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MAINE RULES OF PROFESSIONAL CONDUCT
[With Comments, Reporter's Notes, and Advisory Notes.]

The Maine Supreme Judicial Court has adopted the Maine Rules of Professional Conduct, effective August 1, 2009. On the same date Maine Bar Rule 2-A (Aspirational Goals for Lawyer Professionalism), Maine Bar Rule 3 (Code of Professional Responsibility) and Maine Bar Rule 8 (Contingent Fees) have been abrogated, as they are replaced by the Maine Rules of Professional Conduct.

To aid in interpreting these new Rules, they are being published with the Preamble, comments and reporter's notes. In its publication order, the Court addressed the Preamble, comments and reporter's notes as follows:

> The specific rules of the Maine Rules of Professional Conduct are stated below. To aid in understanding of the rules, a Preamble from the Maine Task Force on Ethics precedes the rules, and the text of each rule is followed by comments and reporter's notes. The Preamble, comments and reporter's notes state the history of and reasons for recommending the rules, discuss the relation of the new rules to the current Code of Professional Responsibility, and offer interpretations of the new rules, but the Preamble, comments and reporter's notes are not part of the rules adopted by the Court.

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MAINE RULES OF PROFESSIONAL CONDUCT

Preamble from the Maine Task Force on Ethics

[1] The Maine Supreme Judicial Court adopted these rules of professional responsibility to coordinate with the American Bar Association's review of the Model Rules of Professional Conduct in 2000 and 2002. Maine's acceptance of these rules maximizes conformity with those states embracing the ABA Model Rules and also preserves the integrity of the manner in which Maine lawyers practice law. The ABA Model Rules and the Maine Bar Rules involve the same core conduct. These rules follow the numbering system used in the ABA Model Rules and in states ratifying the ABA rules, and as much as possible, follow the language of the applicable ABA rules.

[1A] These Maine Rules of Professional Conduct are the product of Task Force study and recommendations, public comment and, as to the Rules themselves, review by the Maine Supreme Judicial Court. The Maine Supreme Judicial Court adopts these rules as edited and published here. The Preamble, Scope, Comments and Reporter's Notes have not been specifically adopted by the Maine Supreme Judicial Court. The Preamble, Scope, Comments and Reporter's Notes are published with the Rules for background information and illustration.

[2] In some instances language found in the former Maine Bar rules is imported into a particular provision. In other instances additional regulatory principles are introduced into a rule. Some rules do not follow the ABA rules, for example Rule 1.6 Confidentiality of Information. Therefore, it is critically important that the user of these Maine Rules of Professional Conduct understand that the Maine Rules of Professional Conduct are not identical to the ABA Model Rules.

[2A] The Maine Task Force was instructed to preserve the structure of the ABA Model Rules (which include Comments) when possible. If provisions of the ABA Model Rules were not incorporated into these Maine Rules of Professional Conduct, those sections appear as "[Reserved]" sections or Comments. Otherwise, topical and substantive provisions of these Maine Rules of Professional Conduct appear in the same numbered Rule and Comment as the ABA Model Rules.

[3] [Reserved]

[4] [Reserved]
[5] [Reserved]
[6] [Reserved]
[7] [Reserved]

[7A] In addition to the Maine Rules of Professional Conduct the Maine Supreme Judicial Court has promulgated two aspirational goals for lawyers. One addresses *pro bono publico* service. The second addresses the substance and style of lawyer advertising. These aspirational goals were found at Maine Bar Rule 2-A and 2-B, and are now found in Rule 6.1 (*Pro bono* service) and Rule 7.2-A (lawyer advertising) of these Rules.

[8] [Reserved]
[9] [Reserved]
[10] [Reserved]
[11] [Reserved]
[12] [Reserved]
[13] [Reserved]

[14A] The Maine Supreme Judicial Court has not adopted the Preamble, Comments or Reporter's Notes. The Comments and Notes are published with the rules to provide background information and illustration.

[14B] 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 partly obligatory and disciplinary and partly constitutive and descriptive where 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. The Reporter's Notes are designed to elucidate and provide historical context for the recommendations of the Maine Task Force on Ethics.

[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 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 systems, including constitutional, statutory and common law, the responsibilities of government lawyers may include authority concerning legal matters that ordinarily resides in the client in 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 generally is 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 legal controversies in circumstances where a private lawyer could not represent multiple private clients. 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 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 a lawyer often has to act upon uncertain or incomplete evidence of the situation. Moreover, 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] Violation of a Rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached. In addition, violation of a Rule does not necessarily warrant any other nondisciplinary remedy, such as disqualification of a lawyer in pending litigation. 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. Furthermore, the purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons. The fact 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. Nevertheless, since the Rules do establish standards of conduct by lawyers, a lawyer's violation of a Rule may be evidence of breach of the applicable standard of conduct.

[21] The Comment and Reporter's Notes accompanying each Rule explain and illustrate the meaning and purpose of the Rule. The Preamble provides general orientation. The Comments and Reporter's Notes are intended as guides to interpretation. However, only the text of each Rule is authoritative to govern attorney conduct.

RULE 1.0 *DEFINITIONS AND TERMINOLOGY*

As used in these Rules, the following terms shall have the following meanings:

(a) "Belief" or "believes" means 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," referring to the informed consent of a person means informed consent given in writing by the person or a writing 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" means a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; lawyers employed by the government to represent the government or a governmental entity; or lawyers in a legal services organization or the legal department of a corporation or other organization.

(d) "Fraud" or "fraudulent" means conduct fraudulent under the substantive or procedural law of the applicable jurisdiction and for the purpose to deceive.

(e) "Informed consent" means a person's agreement 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. Whether a client has given informed consent to representation shall be determined in light of the mental capacity of the client to give consent, the explanation of the advantages and risks involved provided by the lawyer seeking consent, the circumstances under which the explanation was provided and the consent obtained, the experience of the client in legal matters generally, and any other circumstances bearing on whether the client has made a reasoned and deliberate choice.

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

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

(h) "Reasonable" or "reasonably" when referring to a lawyer's conduct means the conduct of a reasonably prudent and competent lawyer.

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

(j) "Reasonably should know" when referring to a lawyer means a lawyer of reasonable prudence and competence would ascertain the matter in question.

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

(l) "Substantial" when referring to degree or extent means a material matter of clear and weighty importance.

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

(n) "Writing" or "written" means a tangible or electronic record of a communication or representation, including, but not limited to, handwriting, typewriting, printing, Photostatting, photography, audio or video recording 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.

(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.

(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.

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. 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.

[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 1.11, 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.

Advisory Committee's Note – June 2014

Definitions have been added for "advance," "advance payment of fees," and "retainer" at Rule 1.0(o); and "nonrefundable fee" at Rule 1.0(p).

A stylistic change has been made in the use of the term "retainer." Historically, the Rules and Ethics Opinions interpreting the Rules have used the term "retainer" to mean a fee that is earned on receipt, in contrast to an advance, which is not earned until future services are rendered. That usage was peculiar to the Rules. It did not conform to usage by lay people and even by many lawyers, who use the term "retainer" to refer to an advance that will be credited against future bills for services. In order to comport with common usage, the term "retainer" is now included in the definition of "advance," to be synonymous with that term.

This stylistic change is not meant to change the substantive principle that unearned fees (whether called "advances" or "retainers") must be kept in a lawyer's trust account before they are earned. It also is not meant to do away with the concept that was formerly referred to as a "retainer," namely a fee that is earned on receipt before services are rendered and not to be refunded. The previous definition of "retainer," which appeared in Rule 1.15(b)(7)(iii), has been removed from that Rule, and the concept it expressed is now captured in the newly defined term "nonrefundable fee."

The definition of "nonrefundable fee" clarifies that such fees, earned on receipt, are not limited to so-called "availability retainers." Rather, a fee may be earned on receipt, even though the parties expect the lawyer to render future services, even at no additional charge. So long as the fee is reasonable, such an agreed-upon fee is not refundable, even though the future services are not rendered (for example, because they end up not needed or because the client terminates the representation). The Committee intends this broader definition to displace the narrower concept of a "general retainer" or "availability retainer" expressed in Ethics Opinion No. 206 (Dec. 12, 2012) of the Professional Ethics Commission.

A lawyer's acceptance of a nonrefundable fee is subject to requirements set forth in Rule 1.5(h). The requirement that all advances be placed in a trust account is set forth in Rule 1.15(b). Rule 1.16(d) requires a lawyer to return the unearned portion of an "advance payment of fees" on termination of representation, and does not require the return of a "nonrefundable fee."

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.

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:

Model Rule 1.1 (2002) is substantively equivalent to M. Bar R. 3.6(a). The Task Force discussed whether to expand upon the language of Model Rule 1.1 (2002) and ultimately recommended that the language in Model Rule 1.1 (2002), read together with the Comments, was elegant in its simplicity and accurately communicated the substance of M. Bar R. 3.6(a).

The Task Force considered the issue of whether a lawyer's liability for malpractice would be a *per se* violation of Rule 1.1. In the same way the Maine Rules of Professional Conduct are not designed to be the basis for civil liability,

the Task Force recognized that a determination of civil liability should not itself be the basis for a Rule violation. The Task Force observed not every mistake made by lawyers suggests incompetence. See Preamble ¶ [20].

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. Subject to the Rules with respect to Declining or Terminating Representation (Rule 1.16), 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 representation if the limitation is reasonable under the circumstances and the client provides informed consent after consultation. If, after consultation, the client consents, an attorney may enter a limited appearance on behalf of an otherwise unrepresented party involved in a court proceeding. A lawyer who signs a complaint, counterclaim, cross-claim or any amendment thereto that is filed with the court, may not thereafter limit representation as provided in this rule, without leave of court.

(d) A lawyer, who under the auspices of a non-profit organization or a court-annexed program provides limited representation to a client without expectation of either the lawyer or the client that the lawyer will provide continuing representation in the matter, is subject to the requirements of Rules 1.7, 1.9, 1.10 and 1.11 only if the lawyer is aware that the representation of the client involves a conflict-of-interest.

(e) 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.

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] Both lawyer and client have authority and responsibility to determine the objectives and means of representation. The scope of services to be provided by a lawyer may be limited by agreement with the client. In situations where the lawyer will not be providing limited representation in court, the limited representation agreement must be reasonable under the circumstances. If, for example, a client's objective is limited to securing general information about the law and the client's needs in order to handle a common and typically uncomplicated legal problem, the lawyer and the client may agree that the lawyer's services will be limited to a brief telephone consultation or office visit. Such a limitation, however, will not be reasonable if the time allotted was not sufficient to yield advice upon which the client can rely. Although an agreement for 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. A lawyer's advice may be based upon the scope of the representation agreed upon by the lawyer and client, and the client's representation of the facts.

[6A] While a writing memorializing the agreement is not required, to the extent a writing can be obtained, it is a better practice to do so for both the lawyer and the client.

[6B] In situations involving limited representation in court of an otherwise unrepresented party, an agreement outlining the scope of representation is required, and a written memorandum of the scope of representation is recommended. A lawyer providing limited representation in court proceedings should include in the consultation with the client an explanation of the risks and benefits of the limited representation. A general form of the agreement is attached for reference.

[6C] An attorney reasonably may rely on the information provided by the limited representation client. This rule does not reduce an attorney's obligation to provide competent representation, but makes clear the preparation for the legal matter is limited along with the scope of the representation.

[7] Rule 1.2(c) allows the client and lawyer to agree to the parameters, including time limitations, on the scope of representation, and allows the attorney to withdraw from pending litigation or otherwise terminate representation in accordance with the agreement with the client, or when permitted by the court as set forth in 1.2(c). 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 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.

[7A] Legal service organizations, courts, and various non-profit organizations have established programs through which lawyers provide limited legal services—typically advice—that will assist persons with limited means to address their legal problems without further representation by a lawyer. In these programs, such as legal advice hotlines, advice-only clinics, lawyer for the day programs in criminal or civil matters, or *pro se* counseling programs, an attorney-client relationship is established, but there is no expectation that the lawyer's representation of the client will continue beyond the limited consultation. It is the purpose of this Rule to provide guidance to lawyers about their professional responsibilities when serving a client in this capacity.

[7B] The phrase "is aware" as used in Rule 1.2(d) should be distinguished from the term "knows" as defined in Rule 1.0: Definitions and Terminology. "Knows," according to the definition, means actual knowledge of the fact in question, which may be inferred from circumstances. In contrast, "is aware" allows a lawyer, in the limited circumstances described in Rule 1.2(d), to represent clients without risk of a violation of Rules 1.7, 1.9, 1.10 and 1.11, if the lawyer knows, based on reasonable recollection and information provided by the client in the ordinary course of the consultation, that the representation does not present a

conflict-of-interest. In such a case, knowledge may not be inferred from circumstances. This is because a lawyer who is representing a client in the circumstances addressed by Rule 1.2(d) is not able to check systematically for conflicts. A conflict-of-interest that would otherwise be imputed to a lawyer because of the lawyer's association with a firm will not preclude the lawyer from representing a client in a limited services program. Nor will the lawyer's participation in such a program preclude the lawyer's firm from undertaking or continuing the representation of clients with interests adverse to a client being represented under the program's auspices.

[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 (e) 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 (e) 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 (e) does not preclude undertaking a criminal defense incident to a general retainer for legal services to a lawful enterprise. The last clause of paragraph (e) 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)

REPORTER'S NOTES:

Model Rule 1.2 addresses the allocation of authority for decision making between lawyers and clients. The framework of the Rule makes a distinction between "objectives" and "means," but as a practical matter, there is often overlap between these realms of authority. Generally, a client decides the objectives of representation, while the lawyer is engaged to make educated decisions about the means by which to pursue such.

Paragraph (b) makes clear that representation of a client does not constitute an endorsement of a client's views. This provision was included to encourage the representation of unpopular clients.

The Task Force recommended the revision of Model Rule 1.2 (2002) to reflect the substance of M. Bar R. 3.4(i), which allows for the limited representation of clients. As described in Comment [7A], legal service organizations, courts, and various non-profit organizations have established programs through which lawyers provide limited legal services—typically advice—that will assist persons with limited means to address their legal problems without further representation by a lawyer. In these programs, such as legal advice hotlines, advice-only clinics, lawyer for the day programs in criminal or civil matters, or *pro se* counseling programs, an attorney-client relationship is established, but there is no expectation that the lawyer's representation of the client will continue beyond the limited consultation. It is the purpose of this Rule to provide guidance to lawyers about their professional responsibilities when serving

a client in this capacity. Maine Rule of Professional Conduct 6.5 describes the application of the conflict-of-interest rules in the context of such limited representation. (The Task Force acknowledges that the Federal District Court does not allow limited appearances on behalf of clients. Local Rule 83.2(b).)

Rule 1.2 (e) prohibits a lawyer from assisting or advising a client to engage in criminal or fraudulent conduct. Both passive and active assistance is prohibited by this rule. This rule, however, permits lawyer to assist clients in making good-faith determinations of the validity, scope and meaning of the application of a rule or law.

LIMITED REPRESENTATION AGREEMENT

(Used in conjunction with Rule 1.2 the following form shall be sufficient to satisfy the rule. The authorization of this form shall not prevent the use of other forms consistent with this rule.)

To Be Executed in Duplicate

Date:_____, 20___

1. The client, _____, retains the attorney, , to perform limited legal services in the following matter:_v._____
2. The client seeks the following services from the attorney (indicate by writing "yes" or "no"):
   a. _____Legal advice: office visits, telephone calls, fax, mail, e-mail;
   b. _____Advice about availability of alternative means to resolving the dispute, including mediation and arbitration;
   c. _____Evaluation of client self-diagnosis of the case and advising client about legal rights and responsibilities;
   d. _____Guidance and procedural information for filing or serving documents;
   e. _____Review pleadings and other documents prepared by client;
   f. _____Suggest documents to be prepared;
   g. _____Draft pleadings, motions, and other documents;
   h. _____Factual investigation: contacting witnesses, public record searches, in-depth interview of client;
   i. _____Assistance with computer support programs;
   j. _____Legal research and analysis;
   k. _____Evaluate settlement options;
   l. _____Discovery: interrogatories, depositions, requests for document production;
   m. _____Planning for negotiations;
   n. _____Planning for court appearances;
   o. _____tandby telephone assistance during negotiations or settlement conferences;
   p. _____Referring client to expert witnesses, special masters, or other counsel;
   q. _____Counseling client about an appeal;
   r. _____Procedural assistance with an appeal and assisting with substantive legal argument in an appeal;
   s. _____Provide preventive planning and/or schedule legal check-ups:
   t. _____Other:
3. The client shall pay the attorney for those limited services as follows:
   a. Hourly Fee:

The current hourly fee charged by the attorney or the attorney's law firm for services under this agreement are as follows:

i. Attorney:
ii. Associate:
iii. Paralegal:
iv. Law Clerk:

Unless a different fee arrangement is established in clause b.) of this paragraph, the hourly fee shall be payable at the time of the service. Time will be charged in increments of one-tenth of an hour, rounded off for each particular activity to the nearest one-tenth of an hour.

b. Payment from Deposit:

For a continuing consulting role, client will pay to attorney a deposit of $_____, to be received by attorney on or before _____, and to be applied against attorney fees and costs incurred by client. This amount will be deposited by attorney in attorney trust account. Client authorizes attorney to withdraw funds from the trust account to pay attorney fees and costs as they are incurred by client. The deposit is refundable. If, at the termination of services under this agreement, the total amount incurred by client for attorney fees and costs is less than the amount of the deposit, the difference will be refunded to client. Any balance due shall be paid within thirty days of the termination of services.

c. Costs:

Client shall pay attorney out-of-pocket costs incurred in connection with this agreement, including long distance telephone and fax costs, photocopy expense and postage. All costs payable to third parties in connection with client case, including filing fees, investigation fees, deposition fees, and the like shall be paid directly by client. Attorney shall not advance costs to third parties on client behalf.

4. The client understands that the attorney will exercise his or her best judgment while performing the limited legal services set out above, but also recognizes:
   a. the attorney is not promising any particular outcome.
   b. the attorney has not made any independent investigation of the facts and is relying entirely on the client limited disclosure of the facts given the duration of the limited services provided, and
   c. the attorney has no further obligation to the client after completing the above described limited legal services unless and until both attorney and client enter into another written representation agreement.
5. If any dispute between client and attorney arises under this agreement concerning the payment of fees, the client and attorney shall submit the dispute for fee arbitration in accordance with Rule 9(e)-(k) of the Maine Bar Rules. This arbitration shall be binding upon both parties to this agreement.

WE HAVE EACH READ THE ABOVE AGREEMENT BEFORE SIGNING IT.

_____	_____
Signature of client	Signature of attorney

RULE 1.3 *DILIGENCE*

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

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. 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 workload must be controlled so that each matter can be handled competently.

[3] Perhaps no professional shortcoming is more widely resented than procrastination or neglect. 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 requires 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.

REPORTER'S NOTES:

Model Rule 1.3 (2002) corresponds to and is substantively equivalent to M. Bar R. 3.6(a). The Task Force liked the positive language in Model Rule 1.3 (2002) and recommended its adoption.

The Task Force discussed the use of the term "zeal" as used in Model Rule 1.3 Comment [1] (2002). The Task Force determined that the term "zeal" was often used as a cover for a lawyer's inappropriate behavior. Moreover, the Task Force thought the term was not needed to describe a lawyer's ethical duties. Accordingly, the Task Force recommended its deletion.

The Task Force recommended the inclusion of the term "neglect" in Comment [3]. The Task Force believed that neglect is a broader concept than procrastination, and thus ought to be specifically referenced in the Comment.

With respect to Comment [5], the Task Force observed that a sole practitioner's duty of diligence includes preparation of a plan designating another responsible lawyer to act in the event of a sole practitioner's death or disability. This is not a new requirement and has been addressed in a Professional Ethics Commission Opinion.

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 limitations set forth in the Maine Rules of Professional Conduct, or other law with respect to lawyers' conduct, when the lawyer knows that the client expects assistance not permitted by the Maine 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.

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).

[5.1] Paragraph (a)(5) requires if a lawyer perceives the client expects assistance unethical or unlawful for the lawyer to provide, the lawyer must inform the client of the limitations on the lawyer's conduct.

[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:

Model Rule 1.4 (2002) substantively is equivalent to M. Bar R. 3.6(a). The rule addresses the issue of a lawyer's duty to communicate with his or her client.

The Task Force recognized that failure to effectively communicate with clients was one of the most oft-cited sources of client dissatisfaction.

Subsection (a)(1) requires a lawyer to keep a client informed as to any matter requiring the client's informed consent; for example, when a lawyer seeks a waiver of a conflict-of-interest. Subsection (a)(2) addresses the issue of the lawyer's duty to consult with a client about the means by which the client's objectives are met; and "reasonably" modifies "consult," to recognize implied authorization which can exist. Subsections (a)(3) and (a)(4) set forth the common sense requirement that a lawyer keep his or her client reasonably informed about

the status of a matter and to promptly respond to clients' requests for information about their matters.

The Task Force recommended the addition of clarifying language in subsection (a)(5). This subsection makes clear that if a client requests a lawyer take an action that would be illegal or in violation of a rule, the lawyer has a duty to inform the client of the limitations on the lawyer's conduct.

Rule 1.4(b) requires that a lawyer explain a matter to a client sufficiently so as to enable the client to make an informed decision. This includes advising a client as to any adverse consequences of decisions, and any potential alternative decisions. See Rule 2.1 addressing the role of lawyer as advisor.

The Task Force recognized that lawyer-client communication is the lynchpin of the lawyer-client relationship. As such, with the addition of the non-substantive clarifying language in Rule 1.4(b)(5), it recommended adoption of Rule 1.4 as written.

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. A fee or charge for expenses is unreasonable when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee or expense is in excess of a reasonable fee or expense. 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 that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the range of fees customarily charged in the locality for similar legal services;

(4) the responsibility assumed, 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;

(8) whether the fee is fixed or contingent;

(9) whether the client has given informed consent as to the fee arrangement;

(10) whether the fee agreement is in writing; and

(11) any other risks allocated by the fee agreement or potential benefits of the fee agreement, judged as of the time the fee agreement was made.

(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. A general form of Contingent Fee Agreement is attached to the comments to this rule.

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

(1) a contingent fee in any initial action for divorce, annulment, judicial separation, paternity or parentage, parental rights and responsibilities, emancipation, grandparent visitation, guardianship, or child support, or in any post-judgment proceeding to modify, alter, or amend an order arising from these actions; or

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

(3) any fee to administer an estate in probate, the amount of which is based on a percentage of the value of the estate.

(e) A lawyer shall not divide a fee for legal services with another lawyer who is not a partner in or associate of the lawyer's law firm or office unless:

(1) after full disclosure, the client consents to the employment of the other lawyer and to the terms for the division of the fees, confirmed in writing; and

(2) the total fee of the lawyers does not exceed reasonable compensation for all legal services they rendered to the client.

(f) A lawyer may accept payment by credit card for legal services previously rendered, or for an advance payment of fees or nonrefundable fee otherwise permitted by these rules.

(g) A lawyer practicing in this State shall submit, upon the request of the client, the resolution of any fee dispute in accordance with the Supreme Judicial Court's rules governing fee arbitration.

(h) 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 (a) that the funds will not be refundable and (b) 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," or other similar description indicating that the funds will be deemed earned regardless whether the client terminates the representation.

(i) A nonrefundable fee that complies with the requirements of (h)(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 (h)(1)-(3) constitute an advance that must be deposited in the lawyer's trust account in accordance with Rule 1.15(b)(1) until such funds are earned by rendering services.

(j) For definitions of "advance," "retainer," and "nonrefundable fee" as used in this Rule, see the definitions in Rule 1.0.

COMMENT

Reasonableness of Fees and Expenses

[1] Paragraph (a) requires that lawyers charge fees that are reasonable under the circumstances. The factors specified in (1) through (10) 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, she or he 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. This provision does not preclude a contract for a contingent fee for legal representation in connection with the recovery of post-judgment balances due under support, alimony or other financial orders because such contracts do not implicate the same policy concerns. Paragraph (d) further prohibits a lawyer from charging a fee to administer a probate estate when payment is based upon a percentage of the value of the estate.

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 subject to certain conditions. The client must consent to the employment of the other lawyer and to the terms for the division of the fees, after full disclosure, which disclosure must be confirmed in writing. In addition, the total fee must be reasonable. Contingent fee agreements must be in a writing signed by the client and must otherwise comply with paragraph (c) of this Rule. 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, nor does paragraph (e) prohibit payment to a former partner or associate pursuant to a separation or retirement agreement. Paragraph (e) further does not address the issue of the fee division when a lawyer is terminated before the matter is completed, and new counsel is engaged.

Disputes over Fees

[9] A mandatory fee arbitration procedure has been established for resolution of fee disputes. Lawyers must conscientiously comply with the procedure set forth in Maine Bar Rule 9. This Rule prescribes 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 shall comply with the prescribed procedure.

REPORTER'S NOTES:

Model Rule 1.5 substantively is equivalent to M. Bar R. 3.3 and replaces M. Bar. R. 8. Because the Task Force thought Model Rule 1.5 clearly and comprehensively set forth the rules governing lawyer's fee arrangements and included the rules governing contingent fees, it recommended its adoption, subject to the noted modifications.

The Task Force recommended Rule 1.5(a) track M. Bar R. 3.3(a)'s more expansive description of what constitutes an "unreasonable fee." The language added to Model Rule 1.5(a)(4) reflects the recommended addition to the Maine Rules of Professional Conduct Rule 1.2(c)(1) and (c)(2), allowing, under certain circumstances, lawyers' provision of limited representation to clients. The Task Force recommended two additional provisions to Rule 1.5: (i) the allowance of credit cards as a method of payment for legal services, and (ii) a recognition of mandatory fee arbitration, in accordance with the provisions set forth in Rule 9.

The Task Force further recommended, consistent with established law, lawyers not be paid a fee for administering a probate estate based on a percentage of the value of a probate estate.

In 2005, the Supreme Judicial Court asked the Advisory Committee on Professional Responsibility (the "Advisory Committee") to consider whether

Maine should adopt the Model Rule version of the fee division rule, that allows fee sharing "in proportion to the services performed by each lawyer" or if the referring lawyer "assumes joint responsibility for the representation." In contrast, M. Bar R. 3.3(d) allows fee division between unaffiliated lawyers if the terms of the fee division are disclosed to the client, and if the total fee is reasonable. The Advisory Committee observed the fee division rule as set forth in M. Bar R. 3.3(d) has been serving its intended purpose of encouraging the early referral of cases to lawyers with greater experience and expertise to handle them. The Advisory Committee solicited comments from members of the Maine Bar, and held an open forum to discuss the fee division issues. Because the vast majority of comments were in favor of maintaining the existing Maine Bar Rule, the Advisory Committee recommended that the language of Model Rule 1.5(e) be replaced with the language of M. Bar R. 3.3(d). The Task Force thought misunderstandings could be avoided, however, if the disclosure to the client about the fee division was confirmed in writing.

Finally the Task Force stressed that Rule 1.5(d) does not address the issue of the fee division when a lawyer is terminated before the matter is completed, and new counsel is engaged. In such a case, the fees paid to the old lawyer and new lawyer must meet the standards set forth in Rules 1.5(a) and (b).

Advisory Committee's Note – June 2014

Paragraph (a) has been amended to make clarifying changes regarding the considerations that bear on the reasonableness of a fee.

