lawyer's temporary presence in a state where the lawyer is not presently admitted to practice, if (a) the lawyer's services are in anticipation of litigation reasonably expected to be filed in a state where the lawyer is admitted or expects to be admitted pro hac vice, or (b) the lawyer's services are ancillary to pending litigation in which the lawyer lawfully appears (or reasonably expects to appear), either because the lawyer is licensed in the jurisdiction where the litigation takes place or because the lawyer has been or reasonably expects to be admitted pro hac vice to participate in the litigation. This provision would not supplant pro hac vice requirements, however. In order to appear before a tribunal in a state where the lawyer is not licensed, the out-of-state lawyer would be required to comply with existing pro hac vice provisions.

When a lawyer represents a party in a pending lawsuit in a jurisdiction in which the lawyer is licensed to practice law or in a pending litigation in which the lawyer appears pro hac vice, this provision would cover work related to the lawsuit that is performed in other states. Often, a lawyer representing a party in pending litigation must travel outside the jurisdiction where the litigation takes place in order to interview or depose witnesses, review documents, conduct negotiations, and perform other necessary work. It is generally recognized that work of this nature, insofar as it does not involve appearances in court by the out-of-state lawyer, is and should be permissible. It would be exceedingly costly and inefficient for a party to retain separate counsel in every state in which work must be performed ancillary to a pending litigation, and requiring parties to do so would not strongly serve any regulatory interest, since lawyers in litigation are generally supervised adequately by the courts before which they appear.

Additionally, this provision would cover work of a similar nature in connection with prospective litigation when there is a reasonable expectation that the lawsuit will be filed in a jurisdiction in which the lawyer is admitted to practice law or reasonably expects to be admitted pro hac vice. Prior to the filing of a lawsuit in a particular jurisdiction, lawyers may need to perform a variety of tasks, such as interviewing witnesses and reviewing documents, which may occur in multiple states. As in the case of pending litigation, in the context of prospective litigation it would be exceedingly costly and inefficient to require a party to retain separate counsel in every state in which such preliminary work must be done.

This provision would also cover supporting work by assisting lawyers who do not appear before the tribunal and are not themselves admitted pro hac vice. When a group of lawyers from an out-of-state law firm works collectively on a substantial litigation, it is understood that those lawyers who are making formal appearances in court or in depositions must seek pro hac vice admission, but it is customary for assisting lawyers not to do so if they serve exclusively in certain supporting roles, such as conducting legal research and drafting documents. The Commission's proposed amendment would establish that as long as the supervisory lawyers involved in the litigation are or reasonably expect to be authorized to appear in the proceeding, this type of supporting legal work by assisting lawyers is permissible, even if some of it is performed outside the states in which the assisting lawyers are licensed.

Proposed Model Rule 5.5(c)(2) would also make clear that jurisdictional restrictions do not apply when out-of-state lawyers are authorized by law or court order to appear before a tribunal or administrative agency in the jurisdiction. As the Ethics 2000 Commission provided in Comment [3] to its proposed provision on this subject, “Lawyers not admitted to practice generally in the jurisdiction may be authorized by law or order of a tribunal or an administrative agency to appear before the tribunal or agency. Such authority may be granted pursuant to formal rules governing admission pro hac vice or pursuant to informal practice of the tribunal or agency.” To avoid confusion, the proposed Rule would incorporate the substance of this Comment.

Proposed Model Rule 5.5(c)(3) would allow a lawyer to provide services on a temporary basis in a jurisdiction in which the lawyer is not licensed to practice law in connection with the representation of clients in pending or anticipated arbitrations, mediations or other alternative dispute resolution (“ADR”) proceedings, where the work arises out of or is reasonably related to the lawyer’s practice in a jurisdiction in which the lawyer is admitted to practice. The provision would not apply, however, when participation in an ADR proceeding is governed by a pro hac vice provision.

It is generally recognized that, in the ADR context, there is often a strong justification for choosing a lawyer who is not admitted to practice law in the jurisdiction in which the proceeding takes place but who has an ongoing relationship with the client, who is admitted to practice in the jurisdiction in which the client is located, or has developed a particular knowledge or expertise that would be advantageous in providing the representation. Admission to practice law in the jurisdiction in which the proceeding takes place may be relatively unimportant, in part, because that jurisdiction may have no relation to the law governing the proceeding or to the dispute. Unlike litigation, in ADR parties may select the site of the proceeding simply on the basis of convenience. At times, as in the case of international arbitrations, a site is chosen precisely because it has no connection to either party or to the dispute. Thus, in ADR proceedings, the in-state lawyer is not ordinarily better qualified than other lawyers by virtue of greater familiarity with state law, state legal processes and state institutions. Further, as noted by the ABA Section of Litigation in its comments to the Commission, “Clients have important considerations in ADR, which include confidentiality, consistency, uniformity, costs, and convenience. After all, non-binding ADR procedures usually require client “buy in” to succeed. Denying a client her preferred counsel could hamper early ADR efforts and impede prompt resolution of disputes.” It is for these reasons that many found the Birbrower decision troubling, and that the California legislature subsequently adopted a law temporarily authorizing out-of-state lawyers to represent clients in arbitration proceedings.

This proposed provision would not address the work of arbitrators, mediators and others serving in ADR proceedings in comparable non-representative roles. It is questionable whether work as an adjudicator or “neutral” in an ADR proceeding comprises the practice of law for purposes of UPL restrictions. Assuming it does, this work would typically be covered by the proposed provision, discussed below in Model Rule 5.5(c)(4), applicable to providing services that arise out of or are reasonably related to the lawyer’s practice in a jurisdiction in which the lawyer is admitted to practice.

Proposed Model Rule 5.5(c)(4) would permit, on a temporary basis, transactional representation, counseling and other non-litigation work that arises out of or is reasonably related to the lawyer’s practice in a jurisdiction in which the lawyer is admitted to practice. This provision would address legal services provided by the lawyer outside the lawyer’s state of admission that are related to the lawyer’s practice in the home state. The provision is drawn from § 3(3) of the Restatement (Third) of the Law Governing Lawyers. The Commission’s proposed Comment to Rule 5.5 offers guidance as to its scope and limitations, and it is anticipated that courts and other authorities would provide additional guidance.

This provision is intended, first, to cover services that are ancillary to a particular matter in the home state. For example, in order to conduct negotiations on behalf of a home state client or in connection with a home state matter, the lawyer may need to meet with the client and/r other parties to the transaction outside the lawyer’s home state. A client should be able to have a single lawyer conduct all aspects of a transaction, even though doing so requires traveling to different states. It is reasonable that the lawyer be one who practices law in the client’s state or in a state with a connection to the legal matter that is the subject of the representation. In such circumstances, it should be sufficient to rely on the lawyer’s home state as the jurisdiction with the primary responsibility to ensure that the lawyer has the requisite character and fitness to practice law; the home state has a substantial interest in ensuring that all aspects of the lawyer’s provision of legal services, wherever they occur, are conducted competently and professionally.

Second, this provision would respect preexisting and ongoing client-lawyer relationships by permitting a client to retain a lawyer to work on multiple related matters, including some having no connection to the jurisdiction in which the lawyer is licensed. Clients who have multiple or recurring legal matters in multiple jurisdictions have an interest in retaining a single lawyer or law firm to provide legal representation in all the related matters. In general, clients are better served by having a sustained relationship with a lawyer or law firm in whom the client has confidence. Through past experience, the client can gain some assurance that the lawyer performs work competently and can work more efficiently by drawing on past experience regarding the client, its business, and its objectives. In order to retain the client’s business, lawyers representing clients in multiple matters

have a strong incentive to work competently, and to engage other counsel to provide legal services work that they are not qualified to render.

Third, this provision would authorize legal services to be provided on a temporary basis outside the lawyer's home state by a lawyer who, through the course of regular practice in the lawyer's home state, has developed a recognized expertise in a body of law that is applicable to the client's particular matter. This could include expertise regarding nationally applicable bodies of law, such as federal, international or foreign law. A client has an interest in retaining a specialist in federal tax, securities or antitrust law, or the law of a foreign jurisdiction, regardless of where the lawyer has been admitted to practice law. This could also include expertise regarding the law of the lawyer's home state if that law governs the matter, since a client has an interest in retaining a lawyer who is admitted in the jurisdiction whose law governs the particular matter and who has experience regarding that law. The provision would, thus, bring the law into line with prevalent law practices. For example, many lawyers who specialize in federal law currently practice nationally, without regard to jurisdictional restrictions, which are unenforced. The same is true of lawyers specializing in other law that applies across state lines.

To be covered by this provision, the lawyer's contact with any particular host state would have to be temporary. As the California Supreme Court Advisory Task Force noted in its preliminary report on MJJP, "clients often request an out-of-state transactional or other nonlitigating lawyer to come temporarily to [a host state] to provide legal services on a discrete matter. In many circumstances, such conduct poses no significant threat to the public or the legal system, particularly where the attorney is representing a client located in another state [or] has a longstanding relationship with the client..."

When a lawyer seeks to practice law regularly in a state, to open an office for the solicitation of clients, or otherwise to establish a practice in the state, however, the state has a more substantial interest in regulating the lawyer's law practice by requiring the lawyer to gain admission to the bar. Although the line between the "temporary" practice of law and the "regular" or "established" practice of law is not a bright one, the line can become clearer over time as Rule 5.5 is interpreted by courts, disciplinary authorities, committees of the bar, and other relevant authorities.

Additionally, for this provision to apply, the lawyer's work in the host state must arise out of or be reasonably related to the lawyer's practice in the home state, so that as a matter of efficiency or for other reasons, the client's interest in retaining the lawyer should be respected. For example, if a corporate client is seeking legal advice about its environmental liability or about its employment relations in each of the twenty states in which it has plants, it is likely to be unnecessarily costly and inefficient for the client to retain twenty different lawyers. Likewise, if a corporate client is seeking to open a retail store in each of twenty states, the client may be best served by retaining a single lawyer to assist it in coordinating its efforts. On the other hand, work for an out-of-state client with whom the lawyer has no prior professional relationship and for whom the lawyer is performing no other work ordinarily will not have the requisite relationship to the lawyer's practice where the matter involves a body of law in which the lawyer does not have special expertise. In the context of determining whether work performed outside the lawyer's home state is reasonably related to the lawyer's practice in the home state, as is true in the many other legal contexts in which a "reasonableness" standard is employed, some judgment must be exercised.

Proposed Model Rule 5.5(d)(1) would permit a lawyer employed by an organizational entity (e.g. an in-house corporate lawyer or a government lawyer), admitted in another United States jurisdiction, to provide legal services in a jurisdiction in which the lawyer is not admitted, other than representations for which pro hac vice admission is required, on behalf of the employer, an affiliated entity (i.e., an entity controlling, controlled by, or under common control with, the lawyer's organizational employer). This proposed provision would authorize the employed lawyer to give advice to the employer-client or assist in transactions on the employer-client's behalf in jurisdictions where the lawyer does not maintain an office. This provision would not apply, however, to appearances in judicial and agency proceedings that are subject to pro hac vice provisions; to participate in such proceedings, out-of-state employed lawyers, like other out-of-state lawyers, would be required to seek and obtain admission pro hac vice.

This proposed provision reflects well-accepted contemporary law practice. Corporations and similar entities with ongoing and recurring legal issues have an interest in retaining in-house lawyers to provide legal assistance with respect to those matters, wherever they arise. In recent years, in-house corporate lawyers' work has grown increasingly national and global along with the business of corporate clients. The organization's interest in being provided legal assistance in an efficient, cost-effective and competent manner by a lawyer in whom it reposes confidence is furthered by permitting an organization to employ a lawyer to assist it with recurring matters. From a regulatory perspective, a lawyer who is employed to represent an organization on an ongoing basis poses less of a risk to the client and the public than a lawyer retained by an individual on a one-time basis, since, as the California report observed, an in-house lawyer is "under the constant scrutiny of his or her employer."

The proposed provision would allow an out-of-state lawyer to work permanently from the office of a corporate, government or other organizational employer. This is consistent with the explicit understanding in many jurisdictions. In New Jersey, for example, established practice by an employed lawyer is authorized by

opinion. In other states, this practice is authorized by a court rule or statute that requires the employed lawyer to apply to the admissions authority and receive permission to practice to this limited extent. The Commission is unaware of significant regulatory concerns raised by the practice in these jurisdictions and, accordingly, recommends that ABA Model Rule 5.5 be amended to recognize this practice.

Comment [16] to Rule 5.5 clarifies that paragraph (d)(1) would not authorize representing the employer's officers or employees solely in their personal capacity. Nor would this provision authorize representation of customers of the corporate employer, or other third parties, if the lawyer is not licensed to practice law in the jurisdiction. Comment [17] to Rule 5.5 makes clear that the employed lawyer who has an office in the jurisdiction must comply with registration requirements and any other requirements that are applicable.

Proposed Model Rule 5.5(d)(2) would permit a lawyer to render legal services in a jurisdiction in which the lawyer is not licensed to practice law when authorized to do so by federal law or other law. Among other things, the proposed provision would make clear that in a jurisdiction that has adopted rules permitting established practice by foreign lawyers who serve as legal consultants, a lawyer may establish a law practice in the jurisdiction as permitted by such a rule.

ANNOTATIONS

1. Sanctions. Two concurrent six-month suspensions were proper for an attorney who failed to cooperate with the disciplinary system, failed to communicate with her client and to return his papers, and practiced law where doing so violated the regulation of the legal profession. Furthermore, when respondent sought reinstatement, she would have to provide a detailed explanation for her lack of participation over the course of these proceedings. In re Hongisto, 2010 VT 51, 188 Vt. 553, 998 A.2d 1065 (mem).

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Rule 5.6. RESTRICTIONS ON RIGHT TO PRACTICE

A lawyer shall not participate in offering or making:

(a) a partnership, shareholders, operating, employment, or other similar type of agreement that restricts the right of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement; or

(b) an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a client controversy.—Amended June 17, 2009, eff. Sept. 1, 2009.

Comment

[1] An agreement restricting the right of lawyers to practice after leaving a firm not only limits their professional autonomy but also limits the freedom of clients to choose a lawyer. Paragraph (a) prohibits such agreements except for restrictions incident to provisions concerning retirement benefits for service with the firm.

