

THE ALABAMA RULES OF PROFESSIONAL CONDUCT
together with Comment and Comparison with Former Alabama Code of Professional
Responsibility

TABLE OF CONTENTS

PREAMBLE: A LAWYER'S RESPONSIBILITIES
TERMINOLOGY

CLIENT-LAWYER RELATIONSHIP

- RULE 1.1 COMPETENCE
- RULE 1.2 SCOPE OF REPRESENTATION
- RULE 1.3 DILIGENCE
- RULE 1.4 COMMUNICATION
- RULE 1.5 FEES
- RULE 1.6 CONFIDENTIALITY OF INFORMATION
- RULE 1.7 CONFLICT OF INTEREST: GENERAL RULE
- RULE 1.8 CONFLICT OF INTEREST: PROHIBITED TRANSACTIONS
- RULE 1.9 CONFLICT OF INTEREST: FORMER CLIENT
- RULE 1.10 IMPUTED DISQUALIFICATION: GENERAL RULE
- RULE 1.11 SUCCESSIVE GOVERNMENT AND PRIVATE EMPLOYMENT
- RULE 1.12 FORMER JUDGE OR ARBITRATOR
- RULE 1.13 ORGANIZATION AS CLIENT
- RULE 1.14 CLIENT UNDER A DISABILITY
- RULE 1.15 SAFEKEEPING PROPERTY
- RULE 1.16 DECLINING OR TERMINATING REPRESENTATION

COUNSELOR

- RULE 2.1 ADVISOR
- RULE 2.2 INTERMEDIARY
- RULE 2.3 EVALUATION FOR USE BY THIRD PERSONS ADVOCATE
- RULE 3.1 MERITORIOUS CLAIMS AND CONTENTIONS
- RULE 3.2 EXPEDITING LITIGATION
- RULE 3.3 CANDOR TOWARD THE TRIBUNAL
- RULE 3.4 FAIRNESS TO OPPOSING PARTY AND COUNSEL
- RULE 3.5 IMPARTIALITY AND DECORUM OF THE TRIBUNAL
- RULE 3.6 TRIAL PUBLICITY
- RULE 3.7 LAWYER AS WITNESS
- RULE 3.8 SPECIAL RESPONSIBILITIES OF A PROSECUTOR
- RULE 3.9 ADVOCATE IN NONADJUDICATIVE PROCEEDINGS
- RULE 3.10 THREATENING CRIMINAL PROSECUTION

TRANSACTIONS WITH PERSONS OTHER THAN CLIENTS

RULE 4.1 TRUTHFULNESS IN STATEMENTS TO OTHERS
RULE 4.2 COMMUNICATION WITH PERSON REPRESENTED BY COUNSEL
RULE 4.3 DEALING WITH UNREPRESENTED PERSON
RULE 4.4 RESPECT FOR RIGHTS OF THIRD PERSONS

LAW FIRMS AND ASSOCIATIONS

RULE 5.1 RESPONSIBILITIES OF A PARTNER OR SUPERVISORY LAWYER
RULE 5.2 RESPONSIBILITIES OF A SUBORDINATE LAWYER
RULE 5.3 RESPONSIBILITIES REGARDING NONLAWYER ASSISTANTS
RULE 5.4 PROFESSIONAL INDEPENDENCE OF A LAWYER
RULE 5.5 UNAUTHORIZED PRACTICE OF LAW
RULE 5.6 RESTRICTIONS ON RIGHT TO PRACTICE

PUBLIC SERVICE

RULE 6.1 PRO BONO PUBLICO SERVICE
RULE 6.2 ACCEPTING APPOINTMENTS
RULE 6.3 MEMBERSHIP IN LEGAL SERVICES ORGANIZATION
RULE 6.4 LAW REFORM ACTIVITIES AFFECTING CLIENT INTERESTS

INFORMATION ABOUT LEGAL SERVICES

RULE 7.1 COMMUNICATIONS CONCERNING A LAWYER'S SERVICES
RULE 7.2 ADVERTISING
RULE 7.3 DIRECT CONTACT WITH PROSPECTIVE CLIENTS
RULE 7.4 COMMUNICATION OF FIELDS OF PRACTICE
RULE 7.5 FIRM NAMES AND LETTERHEADS
RULE 7.6 PROFESSIONAL CARDS OF NONLAWYERS

MAINTAINING THE INTEGRITY OF THE PROFESSION

RULE 8.1 BAR ADMISSION AND DISCIPLINARY MATTERS
RULE 8.2 JUDICIAL AND LEGAL OFFICIALS
RULE 8.3 REPORTING PROFESSIONAL MISCONDUCT
RULE 8.4 MISCONDUCT
RULE 8.5 JURISDICTION

PREAMBLE: A LAWYER'S RESPONSIBILITIES

A lawyer is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.

As a representative of clients, a lawyer performs various functions. As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their

practical implications. As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system. As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealing with others. As intermediary between clients, a lawyer seeks to reconcile their divergent interests as an advisor to and, to a limited extent, as a spokesperson for each client. A lawyer acts as evaluator by examining a client's legal affairs and reporting about them to the client or to others.

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

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

As a public citizen, a lawyer should seek improvement of the law, of the administration of justice, and of the quality of service rendered by the legal profession. As a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients, employ that knowledge in reform of the law, and work to strengthen legal education. A lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance, and should therefore devote professional time and civic influence in their behalf. A lawyer should aid the legal profession in pursuing these objectives and should help the bar regulate itself in the public interest.

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

A lawyer's responsibilities as a representative of clients, an officer of the legal system and a public citizen are usually harmonious. Thus, when an opposing party is well represented, a lawyer can be a zealous advocate on behalf of a client and at the same time assume that justice is being done.

So, also, a lawyer can be sure that preserving client confidences ordinarily serves the public interest, because people are more likely to seek legal advice, and thereby heed their legal obligations, when they know their communications will be private. In the nature of a law practice, however, conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system and to the lawyer's own interest in remaining an upright person while earning a satisfactory living. The Rules of Professional Conduct prescribe terms for resolving such conflicts. Within the framework of these Rules many difficult issues of professional discretion can arise. Such issues must be resolved

through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules.

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

To the extent that lawyers meet the obligations of their professional calling, the occasion for government regulation is obviated. Self-regulation also helps maintain the legal profession's independence from government domination. An independent legal profession is an important force in preserving government under law, for abuse of legal authority is more readily challenged by a profession whose members are not dependent on government for the right to practice. The legal profession's relative autonomy carries with it special responsibilities of self-government. The profession has a responsibility to assure that its regulations are conceived in the public interest and not in furtherance of parochial or self-interested concerns of the bar. Every lawyer is responsible for observance of the Rules of Professional Conduct. A lawyer should also aid in securing their observance by other lawyers.

Neglect of these responsibilities compromises the independence of the profession and the public interest which it serves.

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

SCOPE

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 professional discretion. No disciplinary action should be taken when the lawyer chooses not to act or acts within the bounds of such discretion. Other Rules define the nature of relationships between the lawyer and others. The Rules are thus partly obligatory and disciplinary and partly constitutive and descriptive, in that they define a lawyer's professional role. Many of the Comments use the term "should." Comments do not add obligations to the Rules but provide guidance for practicing in compliance with the Rules.

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. 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.

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 may attach when the lawyer agrees to consider whether a client-lawyer relationship shall be established. Whether a client-lawyer relationship exists for any specific purpose can depend on the circumstances and may be a question of fact.

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

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

Violation of a Rule should not give rise to a cause of action nor should it create any presumption that a legal duty has been breached. 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 that a Rule is a just basis for a lawyer's self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the Rule. Accordingly, nothing in the Rules should be deemed to augment any substantive legal duty of lawyers or the extra-disciplinary consequences of violating such a duty.