In paragraph (a)(2), the requirement that the preclusion of a lawyer's employment be apparent to the client has been removed. A lawyer's reasonable perception of the risk of loss of other employment is relevant to the reasonableness of the fee, whether or not the client is aware of potentially conflicting engagements.

Paragraph (a)(3) has been amended to clarify that in any particular locality, a range of fees, rather than a single precise fee, can very well be charged for a particular service, and that range, rather than any one particular fee, is relevant to determining the zone of reasonableness of fees in any particular case.

Paragraph (a)(11) is new. It highlights the fact that, as with many commercial contracts, parties to a fee agreement enter the agreement in order to allocate various risks and in the expectation of, or pursuit of, certain potential

benefits. Parties make those agreements lacking perfect foresight. The reasonableness of the agreement is to be judged by the reasonableness at the time of contracting, in light of the parties' desire to allocate risks and pursue benefits, not in hindsight. An agreement entered into by parties reasonably seeking certainty despite (or even because of) their lack of perfect foresight should be respected, even if one party might regret it in hindsight or, if the party had had perfect foresight, might not have entered it.

Paragraph (d)(1) is amended to update the current rule prohibiting fees that are contingent upon securing a divorce or contingent upon the amount of alimony, support, or property settlement in lieu thereof. The amendment expands the Rule to include all family matter actions in which a contingent fee arrangement is not appropriate. Neither the existing Rule, nor the amendment prohibits a contingent fee arrangement in a family matter enforcement proceeding.

Paragraph (f) has been amended to clarify that a lawyer can accept an advance paid by credit card or other means that requires initial deposit into the lawyer's operating account, so long as the lawyer complies with the requirements set forth in newly amended Rule 1.15(b)(1). See the Advisory Committee's Note June – 2014 to Rule 1.15 for discussion of this issue.

Paragraph (g) has been amended to change the reference to "Bar Rule 9" in light of coming revisions to the organization and content of the Bar Rules. No substantive change is intended.

Paragraph (h) is new. It clarifies the conditions that apply to a lawyer's acceptance of a nonrefundable fee.

Paragraph (h)(1) provides that nonrefundable fees are permissible, subject to the requirement of reasonableness that applies to all fees. The paragraph requires certain safeguards to ensure the client's informed consent to the nonrefundability of a fee. Although the safeguards in paragraph (h)(1) are required, they will not guarantee a finding of informed consent in every case and are not exclusive of the factors that otherwise bear on the existence of informed consent. See Rule 1.0(e). When fees are paid prior to the rendition of services and in the expectation that such future services will be rendered, the Committee believes that a client's default expectation will be that the payment is an advance rather than a nonrefundable fee. In order to avoid client confusion, paragraph (h)(1) requires clear disclosure to the client that the fee is nonrefundable and a description of the scope of future services that the client is entitled to receive.

The Committee intends that Opinion No. 206 (Dec. 12, 2012) of the Professional Ethics Commission shall not apply to nonrefundable fees that lawyers accept in compliance with this new paragraph. The amendment differs from the law as stated in Opinion No. 206 in two important ways: (1) it permits nonrefundable fees for more than a lawyer's mere "availability," and allows such fees even though the parties fully expect the lawyer to render specified future services; (2) it requires (where Opinion No. 206 forbids) description of the fee as nonrefundable, in order to ensure the client's informed consent thereto.

A lawyer who accepts payment before services are rendered cannot treat such payment as a nonrefundable fee, unless the lawyer complies with the disclosure requirements of paragraph (h)(1). Without the client's informed consent to nonrefundability in accordance with this paragraph, the lawyer must treat the funds as an advance to be credited against future bills for services and must keep such funds in a trust account, in accordance with Rule 1.15, until future services are rendered, and must refund the unearned portion of any such funds upon termination of representation, in accordance with Rule 1.16(d). If conditions (h)(1) and (h)(2) are met, nonrefundable fees cannot be deposited in the lawyer's trust account as those nonrefundable fees are not the property of a client.

Paragraph (h)(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 under paragraph (a) in the determination of its reasonableness. 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.

CONTINGENT FEE AGREEMENT

To Be Executed In Duplicate

Date _____ , 20_____

The client, _____

(Name) (Street & Number) (City or Town)

retains the attorney _____

(Name) (Street & Number)

_____

(City or Town)

to perform the legal services mentioned in par. (1) below. The attorney agrees to perform them faithfully and with due diligence.

(1) The claim, controversy, and other matters with reference to which the services are to be performed are:

(2) The contingency upon which compensation is to be paid is:

(3) The client is not to be liable to pay compensation otherwise than from amounts collected for the client by the attorney, except as follows:

(4) Reasonable compensation on the foregoing contingency is to be paid by the client to the attorney, but such compensation (including that of any associated counsel) to be paid by the client shall not exceed the following maximum percentages of the gross (net) (indicate which) amount collected. Here insert the maximum percentages to be charged in the event of collection. These may be on a flat basis or in a descending scale in relation to amount collected.)

(5) The client is to be liable to the attorney for the attorney's reasonable expenses and disbursements as hereinafter specified.

A. Litigation costs. Costs of the action, including:

1. Filing fees paid to the clerk of courts;
2. Fees for service of process and other documents;
3. Attendance fees and travel costs paid to witnesses;
4. Expert witness fees and expenses;
5. Costs of medical reports;
6. Costs of visual aids; and
7. Costs of taking depositions.

B. Travel expenses. Expenses for travel by the attorney on behalf of the client.

C. Telephone. Disbursements for long-distance telephone calls made by the attorney on behalf of the client.

D. Postage. Postage paid by the attorney for mailings on behalf of the client; and

E. Copying. Costs of photocopying and facsimile telecopying done by the attorney on behalf of the client.

F. Other: (Specify). (The client agrees that fees paid pursuant to this agreement will be divided. Attorney_____ will receive _____ (dollars or percent of the contingent fee) and Attorney _____ will receive (dollars or percent of the contingent fee).)

(6) This agreement and its performance are subject to Rule 1.5 of the Maine Rules of Professional Conduct.

WE HAVE EACH READ THE ABOVE AGREEMENT BEFORE SIGNING IT.

Witnesses to signatures

To client: _____ _____
Signature of Client

To attorney: _____ _____
Signature of Attorney

(If more space is needed, separate sheets may be attached and initialed.)

RULE 1.6 *CONFIDENTIALITY OF INFORMATION*

(a) A lawyer shall not reveal a confidence or secret of a client unless, (i) the client gives informed consent; (ii) the lawyer reasonably believes that disclosure is authorized in order to carry out the representation; or (iii) the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal a confidence or secret of a client to the extent the lawyer reasonably believes necessary:

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

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

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

(4) to secure legal advice about the lawyer's professional obligations;

(5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or

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

(c) Before revealing information under paragraph (b) (1), (2), or (3), the lawyer must, if feasible, make a good-faith effort to counsel the client to prevent the harm and advise the client of the lawyer's ability to reveal information and the consequences thereof. Before revealing information under paragraph (b)(5) or (6), in controversies in which the client is not a complainant or a party, the lawyer must, if feasible, make a good faith

effort to provide the client with reasonable notice of the intended disclosure.

(d) As used in Rule 1.6, "confidence" refers to information protected by the attorney-client privilege under applicable law, and "secret" refers to other information relating to the representation if there is a reasonable prospect that revealing the information will adversely affect a material interest of the client or if the client has instructed the lawyer not to reveal such information.

COMMENT

[1] Lawyers must be circumspect with respect to information learned in the course of representing their clients. This Rule governs the disclosure by a lawyer of confidences or secrets 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 which is protected by the attorney-client privilege or may be detrimental to the client's interests. While the Model Rule (2002) provides a broad formulation with respect to confidential information, the Task Force chose to retain the more limited scope of protection to matters protected by the attorney-client privilege and information gained in the relationship the disclosure of which may be detrimental to the client's interests. This was the approach taken under M. Bar R. 3.6, the Model Code of Professional Responsibility, the RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS, as well as other states which have otherwise adopted the Model Rules of Professional Responsibility. 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. The Task Force determined that the use of the term, "confidences and secrets," as used in the Model Code, the RESTATEMENT and M. Bar R. 3.6 is preferable to the broader formulation of "information relating to the representation of the client." The language of the definition of "secrets," derived from Section 60 of the RESTATEMENT, offers lawyers the benefit of the law expressed and cited therein.

[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, which may be detrimental to the client's interests. 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 confidences and secrets of a client. The prohibition on disclosure 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] The lawyer may disclose information relating to the representation which he or she reasonably believes is necessary to carry out the representation. This language is derived from Section 61 of the RESTATEMENT OF THE LAW GOVERNING LAWYERS. In some situations, for example, a lawyer may believe it is necessary 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 confidences and secrets of clients' information relating to the representation of their clients, the confidentiality rule is subject to limited exceptions. Paragraph (b)(1) recognizes the overriding value of life and physical integrity and permits disclosure reasonably necessary to prevent reasonably certain substantial bodily harm or death. Such harm is reasonably certain to occur if it will be suffered imminently or if there is a present and substantial threat that a person will suffer such harm at a later date if the lawyer fails to take action necessary to eliminate the threat. Thus, a lawyer who knows that a client has accidentally discharged toxic waste into a town's water supply may reveal this information to the authorities if there is a present and substantial risk that a person who drinks the water will contract a life-threatening or debilitating disease and the lawyer's disclosure is necessary to eliminate the threat or reduce the number of victims. The requirement in M. Bar R. 3.6(h)(4)(l) requiring that an act that is likely to result in death or bodily harm be a criminal act has been eliminated. Rule 1.6(b)(1) also requires that the potential harm be substantial. The elimination of the requirement of criminality and the inclusion of the requirement of substantiality is consistent with the approach taken in the 2002 Model Rules and the RESTATEMENT.

[7] Paragraph (b)(2) is a limited exception to the rule of confidentiality that permits the lawyer to reveal information to the extent necessary to enable affected persons or appropriate authorities to prevent the client from committing a crime or fraud, as defined in Rule 1.0(d), that is reasonably certain to result in substantial injury to the financial or property interests of another and in furtherance of which the client has used or is using the lawyer's services. 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. Although paragraph (b)(2) does not require the lawyer to reveal the client's misconduct, the lawyer may not counsel or assist the client in conduct the lawyer knows is criminal or fraudulent. See Rule 1.2(d). See also Rule 1.16 with respect to the lawyer's obligation or right to withdraw from the representation of the client in such circumstances, and Rule 1.13(c), which permits the lawyer, where the client is an organization, to reveal information relating to the representation in limited circumstances. As noted in Comment [6], this provision is a departure from recently amended M. Bar R. 3.6(h)(4), which draws the permissive disclosure line at whether the client's conduct is "criminal," and not at the nature and extent of the harm. At the time the lawyer makes the decision as to whether he or she can or will disclose the client's act, it may be difficult to

determine whether the client's "fraud" rises to the level of a crime. Accordingly, the Task Force deleted the categorical limitation to crime and follows the Model Rule 1.6 (2002) inclusion of fraud, so long as the harm could be substantial.

[8] Paragraph (b)(3) addresses the situation in which the lawyer does not learn of the client's crime or fraud until after it has been consummated. 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 may disclose information relating to the representation to the extent necessary to enable the affected persons to prevent or mitigate reasonably certain losses or to attempt to recoup their losses. Paragraph (b)(3) does not apply when a person who has committed a crime or fraud thereafter employs a lawyer for representation concerning that offense.

[9] A lawyer's confidentiality obligations do not preclude a lawyer from securing confidential legal advice about the lawyer's professional 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 (b)(4) permits such disclosure because of the importance of a lawyer's compliance with the Rules of Professional Conduct.

[10] 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 (b)(5) does not require the lawyer to await the commencement of an action or proceeding that charges such complicity, so that the defense may be established by responding directly to a third party who has made such an assertion. The right to defend also applies, of course, where a proceeding has been commenced.

[11] Lawyers may not use the threat of disclosure of confidences or secrets out of spite or in order to obtain leverage against a client in a fee dispute. A lawyer

reasonably entitled to a fee is permitted by paragraph (b)(5), however, 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.

[12] Other law may require that a lawyer disclose information about a client. Whether such a law supersedes Rule 1.6 is a question of law beyond the scope of these Rules. When disclosure of confidences or secrets 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 the other law supersedes this Rule and requires disclosure, paragraph (b)(6) permits the lawyer to make such disclosures as are necessary to comply with the law. In situations in which confidences and secrets may be revealed in connection with a controversy in which the client is not a party, prior to disclosure, paragraph (c) requires the lawyer to make a good faith effort to provide notice to the client that a confidence or secret under paragraph (b)(5) or (6) may be revealed.

[13] A lawyer may be ordered to reveal confidences or secrets by a court or by another tribunal or governmental entity claiming authority pursuant to other law to compel the disclosure. Absent informed consent of the client to do otherwise, the lawyer should assert on behalf of the client all non-frivolous claims that the order is not authorized by other law or that the information sought is protected against disclosure by the attorney-client privilege or other applicable law. In the event of an adverse ruling, the lawyer must consult with the client about the possibility of appeal to the extent required by Rule 1.4. Unless review is sought, however, paragraph (b)(6) permits the lawyer to comply with the court's order.

[14] Paragraph (b) permits disclosure only to the extent the lawyer reasonably believes the disclosure is necessary to accomplish one of the purposes specified. Paragraph (c) requires that with respect to disclosures under paragraphs (b)(1), (2) and (3), the lawyer must make a good faith effort, if feasible, to counsel the client to prevent the harm and obviate the need for disclosure. This requirement is consistent with Sections 66 and 67 of the RESTATEMENT. 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 (b) permits but does not require the disclosure confidences or secrets to accomplish the purposes specified in paragraphs (b)(1) through (b)(6). 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 (b) does not violate this Rule. Disclosure may be required, however, by other Rules. Some Rules require disclosure only if such disclosure would be permitted by paragraph (b). See Rules 1.2(d), 4.1(b), 8.1 and 8.3. Rule 3.3, on the other hand, requires disclosure in some circumstances regardless of whether such disclosure is permitted by this Rule. See Rule 3.3(c).

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. Consistent with Section 66 of the RESTATEMENT, a lawyer who takes action or decides not to take action allowed under this Rule is not, solely by reason of such action or inaction, subject to professional discipline, liable for damages to the lawyer's client or any third persons, or barred from recovery against a client or third persons. The legal effect of the lawyer's choice, however, is beyond the scope of the Model Rules of Professional Conduct.

[17] When transmitting a communication that includes confidences or secrets 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.

REPORTER'S NOTES:

Model Rule 1.6 (2002) corresponds to M. Bar R. 3.6(h). Notwithstanding some significant substantive distinctions, the Task Force recommended the adoption of the structure set forth in the 2002 Model Rules with respect to the confidentiality issues. For example, the issue of confidentiality of information with respect to current clients, former clients and prospective clients is found within the confines of M. Bar R. 3.6(h). In contrast, the 2002 Model Rules address confidentiality with respect to former clients in Rule 1.9(c), and confidentiality with respect to prospective clients in Rule 1.18(b). Moreover, 2002 Model Rule 1.6 addresses permissive disclosure of confidential information but leaves mandatory disclosure of confidential information to Rule 3.3, Candor to the Tribunal and Rule 4.1, Truthfulness in Statements to Others. The Model Rules handle the duty to prevent others from disclosing confidential information as part of Rules 5.1, Responsibility of Partners, and 5.3, Responsibilities Regarding Non-lawyer Assistants.

The Task Force discussed the issue of how much and what type of information should be protected by the confidentiality rule. The Task Force considered whether the Maine Rules of Professional Conduct should protect "all information relating to the representation of the client" (the approach taken by the 2002 Model Rules), or "confidences or secrets of a client" (the approach taken by Maine before the July 1, 2005 amendment to M. Bar R. 3.6(h)).

"Information relating to the representation of a client" is a very broad formulation. It protects not only information communicated by the client, but any information related to the representation received from other sources; and even information that is not in itself protected, if it leads to the discovery of protected information. Positive, public information about the client learned in the course of the client representation would also be protected. The Model Rules Reporter acknowledged the potential breadth of this formulation of the scope of protected information, if read literally.

In contrast, under the "confidences or secrets" approach, information relating to the representation obtained from sources other than the client is

protected only if disclosure of the information is detrimental to the client's interests, or the client affirmatively requests the information be protected. "Secret" in former M. Bar R. 3.6(h) (the rule in effect prior to July 1, 2005) (and in the pre-2002 Model Code and RESTATEMENT § 60) refers to information other than information protected by the attorney-client privilege, that is "gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or detrimental to a client." Presumably, information gained in the course of representation of the client could be from any source. Thus, former M. Bar R. 3.6(h) definition of "secret" permits disclosure of information relating to the representation without the client's consent, so long as disclosure would not disadvantage the client. This is not permitted under the Model Code or under the Model Rules. Information that is protected by the attorney-client privilege is considered a "confidence."

The Task Force further discussed the distinction between "use of" and "revealing" recognizing that one can use information without revealing it. Consider the following example. You know that your client is about to develop a tract of land. As a result, neighboring tracts will become more valuable. You buy a neighboring tract. The purchase does not reveal what you know as a result of your client representation. If the use of the information (purchasing the land) does not disadvantage your client, you may do so under Model Rule 1.8(b). "Use of information" is a concept more closely aligned with a conflict-of-interest, than with the revelation of confidential client information. Thus, in the 2002 Rules, "use" is included in Rule 1.8 and 1.9, rather than Rule 1.6.

The vast majority of jurisdictions have adopted the term "reveal" in Rule 1.6 and retained "use" in Rule 1.8(b) and Rule 1.9(c)(1). The Task Force ultimately decided to follow the approach of the 2002 Model Rules, and have Rule 1.6 simply govern information that may be "revealed" and have information that is "used" be addressed in Rule 1.8(b) and Rule 1.9(c)(1).

The Task Force discussed whether disclosures authorized under Paragraph (a) include information that is expressly authorized (informed consent) as well as impliedly authorized. The Task Force thought that the term, "impliedly authorized" was unclear. The Task Force thought the better choice was to allow disclosure when "the lawyer reasonably believes that disclosure is authorized in order to carry out the representation." The Task Force also discussed whether express authorization must be made in writing and recommended that express authorization of disclosures was not required to be in writing.

The Task Force thought it was important, consistent with the approach taken in the 2002 Model Rules, that the disclosures authorized by paragraph (b)(1)-(6) be permissive rather than mandatory. Maine Rules of Professional Conduct 3.3, however, makes disclosure mandatory when the fraud is upon a tribunal. See also Maine Rules of Professional Conduct Rule 4.1 requiring lawyers to "disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6." With respect to the specific exceptions set forth in paragraphs (b)(1)-(6), the Task Force recommended the adoption of the 2002 Model Rule format. In some instances the Task Force recommended the Maine Rules of Professional Conduct 1.6 follow the substance of Model Rule 1.6 (2002); in other instances, the Task Force recommended substantive changes.

With respect to the bodily harm exception found in paragraph (b)(1), the Task Force recommended the exception recognized in M. Bar R. 3.6(h) for client crimes that are "likely to result in death or bodily harm to another person" and "to avoid the furthering of a criminal act," be replaced with an exception for disclosures to "prevent reasonably certain substantial bodily harm or death." This language negates the requirement of client criminality. This change sets forth an objective test and is in accord with Model Rule 1.6(b)(1) (2002) as well as Section 66 of the RESTATEMENT. This language goes beyond an exception for imminent harm and makes clear in the existence of a present and substantial threat that a person will suffer an injury or death at a later date is also addressed. Information a client is about to discharge a toxic substance is an example of information that may be revealed to prevent reasonably certain substantial bodily harm or death to third parties. This formulation is a departure from the recent revision to M. Bar R. 3.6(h).

The Task Force, mindful of potential magnitude of the harm to the financial interests or property of third parties as a result of criminal or fraudulent acts of client, recommended the adoption of Model Rule 1.6(b)(2) and (3) (2002). It is a serious abuse of the lawyer-client relationship when a lawyer's services are used in furtherance of such a crime or fraud. Similar to paragraph (b)(1), there is no requirement of criminality. The Task Force thought a lawyer ought to be able to disclose information relating to a ten million dollar fraud on shareholders, whether or not the fraud rises to the level of a criminal act. Moreover, at the time the lawyer is making the decision as to whether he or she should disclose, it may not be clear whether a client's "fraud" is criminal, or whether the client behavior can be ultimately proven to be criminal. Paragraph (b)(3) allows for disclosure of confidences or secrets where a client can no longer prevent the disclosure by

abstaining from the crime or fraud. The focus of this paragraph is on mitigation and recoupment of losses.

Paragraph (b)(4) allows disclosure when a lawyer is seeking legal advice about the lawyer's professional obligations The ABA Reporter's Explanation of this provision is as follows: "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."

With respect to paragraph (b)(5), the Task Force added to the Rule a requirement of reasonable notice to the client before making a disclosure in "self defense." The notice requirement does not apply to a disclosure in a dispute between the attorney and the client. This requirement of notice strikes a balance between the interest of the lawyer and his or her client. The Task Force discussed whether disclosure ought to be permitted to allow the lawyer to establish an affirmative claim against the client (the approach taken in Model Rule 1.6(b)(5) (2002)) or only to allow the lawyer to establish a defense to a charge of wrongful conduct (the approach taken under M. Bar R. 3.6(h)(3) and Section 63 of the RESTATEMENT). The Task Force recommended the Model Rule approach on this issue, with no requirement of reasonable notice to the client, and subject to the principles set forth in Comment [11].

Paragraph (b)(6) allows the disclosure of confidences or secrets in order to comply with other law or a court order. While there is general consensus that a lawyer may disclose to comply with other law or a court order, Section 63 of the RESTATEMENT imposes the additional condition that the disclosure occur only "after the lawyer takes reasonably appropriate steps to assert that the information is privileged or otherwise protected against disclosure." The disclosure is permissive to allow lawyers to take the risk of contempt or other legal penalties on behalf of a client and not also be the subject of professional discipline.

The Task Force recommended the inclusion of the first sentence of paragraph (c) to make clear that lawyers should give clients "one last chance" to reconsider their contemplated fraudulent or criminal plans. While the 2002 Rules do not articulate a lawyer's duty to remonstrate with his or her client, M. Bar R. 3.6(h) expressly requires such a conversation with respect to past fraud. Sections 66 and 67 of the RESTATEMENT include the requirement that a lawyer make a

"good faith effort to persuade the client not to act," before disclosing client information.

With respect to the second sentence in paragraph (c), the Task Force thought it is both good policy and practice for lawyers to make a good faith effort to provide notice to a client that their secrets may be revealed in the circumstances outlined in paragraphs (b)(5) and (b)(6).

The Task Force recommended that Maine Rules of Professional Conduct Rule 1.6 not include the explicit requirement set forth in M. Bar R. 3.6(h)(2) (addressing a lawyer's responsibility with respect to lawyers and non-lawyer's employed by the lawyer) and adopt the Model Rules (2002) approach of relying on Rules 5.1 and 5.3

The Task Force discussed the discretionary nature of the lawyer's choice to disclose. Consistent with Sections 66 and 67 of the RESTATEMENT, the Task Force thought it was important to note that the lawyer's choice to act or not act does not subject the attorney to liability. The Task Force also thought it was also important to make clear that the legal effect of the lawyer's choice to act or not act is beyond the scope of the Maine Rules of Professional Conduct.

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 would be directly adverse to another client, even if representation would not occur in the same matter or in substantially related matters; or

(2) there is a significant risk that the representation of one or more clients would 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 would be able to provide competent and diligent representation to each affected client; and

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

(c) Under no circumstances may a lawyer represent a client if:

(1) the representation is prohibited by law;

(2) the representation involves 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.

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. Subject to the exception set forth in Comment [24] with respect to "issue conflicts," 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 determines the conflict is consentable and 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 a determination by the lawyer that the conflict is consentable and the grant of consent by the client, 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 determining that the conflict may be waived by consent and the grant of informed consent by 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 or marriage, there may be a significant risk that client confidences will be revealed and that the lawyer's family relationship will interfere with both loyalty and independent professional judgment. 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 or spouse, 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. See also Rule 1.8(l).

[12] Maine has not adopted the ABA Model Rules' categorical prohibition on an attorney forming a sexual relationship with an existing client because such a rule seems unnecessary to address true disciplinary problems and it threatens to make disciplinary issues out of conduct that we do not believe should be a matter of attorney discipline. However, the lack of a categorical prohibition should not be construed as an implicit approval of such relationships. Attorneys have been disciplined under the former Maine Code of Professional Responsibility for entering into sexual relations with clients, and they may be disciplined for similar conduct under these rules. The relationship between lawyer and client is a fiduciary one in which the lawyer occupies the highest position of trust and confidence. In certain types of representations such as family or juvenile matters, the relationship is almost always unequal; thus, a sexual relationship between

lawyer and client in such circumstance may 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. Before proceeding with the representation in these circumstances, the lawyer should consider whether the lawyer's ability to represent the client will be materially limited by the sexual relationship.

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] In many instances, clients may consent to representation notwithstanding a conflict. However, as indicated in paragraph (c), 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 a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, 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 (c)(1) 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 (c)(2) 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. Whether a client has given informed consent to representation, when required by this Rule or Rule 1.8, shall be determined in light of the mental capacity of the client to give consent, the explanation of the advantages and risks involved provided by the lawyer seeking consent, the circumstances under which the explanation was provided and the consent obtained, the experience of the client in legal matters generally, and any other circumstances bearing on whether the client has made a reasoned and deliberate choice. See Rule 1.0(e) (informed consent). The lawyer must reasonably believe that each client will be able to make adequately informed decisions during the representation and, to that end, the lawyer must consult with each client concerning the decisions to be made and the considerations relevant in making them, so that each client can make adequately informed decisions. See

Rule 1.4. 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)(1) or paragraph (c).

Conflicts in Litigation

[23] Paragraph (c)(2) 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) and paragraph (b). 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] 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. Under Maine law and practice, this Rule is violated only if an attorney does not obtain informed consent to an issue conflict that rises to the level of a conflict-of-interest described in Rule 1.7(a), and is actually known by the lawyer. A lawyer does not violate this Rule merely by being ignorant of the existence of an issue conflict. There are situations where, because of the risk of material limitation of a client representation, that an issue conflict can be a true (albeit consentable) conflict-of-interest. The intent of this Rule and this paragraph is not to create a conflict-of-interest-screening requirement that has not heretofore existed in Maine.

[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 (b) 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. 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. But see M.R. Evid. 502(d)(5). 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:

Model Rule 1.7 (2002) corresponds to M. Bar R. 3.4(b) and (c), and addresses conflicts of interest with respect to concurrent representation of clients. In substance, Model Rule 1.7 (2002) does not represent a significant departure from the treatment of conflicts of interest in M. Bar R. 3.4. Accordingly, the Task Force recommended the adoption of the structure of Model Rule 1.7 (2002), with some clarifying adjustments. The RESTATEMENT §§ 121, 122, 123, 128 and 129 are generally in accord with Model Rule 1.7 (2002).

The conflicts of interest rules preserve a lawyer's loyalty to his or her clients. A conflict-of-interest may also implicate issues relating to confidentiality. Even in cases where there is little or no chance of disclosing client confidences or secrets, however, representation may be prohibited because of the presence of a conflict-of-interest that may be viewed, from the client's perspective, as a concession of their lawyer's loyalty.