[2] Paragraph (b) prohibits a lawyer from agreeing not to represent other persons in connection with settling a claim on behalf of a client.

[3] This rule does not apply to prohibit restrictions that may be included in the terms of the sale of a law practice pursuant to Rule 1.17.

Reporter's Notes — 2009 Amendment

V.R.P.C. 5.6 is amended to conform to the changes in the Model Rule. The ABA Reporter's Explanation is as follows:

TEXT:

1. Paragraph (a): Add references to shareholders, operating, and other similar types of agreements. The reference to a partnership agreement is underinclusive because lawyers also practice in professional corporations and professional limited liability companies.

2. Paragraph (b): Substitute "client controversy" for "controversy between private parties." This change clarifies that the Rule applies to settlements not only between purely private parties, but also between a private party and the government. See ABA Ethics Opinion 394.

COMMENT:

[1] "[P]artners and associates" has been replaced with "lawyers" in recognition that lawyers associate together in organizations other than traditional law firm partnerships.

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Rule 5.7. RESPONSIBILITIES REGARDING LAW-RELATED SERVICES

(a) A lawyer shall be subject to the Rules of Professional Conduct with respect to the provision of law-related services, as defined in paragraph (b), if the law-related services are provided:

(1) by the lawyer in circumstances that are not distinct from the lawyer's provision of legal services to clients; or

(2) in other circumstances by an entity controlled by the lawyer individually or with others if the lawyer fails to take reasonable measures to assure that a person obtaining the law-related services knows that the services are not legal services and that the protections of the client-lawyer relationship do not exist.

(b) The term "law-related services" denotes services that might reasonably be performed in conjunction with and in substance are related to the provision of legal services, and that are not prohibited as unauthorized practice of law when provided by a nonlawyer.—Amended June 17, 2009, eff. Sept. 1, 2009.

Comment

[1] When a lawyer performs law-related services or controls an organization that does so, there exists the potential for ethical problems. Principal among these is the possibility that the person for whom the law-related services are performed fails to understand that the services may not carry with them the protections normally afforded as part of the client-lawyer relationship. The recipient of the law-related services may expect, for example, that the protection of client confidences, prohibitions against representation of persons with conflicting interests, and obligations of a lawyer to maintain professional independence apply to the provision of law-related services when that may not be the case.

[2] Rule 5.7 applies to the provision of law-related services by a lawyer even when the lawyer does not provide any legal services to the person for whom the law-related services are performed and whether the law-related services are performed through a law firm or a separate entity. The rule identifies the circumstances in which all of the Rules of Professional Conduct apply to the provision of law-related services. Even when those circumstances do not exist, however, the conduct of a lawyer involved in the provision of law-related services is subject to those rules that apply generally to lawyer conduct, regardless of whether the conduct involves the provision of legal services. See, e.g., Rule 8.4.

[3] When law-related services are provided by a lawyer under circumstances that are not distinct from the lawyer's provision of legal services to clients, the lawyer in providing the law-related services must adhere to the requirements of the Rules of Professional Conduct as provided in paragraph (a)(1). Even when the law-related and legal services are provided in circumstances that are distinct from each other, for example through separate entities or different support staff within the law firm, the Rules of Professional Conduct apply to the lawyer as provided in paragraph (a)(2) unless the lawyer takes reasonable measures to assure that the recipient of the law-related services knows that the services are not legal services and that the protections of the client-lawyer relationship do not apply.

[4] Law-related services also may be provided through an entity that is distinct from that through which the lawyer provides legal services. If the lawyer individually or with others has control of such an entity's operations, the rule requires the lawyer to take reasonable measures to assure that each person using the services of the entity knows that the services provided by the entity are not legal services and that the Rules of Professional Conduct that relate to the client-lawyer relationship do not apply. A lawyer's control of an entity extends to the ability to direct its operation. Whether a lawyer has such control will depend upon the circumstances of the particular case.

[5] When a client-lawyer relationship exists with a person who is referred by a lawyer to a separate law-related service entity controlled by the lawyer, individually or with others, the lawyer must comply with Rule 1.8(a).

[6] In taking the reasonable measures referred to in paragraph (a)(2) to assure that a person using law-related services understands the practical effect or significance of the inapplicability of the Rules of Professional Conduct, the lawyer should communicate to the person receiving the law-related services, in a manner sufficient to assure that the person understands the significance of the fact, that the relationship of the person to the business entity will not be a client-lawyer relationship. The communication should be made before entering into an agreement for provision of or providing law-related services, and preferably should be in writing.

[7] The burden is upon the lawyer to show that the lawyer has taken reasonable measures under the circumstances to communicate the desired understanding. For instance, a sophisticated user of law-related

services, such as a publicly held corporation, may require a lesser explanation than someone unaccustomed to making distinctions between legal services and law-related services, such as an individual seeking tax advice from a lawyer-accountant or investigative services in connection with a lawsuit.

[8] Regardless of the sophistication of potential recipients of law-related services, a lawyer should take special care to keep separate the provision of law-related and legal services in order to minimize the risk that the recipient will assume that the law-related services are legal services. The risk of such confusion is especially acute when the lawyer renders both types of services with respect to the same matter. Under some circumstances the legal and law-related services may be so closely entwined that they cannot be distinguished from each other, and the requirement of disclosure and consultation imposed by paragraph (a)(2) of the rule cannot be met. In such a case a lawyer will be responsible for assuring that both the lawyer's conduct and, to the extent required by Rule 5.3, that of nonlawyer employees in the distinct entity that the lawyer controls complies in all respects with the Rules of Professional Conduct.

[9] A broad range of economic and other interests of clients may be served by lawyers' engaging in the delivery of law-related services. Examples of law-related services include providing title insurance, financial planning, accounting, trust services, real estate counseling, legislative lobbying, economic analysis, social work, psychological counseling, tax preparation, and patent, medical or environmental consulting.

[10] When a lawyer is obliged to accord the recipients of such services the protections of those rules that apply to the client-lawyer relationship, the lawyer must take special care to heed the proscriptions of the rules addressing conflict of interest (Rules 1.7 through 1.11, especially Rules 1.7(a)(2) and 1.8(a), (b) and (f)), and to scrupulously adhere to the requirements of Rule 1.6 relating to disclosure of confidential information. The promotion of the law-related services must also in all respects comply with Rules 7.1 through 7.3, dealing with advertising and solicitation. In that regard, lawyers should take special care to identify the obligations that may be imposed as a result of a jurisdiction's decisional law.

[11] When the full protections of all of the Rules of Professional Conduct do not apply to the provision of law-related services, principles of law external to the rules, for example, the law of principal and agent, govern the legal duties owed to those receiving the services. Those other legal principles may establish a different degree of protection for the recipient with respect to confidentiality of information, conflicts of interest and permissible business relationships with clients. See also Rule 8.4 (Misconduct).

Reporter's Notes – 2009 Amendment

V.R.P.C. 5.7 is amended to conform to the changes in the Model Rule. The ABA Reporter's Explanation of Changes is as follows:

TEXT:

Paragraph (a)(2): Broaden to apply to all circumstances not covered by paragraph (a)(1) and to all entities controlled by the lawyer

Paragraph (a)(2) has been broadened to cover all circumstances in which a lawyer's provision of law-related services are distinct from the lawyer's provision of legal services. This change, coupled with the changes to Comments [2] and [3], is intended to clarify that (1) there can be situations in which a law firm's provision of law-related services will be distinct from the firm's provision of legal services, even though rendered by the firm rather than a separate entity, and (2) that in such circumstances the lawyer must comply with paragraph (a)(2). This change eliminates an unintended gap in the coverage of the Model Rule.

COMMENT:

[2] This change clarifies that a lawyer can directly provide law-related services in circumstances that are distinct from the lawyer's provision of legal services. This precludes an overly restrictive reading of paragraph (a)(1) to the effect that the provision of law-related services could never be distinct from the provision of legal services if directly provided by a lawyer or law firm, rather than by a separate entity.

[3] The new sentence clarifies that paragraph (a)(2) applies in all cases in which the provision of law-related services is distinct from the provision of legal services within the meaning of paragraph (a)(1), without regard to whether the law-related services are provided directly by the lawyer or the lawyer's firm or by a separate entity controlled by the lawyer or law firm.

[10] The Commission changed the reference to Rule 1.7(b) in light of changes that were made to that Rule.

Reporter's Notes

This rule, adopted by the ABA in 1994, has no counterpart in the Vermont Code. It provides that a lawyer's conduct is governed by the Rules of Professional Conduct, even where the lawyer is rendering nonlegal but law-related services (such as title insurance, lobbying or mediation) in two distinct situations: in the context of the lawyer's normal law practice and in the context of a separate entity controlled by the lawyer where the lawyer has failed to inform the client that the services rendered are not protected by the lawyer-client relationship.

PUBLIC SERVICE

Rule 6.1. VOLUNTARY *PRO BONO PUBLICO* SERVICE

Every lawyer has a professional responsibility to provide legal services to those unable to pay. A lawyer should render at least 50 hours of pro bono publico legal services per year. In fulfilling this responsibility, the lawyer should:

(a) provide a substantial majority of the 50 hours of legal services without fee or expectation of fee to:

(1) persons of limited means; or

(2) charitable, religious, civic, community, governmental and educational organizations in matters which are designed primarily to address the needs of persons of limited means; and

(b) provide any additional services through:

(1) delivery of legal services at no fee or substantially reduced fee to individuals, groups or organizations seeking to secure or protect civil rights, civil liberties or public rights, or charitable, religious, civic, community, governmental and educational organizations in matters in furtherance of their organizational purposes, where the payment of standard legal fees would significantly deplete the organization's economic resources or would be otherwise inappropriate;

(2) delivery of legal services at a substantially reduced fee to persons of limited means; or

(3) participation in activities for improving the law, the legal system or the legal profession.

In addition, a lawyer should voluntarily contribute financial support to organizations that provide legal services to persons of limited means.— Amended June 17, 2009, eff. Sept. 1, 2009.

Comment

[1] Every lawyer, regardless of professional prominence or professional work load, has a responsibility to provide legal services to those unable to pay, and personal involvement in the problems of the disadvantaged can be one of the most rewarding experiences in the life of a lawyer. The Vermont Supreme Court urges all lawyers to provide a minimum of 50 hours of pro bono services annually. It is recognized that in some years a lawyer may render greater or fewer hours than the annual standard specified, but during the course of his or her legal career, each lawyer should render, on average per year, the number of hours set forth in this rule. Services can be performed in civil matters or in criminal or quasi-criminal matters for which there is no government obligation to provide funds for legal representation, such as divorce and family law matters.

[2] Paragraphs (a)(1) and (2) recognize the critical need for legal services that exists among persons of limited means by providing that a substantial majority of the legal services rendered annually to the disadvantaged be furnished without fee or expectation of fee. Legal services under these paragraphs consist of a full range of activities, including individual and class representation, the provision of legal advice, legislative lobbying, administrative rule making and the provision of free training or mentoring to those who represent persons of limited means. The variety of these activities should facilitate participation by government attorneys, even when restrictions exist on their engaging in the outside practice of law.

[3] Persons eligible for legal services under paragraphs (a)(1) and (2) are those who qualify for participation in programs funded by the Legal Services Corporation and those whose incomes and financial resources are slightly above the guidelines utilized by such programs but nevertheless cannot afford counsel. Legal services can be rendered to individuals or to organizations such as homeless shelters, battered women's centers and food pantries that serve those of limited means. The term "governmental organizations" includes, but is not limited to, public protection programs and sections of governmental or public sector agencies.

[4] Because service must be provided without fee or expectation of fee, the intent of the lawyer to render free legal services is essential for the work performed to fall within the meaning of paragraphs (a)(1) and (2). Accordingly, services rendered cannot be considered pro bono if an anticipated fee is uncollected, but the award of statutory attorneys' fees in a case originally accepted as pro bono would not disqualify such services from inclusion

under this section. Lawyers who do receive fees in such cases are encouraged to contribute an appropriate portion of such fees to organizations or projects that benefit persons of limited means.

[5] While it is possible for a lawyer to fulfill the annual responsibility to perform pro bono services exclusively through activities described in paragraphs (a)(1) and (2), to the extent that any hours of service remained unfulfilled, the remaining commitment can be met in a variety of ways as set forth in paragraph (b). Constitutional, statutory or regulatory restrictions may prohibit or impede government and public sector lawyers and judges from performing the pro bono services outlined in paragraphs (a)(1) and (2). Accordingly, where those restrictions apply, government and public sector lawyers and judges may fulfill their pro bono responsibility by performing services outlined in paragraph (b).

[6] Paragraph (b)(1) includes the provision of certain types of legal services to those whose incomes and financial resources place them above limited means. It also permits the pro bono attorney to accept a substantially reduced fee for services. Examples of the types of issues that may be addressed under this paragraph include First Amendment claims, Title VII claims and environmental protection claims. Additionally, a wide range of organizations may be represented, including social service, medical research, cultural and religious groups.

[7] Paragraph (b)(2) covers instances in which attorneys agree to and receive a modest fee for furnishing legal services to persons of limited means. Participation in judicare programs and acceptance of court appointments in which the fee is substantially below a lawyer's usual rate are encouraged under this section.

[8] Paragraph (b)(3) recognizes the value of lawyers engaging in activities that improve the law, the legal system or the legal profession. Serving on bar association committees, serving on boards of pro bono or legal services programs, taking part in Law Day activities, acting as a continuing legal education instructor, a mediator or an arbitrator and engaging in legislative lobbying to improve the law, the legal system or the profession are a few examples of the many activities that fall within this paragraph.

[9] Because the provision of pro bono services is a professional responsibility, it is the individual ethical commitment of each lawyer. Nevertheless, there may be times when it is not feasible for a lawyer to engage in pro bono services. At such times a lawyer may discharge the pro bono responsibility by providing financial support to organizations providing free legal services to persons of limited means. Such financial support should be reasonably equivalent to the value of the hours of service that would have otherwise been provided. In addition, at times it may be more feasible to satisfy the pro bono responsibility collectively, as by a firm's aggregate pro bono activities.

[10] Because the efforts of individual lawyers are not enough to meet the need for free legal services that exists among persons of limited means, the government and the profession have instituted additional programs to provide those services. Every lawyer should financially support such programs, in addition to either providing direct pro bono services or making financial contributions when pro bono service is not feasible.