Moreover, these Rules are not intended to govern or affect judicial application of either the attorney-client or work product privilege. Those privileges were developed to promote compliance with law and fairness in litigation. In reliance on the attorney-client privilege, clients are entitled to expect that communications within the scope of the privilege will be protected against compelled

disclosure. The attorney-client privilege is that of the client and not of the lawyer. The fact that in exceptional situations the lawyer under the Rules has a limited discretion to disclose a client confidence does not vitiate the proposition that, as a general matter, the client has a reasonable expectation that information relating to the client will not be voluntarily disclosed and that disclosure of such information may be judicially compelled only in accordance with recognized exceptions to the attorney-client and work product privileges.

The lawyer's exercise of discretion not to disclose information under Rule 1.6 should not be subject to reexamination. Permitting such reexamination would be incompatible with the general policy of promoting compliance with law through assurances that communications will be protected against disclosure.

The Comment accompanying each Rule explains and illustrates the meaning and purpose of the Rule. The Preamble and this note on Scope provide general orientation. The Comments are intended as guides to interpretation, but the text of each Rule is authoritative. Research notes were prepared by the Alabama State Bar Permanent Code Commission to compare counterparts in the former Alabama Code of Professional Responsibility and to provide selected references to other authorities. These were intended by the Commission to assist in the study by the Court of the proposed Rules and in the transition by the lawyer from the former Code of Professional Responsibility to these Rules of Professional Conduct.

The notes have not been adopted by the Court, do not constitute part of the Rules, and are not intended to affect the application or interpretation of the Rules and Comments.

TERMINOLOGY

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

“Consult” or “consultation” denotes communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question.

“Firm” or “law firm” denotes a lawyer or lawyers in a private firm, lawyers employed in the legal department of a corporation or other organization, and lawyers employed in a legal services organization. See Comment, Rule 1.10.

“Fraud” or “fraudulent” denotes conduct having a purpose to deceive and not merely negligent misrepresentation or failure to apprise another of relevant information.

“Knowingly,” “known,” or “knows” denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.

“Nonlawyer assistant” denotes any nonlawyer employee, full- or part-time, of a lawyer or law firm.

“Partner” denotes a member of a partnership and a shareholder in a law firm organized as a professional corporation.

“Reasonable” or “reasonably” when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer.

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

“Reasonably should know” when used in reference to a lawyer denotes that a lawyer of reasonable prudence and competence would ascertain the matter in question.

“Substantial” when used in reference to degree or extent denotes a material matter of clear and weighty importance.

ALABAMA RULES OF PROFESSIONAL CONDUCT

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

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.

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.

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.

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

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 elaborate treatment than matters of lesser consequence.

Maintaining Competence

To maintain the requisite knowledge and skill, a lawyer should engage in continuing study and education.

COMPARISON WITH FORMER ALABAMA CODE OF PROFESSIONAL RESPONSIBILITY

Rule 1.1 adds a requirement, not previously existing in Alabama, that affirmatively requires a lawyer to provide competent representation and that particularizes the elements of competence. In 1974 Alabama rejected the ABA's Model DR 6-101(A)(1), which provided that a lawyer shall not handle a matter "which he knows or should know that he is not competent to handle, without associating himself with a lawyer who is competent to handle it," together with Model DR 6-101(A)(2), which required "preparation adequate in the circumstances," and Model DR 6-101(A)(3), which prohibited the "[n]eglect of a legal matter."

Rather, Alabama adopted as DR 6-101 a requirement that "A lawyer shall not willfully neglect a legal matter entrusted to him." The former DR 6-101 is carried forward in Rule 1.3.

RULE 1.2

SCOPE OF REPRESENTATION

(a) A lawyer shall abide by a client's decisions concerning the objectives of representation, subject to paragraphs (c), (d) and (e), and shall consult with the client as to the means by which they are to be pursued. A lawyer shall abide by a client's decision whether to accept an offer of settlement of 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 objectives of the representation if the client consents after consultation.

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

(e) When a lawyer knows that a client expects assistance not permitted by the Rules of Professional Conduct or other law, the lawyer shall consult with the client regarding the relevant limitations on the lawyer's conduct.

COMMENT

Scope of Representation

Both lawyer and client have authority and responsibility in the objectives and means of representation. The client has ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations. Within those limits, a client also has a right to consult with the lawyer about the means to be used in pursuing those objectives. At the same time, a lawyer is not required to pursue objectives or employ means simply because a client may wish that the lawyer do so. A clear distinction between objectives and means sometimes cannot be drawn, and in many cases the client-lawyer relationship partakes of a joint undertaking. In questions of means, the lawyer should assume responsibility for technical and legal tactical issues, but should defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected. Law defining the lawyer's scope of authority in litigation varies among jurisdictions.

In a case in which the client appears to be suffering mental disability, 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

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.

Services Limited in Objectives or Means

The objectives or scope of services provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer's services are made available to the client. For example, a retainer may be for a specifically defined purpose. Representation provided through a legal aid agency may be subject to limitations on the types of cases the agency handles. When a lawyer has been retained by an insurer to represent an insured, the representation may be limited to matters related to the insurance coverage. The terms upon which representation is undertaken may exclude specific objectives or means. Such limitations may exclude objectives or means that the lawyer regards as repugnant or imprudent.

An agreement concerning the scope of representation must accord with the Rules of Professional Conduct and other law. Thus, the client may not be asked to agree to representation so limited in

scope as to violate Rule 1.1, or to surrender the right to terminate the lawyer's services or the right to settle litigation that the lawyer might wish to continue.

Criminal, Fraudulent, and Prohibited Transactions

A lawyer is required to give an honest opinion about the actual consequences that appear likely to result from a client's conduct. The fact that a client uses advice in a course of action that is criminal or fraudulent does not, of itself, make a lawyer a party to the course of action. However, a lawyer may not knowingly assist a client in criminal or fraudulent conduct. 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.

When the client's course of action has already begun and is continuing, the lawyer's responsibility is especially delicate. The lawyer is not permitted to reveal the client's wrongdoing, except where permitted by Rule 1.6. However, the lawyer is required to avoid furthering the purpose, for example, by suggesting how it might be concealed. A lawyer may not continue assisting a client in conduct that the lawyer originally supposes is legally proper but then discovers is criminal or fraudulent. Withdrawal from the representation, therefore, may be required.

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

Paragraph (d) applies whether or not the defrauded party is a party to the transaction. Hence, a lawyer should not participate in a sham transaction; for example, a transaction to effectuate criminal or fraudulent escape of tax liability. Paragraph (d) does not preclude undertaking a criminal defense incident to a general retainer for legal services to a lawful enterprise. The last clause of paragraph (d) recognizes that determining the validity or interpretation of a statute or regulation may require a course of action involving disobedience of the statute or regulation or of the interpretation placed upon it by governmental authorities.

COMPARISON WITH FORMER ALABAMA CODE OF PROFESSIONAL RESPONSIBILITY

Paragraph (a) has no counterpart in the Disciplinary Rules. EC 7-7 stated: "In certain areas of legal representation not affecting the merits of the cause or substantially prejudicing the rights of a client, a lawyer is entitled to make decisions on his own. But otherwise the authority to make decisions is exclusively that of the client" EC 7-8 stated that "[i]n the final analysis, however, the . . . decision whether to forego legally available objectives or methods because of nonlegal factors is ultimately for the client.... In the event that the client in a nonadjudicatory matter insists upon a course of conduct that is contrary to the judgment and advice of the lawyer but not prohibited by Disciplinary Rules, the lawyer may withdraw from the employment." DR 7-101(A)(1) provided that a lawyer "shall not intentionally . . . fail to seek the lawful objectives of his client through reasonably available means permitted by law A lawyer does not violate this Disciplinary Rule, however, by . . . avoiding offensive tactics"

Paragraph (b) has no counterpart in the former Code.