The Task Force recognized that some conflicts of interest can be cured, and others can not. The recommendation to divide Model Rule 1.7(b) (2002) into M. Bar R. 1.7(b) and (c) was not meant to be a change in substance from the 2002 Model Rule formulation: the purpose was to make explicit the types of conflicts that can be cured, and the types of conflicts that can not. Rule 1.7(b) provides for a conflict-of-interest cure by "consent plus." This means when a conflict-of-interest is found, (except in circumstances described in paragraph (c)) for the lawyer to engage in the concurrent representation, each client must give "informed consent" to the conflict (as defined in Maine Rules of Professional Conduct 1.0 (e)), *and* the lawyer must reasonably believe that he or she will be able to provide competent and diligent representation to each client. This "consent plus" concept is not meant to be a substantive departure from the standard set forth in M. Bar R. 3.4(c)(2)(i): a client's consent is valid only in those instances in which a disinterested lawyer would conclude that the risk of inadequate representation is minimal. The Task Force recognized this standard was an objective one: the lawyer's independent judgment must be measured against the judgment of the "reasonable lawyer."

Model Rule 1.7 (2002) and M. Bar R. 3.4(b) and (c) both identify a conflict-of-interest when a lawyer is representing one client and simultaneously representing another client, while the clients' interests are adverse. A classic illustration of this type of conflict is A suing B, when a lawyer is representing both A and B. Pursuant to M. Bar R. 3.4 (c)(2), and Model Rule 1.7 (2002), however, the matters involved do not have to be related. M. Bar R. 3.4(c)(2) explicitly states adversity between clients may exist in unrelated matters. Model Rule 1.7 (2002) does not state this explicitly in the Rule, but relegates it to Comment [6]. The Task Force recommended making this point explicit in the Rule itself and discussed the following example: Lawyer X is representing Client A in connection with the adoption of a child. Client B desires to engage Lawyer X in connection with a real estate sale in which Client A is the buyer. In such a circumstance, Lawyer X's concurrent representation of Client B would be directly adverse to Lawyer X's representation of Client A in the real estate transaction. Where representation of one client is directly adverse to the concurrent representation of another client, even if the representation involves wholly unrelated matters, a conflict-of-interest

exists. The Task Force recognized the issue of conflicts of interest must be viewed from the perspective of the client as well as of the lawyer. The duty of loyalty requires the lawyer obtain the client's consent before being directly adverse to the client. In the vast majority of cases, where a lawyer determines a conflict is consentable, i.e., the lawyer has a reasonable belief that the quality of the representation would not be compromised by the conflict, the affected clients are likely to consent to the representation.

Unlike M. Bar R. 3.4 (b), Rule 1.7 addresses only conflicts of interest with respect to current clients. Conflicts of interest with respect to former clients are addressed in Model Rule 1.9 (2002). The Task Force acknowledged the issue of when a client is a current client and when a client is a former client is not always clear in practice. It is an issue, however, that can be addressed through plain language in attorney engagement letters, clearly defining both the scope and duration of a lawyer's engagement.

There are, however, certain circumstances where concurrent representation of two (or more) clients is categorically prohibited. This is the case, (i) when the representation is prohibited by law, and (ii) when two (or more) clients are asserting claims against each other in the same proceeding. The Task Force recommended dividing Rule 1.7(b) into Rule 1.7(b) and (c) to make that point clearly and explicitly. This structural modification of the Model Rule does not represent a substantive departure from either M. Bar R. 3.4 or from Model Rule 1.7(b) (2002).

The Task Force also recognized that under M. Bar R. 3.4(c)(2)(i)(A) and (B), a lawyer engaged in a simultaneous representation that presents a conflict must reasonably believe that each affected client "will be able to make adequately informed decisions, and consult with each client concerning the decisions to be made and the considerations relevant in making them." Although these requirements are not stated expressly in Model Rule 1.7 (2002), the Task Force believed they are implicit in the Model Rules. An attorney cannot reasonably determine whether he or she can provide diligent and competent representation if it is not possible for an affected client to make adequately informed decisions. A concurrent representation does not relieve a lawyer of his or her obligations under Maine Rules of Professional Conduct Rule 1.4 to consult with clients and keep them adequately informed so that they can make informed decisions.

Under the Maine Bar Rules, a lawyer engaged in concurrent representation presenting a conflict must terminate representation if any of the conditions that

made it permissible to undertake the concurrent representation cease to exist. The Task Force was satisfied these issues are adequately addressed in Comments [4] and [5].

Comment [11] to Model Rule 1.7 is substantially the same as existing M. Bar R. 3.4(f)(3), addressing the issue of familial relations between lawyers in the same or substantially related matters. The Task Force recommended adding a new Rule 1.8(l) setting forth the substance of M. Bar R. 3.4(f)(3).

With respect to advance waivers of conflicts of interest, the Task Force was in accord with the approach taken by Model Rule 1.7 Comment [22] (2002). Comment [22], in setting forth various factors to consider in evaluating the validity of such an advance waiver, is consistent with what has been both common law and practice in the State of Maine. The Task Force recognized that such advance waivers are a business necessity for many lawyers and law firms, and may be the only way that clients can secure counsel of their choosing. Especially in cases where sophisticated, repeat users of legal services are independently represented by their own in-house lawyers, advance waivers of conflicts of interest ought to be allowed. Notwithstanding the absence of a specific provision addressing this issue in M. Bar R. 3.4, inclusion of interpretive Comment [22] does not represent a substantive departure from the approach historically taken in Maine. The Model Rule (2002) approach is in accord with the RESTATEMENT § 122, comment d.

M. Bar R. 3.4(b)(2) lists a number of factors bearing on the determination of whether a client has given "informed consent." The Task Force recommended that the enumeration of factors informing the issue of whether a client has given informed consent set forth in M. Bar R. 3.4(b)(2) be added to Maine Rule of Professional Conduct 1.0(e) definition of "informed consent." The Rule 1.0(e) definition of "informed consent" is cross-referenced in Comment [18] to Rule 1.7.

The Task Force discussed the difficulties that may face a lawyer who is himself or herself being represented in a legal matter, and who may face his or her own lawyer in unrelated matters as opposing counsel. For example Lawyer A represents Smith against Jones, who is represented by Lawyer B. At the same time, Lawyer B is representing Lawyer A in a personal affair of Lawyer A's. Lawyer A's client relationship to Lawyer B is a personal relationship of Lawyer A. In the appropriate case, the Task Force advises it would be prudent for Lawyer A to disclose to Smith that personal relationship, including that Lawyer B represents him on an unrelated personal matter.

With respect to the issue of the form of informed consent required, the Task Force recognized three potential options: (i) verbal informed consent, (ii) informed consent, confirmed in writing by the lawyer (which does not need to be written or signed by the client), and (iii) informed consent in writing, signed by the client. Under the Model Rules (2002), the default rule for informed consent to a concurrent conflict-of-interest is to obtain consent from the client, confirmed in writing. In contrast, the Maine Bar Rules do not require a writing. Because it is in the best interest of both clients and lawyers to memorialize the specifics of the consent, the Task Force recommended the adoption of the Model Rule 1.7 (2002) requirement that clients' informed consent be confirmed in writing.

Comment [24] addresses the issue of positional (or issue) conflicts of interest. When a lawyer advocates a resolution of particular legal issue in one way for one client, and advocates the opposite resolution of the same issue for another client in an unrelated matter, this is referred to as a "positional" or an "issue" conflict. The Task Force recognized that the treatment of such situations has been the subject of much debate; the ABA, the RESTATEMENT 3RD, and Board of Overseers' Professional Ethics Commission all have spoken to this issue, not entirely consistently.

Under the Maine Rules of Professional Responsibility, an issue conflict is not a *per se* conflict-of-interest under Rule 3.4; the only Rule bearing on an issue conflict is the lawyer's duty under Rule 3.6 to employ "reasonable care and skill" and "the lawyer's best judgment" in representing clients and to determine whether the issue conflict (so-called) requires the lawyer to withdraw. In so ruling, the Board of Overseers' Professional Ethics Commission expressly declined to adopt the reasoning of the ABA. The ABA has analyzed issue conflicts as conflicts under Rule 1.7(b), and set forth factors that counsel should consider in determining whether the conflict is consentable or not (i.e. whether the representation of one client would be adversely affected). In other words, an issue conflict by itself is not representation of "directly adverse" clients (under Rule 1.7(a)); it is a potentially consentable conflict, assuming the lawyer reasonably believes that one representation will not be adversely affected by the other. The ABA interpretation was based on the text of Rule 1.7 and the comments thereto as they existed at that time. The subsequent revisions to Rule 1.7 (2002), as well as the RESTATEMENT 3RD, follow the same general approach addressing issue conflicts in general as consentable conflicts, but they revised the discussion of the factors to be considered in making the consentability determination, and made clear that an "issue conflict" is not a conflict at all unless one representation presents a significant risk of materially impairing another representation.

The Task Force concluded that interpretations of the Maine Bar Rules and interpretations of the ABA rules are not very far apart. The common concern is the risk of materially impairing the lawyer's effectiveness in representing one client in light of the positions that the lawyer is advocating for another client: contemporaneously arguing opposite sides of the same issue before the same judge or panel of judges has the potential to impair his or her effectiveness on behalf of both clients. In Maine, however, the principal concern seemed to be that treating issue conflicts as true conflicts would require attorneys to engage in conflict screening not simply as to the identity of clients, but as to the substance of legal arguments advanced on behalf of clients: a considerable burden. A related but unstated consequence of the Maine Professional Ethics Commission's ruling is issue conflicts are not something that need to be disclosed to or consented to by a client. Either they actually do materially impair the lawyer's effectiveness, in which case the lawyer must withdraw; or they do not, in which case the representation continues. The lawyer decides whether the impairment is actual or not, and there is no need to disclose or get consent to the mere potential of adverse impact.

The Task Force decided to adopt the approach taken under the Model Rules (2002): issue conflicts may be conflicts in some circumstances; and a multifactored analysis is necessary to determine whether an issue conflict can be waived by the client.

An issue conflict can, under certain circumstances, ripen into a true, albeit consentable, conflict-of-interest, but an issue conflict is not necessarily a conflict-of-interest in all cases. The Task Force was mindful fact that to the extent that issue conflicts are conflicts, they have not historically been the subject of a screening requirement in Maine. The adoption of this rule does not make them the subject of screening but simply recognizes that when a lawyer is aware of the existence of such an issue conflict, the lawyer must go through the paragraph 1.7(b) analysis to determine whether the 'conflict' presents a risk to the representation that is significant enough to constitute a true conflict; if so, whether the risk is insubstantial enough that the conflict, though real, is curable; and if so, that the lawyer make the necessary disclosure and obtain the necessary consent.

The Task Force recognized the sensitive issues raised by Model Rule 1.7 Comment [10] (2002) and Model Rule 1.8(j) (2002), categorically prohibiting of sexual relationships with clients. The Model Rules (2002) categorical prohibition does not exist in the Maine Bar Rules. Model Rule 1.8(j) (2002) bars forming a

sexual relationship with a client (but does not prohibit forming a client relationship with an existing sexual partner) (and that prohibition is recognized as a conflict-of-interest in Comment [10] to Model Rule 1.7 (2002)). Comment [19] to Model Rule 1.8 (2002) notes that the prohibition applies in the context of organizational clients as well, prohibiting a sexual relationship "with a constituent of the organization who supervises, directs or regularly consults with that lawyer concerning the organization's legal matters."

Three principal rationales for the prohibition found in Model Rule 1.8(j) (2002) are put forward: impairment of the lawyer's professional detachment, risk to ability to protect client confidences, and possible sexual exploitation of the client by the lawyer. See Comment [17] to Model Rule 1.8 (2002). The first two rationales apply with equal force regardless of whether the sexual relationship pre-dates or post-dates the formation of the client relationship. The Rule, however, does permit a sexual relationship with the client as long as the sexual relationship predated the client relationship. The rationale that appears to motivate the rule as written is the rationale based on inequality in the relationship and the possibility of sexual exploitation of the client by the lawyer—or an unstated moral judgment that neither has, nor necessarily needs, further support (i.e., "it's just plain wrong").

The Task Force ultimately recommended (albeit with some dissent) that Maine not adopt the Model Rule (2002). A minority of members of the Task Force thought that the Model Rule 1.7 Comment [10] (2002) and Model Rule 1.8(j) (2002) should be adopted in Maine. The minority members expressed the concern that a failure to adopt a categorical prohibition against sexual relations with clients would tarnish the image of the legal profession in the eyes of the public. Furthermore, the Model Rule (2002) formulation, in setting forth a bright line rule, was more functional and gave attorneys clear guidance as to what was and was not prohibited conduct.

In the view of the majority of Task Force members, the rule is unnecessary to address the true disciplinary problems needing to be addressed. Moreover, it threatens to make disciplinary issues out of conduct that should not be a matter of attorney discipline. For example, if a junior associate were to become romantically involved with a corporate officer with whom he regularly consulted on a corporate client's title matters, for instance, the Rule would make that professional misconduct, subjecting that associate as well as his supervising partner(s) to potential professional discipline. It was the view of a majority of the Task Force that the problem of client exploitation can be addressed without Model Rule 1.8(j) (2002). Moreover, private moral judgment is not an appropriate basis for a rule of

discipline. The Task Force was clear that this position does not condone sexual relationships that involve exploitation. They have been, and remain inappropriate.

The Task Force recognized even without a categorical prohibition, the Board of Overseers has, when appropriate, been able to discipline lawyers for inappropriate sexual relationships with clients. Sexual relationships involving exploitation of the client or impairment of the representation of the client have always been prohibited. Accordingly, the Task Force concluded that Model Rule 1.8(j) (2002) and its related Comments are well-intentioned, but poorly thought-out, attempts to address the core problem of sexual exploitation.

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 confidences or secrets 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 confidences or secrets of the client.

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

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

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

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

(1) the client gives informed consent;

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

(3) the confidences and secrets of a client are 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; 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 against the proceeds of such action or litigation to secure the lawyer's fee or expenses; and

(2) contract with a client for a reasonable contingent fee in a civil case, subject to the limitations in Rule 1.5(c) and (d).

(j) [Reserved]

(k) 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.

(l) A lawyer related to another lawyer (as parent, child, sibling, domestic associate or spouse), ordinarily may not represent a client in a matter where the related lawyer is representing another party who is or shall be adverse to the lawyer's client, unless each client gives informed consent, confirmed in writing.

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 Confidences and Secrets

[5] Use of confidences and secrets of the client 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. 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 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. Repayment of an advance of these costs and expenses may be waived by the lawyer.

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 paragraph 1.7(c). 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 this circumstance the informed consent must be in writing, signed by the clients. 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 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 Relationships

[17] The Maine Rules of Professional Conduct do not include the Model Rule (2002) categorically prohibiting sexual relations between lawyer and client. See Rule 1.7 Comment [12].

[18] Reserved.

[19] Reserved.

Imputation of Prohibitions

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

REPORTER'S NOTES:

Model Rule 1.8 (2002) outlines the conflict-of-interest rules that arise in certain specified circumstances. The rule is consistent, in substance with M. Bar R. 3.4(b) and (f). Accordingly, the Task Force recommended that adoption of the structure and substance of Model Rule 1.8 (2002).

Rule 1.8(a) tracks the substance (and much of the language) of M. Bar R. 3.4(f)(1) and (2)(i). The recommendation of the adoption of the Model Rule 1.8(a) structure is not meant to be a substantive departure from the Maine Bar Rules. RESTATEMENT §§ 16, 36, 54, 126 and 127 are generally in accord with Model Rule 1.8 (2002).

Paragraph (b) addresses the issue of the "use" of client confidences and secrets. As stated in the Reporter's Notes to Maine Rule Professional Conduct 1.6, above, there is a distinction between "using" information and "revealing"

information. Model Rule 1.8(b) (2002) prohibits the use of confidences and secrets of a client to the disadvantage of a client, in the absence of informed consent. This is consistent with (although somewhat narrower than) the rule set forth in the former (and the 2005 revision) M. Bar R. 3.6(h)(1), prohibiting the use of a confidence or secret. Consider the following example (as set forth in the Reporter's Notes to Rule 1.6). You know that your client is about to develop a tract of land. As a result, neighboring tracts will become more valuable. You buy a neighboring tract. The purchase does not reveal what you know as a result of your client representation. If the use of the information (purchasing the land) does not disadvantage your client, you are not prohibited from doing so under Model Rule 1.8(b) (2002). If however, the lawyer uses the information learned from a client to purchase one of the parcels in competition with the client, the use of the information would be to the disadvantage of the client, and thus prohibited. "Use" of information is a concept more closely aligned with a conflict-of-interest and thus implicates issues of loyalty, than with the revelation of confidential client information. See also RESTATEMENT § 60, stating that "a lawyer who uses confidential information of a client for the lawyer's pecuniary gain . . . must account to the client for any profits made," based upon principles of agency.

A client's informed consent to the conflicts of interest set forth in Model Rule 1.8(a) (2002) (consent to a business transaction with a lawyer or consent to a lawyer acquiring a pecuniary interest adverse to a client), and (g) (consent to aggregate settlements and plea bargains) must be in writing, signed by the client. The requirement of written consent to aggregate settlements and plea bargains is departure from the Maine Bar Rules, which requires only informed consent. Because it is in the best interest of both clients and lawyers to memorialize the specifics of consent in these contexts, the Task Force recommended the adoption of the Model Rule 1.8 (2002) requirement that clients' informed consent be confirmed in writing. The Task Force agreed with the Model Rule drafters that the requirement that the client sign a written consent in the circumstances set forth in Rule 1.8(a)(3) and 1.8(g) provided the client with greater protection than a mere written confirmation presented by a lawyer. This added client protection is warranted because of the potential for client exploitation or a lawyer's over-reaching. Requiring the client to sign a written consent presents a further opportunity for the client to understand and reflect upon the conflict being waived.

As noted in the Reporter's Notes to Rule 1.7, the definition of "informed consent" in Rule 1.0(e) has been expanded to include the factors that bear on the determination of whether a client has given informed consent, as found in M. Bar R. 3.4(b)(2).

Model Rule 1.8(c) (2002) substantively is consistent with M. Bar R. 3.4(f)(2)(iv). Both rules set forth prohibitions against lawyers preparing an instrument pursuant to which he or she receives substantial gifts from clients. Both rules make an exception for when the lawyer is related to the client. Model Rule 1.8(c) (2002) however, in its broader formulation of prohibitions, represents a positive expansion of the Maine Bar Rules.

Model Rule 1.8(d) (2002) substantively is similar to M. Bar R. 3.4(f)(2)(iii). The Model Rule, however, expands the prohibition against a lawyer acquiring publication rights with respect to the subject matter of a client's representation to literary, media, portrayal or other accounts based in substantial part on information relating to the representation. The Task Force recommended the more thorough formulation of the prohibition set forth in Model Rule 1.8(d) (2002).

Model Rule 1.8(e) (2002) is in accord with M. Bar R. 3.7(d), prohibiting a lawyer from providing financial assistance to a client in connection with pending or contemplated litigation, except for court costs and other litigation expenses. The Model Rule (2002) formulation is explicit in stating that although the allowed financial assistance may be initially characterized as an advance, repayment may not be forthcoming. This is not a departure from the Maine Bar Rules.

Model Rule 1.8(f) (2002) prohibits a lawyer from accepting compensation from a third party, except under certain, specified conditions. This rule is in accord with M. Bar R. 3.12(b). The Model Rule (2002) is more stringent however in requiring informed client consent in addition to a lawyer's reasonable judgment that the third party compensation will not interfere with the lawyer's independence of professional judgment, or with the client-lawyer relationship. The Task Force recommended the adoption of the additional safeguards found in Model Rule 1.8(f) (2002).

Model Rule 1.8(h)(1) (2002) allows a prospective waiver of a lawyer's malpractice liability, if the client is independently represented in making the agreement. M. Bar R. 3.4(f)(2)(v) categorically prohibits such a prospective waiver. The Task Force discussed that business clients are becoming increasingly sophisticated, as is the complexity of the lawyer/client relationship. The Task Force further deliberated whether, in some instances, it may be in the best interest of the client to allow such a waiver. The Task Force ultimately recommended, however, that the rule prohibiting prospective waivers of malpractice liability be retained.

Model Rule 1.8(i) (2002) is consistent with M. Bar R. 3.7(c), both prohibiting a lawyer from acquiring a proprietary interest in the cause of action or the subject matter of litigation, with certain exceptions. The first of these exceptions allows a lawyer to acquire a lien to secure payment of a lawyer's fees or expenses. M. Bar R. 3.7(c) explicitly states the lien may be against only the proceeds of the action or litigation, and not against a client's files. The Task Force recommended including this explicit distinction between acceptable and unacceptable liens in the text of the Rule. Reasonable contingent fees are allowable under both the Model Rules (2002) and the Maine Bar Rules, subject to the limitations set forth in Maine Rules of Professional Conduct 1.5(c) and (d).

The Task Force recommended not to adopt (with a minority dissenting) the Model Rule 1.8(j) (2002) categorical prohibition on sexual relationships between lawyers and clients. See Rule 1.7 Comment [12].

Model Rule 1.8(k) (2002) states that if a lawyer finds a Rule 1.8 conflict-of-interest (except for one that grows out of a personal relationship), that conflict is imputed to associates, partners and other affiliated lawyers of the conflicted lawyer. M. Bar R. 3.4(b)(3)(i) similarly imputes such conflicts of interest.

When a lawyer who is related to another lawyer is representing a client in a matter where the related lawyer is representing another party, there is a conflict-of-interest under M. Bar R. 3.4(f)(3). Comment [11] to Model Rule 1.7 (2002) describes the same situation and identifies it as a conflict. The Task Force thought this type of conflict-of-interest ought to be described in the Rule (rather than merely in a Comment) and thus recommended the addition of Rule 1.8(l).

M. Bar R. 3.4(f)(2)(ii) categorically prohibits a lawyer from purchasing property "at a probate, foreclosure, or judicial sale in an action or proceeding in which the lawyer or any partner or associate appears as attorney for a party or is acting as executor, trustee, administrator, guardian, conservator, or other personal representative." The Model Rules (2002) include no such categorical prohibition and requires such transactions be analyzed under Rule 1.8(a)'s general rubric governing business transactions with clients. (See Comment [1], noting that the Rule "applies to lawyers purchasing property from estates they represent.) The Task Force recommended adopting the Model Rule approach (2002). The protections set forth in Rule 1.8(a) are sufficient to protect the interest of clients;

the categorical prohibition appears to be idiosyncratic in Maine and creates a potential trap for the unwary.

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 confidences or secrets of a former client 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 confidences or secrets of a former client except as these Rules would permit or require with respect to a client.

(d) 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.

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] In accordance with prior Maine law, 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:

Model Rule 1.9 (2002) addresses the issue of conflicts of interest between current clients and former clients. It corresponds in substance to M. Bar R. 3.4(d) and M. Bar R. 3.4(b)(1). For the reasons set forth below, the Task Force recommended the adoption, with some minor modifications, of the structure and substance of Model Rule 1.9 (2002).

The Maine Bar Rules defining conflicts of interest generally is found in M. Bar R. 3.4(b)(i). This definition applies to conflicts with respect to current clients, former clients, third parties and conflicts between a lawyer's own interests and those of the client. M. Bar R. 3.4(d) addresses conflicts of interest between the representation of a current client and a former client. The Model Rules (2002) present a different organization for the conflict-of-interest rules, allowing each type of conflict its own rule. The conflict-of-interest rules outlining the rules governing conflicts between current clients and former clients are found in Model Rule 1.9 (2002).

The underlying message of Model Rule 1.9 (2002) is that a lawyer's duty to preserve a client's confidences and secrets continues beyond the end of the attorney-client relationship. Thus, as to confidential information about a former client, a lawyer has a duty which continues in perpetuity unless otherwise required by Maine Rule of Professional Conduct 1.6 or 3.3; in subsequent representation of another client, a lawyer cannot use that confidential information to the disadvantage of the former client.

Both Model Rule 1.9 (2002) and the existing Maine Bar Rules preclude representation of a client that is adverse to a former client in the same or substantially related matter, but they approach differently the issue of potential use of confidential information which is not substantially related. M. Bar R. 3.4(d)(1) states that the representation is prohibited if representation adverse to a former client may involve the use of confidential information obtained through such former representation. Model Rule 1.9 Comment [3] (2002) addresses the same point in its definition of when matters are "substantially related": "if they involve the same transaction or legal dispute, or if there is otherwise 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." This is an objective test. Using information about, for example, a former client's financial difficulties or a client's ability to weather the stress of litigation, may very well materially advance the current client's position in a subsequent adverse matter—even if the matters involve different transactions, facts or legal disputes. Representation without consent is prohibited in both situations. In order to make clear to the reader without the benefit of the Comments that the new Rule 1.9 continues to prohibit representation where there is a substantial risk that confidential factual information could materially advance the new client's position, the Task Force moved the Comment 3 definition of "substantially related" to a new subsection (d) in the body of the rule itself.

In addition to prohibiting the use and disclosure of confidences and secrets of former clients, Rule 1.9(c) also embraces the idea that gaining confidential information in the course of representing Client X may trigger a conflict-of-interest in a later representation of Client Y in a matter adverse to former Client X. The presence of a conflict-of-interest in this situation turns on whether the matters are substantially related.

Moreover, Rule 1.9 and the corresponding Comments must be read in light of Rule 1.6 and Rule 1.9(c), prohibiting lawyers from revealing or using client confidences and secrets. As the text of and Comments to Rule 1.9, read together with Rule 1.6, make clear, loyalties to clients may fade as current clients become former clients, but confidences and secrets last forever. Thus, even if a matter that was the subject of a former representation was not substantially related to a subsequent representation, if the lawyer sought to use information about a former client's reaction to the stress of litigation in the unrelated matter that was adverse to that client, this "use of information" would violate Rule 1.9(c)(1). Model Rule 1.9 (2002) is in accord with RESTATEMENT § 132.

Model Rule 1.9(b) is substantially equivalent to M. Bar R. 3.4(d)(1)(ii), but there are some distinctions. The Maine Bar Rules makes clear that when Lawyer X moves from Firm A to Firm B, Lawyer X (or any other lawyer in Firm B) may not represent a client of Firm B whose interests are materially adverse to a client of Firm A, if the representation involves "the subject matter of the former representation on which the lawyer personally worked." The Maine Bar Rules also includes an independent basis upon which to prohibit representation in such a situation: if the lawyer personally acquired confidential information that is material to the new matter. In contrast, the Model Rule (2002) requires that not only does the representation have to be in connection with the same, or a substantially related matter, the lawyer must also have personally acquired information protected under Rule 1.6 and 1.9(c) (confidences or secrets) that is material to the new matter. In the departing lawyer context, knowledge of confidences and secrets by some members of a firm is not *per se* imputed to the departing lawyer. This rule reflects the reality, particularly in large law firms, that a lawyer may not be aware that a certain client was represented by his or her former firm, much less gained confidential information about that client, and thus it makes little sense to impute such knowledge to both that lawyer and the lawyer's new law firm. In smaller firms however, there may be much more firm-wide knowledge of client confidences and secrets. If the departing lawyer does have confidences and secrets of a client, however, as Comments [5], [6] and [7] and Rule 1.9(c) make clear, lawyers have a duty to keep the confidences and secrets of

their former clients in perpetuity. This is consistent with the rule imputing conflicts of interest found in Rule 1.10(b).

Rule 1.9 is concerned with principles of loyalty, as well as confidentiality (See Comment [4]). It is also aspires to strike a balance between giving clients freedom to make choices with respect to their counsel, allowing lawyers to have a degree of career mobility, and in protecting the material interests of clients.