[11] Law firms should act reasonably to enable and encourage all lawyers in the firm to provide the pro bono legal services called for by this rule.

[12] The responsibility set forth in this rule is not intended to be enforced through disciplinary process.

Reporter's Notes – 2009 Amendment

V.R.P.C. 6.1 is amended to conform to the changes in the Model Rule. In Vermont Comment [1], "Vermont Supreme Court" is substituted for "American Bar Association," emphasizing the importance that the Court attaches to pro bono service, and the parentheses have been removed from the number "50" in the rule, reflecting adoption of that minimum service goal. The added sentence at the end of Comment [9] restores language omitted without explanation when the Vermont rule was adopted.

The ABA Reporter's Explanation is as follows:

TEXT:

The Commission has added a sentence at the beginning of the Rule to give greater prominence to the proposition that every lawyer has a professional responsibility to provide legal services to persons unable to pay. The point is [also] made in...Comment [1].

COMMENT:

[11] This new Comment calls upon law firms to act reasonably to enable all lawyers in the firm to provide the pro bono legal services called for by the Rule.

Reporter's Notes

The only counterpart to this rule in the Vermont Code lies in the Ethical Considerations. See EC 2-25, EC 8-9, and EC 8-3. Rule 6.1 is consistent with the Vermont Bar Association's 1994 resolution on pro bono services.

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Rule 6.2. ACCEPTING APPOINTMENTS

A lawyer shall not seek to avoid appointment by a tribunal to represent a person except for good cause, such as:

- (a) representing the client is likely to result in violation of the Rules of Professional Conduct or other law;
- (b) representing the client is likely to result in an unreasonable financial burden on the lawyer; or
- (c) the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client.

Comment

[1] A lawyer ordinarily is not obliged to accept a client whose character or cause the lawyer regards as repugnant. The lawyer's freedom to select clients is, however, qualified. All lawyers have a responsibility to assist in providing pro bono publico service. See Rule 6.1. An individual lawyer fulfills this responsibility by accepting a fair share of unpopular matters or indigent or unpopular clients. A lawyer may also be subject to appointment by a court to serve unpopular clients or persons unable to afford legal services.

Appointed Counsel

[2] For good cause a lawyer may seek to decline an appointment to represent a person who cannot afford to retain counsel or whose cause is unpopular. Good cause exists if the lawyer could not handle the matter competently, see Rule 1.1, or if undertaking the representation would result in an improper conflict of interest, for example, when the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client. A lawyer may also seek to decline an appointment if acceptance would be unreasonably burdensome, for example, when it would impose a financial sacrifice so great as to be unjust.

[3] An appointed lawyer has the same obligations to the client as retained counsel, including the obligations of loyalty and confidentiality, and is subject to the same limitations on the client-lawyer relationship, such as the obligation to refrain from assisting the client in violation of the rules.

Reporter's Notes — 2009 Amendment

There are no changes to Model Rule 6.2 or its comment. The only change in the Vermont rule is the insertion of the bracketed numbers to designate the paragraphs of the comment.

Reporter's Notes

The only counterpart to this rule in the Vermont Code appears in the Ethical Considerations. See EC 2-29 and EC 2-30.

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Rule 6.3. MEMBERSHIP IN LEGAL SERVICES ORGANIZATION

A lawyer may serve as a director, officer or member of a legal services organization, apart from the law firm in which the lawyer practices, notwithstanding that the organization serves persons having interests adverse to a client of the lawyer. The lawyer shall not knowingly participate in a decision or action of the organization:

- (a) if participating in the decision or action would be incompatible with the lawyer's obligations to a client under Rule 1.7; or
- (b) here the decision or action could have a material adverse effect on the representation of a client of the organization whose interests are adverse to a client of the lawyer.

Comment.

[1] Lawyers should be encouraged to support and participate in legal services organizations. A lawyer who is an officer or a member of such an organization does not thereby have a client-lawyer relationship with persons served by the organization. However, there is potential conflict between the interests of such persons and the interests of the lawyer's clients. If the possibility of such conflict disqualified a lawyer from serving on the board of a legal services organization, the profession's involvement in such organizations would be severely curtailed.

[2] It may be necessary in appropriate cases to reassure a client of the organization that the representation will not be affected by conflicting loyalties of a member of the board. Established, written policies in this respect can enhance the credibility of such assurances.

Reporter's Notes — 2009 Amendment

There are no changes to Model Rule 6.3 or its comment. The only change in the Vermont rule is the insertion of the bracketed numbers to designate the paragraphs of the comment.

Reporter's Notes

There is no counterpart to this rule in the Vermont Code. The rule provides that a lawyer may serve in legal services organizations with interests adverse to the lawyer's clients, but that participation in the organization is limited by the lawyer's obligation to avoid activities having a material adverse effect on the representation of a client.

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Rule 6.4. LAW REFORM ACTIVITIES AFFECTING CLIENT INTERESTS

A lawyer may serve as a director, officer or member of an organization involved in reform of the law or its administration notwithstanding that the reform may affect the interests of a client of the lawyer. When the lawyer knows that the interests of a client may be materially benefitted by a decision in which the lawyer participates, the lawyer shall disclose that fact but need not identify the client.

Comment

[1] Lawyers involved in organizations seeking law reform generally do not have a client-lawyer relationship with the organization. Otherwise, it might follow that a lawyer could not be involved in a bar association law reform program that might indirectly affect a client.

See also Rule 1.2(b). For example, a lawyer specializing in antitrust litigation might be regarded as disqualified from participating in drafting revisions of rules governing that subject. In determining the nature and scope of participation in such activities, a lawyer should be mindful of obligations to clients under other rules, particularly Rule 1.7. A lawyer is professionally obligated to protect the integrity of the program by making an appropriate disclosure within the organization when the lawyer knows a private client might be materially benefitted.

Reporter's Notes — 2009 Amendment

There are no changes to Model Rule 6.4 or its comment. The only change in the Vermont rule is the insertion of the bracketed numbers to designate the paragraphs of the comment.

Reporter's Notes

There is no counterpart to this rule in the Vermont Code. It permits a lawyer to serve in law reform organizations even if the reform may affect a client's interests. The rule also requires the lawyer whose client might benefit from a decision in which the lawyer participates to disclose that fact to the organization.

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Rule 6.5. NONPROFIT AND COURT-ANNEXED LIMITED LEGAL SERVICES PROGRAMS

(a) A lawyer who, under the auspices of a program sponsored by a nonprofit organization or court, provides short-term limited legal services to a client without expectation by either the lawyer or the client that the lawyer will provide continuing representation in the matter:

(1) is subject to Rules 1.7 and 1.9(a) only if the lawyer knows that the representation of the client involves a conflict of interest; and

(2) is subject to Rule 1.10 only if the lawyer knows that another lawyer associated with the lawyer in a law firm is disqualified by Rule 1.7 or 1.9(a) with respect to the matter.

(b) Except as provided in paragraph (a)(2), Rule 1.10 is inapplicable to a representation governed by this rule.—Added June 17, 2009, eff. Sept. 1, 2009.

Comment

[1] Legal services organizations, courts and various nonprofit organizations have established programs through which lawyers provide short-term limited legal services -such as advice or the completion of legal forms - that will assist persons to address their legal problems without further representation by a lawyer. In these programs, such as legal-advice hotlines, advice-only clinics or pro se counseling programs, a client-lawyer relationship is established, but there is no expectation that the lawyer's representation of the client will continue beyond the limited consultation. Such programs are normally operated under circumstances in which it is not feasible for a lawyer to systematically screen for conflicts of interest as is generally required before undertaking a representation. See, e.g., Rules 1.7, 1.9 and 1.10.

[2] A lawyer who provides short-term limited legal services pursuant to this rule must secure the client's informed consent to the limited scope of the representation. See Rule 1.2(c). If a short-term limited representation would not be reasonable under the circumstances, the lawyer may offer advice to the client but must also advise the client of the need for further assistance of counsel. Except as provided in this rule, the Rules of Professional Conduct, including Rules 1.6 and 1.9(c), are applicable to the limited representation.

[3] Because a lawyer who is representing a client in the circumstances addressed by this rule ordinarily is not able to check systematically for conflicts of interest, paragraph (a) requires compliance with Rules 1.7 or 1.9(a) only if the lawyer knows that the representation presents a conflict of interest for the lawyer, and with Rule 1.10 only if the lawyer knows that another lawyer in the lawyer's firm is disqualified by Rules 1.7 or 1.9(a) in the matter.

[4] Because the limited nature of the services significantly reduces the risk of conflicts of interest with other matters being handled by the lawyer's firm, paragraph (b) provides that Rule 1.10 is inapplicable to a representation governed by this rule except as provided by paragraph (a)(2). Paragraph (a)(2) requires the participating lawyer to comply with Rule 1.10 when the lawyer knows that the lawyer's firm is disqualified by Rules 1.7 or 1.9(a). By virtue of paragraph (b), however, a lawyer's participation in a short-term limited legal services program will not preclude the lawyer's firm from undertaking or continuing the representation of a client with interests adverse to a client being represented under the program's auspices. Nor will the personal disqualification of a lawyer participating in the program be imputed to other lawyers participating in the program.

[5] If, after commencing a short-term limited representation in accordance with this rule, a lawyer undertakes to represent the client in the matter on an ongoing basis, Rules 1.7, 1.9(a) and 1.10 become applicable.

Reporter's Notes

V.R.P.C. 6.5 is added to incorporate new Model Rule 6.5 and its comment into the Vermont Rules of Professional Conduct. The ABA Reporter's Explanation is as follows:

TEXT:

Rule 6.5 is a new Rule in response to the Commission's concern that a strict application of the conflict-of-interest rules may be deterring lawyers from serving as volunteers in programs in which clients are provided short-term limited legal services under the auspices of a nonprofit organization or a court-annexed program. The paradigm is the legal-advice hotline or pro se clinic, the purpose of which is to provide short-term limited legal assistance to persons of limited means who otherwise would go unrepresented.

1. Paragraph (a): Rule only applies to short-term legal services provided under auspices of program sponsored by court or nonprofit organization

Paragraph (a) limits Rule 6.5 to situations in which lawyers provide clients short-term limited legal services under the auspices of a program sponsored by a nonprofit organization or court. The Commission believes that the proposed relaxation of the conflict rules does not pose a significant risk to clients when the lawyer is working in a program sponsored by a nonprofit organization or a court and will eliminate an impediment to lawyer participation in such programs. See Comment [1].

2. Paragraph (a)(1): Rules 1.7 and 1.9(a) apply only if participating lawyer "knows" of conflict of interest

Paragraph (a)(1) provides that the lawyer is subject to the requirements of Rules 1.7 and 1.9(a) only if the lawyer knows that the representation involves a conflict of interest. The purpose is to make it unnecessary for the lawyer to do a comprehensive conflicts check in a practice setting in which it normally is not feasible to do so. See Comment [3]. In cases in which the lawyer knows of a conflict of interest, however, compliance with Rules 1.7 and 1.9(a) is required.

3. Paragraph (b): Rule 1.10 only applicable as specified in paragraph (a)(2)

Paragraph (a)(2) provides that a lawyer participating in a short-term legal services program must comply with Rule 1.10 if the lawyer knows that a lawyer with whom the lawyer is associated in a firm would be disqualified from handling the matter by Rules 1.7 or 1.9(a). By otherwise exempting a representation governed by this Rule from Rule 1.10, however, paragraph (b) protects lawyers associated with the participating lawyer from a vicarious disqualification that might otherwise be required. Thus, as explained in Comment [4], a lawyer's participation in a short-term limited legal services program will not preclude the lawyer's firm from undertaking or continuing the representation of a client with interests adverse to a client being represented under the program's auspices. Nor will a personal disqualification of a lawyer participating in the program be imputed to other lawyers participating in the program. Given the limited nature of the representation provided in nonprofit short-term limited legal services programs, the Commission thinks that the protections afforded clients by Rule 1.10 are not necessary except in the circumstances specified in paragraph (a)(2).

COMMENT:

[1] This Comment explains the scope of the Rule.

[2] This Comment explains the relationship to Rule 1.2(c) and adds a reminder that, except for the relaxation of the requirements of Rules 1.7, 1.9 and 1.10, the lawyer must comply with the Rules of Professional Conduct when providing limited legal services.

[3] This Comment provides the reason for limiting disqualification to situations in which the lawyer knows the lawyer's representation involves a conflict of interest for the lawyer or that a lawyer associated with the lawyer in a law firm would be disqualified from handling the matter. A strict duty to identify conflicts does not make sense in the context of the short-term limited representation provided through a hotline or pro se clinic.

[4] This Comment explains the effect of and reason for otherwise exempting nonprofit, short-term limited legal services programs from Rule 1.10.

[5] This Comment recognizes that in some instances a lawyer who initially intends only to provide a limited short-term representation will decide to provide more extensive legal services. In such circumstances, the lawyer must comply with the generally applicable conflict-of-interest rules.

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INFORMATION ABOUT LEGAL SERVICES

Rule 7.1. COMMUNICATIONS CONCERNING A LAWYER'S SERVICES

A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.—Amended June 17, 2009, eff. Sept. 1, 2009.

Comment

[1] This rule governs all communications about a lawyer's services, including advertising permitted by Rule 7.2. Whatever means are used to make known a lawyer's services, statements about them must be truthful.

[2] Truthful statements that are misleading are also prohibited by this rule. A truthful statement is misleading if it omits a fact necessary to make the lawyer's communication considered as a whole not materially misleading. A truthful statement is also misleading if there is a substantial likelihood that it will lead a reasonable person to formulate a specific conclusion about the lawyer or the lawyer's services for which there is no reasonable factual foundation.

[3] An advertisement that truthfully reports a lawyer's achievements on behalf of clients or former clients may be misleading if presented so as to lead a reasonable person to form an unjustified expectation that the same results could be obtained for other clients in similar matters without reference to the specific factual and legal circumstances of each client's case. Similarly, an unsubstantiated comparison of the lawyer's services or fees with the services or fees of other lawyers may be misleading if presented with such specificity as would lead a reasonable person to conclude that the comparison can be substantiated. The inclusion of an appropriate disclaimer or qualifying language may preclude a finding that a statement is likely to create unjustified expectations or otherwise mislead a prospective client.