With regard to paragraph (c), DR 7-101(B)(1) provided that a lawyer may, “where permissible, under ethical considerations, exercise his professional judgment to waive or fail to assert a right or position of his client.”

With regard to paragraph (d), DR 7-102(A)(7) provided that a lawyer shall not “counsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent.” DR 7-102(A)(6) provided that a lawyer shall not “participate in the creation or preservation of evidence when he knows or it is obvious that the evidence is false.” DR 7-106(A) provided that a lawyer shall not “advise his client to disregard a standing rule of a tribunal or a ruling of a tribunal . . . but he may take appropriate steps in good faith to test the validity of such rule or ruling.” EC 7-5 stated that a lawyer “should never encourage or aid his client to commit criminal acts or counsel his client on how to violate the law and avoid punishment therefor.”

With regard to paragraph (e), Alabama had no counterpart, since in 1974 it had not adopted the ABA's Model DR 2-110(C)(1)(c), which provided that a lawyer may withdraw from representation if a client “insists” that the lawyer engage in “conduct that is illegal or that is prohibited under the Disciplinary Rules.” Alabama had adopted DR 9-101 (C) which provided that “a lawyer shall not state or imply that he is able to influence improperly . . . any tribunal, legislative body or public official.”

RULE 1.3

DILIGENCE

A lawyer shall not willfully neglect a legal matter entrusted to him.

COMMENT

With respect to the standard of care imposed by this rule, a lawyer is only subject to discipline for the willful neglect of a legal matter entrusted to him. This standard has been applied in the courts of this state. The mere failure of the lawyer to act with reasonable diligence and promptness is regrettable, but does not necessarily provide a basis for lawyer discipline under these rules. The failure of a lawyer to act with reasonable diligence and promptness may, however, provide a reason for a client to seek another lawyer, or, when the client is damaged, to consider a civil action against the lawyer for negligence, breach of contract, or other remedy.

A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and may take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf.

However, a lawyer is not bound to press for every advantage that might be realized for a client. A lawyer has professional discretion in determining the means by which a matter should be pursued. See Rule 1.2. A lawyer's workload should be controlled so that each matter can be handled adequately. Inevitably, there will be times when a lawyer, through no fault of the lawyer, is unable to complete all work for the client within an optimal time frame. In these circumstances, a lawyer

has professional discretion to determine that a client's legal position will not be affected by the lawyer's pursuing for the moment the work of other clients.

Perhaps no professional shortcoming is more widely resented than procrastination. A client's interests often can be adversely affected by the passage of time or the change of conditions; in extreme instances, as when a lawyer overlooks a statute of limitations, the client's legal position may be destroyed. In other instances, a client's legal position is unaffected by the passage of time. 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. However, delays may be beyond the control of the lawyer, and the timing and pace of a matter may be determined by either courts or other parties.

The client bears ultimate responsibility for entrusting a legal matter to a lawyer. The offer to a lawyer of a legal matter for handling, and the acceptance by the lawyer of the responsibility for the matter, should constitute a clear and unambiguous undertaking by the lawyer and an entrustment by the client. Absent either, the client and the lawyer may hold differing beliefs concerning the lawyer's responsibilities.

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 but has not been specifically instructed concerning pursuit of an appeal, the lawyer should advise the client of the possibility of appeal before relinquishing responsibility for the matter.

COMPARISON WITH FORMER ALABAMA CODE OF PROFESSIONAL RESPONSIBILITY

DR 6-101 (A) required that a lawyer not "willfully neglect a legal matter entrusted to him." In a footnote, DR 6-101 referred for a definition of "willful neglect to *Nelson v. State*, 182 Ala. 449, 62 So. 189 (1913), *State v. Martin*, 180 Ala. 458, 61 So. 491 (1913), and *Haynes v. Alabama State Bar*, 447 So. 2d 675 (Ala. 1984). EC 6-4 stated that a lawyer should "give appropriate attention to his legal work." Canon 7 stated that "a lawyer should represent a client zealously within the bounds of the law." DR 7-101(A)(1) provided that a lawyer "shall not intentionally . . . fail to seek the lawful objectives of his client through reasonably available means permitted by law and the Disciplinary Rules" DR 7-101 (A)(3) provided that a lawyer "shall not intentionally . . . p]rejudice or damage his client during the course of the relationship"

RULE 1.4

COMMUNICATION

(a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.

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

COMMENT

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. For example, a lawyer negotiating on behalf of a client should provide the client with facts relevant to the matter, inform the client of communications from another party, and take other reasonable steps that permit the client to make a decision regarding a serious offer from another party. A lawyer who receives from opposing counsel an offer of settlement in a civil controversy or a proffered plea bargain in a criminal case should promptly inform the client of its substance unless prior discussions with the client have left it clear that the proposal will be unacceptable. See Rule 1.2(a). Even when a client delegates authority to the lawyer, the client should be kept advised of the status of the matter. Adequacy of communication depends in part on the kind of advice or assistance involved. For example, in negotiations where there is time to explain a proposal, 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 might injure or coerce others. On the other hand, a lawyer ordinarily cannot be expected to describe trial or negotiation strategy in detail.

The guiding principle under this Rule is that the lawyer should fulfill the reasonable expectation of the client for information. In determining what is reasonable, the lawyer must consider that the lawyer has a duty to act in the client's best interests. However, each client will have different levels of willingness, ability, and desire to participate intelligently in the representation. These levels are often dependent upon the kind of representation. Thus, the guiding principle is contingent upon the client's reasonable expectation but is limited or expanded by the client's willingness, ability and desire to participate in the particular representation, and by the practicability of the lawyer's meeting the client's expectations.

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 mental disability. 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. Practical exigency may also require a lawyer to act for a client without prior consultation.

Withholding Information

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. 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.

COMPARISON WITH FORMER ALABAMA CODE OF PROFESSIONAL RESPONSIBILITY

Rule 1.4 has no direct counterpart in the Disciplinary Rules. DR 6101(A) provided that a lawyer shall not "willfully neglect a legal matter entrusted to him." DR 9-102(B)(1) provided that a lawyer shall promptly notify a client of the receipt of his funds, securities, or other properties." EC 7-8 stated that a lawyer "should exert his best efforts to insure that decisions of his client are made only after the client has been informed of relevant considerations." EC 9-2 stated that "a lawyer should fully and promptly inform his client of material developments in the matters being handled for the client."

RULE 1.5

FEES

(a) A lawyer shall not enter into an agreement for, or charge, or collect a clearly excessive fee. In determining whether a fee is excessive the factors to be considered are the following:

- (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill required to perform the legal service properly;
- (2) the likelihood, if apparent to the client that the acceptance of the particular employment will preclude other employment by the lawyer;
- (3) the fee customarily charged in the locality for similar legal services;
- (4) the amount involved and the results obtained;
- (5) the time limitations imposed by the client or by the circumstances;
- (6) the nature and length of the professional relationship with the client;
- (7) the experience, reputation, and ability of the lawyer or lawyers performing the services;
- (8) whether the fee is fixed or contingent; and
- (9) whether there is a written fee agreement signed by the client.

(b) When the lawyer has not regularly represented the client, the basis or rate of the fee shall be communicated to the client preferably in writing, before or within a reasonable time after commencing the representation.