The Model Rule (2002) includes the qualification that such representation, to be prohibited, must be done "knowingly," defined in Rule 1.0(f), as meaning "actual knowledge of the facts in question" (although a person's knowledge may be inferred from circumstances). See Rule 1.0(f). According to Comment [5], a lawyer is disqualified from representation only when he or she has actual knowledge of information protected by Rules 1.9 and 1.9(c). This is not meant to relieve lawyers from the obligation of having rigorous conflict checking procedures in place, and implementing them upon the hiring of lawyers from other law firms.

M. Bar R. 3.4(d)(1)(iii) states the former-client-conflict-of-interest-rule from the perspective of the firm from which a lawyer has departed. It is a conflict-of-interest rule as well as an imputation rule. It makes clear that a law firm may not represent a party adverse to a former client of that a firm (i) in a matter that is substantially related to the subject matter of the former client's representation or, (ii) if a lawyer remaining with the law firm has confidences or secrets that are material to the new matter, in the absence of informed written consent. This rule is designed to make the point (among others) that notwithstanding the fact that the matter is not formally concluded, the relationship between the client and the law firm is deemed to be formally terminated. Thus, the client is, at that point, a former client of the law firm. This conflict-of-interest rule is addressed in concept in Model Rule 1.9 (2002), and more directly in Rule 1.10. See Reporter's Note to Maine Rule of Professional Conduct 1.10 for a more complete discussion of this issue.

A conflict-of-interest, as described in Model Rule 1.9(a) and (b) (2002) may be cured by a client's informed consent. Pursuant to the M. Bar R. 3.4(d)(1)(ii), such consent must be in writing. The informed consent required to cure a Rule 1.9(a) or (b) (2002) conflict does not have to be written or signed by the client; merely confirmed in writing by the lawyer. The Task Force determined that informed consent, confirmed in writing by the lawyer provides clients with sufficient protection of their interests.

The Task Force discussed the distinction between the two primary remedies for a finding of a conflict-of-interest: discipline and disqualification. Finding a violation of Rule 1.9 is a threshold question to a motion to disqualify. Finding a violation of Rule 1.9 is a necessary predicate to a successful motion to disqualify. To disqualify a lawyer based upon a claim of a conflict-of-interest, a court must also decide whether disqualification of a lawyer is a proper sanction to remedy a violation of the Rules of Professional Conduct. Courts must balance the public's interest in the integrity of the judicial process with a client's interest in picking his or her own lawyer.

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 the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.

(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) For purposes of Rule 1.10 only, "firm" does not include government agencies. The disqualification of lawyers associated in a firm with former or current government lawyers is governed by Rule 1.11.

(e) If a lawyer or law student affiliated both with a law school legal clinic and with one or more lawyers outside the clinic is required to decline representation of any client solely by virtue of this Rule 1.10, this rule imposes no disqualification on any other lawyer or law student who would otherwise be disqualified solely by reason of an affiliation with that individual, provided that the originally disqualified individual is screened from all participation in the matter at and outside the clinic.

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 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]. The term "firm" as used in Rule 1.10, however, does not include governmental entities.

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) 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(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. 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. A client's consent may be conditional: for example, the client's consent to waiver of imputation may be conditioned on the law firm screening to assure the affected parties that confidential information known by the personally disqualified lawyer remains protected. See Rule 1.0(k) "Screened" and Comments 8, 9 and 10. 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] Where a lawyer has joined a private firm after having represented the government, imputation is governed by 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.

[8] 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:

Model Rule 1.10 (2002) corresponds, and is equivalent to, M. Bar R. 3.4(b)(3)(i) and M. Bar R. 3.15(a). There are however, some distinctions between the 2002 Rule formulation, and the Maine Bar Rules. The Model Rule (2002) is in accord with RESTATEMENT § 123. For the reasons set forth below, the Task Force recommended the adoption of Model Rule 1.10 (2002) as written.

Imputation of conflicts of interest, based upon general principles of agency law, refers to the finding of a conflict-of-interest with respect to an entire firm or group of lawyers when one or more of its members are found to have a conflict-of-interest. This rule is consistent with the idea that a law firm is, in essence, one lawyer for purposes of a lawyer's duties of loyalty and confidentiality. Moreover, the rule imputing conflicts of interest prohibits a lawyer from circumventing conflict-of-interest rules through his or her partners, associates or lawyer/employees.

Model Rule 1.10's application is limited to "lawyers associated in a firm." However, "firm" is broadly defined, in both the Comments, as well as in Model Rule 1.0(c) (2002) (the "Terminology" section). It not only includes lawyers in law partnerships, professional corporations, legal services organizations and legal departments of corporations, but may include lawyers who share the same physical office space, if they hold themselves out to the public in a way that suggests they are operating as a law firm. This is in accord with the M. Bar R. 3.4(b)(3), which, in essence, defines "firm" to include, partners, associates and affiliated lawyers. For Rule 1.10, however, the term "firm" does not include governmental entities, which limitation is consistent with M. Bar Rule 3.15(a).

Model Rule 1.10 (2002) sets forth the general rules on the imputation of conflicts of interest. The imputation of conflicts of interest in certain specific

contexts is further addressed in other Rules. For example, rules with respect to imputation of conflicts in the context of legal services organizations (including law school clinics) are found in Model Rule 6.5 (2002), rules regarding imputation of conflicts in the context of prior service in the judiciary are found in Model Rule 1.12 (2002), and rules addressing imputation of conflicts with respect to current and former government employees are found in Model Rule 1.11 (2002).

Model Rule 1.10(a) (2002) addresses when conflicts of interest of an individual lawyer are imputed to the other members and associates of the lawyer's law firm. An analysis under Model Rule 1.10(a) (2002) must begin with finding of a conflict-of-interest under Model Rules 1.7 or 1.9 (2002). Simply stated, except for conflicts based on the personal interest of a lawyer, if one lawyer is found to have a conflict-of-interest with respect to the representation of two or more clients, then the conflict is imputed to all other lawyers in the lawyer's firm. Because it is understood that conflicts wholly personal to a lawyer are not likely to affect others in the firm, such conflicts of interest generally are not subject to the imputation rule. If, however, a wholly personal conflict presents a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm, then even this type of conflict-of-interests will be imputed to the firm as a whole. Because even a personal conflict would be imputed to other firm members and associates if such a conflict presents a significant risk of materially limiting the representation of the client by the other lawyers in the firm, the Task Force recommended the adoption of Rule 1.10(a).

ABA Model Rule 1.10(b) addresses the extent to which a law firm's imputed conflict-of-interest should continue after a lawyer terminates an association with the firm. It provides that the law firm is prohibited from representing a person with interests materially adverse to those of a former client represented by the former lawyer if (1) the matter is the same or substantially related to that in which the former lawyer represented the former client, and (2) any lawyer in the firm has information protected by Rule 1.6 and 1.9(c) (i.e., a confidence or secret) that is material to the matter. This Rule is a departure from M. Bar R. 3.4(d)(1)(iii), which provides that a law firm has a conflict-of-interest if (1) the subject matter is substantially related, or (2) any lawyer remaining in the firm has protected information. As noted in the Reporter's Notes to Rule 1.9, the 2002 formulation reflects the reality, particularly in large law firms, that remaining lawyers may not be aware that a certain client was represented by a lawyer formerly associated with the firm, much less gained confidential information about that client. Thus, in such circumstances, it makes little sense to impute such knowledge to the former law firm. In smaller firms however, there may be much more firm-wide knowledge of

client confidences and secrets. If the remaining lawyers do have confidences and secrets of a former client, however, such lawyers have a duty to keep the confidences and secrets in perpetuity. The Task Force observed that Model Rule 1.10(b) (2002) is also concerned with principles of loyalty and aspires to strike a balance between giving clients freedom to make choices with respect to their counsel, allowing lawyers to have a degree of career mobility, and protecting the material interests of clients.

Both Model Rule 1.10(c) (2002) and the Maine Bar Rules (M. Bar R. 3.4(b)(2) concerning waivers of conflicts of interest with respect to two or more current clients, and M. Bar R. 3.4(d)(1) providing for waivers of conflicts between former clients and current clients) allow for waiver of disqualification by the affected client, under the conditions set forth in Rule 1.7 (setting forth the requirements for informed client consent).

For a discussion of disqualification as a remedy for breach of a conflict-of-interest rule, see Reporter's Notes to Rule 1.9.

Advisory Note – February 2010

Rule 1.10 generally addresses conflicts of interest. The introductory section of the Rule, 1.10(a) states:

> (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 the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.

This is the general so called "one excluded, all excluded" rule that also prevailed under the former Code of Professional Responsibility, Rule 3 of the Maine Bar Rules. The general rule is, of necessity, subject to a number of exceptions. The new Rule 1.10(e), which was recommended by the Advisory Committee on Professional Responsibility, recognizes an exception to the general rule regarding imputation of conflicts of interest in the case of lawyers or law students affiliated with both a law school legal clinic and with one or more lawyers outside the clinic, such as through an internship or part-time employment. When such a lawyer or law student would be required to decline representation due to a conflict of interest, that conflict is not imputed to any other lawyer or law student

affiliated with the disqualified individual, provided that the disqualified individual is screened from all participation in the matter involving a conflict of interest.

RULE 1.11 *SPECIAL CONFLICTS-OF-INTEREST OF 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 governmental officer or 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) the appropriate governmental officer or agency gives its informed consent, confirmed in writing, to the representation.

(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:

(A) the appropriate governmental officer or agency gives its informed consent, confirmed in writing, to the representation; or

(B) under applicable law, no one is or by lawful delegation may be authorized to act in the lawyer's stead in the matter.

(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.

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, including but not limited to 5 M.R.S. § 18. 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 requires informed consent. 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 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 [9].

[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] Informed consent, confirmed in writing, which writing should include a description of the screened lawyer's prior representation and of the screening procedures employed, generally should be requested 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:

Model Rule 1.11 (2002) corresponds to M. Bar R. 3.4(d)(2)(i)-(iv) and addresses conflicts of interest and imputed disqualification with respect to lawyers who have served or are currently serving as lawyers for a governmental agency or entity. Model Rule 1.11 (2002) and the Maine Bar Rules differ substantially in their organization. The Model Rule, however, does not represent a significant substantive departure from the Maine Bar Rules. Because of this, and because Model Rule 1.11 (2002) builds upon the general conflict-of-interest rules found in Rules 1.7 and 1.9(c), the Task Force recommended the adoption of the structure of Model Rule 1.11 (2002), with some substantive modifications to reflect best practices in Maine.

Model Rule 1.11 (a), (b) and (c) (2002) correspond to M. Bar R. 3.4(d)(2)(i) and (iii), and address the issue of conflicts of interest when a former government lawyer enters the private practice of law. Model Rule 1.11(d) (2002), corresponding to M. Bar R. 3.4(d)(2)(ii) and (iv), addresses the issue of conflicts of interest when a former private practice lawyer begins to serve as a public officer or employee. Lawyers working for Maine State government, whether serving as Assistant Attorneys General or as state officials, are also governed by statutory conflict-of-interest provisions, in addition to the Maine Rules of Professional Conduct. See 5 M.R.S. § 18 et. seq. Although the language of 5 M.R.S. § 18 varies somewhat from the conflict-of-interest provisions found in the Maine Rules of Professional Conduct, it is intended to address substantially the same concerns.

Model Rule 1.11(a) (2002) specifically states that lawyers who have formerly served as a public officer or employee of the government are subject to Rule 1.9(c). Rule 1.9(c) is the rule governing duties to former clients that generally prohibits the use by a lawyer, or the lawyer's current or former firm, of confidences and secrets of a former client to the former client's disadvantage. Rule 1.9(c) also precludes a lawyer from revealing a client's confidences and secrets. In contrast, M. Bar R. 3.4(d) prohibits the use of confidential information by a former government lawyer. The Task Force recommended adoption of the

Model Rule (2002) expanded prohibition against both the use and disclosure of confidences and secrets.

Model Rule 1.11(a) (2002) further provides that a lawyer shall not represent a client in connection with a matter in which the lawyer participated, personally and substantially as a public officer or employee. Whereas under M. Bar R. 3.4(d)(2)(i), such representation is absolutely prohibited (and is not limited only to matters in which a lawyer personally and substantially participated), Rule 1.11(a) allows the governmental office or agency to waive the conflict-of-interest (with such waiver confirmed in writing). The Task Force recognized that, as a practical matter, the government is not likely to consent to such types of conflicts of interest, due to the importance of public trust in the decisions of the government. Furthermore, Section 18 sets forth a time-barred conflict-of-interest rule for former Maine state government employees (barring representation involving matters the former government employee worked on prior to his or her last year of government employment for one year after leaving employment, whereas the employee is permanently barred from representation involving matters worked on during that final year of employment). Inclusion of the Rule 1.11(a) provision for informed consent provides the government with a vehicle to approve conflicts that are within the scope of these rules and not barred by § 18, when circumstances are otherwise appropriate for such consent. For these reasons, the Task Force recommended adoption of Model Rule 1.11(a) (2002).

Model Rule 1.11(b) (2002) is the rule governing imputation of conflicts of interest when a lawyer leaves employment as a public officer or employee of the government. The Task Force recognized three possible formulations of the imputation rule in the government lawyer context: The rule set forth in M. Bar R. 3.4(d)(2)(iii), which conditions the government's waiver of a conflict-of-interest upon the effective screening (as such term is defined in Model Rule 1.0(k) (2002)) of the conflicted former government lawyer; a rule consistent with Model Rule 1.10 (2002), which also allows the client (in this context, the governmental officer or agency) to waive an imputed conflict-of-interest, and implicitly allows the waiver to be conditioned upon the screening of the conflicted lawyer; and the rule set forth in Model Rule 1.11 (2002), requiring screening of a conflicted former government lawyer, but only notice to (not consent of) the governmental officer or agency.

After discussion (and some dissent) the majority of the Task Force recommended retention of the substance of M. Bar R. 3.4(d)(2)(iii), which states that the firm in which a disqualified former government lawyer works may

represent a client in connection with a matter in which the conflicted former government lawyer participated personally and substantially as a public officer or employee, only if the former government lawyer is properly "screened" (See Rule 1.0(k)) and the governmental officer or agency gives its informed consent, confirmed in writing. This rule is consistent with the objective of protecting the public trust in government. It also has been the operative rule in Maine, and has presented no substantial barriers to lawyers' serving the public interest as governmental officers and employees, nor adversely impacting former government lawyers' transition into the private sector.

Model Rule 1.11(c) (2002) creates a special category of "confidential government information" in order to prohibit a former government lawyer form representing a private client whose interests are adverse to a person about whom the lawyer has such information and could use it to the disadvantage of that person; the lawyer need not have represented the government agency or acted as a public official with respect to a particular matter for this prohibition to apply. While this provision is comparable to the M. Bar R. 3.4(d)(2)(i) prohibition on use of confidential information obtained through government employment, the more specific language of Rule 1.11(c) more clearly puts the former government lawyer on notice that the lawyer may not use confidential information that the lawyer became privy to merely as a result of employment without having acted as a representative of an agency or taken action on a particular matter.

Model Rule 1.11(d) (2002), read together with Rule 1.9, addresses the issue of conflicts of interest involving the current government lawyer who formerly represented clients as a private sector lawyer. With respect to personal disqualification of the former private sector lawyer, Rule 1.9 and M. Bar R. 3.4(d)(ii) both allow representation of the government client that is adverse to a former private client, with the informed consent of the private client. Model Rule 1.11(d)(2)(i) (2002), however, requires the informed written consent of the relevant governmental officer or agency, in addition to the consent of the private client. The Task Force recommended the addition into 1.11(d)(2)(i) of the provision found in M. Bar R. 3.4(d)(2)(ii)(A), allowing a government lawyer/official to act without the informed consent of a former client in a matter in which the lawyer participated personally and substantially on behalf of that client if no one else has or can be delegated authority to act in the lawyer's stead.

There is no provision in the Maine Bar Rules that is comparable to Model Rule 1.11(d)(2)(ii) (2002), prohibiting a government lawyer from negotiating for private employment with any person who is involved as a party or as lawyer for a

party in a matter in which the government lawyer is participating personally and substantially. This situation is addressed in 5 M.R.S. § 18(2)(C), but is limited to situations in which the interests of the person or organization with whom the lawyer is negotiating possible employment is "direct and substantial." The Task Force recommended the adoption of the clearer and more broadly applicable provision found in Rule 1.11(d)(2)(ii).

While "matter" is not defined in the Maine Bar Rules, the definition set forth in Model Rule 1.11(e) (2002) is consistent with the definition of "proceeding" in 5 M.R.S. § 18, except for the inclusion of matters covered by the government agency's conflict-of-interest rules. Because of the sometimes complex responsibilities of government agencies and the need for clear prohibitions in the event of lawyer disciplinary action, the Task Force recommended the inclusion of this descriptive definition.

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.

(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 confirm compliance with the provisions of this Rule.

(d) An arbitrator selected as a partisan of a party in a multimember arbitration panel is not prohibited from subsequently representing that party.

COMMENT

[1] This Rule generally parallels Rule 1.11. The term "personally and substantially" signifies that a judge who was a member of a multimember 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 judges *pro tempore*, referees, special masters, hearing officers and other parajudicial officers, and also lawyers who serve as part-time judges. Part I, Section 1 of the Maine Code of Judicial Conduct provides that a justice, judge, active retired justice and active retired judge 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. Other law or codes of ethics governing third-party neutrals may also impose 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:

Model Rule 1.12 (2002), addressing conflicts of interest of former judges, arbitrators, mediators, referees and other third party neutrals, corresponds in substance to M. Bar R. 3.4(g)(2). The Task Force recommended the adoption of the structure of Model Rule 1.12 (2002), with some modification to reflect best Maine practices.

Model Rule 1.12 sets forth one conflict-of-interest rule for former judges, arbitrators, mediators and other third party neutrals. In contrast, M. Bar R. 3.4(g)(2)(i) dictates one conflicts rule for former judges and law clerks, another for non-judicial adjudicative officers, and yet another for mediators (see M. Bar R. 3.4(h)). Under the Maine Bar Rules, a lawyer is prohibited from commencing representation in a matter in which the lawyer participated personally and substantially as a judge or judicial law clerk, and such prohibition may not be waived. In contrast, conflicts of interest involving non-judicial adjudicative officers may be waived, upon the informed consent of all parties to the proceeding at issue. Additionally, M. Bar R. 3.4(h)(3) and (5), setting forth rules applicable to mediators, prohibit a lawyer, while acting as a mediator, from representing any of the parties in court or in the matter under mediation or any related matter. The Task Force discussed the structure and substance of both the Maine Bar Rules and Model Rule 1.12, and recommended the blanket prohibition of waiver of all conflicts of interest involving all third party neutrals.

There is no provision in the Maine Bar Rules comparable to Model Rule 1.12(b) (2002) (addressing post-judicial employment or third-party neutral employment negotiation). The Task Force thought this was a positive addition and recommended its adoption.

Model Rule 1.12(c) (2002) addresses the issue of imputed disqualification of other lawyers in the same firm of a disqualified former third party neutral. Model Rule (2002) imputes a conflict to lawyers with whom a former third party neutral is associated, but such a conflict with respect to the non-conflicted former third-party neutral may be waived, subject to two conditions: (i) the conflicted former third party neutral must be properly screened (See Rule 1.0(k) defining what constitutes proper screening), and (ii) the parties and the appropriate tribunal must be given written notice. Maine Bar Rules 3.4(g)(2)(ii) (addressing imputation and former third party neutrals) and 3.4(h)(7) (addressing imputation and former mediators) imputes the conflicts of interest of a former third-party neutral or mediator, unless the conflicted lawyer is properly screened, fees are not shared, and disclosure of the circumstances and the measures taken to screen the conflicted lawyer is given to all affected parties. The Task Force considered both Model Rule 1.12(c) (2002) as well as the Maine Bar Rules addressing imputation, and recommended that a more client-protective rule would better serve the citizens of Maine. Thus, the Task Force recommended that the affected parties, and any appropriate tribunal be required to give its informed consent of the waiver of the imputed conflict, to be confirmed in writing. This writing must fully describe the screening procedure that requires the client's consent.

ADVISORY NOTE – OCTOBER 2014

The Task Force recommendation for subsection (c)(2) varied from the Model Rule, requiring informed consent for the screening of a former judge, arbitrator, mediator or other third-party neutral. The recommendation was adopted by the Supreme Judicial Court. The requirement of informed consent, confirmed in writing, created an unintended consequence: By withholding consent—even without any grounds for challenging the screening procedures adopted—an opposing party could exercise an absolute veto to a firm representing a client in a matter in which a lawyer in that firm previously participated personally as a judge, law clerk, arbitrator or other adjudicative officer. The present amendment is not meant to diminish a consumer protective approach. But it is meant to clarify that opposing parties have a right to address perceived shortcomings in screening procedures only, not an absolute right to withhold consent to an opponent's choice of counsel. Notice to opposing parties and the tribunal should include a description of the implemented screening, giving opposing parties and the tribunal the opportunity to confirm compliance with the Rule. Disagreements between parties as to the adequacy of screening should be addressed to the appropriate tribunal, which could be the tribunal adjudicating the matter that is the subject of

the representation, the tribunal that formerly employed the judicial officer or law clerk subject to this Rule, or judicial or bar regulatory bodies.

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 a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and is likely to result in substantial injury to the organization, the lawyer shall proceed as is reasonably necessary in the best interest of the organization. In determining how to proceed, the lawyer shall give due consideration to the seriousness of the violation and its consequences, the scope and nature of the lawyer's representation, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters, and any other relevant considerations. Any measures taken shall be designed to minimize disruption of the organization and the risk of revealing confidences and secrets to persons outside the organization. Such measures may include among others:

(1) asking reconsideration of the matter;

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

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

(c) Except as provided in paragraph (d), if

(1) despite the lawyer's efforts in accordance with paragraph (b) the highest authority that can act on behalf of the organization insists

upon action, or a refusal to act, that is clearly a violation of law, and

(2) likely to result in substantial injury to the organization, the lawyer may resign in accordance with Rule 1.16 and make such disclosures as are consistent with Rule 1.6, Rule 3.3, Rule 4.1 and Rule 8.3, but only to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.

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

(f) 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.

(g) A lawyer who acts contrary to this Rule but in conformity with promulgated federal law shall not be subject to discipline under this Rule, regardless whether such federal law is validly promulgated.

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 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. Paragraph (b) makes clear, however, that when the lawyer knows that the organization is likely to be substantially injured by action of an officer or other constituent that violates a legal obligation to the organization or is in violation of law that might be imputed to the organization, the lawyer must proceed as is reasonably necessary in the best interest of the organization. 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 would be necessary. In some circumstances, however, 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 reasonably 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 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 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 on behalf of 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 Rules 1.6, 1.8, 1.16, 3.3 or 4.1. Paragraph (c) of this Rule does not modify, restrict, or limit the provisions of Rule 1.6(b)(1) - (6). If the lawyer's services are being used by an organization to further a crime or fraud by the organization, Rules 1.6(b)(2) and 1.6(b)(3) may permit 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 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] [Reserved]

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 (f) 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:

Model Rule 1.13 (2002) addresses issues that arise when the client is an organization. There is no corresponding provision under the Maine Bar Rules.

When the client is an organization, the interests at stake do not reside in a single person; accordingly, the lawyer for the organization owes his or her professional duties to the organization, not the organization's constituents. Because, however, a lawyer who represents an organization necessarily interacts with individuals—officers, directors, board of directors and employees—there is the risk that a lawyer will view them as the "client." This has often been referred to as the "client-identity paradox." Lawyers who represent organizations must be mindful that their duties as lawyers are owed to the organization itself, notwithstanding the lawyer's interactions with the client through its individual agents. Model Rule 1.13 (a) and (f) (2002) make explicit a lawyer's duty to be both forthright about whom the lawyer represents, and be diligent in his or her analysis of any existing or potential conflicts of interest. RESTATEMENT § 96 is in accord with Model Rule 1.13 (2002) (lawyers represent an organization's interests "as defined by its responsible agents acting pursuant to the organization's decision-making procedures). The client-identity paradox becomes especially problematic when an agent of the client is engaged in, or plans to engage in, activities that violate the law and cause substantial injury to the organization.

Rule 1.13 has been very controversial with respect to what steps a lawyer should take when the lawyer discovers that an agent of the client is engaged in, or plans to engage in, activities that violate the law and cause substantial injury to the organization. See subsections 1.13 (b), (c) and (d). States have articulated a variety of standards regarding when the lawyer is required to act, and, most contentiously, when the attorney is permitted to breach the confidentiality mandates of Rule 1.6 in order to protect the corporation's interests. In 2003 the ABA Task Force on Corporate Responsibility revised Model Rule 1.13 to expand the lawyer's responsibilities and to provide for permissive disclosure of a corporate client's confidences. While some states have incorporated those 2003 changes, many states have declined to permit the lawyer to disclose any client confidences that are otherwise protected by Rule 1.6, including Massachusetts, New York, Delaware and California. The difficult issue is which version of Rule 1.13 would best suit Maine practice. The Task Force decided against recommending the permissive disclosure provisions proposed by the ABA Task Force on Corporate Responsibility and decided to follow more closely the standards set forth in the original Rule 1.6 as well as a comparable rule adopted in Massachusetts.

When a lawyer is deemed to have "knowledge" of the wrongdoing, is a question fundamental to the analysis under this rule. "Knows" and "Known" are defined in Rule 1.0(f) as "actual knowledge of the fact in question. A person's knowledge can be inferred from circumstances." It is not always easy, however, to determine when a hunch about a transgression ripens into actual knowledge. Moreover, in a large organization, it may not always be clear how to confirm when and whether the suspected misconduct has actually occurred. Nonetheless, a lawyer may not stay willfully uninformed. Lawyers have a duty to investigate potential wrongdoing, if they have the concern that such wrongdoing may harm the client.

Legal ethics professor Geoffrey Hazard has identified the danger of a lawyer receiving what he calls "water-cooler information": Information that may be casually or inadvertently communicated to a lawyer. This may more often be the case when lawyers work as in-house business counsel. See also RESTATEMENT § 96 comment b (noting that in-house lawyers may have greater access to corporate information than outside counsel and therefore gain more knowledge about constituents). When a lawyer is working in-house in an organizational legal department, he or she should inform the general counsel about the suspected wrongdoing. If the general counsel's actions qualify as "a reasonable resolution of an arguable question of professional duty," Rule 5.2(b) provides the lawyer a safe

harbor from discipline for failing to act in the organizational client's best interests under Rule 1.13(b).

Rule 1.13 recognizes that it is not a lawyer's function to second-guess the business judgments or manager or corporate employees. Comment [3] to Rule 1.13 states, "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." A lawyer's duty to take action to protect the interest of his or her organizational client is triggered in two separate instances under Rule 1.13. The first instance is when there is an act or omission that breaches the organizational agent's duty to the organization, resulting in harm. A flagrant example of such an act is embezzlement. The second instance is an act or omission that creates vicarious civil or criminal liability for the organization. The act or omission must be that of "an officer, employee, or other person associated with the organization." The phrase, "violation of law" in Rule 1.13(b) appears to include the contravention of any source of law (e.g., statutes, regulations and municipal codes).