[4] See also Rule 8.4(e) for the prohibition against stating or implying an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law.

Reporter's Notes — 2009 Amendment

V.R.P.C. 7.1 is amended to conform to the changes in the Model Rule.

In *In re PRB Docket No. 2002-093*, 2005 VT 2, 177 Vt. 629, 868 A.2d 709 (mem.), after a thorough review of the basis and scope of V.R.P.C. 7.1-7.4, the Court held that the PRB could have reasonably found that an advertisement stating “WE ARE THE EXPERTS IN” three enumerated areas violated former V.R.P.C. 7.1(c) as an unsubstantiated comparison with the quality of other lawyers, and that the phrase “INJURY EXPERTS” violated former V.R.P.C. 7.1(b) as creating an unjustified expectation of results that the lawyer could achieve and could not be characterized as a proper description of a specialty under V.R.P.C. 7.4.

The ABA Reporter's Explanation is as follows:

TEXT:

1. Modify to limit prohibition to false and misleading communications

The Commission has limited Rule 7.1 to a prohibition against false or misleading communications, defined in terms of the material misrepresentations or omissions that are the subject of current paragraph (a). The categorical prohibitions in [former] paragraphs (b) and (c) have been criticized as being overly broad and have therefore been relocated from text to the commentary as examples of statements that are likely to be misleading. The Commission believes this approach strikes the proper balance between lawyer free-speech interests and the need for consumer protection.

2. Paragraph (b): Delete “is likely to create an unjustified expectation about results the lawyer can achieve”

The Commission recommends deletion of this specification of a “misleading” communication because it is overly broad and can be interpreted to prohibit communications that are not substantially likely to lead a reasonable person to form a specific and unwarranted conclusion about the lawyer or the lawyer's services. See Comment [2].

3. Paragraph (b): Delete “states or implies that the lawyer can achieve results by means that violate the Rules of Professional Conduct or other law”

The Commission recommends that this portion of paragraph (b) be moved to Rule 8.4(e) because this prohibition should not be limited to advertising. Comment [4] provides a cross-reference.

4. Delete paragraph (c)

The Commission also believes that a prohibition of all comparisons that cannot be factually substantiated is unduly broad. Whether such comparisons are misleading should be assessed on a case-by-case basis in terms of whether the particular comparison is substantially likely to mislead a reasonable person to believe that the comparison can be substantiated. See Comment [3].

COMMENT:

[1] The matters addressed by the deleted portions of [former] Comment [1] are now addressed in Comment [3].

[2] New Comment [2] discusses the prohibition against materially misleading statements. The third sentence sets forth a new standard for determining whether a lawyer's truthful statement is misleading. The “substantial likelihood” test is used in Rule 3.6 to balance the competing interests in free speech and fair trial. The Commission thinks that this standard strikes the proper balance between the lawyer's free-speech interests and the need for consumer protection.

[3] New Comment [3] addresses the problem areas covered in [former] paragraphs (b) and (c), explaining circumstances under which statements raising unjustified expectations and making unsubstantiated comparisons may be false or misleading. The first sentence is a modification of the deleted portion of [former] Comment [1]. Rather than stating that truthful reports of a lawyer's achievements are ordinarily prohibited as misleading, the Comment is limited to a warning that such statements may be misleading. The second sentence indicates that comparisons that cannot be factually substantiated will be misleading only if there is a substantial likelihood that a reasonable person would conclude that the comparison could be factually substantiated. Neither statement is as sweeping as its counterpart in the [former] Comment or paragraph (c). Because many jurisdictions encourage or require the use of disclaimers in lawyer advertising, the final sentence indicates that disclaimers may reduce the likelihood that a statement about the lawyer or the lawyer's services will be misleading.

[4] This new Comment is a cross-reference to Rule 8.4(e) which prohibits lawyers from stating or implying that they have an ability to influence improperly a government agency or official or that they can achieve results by means that violate the Rules of Professional Conduct or other law.

ANNOTATIONS

1. Qualitative advertising claims. Attorney's advertisement proclaiming his firm to be “injury experts” and “the experts” in certain enumerated fields of law fell squarely within that category of qualitative advertising claims that are not susceptible of measurement or verification; thus, they were likely to create an unjustified expectation and differentiation among those reading the advertisement about the results which can be achieved by

a lawyer claiming to be an expert in violation of this rule. In re PRB Docket No. 2002.093, 2005 VT 2, 177 Vt. 629, 868 A.2d 709 (mem.).

Any attorney advertisement using the term “specialist” or “specialty” in the sense that the terms imply expertise should be qualified by a disclaimer that the attorney has not been certified as a specialist by any recognized organization, in order to avoid potential confusion to the consumer and to comport with this rule’s prohibition against misleading communications. In re PRB Docket No. 2002.093, 2005 VT 2, 177 Vt. 629, 868 A.2d 709 (mem.).

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Rule 7.2. ADVERTISING

(a) Subject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise services through written, recorded or electronic communication, including public media.

(b) A lawyer shall not give anything of value to a person for recommending the lawyer’s services except that a lawyer may

(1) pay the reasonable costs of advertisements or communications permitted by this rule;

(2) pay the usual charges of a legal service plan or a not-for-profit or qualified lawyer referral service. A qualified lawyer referral service is a lawyer referral service that has been approved by any regulatory authority designated by the Supreme Court;

(3) pay for a law practice in accordance with Rule 1.17; and

(4) refer clients to another lawyer or a nonlawyer professional pursuant to an agreement not otherwise prohibited under these rules that provides for the other person to refer clients or customers to the lawyer, if

(i) the reciprocal referral agreement is not exclusive, and

(ii) the client is informed of the existence and nature of the agreement.

(c) Any communication made pursuant to this rule shall include the name and office address of at least one lawyer or law firm responsible for its content.—Amended June 17, 2009, eff. Sept. 1, 2009.

Comment

[1] To assist the public in obtaining legal services, lawyers should be allowed to make known their services not only through reputation but also through organized information campaigns in the form of advertising. Advertising involves an active quest for clients, contrary to the tradition that a lawyer should not seek clientele. However, the public’s need to know about legal services can be fulfilled in part through advertising. This need is particularly acute in the case of persons of moderate means who have not made extensive use of legal services. The interest in expanding public information about legal services ought to prevail over considerations of tradition. Nevertheless, advertising by lawyers entails the risk of practices that are misleading or overreaching.

[2] This rule permits public dissemination of information concerning a lawyer’s name or firm name, address and telephone number; the kinds of services the lawyer will undertake; the basis on which the lawyer’s fees are determined, including prices for specific services and payment and credit arrangements; a lawyer’s foreign language ability; names of references and, with their consent, names of clients regularly represented; and other information that might invite the attention of those seeking legal assistance.

[3] Questions of effectiveness and taste in advertising are matters of speculation and subjective judgment. Some jurisdictions have had extensive prohibitions against television advertising, against advertising going beyond specified facts about a lawyer, or against “undignified” advertising. Television is now one of the most powerful media for getting information to the public, particularly persons of low and moderate income; prohibiting television advertising, therefore, would impede the flow of information about legal services to many sectors of the public. Limiting the information that may be advertised has a similar effect and assumes that the bar can accurately forecast the kind of information that the public would regard as relevant. Similarly, electronic media, such as the Internet, can be an important source of information about legal services, and lawful communication by electronic mail is permitted by this rule. But see Rule 7.3(a) for the prohibition against the solicitation of a prospective client through a real-time electronic exchange that is not initiated by the prospective client.

[4] Neither this rule nor Rule 7.3 prohibits communications authorized by law, such as notice to members of a class in class action litigation.

Paying Others to Recommend a Lawyer

[5] Lawyers are not permitted to pay others for channeling professional work. Paragraph (b)(1), however, allows a lawyer to pay for advertising and communications permitted by this rule, including the costs of print directory listings, on-line directory listings, newspaper ads, television and radio airtime, domain-name registrations, sponsorship fees, banner ads, and group advertising. A lawyer may compensate employees, agents and vendors who are engaged to provide marketing or client-development services, such as publicists, public-relations personnel, business-development staff and website designers. See Rule 5.3 for the duties of lawyers and law firms with respect to the conduct of nonlawyers who prepare marketing materials for them.

[6] A lawyer may pay the usual charges of a legal service plan or a not-for-profit or qualified lawyer referral service. A legal service plan is a prepaid or group legal service plan or a similar delivery system that assists prospective clients to secure legal representation. A lawyer referral service, on the other hand, is any organization that holds itself out to the public as a lawyer referral service. Such referral services are understood by laypersons to be consumer-oriented organizations that provide unbiased referrals to lawyers with appropriate experience in the subject matter of the representation and afford other client protections, such as complaint procedures or malpractice insurance requirements. Consequently, this rule only permits a lawyer to pay the usual charges of a not-for-profit or qualified lawyer referral service. A qualified lawyer referral service is one that is approved by an appropriate regulatory authority as affording adequate protections for prospective clients. See, e.g., the American Bar Association's Model Supreme Court Rules Governing Lawyer Referral Services and Model Lawyer Referral and Information Service Quality Assurance Act (requiring that organizations that are identified as lawyer referral services (i) permit the participation of all lawyers who are licensed and eligible to practice in the jurisdiction and who meet reasonable objective eligibility requirements as may be established by the referral service for the protection of prospective clients; (ii) require each participating lawyer to carry reasonably adequate malpractice insurance; (iii) act reasonably to assess client satisfaction and address client complaints; and (iv) do not refer prospective clients to lawyers who own, operate or are employed by the referral service.)

[7] A lawyer who accepts assignments or referrals from a legal service plan or referrals from a lawyer referral service must act reasonably to assure that the activities of the plan or service are compatible with the lawyer's professional obligations. See Rule 5.3. Legal service plans and lawyer referral services may communicate with prospective clients, but such communication must be in conformity with these rules. Thus, advertising must not be false or misleading, as would be the case if the communications of a group advertising program or a group legal services plan would mislead prospective clients to think that it was a lawyer referral service sponsored by a state agency or bar association. Nor could the lawyer allow in-person, telephonic, or real-time contacts that would violate Rule 7.3.

[8] A lawyer also may agree to refer clients to another lawyer or a nonlawyer professional, in return for the undertaking of that person to refer clients or customers to the lawyer. Such reciprocal referral arrangements must not interfere with the lawyer's professional judgment as to making referrals or as to providing substantive legal services. See Rules 2.1 and 5.4(c). Except as provided in Rule 1.5(e), a lawyer who receives referrals from a lawyer or nonlawyer professional must not pay anything solely for the referral, but the lawyer does not violate paragraph (b) of this rule by agreeing to refer clients to the other lawyer or nonlawyer professional, so long as the reciprocal referral agreement is not exclusive and the client is informed of the referral agreement. Conflicts of interest created by such arrangements are governed by Rule 1.7. Reciprocal referral agreements should not be of indefinite duration and should be reviewed periodically to determine whether they comply with these rules. This rule does not restrict referrals or divisions of revenues or net income among lawyers within firms comprised of multiple entities.

Reporter's Notes – 2009 Amendment

V.R.P.C. 7.2 is amended to conform to the changes in the Model Rule. Rule 7.2(b)(4) and Comment [8] were added by amendment at the August 2002 meeting of the House of Delegates on the recommendation of the Standing Committee on Ethics and Professional Responsibility to provide guidance for lawyers for referral agreements with other lawyers or nonlawyer professionals. See ABA Report No. 114 (August 2002).

The ABA Reporter's Explanation of other changes is as follows:

TEXT:

1. Paragraph (a): delete specification of types of public media and add reference to "electronic communication"

This change is proposed to accommodate the new technology that is currently being used by law firms to market legal services-e.g., websites and e-mail. Examples of "public media" are being dropped from the Rule text and moved to Comment [3], obviating the necessity of changing the Rule to accommodate the next new public-communication technology. A specific reference to the Internet has been added to Comment [3].

A reference to electronic communication has also been added. To provide a specific example of this type of technology, a reference to e-mail has been added to Comment [3] with a cross-reference to the prohibition in Rule 7.3(a) of solicitation by real-time electronic contact.

2. Delete current paragraph (b)

The requirement that a lawyer retain copies of all advertisements for two years has become increasingly burdensome, and such records are seldom used for disciplinary purposes. Thus the Commission, with the concurrence of the ABA Commission on Responsibility in Client Development, is recommending elimination of the requirement that records of advertising be retained for two years.

3. Paragraph (b)(2): Replace reference to “legal service organization” with “legal service plan”

This change in terminology is intended to avoid confusion between a “legal services organization,” which provides direct legal services to clients and is included in the definition of a law firm in Rule 1.0(c), and prepaid and group legal service plans, and other similar delivery systems, whose usual charges are excepted from the prohibition against a lawyer giving anything of value to a person for recommending the lawyer’s services in Rule 7.2(b).

4. Paragraph (b)(2): Modify to permit lawyers to pay the usual charges of “a not-for-profit or qualified lawyer referral service”

This change is intended to more closely conform the Model Rules to ABA policy with respect to lawyer referral services. It recognizes the need to protect prospective clients who have come to think of lawyer referral services as consumer-oriented organizations that provide unbiased referrals to lawyers with appropriate experience in the subject matter of the representation and afford other client protections, such as complaint procedures or malpractice insurance requirements. The effect of the proposal is to permit lawyers to pay the usual charges of a for-profit lawyer referral service, but only if it has been approved by an appropriate regulatory authority [approved by the Vermont Supreme Court] as affording adequate protections for prospective clients, preferably in conformity with the four core standards prescribed in the American Bar Association’s Model Supreme Court Rules Governing Lawyer Referral Services and Model Lawyer Referral and Information Service Quality Assurance Act. Because the need for special regulation arises from the prevailing public perception of lawyer referral services, this special regulatory regime is only applicable to a for-profit organization that holds itself out to the public as a lawyer referral service. See Comment [6].

5. Paragraph (c): Modify to permit identification of law firm as entity responsible for advertisement

The Commission thinks that law firms should be able to designate the firm as the entity responsible for the contents of an advertisement. Such information, rather than the name of a specific lawyer in the firm, should be sufficient to enable disciplinary authorities to take action necessary to protect the public from misleading advertising.