(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 writing 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.* Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

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

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

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

(e)A division of fee between lawyers who are not in the same firm, including a division of fees with a referring lawyer, may be made only if:

(1)either (a) the division is in proportion to the services performed by each lawyer, or (b) by written agreement with the client, each lawyer assumes joint responsibility for the representation, or (c) in a contingency fee case, the division is between the referring or forwarding lawyer and the receiving lawyer;

(2)the client is advised of and does not object to the participation of all the lawyers involved;

(3)the client is advised that a division of fee will occur; and

(4)the total fee is not clearly excessive.

(f)Without prior notification to and prior approval of the appointing court, no lawyer appointed to represent an indigent criminal defendant shall accept any fee in the matter from the defendant or anyone on the defendant's behalf. A lawyer appointed to represent an indigent criminal defendant may separately hold property or funds received from the defendant or on the defendant's behalf which are intended as a fee for the representation, as provided for by Rule 1.15, only if the lawyer promptly notifies the appointing court and promptly seeks its approval for accepting the property or funds as a fee.

COMMENT

Basis or Rate of Fee

When the lawyer has regularly represented a client, they ordinarily will have evolved an understanding concerning the basis or rate of the fee. In a new client-lawyer relationship, however, an understanding as to the fee should be promptly established. It is not necessary to recite all the factors that underlie the basis of the fee, but only those that are directly involved in its computation. It is sufficient, for example, to state that the basic rate is an hourly charge or a fixed amount or an estimated amount, or to identify the factors that may be taken into account in finally fixing the fee. When developments occur during the representation that render an earlier estimate substantially inaccurate, a revised estimate should be provided to the client. A written statement concerning the fee reduces the possibility of misunderstanding. Furnishing the client with a simple memorandum or a copy of the lawyer's customary fee schedule is sufficient if the basis or rate of the fee is set forth.

Terms of Payment

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 1.80(j).

However, a fee paid in property instead of money may be subject to special scrutiny because it involves questions concerning both the value of the services and the lawyer's special knowledge of the value of the property.

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.

When there is doubt whether a contingent fee is consistent with the client's best interest, the lawyer should offer the client alternative bases for the fee and explain their implications. Applicable law may impose limitations on contingent fees, such as a ceiling on the percentage.

Division of Fee

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. Paragraphs (e)(1)(a) and (b) permit the lawyers in any type of matter to divide a fee on either the basis of the proportion of services they render or by agreement between the participating lawyers if all assume responsibility for the representation as a whole and the client is advised and does not object. Paragraph (e)(1)(c) permits the lawyers in a contingency fee matter to divide the fee without restriction other than disclosure to the client. Paragraphs (e)(2) and (3) do not require disclosure to the client of the share that each lawyer is to receive. However, Rule 1.5(b) does require the extent of the division to be disclosed upon request. Joint responsibility for the representation entails the obligations stated in Rule 5.1 for purposes of the matter involved.

Paragraph (e)(4) requires that the total fee of both lawyers not be clearly excessive. That the total percentage applicable to a contingency fee arrangement is increased when a matter is referred does not indicate that the fee is excessive. Nor is excessiveness shown merely because the receiving lawyer would have accepted the matter for a lesser total fee had that lawyer been the only lawyer receiving a fee.

Disputes over Fees

If a procedure has been established for resolution of fee disputes, such as an arbitration or mediation procedure established by the bar, the lawyer should conscientiously consider submitting to it. Law may prescribe a procedure for determining a lawyer's fee, for example, in representation of an executor or administrator, a class or a person entitled to a reasonable fee as part of the measure of damages. The lawyer entitled to such a fee and a lawyer representing another party concerned with the fee should comply with the prescribed procedure.

Fees for Indigent Representation

Lawyers appointed by a court to represent indigent criminal defendants are typically paid by the government, under various state or federal programs providing for the representation of indigent criminal defendants. When a criminal defendant, upon the basis of indigency, receives representation by a lawyer through a court appointment, the lawyer may not accept any fee from the defendant or from anyone acting on behalf of the defendant, unless the lawyer obtains the prior approval of the court. This prohibition prevents the defendant from abusing the system of court appointments. Furthermore, a lawyer who accepts a court appointment does so with the expectation that any fee in excess of the amount approved through the appointment system will be subject to further scrutiny by the court. When a criminal defendant is indigent at the time of appointment but is later able, through family, friends or other sources, to pay a fee to the lawyer, the lawyer may deposit the proffered fee, which may be kept separately in trust according to the Rules regulating the holding of property for clients or third persons. When the appointing court approves the acceptance of a fee from the defendant or on his behalf, then the Rules generally applicable to the disbursement of such property or funds apply. Otherwise the fee shall be disbursed first as the appointing court directs.

COMPARISON WITH FORMER ALABAMA CODE OF PROFESSIONAL RESPONSIBILITY

Rule 1.5(a) has no counterpart in the Disciplinary Rules. In 1974, Alabama did not adopt Model DR 2-106(A) which provided that a lawyer “shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee” and Model DR 2-106(B), which provided that a fee is “clearly excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee.” Instead, these considerations were included in the prior EC 2-18. The factors to be considered in determining whether a fee is excessive in Rule 1.5(a) are substantially identical to those listed in EC 2-18, with two modifications. The factor of “the responsibility, financial or otherwise, assumed by the lawyer,” as previously contained in EC 2-18, is omitted. And, a new factor is added at Rule 1.5(a)(9): “Whether there is a written fee agreement signed by the client.” EC 2-17 states that a lawyer “should not charge more than a reasonable fee” There was no counterpart to paragraph (b) in the Disciplinary Rules. EC 2-19 stated that it is “usually beneficial to reduce to writing the understanding of the parties regarding the fee, particularly when it is contingent.”

There was also no counterpart to paragraph (c) in the Disciplinary Rules. EC 2-20 provided that “[c]ontingent fee arrangements in civil cases have long been commonly accepted in the United States,” but that “a lawyer generally should decline to accept employment on a contingent fee basis by one who is able to pay a reasonable fixed fee”

With regard to paragraph (d), DR 2-107(A) prohibited “a contingent fee for representing a defendant in a criminal case.” EC 2-20 provided that “contingent fee arrangements in domestic relation cases are rarely justified.”

With regard to paragraph (e), DR 2-107(A) permitted division of fees only if: “(1) The client consents to employment of the other lawyer after a full disclosure that a division of fees will be made.” Alabama had rejected the other subdivisions of the Model DR which also required that “(2) The division is in proportion to the services performed and responsibility assumed by each.” and “(3) The total fee does not exceed clearly reasonable compensation” Further, in a provision unique to Alabama, as found in DR 2-103, it was said: “Nothing contained herein shall prohibit the division of fees with a forwarding lawyer.” A similar provision was added to the Model Rule at Rule 1.5(e) by the phrase “including a division of fees with a referring lawyer.”

There is no counterpart to paragraph (f) in the disciplinary rules. EC 2-29 stated that “[i]t is not unethical for an appointed attorney to receive a fee voluntarily paid by the defendant, or persons interested in him; but any appointed attorney receiving such payment shall forthwith advise the appointing court of such fact.”

RULE 1.6

CONFIDENTIALITY OF INFORMATION

(a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).

(b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

(1) to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm; or

(2) 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.

COMMENT

A lawyer, as an officer of the court and as a part of the judicial system, is charged with upholding the law. One of the lawyer's functions is to advise clients so that they avoid any violation of the law in the proper exercise of their rights.

The observance of the ethical obligation of a lawyer to hold inviolate confidential information of the client not only facilitates the full development of facts essential to proper representation of the client but also encourages people to seek early legal assistance. Almost without exception, clients come to lawyers in order to determine what their rights are and what is, in the maze of laws and regulations, deemed to be legal and correct. The common law recognizes that the client's

confidences must be protected from disclosure. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld.