If the lawyer concludes that a manager or employee's misconduct threatens substantial injury to the organization, the lawyer must then determine how to proceed. As recommended by the Maine Task Force, Rule 1.13(b) includes three non-exclusive, non-exhaustive actions available to lawyers in these circumstances. After much discussion, the Maine Task Force decided not to follow the 2003 version of Model Rule 1.13(b), which articulates only the general principle that the lawyer must proceed "as is reasonably necessary in the best interests of the organization" and intentionally omits any specific guidance. The Task Force reached the conclusion that some specific guidance on this thorny problem was useful and thus recommended their inclusion in the text of the Rule. In essence, the lawyer is required to "refer the matter to higher authority in the organization . . . ." This is known as taking the issue "up the ladder." In some cases this may mean the highest authority, which in many instances is the board of directors.

As noted above, the most controversial issue with respect to Rule 1.13 has involved the question of whether the Rule should include a provision allowing a lawyer, in certain narrowly prescribed circumstances, to reveal the confidences and secrets of a client that would otherwise be protected under Rule 1.6. The pre-2003 version of Model Rule 1.13 limited the attorney's discretion to reveal confidences to the general rules of Rule 1.6, which are applicable to all clients. However, in 2003, the ABA House of Delegates voted to amend paragraphs (b) and (c) of Rule

1.13 to allow attorneys to operate outside the bounds of Rule 1.6 in the corporate context, by permitting the attorney the discretion to disclose corporate confidences and secrets "to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization." The language proposed by the ABA Task Force, and adopted by the ABA House of Delegates in 2003 is as follows:

> (c) Except as provided in paragraph (d), if
>
> (1) 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 clearly a violation of law, and
>
> (2) the lawyer reasonably believes that the violation 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 permits such disclosure, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.[1]

The ABA Task Force on Corporate Responsibility described the reasons for recommending the "reporting out" rule as follows:

> The [ABA] Task Force agrees with the Reporter to the ALI RESTATEMENT that Model Rule 1.6 ". . . should not be understood to preclude controlled disclosure beyond the organization in the limited circumstances where the wrongdoing is clear, the injury to the client organization is substantial, and disclosure would clearly be in the best interest of the entity client." The Task Force considers this especially important in the circumstance in which the board of directors or other highest authority of the organizational client is disabled from acting in the best interest of the organization, e.g., because of self-interest or personal involvement in the violation. (Footnotes omitted.)

Because such disclosure may reveal client information otherwise protected under Rule 1.6(a), the proposed addition to Rule 1.13 contains strict conditions that must

[1] Model Rules of Professional Responsibility Rule 1.13(b).

exist before any "reporting out" is allowed. The lawyer must have a heightened level of certainty as to the violation of law, and the actual or threatened violation must be "clear." Moreover, there is no permission to "report out" when the organizational governance failure involves a violation of legal duty to the organization but is not otherwise a violation of law. As under Rule 1.6, communication of client information outside the organization must be limited to information reasonably believed to be necessary to prevent substantial injury to the organization that is reasonably certain to occur. In most circumstances, this limitation would permit communication only with persons outside the organization who have authority and responsibility to take appropriate preventive action.

The Maine Task Force reviewed the language of the original Model Rule 1.13(b) and (c) and the versions adopted in other states, and engaged in a detailed discussion of the arguments put forth by the ABA Task Force on Corporate Responsibility. Members of the Maine Task Force expressed concern about several consequences of adopting the 2003 version of 1.13 (c).

First, any further erosion of the protection of confidences and secrets was particularly troublesome because the version of Rule 1.6 proposed by the Maine Task Force already significantly expands the circumstances in which a lawyer is permitted to disclose "confidences" and "secrets." Because Rule 1.6 already represents a significant substantive departure from the prior limited exceptions, the Task Force was unwilling to recommend yet another exception in the protection of client confidences.

Second, concern was expressed that under Model Rule 1.13(b) and (c), a lawyer is allowed to disclose confidences and secrets when the client is an organization in more circumstances than when the client is an individual. Thus, it was articulated, if the 2003 version of Model Rule 1.13(b) and (c) were adopted, organizational clients would be afforded less protection against disclosure than are individual clients, a result the Task Force could not recommend.

Third, concern was expressed about whether the lawyer's failure to take steps outside the organizational client in order to protect the organization from the bad acts of its agents was more appropriately determined between lawyer and the client (e.g. the lawyer's civil liability to the organization for malpractice) rather than in the context of professional discipline. The counterargument is that the scope of information that the 2003 version of Rule 1.3(b) and (c) allows to be "reported out" is in actuality a very narrow: information about a harm that could befall the organization (knowledge that a "violation of a legal obligation to the

organization, or a violation of law which reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization"—and then only when the lawyer has referred the matter to the highest authority in the organization). However, there is no such disclosure permitted if the lawyer is acting for the benefit of an individual or individuals as opposed to the benefit of the organizational client.

The Maine Task Force recommended adoption of the language of the original Model Rule 1.13 rather than the new language recommended by the ABA Task Force on Corporate Responsibility. The Maine Task Force recommended that, lawyers, in their representation of organizations, not be permitted to "report out" confidences and secrets, beyond the disclosures already allowed, for all clients, under Rule 1.6.

Rule 1.13(b) and (c) must be read in light of Rule 1.16, which requires lawyers to withdraw "if further representation will result in the lawyer's violation of the law or rules of ethics" (meaning if the client is using the lawyer's services for criminal or fraudulent purposes). See also Comment [7], Rule 1.6 (duty of confidentiality does not prevent lawyer from giving to interested persons notice of fact of withdrawal, and disaffirming any opinion or document that lawyer previously rendered). In addition, ABA Formal Ethics Opinion 92-366 (1992) permits a client to make a "noisy withdrawal" if the lawyer's work product is being used in the commission of an ongoing crime or fraud.

The Maine Task Force recommended that Model Rule 1.13(e) not be adopted as part of the Maine Rules of Professional Conduct. It was thought that this subparagraph requiring the discharged attorney to "report out" his discharge opens a Pandora's box: lawyers would be placed in the uncomfortable position of publicly justifying their conduct.

Withdrawal may not be a lawyer's final obligation; other ethics rules (e.g., securities laws, including the Sarbanes-Oxley Act and banking laws) may allow–and in some situations require, that a lawyer to reveal the organization's ongoing or future criminal or fraudulent activity. The Maine Task Force recommended inclusion of subparagraph (g), to make clear that a lawyer who is required to "report out" pursuant to other law should not deemed to be in violation of the Maine Rules of Professional Conduct.

Finally, the Task Force discussed one of the more vexing issues that has arisen in the context of organizational representation: the identification of the client

when a lawyer is organizing the entity. While this is not directly addressed in Model Rule 1.13 (2002), the Rule does emphasize the importance of clarity in the lawyer's own mind about who the client is, and communication of this clarity with the organizer, in order to avoid misunderstandings. A lawyer should reach an express understanding with the organizer of the entity at the outset of his or her involvement, and document that understanding in a formal engagement letter. RESTATEMENT § 14 addressing the "Formation of a Client-Lawyer Relationship" makes clear in Comment f., that "[w]hen the client is a corporation or other organization, the organization's structure and organic law determine whether a particular agent has authority to retain and direct the lawyer. Whether the lawyer is to represent the organization, a person or entity associated with it, or more than one such persons and entities is a question of fact to be determined based on reasonably expectations in the circumstances."

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), 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.

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. Confidences and secrets 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), 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] In an emergency where the health, safety or a financial interest of a person with seriously diminished capacity is threatened with imminent and irreparable harm, a lawyer may take legal action on behalf of such a person even though the person is unable to establish a client-lawyer relationship or to make or express considered judgments about the matter, when the person or another acting in good faith on that person's behalf has consulted with the lawyer. Even in such an emergency, however, the lawyer should not act unless the lawyer reasonably believes that the person has no other lawyer, agent or other representative available. 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 who undertakes to represent a person in such an exigent situation has the same duties under these Rules as the lawyer would with respect to a client.

[10] A lawyer who acts on behalf of a person with seriously diminished capacity in an emergency should keep the confidences of the person as if dealing with a client, disclosing them only to the extent necessary to accomplish the intended protective action. The lawyer should disclose to any tribunal involved and to any other counsel involved the nature of his or her relationship with the person. The lawyer should take steps to regularize the relationship or implement other protective solutions as soon as possible. Normally, a lawyer would not seek compensation for such emergency actions taken.

REPORTER'S NOTES:

Model Rule 1.14 (2002) corresponds to M. Bar R. 3.6(j) and addresses the unique issues that arise when representing a client with diminished capacity. It is commonly understood that examples of "diminished capacity" include mental retardation, mental illness, physical illness, the aging process, and an example not included in the Maine Bar Rules, minority (youth). Because there is otherwise little substantive difference between the Maine Bar Rule and Rule 1.14, the Task Force recommended the adoption of the structure and language of the Model Rule.

Model Rule 1.14 (2002) is designed to address issues that arise when the lawyer's duty of loyalty and confidentiality to a client with diminished capacity conflict with the lawyer's duty to take protective action on their behalf. The Rule recognizes that, in certain circumstances, the intervention of and disclosure to a third party may be necessary for the protection of a client with diminished capacity. In practice, the line between a lawyer acting as legal counsel and as guardian *ad litem* may sometimes be blurred. The Task Force recognized that the Rule 1.14 describes what has been considered "best practices" in Maine.

The Task Force further recognized that there is a continuum of capacities that may be presented by clients, and thus the application of this rule is very context sensitive. Lawyers must be mindful of his or her responsibilities to the client, and at the same time, be prepared to take actions that are in the client's best interest.

RULE 1.15 *SAFEKEEPING PROPERTY, CLIENT TRUST ACCOUNTS, INTEREST ON TRUST ACCOUNTS*

(a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property.

(b) (1) A lawyer shall deposit into a client trust account any advance payment of fees or retainer and any expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses incurred, except that an advance or retainer may be placed temporarily in a non-trust account, where necessary to effectuate payment by the client's chosen means (e.g., by credit card), so long as such funds are transferred promptly, and no later

than two business days following receipt, into a client trust account. A lawyer shall not accept any advance payment or retainer into a non-trust account if the lawyer has any reason to suspect that the funds will not be successfully transferred into the client trust account within two business days of receipt. All such funds shall be deposited in one or more identifiable accounts maintained in the state in which the law office is situated at a financial institution authorized to do business in such state. No funds belonging to the lawyer or law firm shall be deposited therein except as follows:

(i) Funds reasonably sufficient to pay institutional service charges may be deposited therein; and

(ii) Funds belonging in part to a client and in part presently or potentially to a lawyer or law firm must be deposited therein, but the portion belonging to the lawyer or law firm may be withdrawn when due unless the right of the lawyer or law firm to receive the funds is disputed by the client; in that event the disputed portion shall not be withdrawn until the dispute is finally resolved.

(2) A lawyer shall:

(i) Promptly notify a client of the receipt of the client's funds, securities, or other properties;

(ii) Identify and label securities and properties of a client promptly upon receipt and place them in a safe-deposit box or other place of safekeeping as soon as practicable;

(iii) Maintain complete records of all funds, securities and other properties of a client coming into possession of the lawyer and render prompt and appropriate accounts to the client regarding them, which records shall be kept by the lawyer and shall be preserved for a period of eight years after termination of the representation; and

(iv) Promptly pay or deliver to the client, as requested by the client, the funds, securities, or other properties in the possession of the lawyer which the client is entitled to receive.

(3) Unless the client directs otherwise, when a lawyer or law firm reasonably expects that client funds will earn interest or dividends for the client in excess of the costs incurred to secure such income, such funds shall be deposited in a client trust account that may be either

(i) separate trust account for the particular client or client's matter, on which the earnings net of any transaction costs or other account-related charges will be paid or credited to the client; or

(ii) A pooled trust account with subaccounting which will provide for computation of earnings accrued on each client's funds and the payment thereon, net of any transaction costs or other account-related charges to the client.

(4) All funds of any client held by the lawyer or law firm that are small in amount or held for a short period of time so that they cannot earn interest or dividends for the client in excess of the costs incurred to secure such income shall be deposited in an Interest on Lawyer's Trust Account (IOLTA) account and shall be subject to the following conditions:

(i) The financial institution in which the account is established shall be authorized to do business in Maine, shall be insured by the Federal Deposit Insurance Corporation or National Credit Union Share Insurance Fund, and shall be an eligible institution selected by the lawyer in the exercise of ordinary prudence. "Eligible Institution" is one determined by the Maine Bar Foundation in accordance with Rule 6(a)(2), (3) and (4);

(ii) Funds deposited in the account shall be subject to withdrawal upon request and without delay;

(iii) Within 30 days after the opening of any IOLTA account that is to be maintained hereunder, the lawyer or law firm shall file with the Board of Overseers of the Bar an order directing the financial institution to remit any net interest or dividends that may accrue on the account to the Maine Bar Foundation, a nonprofit corporation incorporated under the laws of the State of Maine that has in force a determination letter from the Internal Revenue Service that it qualifies as an exempt organization under Section 501(c)(3) of the Internal Revenue Code of 1954 as from time to time amended;

(iv) No interest or dividends on the account shall be paid to the lawyer or law firm, and the lawyer or law firm shall not receive any direct or indirect pecuniary benefit by reason of the remittance of interest in accordance with subparagraph (iii); and

(v) The determination of whether funds are small in amount or held for a short period of time so that they cannot earn interest or dividends for the client in excess of the costs incurred to secure such income, shall rest in the sound judgment of the lawyer or law firm. No lawyer shall be charged with an ethical impropriety or other breach of professional conduct based on the good faith exercise of such judgment.

(5) A lawyer or a law firm, holding funds of the United States government that by law may not earn interest shall deposit those funds in one or more insured, non-interest bearing accounts, whether or not the lawyer or firm has made the election provided by this paragraph for other client funds.

(6) If the circumstances on which a lawyer or law firm has based a determination to deposit client funds in an account under paragraph (4) of this subdivision change, so that interest or dividends in excess of costs may reasonably be expected to be earned on such funds, the lawyer or law firm shall transfer the principal amount originally deposited to the appropriate account established under paragraph (3) of this subdivision.

(7) For purposes of this rule, the following definitions apply:

(i) "Interest or dividends in excess of costs" means the net of interest or dividends earned on a particular amount of one client's funds over the administrative costs allocable to that amount. In estimating the gross amount of interest or dividends to be earned, 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 that portion of the following costs properly allocable to a particular amount of one client's funds paid to a lawyer or law firm:

(A) Financial institutional service charges for opening, maintaining, or closing an account, or accounting for the deposit and withdrawal of funds and payment of interest or dividends.

(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 or dividends; and obtaining information and preparing or forwarding any returns or reports that may be required by a revenue taxing agency as to the interest or dividends earned on a client's funds.

(c) [Reserved – included in (b), above.]

(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) Upon termination of representation, a lawyer shall return to the client or retain and safeguard in a retrievable format all information and data in the lawyer's possession to which the client is entitled. Unless information and data are returned to the client or as otherwise ordered by a court, the lawyer shall retain and safeguard such information and data for a minimum of eight (8) years, except for client records in the lawyer's possession that have intrinsic value in the particular version, such as original signed documents, which must be retained and safeguarded until such time as they are out of date and no longer of consequence. A lawyer may enter into a voluntary written agreement with the client for a different period. In retaining and disposing of files, a lawyer shall employ means consistent with all other duties under these rules, including the duty to preserve confidential client information.

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 trust accounts. Separate trust accounts may be warranted 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 any record keeping rules established by law or court order. See, e.g., ABA Model Financial Recordkeeping Rule.

[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 bank service charges 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 matter shall be submitted to mandatory fee arbitration, in accordance with Rule 1.5(g) and former Maine Bar Rule 9. 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. Participation in the Maine Lawyers' Fund for Client Protection is a condition of continuing membership in the Maine Bar, for every member, including nonresident members and full-time Justices and Judges of the courts of Maine, and inactive members for the first three years after they reach inactive status.

[7] Subsection (f) of Rule 1.15 is derived from M. Bar R. 3.4(a)(4), as adopted by the Maine Supreme Judicial Court on August 1, 2004. The Rule is intended to provide lawyers (or their successors in the event of a cessation of practice) with a safe harbor for the retention and destruction of client files following the termination of representation. If the attorney has not returned to the client documents and data to which the client is entitled, the rule is intended to cover information and data in the lawyer's possession to which the client is entitled under these rules, whether contained in tangible client files or other media where client information is stored. The Rule establishes two time periods for the retention and destruction of such client information and data. Records in the lawyer's

possession that have intrinsic value in the particular version, such as original signed documents, must be retained indefinitely until such time as they are clearly out of date and no longer of consequence. All other client information and data must be retained for a period of eight years from the termination of representation, after which they may be destroyed, unless subject to a court order or voluntary written agreement with the client. Eight years was selected because it is two years longer than the typical limitations period for professional malpractice actions. However, in cases where the statute of limitations for commencing professional liability actions against the lawyer is longer than six years, a lawyer would be well advised to retain such information for a minimum of two years after the expiration of the limitations period even though it is not required by the rule. This Rule is not intended to modify the lawyer's obligations upon withdrawal from employment.

[8] Income on IOLTA Accounts is paid to the Maine Bar Foundation, a 501(c)(3) Organization, and thus is not made available to the client or third person whose funds are deposited in this type of client trust account. In determining whether client or third person funds must be deposited in an IOLTA account instead of a non-IOLTA client trust account, a lawyer should consider the following factors:

(1) the amount of interest or dividends the funds would earn during the period that they are expected to be deposited in light of (a) the amount of the funds to be deposited; (b) the expected duration of the deposit, including the likelihood of delay in the matter for which the funds are held; and (c) the rates of interest or yield at financial institutions where the funds are to be deposited;

(2) the cost of establishing and administering non-IOLTA accounts for the client or third person's benefit, including service charges or fees, the lawyer's services, preparation of tax reports, or other associated costs;

(3) the capability of financial institutions or lawyers to calculate and pay income to individual clients or third persons; and any other circumstances that affect the ability of the funds to earn a net return for the client or third person.

This rule should be read in connection with former M. Bar R. 6(a), which sets forth eligibility requirements of financial institutions where client funds are deposited.

REPORTER'S NOTES:

Model Rule 1.15 (2002) corresponds to M. Bar R. 3.6(e). Both rules address a lawyer's duty to account for and return clients' property. Whether deemed an agent, an agent with fiduciary duties, or a trustee, lawyers have duties to account for and return clients' property. In addition to these two principal duties, lawyers have certain obligations with respect to property when the rights to its ownership are in dispute. Further, lawyers have ministerial obligations with respect to recordkeeping.

Model Rule 1.15 is substantively consistent with M. Bar R. 3.6(e), as well as with the RESTATEMENT (THIRD) § 44 (safeguarding and segregating property), § 45 (surrendering possession of property) and § 46 (documents relating to a representation).

The Task Force recommended adding the requirement that records of accounts of client funds be preserved for a minimum of eight years.

The Task Force further recommended the inclusion of new subparagraph 1.15(f), which speaks to the issue of a lawyer's retention of a client's files. The rule requires that after representation is terminated, a lawyer must keep all information and data of the clients for a minimum of eight years (or longer if the statute of limitation for a cause of action in which such property may come into evidence exceeds six years). There is an added requirement for client records with intrinsic value (such as original, signed documents). Subparagraph (f) was recommended by the Advisory Committee on Professional Responsibility, and adopted by the Supreme Judicial Court in July, 2005.

Finally, 1.15 reflects the Maine Bar Foundation's comprehensive review of Maine's IOLTA (Interest on Attorney Trust Accounts) rules and the Supreme Judicial Court's adoption of amendments to those rules. See Rules amendments at SJC-51 and 2008 ME. Rules 07. Model Rule 1.15(b) requires lawyers to establish accounts known as IOLTA accounts, which generate interest on pooled accounts made up of individual deposits which are nominal in amount or expected to be held for a short period of time and which meet the requirements of former M. Bar R. 6(a)(3). The effect is to make participation in IOLTA mandatory, and interest and dividend rates on IOLTA accounts comparable with similarly constituted bank accounts. Maine Bar Rule 6(a)(2)-(3) is the Board of Bar Overseers administrative rule regarding IOLTA accounts, and includes provisions defining bank eligibility.

After discussion, the Task Force recommended the adoption of the language and structure of Rule 1.15, with the above noted additions and modifications.

Advisory Note – November 2011

The deleted phrase clarifies that Rule 1.15(f) pertains to an attorney's responsibilities to a former client when the attorney-client relationship ends. In circumstances when a proxy is appointed, M. Bar R. 7.3(f) governs.

Advisory Committee's Note – June 2014

Rule 1.15(b) has been amended to clarify that a lawyer can accept an advance paid by credit card or other means that requires initial deposit into the lawyer's operating account, so long as: (a) the lawyer promptly places the advanced funds into the trust account, and (b) the lawyer has no reason to believe that the funds will be meaningfully exposed to the lawyer's creditors while in the operating account or that there is any practical risk that the funds will not be successfully transferred promptly into the trust account. The Committee intends that Opinion No. 173 (Mar. 7, 2000) of the Professional Ethics Commission shall not apply to credit card payments accepted in compliance with this amendment. The Committee believes that the benefit to clients and lawyers of being able to choose payment by credit card or other means that might require temporary deposit into a lawyer's operating account warrants the slight risk that such deposit entails, since those risks can be mitigated with the controls the rule provides: the exposure in the operating account must be very short-lived, and such deposit is prohibited if the lawyer is aware of any meaningful risk to such funds from deposit into the operating account.

The Committee intends to maintain a bright line separating earned fees from unearned fees (which must be deposited into a trust account). The Committee intends the concept of a fee that is "earned, subject to refund," as described in Opinion No. 206 (Dec. 12, 2012) of the Professional Ethics Commission, to have no place in the rules. A fee that is subject to future refund if the client decides to terminate the representation or not to make use of anticipated future services is an advance, not a nonrefundable fee, and must be placed in a trust account, even though the parties think it highly likely that the future services will in fact be rendered. If the parties intend for the lawyer to treat funds as the lawyer's own before services are rendered, the lawyer must make an agreement for a nonrefundable fee that complies with Rule 1.5(h).

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 and rules 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. This subsection (c) does not apply to the automatic withdrawal of a lawyer upon completion of a limited representation made pursuant to Rule 1.2.

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, including giving reasonable notice to the client, allowing time for employment of other counsel, refunding any advance payment of fees or expenses that has not been earned or incurred, and complying with Rule 1.15(f) concerning the information and data to which the client is entitled.

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. 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 may also 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.

[8A] An attorney's limited appearance on behalf of an otherwise self-represented client made pursuant to Rule 1.2 is self-executing. Withdrawal is automatic upon completion of a limited representation. Consequently, the limited

appearance itself constitutes notice of termination of representation and does not require the consent of a tribunal.

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. See Rule 1.15.

REPORTER'S NOTES:

Model Rule 1.16 (2002) corresponds to M. Bar R. 3.5. Both rules address the professional responsibilities of a lawyer upon declining, terminating or withdrawing from a client representation. Because there are few substantive differences between the two rules, and there was agreement that the Model Rule was more clearly organized, the Task Force recommended the adoption of the structure and language set forth in Model Rule 1.16 (2002). Lawyers are advised, however, to consult the specific provisions found in Maine procedural rules which address termination of and withdrawal from representation.

Pursuant to Model Rule 1.16, a lawyer may not accept representation in a matter, and must withdraw from a matter if representation has commenced, if the representation cannot be performed competently and in accordance with the rules of professional responsibility. Impliedly, a lawyer may not accept an engagement or must withdraw if a conflict-of-interest exists or later arises. A lawyer must also withdraw upon discharge by the client. Model Rule 1.16 (a) is substantively in accord with M. Bar R. 3.5(b).

Model Rule 1.16(b) (2002) sets forth the circumstances under which a lawyer may withdraw from a representation (permissive withdrawal). It lists seven specific reasons for a lawyer withdrawing, with the last reason being, if "other good cause for withdrawal exists." These specific reasons are substantively consistent with the specific circumstances for withdrawal set forth in M. Bar R. 3.5(c)(1) – (11). Both M. Bar R. 3.5 and Model Rule 1.16 are substantially in accord with The RESTATEMENT (THIRD), § 32. The RESTATEMENT, however, adds a further level of analysis to the matter of permissive withdrawal. It provides that in certain instances of permissive withdrawal, a lawyer may not withdraw if the "harm that withdrawal would cause significantly exceeds the harm to the lawyer or others in not withdrawing."

The balancing test implied in the RESTATEMENT highlights the tension between permissive withdrawal under Rule 1.16(b) and the authority of the court to deny permission to withdraw, presumably in the "interest of justice." The limited representation ("unbundling") process adhered to in Maine requires the acknowledgment that permission of the court is not required when, by its nature, the termination of limited representation is self-executing. See Rule 1.16(c).

M. Bar R. 3.4(g)(ii) states that "a lawyer may commence representation in contemplated or pending litigation if another lawyer in the lawyer's firm is likely or ought to be called as a witness," unless such representation is precluded by the conflict-of-interest rules. The Model Rule equivalent to this rule is not included in Rule 1.16, but is found in Model Rule 3.7(b) (2002).

Advisory Note – November 2011

The changes to Rule 1.16(d) render it consistent with Rule 1.15(f), as both rules apply to an attorney's responsibilities when the attorney-client relationship terminates. The changes to Rule 1.16(d) invite the attorney to consult Rule 1.15(f) concerning the disposition and retention of information and data in the lawyer's possession to which the client is entitled.

RULE 1.17 *SALE OF LAW PRACTICE*

A lawyer or a law firm may sell or purchase a law practice, including good will, if the parties comply with the other applicable provisions of these rules, and the conditions of this rule are satisfied.

(a) The selling attorney or each attorney in the selling firm has retired, become disabled or has died; or the selling attorney or each attorney in the selling firm has ceased to engage in the private practice of law in the State of Maine.

(b) If the seller is or was a solo practitioner, then the entire law practice must be sold as a single unit. If the seller is or was a law firm, then the entire practice of the firm must be sold as a single unit. The entire law practice, for purposes of this rule, shall mean all client files, for open and closed engagements, excepting only those cases in which a conflict-of-interest is present or may arise.

(c) The purchaser, who must be registered with the Board as an active member of the Bar of the State of Maine, assumes the obligations of an attorney to the client or clients whose files are transferred.

(d) The seller gives the following notices:

(1) written notice to each of the seller's clients and to the Board of Overseers of the Bar regarding:

(A) the proposed sale including the name of the purchasing attorney or the names of the attorneys who practice within the purchasing firm;

(B) the client's right to retain other counsel or to take possession of the file;

(C) 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; and

(D) the terms of any proposed change in the fee arrangement authorized by paragraph (e).

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 single justice of the Maine Supreme Judicial Court, which shall not issue without the Board of Overseers of the Bar having been given notice and opportunity to be heard. 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.

(2) Further notice shall be given by publication in a newspaper of general circulation in each county in which seller has engaged in the practice of law, at least thirty days before the anticipated transfer of files. Such notice shall include the anticipated date of sale and identification of the purchasing lawyer or firm.

(e) The fees charged clients shall not be increased by reason of the sale.

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, 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 be sold is satisfied if the seller in good faith makes the entire 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.

[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 that 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 jurisdiction. Its provisions, therefore, accommodate the lawyer who sells the practice on the occasion of moving to another state.

[5] [Reserved]

Sale of Entire Practice

[6] The Rule requires that the seller's entire 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 Model 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 single Justice of the Maine Supreme Judicial Court authorizing their transfer or other disposition. The Board of Overseers of the Bar must be given notice and an opportunity to be heard in any such proceeding. 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.