6. Paragraph (c): Require identification of the address of the law firm or lawyer responsible for advertisement

Because Rule 7.5 permits the use of trade names and because lawyers frequently advertise in locations where they do not maintain an office, the Commission has added a requirement that each advertisement include an office address for the law firm or lawyer named in the advertisement. This information will help disciplinary authorities track down those who are responsible for an advertisement, but, more importantly, it will provide prospective clients with important information about where the lawyer or law firm is located -an important fact in this era of multi jurisdictional advertising.

COMMENT:

[3] Although the Commission concluded that a specification of the various public media lawyers can use to market their services should not be included in the Rule text, it thought it appropriate to explicitly affirm the legitimacy of using electronic media, including the Internet and the World Wide Web. The reference to “lawful” electronic mail was included to require lawyers to comply with any law that might prohibit “spamming”-i.e., the mass e-mailing of commercial messages. A cross-reference to Rule 7.3(a) has been added to alert lawyers to the proposed prohibition of solicitation by real-time electronic contact. This Comment and the related caption have been deleted because [former] paragraph (b) was deleted from the Rule text.

[5] The discussion of advertising expenses has been modified to more accurately reflect the current state of client-development activities in law firms. To this has been added a cross-reference to Rule 5.3 as a reminder of the partner’s and firm’s obligations with respect to the conduct of nonlawyers involved in client development activities.

[6] In response to a concern about the ambiguity of the reference in paragraph (b)(2) to “a legal service organization,” this new Comment defines a legal service plan to specifically include prepaid and group legal service plans, and also to include “a similar delivery system that assists prospective clients to secure legal representation.” This clarifies that lawyers may pay the usual charges of not only traditional prepaid and group legal service plans, but also the usual charges of new hybrid plans that might undertake to provide a variety of services to prospective clients. Also by its definition of a lawyer referral service as an organization that holds itself out to the public as a lawyer referral service, the Comment precludes extension of the special regulatory regime governing lawyer referral services to prepaid or group legal service plans and other similar delivery systems. Finally the Comment articulates ABA policy with respect to the core characteristics of a qualified lawyer referral service.

[7] This new Comment alerts lawyers who accept assignments or referrals from legal service plans or referrals from lawyer referral services that they must act reasonably to assure that the activities of the plan or service are compatible with the lawyers' professional obligations.

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Rule 7.3. DIRECT CONTACT WITH PROSPECTIVE CLIENTS

(a) A lawyer shall not by in-person, live telephone or real-time electronic contact solicit professional employment from a prospective client when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain, unless the person contacted:

(1) is a lawyer; or

(2) has a family, close personal, or prior professional relationship with the lawyer.

(b) A lawyer shall not solicit professional employment from a prospective client by written, recorded or electronic communication or by in-person, telephone or real-time electronic contact even when not otherwise prohibited by paragraph (a), if:

(1) the prospective client has made known to the lawyer a desire not to be solicited by the lawyer; or

(2) the solicitation involves coercion, duress or harassment.

(c) Every written, recorded or electronic communication from a lawyer soliciting professional employment from a prospective client known to be in need of legal services in a particular matter shall include the words "Advertising Material" on the outside envelope, if any, and at the beginning and ending of any recorded or electronic communication, unless the recipient of the communication is a person specified in paragraphs (a)(1) or (a)(2).

(d) Notwithstanding the prohibitions in paragraph (a), a lawyer may participate with a prepaid or group legal service plan operated by an organization not owned or directed by the lawyer which uses in-person or telephone contact to solicit memberships or subscriptions for the plan from persons who are not known to need legal services in a particular matter covered by the plan.—Amended June 17, 2009, eff. Sept. 1, 2009.

Comment

[1] There is a potential for abuse inherent in direct in-person, live telephone or real-time electronic contact by a lawyer with a prospective client known to need legal services. These forms of contact between a lawyer and a prospective client subject the layperson to the private importuning of the trained advocate in a direct interpersonal encounter. The prospective client, who may already feel overwhelmed by the circumstances giving rise to the need for legal services, may find it difficult fully to evaluate all available alternatives with reasoned judgment and appropriate self-interest in the face of the lawyer's presence and insistence upon being retained immediately. The situation is fraught with the possibility of undue influence, intimidation, and overreaching.

[2] This potential for abuse inherent in direct in-person, live telephone or real-time electronic solicitation of prospective clients justifies its prohibition, particularly since lawyer advertising and written and recorded communication permitted under Rule 7.2 offer alternative means of conveying necessary information to those who may be in need of legal services. Advertising and written and recorded communications which may be mailed or autodialed make it possible for a prospective client to be informed about the need for legal services, and about the qualifications of available lawyers and law firms, without subjecting the prospective client to direct in-person, telephone or real-time electronic persuasion that may overwhelm the client's judgment.

[3] The use of general advertising and written, recorded or electronic communications to transmit information from lawyer to prospective client, rather than direct in-person, live telephone or real-time electronic contact, will help to assure that the information flows cleanly as well as freely. The contents of advertisements and communications permitted under Rule 7.2 can be permanently recorded so that they cannot be disputed and may be shared with others who know the lawyer. This potential for informal review is itself likely to help guard against statements and claims that might constitute false and misleading communications, in violation of Rule 7.1. The contents of direct in-person, live telephone or real-time electronic conversations between a lawyer and a prospective client can be disputed and may not be subject to third-party scrutiny. Consequently, they are much more likely to approach (and occasionally cross) the dividing line between accurate representations and those that are false and misleading.

[4] There is far less likelihood that a lawyer would engage in abusive practices against an individual who is a former client, or with whom the lawyer has a close personal or family relationship, or in situations in which the lawyer is motivated by considerations other than the lawyer's pecuniary gain. Nor is there a serious potential for abuse when the person contacted is a lawyer. Consequently, the general prohibition in Rule 7.3(a) and the requirements of Rule 7.3(c) are not applicable in those situations. Also, paragraph (a) is not intended to prohibit a lawyer from participating in constitutionally protected activities of public or charitable legal-service organizations or bona fide political, social, civic, fraternal, employee or trade organizations whose purposes include providing or recommending legal services to its members or beneficiaries.

[5] But even permitted forms of solicitation can be abused. Thus, any solicitation which contains information which is false or misleading within the meaning of Rule 7.1, which involves coercion, duress or harassment within the meaning of Rule 7.3(b)(2), or which involves contact with a prospective client who has made known to the lawyer a desire not to be solicited by the lawyer within the meaning of Rule 7.3(b)(1) is prohibited. Moreover, if after sending a letter or other communication to a client as permitted by Rule 7.2 the lawyer receives no response, any further effort to communicate with the prospective client may violate the provisions of Rule 7.3(b).

[6] This rule is not intended to prohibit a lawyer from contacting representatives of organizations or groups that may be interested in establishing a group or prepaid legal plan for their members, insureds, beneficiaries or other third parties for the purpose of informing such entities of the availability of and details concerning the plan or arrangement which the lawyer or lawyer's firm is willing to offer. This form of communication is not directed to a prospective client. Rather, it is usually addressed to an individual acting in a fiduciary capacity seeking a supplier of legal services for others who may, if they choose, become prospective clients of the lawyer. Under these circumstances, the activity which the lawyer undertakes in communicating with such representatives and the type of information transmitted to the individual are functionally similar to and serve the same purpose as advertising permitted under Rule 7.2.

[7] The requirement in Rule 7.3(c) that certain communications be marked "Advertising Material" does not apply to communications sent in response to requests of potential clients or their spokespersons or sponsors. General announcements by lawyers, including changes in personnel or office location, do not constitute communications soliciting professional employment from a client known to be in need of legal services within the meaning of this rule.

[8] Paragraph (d) of this rule permits a lawyer to participate with an organization which uses personal contact to solicit members for its group or prepaid legal service plan, provided that the personal contact is not undertaken by any lawyer who would be a provider of legal services through the plan. The organization must not be owned by or directed (whether as manager or otherwise) by any lawyer or law firm that participates in the plan. For example, paragraph (d) would not permit a lawyer to create an organization controlled directly or indirectly by the lawyer and use the organization for the in-person or telephone solicitation of legal employment of the lawyer through memberships in the plan or otherwise. The communication permitted by these organizations also must not be directed to a person known to need legal services in a particular matter, but is to be designed to inform potential plan members generally of another means of affordable legal services. Lawyers who participate in a legal service plan must reasonably assure that the plan sponsors are in compliance with Rules 7.1, 7.2 and 7.3(b). See 8.4(a).

Reporter's Notes — 2009 Amendment

V.R.P.C. 7.3 is amended to conform to the changes in the Model Rule. The ABA Reporter's Explanation is as follows:

TEXT:

1. Paragraph a: Extend prohibition to "real-time electronic contact"

The Commission, in accord with the ABA Commission on Responsibility in Client Development, is recommending that lawyer solicitation by real-time electronic communication (e.g., an Internet chat room) be prohibited. Differentiating between e-mail and real-time electronic communication, the Commission has concluded that the interactivity and immediacy of response in realtime electronic communication presents the same dangers as those involved in live telephone contact.

2. Paragraph (a)(1): Exempt contacts with lawyers

In agreement with a recommendation of the ABA Commission on Responsibility in Client Development, the Commission has concluded that lawyers do not need the special protection afforded by this Rule. Such an exemption would permit in-person contacts with inhouse lawyers of organizations but would not permit contact with nonlawyer representatives of such organizations.

3. Paragraph (a)(2): Exempt contacts with persons with "close personal relationship" to lawyer

The ABA Model Code of Professional Responsibility permitted in-person contact with close personal friends. Approximately 10 states still do. Although the Commission recognizes the imprecision of the concept of a

close personal relationship, it seems difficult to justify prohibiting a lawyer from calling a close friend and offering to represent the friend in a legal matter.

4. Paragraph (b): Add reference to “real-time electronic contact”

The prohibition against real-time electronic contact in paragraph (a) requires the addition of a reference to real-time electronic contact in paragraph (b).

5. Paragraph (c): Add reference to electronic contact and modify exception to conform to paragraph (a)

The reference to electronic contact is needed so a lawyer sending e-mail to a person known to need legal services will be required to identify the e-mail as an advertisement. The relocation and modification of the exception was necessary to conform paragraph (c) with the changes in paragraph (a).

COMMENT:

[1], [2] and [3] The references to real-time electronic contact and electronic communications were added to conform the Comment to the proposed changes in the text of the Rule.

[3] The second sentence of this Comment has been modified to reflect the deletion of [former] paragraph (b) from Rule 7.2. The change in the second to the last sentence corrects an error in the [former] Comment.

[4] The first sentence has been modified to indicate that the reference in the Rule text to a “prior professional relationship” denotes a former client-lawyer relationship. A sentence has been added to explain the inapplicability of paragraphs (a) and (c) to contacts with lawyers. The last sentence has been added to recognize the constitutional limitations on regulators attempting to prohibit lawyers from cooperating with nonprofit organizations assisting members or beneficiaries to secure legal counsel necessary for redress of grievances. See *United Transportation Union v. State Bar*, 401 U.S. 576 (1971).

[8] These changes are stylistic. No change in substance is intended.

Reporter’s Notes

This rule diverges from Vermont’s DR 2-104 by requiring that all targeted advertising, written or broadcast, be identified as advertising at the beginning and end of the message.

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Rule 7.4. COMMUNICATION OF FIELDS OF PRACTICE AND SPECIALIZATION

(a) A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law.

(b) A lawyer admitted to engage in patent practice before the United States Patent and Trademark Office may use the designation “Patent Attorney” or a substantially similar designation.

(c) A lawyer engaged in admiralty practice may use the designation “Admiralty,” “Proctor in Admiralty” or a substantially similar designation.

(d) A lawyer shall not state or imply that a lawyer is certified as a specialist in a particular field of law, unless:

(1) the lawyer has been certified as a specialist by a named organization, provided that the communication clearly states that there is no procedure in Vermont for approving certifying organizations, unless the named organization has been accredited by the American Bar Association to certify lawyers as specialists in a particular field of law; and

(2) the name of the certifying organization is clearly identified in the communication.—
Amended June 17, 2009, eff. Sept. 1, 2009.

Comment

[1] Paragraph (a) of this rule permits a lawyer to indicate areas of practice in communications about the lawyer’s services. If a lawyer practices only in certain fields, or will not accept matters except in a specified field or fields, the lawyer is permitted to so indicate. A lawyer is generally permitted to state that the lawyer is a “specialist,” practices a “specialty,” or “specializes in” particular fields, but such communications are subject to the “false and misleading” standard applied in Rule 7.1 to communications concerning a lawyer’s services.

[2] Paragraph (b) recognizes the long-established policy of the Patent and Trademark Office for the designation of lawyers practicing before the Office. Paragraph (c) recognizes that designation of admiralty practice has a long historical tradition associated with maritime commerce and the federal courts.

[3] Paragraph (d) permits a lawyer to state that the lawyer is certified as a specialist in a field of law. In Vermont, because there is no appropriate regulatory authority that has a procedure for approving organizations

granting certification, the rule requires that the lawyer clearly state such lack of procedure. If, however, the named organization has been accredited by the American Bar Association to certify lawyers as specialists in a particular field of law, the communication need not contain such a statement. In order to insure that consumers can obtain access to useful information about an organization granting certification, the name of the certifying organization, if any, must be included in any communication regarding the certification.

Reporter's Notes — 2009 Amendment

V.R.P.C. 7.4 is amended to conform to the changes in the Model Rule, except for Rule 7.4(d)(1), which retains the original provision of V.R.P.C. 7.4(c), adapted from the original Model Rule, that allows a lawyer to claim specialty certification by a named organization that has not been approved by the American Bar Association, provided that the claim clearly states that there is no procedure in Vermont for approval of such organizations. The amended Model Rule requires that the certifying organization be approved either by an appropriate state authority or by the American Bar Association.

In *In re PRB Docket No. 2002-093*, 2005 VT 2, 177 Vt. 629, 868 A.2d 709 (mem.), after a thorough review of the basis and scope of V.R.P.C. 7.1-7.4, the Court held that the PRB could have reasonably found that the phrase “INJURY EXPERTS” in an advertisement violated former V.R.P.C. 7.1(b) as creating an unjustified expectation of results that the lawyer could achieve and was not acceptable as a description of a specialty under V.R.P.C. 7.4 because that rule only allowed the use of the descriptive term “specialty”; further, any use of “specialist” or “specialty” must include a disclaimer of organizational certification to avoid violation of the “false and misleading” standard of V.R.P.C. 7.1.