A fundamental principle in the client-lawyer relationship is that the lawyer maintain confidentiality of information relating to the representation. The client is thereby encouraged to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter.

The principle of confidentiality is given effect in two related bodies of law, the attorney-client privilege (which includes the work product doctrine) in the law of evidence and the rule of confidentiality established in professional ethics. The attorney-client privilege applies 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 applies not merely to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of professional Conduct or other law. See also Scope.

The requirement of maintaining confidentiality of information relating to representation applies to government lawyers who may disagree with the policy goals that their representation is designed to advance.

Authorized Disclosure

A lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation, except to the extent that the client's instructions or special circumstances limit that authority. In litigation, for example, a lawyer may disclose information by admitting a fact that cannot properly be disputed, or in negotiation by making a disclosure that facilitates a satisfactory conclusion.

When coverage is or may be disputed, a lawyer representing an insured pursuant to an insurance contract may disclose any information pertinent to the issue of coverage to the insurer as well as to the insured. Although the insurer in such a situation is not the appointed attorney's client, as opposed to the situation in a normal insurance defense relationship, such disclosure is impliedly authorized in order to carry out the representation. However, the lawyer should avoid disclosing information to the insurer that the lawyer knows would adversely affect insurance coverage for the insured, unless either such disclosure is approved by the insured or the lawyer has assurances that the insurer will not use the information to the insured's disadvantage.

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

The confidentiality rule is subject to limited exceptions. In becoming privy to information about a client, a lawyer may foresee that the client intends serious harm to another person. However, to the extent a lawyer is required or permitted to disclose a client's purposes, the client will be inhibited from revealing facts which would enable the lawyer to counsel against a wrongful course of action. The public is better protected if full and open communication by the client is encouraged than if it is inhibited.

Several situations must be distinguished.

First, the lawyer may not counsel or assist a client in conduct that is criminal or fraudulent. See Rule 1.2(d). Similarly, a lawyer has a duty under Rule 3.3(a)(3) not to use false evidence. This duty is essentially a special instance of the duty prescribed in Rule 1.2(d) to avoid assisting a client in criminal or fraudulent conduct.

Second, the lawyer may have been innocently involved in past conduct by the client that was criminal or fraudulent. In such a situation the lawyer has not violated Rule 1.2(d), because to "counsel or assist" criminal or fraudulent conduct requires knowing that the conduct is of that character.

Third, the lawyer may learn that a client intends prospective conduct that is criminal and likely to result in imminent death or substantial bodily harm. As stated in paragraph (b)(1), the lawyer has professional discretion to reveal information in order to prevent such consequences. The lawyer may make a disclosure in order to prevent homicide or serious bodily injury which the lawyer reasonably believes is intended by a client. It is very difficult for a lawyer to "know" when such a heinous purpose will actually be carried out, for the client may have a change of mind.

The lawyer's exercise of discretion requires consideration of 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. Where practical, the lawyer should seek to persuade the client to take suitable action. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to the purpose.

A lawyer's decision not to take preventive action permitted by paragraph (b)(1) does not violate this Rule.

Withdrawal

If the lawyer's services will be used by the client in materially furthering a course of criminal or fraudulent conduct, the lawyer must withdraw, as stated in Rule 1.16(a)(1).

After withdrawal the lawyer is required to refrain from making disclosure of the clients' confidences, except as otherwise provided in Rule 1.6. Neither this Rule nor Rule 1.8(b) nor Rule 1.16(d) prevents the lawyer from giving notice of the fact of withdrawal, and the lawyer may also withdraw or disaffirm any opinion, document, affirmation, or the like. Where the client is an organization, the lawyer may be in doubt whether contemplated conduct will actually be carried out

by the organization. Where necessary to guide conduct in connection with this Rule, the lawyer may make inquiry within the organization as indicated in Rule 1.1 3(b).

Dispute Concerning Lawyer's Conduct

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. The lawyer's right to respond arises when an assertion of such complicity has been made. Paragraph (b)(2) 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, of course, applies where a proceeding has been commenced. Where practicable and not prejudicial to the lawyer's ability to establish the defense, the lawyer should advise the client of the third party's assertion and request that the client respond appropriately. In any event, disclosure should be no greater than the lawyer reasonably believes is necessary to vindicate innocence, the disclosure should be made in a manner which 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.

If the lawyer is charged with wrongdoing in which the client's conduct is implicated, the rule of confidentiality should not prevent the lawyer from defending against the charge. Such a charge can arise in a civil, criminal or professional disciplinary 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. A lawyer entitled to a fee is permitted by paragraph (b)(2) 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. As stated above, the lawyer must make every effort practicable to avoid unnecessary disclosure of information relating to a representation, to limit disclosure to those having the need to know it, and to obtain protective orders or make other arrangements minimizing the risk of disclosure.

Disclosures Otherwise Required or Authorized

The attorney-client privilege is differently defined in various jurisdictions. If a lawyer is called as a witness to give testimony concerning a client, absent waiver by the client, paragraph (a) requires the lawyer to invoke the privilege when it is applicable. The lawyer must comply with the final orders of a court or other tribunal of competent jurisdiction requiring the lawyer to give information about the client.

The Rules of Professional Conduct in various circumstances permit or require a lawyer to disclose information relating to the representation. See Rules 2.2, 2.3, 3.3 and 4.1. In addition to these provisions, a lawyer may be obligated or permitted by other provisions of law to give information about a client. Whether another provision of law supersedes Rule 1.6 is a matter of interpretation beyond the scope of these Rules, but a presumption should exist against such a supersession.

Former Client

The duty of confidentiality continues after the client-lawyer relationship has terminated.

COMPARISON WITH FORMER ALABAMA CODE OF PROFESSIONAL RESPONSIBILITY

Rule 1.6 eliminates the two-pronged duty under the former Code in favor of a single standard protecting all information about a client “relating to representation.” Under DR 4-101, the requirement applied to information protected by the attorney-client privilege and to information “gained in” the professional relationship that “the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.” EC 4-4 added that the duty differed from the evidentiary privilege in that it existed “without regard to the nature or source of information or the fact that others share the knowledge.” Rule 1.6 imposes confidentiality on information relating to the representation even if it is acquired before or after the relationship existed. It does not require the client to indicate information that is to be confidential, or permit the lawyer to speculate whether particular information might be embarrassing or detrimental.

Paragraph (a) permits a lawyer to disclose information where impliedly authorized to do so in order to carry out the representation.

Paragraph (b) redefines the exceptions to the requirement of confidentiality. Regarding paragraph (b)(1), DR 4-101(C)(5) provided that a lawyer “may reveal t]he intention of his client to commit a crime and the information necessary to prevent the crime.” This option existed regardless of the seriousness of the proposed crime. With regard to paragraph (b)(2), DR 4-101(C)(4) provided that a lawyer may reveal “c]onfidences or secrets necessary to establish or collect his fee or to defend himself or his employers or associates against an accusation of wrongful conduct.” Paragraph (b)(2) enlarges the exception to include disclosure of information relating to claims by the lawyer other than for the lawyer's fee, for example, recovery of property from the client.

RULE 1.7

CONFLICT OF INTEREST:

GENERAL RULE

(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:

(1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and

(2) each client consents after consultation.

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

(1) the lawyer reasonably believes the representation will not be adversely affected; and

(2)the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

COMMENT

Loyalty to a Client

Loyalty is an essential element in the lawyer's relationship to a client. An impermissible conflict of interest may exist before representation is undertaken, in which event the representation should be declined. The 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 parties and issues involved and to determine whether there are actual or potential conflicts of interest.