[9] All 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 arrangements 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 of a deceased, disabled or disappeared lawyer. Thus, the seller may be represented by a non-lawyer 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:

Model Rule 1.17 (2002) addressing the issue of the sale of a law practice, corresponds to M. Bar R. 3.14. Until recently in Maine, lawyers were forbidden to sell all or part of their law practices, other than tangible items such as furnishings, equipment, books and leases. Because clients are not the "property" of the lawyer, they could not be "sold." Moreover, good will was not recognized as an asset of a law practice. Firms could, however, buy-out withdrawing or retiring partners, return their capital and continue to pay distributions and provide benefits to such departing partners, thus affirmatively recognizing that a departing partner leaves behind some value in the firm. Unfortunately, unless solo practitioners joined in partnerships, upon their departure from their "firm" there was no opportunity for them to capture the value they created in their firm.

In 2000 the Maine Supreme Court Advisory Committee on the Rules of Professional Responsibility began consideration of what was to become M. Bar R. 3.14. The Advisory Committee's deliberations focused on the requirement that seller cease the private practice of law in order to be eligible to "sell" his/her practice. After much discussion, the Advisory Committee recommended allowing the sale of an entire law practice to a single purchaser, subject to narrowly specified exceptions. The Advisory Committee also recommended that Bar Counsel, on behalf of the Board of Overseers, be involved in such sales at an early stage in the process, in order to provide lawyers with assistance in avoiding unintended violations of the rule. (The Board of Overseers is already the central repository of information on attorneys who have ceased practicing law pursuant to M. Bar R. 6(c)(1) and (2).)

After a review and discussion of the Advisory Committee notes on M. Bar R. 3.14, the Task Force recommended the adoption of the form of Model Rule 1.17 (2002), substantively revised to reflect the recent revision of M. Bar R. 3.14.

RULE 1.18 *DUTIES TO PROSPECTIVE CLIENT*

(a) A person who 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 1.9 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.

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, 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).

[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 non-representation 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:

Model Rule 1.18 (2002), addressing duties to prospective clients, has no Maine Bar Rule equivalent, although new M. Bar R. 3.6(h)(1)(iv), effective July 1, 2005, addresses the lawyer's duty not to disclose or use confidential information received from a prospective client.

The Maine Professional Ethics Commission has addressed issues relevant to the issue of a lawyer's duty to prospective clients. It has noted that a prospective client who consults with a lawyer is a "client" of the lawyer for the purposes of confidentiality, even in the absence of a formal engagement. The Commission has also indicated that there were at least two instances where a prospective client will not be deemed to have communicated a confidence or secret, and thus the lawyer would not be disqualified from representing the opposing party. The first would occur if confidences or secrets were revealed when a prospective client contacted a lawyer in an effort to disqualify the lawyer from representing the opposing party. In that instance the client would not be deemed to have disclosed such a confidence or secret in the context of seeking legal assistance. The second would be where the prospective client was clearly warned that any information disclosed in the initial contact would not be considered confidential and would be given at the prospective client's peril. These opinions are generally in accord with Model Rule 1.18 (2002) (See Comment [5]).

Paragraph (a) defines a prospective client as one who discusses with a lawyer the possibility of forming a lawyer-client relationship. Paragraph (b) states that even though no attorney-client relationship is established, the lawyer still has an obligation not to use or reveal confidential information learned through the consultation, except as would be permitted by Rule 1.9 with respect to a former client. Paragraphs (c) and (d), read together, provide that a lawyer who has obtained confidential information from a prospective client shall not represent another person with interests materially adverse to those of the prospective client in the same or a substantially related matter, if the information could be significantly harmful to the prospective client. This disqualification is removed if the lawyer has informed written consent from both persons. The lawyer's law firm is also disqualified from representation unless (1) the lawyer who received the information took reasonable steps to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client, (2) the lawyer is screened from the matter and takes no part in the fee from the matter, and (3) written notice is promptly given to the prospective

client. The screening of lawyers to avoid disqualification in this context is a departure from the Maine Bar Rules.

The Task Force recommended adoption of Model Rule 1.18 (2002). There was consensus that this Rule encompasses several principles recognized under Maine's current rules. Moreover, it reflects a sound approach to the ethical duties of a lawyer to prospective clients.

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, emotional and political factors, that may be relevant to the client's situation.

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 narrow legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people, are predominant. Purely technical legal advice, therefore, can sometimes be inadequate. 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 inform the client of forms of dispute resolution that might constitute reasonable alternatives to litigation. 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.

[6] As noted in Rule 1.7 Comment [12] and Rule 1.8 Comment [17], Maine has not adopted the ABA Model Rules' categorical prohibition on a lawyer forming a sexual relationship with an existing client. Such a rule is unnecessary to address true disciplinary problems and it threatens to make disciplinary issues out of conduct that ought not be a matter of attorney discipline. However, the lack of a categorical prohibition should not be construed as an implicit approval of such relationships, which may affect a lawyer's ability to provide competent legal advice. Lawyers should bring a degree of objectivity with respect to their clients' matters to the representation. A sexual relationship may adversely impact a lawyer's ability to exercise independent judgment and render candid advice to a client.

REPORTER'S NOTES:

Model Rule 2.1 (2002) is a separate and independent articulation of the principle that a lawyer has an obligation to provide independent, candid advice to his/her clients. There is no direct analog under the Maine Bar Rules, although Rule 2.1 is generally consistent with current Maine practice. Rule 2.1 is also in accord with RESTATEMENT (THIRD) § 94(3).

Model Rule 2.1 (2002) has received a fair amount of attention from commentators who have expressed a concern about factors that may influence a lawyer's independence. Among the issues addressed include third party influences on a lawyer's independent judgment, and the compromise of a lawyer's independent judgment that may result from a lawyer/client sexual relationship. The Task Force recognized the importance of lawyers of caring about their clients and causes, but was mindful of the risk of a lawyer losing his or her objectivity.

Because Rule 2.1, in affirmatively recognizing the role of a lawyer as an independent and candid advisor, is in accord with Maine practice, the Task Force recommended that Model Rule 2.1 (2002) be adopted with minor modification as written.

RULE 2.2 *[RESERVED IN THE MODEL RULES]*

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, confidences and secrets are otherwise protected by Rule 1.6.

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 and secrets 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 that 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] Confidences and secrets are 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 confidences and secrets necessary 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 Auditors' 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:

Model Rule 2.3 (2002) sets forth the approach to be taken by lawyers asked to provide evaluations or render legal opinions to third parties. There is no corresponding provision in the Maine Bar Rules, although Model Rule 2.3 (2002) is in accord with the legal opinion practice that has long been customary in Maine.

Lawyers often provide opinion letters concerning a client for the use of third parties. Commonly, these opinion letters are issued in the context of representing a party or parties to a transaction. Rule 2.3 recognizes that a lawyer's evaluation (opinion) for the use of third parties is an important part of the representation of his or her own client. The Rule provides guidance as to how to discharge such responsibility.

Rule 2.3(a) corresponds to Rule 1.2's prescription that a "lawyer may take such action on behalf of the client as impliedly authorized to carry out the representation." Rule 2.3(c) affirms that unless disclosures of clients' confidences and secrets are authorized, any confidences and secrets relating to the evaluation are protected by Rule 1.6. The Task Force recommended that Rule 2.3(c) include the phrase "confidences and secrets," consistent with the recommended formulation in Rule 1.6.

The question of how much investigation a lawyer should conduct before providing a legal opinion is not squarely and thoroughly addressed in Model Rule 2.3. The Task Force noted that lawyers will find guidance with respect to this and related questions in various reports and articles published by the American Bar Association and state bar associations (*see e.g.*, TriBar Opinion Comm., Third Party "Closing" Opinions, 53 Bus. Law 591 (1998); see generally, The RESTATEMENT (THIRD) of the Law Governing Lawyers cmt a. (2000) ("[c]ustom and practice determining the scope of diligence in represented situations is articulated in bar-association reports, treatises and articles")).

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.

(c) The role of third party neutral does not create a lawyer-client relationship with any of the parties and does not constitute representation of any of them. The lawyer shall not attempt to advance the interest of any of the parties at the expense of any other party.

(d) The lawyer shall not use any conduct, discussions or statements made by any party in the course of any alternative dispute resolution process to the disadvantage of any party to the process, or, without the informed consent of the parties, to the advantage of the lawyer or a third person.

(e) When acting as a mediator, the lawyer shall undertake such role subject to the following additional conditions:

(1) The lawyer must clearly inform the parties of the nature and limits of the lawyer's role as mediator and should disclose any interest or relationship likely to affect the lawyer's impartiality or that might create an appearance of partiality or bias. The parties must consent to the arrangement unless they are in mediation pursuant to a legal mandate.

(2) The lawyer may draft a settlement agreement or instrument reflecting the parties' resolution of the matter but must advise and encourage any party represented by independent counsel to consult with that counsel, and any unrepresented party to seek independent legal advice, before executing it.

(3) The lawyer shall withdraw as mediator if any of the parties so requests, or if any of the conditions stated in this subdivision (e) is no longer satisfied. Upon withdrawal, or upon conclusion of the mediation, the lawyer shall not represent any of the parties in the matter that was the subject of the mediation, or in any related matter.

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. 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. 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:

Model Rule 2.4 (2002) addresses the professional obligations of a lawyer acting as a third party neutral. This Rule corresponds to, but is somewhat broader than, M. Bar R. 3.4(h), which addresses the obligations of a lawyer who is acting as a mediator. Given the breadth of potential alternative dispute resolution (ADR) services, and given the lack of specific definition among various types of ADR services, the Task Force recommended the adoption of the format and substance of Model Rule 2.4 modified to include the more specific rules related to mediation found in M. Bar R. 3.4(h)(1) - (6).

Rule 2.4(c) and (d) incorporate the specific language found in M. Bar R. 3.4(h)(2) and (d), broadened to apply to all alternative dispute resolution processes. These provisions make clear that a lawyer serving as a neutral does not enter into an attorney-client relationship with any of the parties to the ADR procedure and that a lawyer may not use any conduct, discussions or statements made by any party to the ADR process to the disadvantage of any other parties to such process.

The language set forth in Rule 2.4(e) describing the role and obligations of a lawyer acting as a mediator is derived from M. Bar R. 3.4(h), consistent with Maine Rule of Civil Procedure 16B. The prohibition against a lawyer engaging in the representation of a party who has appeared as part of the ADR process (see M. Bar R. 3.4(h)) is addressed in Model Rule 1.12 (2002).

The Task Force recommended the adoption of Rule 2.4, as set forth above. It incorporates not only the general provisions of the Model Rule (2002), but also elaborates upon them and includes the more specific mediation-related provisions of M. Bar R. 3.4(h).

ADVOCATE

RULE 3.1 *MERITORIOUS CLAIMS AND CONTENTIONS*

(a) A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a non-frivolous basis in law and fact for doing so, 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.

(b) A lawyer shall not report or threaten to report misconduct to a criminal, administrative or disciplinary authority solely to obtain an advantage in a civil matter.

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:

Model Rule 3.1 (2002), addressing the lawyer's role as an advocate, is substantively consistent with M. Bar R. 3.7(a). Moreover, Rule 3.1 is consistent

with the requirements imposed upon a lawyer by the Maine Attorney's Oath found in 4 M.R.S. § 806, which has been held by the Maine Supreme Judicial Court to impose substantive ethical and legal restrictions on lawyers. Model Rule 3.1 is arguably broader than M. Bar R. 3.7(a), however, in barring lawyers from taking frivolous positions, even if they are not offensive, harassing, or taken with malicious intent. It is not considered frivolous for a party to a proceeding to compel adverse parties to meet their required burdens of proof. After discussion, the Task Force thought this was a positive modification and recommended adoption of Model Rule 3.1 (2002).

Advisory Note – November 2011

This Amendment addresses a transitional issue from the former Bar Rules to the Maine Rules of Professional Conduct. Former Maine Bar Rule 3.6(c) proscribed threatening prosecution: "A lawyer shall not present, or threaten to present, criminal, administrative, or disciplinary charges solely to obtain an advantage in a civil matter." The ABA Model Rules of Professional Conduct do not directly prohibit this conduct. ABA Formal Ethics Opinions 92-363 and 94-383 suggest the conduct is addressed by Model Rules 3.1 and 4.1(a) & (b). The omission of explicit language in the Maine Rules of Professional Conduct by the Ethics 2000 Task Force was not to be read as condoning the previously proscribed conduct. This addition of subsection (b) gives expression to the continuing prohibition. The rule as promulgated clarifies that prosecutors may engage in good faith negotiations to resolve multiple related matters.

RULE 3.2 *EXPEDITING LITIGATION*

A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.

COMMENT

[1] Dilatory practices bring the administration of justice into disrepute. Although there will be occasions when a lawyer properly may 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:

Model Rule 3.2 (2002), prohibiting dilatory practices of lawyers, has no direct analog in the Maine Bar Rules, although it overlaps and is consistent with M. Bar R. 3.6(a)(3) (proscribing a lawyer's neglect of a legal matter entrusted to him or her). In light of the Maine trial courts' time-focused management of dockets, Model Rule 3.2 will have limited effect on the progress of litigation. However, it remains the lawyer's obligation to move litigation to conclusion in a timely manner. The Task Force recommended the adoption of Model Rule 3.2 (2002), as written.

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) misquote to a tribunal the language of a book, statute, ordinance, rule or decision or, with knowledge of its invalidity and without disclosing such knowledge, cite as authority, a decision that has been overruled or a statute, ordinance or rule that has been repealed or declared unconstitutional;

(3) offer evidence that is 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 that the lawyer reasonably believes is false, except a lawyer in a criminal matter may not refuse to offer the testimony of a defendant, unless the lawyer knows from the defendant that such testimony 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 that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

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 not knowingly misrepresent pertinent legal authorities.

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.

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 permitted by Rule 1.6.

REPORTER'S NOTES:

Model Rule 3.3 (2002), addressing a lawyer's obligation to be candid with a tribunal is generally in accord with M. Bar R. 3.7 and with the Maine Attorney's Oath (4 M.R.S. § 806). With regard to any statement of fact or law, the attorney has a positive obligation to advise the tribunal of the applicable facts and law and not to misrepresent the status of the law or authority being utilized in order to support a legal argument. With some modification, the Task Force recommended the adoption of Model Rule 3.3.

Model Rule 3.3 (2002) subparagraph (a)(1) is substantively consistent with Maine Bar Rules 3.7(a) and (e)(1)(i).

Members of the Task Force observed that Rule 3.3(a)(2) is a substantive departure from the corresponding rule in Maine (M. Bar R. 3.7(e)(2)(i)). Two specific concerns were articulated: (i) the difficulty of determining whether authority is "directly adverse" and "controlling," and (ii) the added burden such a disclosure of adverse authority places on a lawyer as advocate. While the language of the rule requires disclosure of only authority "known" to the lawyer, some jurisdictions have held that this Rule implies a duty to learn of adverse authority. Moreover, it has not been uniformly clear what is meant by a "controlling jurisdiction." This has been held to mean cases that originate from a higher court, as well as cases considered persuasive precedent. The Task Force thought that Model Rule 3.3(a)(2) (2002) placed too ambiguous a burden on attorneys, and thus recommended the adoption of language identical in substance to M. Bar R. 3.7(e)(2)(i) in its place. To avoid any ambiguity with respect to the authority involved, the Task Force recommended the addition of "rules" and "ordinances" to the existing text of M. Bar R. 3.7(e)(2)(i).

M. Bar R. 3.3(a)(3) incorporates current M. Bar R. 3.7(e)(1)(i) and (2)(ii). It is also consistent with the specific requirements imposed by 4 M.R.S. § 806 and case law interpreting that statute. Model Rule 3.3(a)(3) provides that reasonable

measures to remedy the proffer of materially false evidence include, if necessary, disclosure to a tribunal. Similarly, Model Rule 3.3(b) provides that reasonable measures to remedy criminal or fraudulent conduct relating to a proceeding include, if necessary, disclosure to a tribunal. Model Rule 3.3(c) explicitly states that, under certain clearly specified circumstances, a lawyer's obligation to disclose to a tribunal, information otherwise protected under Rule 1.6 (Confidentiality of Information) supersedes the lawyer's obligation of confidentiality under Rule 1.6. The Task Force noted, however, that adoption of Model Rules 3.3(a)(3) and 3.3(b), would resolve an arguable conflict between M. Bar R. 3.6(h)(1) (prohibiting the disclosure of a confidence or secret, without informed written consent of the client, or except as permitted by the Maine Code of Professional Responsibility or as required by law or by order of court) and the Attorney's Oath (". . .you will do no falsehood nor consent to the doing of any in court, and that if you know of an intention to commit any, you will give knowledge thereof to the justices of the court or some of them that it may be prevented"). In formulating its recommendation to adopt Model Rules 3.3(a)(3) and 3.3(b), the Task Force recognized the need to balance the interests of client confidentiality with the importance of candor to a tribunal.

Under Model Rule 3.3 subparagraph (c), a lawyer's obligation of candor applies until the case is concluded. Under M. Bar R. 3.6(h)(4) and (5), however, it was not clear whether a lawyer's obligation of candor is in force until the conclusion of the case, or whether such obligation ends at the time the lawyer's representation of the client is terminated.

Model Rule 3.3(d) does not have a direct Maine analog, but is consistent with requirements imposed upon an attorney when dealing with a tribunal. When the attorney is appropriately acting in an *ex parte* situation, as in an *ex parte* request for attachment, the lawyer's obligation of candor to the court includes a recitation of all material facts, regardless of whether or not those facts are adverse to the attorney's client.

The Task Force recommended that Rule 3.3 be adopted in accordance with the structure of the Model Rule, but modified to reflect the above expressed issues and concerns.

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) [Reserved]

(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.

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. See also Rule 4.4 (Respect for Rights of Third Persons; Inadvertent Disclosure).

[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 data stored electronically. 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 (except for expenses and reimbursement for lost wages) 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:

Model Rule 3.4 (2002) sets forth a lawyer's duties to opposing parties and their counsel in the context of litigation. Rule 3.4 corresponds to and is generally in accord with Maine Bar Rules 3.7(b), 3.7(e)(2)(ii)-(v), and 3.7(g). The Task Force observed that while a lawyer may be subject to professional discipline for offensive behavior in a litigation context, sanctions such as disqualification, exclusion of evidence, and the payment of fines, costs, and attorneys' fees may also be imposed on the lawyer by the judge hearing the matter.

The Task Force observed, in essence, Rule 3.4 recognizes fairness as the linchpin of the adversary process, and requires lawyers behave in a way consistent with that ideal. Such behavior means lawyers may not alter, destroy or conceal evidence, or otherwise obstruct another's access to evidence; falsify evidence; elicit false testimony or offer unlawful inducement to witnesses; disobey an obligation to a tribunal; engage in misconduct at trial; or ask a non-client to refrain from voluntarily giving relevant information to another (subject to certain noted

exceptions). Subsection (d), pertaining to discovery, was omitted because the courts have, under their procedural rules, authority to resolve such claims and to take appropriate action.

Because these dictates are consistent with Maine Bar Rules and practice, the Task Force recommended adoption of Rule 3.4 as written.

RULE 3.5 *IMPARTIALITY AND DECORUM OF THE TRIBUNAL*

A lawyer shall not:

(a) seek to influence a judge, juror, prospective juror or other tribunal official by means prohibited by law; nor shall a lawyer, directly or indirectly give or lend anything of value to a judge, tribunal official, or employee of a tribunal unless the personal or family relationship between the lawyer and the judge, tribunal official, or employee is such that gifts are customarily given and exchanged;

(b) communicate *ex parte* with such a person, directly or indirectly, during the proceeding, concerning such proceeding, unless authorized to do so by law or court order;

(c) communicate with a juror or prospective juror after discharge of the jury if:

(1) the communication is prohibited by law or court order;[2]

(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 conduct intended to disrupt a tribunal; or

(e) fail to reveal promptly to the court knowledge of improper conduct by a juror, prospective juror, or member of the jury pool, or by another

[2] There is a distinction with respect to communication with a juror or prospective juror, after discharge of the jury panel, under state and federal law in Maine.

toward a juror or member of the jury pool or a member of a juror's or jury pool member's family.

Paragraph 3.5(a) does not preclude contributions to election campaigns of public officers.

COMMENT

[1] Many forms of improper influence upon a tribunal are proscribed by criminal law. Others are specified in the ABA Model 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, masters or jurors, unless authorized to do so by law or court order. In particular, in the absence of opposing counsel, a lawyer shall not directly or indirectly communicate with or argue before a judge or tribunal upon the merits of a contested matter pending before such judge or tribunal, except in open court; nor shall the lawyer, without furnishing opposing counsel with a copy thereof, address a written communication to a judge or tribunal concerning the merits of a contested matter pending before such judge or tribunal. Subparagraph (b) does not preclude communications permitted by rule of court. For purposes of subparagraph (b), the term "opposing counsel" includes a party who has no counsel.

[3] A lawyer may on occasion want to communicate with a juror or prospective juror after the jury has been discharged. The lawyer may do so unless the communication is prohibited by law or a court order (as it is with federal jurors in Maine) 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. At no time shall a lawyer connected with a trial of a case, communicate extra judicially, directly or indirectly, with a juror or anyone the lawyer knows to be a member of the pool from which the jury will be selected, or with any member of such person's family.

[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 disruptive conduct applies to any proceeding of a tribunal, including a deposition. See Rule 1.0(m).

REPORTER'S NOTES:

Model Rule 3.5 (2002) is generally in accord with existing Maine law, but is somewhat less specific than the analogous Maine Bar Rules. The corresponding Maine Bar Rules are M. Bar R. 3.7(e)(2)(vi), 3.7(h)(1) and 3.7(h)(2). Because the Task Force thought it was a good idea to offer more explicit guidance on the issue of a lawyer's obligation to be impartial and his or her responsibility to exercise decorum in the context of appearing before a tribunal, it recommended adoption of Model Rule 3.5 (2002) and its corresponding Comments, as revised to reflect existing Maine law and practice.

The Task Force wanted to draw attention to a clear distinction between state and federal law with respect to the issue of communication with a juror or prospective juror, following such juror's discharge from the jury. While post-discharge communication is allowed under state law, it is prohibited in Maine under federal law.

RULE 3.6 *TRIAL PUBLICITY*

A lawyer involved in the prosecution or defense of a criminal matter or in representing a party to a civil cause shall not make or participate in making any extra-judicial statement which poses a substantial danger of interference with the administration of justice.

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.

[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] [Reserved]
[5] [Reserved]
[6] [Reserved]
[7] [Reserved]
[8] [Reserved]

REPORTER'S NOTES:

Model Rule 3.6 (2002) addresses the issue of extra judicial speech and sets forth specific limits on out of court public statements by lawyers participating in an investigation or litigation. The Task Force was mindful, however, of the risks associated with predicting the types of speech that may or may not be ultimately prejudicial to a fair trial. Accordingly, the Task Force recommended the adoption of the language found in M. Bar R. 3.7(j) in lieu of Model Rule 3.6 (2002). The recommendation attempts to strike a balance between three competing concerns: (i) the right to a fair trial without prejudicial interference; (ii) the free speech rights of attorneys; and (iii) the public interest in, and right to know about, judicial proceedings.

RULE 3.7 *LAWYER AS WITNESS*

(a) A lawyer shall not act as advocate at a tribunal 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 tribunal 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.

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 proceeding with new counsel to resolve that issue. Moreover, in such a situation

the presiding officer 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 whether it is a bench, jury trial, or other proceeding 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 proceeding 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 proceeding 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:

Model Rule 3.7 (2002) is substantively in accord with M. Bar R. 3.4(g)(1), but there are some distinctions. Model Rule 3.7 (2002) resolves the conflict between M. Bar R. 3.4(g)(1) and M. Bar R. 3.5. Model Rule 3.7 (2002) addressed the issue of a lawyer as a witness at a trial. The Task Force recommended the rule's scope be broadened to address the issue of a lawyer as a witness before a tribunal. See Model Rule 1.0(m).

Model Rule 3.7(a) prohibits a lawyer from acting as an advocate in a proceeding before a tribunal if the lawyer is likely to be a necessary witness, subject to three specific exclusions. In addition to the three exclusions set forth in the Rule, if ordered to do so by the tribunal, it is permissible for a lawyer to testify. Necessary but minor testimony may be given by the lawyer if disqualification of the lawyer as an advocate would result in substantial hardship to the client (see Model Rule 3.7(a)(3)). It may be the case that a judge in a non-jury trial may use different factors to decide whether a lawyer may testify, including but not limited to the factors set forth in Rule 3.4(g)(1)(i). Pursuant to Model Rule 3.7, the onus is on the lawyer to analyze, by balancing the competing interests, whether it is permissible to act as a witness. If, however, a motion to disqualify is filed, the issue of disqualification will be decided by the tribunal. In any event, the issue of whether a lawyer appropriately may act as both an advocate and necessary witness is an issue the lawyer ought to discuss with the client at the outset of the engagement, or at the earliest time it becomes an issue. Model Rule 3.7 only applies to a lawyer's representation at the adjudicatory hearing, and not to representation at preliminary proceedings (although there may be other grounds for a lawyer's disqualification at the preliminary stage). (See the rules governing conflicts of interest (Rule 1.7 and Rule 1.9), and the rules governing withdrawal from representation (Rule 1.16).)

The Task Force observed that in contrast to M. Bar R. 3.4(g)(1)(i), Model Rule 3.7 provides a narrower standard for disqualification by including the limitation that the lawyer be a "necessary" witness. The requirement for the lawyer's testimony to be "necessary" means the party moving to disqualify must show that the lawyer's testimony is relevant, material and unobtainable from other sources. The Task Force thought Rule 3.7 provided a clear articulation of an important rule, and thus recommended adoption as written.

RULE 3.8 *SPECIAL RESPONSIBILITIES OF A PROSECUTOR*

The prosecutor shall:

(a) refrain from prosecuting a criminal or juvenile charge that the prosecutor knows is not supported by probable cause;

(b) make timely disclosure in a criminal or juvenile case to counsel for the defendant, or to a defendant without counsel, of the existence of evidence or information known to the prosecutor after diligent inquiry and within the prosecutor's possession or control, that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment;

(c) refrain from conducting a civil, juvenile, or criminal case against any person whom the prosecutor knows that the prosecutor represents or has represented as a client;

(d) refrain from conducting a civil, juvenile, or criminal case against any person relative to a matter in which the prosecutor knows that the prosecutor represents or has represented a complaining witness.

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] Subsections (a) and (b) are based on ABA Disciplinary Rule 7-103(A) and (B). Subsections (c) and (d) have evolved from Maine common law.

[2A] The duties of a prosecutor include the duty to make, with reasonable diligence, and within a reasonable time, a reasonable inquiry of any member of the prosecutor's staff, any employee of an agency of the state or political subdivision that regularly reports to the prosecutor, or has reported in the particular case. The disclosure requirements under subsection (b) are an ongoing duty.

[3] It has long been the case that public prosecutors carry special ethical duties: they have an obligation to seek justice, not just to convict. Prosecutors face ethical obligations not shared by other lawyers, due to their dual role of advocate and government official. As a public officer and government representative vested with special powers and privileges, a prosecutor has corresponding obligations to assure protection of all citizens' rights, including those of criminal defendants.

[4] [Reserved]
[5] [Reserved]

[6] Like other lawyers, prosecutors are subject to Rules 5.1 and 5.3, which relate to responsibilities of lawyers and nonlawyers who work for or are associated with the lawyer's office.