The ABA Reporter's Explanation is as follows:

TEXT:

1. Caption: Add reference to “Specialization”

As Rule 7.4 deals with communication of both fields of law in which the lawyer practices and fields of law in which the lawyer claims to be a specialist, the current caption is underinclusive.

2. Paragraph (a): Move first sentence to new paragraph (a)

This change serves to separate the two basic subjects addressed by this Rule: communication of fields of law in which the lawyer practices, as permitted by paragraph (a), and communication of fields of law in which the lawyer claims to be certified as a specialist, as governed by paragraph (d). No change in substance is intended.

3. Paragraph (b): Move [former] paragraph (a) to new paragraph (b)

As revised, the grant of permission to lawyers who are admitted before the United States Patent and Trademark Office to use the designation “Patent Attorney” is no longer presented as an exception to the prohibition against claiming to be certified or recognized as a specialist, but rather is treated as a separate subject. This is because a claim to be a patent attorney is premised on admission to practice rather than on certification as a specialist and also entails more than a simple designation of an area in which the lawyer practices. No change in substance is intended.

4. Paragraph (c): Move [former] paragraph (b) to new paragraph (c)

As revised, the grant of permission to lawyers who engage in Admiralty practice to use the designation “Proctor in Admiralty” is no longer presented as an exception to the prohibition against claiming to be certified or recognized as a specialist, but rather is treated as a separate subject. This is because a claim to be a Proctor in Admiralty is not premised on certification but does seem to denote more than a simple designation of an area in which the lawyer practices. No change in substance is intended. [Note: Admission to the bar of a United States District Court still includes admission as “proctor in admiralty.”]

5. Paragraph (d): Replace [former] paragraphs (c) and alternate (c) with new paragraph (d)

[As noted above, V.R.P.C. 7.4(d)(1) differs from Model Rule 7.4(d)(1).] Paragraph (d) also contains a new requirement that the name of the certifying organization be clearly identified. This will enable prospective clients to make further inquiry about the certification program.

COMMENT:

[1] A minor change has been made to indicate that this Comment refers to paragraph (a) of the restructured Rule.

[2] The first sentence has been deleted because paragraphs (b) and (c) are no longer presented as exceptions to the prohibition against claiming to be certified as a specialist. Other minor changes conform the Comment to the changes in the Rule text.

[3] The Comment has been modified to conform with paragraph(d)....

Reporter's Notes

This rule, amended by the ABA in 1994, allows means by which lawyers can advertise themselves as certified specialists (other than in admiralty and patent law). The change was necessitated by the ruling in *Peel v.*

Attorney Registration & Disciplinary Comm'n, 496 U.S. 91 (1990), which rendered the current Vermont Code provision constitutionally infirm. The drafters gave careful consideration to the possibility of creating an agency responsible for approving organizations which certify lawyers. After considering the legislative history in adopting the 1994 amendments, however, the drafters decided that reliance upon the ABA certification process would suffice.

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Rule 7.5. FIRM NAMES AND LETTERHEADS

(a) A lawyer shall not use a firm name, letterhead or other professional designation that violates Rule 7.1. A trade name may be used by a lawyer in private practice if it does not imply a connection with a government agency or with a public or charitable legal services organization and is not otherwise in violation of Rule 7.1.

(b) A law firm with offices in more than one jurisdiction may use the same name or other professional designation in each jurisdiction, but identification of the lawyers in an office of the firm shall indicate the jurisdictional limitations on those not licensed to practice in the jurisdiction where the office is located.

(c) The name of a lawyer holding a public office shall not be used in the name of a law firm, or in communications on its behalf, during any substantial period in which the lawyer is not actively and regularly practicing with the firm.

(d) Lawyers may state or imply that they practice in a partnership or other organization only when that is the fact.—Amended June 17, 2009, eff. Sept. 1, 2009.

Comment

[1] A firm may be designated by the names of all or some of its members, by the names of deceased members where there has been a continuing succession in the firm's identity or by a trade name such as the "ABC Legal Clinic." A lawyer or law firm may also be designated by a distinctive website address or comparable professional designation. Although the United States Supreme Court has held that legislation may prohibit the use of trade names in professional practice, use of such names in law practice is acceptable so long as it is not misleading. If a private firm uses a trade name that includes a geographical name such as "Springfield Legal Clinic," an express disclaimer that it is a public legal aid agency may be required to avoid a misleading implication. It may be observed that any firm name including the name of a deceased partner is, strictly speaking, a trade name. The use of such names to designate law firms has proven a useful means of identification. However, it is misleading to use the name of a lawyer not associated with the firm or a predecessor of the firm, or the name of a nonlawyer.

[2] With regard to paragraph (d), lawyers sharing office facilities, but who are not in fact associated with each other in a law firm,, may not denominate themselves as, for example, "Smith and Jones," for that title suggests that they are practicing law together in a firm.

Reporter's Notes — 2009 Amendment

V.R.P.C. 7.5 has been amended to conform to the changes in the Model Rule. The phrase "or a nonlawyer" was added by amendment at the August 2002 meeting of the House of Delegates on the recommendation of the Standing Committee on Ethics and Professional Responsibility for consistency with the simultaneous amendment of Model Rule 7.2(b). See Reporter's Notes to Amendment of V.R.P.C. 7.2.

The ABA Reporter's Explanation of other changes is as follows:

TEXT:

Paragraph (b): Add reference to "other professional designation"

A reference to "other professional designation" has been added in paragraph (b) to clarify that the Rule applies to website addresses and other ways of identifying law firms in connection with their use of electronic media.

COMMENT:

[1] The new sentence in Comment [1] recognizes that a law firm's website address is a professional designation governed by Rule 7.5. Thus, a law firm may not use a website address that violates Rule 7.1.

[2] The reference to partnership in the [former] Comment is underinclusive because lawyers also practice in professional corporations and limited liability companies.

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Rule 7.6. POLITICAL CONTRIBUTIONS TO OBTAIN GOVERNMENT LEGAL ENGAGEMENTS OR APPOINTMENTS BY JUDGES

A lawyer or law firm shall not accept a government legal engagement or an appointment by a judge if the lawyer or law firm makes a political contribution or solicits political contributions for the purpose of obtaining or being considered for that type of legal engagement or appointment.— Added June 17, 2009, eff. Sept. 1, 2009.

Comment

[1] Lawyers have a right to participate fully in the political process, which includes making and soliciting political contributions to candidates for judicial and other public office. Nevertheless, when lawyers make or solicit political contributions in order to obtain an engagement for legal work awarded by a government agency, or to obtain appointment by a judge, the public may legitimately question whether the lawyers engaged to perform the work are selected on the basis of competence and merit. In such a circumstance, the integrity of the profession is undermined.

[2] The term “political contribution” denotes any gift, subscription, loan, advance or deposit of anything of value made directly or indirectly to a candidate, incumbent, political party or campaign committee to influence or provide financial support for election to or retention in judicial or other government office. Political contributions in initiative and referendum elections are not included. For purposes of this Rule, the term “political contribution” does not include uncompensated services.

[3] Subject to the exceptions below, (i) the term “government legal engagement” denotes any engagement to provide legal services that a public official has the direct or indirect power to award; and (ii) the term “appointment by a judge” denotes an appointment to a position such as referee, commissioner, special master, receiver, guardian or other similar position that is made by a judge. Those terms do not, however, include (a) substantially uncompensated services; (b) engagements or appointments made on the basis of experience, expertise, professional qualifications and cost following a request for proposal or other process that is free from influence based upon political contributions; and (c) engagements or appointments made on a rotational basis from a list compiled without regard to political contributions.

[4] The term “lawyer or law firm” includes a political action committee or other entity owned or controlled by a lawyer or law firm.

[5] Political contributions are for the purpose of obtaining or being considered for a government legal engagement or appointment by a judge if, but for the desire to be considered for the legal engagement or appointment, the lawyer or law firm would not have made or solicited the contributions. The purpose may be determined by an examination of the circumstances in which the contributions occur. For example, one or more contributions that in the aggregate are substantial in relation to other contributions by lawyers or law firms, made for the benefit of an official in a position to influence award of a government legal engagement, and followed by an award of the legal engagement to the contributing or soliciting lawyer or the lawyer’s firm would support an inference that the purpose of the contributions was to obtain the engagement, absent other factors that weigh against existence of the proscribed purpose. Those factors may include among others that the contribution or solicitation was made to further a political, social, or economic interest or because of an existing personal, family, or professional relationship with a candidate.

[6] If a lawyer makes or solicits a political contribution under circumstances that constitute bribery or another crime, Rule 8.4(b) is implicated.

Reporter’s Notes

V.R.P.C. 7.6 is new to Vermont. It is identical to Model Rule 7.6, adopted by the ABA in February 2000 and not changed in 2002 or 2003. The purposes and scope of the rule are explained in the Comment.

Although the rule applies to contributions for retention, as well as election, of judges, Canon 5B(4)(d) of the Vermont Code of Judicial Conduct prohibits candidates for appointment or retention in judicial office, or appointment to other public office, from soliciting or accepting funds, “personally or through a committee or otherwise, to support the candidacy.” Thus, the rule will have little or no applicability to those individuals. It will apply, however, to candidates for election as judge of probate or assistant judge who, by virtue of Canon 5C(3) of the Code of Judicial Conduct, may not personally solicit or accept campaign contributions but may establish campaign committees to perform that role. See Comment [2].

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MAINTAINING THE INTEGRITY OF THE PROFESSION

Rule 8.1. BAR ADMISSION AND DISCIPLINARY MATTERS

An applicant for admission to the bar, or a lawyer in connection with a bar admission application or in connection with a disciplinary matter, shall not:

(a) knowingly make a false statement of material fact; or

(b) fail to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter, or knowingly fail to respond to a lawful demand for information from an admissions or disciplinary authority, except that this rule does not require disclosure of information otherwise protected by Rule 1.6.—Amended June 17, 2009, eff. Sept. 1, 2009.

Comment

[1] The duty imposed by this rule extends to persons seeking admission to the bar as well as to lawyers. Hence, if a person makes a material false statement in connection with an application for admission, it may be the basis for subsequent disciplinary action if the person is admitted, and in any event may be relevant in a subsequent admission application. The duty imposed by this rule applies to a lawyer's own admission or discipline as well as that of others. Thus, it is a separate professional offense for a lawyer to knowingly make a misrepresentation or omission in connection with a disciplinary investigation of the lawyer's own conduct. Paragraph (b) of this rule also requires correction of any prior misstatement in the matter that the applicant or lawyer may have made and affirmative clarification of any misunderstanding on the part of the admissions or disciplinary authority of which the person involved becomes aware.

[2] This rule is subject to the provisions of the fifth amendment of the United States Constitution and corresponding provisions of state constitutions. A person relying on such a provision in response to a question, however, should do so openly and not use the right of nondisclosure as a justification for failure to comply with this rule.

[3] A lawyer representing an applicant for admission to the bar, or representing a lawyer who is the subject of a disciplinary inquiry or proceeding, is governed by the rules applicable to the client-lawyer relationship, including Rule 1.6 and, in some cases, Rule 3.3.

Reporter's Notes — 2009 Amendment

V.R.P.C. 8.1 has been amended to conform to the changes in the comment to the Model Rule. There were no changes in the Model Rule text. The ABA Reporter's Explanation of the comment changes is as follows:

[1] These changes clarify that there is a duty to supplement an answer later found to be wrong. The point might already be comprehended within the black letter "correct a misapprehension known by the person to have arisen in the matter," but, to make the point clear, the new language has been added and paragraph (b) is cited as the source of the obligation. No change in substance is intended.

[3] This change reminds lawyers that bar admission and professional discipline are judicial proceedings subject to the requirements of Rules 1.6 and 3.3. Although Rule 1.6 does not require a lawyer to come forward with adverse evidence, in a limited number of cases, the requirements of Rule 3.3 may do so. No change in substance is intended.

Reporter's Notes

This rule broadens the scope of its Vermont Code counterpart to prohibit false statements or omissions in connection with disciplinary matters as well as in connection with bar admission applications. The rule also goes further by requiring compliance with lawful requests for information from bar admissions or disciplinary authorities. Administrative Order 9, Rule 6, presently achieves similar results by providing that failure to cooperate with bar counsel or the Professional Conduct Board is grounds for imposition of discipline.

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Rule 8.2. JUDICIAL AND LEGAL OFFICIALS

(a) A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge,

adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office.

(b) A lawyer who is a candidate for judicial office shall comply with the applicable provisions of the Code of Judicial Conduct.

Comment

[1] Assessments by lawyers are relied on in evaluating the professional or personal fitness of persons being considered for election or appointment to judicial office and to public legal offices, such as attorney general, prosecuting attorney and public defender. Expressing honest and candid opinions on such matters contributes to improving the administration of justice. Conversely, false statements by a lawyer can unfairly undermine public confidence in the administration of justice.

[2] When a lawyer seeks judicial office, the lawyer should be bound by applicable limitations on political activity.

[3] To maintain the fair and independent administration of justice, lawyers are encouraged to continue traditional efforts to defend judges and courts unjustly criticized.

Reporter's Notes — 2009 Amendment

There are no changes to Model Rule 8.1 or its comment. The only change in the Vermont rule is the insertion of the bracketed numbers to designate the paragraphs of the comment.

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Rule 8.3. REPORTING PROFESSIONAL MISCONDUCT

(a) A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.

(b) A lawyer who knows that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the appropriate authority.

(c) This rule does not require disclosure of information gained by Bar counsel in responding to an inquiry or by a lawyer while participating in a lawyer assistance program approved by the Vermont Bar Association or as a member of the Professional Responsibility Committee of the Vermont Bar Association or of information otherwise protected by Rule 1.6. — Amended June 17, 2009, eff. Sept. 1, 2009. **Amended March 7, 2016; eff. May 9, 2016.**

Comment

[1] Self-regulation of the legal profession requires that members of the profession initiate disciplinary investigation when they know of a violation of the Rules of Professional Conduct. Lawyers have a similar obligation with respect to judicial misconduct. An apparently isolated violation may indicate a pattern of misconduct that only a disciplinary investigation can uncover. Reporting a violation is especially important where the victim is unlikely to discover the offense.