If such a conflict arises after representation has been undertaken, the lawyer should withdraw from the representation. See Rule 1.16. Where more than one client is involved and the lawyer withdraws because a conflict arises after representation, whether the lawyer may continue to represent any of the clients is determined by Rule 1.9. See also Rule 2.2(c). As to whether a client-lawyer relationship exists or, having once been established, is continuing, see Comment to Rule 1.3 and Scope.

As a general proposition, loyalty to a client prohibits undertaking representation directly adverse to that client without that client's consent.

Paragraph (a) expresses that general rule. Thus, a lawyer ordinarily may not act as advocate against a person the lawyer represents in some other matter, even if it is wholly unrelated. On the other hand, simultaneous representation in unrelated matters of clients whose interests are only generally adverse, such as competing economic enterprises, does not require consent of the respective clients. Paragraph (a) applies only when the representation of one client would be directly adverse to the other. Loyalty to a client is also impaired when a lawyer cannot consider, recommend or carry out an appropriate course of action for the client because of the lawyer's other responsibilities or interests. The conflict in effect forecloses alternatives that would otherwise be available to the client.

Paragraph (b) addresses such situations. A possible conflict does not itself preclude the representation. The critical questions are the likelihood that a conflict 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. Consideration should be given to whether the client wishes to accommodate the other interest involved.

Consultation and Consent

A client may consent to representation notwithstanding a conflict. However, as indicated in paragraph (a)(1) with respect to representation directly adverse to a client, and paragraph (b)(1) with respect to material limitations on representation of a client, 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 more than one client is involved, the question of conflict must be resolved as to each client. Moreover, there may be circumstances where it is 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.

Lawyer's Interests

The lawyer's own interests should not be permitted to have adverse effect on representation of a client. For example, a lawyer's need for income should not lead the lawyer to undertake matters that cannot be handled competently and at a reasonable fee. See Rules 1.1 and 1.5. 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. 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 interest.

Conflicts in Litigation

Paragraph (a) prohibits representation of opposing parties in litigation. Simultaneous representation of parties whose interests in litigation may conflict, such as coplaintiffs or codefendants, is governed by paragraph (b). An impermissible 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 is proper if the risk of adverse effect is minimal and the requirements of paragraph (b) are met. Compare Rule 2.2 involving intermediation between clients.

Ordinarily, a lawyer may not act as advocate against a client the lawyer represents in some other matter, even if the other matter is wholly unrelated. However, there are circumstances in which a lawyer may act as advocate against a client. For example, a lawyer representing an enterprise with diverse operations may accept employment as an advocate against the enterprise in an unrelated matter if doing so will not adversely affect the lawyer's relationship with the enterprise or conduct of the suit and if both clients consent upon consultation. By the same token, government lawyers in some circumstances may represent government employees in proceedings in which a government agency is the opposing party. The propriety of concurrent representation can depend on the nature of the litigation. For example, a suit charging fraud entails conflict to a degree not involved in a suit for a declaratory judgment concerning statutory interpretation.

A lawyer may represent parties having antagonistic positions on a legal question that has arisen in different cases, unless representation of either client would be adversely affected. Thus, it is ordinarily not improper to assert such positions in cases pending in different trial courts, but it may be improper to do so in cases pending at the same time in an appellate court.

Interest of Person Paying for a Lawyer's Service

A lawyer may be paid from a source other than the client, if the client is informed of that fact and consents and the arrangement does not compromise the lawyer's duty of loyalty to the client. See Rule 1.8(f). For example, when an insurer and its insured have conflicting interests in a matter arising from a liability insurance agreement, and the insurer provides special counsel for the insured, the arrangement should assure the special counsel's professional independence. So also, when a corporation and its directors or employees are involved in a controversy in which they have conflicting interests, the corporation may provide funds for separate legal representation of the directors or employees, if the clients consent after consultation and the arrangement ensures the lawyer's professional independence.

Other Conflict Situations

Conflicts of interest in contexts other than litigation sometimes may be difficult to assess. Relevant factors in determining whether there is potential for adverse effect 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 actual conflict will arise and the likely prejudice to the client from the conflict if it does arise.

The question is often one of proximity and degree.

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 of interest among them.

Conflict questions may also 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 arise. In estate administration the identity of the client may be unclear under the law of a particular jurisdiction. Under one view, the client is the fiduciary; under another view, the client is the estate or trust, including its beneficiaries. The lawyer should make clear the relationship to the parties involved.

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.

Conflict Charged by an Opposing Party

Resolving questions of conflict of interest is primarily the responsibility of the lawyer undertaking the representation. In litigation, a court may raise the question when there is reason to infer that the

lawyer has neglected the responsibility. In a criminal case, inquiry by the court is generally required when a lawyer represents multiple defendants. Where the conflict is such as clearly to call in question the fair or efficient administration of justice, opposing counsel may properly raise the question. Such an objection should be viewed with caution, however, for it can be misused as a technique of harassment. See Scope.

COMPARISON WITH FORMER ALABAMA CODE OF PROFESSIONAL RESPONSIBILITY

DR 5-101(A) provided that “[e]xcept with the consent of his client after full disclosure, a lawyer shall not accept employment if the exercise of his professional judgment on behalf of his client will be or reasonably may be affected by his own financial, business, property, or personal interests.”

DR 5-105(A) provided that a lawyer “shall decline proffered employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, or if it would be likely to involve him in representing differing interests, except to the extent permitted under DR 5-105(C).” DR 5-105(C)

provided that “a lawyer may represent multiple clients if it was obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each.” DR 5-107(B) provided that a lawyer “shall not permit a person who recommends, employs, or pays him to render legal services for another to direct or regulate his professional judgment in rendering such services.”

Rule 1.7 clarifies DR 5-105(A) by requiring that, when the lawyer's other interests are involved, not only must the client consent after consultation, but also, independent of such consent, the representation reasonably appear not to be adversely affected by the lawyer's other interests. This requirement was implicit in EC 5-2, which stated that a lawyer “should not accept proffered employment if his personal interests or desires will, or there is a reasonable probability that they will, affect adversely the advice to be given or services to be rendered the prospective client.”

RULE 1.8

CONFLICT OF INTEREST:

PROHIBITED TRANSACTIONS

(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 to the client in a manner which can be reasonably understood by the client;

(2) the client is given a reasonable opportunity to seek the advice of independent counsel in the transaction; and

(3) the client consents in writing thereto:

(b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client consents after consultation, except as permitted or required by Rule 1.6 or Rule 3.3.

(c) A lawyer shall not prepare an instrument giving the lawyer or a person related to the lawyer as parent, child, sibling, or spouse any substantial gift from a client, including a testamentary gift, except where the client is related to the donee.

(d) Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.

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

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

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

(3) a lawyer may advance or guarantee emergency financial assistance to the client, the repayment of which may not be contingent on the outcome of the matter, provided that no promise or assurance of financial assistance was made to the client by the lawyer, or on the lawyer's behalf, prior to the employment of the lawyer; and

(4) in an action in which an attorney's fee is expressed and payable, in whole or in part, as a percentage of the recovery in the action, a lawyer may pay, for his own account, court costs and expenses of litigation. The fee paid to the attorney from the proceeds of the action may include an amount equal to such costs and expenses incurred.

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

(1) the client consents after consultation or the lawyer is appointed pursuant to an insurance contract;

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

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

(g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the client, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client consents after consultation, including disclosure of 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 make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless permitted by law and the client is independently represented in making the agreement, or settle a claim for such liability with an unrepresented client or former client without first advising that person in writing that independent representation is appropriate in connection therewith.