REPORTER'S NOTES:

Model Rule 3.8, addressing the special responsibilities of a prosecutor corresponds to M. Bar R. 3.7(i)(1)-(4). For the reasons set forth below, the Task Force recommended adoption of the Model Rule 3.8(a), followed by the provisions found in M. Bar R. 3.7(i)(2)-(4).

In connection with its consideration of Rule 3.8, the Task Force consulted with the Advisory Committee on Rules of Criminal Procedure, as well as Maine prosecutors. After consultation and discussion, the Task Force concluded that Model Rule 3.8 imposed restrictions and obligations on prosecutors that could not be easily enforced; indeed, some of the obligations imposed upon prosecutors by

the Model rule are not required by substantive law. There was also concern expressed about Model Rule 3.8's balance of First Amendment free speech rights, and the state's interest in protecting the rights of the accused.

The Task Force ultimately determined that Model Rule subsections (b)-(f) were unnecessary, and in some cases not appropriate for Maine. M. Bar R. 3.7(i)(1)-(4), governing prosecutors, has worked well and has provided appropriate guidance to prosecutors in Maine. Accordingly, the Task Force recommended the adoption of Rule 3.8, substantively modified as described.

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, and Rules 4.1 through 4.4. 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.

COMMENT

[1] In representation before bodies acting in a rule-making or policy-making capacity, such as legislatures, municipal councils, and executive and administrative agencies, lawyers present facts, formulate issues and advance argument in the matters under consideration. The decision-making body 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 or other adjudicative bodies. 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] [Reserved]

REPORTER'S NOTES:

Model Rule 3.9 (2002), establishing rules governing attorneys who appear before a legislative body or administrative agency in a nonadjudicative proceeding, has no analog under the Maine Bar Rules which do not distinguish between adjudicative and nonadjudicative proceedings. To address the issue of a lawyer's obligations in representing a client before a legislative or administrative body, Model Rule 3.9 (2002) establishes an additional rule specific to nonadjudicative proceedings.

Model Rule 3.9 (2002) incorporates by reference the requirements found in Model Rules 3.3, 3.4, 3.5, 4.1, 4.2, 4.3 and 4.4 (other than those that are specific to proceedings before a tribunal). The Task Force thought the more specific approach of Model Rule 3.9 enhances both the clarity and enforceability of a lawyer's obligation in a nonadjudicative context. The Task Force also thought inclusion of the language found in Model Rule 3.9 Comment [3] in the text of the Rule added clarity. Accordingly, the Task Force recommended adoption of Model Rule 3.9 (2002), with the noted addition.

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:

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

(b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

COMMENT

Misrepresentation

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

Crime or Fraud by Client

[3] Under Rule 1.2(d), a lawyer is prohibited from counseling or assisting a client in conduct that the lawyer knows is criminal or fraudulent. Paragraph (b) states a specific application of the principle set forth in Rule 1.2(d) and addresses the situation where a client's crime or fraud takes the form of a lie or misrepresentation. Ordinarily, a lawyer can avoid assisting a client's crime or fraud by withdrawing from the representation. Sometimes it may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm an opinion, document, affirmation or the like. In extreme cases, substantive law may require a lawyer to disclose information relating to the representation to avoid being deemed to have assisted the client's crime or fraud. If the lawyer can avoid assisting a client's crime or fraud only by disclosing this information, then under paragraph (b) the lawyer is required to do so, unless the disclosure is prohibited by Rule 1.6.

REPORTER'S NOTES:

Model Rule 4.1 (2002) substantively is in accord with M. Bar R. 3.7(b). Both rules prohibit a lawyer from making false statements of material fact or law to third parties. Whereas M. Bar R. 3.7(b) applies only to conduct during litigation, Model Rule 4.1 addresses the issue of truthfulness in statements to

others in a broader context. Indeed, this rule regularly is cited as the rule governing the requirement of truthfulness by lawyers in the context of a negotiation. Both Model Rule 4.1 and M. Bar R. 3.7(b) make clear that a false statement must be made "knowingly" in order for the speaker to violate the rule.

Model Rule 4.1 prohibits both affirmative false statements as well as omissions when there is a duty to speak. False statements and omissions must, however, be material under Rule 4.1. The Task Force observed that this Rule was also in accord with both M. Bar R. 3.2(f)(3) (prohibiting a lawyer from engaging in conduct involving dishonesty, fraud, deceit or misrepresentation) and Model Rule 8.4(c) (stating that it is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation). Model Rule 4.1(b) recognizes the duty to disclose material facts to avoid assisting a criminal or fraudulent act by a client may be limited by the confidentiality rule found in Model Rule 1.6. The Task Force previously recommended, however, the adoption of Model Rule 1.6, that permits lawyers to reveal confidences and secrets to the extent the lawyer reasonably believes necessary to prevent reasonably certain death or substantial bodily harm, or financial harm that results from a crime or fraud. The Task Force thought Rule 4.1 was a sensible guide to positive lawyer conduct, and accordingly recommended adoption of the Rule as written.

RULE 4.2 *COMMUNICATION WITH PERSON REPRESENTED BY COUNSEL AND LIMITED REPRESENTATIONS*

(a) 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. Specific limitations on communications by a prosecutor are contained in (c).

(b) An otherwise unrepresented party to whom limited representation is being provided or has been provided in accordance with Rule 1.2(c) is considered to be unrepresented for purposes of this Rule, except to the extent the limited representation attorney provides other counsel written notice of a time period within which other counsel shall communicate only with the limited representation attorney.

(c) If a prosecutor knows a person is represented with respect to the matter under investigation:

(1) the prosecutor shall not communicate directly with that person absent consent of the other lawyer or a court order; and

(2) The prosecutor shall not extend, through any third person an offer to meet with the prosecutor or an offer to enter into plea negotiations with the prosecutor, or an offer of a plea agreement absent consent of the other lawyer or a court order.

Communications by the prosecutor in the form of advice or instruction to law enforcement agents about a person a prosecutor knows is represented with respect to a matter under investigation are authorized by this Rule and are governed by the substantive law.

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 uncounseled disclosure of information relating to the representation.

[2] This Rule applies to communications with any person who is represented by counsel concerning the matter to which the communication relates. This Rule also provides guidance to attorneys with respect to communications with parties to whom limited representation is being provided or has been provided in accordance with Rule 1.2(c).

[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 or legal authorization for communicating with a represented person is permitted to do so. Parties who are represented on a limited representation basis are considered unrepresented for purposes of this Rule, unless written notice of the limited representation is provided to the attorney seeking to communicate with such party.

[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. Communications 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, the 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:

Model Rule 4.2 addresses the issue of communicating with persons represented by counsel. The Rule, in recognizing the importance of the preservation of the lawyer-client relationship, is designed to protect clients against overreaching by other lawyers, and to reduce the likelihood that clients will disclose confidential or damaging information without the advice of their counsel.

Model Rule 4.2 (a) is in accord with M. Bar R. 3.6(f). Because the Task Force thought Rule 4.2(a) was an accurate and concise exposition of the rule currently in force in Maine, it recommended its adoption. In addition, the Task Force recommended inclusion of the second sentence of M. Bar R. 3.6(f), which provides guidance to attorneys in the context of a limited representation and inclusion of new paragraph (c) regarding the actions of prosecutors.

The Task Force considered whether the application of this rule to a "person" as opposed to a "party" was overbroad, particularly in the context of law enforcement activities. The consensus of the Task Force was that it was not. Traditional investigative activities of prosecutors are those "authorized . . . by law." And this rule is not intended to affect or change present substantive law or practice. However, formal notifications, such as written proffers, to persons known to be represented outside of that context have no legitimate reason to be directed so as to avoid the person's lawyer.

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, but may provide legal information to and may negotiate with the unrepresented person. The lawyer may recommend that such unrepresented client 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.

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(f).

[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. 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, or recommending an unrepresented person secure counsel. 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.

[2A] This rule is not intended to limit negotiations between a lawyer and an unrepresented person, nor limit information provided by the lawyer to an unrepresented person.

REPORTER'S NOTES:

Model Rule 4.3 (2002) provides guidance to a lawyer who is dealing on behalf of a client with a person who is not represented by counsel. The Maine Bar Rule that comes closest to addressing the same issues is M. Bar R. 3.6(i), entitled "Avoiding Misreliance." Both rules attempt to make certain that unrepresented persons are not misled about the lawyer's role in a matter, and require a lawyer to take affirmative steps to ensure that misunderstandings about a lawyer's allegiances and duties are rectified. The Task Force thought that Model Rule 4.3's formulation was clearer and more direct and accordingly recommended the adoption of Model Rule 4.3 (2002) as written.

The Task Force discussed the issues arising when the lawyer's fee is paid in whole or in part by an unrepresented party, for example as often occurs in a real estate transaction where the financing institution designates counsel whose fees are paid by the purchasing party. It is the lawyer's responsibility to clarify which party the lawyer is representing, notwithstanding the source of the lawyer's fee.

RULE 4.4 *RESPECT FOR RIGHTS OF THIRD PERSONS; INADVERTENT DISCLOSURES*

(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 writing and has reasonable cause to believe the writing may have been inadvertently disclosed and contain confidential information or be subject to a claim of privilege or of protection as trial preparation material:

(1) shall not read the writing or, if he or she has begun to do so, shall stop reading the writing;

(2) shall notify the sender of the receipt of the writing; and

(3) shall promptly return, destroy or sequester the specified information and any copies.

The recipient may not use or disclose the information in the writing until the claim is resolved, formally or informally. The sending or receiving lawyer may promptly present the writing to a tribunal under seal for a determination of the claim.

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 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. See also Rule 3.4, setting forth rules regarding Fairness to Opposing Party and Counsel.

[2] Paragraph (b) recognizes lawyers sometimes receive writings mistakenly sent or produced by opposing parties or their lawyers. If a lawyer knows or reasonably should know that such a received writing contains confidential information or may be subject to a claim of privilege, this Rule requires that the lawyer not read the writing, and return, sequester or destroy the writing and any copies, making no further use of it. Whether the privileged status of a writing has been waived is a matter of law beyond the scope of these Rules. For purposes of these Rules, "writing" includes e-mail or other electronic modes of transmission subject to being read or put into readable form (see Rule 1.0(n)).

[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. When 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. It is not a violation of a duty to a client or of these Rules of Professional Conduct to return a document in such circumstances.

[4] The fact a writing contains metadata does not necessarily mean the sending lawyer intended the metadata be disclosed, notwithstanding the fact the ostensible writing may have been disclosed intentionally. The embedded metadata, if it contains confidential information, or is subject to a claim of

privilege or of protection as trial preparation material, may be deemed to be inadvertently disclosed, and thus subject to paragraph (b).

REPORTER'S NOTES:

Model Rule 4.4(a) (2002) substantively is in accord with M. Bar R. 3.7(a), as well as with the Maine Attorney's Oath, 4 M.R.S. §806 (stating that, as lawyers, we should not "wittingly or willingly promote or sue any false, groundless or unlawful suit nor give aid or consent to the same"). The Task Force thought the Model Rule provided a sound articulation of the idea found in M. Bar R. 3.7(a), and thus recommended its adoption.

Model Rule 4.4(b) (2002) addresses a lawyer's responsibility in the event he or she receives an inadvertently sent writing. The Task Force discussed four alternative formulations of this rule: The Model Rule (2002), the rule in Maine, a version of the rule adopted in New Jersey (the "New Jersey Rule"), and a rule tracking the approach taken in proposed Federal Civil Procedure Rule 26(b)(5)(B) (Dec. 1, 2006).

The Model Rule, originally adopted in 2002, merely requires the lawyer "promptly notify the sender" and provides lawyers with no further guidance. While there is no further obligation imposed upon a lawyer under that rule, other law may impose additional obligations. A number of states, including New Jersey, have adopted a rule offering lawyers further guidance. The New Jersey Rule directs an attorney who has received an inadvertently disclosed writing to not read the writing or, if he or she has begun to do so, stop reading, promptly notify and follow the instructions of the sender and make no further use of the writing.

The Task Force also reviewed Federal Civil Procedure Rule 26(b)(5)(B) (Dec. 1, 2006), in light of the language in the New Jersey Rule. The Task Force recognized the approach taken in Federal Civil Procedure Rule 26(b)(5)(B) allows for a case-by-case determination of the effect of disclosure of confidential or protected writings. It represents an attempt to permit parties to use reasonable measures in discovery to protect their privileged communications. It further recognizes when a writing is disclosed, there may be competing views with respect to whether the writing is confidential or privileged. The version of Rule 4.4(b) recommended by the Task Force places the obligation on the receiving party who realizes the disclosure error to stop reading, to notify the producing party, and to return, destroy or sequester it, pursuant to instructions, or to seal it pending resolution of a claim of privilege or protection. The lawyer is not allowed to make

any further use of it unless the claim of protection is resolved to allow such further use. The resolution may be accomplished formally (by a tribunal) or informally (through negotiation between the parties). The inclusion of an informal means of resolving the issue of a claim of protection is an acknowledgement that in certain situations, it may not be feasible, financially or otherwise, to involve a tribunal.

The Task Force recommended a formulation of Rule 4.4(b) different from Maine Ethics Opinion No. 172, which has been the governing law in Maine since the Maine Supreme Judicial Court's decision in *Corey v. Norman Hanson & DeTroy*, 1999 ME 196, 742 A.2d 933. *Corey*, held an inadvertently disclosed memorandum protected by the attorney-client privilege should be returned by the receiving attorney to the disclosing attorney, and no further use should be made of it. The Task Force's recommendation also departs from the practical impact of the rule articulated by the Federal District Court in *FDIC v. Singh*, 140 F.R.D. 252 (D. Me. 1992) (stating any intentional or inadvertent disclosure of privileged material is an automatic waiver of the attorney-client privilege). In both of these cases, the courts rejected a case-by-case determination of when the inadvertent disclosure of a writing is a waiver of a privilege. The Task Force thought it wise to permit lawyers, who were in dispute with respect to a claim of a writing's privilege, to seek a neutral third party's opinion, or to attempt to resolve the issue through less formal means. The Task Force believed, in situations involving inadvertent disclosures, a case-by-case determination would best balance the competing interests of the parties.

The Task Force also recognized the advent of new technologies may alter the nature of some inadvertent disclosures. For example, while a writing may have been intentionally disclosed by a lawyer, the revelation of embedded metadata may rise to the level of an inadvertent disclosure. If such metadata contains confidential information, or is subject to a claim of privilege or of protection as trial preparation material, it is subject to paragraph (b).

The Task Force stressed the importance of making it clear to lawyers admitted in other jurisdictions that the Maine Rule of Professional Conduct 4.4(b), as recommended, is a departure from the 2002 Model Rule. Lawyers who have been practicing in Maine under Maine Ethics Opinion No. 172 must also be made aware that Rule 4.4(b) represents a different approach to dealing with the issue of inadvertently disclosed writings.

LAW FIRMS AND ASSOCIATIONS

RULE 5.1 *RESPONSIBILITIES OF PARTNERS, MANAGERS, AND SUPERVISORS*

(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.

COMMENT

[1] Paragraph (a) applies to lawyers who have managerial authority over the professional work of a firm. See Rule 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 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:

Model Rule 5.1 (2002) corresponds to M. Bar R. 3.13(a), which was adopted by the Maine Supreme Judicial Court in 1997. M. Bar R. 3.13(a), however, was modeled on the pre-2002 version of Rule 5.1. As part of the Ethics 2000 project, the scope of Rule 5.1 was broadened to address not only the responsibility of law firm partners, but also include as part of the group of responsible lawyers, those lawyers with "managerial authority." This clarification, as it was referred to in the ABA Reporter's Explanation of Changes, recognizes that law is not practiced solely in the context of the traditional law firm partnership; lawyers also organize as professional corporations, they work in corporate and governmental law departments as well as in legal services organizations. The Task Force thought this was an important clarification and recommended adoption of Model Rule 5.1 (2002) as written.

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:

Model Rule 5.2 (2002) is substantively identical to M. Bar R. 3.13(b), which was modeled upon the previous version of Model Rule 5.2, and adopted in 1997. Accordingly, the Task Force recommended adoption of Model Rule 5.2 (2002) as written.

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 the 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.

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:

Model Rule 5.3 (2002) corresponds to M. Bar R. 3.13(c), which was adopted by the Maine Supreme Judicial Court in 1997. As was the case with respect to M. Bar R. 3.13(a), M. Bar R. 3.13(c) was modeled on the pre-2002 version of Rule

5.3. As part of the Ethics 2000 project, the scope of Rule 5.3 (as well as Model Rule 5.1) was broadened to address not only the responsibility of law firm partners with respect to nonlawyer assistants, but also include as part of the group of responsible lawyers, those lawyers with "managerial authority." This clarification, as it was referred to in the ABA Reporter's Explanation of Changes, recognizes that law is not practiced solely in the context of the traditional law firm partnership; lawyers also organize as professional corporations, they work in corporate and governmental law departments as well as in legal services organizations. The Task Force thought this was an important clarification and recommended adoption as written and recommended adoption of Model Rule 5.3 (2002) as written.

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 undertakes to complete unfinished legal business of a deceased lawyer may pay to the estate of the deceased lawyer that proportion of the total compensation which fairly represents the services rendered by the deceased lawyer;

(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; provided that the amounts paid to nonlawyer employees in addition to fixed salary,

(i) are not based upon business brought to the law firm by such employees;

(ii) are not based upon services performed by such employees in a particular case; and

(iii) do not constitute the greater part of the total remuneration of such employees;

(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 a profit, if:

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

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

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). This Rule is not intended to apply to a lawyer, in the context of a professional disciplinary case, who is directed by the court as a condition of probation, to be supervised and mentored by a member of the Maine Bar.

REPORTER'S NOTES:

Model Rule 5.4 (2002) is substantively in accord with M. Bar R. 3.12, although there are some distinctions.

Model Rule 5.4(a)(2) (2002) contemplates the sale of a deceased lawyer's practice. The Task Force thought that M. Bar R. 3.12(a)(2) was a more realistic and practical directive for lawyers who are winding up a deceased lawyer's practice. Thus, the Task Force recommended the adoption of the language of the Maine provision.

Model Rule 5.4(a)(3) (2002) tracks the first clause of M. Bar R. 3.12(a)(3). The Task Force thought that the provision setting forth the fee division rules with respect to non-lawyers found in the second clause of M. Bar R. 3.12(a)(3) offered a useful directive and thus recommended its inclusion.

The Task Force, after discussion, agreed that this Rule was not applicable to a lawyer who is directed by the court to be supervised and mentored by another member of the Maine Bar as a condition of disciplinary probation. In such a case, the supervised lawyer may be subject to the professional judgment of the supervising lawyer.

Because the Task Force thought Model Rule 5.4 (2002) was a clear articulation of the Rule addressing the Professional Independence of a Lawyer, it recommended adoption, subject to the noted modifications.

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 that arise out of or are reasonably related to the representation of an existing client 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.

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:

Model Rule 5.5 (2002), addressing Unauthorized Practice of Law and Multijurisdictional Practice, is an analog to M. Bar R. 3.2(a). Model Rule 5.5, however, goes into much greater detail than the Maine Bar Rule, describing how lawyers may conduct their practice and communicate with persons in states where they are not licensed. Rule 5.5, offering lawyers both clarity and flexibility by specifically outlining practices that are not prohibited, recognizes that such out-of-state contacts and communications have become an increasingly necessary part of many lawyers' home-state legal practices.

Model Rule 5.5 continues to respect each state's interest in licensing lawyers who practice within its state borders. It also recognizes, however, that the market for legal services is increasingly interstate in nature. Model Rule 5.5 distinguishes between a lawyer seeking to establish a "systematic and continuous presence" in a state in which he or she is not licensed (conduct that remains prohibited), and a lawyer's provision of legal services on a "temporary basis" in an out-of-state jurisdiction. The Task Force thought that Rule 5.5's recognition of this significant

distinction strikes the proper balance between the interests of the public in state licensure of attorneys, and the importance of fostering an increasingly multijurisdictional market for legal services. The Task Force recommended inclusion, however, of the limitation that a lawyer not licensed in Maine may only provide legal services on a temporary basis when such services have a connection to the representation of an existing client.

Model Rule 8.5, addressing states' disciplinary authority over lawyers, is designed to work in tandem with Rule 5.5. Rule 8.5 explicitly recognizes the disciplinary authority of both the state in which a lawyer is licensed, as well as the state in which the conduct occurs (the practice of law). Neither Model Rule 5.5, the Maine Bar Rules, nor Maine statutes explicitly defines what constitutes the "practice of law." The ABA convened a Task Force on the Model Definition of the Practice of Law in 2002, which developed a "framework" for states to consider in developing their statutory definitions, but fell short of drafting a definition. Maine law prohibits the unauthorized practice of law without defining it. (See 4 M.R.S. § 807).

The Task Force observed that 4 M.R.S. §§ 801-808 is, in part, inconsistent with Model Rule 5.5. Accordingly, it recommended that the Attorney General's office, the administrative agency authorized to enforce the prohibition against the unauthorized practice of law, propose conforming amendments to 4 M.R.S. §§ 801-808, in order to rectify the conflict between the statutory provisions and Rule 5.5.

It was the consensus of the Task Force, to quote Maine Professional Ethics Commission in Opinion No. 189, that ". . . ABA Model Rule 5.5, as a whole, quite accurately reflects historical and widely accepted notions of the limits of multijurisdictional practice and the parameters of the unauthorized practice of law." Accordingly, the Task Force recommended adoption of Model Rule 5.5 (2002), with noted modifications.

RULE 5.6 *RESTRICTIONS ON THE 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.

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:

Model Rule 5.6 (2002), prohibiting agreements that restrict a lawyer's right to practice law, is substantively in accord with M. Bar R. 3.2(g). Such agreements may have the effect of limiting the pool of lawyers available to the public, as well as affecting a lawyer's autonomy and independence. The Task Force thought that Comment [3], recognizing that there may be restrictions attached to the sale of a law practice but such a sale is governed by another rule (Rule 1.17), highlighted an important related issue.

Because Model Rule 5.6 (2002) offers a clear articulation of the rule prohibiting restrictions on the practice of law, the Task Force recommended its adoption.

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.

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:

Model Rule 5.7 (2002), addressing a lawyer's provision of "law-related services" is substantively consistent with M. Bar R. 3.2(h). Both rules support the idea that lawyers who perform law related services or operate an ancillary business entity remain subject to the Rules of Professional Conduct, unless the lawyer takes reasonable measures to assure the client that the services provided by the entity are not legal services and that the Rules of Professional Conduct do not apply. Other issues implicated by law-related ancillary businesses are addressed in Model Rule 5.4.

The Task Force recommended adoption of Model Rule 5.7 (2002) as written.

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.

Aspirational Goals

In fulfilling this responsibility, the lawyer should provide 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 that are designed primarily to address the needs of persons of limited means;

and

(3) 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; or

(4) activities for improving the law, the legal system or the legal profession.

In addition, a lawyer voluntarily should contribute financial support to organizations that provide legal services to persons of limited means.

COMMENT

[1] Every lawyer, regardless of professional prominence or professional work load, should provide legal services to those unable to pay. While the ABA model rule specifies an annual number of hours each lawyer should provide, Maine lawyers, have created a tradition of delivering a nationally recognized high quantity of *pro bono* services. Because of this professional ethic, Maine attorneys understand any set standard is insufficient to meet the critical need to provide legal services to those individuals and institutions unable to afford them.

[2] Paragraphs (1) and (2) of these Aspirational Goals prioritize the critical need for legal services that exists among persons of limited means by providing legal services be rendered directly to the disadvantaged or to organizations serving the disadvantaged 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 lawyers, even when restrictions exist on their engaging in the outside practice of law.

[3] Persons eligible for legal services under paragraphs (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] 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] To the extent possible, a lawyer should fulfill the responsibility to perform *pro bono* services directly to the financially needy through activities described in paragraphs (1) and (2) of the Aspirational Goals. Paragraphs (3) and (4) describe other means to perform *pro bono* services, although those have a less specific impact on individuals needing legal representation. Constitutional, statutory or regulatory restrictions may prohibit or impede government and public sector lawyers from performing the *pro bono* services outlined in paragraphs (1) and (2). Accordingly, where those restrictions apply, government and public sector lawyers may fulfill their *pro bono* responsibility by performing services outlined in paragraphs (3) and (4).

[6] Paragraph (3) 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* lawyer to accept a substantially reduced fee for services. Examples of the types of issues that may be addressed under this paragraph are 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 (3) covers instances in which lawyers agree to and receive a modest fee for furnishing legal services to persons of limited means such as participation in judicare programs and acceptance of court appointments in which the fee is substantially below a lawyer's usual rate.

[8] Paragraph (4) recognizes the value of lawyers engaging in activities improving the law, the legal system or the legal profession, in addition to providing *pro bono* representation to individuals 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, mediator or 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] There may be times when it is not feasible for a lawyer to engage in *pro bono* services to individuals. 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 is 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] The efforts of individual lawyers are not enough to meet the need for legal services existing among persons of limited means. Consequently, the government and the profession instituted additional programs to provide those services. Every lawyer should support such programs financially, as well as providing direct *pro bono* services.

[11] Although this rule does not express a minimum of *pro bono* legal hours, law firm management and practitioners must not abandon the voluntary commitment to *pro bono* public service Maine lawyers historically have demonstrated. Being in the national forefront bears with it both honor and continuing duty. Thus, law firms should enable and encourage all lawyers in the firm to provide the *pro bono* legal services called for by this Rule, and practitioners should exhort each other to satisfy unmet legal needs in direct and creative ways.

[12] The responsibility set forth in this Rule is aspirational and not to be enforced through disciplinary process.

REPORTER'S NOTES:

Model Rule 6.1 (2002) is substantively in accord with M. Bar R. 2-A, Aspirational Goals for Lawyer Professionalism. The Task Force recognized that Maine lawyers are nationally known for their outstanding commitment to providing *pro bono* legal services. As such, the Task Force recommended adoption of Model Rule 6.1, with some noted modifications.

The ABA Model Rule specifies fifty (50) hours per year as the amount each lawyer should provide. Because of the high standard for *pro bono* service Maine lawyers have established, the Task Force thought that any enumeration of hours is unnecessary, and perhaps send the wrong message that there is a specific number of hours of *pro bono* service that would sufficiently meet the critical legal services need of those individuals and institutions unable to afford them. Accordingly, the Task Force decided not to suggest a specific number of hours.

Model Rule 6.1 (2002) sets forth a staged order of preference for the types of *pro bono* services to be rendered by lawyers: it prioritizes direct *pro bono* representation of persons of limited means or *pro bono* representation to organizations that are designed primarily to address the needs of persons of limited means. The Task Force recognized the compelling need of people of limited means for legal services, but also acknowledged the importance of lawyers' *pro*

bono service in furtherance of the creation of a framework to support charitable, religious, civic, community, governmental and educational organizations. The Task Force further credited the importance of lawyers' participation in law reform activities. The Task Force believed the prioritized listing of types of *pro bono* service was important in efforts to address the critical need for legal services for persons with limited means. Thus it recommended adoption of the Model Rule, as modified.