[2] A report about misconduct is not required where it would involve violation of Rule 1.6. However, a lawyer should encourage a client to consent to disclosure where prosecution would not substantially prejudice the client's interests.

[3] This rule limits the reporting obligation to those offenses that a self-regulating profession must vigorously endeavor to prevent. A measure of judgment is, therefore, required in complying with the provisions of this rule. The term "substantial" refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware. A report should be made to the bar disciplinary agency unless some other agency, such as the court in which the violation occurred, is more appropriate in the circumstances. Similar considerations apply to the reporting of judicial misconduct.

[4] The duty to report professional misconduct does not apply to a lawyer retained to represent a lawyer whose professional conduct is in question or to a lawyer who has volunteered to help such lawyers through approved Vermont Bar Association committees. Such a situation is governed by the rules applicable to the client-lawyer relationship.

Reporter's Notes—2016 Amendment

Rule 8.3(c) is amended to exempt Bar Counsel from the requirement of disclosure of information about misconduct otherwise required by Rule 8.3(a) when Bar Counsel is responding to an inquiry from an attorney pursuant to A.O. 9, Rules 3(B)(1) and 9. The purpose of the amendment is to maintain the integrity of the inquiry process.

Reporter's Notes — 2009 Amendment

V.R.P.C. 8.3 is amended to conform to changes in the Model Rule, retaining references to the Vermont Bar Association-approved lawyer assistance program and the Association's Professional Responsibility Committee as a variation in Rule 8.3(c).

In *State v. Wade*, 2003 VT 99, 176 Vt. 550, 839 A.2d 559 (mem.), the Court held that a trial judge had abused his discretion in dismissing a prosecution with prejudice as a sanction for a long history of alleged prosecutorial neglect and misconduct in discovery matters where the conduct in the instant case had not prejudiced defendant. In a concurring opinion, two justices referred the matter to the PRB under V.R.P.C. 8.3(a) and Canon 3D(2) of the Vermont Code of Judicial Conduct over the majority's objection that Rule 12 of the Rules Governing the Professional Responsibility Program (A.O. 9) required confidentiality before formal disciplinary action was filed.

The ABA Reporter's Explanation in pertinent part is as follows:

TEXT:

1. Paragraphs (a) and (b): Change "having knowledge" to "who knows"

In importing DR 1-103 of the ABA Model Code of Professional Responsibility into the Model Rules, the "having knowledge" formulation was used even though that term is undefined in the Rules. "Knows" and "knowingly," on the other hand, are defined terms, and the Commission is substituting them in this Rule for consistency and to put the mandate into the active voice. No change in substance is intended.

....

3. Paragraph (c): Change "serving as a member of" to "participating" This change expands the reporting exception to any lawyer...who participates in an approved lawyers assistance program, even if such participation is limited to a single instance.

Reporter's Notes

This rule narrows the Code's reporting rule by requiring lawyers to report only that misconduct which raises a substantial question as to a lawyer's honesty, trustworthiness or fitness as a lawyer. The new rule also adds a requirement that lawyers report significant judicial misconduct to the appropriate authority.

Paragraph (c) is a significant departure from the present Vermont requirement. It provides that lawyers who counsel other lawyers in trouble or with ethical dilemmas will not be compelled to report violations which come to their attention.

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Rule 8.4. MISCONDUCT

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) engage in a "serious crime," defined as illegal conduct involving any felony or involving any lesser crime a necessary element of which involves interference with the administration of justice, false swearing, intentional misrepresentation, fraud, deceit, bribery, extortion, misappropriation, theft, or an attempt or a conspiracy or solicitation of another to commit a "serious crime";

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice;

(e) state or imply an ability to influence improperly a government

agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law;

(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law; or

(g) discriminate against any individual because of his or her race, color, religion, ancestry, national origin, sex, sexual orientation, place of birth or age, or against a qualified handicapped individual, in hiring, promoting or otherwise determining the conditions of employment of that individual.— Amended June 17, 2009, eff. Sept. 1, 2009.

Comment

[1] Lawyers are subject to discipline when they violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so or do so through the acts of another, as when they request or instruct an agent to do so on the lawyer's behalf. Paragraph (a), however, does not prohibit a lawyer from advising a client concerning action the client is legally entitled to take.

[2] Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offenses carry no such implication. Traditionally, the distinction was drawn in terms of offenses involving "moral turpitude." That concept can be construed to include offenses concerning some matters of personal morality, such as adultery and comparable offenses, that have no specific connection to fitness for the practice of law. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, breach of trust, or serious interference with the administration of justice are in that category. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.

[3] A lawyer who, in the course of representing a client, knowingly manifests by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, violates paragraph (g) when such actions are prejudicial to the administration of justice. Legitimate advocacy respecting the foregoing factors does not violate paragraph (g). A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule.

[4] A lawyer may refuse to comply with an obligation imposed by law upon a good faith belief that no valid obligation exists. The provisions of Rule 1.2(d) concerning a good faith challenge to the validity, scope, meaning or application of the law apply to challenges of legal regulation of the practice of law.

[5] Lawyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer's abuse of public office can suggest an inability to fulfill the professional role of lawyers. The same is true of abuse of positions of private trust such as trustee, executor, administrator, guardian, agent and officer, director or manager of a corporation or other organization.

Reporter's Notes — 2009 Amendment

V.R.P.C. 8.4 is amended to conform to changes in the Model Rule, retaining significant variations in the Vermont Rule as originally adopted. That rule incorporated the specific former Code language of "serious crime" in Rule 8.4(b) and carried forward paragraphs (g) and (h) from the former Code. See Reporter's Notes to V.R.P.C. 8.4 (1999). Comment [3] describes the application of Rule 8.4(g), which forbids discrimination in employment, in the context of client representation, where references to protected characteristics, even of an employee or associate, are not subject to discipline if they are legitimate advocacy and are thus not conduct prejudicial to the administration of justice in violation of Rule 8.4(d). Discrimination against an associate or employee in the employment context, however, is a violation of Rule 8.4(g), regardless of the purpose. The present amendment follows the Model Rules in deleting subdivision (h) and related language in Comment [5] in light of the omission from these Rules of ABA Model Rule 1.8(j) prohibiting sexual relations with a client (see Reporter's Notes to V.R.P.C. 1.8 and comment [17] to that rule) and the fact that as drafted the provision was overly broad.

The Supreme Court has addressed a number of issues under V.R.P.C. 8.4: *In re Sinnott*, 2005 VT 109, 178 Vt. 646, 891 A.2d 896 (mem) (federal indictment and negotiated guilty plea to two felony counts of interstate transmission of stolen property provided clear and convincing evidence of violation of V.R.P.C. 8.4(c), (d), and (h) as grounds for disbarment); *In re McGinn*, 2005 VT 71, 178 Vt. 604, 877 A.2d 688 (mem.) (admission of facts as to transactions involving criminal conduct provided clear and convincing evidence of violation of V.R.P.C. 8.4(c), (d), and (h) as grounds for disbarment); *In re Andres*, 2004 WL 5581930 (Vt., September 29, 2004) (assault on man in wheelchair was sufficient basis for finding of violation of V.R.P.C. 8.4(h) and sanction of three-year suspension from practice of law); *In re Lane*, 174 Vt. 550, 811 A.2d 207 (2002) (mem.) (admission of facts as to

misappropriation of funds provided clear and convincing evidence of violation of V.R.P.C. 8.4(c), (d), and (h) as grounds for disbarment). The ABA Reporter's Explanation in pertinent part is as follows:

TEXT:

Paragraph (e): Add material deleted from Rule 7.1

Rule 7.1 [formerly provided] that a lawyer may not make a false or misleading communication about the lawyer or the lawyer's services and, further, that a communication is false or misleading, inter alia, if it "states or implies that the lawyer can achieve results by means that violate the Rules of Professional Conduct or other law." The Commission recommends that this prohibition be moved out of Rule 7.1 and added to paragraph (e) in order to clarify that the prohibition is not limited to statements made in connection with marketing legal services.

COMMENT:

[1] The purpose of this new Comment is to explain when a lawyer is subject to discipline for violating or attempting to violate the Rules "through the acts of another" and to distinguish such conduct from advising a client concerning action the client is legally entitled to take. Comment [3] from the original Model Rules Comment is added to elaborate on the provisions of paragraph (g), which is unique to the Vermont Rules.

Reporter's Notes

The ABA version of this rule was rewritten to make it consistent with the present Vermont Code. Model Rule 8.4 at paragraph (b) prohibits a lawyer from committing a criminal act "that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects." The drafters opted to replace that language with the more specific prohibition contained in DR 1-102(A)(3) as amended in 1989.

Model Rule 8.4 does not contain paragraphs (g) or (h). These were incorporated from the present Vermont Code. See DR 1-102(A)(6) and (7).

While many jurisdictions are presently considering adopting specific prohibitions against sexual contact with clients, the drafters felt that a formal comment to this rule specifically advising against such conduct in certain situations would address the problem sufficiently.

ANNOTATIONS

1. Dishonesty, fraud, deceit or misrepresentation. Text and construction of the rule prohibiting a member of the Bar from engaging in conduct involving dishonesty, fraud, deceit or misrepresentation persuade the Court that the rule was meant to reach only conduct that calls into question an attorney's fitness to practice law. In re PRB Docket No. 2007-046, 2009 VT 115, 187 Vt. 35, 989 A.2d 523. Subsection (h) of this rule is meant to capture other conduct similar to that described in the preceding subsections and to specifically define such conduct as that which reflects adversely on fitness to practice law. Thus, while the subsection prohibiting a member of the Bar from engaging in conduct involving dishonesty, fraud, deceit or misrepresentation is broad and encompasses conduct both within and outside the realm of the practice of law, the Court is not prepared to believe that any dishonesty, such as giving a false reason for breaking a dinner engagement, would be actionable under the rule; rather, the subsection prohibits conduct involving dishonesty, fraud, deceit or misrepresentation that reflects on an attorney's fitness to practice law, whether that conduct occurs in an attorney's personal or professional life, and the subsection applies only to conduct so egregious that it indicates that the lawyer charged lacks the moral character to practice law. In re PRB Docket No. 2007-046, 2009 VT 115, 187 Vt. 35, 989 A.2d 523.

Not all misrepresentations made by an attorney raise questions about her moral character, calling into question her fitness to practice law. If the subsection prohibiting a member of the Bar from engaging in conduct involving dishonesty, fraud, deceit or misrepresentation is interpreted to automatically prohibit "misrepresentations" in all circumstances, the rule prohibiting an attorney from knowingly making a false statement of material fact or law to a third person would be entirely superfluous. In re PRB Docket No. 2007-046, 2009 VT 115, 187 Vt. 35, 989 A.2d 523.

Respondents' actions in falsely denying that they were recording a telephone conversation with a potential witness did not reflect adversely on their fitness to practice. In the course of zealously representing a defendant in a serious criminal matter, respondents engaged in an isolated instance of deception; all indications were that they earnestly believed that their actions were necessary and proper. In re PRB Docket No. 2007-046, 2009 VT 115, 187 Vt. 35, 989 A.2d 523.

2. Sanctions. Attorney who concealed the continuation of her romantic relationship with the husband of a client of the firm that she worked for was publicly reprimanded, as her relatively brief professional experience and her lack of other disciplinary actions mitigated in favor of that more lenient sanction. In re Strouse, 2011 VT 77, 190 Vt. 170, 34 A.3d 329.

Public reprimand was an appropriate sanction for an attorney who knowingly failed to put a contingent fee agreement in writing and who negligently attempted to charge an unreasonable 12 percent contingent fee for

facilitating communication between the complainant and another attorney. In re Fink, 2011 VT 42, 189 Vt. 470, 22 A.3d 461.

Two concurrent six-month suspensions were proper for an attorney who failed to cooperate with the disciplinary system, failed to communicate with her client and to return his papers, and practiced law where doing so violated the regulation of the legal profession. Furthermore, when respondent sought reinstatement, she would have to provide a detailed explanation for her lack of participation over the course of these proceedings. In re Hongisto, 2010 VT 51, 188 Vt. 553, 998 A.2d 1065 (mem.).

3. Particular cases. Attorney who concealed the continuation of her romantic relationship with the husband of a client of the firm that she worked for, which was a clear conflict of interest, acted deceitfully and her conduct reflected adversely on her fitness to practice law. In re Strouse, 2011 VT 77, 190 Vt. 170, 34 A.3d 329.

Facts supported the panel's finding that respondent, however erroneously, believed that he would contribute to a greater degree to complainant's case. Because he was not consciously aware that he would do very little work for a large fee, his actions in charging an excessive fee were negligent. In re Fink, 2011 VT 42, 189 Vt. 470, 22 A.3d 461

Respondent's agreement to a 12 percent contingent fee for facilitating communication between the complainant and another attorney was misconduct. Respondent's role did not require a large investment of time or labor; his tasks did not require specialized legal knowledge or legal experience; and facilitating communication would not preclude respondent from accepting other employment. In re Fink, 2011 VT 42, 189 Vt. 470, 22 A.3d 461.

In determining that respondent charged an excessive contingent fee, it was irrelevant that respondent did not actually bill the complainant for the contingent fee. In contracting with the complainant for 12 percent of the complainant's recovery, respondent attempted to violate the directive that lawyers charge a reasonable fee, which was a violation of the rule stating that it was unprofessional conduct for a lawyer to attempt to violate the Rules of Professional Conduct. In re Fink, 2011 VT 42, 189 Vt. 470, 22 A.3d 461.

Respondent, who was convicted of giving false information to a law enforcement authority and impeding a public officer after he left the scene of a car accident and then falsely reported that his wife had caused the accident, violated an ethical duty to the public when he engaged in serious criminal conduct that reflected adversely on his honesty and trustworthiness. Because the public expected a lawyer to be honest and to abide by the law, respondent's criminal conduct violated his duty to maintain the standards of personal integrity upon which the community relied. In re Neisner, 2010 VT 102, 189 Vt. 145, 16 A.3d 587.

Respondent, who was convicted of giving false information to a law enforcement authority and impeding a public officer after he left the scene of a car accident and then falsely reported that his wife had caused the accident, acted intentionally when he committed the crime underlying his ethical violation. Respondent consciously sought to achieve a particular result when he falsely stated to the state trooper that his wife had caused the car accident. In re Neisner, 2010 VT 102, 189 Vt. 145, 16 A.3d 587.