(i) A lawyer related to another lawyer as parent, child, sibling or spouse shall not represent a client in a representation directly adverse to a person who the lawyer knows is represented by the other lawyer except upon consent by the client after consultation regarding the relationship.

(j) 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 granted by law to secure the lawyer's fee or expenses; and

(2) contract with a client for a reasonable contingent fee in a civil case.

(k) in no event shall a lawyer represent both parties in a divorce or domestic relations proceeding, or in matters involving custody of children, alimony or child support, whether or not contested. In an

uncontested proceeding of this nature a lawyer may have contact with the non-represented party and shall be deemed to have complied with this prohibition if the non-represented party knowingly executes a document that is filed in such proceeding acknowledging:

(1) that the lawyer does not and cannot appear or serve as the lawyer for the non-represented party;

(2) that the lawyer represents only the client and will use the lawyer's best efforts to protect the client's best interests;

(3) that the non-represented party has the right to employ counsel of the party's own choosing and has been advised that it may be in the party's best interest to do so; and

(4) that having been advised of the foregoing, the non-represented party has requested the lawyer to prepare an answer and waiver under which the cause may be submitted without notice and such other pleadings and agreements as may be appropriate.

COMMENT

Transactions Between Client and Lawyer

As a general principle, all transactions between client and lawyer should be fair and reasonable to the client. In such transactions a review by independent counsel on behalf of the client is often advisable. Furthermore, a lawyer may not exploit information relating to the representation to the client's disadvantage. For example, a lawyer who has learned that the client is investing in specific real estate may not, without the client's consent, seek to acquire nearby property where doing so would adversely affect the client's plan for investment. Paragraph (a) does not, however, apply to standard commercial transactions between the lawyer and the client for products or services that the client generally markets to others, 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.

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 effectuation of a substantial gift requires preparing a legal instrument such as a will or conveyance, however, the client should have the detached advice that another lawyer can provide. Paragraph (c) recognizes an exception where the client is a relative of the donee or the gift is not substantial.

Emergency Financial Assistance

On occasion, a client of a lawyer may suffer a financial emergency. The client may be totally unable to turn to traditional sources of emergency financial assistance such as banks, families, or neighbors to obtain necessary assistance in meeting such a financial emergency. While the client may have an expectation that a recovery in a pending lawsuit would provide ample funds from which to repay a loan, the collateralization of a loan with the anticipated proceeds of litigation is not generally accepted as a good business practice. In these circumstances, the only alternative to whom the client may realistically be able to turn is the lawyer handling the lawsuit. For true financial emergencies, arising from circumstances beyond the control of the client, the Rule permits

the lawyer either to advance a loan to the client or to guarantee the repayment of a loan by a third party to the client.

A lawyer departs from the role of advocate when the lawyer becomes a lender to the client. The lawyer as lender is placed in a position adverse to the client, particularly if the client refuses to repay. Since the repayment by the client may not be contingent on the outcome of a matter, the client is always responsible for repayment of any loan, whether the client wins or loses the pending lawsuit.

Rule 1.8(e)(3) permits the lawyer to act as both advocate for and lender to the client under only the narrowest and most compelling of circumstances. The lawyer must not, prior to employment, directly or indirectly have assured the client of the availability of emergency financial assistance. The assistance must meet a true emergency. Emergency financial assistance does not include the regular provision of income and support to a client. Rather, the Rule is intended to permit the lawyer to help in those few cases which rise to the level of an emergency. The lawyer is never obligated to provide such assistance, and he is obligated to attempt collection from the client regardless of the outcome of the matter.

Literary Rights

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 paragraph (j). Person Paying for Lawyer's Services Paragraph (f) requires disclosure of the fact that the lawyer's services are being paid for by a third party. Subsection (1) in this paragraph expressly recognizes that in the insurance defense practice, attorneys are appointed by insurers to represent insureds as clients. The insurer's authority to appoint counsel springs from its contract with the insured. In the normal insurance defense relationship where, for example, there are no coverage issues, appointed counsel has two clients, the insured and the insurer. Hence, the insurer is not a third party. Additionally, all arrangements pursuant to paragraph (f) must also conform to the requirements of Rule 1.6 concerning confidentiality and Rule 1.7 concerning conflict of interest. Where the client is a class, consent may be obtained on behalf of the class by court-supervised procedure.

Limiting Liability

Paragraph (h) is not intended to apply to customary qualifications and limitations in legal opinions and memoranda.

Family Relationships Between Lawyers Paragraph (i) applies to related lawyers who are in different firms.

Related lawyers in the same firm are governed by Rules 1.7, 1.9, and 1.10.

The disqualification stated in paragraph (i) is personal and is not imputed to members of firms with whom the lawyers are associated.

Acquisition of Interest in Litigation

Paragraph (j) states the traditional general rule that lawyers are prohibited from acquiring a proprietary interest in litigation. This general rule, which has its basis in common law champerty and maintenance, is subject to specific exceptions developed in decisional law and continued in these Rules, such as the exception for reasonable contingent fees set forth in Rule 1.5 and the exception for certain advances of the costs of litigation set forth in paragraph (e).

Representation of both parties in domestic cases.

In domestic relations cases, the lawyer is prohibited from representing both of the opposing parties, who generally are spouses or former spouses. This prohibition is applicable in a broad range of domestic relations cases, including divorce, child custody, child support, alimony, or other proceedings which generally fall under this category. The prohibition applies even in uncontested matters; thus, representation of both parties is not allowed even if the lawyer concludes that he could conduct the representation in a manner consistent with Rule 1.7, concerning conflicts of interest generally, or Rule 2.2, concerning intermediation between clients. This Rule is grounded in the view that, in domestic relations matters, the appropriate policy is a broad-based proscription not subject to waiver by the parties or the lawyer. Often a lawyer is confronted with a situation in which the opposing parties in a divorce case have agreed, or can agree, on the terms of the divorce concerning such matters as alimony, child custody, and child support. In such a situation, paragraphs (k)(1)-(4) permit a lawyer representing one of the parties to provide an answer and waiver to the unrepresented party if the unrepresented party knowingly executes a specified form of document, which must be filed in the proceeding. The document contains disclosures and disclaimers directed towards the unrepresented party. Having complied with paragraphs (k)(1)-(4), the lawyer may have contact with the unrepresented party. Upon request of the unrepresented party, the lawyer may prepare an answer to a petition or complaint, as well as other appropriate pleadings and agreements, for the signature of the unrepresented party. This Rule thus permits a lawyer to facilitate his representation of one party by preparing documents for the unrepresented party to sign. If these activities are performed in accordance with the specified procedure, the lawyer is not in violation of the prohibition upon representation of opposing parties in domestic proceedings.

COMPARISON WITH FORMER ALABAMA CODE OF PROFESSIONAL RESPONSIBILITY

With regard to paragraph (a), DR 5-104(A) provided that a lawyer “shall not enter into a business transaction with a client if they have differing interests therein and if the client expects the lawyer to exercise his professional judgment therein for the protection of the client, unless the client has consented after full disclosure.” EC 5-3 stated that a lawyer “should not seek to persuade his client to permit him to invest in an undertaking of his client nor make improper use of his professional relationship to influence his client to invest in an enterprise in which the lawyer is interested.”

With regard to paragraph (b), DR 4-101(B)(3) provided that a lawyer should not use “a confidence or secret of his client for the advantage of himself, or of a third person, unless the client consents after full disclosure.”