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:

Model Rule 6.2 (2002), addressing a lawyer's obligation to accept court appointments, has no direct Maine Bar Rule counterpart (but see M. Bar R. 2-A addressing lawyers' *pro bono* obligations). The obligation recognized by Rule 6.2 is generally "analyzed as a derivative of the court's inherent judicial power." (See ABA Annotated Model Rules of Professional Conduct, Fifth edition, p. 514). This Rule has been described as "protecting the court's own institutional interests as well as those of the individual litigant." (*Id.*)

Because the Task Force thought Model Rule 6.2 (2002) was a clear articulation of what has been the practice in Maine, it recommended its adoption as written.

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) where 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 service 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:

Model Rule 6.3 (2002) addresses the issues raised when a lawyer serves on the board of directors of a legal services organization. It is designed to neutralize the risk of disqualification as a result of a conflict-of-interest between a lawyer's clients and the clients of a legal services organization, in order to encourage attorneys to serve on boards of these organizations. This Rule provides a relaxed remedy for what might be considered a conflict-of-interest because board members of legal services organizations are commonly not involved in decisions about particular cases. Rather, such board decisions generally address broad policy issues and general fiscal matters. If a decision of a legal services board is inconsistent or incompatible with a lawyer/board member's obligations to his or her client under Rule 1.7, however, the lawyer must recuse himself or herself from taking part in such decision. For example, when a policy matter engenders an apparent conflict for a lawyer/board member (such as the establishment of case acceptance priorities), a lawyer is prohibited from participating in such matter. When however, a lawyer/board member represents one party to a conflict and a staff attorney of the legal services organization represents an opposing party, this may result in a classic conflict-of-interest, as described in Rule 1.7(b). In such a case, the conflict can only be cured by the informed consent of both parties.

Although there is no comparable provision under the Maine Bar Rules, the Task Force thought Model Rule 6.3 (2002) offers lawyers useful guidance, and thus recommended its adoption as written.

RULE 6.4 *LAW REFORM ACTIVITIES AFFECTING CLIENT INTEREST*

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 affected by a decision in which the lawyer participates, the lawyer shall disclose that fact to the organization, 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 affected.

REPORTER'S NOTES:

Model Rule 6.4 (2002) addresses issues that are analogous to the issues raised by Model Rule 6.3: facilitating lawyers' service on boards of "law reform organizations." The Rule recognizes that serving as a member of the board of such an organization can be distinguished from representing it. Accordingly, Rule 6.3 authorizes such service on law reform organization boards, notwithstanding the fact that a reform effort may affect the interests of the lawyer's clients. Disclosure to the organization is required in the event the board member/lawyer's clients are materially affected by a decision of the board.

There is no comparable provision under the Maine Bar Rules. Because Model Rule 6.4 (2002) provides beneficial guidance, the Task Force recommended adoption as written.

RULE 6.5 *NONPROFIT AND COURT-ANNEXED LIMITED LEGAL SERVICES AND 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 is aware that the representation of the client involves a conflict-of-interest; and

(2) is subject to Rule 1.10 only if the lawyer is aware 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.

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.

[6] The phrase "is aware" as used in paragraphs (a) (1) and (2) should be distinguished from the term "knows" as defined in Rule 1.0: Terminology. "Knows," according to the definition, means actual knowledge of the fact in question, which may be inferred from circumstances. In contrast, "is aware" allows a lawyer, in the limited circumstances described in this Rule, to represent clients without risk of a violation of Rules 1.7, 1.9, 1.10 and 1.11, if the lawyer knows, based on reasonable recollection and information provided by the client in the ordinary course of the consultation, that the representation presents a conflict-of-interest. In such a case, knowledge may not be inferred from circumstances. This is because a lawyer who is representing a client in the circumstances addressed by this Rule is not able to check systematically for conflicts. A conflict-of-interest that would otherwise be imputed to a lawyer because of the lawyer's association with a firm will not preclude the lawyer from representing a client in a limited services program. Nor will the lawyer's participation in such a program preclude the lawyer's firm from undertaking or continuing the representation of

clients with interests adverse to a client being represented under the program's auspices.

REPORTER'S NOTES:

Model Rule 6.5 (2002) corresponds in substance to M. Bar R. 3.4(j). Both rules address the issue of the application of the rules governing conflicts of interest in the context of limited representation. The general rule providing for limited representation is found in Rule 1.2.

According to the Annotated Rules of Professional Conduct published by the ABA, "Rule 6.5 was adopted in 2002 in response to concerns that a strict application of the conflict-of-interest rules "may be deterring lawyers from serving as volunteers in programs [providing] short-term limited legal services under the auspices of a nonprofit organization or a court-annexed program." In Maine this type of representation is known as "limited representation." The Annotation goes on to observe that the rule itself makes no reference to the word "volunteer."

The Annotation continues, "[s]hort-term limited legal services are a subset of the "limited scope" representation contemplated by Rule 1.2(c); they are limited in duration as well as purpose. Because they are short-term, the reasoning goes, it would be impracticable to require a conflicts check each time legal advice is offered. . . . Under Rule 6.5, the relationship that arises in these settings will be unique: the recipient of the advice will not become a general purpose former client. The lawyer's brief interaction with this client, in other words, will not come back to disqualify the lawyer from future long-term relationships."

Because Model Rule 6.5 (2002) is consistent with Maine Bar Rules and practice, the Task Force recommended adoption as written.

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.

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:

Model Rule 7.1 (2002) prohibits lawyers from making false or misleading communications about the lawyer or the lawyer's services, including the omission of a fact necessary to make a true statement not misleading. There is no direct analog in the Maine Bar Rules; However, M. Bar R. 3.9(a) prohibits any form of false advertising; and M. Bar R. 3.9(c), prohibits "improper" public communications that are likely to result in legal action "merely to harass or maliciously injure another," or communications that appeal primarily to "fear, greed, desire for revenge or similar emotions." Model Rule 7.1 (2002) sets forth a broader prohibition than M. Bar R. 3.9(a) and (c); it covers all false or misleading

communications, including advertising permitted by Rule 7.2, whether public or private.

The Task Force believed this rule places a reasonable obligation on lawyers to ensure that their statements about themselves or their legal services are not false or misleading. Because this rule underlines the importance of the integrity of the profession, the Task Force recommended adoption of Model Rule 7.1 as written.

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 operated, sponsored or approved by a bar association or bar regulatory organization;

(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.

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 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. See Rule 7.2-A setting forth Aspirational Goals for Lawyer Advertising.

[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 operated, sponsored or approved by a bar association.

[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). 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:

Model Rule 7.2 (2002), recognizing a lawyer's right to advertise his or her legal services, is substantively in accord with M. Bar R. 3.9(f)(2). Model Rule 7.2 provides a concise framework for recognizing a lawyer's right to advertise his or her services subject to certain restrictions. Aspirational goals for lawyer advertising content are set forth in Rule 7.2-A.

Because Maine has no "appropriate regulatory authority" to approve qualified lawyer referral services, the Task Force modified the language in subsection (b)(2) to correspond to the language in M. Bar R. 3.9(f)(2) ("operated, sponsored or approved by a bar association").

Model Rule Comment [8] suggested a prohibition on referral fees. The Task Force deleted this prohibition consistent with Maine Rule of Professional Conduct 1.5(e) (permitting referral fees under certain circumstances).

Because the Task Force thought Rule 7.2 presented a sound articulation of many of the issues implicated in connection with attorney advertising, it recommended adoption as written, with the noted modifications.

RULE 7.2-A *ASPIRATIONAL GOALS FOR LAWYER ADVERTISING*

These aspirational goals are intended to provide suggested objectives that all lawyers who engage in advertising their services should be encouraged to achieve

in order that lawyer advertising may be more effective and reflect the professionalism of the legal community.

(a) A lawyer should ensure that any advertising that the lawyer communicates or causes to be communicated by publication, broadcast, or other media is informative to potential clients, is presented in an understandable and dignified fashion, and accurately portrays the serious purpose of legal services and our judicial system. When advertising, though not false or misleading, degenerates into undignified and unprofessional presentations, the public is not served, the reputation of the lawyer who advertises may suffer, and the public's confidence in the legal profession and the judicial system may be harmed. Lawyers who advertise should recognize their obligation to advance the public's confidence in the legal profession and our system of justice. In furtherance of these goals, lawyers who advertise should:

(1) avoid statements, claims, or comparisons that cannot be objectively substantiated;

(2) avoid representations that demean opposing parties, opposing lawyers, the judiciary, or others involved in the legal process;

(3) avoid crass representations or dramatizations, hawkish spokespersons, slapstick routines, outlandish settings, unduly dramatic music, sensational sound effects, and unseemly slogans that undermine the serious purpose of legal services and the judicial system;

(4) avoid representations to potential clients that suggest promises of results or will create unjustified expectations such as "guaranteed results" or "we get top dollar awards";

(5) clearly identify the use of professional actors or other spokespersons who may not be providing the legal services advertised unless it is readily apparent from the context of the advertisement that the actor or spokesperson does not provide the advertised legal services (e.g., a radio advertisement in which the speaker does not purport to be the lawyer or a member of the firm);

(6) avoid the use of simulated scenes, actors who portray lawyers, clients or participants in the judicial system, and dramatizations unless they are clearly identified as such;

(7) avoid representations that suggest that the ingenuity or prior record of a lawyer, rather than the merits of the claim, are the principal factors likely to determine the outcome of the representation; and

(8) avoid representations designed to appeal to greed, exploit the fears of potential clients, or promote a suggestion of violence.

(b) The responsibilities set forth in this Rule are aspirational and not to be enforced through disciplinary process.

COMMENTS

[See Reporter's Notes.]

REPORTER'S NOTES:

Rule 7.2-A, derived from M. Bar R. 2-A, is not based on or included as part of the Model Rules. The Aspirational Goals in M. Bar R. 2-A were adopted by the Maine Supreme Judicial Court on February 1, 2005 to "provide assistance to lawyers who seek to know, not what is the minimally acceptable behavior for a lawyer, but rather, what conduct attorneys should aspire to achieve in their efforts to advance the professionalism and credibility of the profession."[3] The Rule's adoption by the Supreme Judicial Court followed a 2002 review of the advertising rules conducted by the Advisory Committee on the Rules of Professional Responsibility, which was charged with the task of recommending whether the advertising rules should be changed, and if so, in what way. The Advisory Committee considered the advertising rules from other jurisdictions. It conducted an open forum for the purposes of soliciting comments from Maine lawyers. The Advisory Committee received a number of comments, and after consideration of these comments, it ultimately concluded, ". . . the aspirational goals will encourage

[3] SEPARATE STATEMENT OF CHIEF JUSTICE SAUFLEY, REGARDING THE COURT'S ADOPTION OF ASPIRATIONAL GOALS FOR LAWYER PROFESSIONALISM, WITH WHOM JUSTICES CLIFFORD, RUDMAN, DANA AND LEVY JOIN, January 12, 2005.

lawyers who advertise to do so in a dignified and professional manner without infringing on the First Amendment's protection of commercial speech."[4]

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RULE 7.3 *DIRECT CONTACT WITH PROSPECTIVE CLIENTS*

(a) A lawyer, in person, by live telephone, or by real-time electronic contact, shall not solicit professional employment from a non-commercial client if such solicitation involves or has substantial potential of harassing conduct, coercion, duress, compulsion, intimidation or unwarranted promises of benefits. The prospective client's sophistication regarding legal matters; the physical, emotional state of the prospective non-commercial client; and the circumstances in which the solicitation is made are factors to be considered when evaluating the solicitation.

(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 the prospective client has made known to the lawyer a desire not to be solicited by the lawyer.

(c) [Reserved]

(d) Subject to the prohibitions in paragraphs (a) and (b), a lawyer may participate with a prepaid or group legal service plan operated by an organization not owned or directed by the lawyer that 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.

(e) Subject to the prohibitions in paragraphs (a) and (b), a lawyer may participate in, and announce the availability of, an approved courthouse legal assistance program that offers free representation to unrepresented clients.

COMMENT

[4] Letter from Michael A. Nelson, Chair of the Advisory Committee on the Rules of Professional Responsibility, to Chief Justice Saufley, September 25, 2002.

[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 non-commercial client known to need legal services. These forms of contact between a lawyer and a prospective client potentially 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 over-reaching.

[2] This potential for abuse inherent in direct in-person, live telephone or real-time electronic solicitation of prospective clients justifies its prohibition under certain circumstances, 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.

[3] 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.

[4] 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] 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] 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).

[9] There are several court connected legal assistance programs sponsored by legal aid organizations, bar associations, and others that, with prior approval of a judge or the Administrative Office of the Courts, provide advice to unrepresented individuals at court proceedings. These programs are important to support access to justice for traditionally underrepresented individuals and groups who may not be aware of these assistance programs. Subparagraph (e) clarifies that attorneys

participating in these programs may announce their availability to provide assistance before the start of and during court proceedings.

REPORTER'S NOTES:

Model Rule 7.3 (2002), describing the circumstances under which a lawyer may solicit clients, covers many of the issues addressed by M. Bar R. 3.9(f)(1). The Model Rule's original formulation, however, categorically prohibits "in-person, live telephone or real-time electronic contact" with prospective clients. The Task Force discussed the concerns underlying this categorical prohibition: lawyer overreaching or harassing vulnerable prospective clients through direct solicitations. The Task Force ultimately concluded that such concerns were adequately addressed by limiting solicitation to circumstances in which a lawyer could overreach or harass non-commercial clients. Non-commercial prospective clients are those individual clients in need of legal services in non-commercial or personal matters or circumstances.

Model Rule 7.3(c) (2002) requires that all advertising material contain the explicit indication that it is "Advertising Material." The purpose of this requirement is to prevent deceptive solicitations. The Task Force believed that the prospective client harassment, deception and lawyer overreaching concerns are amply addressed by the dictates set forth in Model Rules 7.1 and 7.2 (2002). As such, the Task Force concluded, such categorical prohibitions and mandates are unnecessary.

Read in concert with proposed Maine Rules of Professional Conduct 7.1 and 7.2 and the "Aspirational Goals for Lawyer Advertising Content" (now found in proposed Maine Rule of Professional Conduct 7.2-A), the revised structure and content of Rule 7.3 reflects time tested and accepted professional lawyer advertising and solicitation practices in Maine. Subsection (e), added after full Task Force activity had concluded, clarifies that solicitation of potential clients within a courthouse legal assistance program, is permissible, subject to the limits of subsections (a) and (b). Accordingly, the Task Force recommended its adoption as modified.

RULE 7.4 *COMMUNICATION OF FIELD OF PRACTICE AND SPECIALIZATION*

(a) A lawyer may communicate the fact that the lawyer does or does not practice, concentrate or specialize 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 Attorney," "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 an organization that has been approved by an appropriate state authority or that has been accredited by the Maine Board of Overseers of the Bar; and

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

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 if such certification is granted by an organization approved by the Maine Board of Overseers of the Bar. Certification signifies that an objective entity has recognized an advanced degree of knowledge and experience in the specialty area greater than is suggested by general licensure to practice law. Certifying organizations may be expected to apply standards of experience, knowledge and proficiency to insure that a lawyer's recognition as a

specialist is meaningful and reliable. In order to insure that consumers can obtain access to useful information about an organization granting certification, the name of the certifying organization must be included in any communication regarding the certification.

REPORTER'S NOTES:

Model Rule 7.4 (2002), addressing communication about a lawyer's concentration or specialty, is substantially in accord with M. Bar R. 3.8. Both rules recognize the positive benefits that flow from a lawyer communicating truthfully to the public about his or her professional expertise. The Task Force, however, recommended that Model Rule 7.4 (2002) be modified to reflect the fact that only the Maine Board of Overseers of the Bar is authorized under Maine law to approve a certifying organization, and to include the addition in subsection (a) of the phrase, "concentrate or specialize." See Maine Bar Rule 4(d)(24).

With those modifications, the Task Force recommended adoption of Rule 7.4.

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.

COMMENT

[1] A firm may be designated by the names of all or some of its members, by the names of retired or 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:

Model Rule 7.5 (2002) sets forth the general rule that a lawyer may not use a firm name, letterhead, or other professional designation that is false or is designed to mislead. The guiding principle under Rule 7.5 is full and accurate disclosure. The Task Force recommended an explicit addition to Comment [1] permitting the use of a retired or deceased member's name "where there has been a continuing succession in the firm's identity."

The closest analog in Maine is M. Bar R. 3.9(e), addressing the disclosure by multi-jurisdictional partnerships of jurisdictional limitations in licensing.

Model Rule 7.5 (2002) is consistent with existing Maine practice, but provides explicit needed guidance to lawyers with respect to firm names and letterheads. Accordingly, the Task Force recommended its adoption as written.

RULE 7.6 *POLITICAL CONTRIBUTIONS TO OBTAIN 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.

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:

Model Rule 7.6 (2002), prohibiting the acceptance of a government legal engagement or a court appointment where the lawyer or the lawyer's firm has made a political contribution with the purpose of obtaining or being considered for that type of engagement or appointment, is known as the "pay-to-play" rule for lawyers. As explained by the ABA Section of Business Law:

> The practice commonly known as pay-to-play addressed by the Rule is a system whereby lawyers and law firms are considered for or awarded government legal engagements or appointments by a judge only upon their making or soliciting contributions for the political campaigns of officials who are in a position to "steer" such business their way. The fundamental harm done by a pay-to-play system is the harm that befalls the public when a government official, motivated by

campaign contributions, chooses lawyers or law firms that may not be the best qualified to perform legal services on the public's behalf.[5]

The closest analog in Maine to Model Rule 7.6 (2002) is M. Bar R. 3.7(h)(1). M. Bar R. 3.7(h)(1) prohibits the giving of gifts to "a judge, official or employee of a tribunal . . . unless the personal or family relationship between the lawyer and the judge, official or employee is such that gifts are customarily given and exchanged." This rule is designed to prohibit the influence (or the appearance of influence) of judicial officials. Moreover, 17-A M.R.S. § 605, in prohibiting gifts to public servants (a term defined to include an official of any branch of government) similarly targets behaviors designed to improperly influence public officials. 17-A M.R.S. § 605 provides for criminal sanctions.

Model Rule 7.6 (2002) must be read in concert with Model Rule 3.5 (2002). Pursuant to Rule 3.5, the giving of gifts or loans to a judge, juror, prospective juror or other official is prohibited only if such gift or loan is an attempt to influence such person. Both Model Rules prohibit behaviors designed to improperly influence public officials. As noted in the Comments, the purpose of a gift or contribution may be determined by an examination of the facts and circumstances surrounding the gift or contribution.

Model Rule 7.6 (2002) prohibits election campaign contributions if the purpose is to secure engagements or appointments from elected officials. Because judges in Maine are appointed, rather than elected (except for Probate Judges), this rule only has limited applicability in the context of the judiciary. While M. Bar R. 3.7(h) specifically excepts from its scope, and thus permits, the making of "contributions to the election campaigns of public officers," contributions for the purpose of influencing public officials are clearly prohibited under Maine law. See 17-A M.R.S. § 605.

The Task Force concluded the Model Rule 7.6 (2002) does not represent a substantive departure from Maine's practice and rules and thus recommended its adoption.

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[5] ABA Section of Business Law, Section of State & Local Gov't, Standing Committee on Ethics and Professional Responsibility, Ass'n of Bar of City of New York, Report No. 110 (Feb. 2000), available at http://www.abanet.org/cpr/pay2playreport.html.

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.

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 separate misconduct 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 relevant 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:

Model Rule 8.1 (2002) generally corresponds to M. Bar R. 3.2(b). The Task Force discussed the distinction between the term "knowingly" as used in Rule 8.1(a) and "should have known," the term used in M. Bar R. 3.2(b). The Task Force observed that the definition of "knowingly" in the Terminology Section of the 2002 Model Rules explicitly states that "a person's knowledge may be inferred from circumstances." M. Bar R. 3.2(b) sets forth a objective standard, and Model Rule 8.1(a) (2002) and the Model Rule definition of "knowingly" present a hybrid standard. The Task Force concluded that, in practice, no meaningful distinction exists.

The Task Force further observed that much of the substance of M. Bar R. 3.2(b)(2) is addressed in the Model Rule 8.1(b) (2002) language. The Task Force noted that the term "person" is broad enough to cover a false statement by a lawyer "further[ing] the application for admission of another . . . ."

The term "misleading" as used in M. Bar R. 3.2(b)(1) is captured in Rule 8.1(b) by the term "misapprehension."

The Task Force decided not to use the 2002 Model Rules phrase "professional offense" in Comment [1] because it implies conduct that is akin to criminal conduct. Within the confines of bar discipline, professional misconduct has never been directly or indirectly associated with criminal conduct. The Task Force recommended the term "misconduct." With the noted modifications, the Task Force recommended adoption of Model Rule 8.1 (2002).

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:

The Task Force observed that Model Rule 8.2 (2002) and M. Bar R. 3.2(c) are substantively in accord. As such, the Task Force recommended adoption of Model Rule 8.2 (2002) as written.

RULE 8.3 *REPORTING PROFESSIONAL MISCONDUCT*

(a) A lawyer who knows that another lawyer has committed a violation of the Maine 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.[6]

(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 professional authority.[7]

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[6] In Maine, the appropriate professional authority will be the Maine Board of Overseers of the Bar, or in certain circumstances, as described in the Maine Rules for Maine Assistance Program for Lawyers, the Maine Assistance Program for Lawyers.

[7] In Maine, the appropriate professional authority will be the Committee on Judicial Responsibility and Disability, or, in certain circumstances, as described in the Maine Rules for Maine Assistance Program for Lawyers, the Maine Assistance Program for Lawyers.

(c) This Rule does not require disclosure of information otherwise protected by Rule 1.6 or information gained by a lawyer or judge while participating in the Maine Assistance Program for Lawyers, or an equivalent peer assistance program approved by a state's highest court.

COMMENT

[1] Self-regulation of the legal profession requires that members of the profession inform the appropriate professional authority when they know of 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. 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] In order to satisfy the objectives of this Rule, a lawyer may request that a client consent to disclosure where prosecution would not substantially prejudice the client's interests.

[3] This Rule limits the reporting obligation to those incidents of misconduct 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 misconduct and not the quantum of evidence of which the lawyer is aware. A report should be made to the appropriate professional authority unless some other agency 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. Such a situation is governed by the Rules applicable to the client-lawyer relationship.

[5] Information about a lawyer's or judge's misconduct or fitness may be received by a lawyer in the course of that lawyer's participation in the Maine Assistance Program for Lawyers or an equivalent peer assistance program approved by a state's highest court. The Rule creating the Maine Assistance Program for Lawyers encourages lawyers and judges to seek treatment through such a program. Conversely, without such an exception, lawyers and judges may

hesitate to seek assistance from these programs, which may then result in additional harm to their professional careers and additional injury to the welfare of clients and the public. These Rules do not otherwise address the confidentiality of information received by a lawyer or judge participating in the Maine Assistance Program for Lawyers or an equivalent peer assistance program approved by a state's highest court; such an obligation, however, may be imposed by the rules of such program or by other law.

REPORTER'S NOTES:

Model Rule 8.3 (2002) is substantively equivalent to M. Bar R. 3.2(e) and recognizes the obligations stated in the attorney's oath, 4 M.R.S. § 806.

The Task Force recommended a specific reference to the Maine Assistance Program for Lawyers, as well as a recognition of equivalent programs in other states. In 2002, the Maine Supreme Judicial Court created by Rule the Maine Assistance Program for Lawyers (MAP). MAP was designed to address, on a confidential basis, the issue of lawyer or judge impairment from the effects of chemical dependency or mental conditions that result from disease, disorder, trauma or other infirmity that impairs the ability of a lawyer or judge to practice or serve. The Task Force recognized the importance of encouraging the immediate and continuing help to lawyers and judges who suffer from such impairment.

Finally, for the reasons set forth in the Reporter's Notes to Rule 8.1, the Task Force recommended the use of the term "misconduct," rather than the 2002 Model Rule use of the term "offense." With the noted modifications, the Task Force recommended adoption of Model Rule 8.3 (2002) as written.

RULE 8.4 *MISCONDUCT*

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate any provision of either the Maine Rules of Professional Conduct or the Maine Bar Rules, or knowingly assist or induce another to do so, or do so through the acts of another;

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

(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 Maine Rules of Professional Conduct, the Maine Bar Rules or law; or

(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or law.

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 unlawful 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. 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] Legitimate advocacy does not violate paragraph (d). However, by way of example, 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 (d) when such actions are prejudicial to the administration of justice. Notwithstanding the foregoing, 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:

Model Rule 8.4 (2002) is substantively equivalent to M. Bar. R. 3.2(f), 3.4(g) and 3.6(g). The Task Force recommended the term "unlawful," rather than the 2002 Model Rule terms "illegal," and "criminal." The Task Force thought that the term "unlawful" was inclusive of and broader than criminal conduct. It is clear that if a lawyer engaged in criminal conduct, he or she would violate these Rules.

The Task Force observed that "conduct that is prejudicial to the administration of justice" is one upon which courts and ethics commissions are reluctant to expand. The Task Force was mindful of the various illustrations provided in Maine Professional Ethics Advisory Opinions. For example the Law Court has found that when a lawyer converts client funds, such conduct is prejudicial to the administration of justice. Because the Task Force thought Model Rule 8.4 (2002) set forth a sound and concise articulation of the rules addressing attorney misconduct, it recommended adoption of Model Rule 8.4 (2002) with the noted modifications.

Advisory Note – February 2010

When the Maine Rules of Professional Conduct were adopted, they along with the Maine Bar Rules were written or amended to indicate that ethical violations could be found, and disciplinary action initiated, based on violation of either set of rules. This amendment to Rule 8.4, which was recommended by the Advisory Committee on Professional Responsibility, corrects an oversight in the original rules and clarifies that lawyers are subject to discipline when they violate

or attempt to violate the Rules of Professional Conduct or the Maine Bar Rules, or 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.

RULE 8.5 *DISCIPLINARY AUTHORITY; CHOICE OF LAW*

(a) Disciplinary Authority. A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction, regardless of where the lawyer's conduct occurs. 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. A lawyer may be subject to the disciplinary authority of both this jurisdiction and another jurisdiction for the same conduct.

(b) Choice of Law. In any exercise of the disciplinary authority of this jurisdiction, 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.

COMMENT

Disciplinary Authority

[1] It is longstanding law that the conduct of a lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction. Extension of the disciplinary authority of this jurisdiction to other lawyers who provide or offer to provide legal services in this jurisdiction is for the protection of the citizens of this jurisdiction. 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 this jurisdiction 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 this jurisdiction 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 a lawyer 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:

Model Rule 8.2 (2002) addresses the issue of the appropriate disciplinary authority and choice of law rules. Before the 2002 Model Rule amendments, the Model Rule governing multi-jurisdictional practice was substantially similar to Maine Bar Rules 1(b) and 2(ii). For reasons similar to those supporting the Commission's 2002 recommendation to modify Model Rule 8.5, the Task Force recommended the adoption of the 2002 changes to Model Rule 8.5. In substance, these changes recognize that the practice of law is increasingly multi-jurisdictional. It may be the case that the jurisdiction with the greatest interest in disciplining a lawyer for improper conduct is a jurisdiction in which the lawyer is not admitted.

With respect to paragraph (b)(2), the choice of law provision, the ABA Reporter's Explanation of Changes to the 2002 amendments to Model Rule 8.5 reads as follows:

> Just as the Commission believes that jurisdictions other than an admitting jurisdiction ought to have the authority to discipline the lawyer . . . 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 [old] . . . Rule, but neither is it as open-ended 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.

The Task Force agreed with the approach taken by the 2002 revision to Model Rule 8.5 and recommended adoption of the Model Rule 8.5 (2002) language.

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