When respondent was convicted of giving false information to a law enforcement authority and impeding a public officer after he left the scene of a car accident and then falsely reported that his wife had caused the accident, there was no merit to his argument that his conduct had not caused an injury to the public. Respondent's misconduct demonstrated a failure to maintain personal honesty and integrity; this type of misconduct was closely related to practice and posed an immediate threat to the public. In re Neisner, 2010 VT 102, 189 Vt. 145, 16 A.3d 587.

Mitigating factors, which included respondent's lack of a prior disciplinary record, his cooperative attitude, his criminal sentence, his good character and positive reputation in the community, his remorse, and his alcoholism and rehabilitation, outweighed the aggravating factors, which included a dishonest or selfish motive, respondent's substantial experience as a lawyer, and his illegal conduct. Accordingly, respondent, who was convicted of giving false information to a law enforcement authority and impeding a public officer after he left the scene of a car accident and then falsely reported that his wife had caused the accident, was suspended for two years, running from the date his interim suspension began, followed by probation, during which time respondent had to perform at least 200 hours of pro bono legal services. In re Neisner, 2010 VT 102, 189 Vt. 145, 16 A.3d 587.

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Rule 8.5. DISCIPLINARY AUTHORITY; CHOICE OF LAW

(a) Disciplinary Authority. A lawyer admitted to practice in Vermont is subject to the disciplinary authority of Vermont, regardless of where the lawyer's conduct occurs. A lawyer not admitted in Vermont is also subject to the disciplinary authority of Vermont if the lawyer provides or offers to provide any legal services in Vermont. A lawyer may be subject to the disciplinary authority of both Vermont and another jurisdiction for the same conduct.

(b) Choice of Law. In any exercise of the disciplinary authority of Vermont, the rules of professional conduct to be applied shall be as follows:

(1) for conduct in connection with a matter pending before a tribunal, the rules of the jurisdiction in which the tribunal sits, unless the rules of the tribunal provide otherwise; and

(2) for any other conduct, the rules of the jurisdiction in which the lawyer's conduct occurred, or, if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction shall be applied to the conduct. A lawyer shall not be subject to discipline if the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect of the lawyer's conduct will occur.—Amended June 17, 2009, eff. Sept. 1, 2009.

Comment

Disciplinary Authority

[1] It is longstanding law that the conduct of a lawyer admitted to practice in Vermont is subject to the disciplinary authority of Vermont. Extension of Vermont's disciplinary authority to other lawyers who provide or offer to provide legal services in the state is for the protection of Vermont's citizens. Reciprocal enforcement of a jurisdiction's disciplinary findings and sanctions will further advance the purposes of this rule. See Rules 6 and 22, ABA Model Rules for Lawyer Disciplinary Enforcement. A lawyer who is subject to the disciplinary authority of Vermont under Rule 8.5(a) appoints an official to be designated by this Court to receive service of process in this jurisdiction. The fact that the lawyer is subject to the disciplinary authority of Vermont may be a factor in determining whether personal jurisdiction may be asserted over the lawyer for civil matters.

Choice of Law

[2] A lawyer may be potentially subject to more than one set of rules of professional conduct which impose different obligations. The lawyer may be licensed to practice in more than one jurisdiction with differing rules, or may be admitted to practice before a particular court with rules that differ from those of the jurisdiction or jurisdictions in which the lawyer is licensed to practice. Additionally, the lawyer's conduct may involve significant contacts with more than one jurisdiction.

[3] Paragraph (b) seeks to resolve such potential conflicts. Its premise is that minimizing conflicts between rules, as well as uncertainty about which rules are applicable, is in the best interest of both clients and the profession (as well as the bodies having authority to regulate the profession). Accordingly, it takes the approach of (i) providing that any particular conduct of an attorney shall be subject to only one set of rules of professional conduct, (ii) making the determination of which set of rules applies to particular conduct as straightforward as possible, consistent with recognition of appropriate regulatory interests of relevant jurisdictions, and (iii) providing protection from discipline for lawyers who act reasonably in the face of uncertainty.

[4] Paragraph (b)(1) provides that as to a lawyer's conduct relating to a proceeding pending before a tribunal, the lawyer shall be subject only to the rules of the jurisdiction in which the tribunal sits unless the rules of the tribunal, including its choice of law rule, provide otherwise. As to all other conduct, including conduct in anticipation of a proceeding not yet pending before a tribunal, paragraph (b)(2) provides that a lawyer shall be subject to the rules of the jurisdiction in which the lawyer's conduct occurred, or, if the predominant effect of the conduct is in another jurisdiction, the rules of that jurisdiction shall be applied to the conduct. In the case of conduct in anticipation of a proceeding that is likely to be before a tribunal, the predominant effect of such conduct could be where the conduct occurred, where the tribunal sits or in another jurisdiction.

[5] When a lawyer's conduct involves significant contacts with more than one jurisdiction, it may not be clear whether the predominant effect of the lawyer's conduct will occur in a jurisdiction other than the one in which the conduct occurred. So long as the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect will occur, the lawyer shall not be subject to discipline under this rule.

[6] If two admitting jurisdictions were to proceed against a lawyer for the same conduct, they should, applying this rule, identify the same governing ethics rules. They should take all appropriate steps to see that they do apply the same rule to the same conduct, and in all events should avoid proceeding against a lawyer on the basis of two inconsistent rules.

[7] The choice of law provision applies to lawyers engaged in transnational practice, unless international law, treaties or other agreements between competent regulatory authorities in the affected jurisdictions provide otherwise.

Reporter's Notes — 2009 Amendment

V.R.P.C. 8.5 is amended to conform to changes in the Model Rule, which incorporate recommendations in the Report of the ABA's Multijurisdictional Practice Commission, adopted by the ABA House of Delegates in August 2002.

The ABA Reporter's Explanation is as follows:

TEXT:

1. Paragraph (a): Expand disciplinary enforcement jurisdiction over lawyer not admitted in adopting jurisdiction "if the lawyer [provides] or offers to [provide] any legal services" in the jurisdiction

Several states have adopted a bracketed provision in Rule 6 of the ABA Model Rules for Lawyer Disciplinary Enforcement that provides disciplinary jurisdiction over "any lawyer not admitted in this state who practices law or renders or offers to render any legal services in this state." The Commission believes that this is an appropriate rule to adopt in the Model Rules of Professional Conduct, given that a jurisdiction in which a lawyer is not admitted may be the one most interested in disciplining the lawyer for improper conduct. There are a number of ways in which discipline might be implemented, including making a disciplinary record and sending it to states in which the lawyer is admitted and having those jurisdictions impose reciprocal discipline. (Alternatively, if disciplinary authorities are ever given a broader range of sanctions, e.g., fines, fee forfeiture or an award of damages, the disciplining jurisdiction could act on the lawyer directly.)

The deleted language in the last sentence of paragraph (a) reflects the substantive change discussed above.

2. Paragraph (b)(1): Change "court" to "tribunal"

Recognizing the increasing use of alternative dispute-resolution processes, the Commission has broadened a number of Rules that formerly applied to "courts" to make them apply to "tribunals," which include binding arbitration and other methods of formally adjudicating the rights of parties. See Rule 1.0 (Terminology). Lawyers who participate in such adjudication, whether as neutrals or as party representatives, should be bound by the Rules of Professional Conduct of the jurisdiction in which the tribunal sits or by the rules of the tribunal itself if they provide otherwise.

3. Paragraph (b)(1): Delete language regarding court admittance

This change reflects the substantive change made in paragraph (a). Even if a lawyer has not been admitted generally or pro hac vice, if the lawyer renders legal services in connection with a proceeding before a tribunal, the rules of that tribunal should govern.

4. Paragraph (b)(1): Substitute "matter before" for "proceeding in"

The Commission believes that the term "matter pending before" more clearly reflects that the rules of the tribunal become controlling from the moment the matter can be said to be "before" that tribunal (typically the date the case is filed), even if no specific "proceeding" is pending at the time the conduct occurs. No change in substance is intended.

5. Paragraph (b)(2): New choice of law provision

The theory underlying the [former] Rule appears to be that discipline is the corollary of bar admission, i.e., it is a proceeding to take away the license the state granted because of a violation of that state's rules. Thus, the [former] Rule permits only an admitting jurisdiction to discipline the lawyer (paragraph (a)) and applies that jurisdiction's rules regardless of where the conduct occurred. Moreover, under the [former] Rule, if the lawyer is admitted in more than one jurisdiction, the rules of the admitting jurisdiction in which the lawyer principally practices apply "provided, however, that if particular conduct clearly has its predominant effect in another jurisdiction in which the lawyer is licensed to practice, the rules of that jurisdiction shall be applied." Again, even for choice of law purposes, only jurisdictions that have licensed the lawyer may expect the lawyer to follow their rules of professional conduct. Just as the Commission believes that jurisdictions other than an admitting jurisdiction ought to have the authority to discipline the lawyer (see changes to paragraph (a)), the Commission believes that the substantive rules of a jurisdiction other than an admitting jurisdiction should sometimes apply. Having moved away from an undue emphasis on the rules of the admitting jurisdiction, the Commission believes that there is no single test that can be applied to determine the appropriate choice-of-law rule in each case. Rather, the Commission believes that there are two factors that are most important to the determination—the place where the conduct occurred and the place where the predominant effect of the conduct occurs. This approach is not as simple as the present Rule, but neither is it as openended as in other areas where conflicts of law are an issue. A lawyer who acts reasonably in the face of uncertainty about which jurisdiction's rules apply will not be subject to discipline.

COMMENT:

[1] This Comment has been expanded to explain the extension of disciplinary authority beyond the traditional realm of lawyers admitted to practice in the jurisdiction.

[2] The last sentence of the [former] Comment has been deleted because it inaccurately implies that the proposed formulation of the Rule will bring certainty.

[3] The new language points out that paragraph (b) now includes a safe harbor for a lawyer who acts reasonably where it is uncertain which jurisdiction's rules apply.

[4] The term "court" has been changed to "tribunal" to reflect changes made to paragraph (b). The Commission has deleted language seeking to explain the standards previously established by this Rule and added language reflecting the proposed change.

[5] This new Comment explains the rationale for the proposed safe harbor provision in paragraph (b)(2).

[7] This is a modification of [former] Comment [6]. The Commission believes that lawyers engaged in transnational practice ought to be governed by this Rule's choice of law provision, unless international law or other agreements between countries or competent regulatory authorities provide otherwise. Moreover, the Commission believes that such lawyers will benefit from the guidance provided in this Rule, as well as from the safe harbor provision. The Report of the Multijurisdictional Practice Commission, ABA Report 201C (August 2002), provided in pertinent part as follows (footnotes omitted):

It is important that state regulatory authorities acknowledge the increasing prevalence of cross-border law practice and respond appropriately. Allowances must be made for effectively regulating lawyers who practice law outside the states in which they are licensed. Sanctions must be available both against lawyers who do unauthorized work outside their home states and against those who violate rules of professional conduct when they engage in otherwise permissible multijurisdictional law practice.

The Ethics 2000 Commission proposed amending Rule 8.5(a) (Disciplinary Authority) to make clear that a jurisdiction in which a lawyer engages in disciplinary misconduct may sanction the lawyer regardless of whether the lawyer is licensed to practice law in that jurisdiction. Most significantly, a sentence would be added to provide that: "A lawyer not admitted in this jurisdiction is also subject to the disciplinary authority of this jurisdiction if the lawyer provides or offers to provide any legal services in this jurisdiction." The proposal is consistent with existing ABA policy, as embodied in Rule 6 of the ABA Model Rules for Lawyer Disciplinary Enforcement. As the Ethics 2000 Commission noted, "this is an appropriate Rule to adopt in the Model Rules of Professional Conduct, given that a jurisdiction in which a lawyer is not admitted may be the one most interested in disciplining the lawyer for improper conduct." As a further enhancement to this Rule, the MJP Commission recommends that the following statement be added to the end of Comment [1]: "Reciprocal enforcement of a jurisdiction's disciplinary findings and sanctions will further advance the purposes of this Rule. See Rules 6 and 22, ABA Model Rules for Lawyer Disciplinary Enforcement."

Additionally, the Ethics 2000 Commission proposed amending Rule 8.5(b) (Choice of Law) in two principal respects. First, a number of changes would clarify the choice of law rule applicable to lawyers participating in adjudications. It would provide that a lawyer who participates in a formal adjudication before any "tribunal"-and not only a "court"-is bound by the rules of professional conduct of the jurisdiction in which the tribunal sits or by the rules of the tribunal itself if they provide otherwise.

Second, the Ethics 2000 Commission proposed changing the choice of law rule applicable to legal work outside the context of adjudications. The [former] rule provides that a lawyer is governed by the rules of professional conduct of the jurisdiction in which the lawyer is licensed. When a lawyer is licensed in multiple jurisdictions, it identifies a principle to determine which of the jurisdictions' rules apply. The proposed amendment recognizes that when lawyers engage in multijurisdictional practice, the jurisdiction in which they practice has an interest in enforcing compliance with its Rules of Professional Conduct. Under the proposed amendment, the applicable rules would be those of the jurisdiction in which lawyer's conduct had its predominant effect or, where the conduct did not have its predominant effect in a single jurisdiction, the rules of the jurisdiction in which the conduct occurred. However, a lawyer who acts reasonably in the face of uncertainty about which jurisdiction's rules apply would not be subject to discipline. Rule 1.0 (Terminology) of the ABA Model Rules of Professional Conduct provides that reasonable, when used in reference to a lawyer's actions, denotes the conduct of a reasonably prudent and competent lawyer.

Reporter's Notes

This rule has no counterpart in the present Vermont Code. Rule 8.5(b)(2)(iii) has been added to the ABA Model Rule. The provision is intended to reach conduct such as telephone solicitation by out-of-state lawyers that violates the Vermont rules. See Rotunda, "West Virginia Provides Model for Lawyer Discipline across State Lines," 2 Vt. Bar News, No.8,p. 10 (July 1997).

These rules replace the Vermont Code of Professional Responsibility, adopted by the Court on February 10, 1971, and amended thereafter. These rules apply to lawyer conduct after their effective date. The Code of Professional Responsibility continues to apply to conduct prior to the effective date of these rules. [\[Back to Top\]](#)