There was no counterpart to paragraph (c) in the Disciplinary Rules. EC 5-5 stated that a lawyer “should not suggest to his client that a gift be made to himself or for his benefit. If a lawyer accepts a gift from his client, he is peculiarly susceptible to the charge that he unduly influenced or overreached the client. If a client voluntarily offers to make a gift to his lawyer, the lawyer may accept the gift, but before doing so, he should urge that the client secure disinterested advice from an independent, competent person who is cognizant of all the circumstances. Other than in exceptional circumstances, a lawyer should insist that an instrument in which his client desires to name him beneficially be prepared by another lawyer selected by the client.”

Paragraph (d) is substantially similar to DR 5-104(B), but refers to “literary or media” rights, a more generally inclusive term than “publication” rights.

Paragraph (e)(1), permitting the lawyer to advance costs which are repayable contingent on the outcome of the litigation, is a change from the accepted interpretation of DR 5-103(B). See Morrow, “Opinions of the General Counsel,” 44 Ala. Law. 168 (1983).

Paragraph (e)(2) has no counterpart in the former Code.

Paragraph (e)(3) is substantially identical to DR 5-103(B).

Paragraph (f) is substantially identical to DR 5-107(A).

Paragraph (g) is substantially identical to DR 5-106.

The first clause of paragraph (h) is similar to DR 6-102(A). There was no counterpart in the former Code to the second clause of paragraph (h).

Paragraph(i) has no counterpart in the former Code.

Paragraph(j) is substantially identical to DR 5-103(A).

Paragraph(k) is substantially identical to the last part of DR 5-105(C). This provision is unique to Alabama and is carried forward into the Rules.

RULE 1.9

CONFLICT OF INTEREST: FORMER CLIENT

A lawyer who has formerly represented a client in a matter shall not thereafter:

(a) 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 consents after consultation; or

(b) use information relating to the representation to the disadvantage of the former client except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client or when the information has become generally known.

COMMENT

After termination of a client-lawyer relationship, a lawyer may not represent another client except in conformity with this Rule. The principles in Rule 1.7 determine whether the interests of the present and former client are adverse. Thus, 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.

The scope of a “maker” for purposes of paragraph (a) may depend 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 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 wholly 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 jurisdiction. 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.

Information acquired by the lawyer in the course of representing a client may not subsequently be used 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.

Disqualification from subsequent representation is for the protection of clients and can be waived by them. A waiver is effective only if there is disclosure of the circumstances, including the lawyer's intended role in behalf of the new client.

With regard to an opposing party's raising a question of conflict of interest, see Comment to Rule 1.7. With regard to disqualification of a firm with which a lawyer is associated, see Rule 1.10.

COMPARISON WITH FORMER ALABAMA CODE OF PROFESSIONAL RESPONSIBILITY

There was no counterpart to paragraphs (a) and (b) in the Disciplinary Rules. The problem addressed in paragraph (a) was sometimes dealt with under the rubric of Canon 9 of the former Code, which provided: “A lawyer should avoid even the appearance of impropriety.” EC 4-6 stated

that the “obligation of a lawyer to preserve the confidences and secrets of his client continues after the termination of his employment.”

The provision in paragraph (a) for waiver by the former client is similar to DR 5-105(C).

The exception in the last sentence of paragraph (b) permits a lawyer to use information relating to a former client that is in the “public domain,” a use that was also not prohibited by the former Code, which protected only “confidences and secrets.” Since the scope of paragraph (a) is much broader than “confidences and secrets,” it is necessary under the Rules to define when a lawyer may make use of information about a client after the client-lawyer relationship has terminated.

RULE 1.10

IMPUTED DISQUALIFICATION: 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, 1.8(c), 1.9 or 2.2.

(b) When a lawyer becomes associated with a firm, the firm may not knowingly represent a person in the same or a substantially related matter in which that lawyer, or a firm with which the lawyer was associated, had previously represented a client whose interests are materially adverse to that person and about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(b) that is material to the matter.

(c) 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, 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(b) that is material to the matter.

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

COMMENT

Definition of “Firm”

For purposes of the Rules of Professional Conduct, the term “firm” includes lawyers in a private firm, and lawyers employed in the legal department of a corporation or other organization, or in a legal services organization. Whether two or more lawyers constitute a firm within this definition 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 suggesting 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 confidential 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.

With respect to the law department of an organization, there is ordinarily no question that the members of the department constitute a firm within the meaning of the Rules of Professional Conduct. However, there can be uncertainty 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.

Similar questions can also arise with respect to lawyers in legal aid.

Lawyers employed in the same unit of a legal service organization constitute a firm, but not necessarily those employed in separate units. As in the case of independent practitioners, whether the lawyers should be treated as associated with each other can depend on the particular rule that is involved, and on the specific facts of the situation.

Where a lawyer has joined a private firm after having represented the government, the situation is governed by Rule 1.11(a) and (b); where a lawyer represents the government after having served private clients, the situation is governed by Rule 1.11(c)(1). The individual lawyer involved is bound by the Rules generally, including Rules 1.6, 1.7, and 1.9.

Different provisions are thus made for movement of a lawyer from one private firm to another and for movement of a lawyer between a private firm and the government. The government is entitled to protection of its client confidences, and therefore to the protections provided in Rules 1.6, 1.9, and 1.11. However, if the more extensive disqualification in Rule 1.10 were applied to former government lawyers, the potential effect on the government would be unduly burdensome. The government deals with all private citizens and organizations, and thus has a much wider circle of adverse legal interests than does any private law firm. In these circumstances, the government's recruitment of lawyers would be seriously impaired if Rule 1.10 were applied to the government. On balance, therefore, the government is better served in the long run by the protections stated in Rule 1.11.

Principles of Imputed Disqualification

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 paragraphs (b) and (c).

Lawyers Moving Between Firms

When lawyers have been associated in a firm but then end their association, however, the problem is more complicated. The fiction that the law firm is the same as a single lawyer is no longer wholly realistic. There are several competing considerations. First, the client previously represented must be reasonably assured that the principle of loyalty to the client is not compromised. Second, the rule of disqualification should not be so broadly cast as to preclude other persons from having reasonable choice of legal counsel. Third, the rule of disqualification 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 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 imputed disqualification were defined 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.

Reconciliation of these competing principles in the past has been attempted under two rubrics. One approach has been to seek per se rules of disqualification. For example, it has been held that a partner in a law firm is conclusively presumed to have access to all confidences concerning all clients of the firm. Under this analysis, if a lawyer has been a partner in one law firm and then becomes a partner in another law firm, there is a presumption that all confidences known by a partner in the first firm are known to all partners in the second firm. This presumption might properly be applied in some circumstances, especially where the client has been extensively represented, but may be unrealistic where the client was represented only for limited purposes. Furthermore, such a rigid rule exaggerates the difference between a partner and an associate in modern law firms.

The other rubric formerly used for dealing with vicarious disqualification is the appearance of impropriety proscribed in Canon 9 of the ABA former Code of Professional Responsibility. This rubric has a twofold problem.

First, the appearance of impropriety can be taken to include any new client-lawyer relationship that might make a former client feel anxious. If that meaning were adopted, disqualification would become little more than a question of subjective judgment by the former client.

Second, since “impropriety” is undefined, the term “appearance of impropriety” is question-begging. It therefore has to be recognized that the problem of imputed disqualification cannot be properly resolved either by simple analogy to a lawyer practicing alone or by the very general concept of appearance of impropriety.

A rule based on a functional analysis is more appropriate for determining the question of vicarious disqualification. Two functions are involved: preserving confidentiality and avoiding positions adverse to a client.

Confidentiality

Preserving confidentiality is a question of access to information. Access to information, in turn, is essentially a question of fact in particular circumstances, 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 discussion 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.

Application of paragraphs (b) and (c) depends on a situation's particular facts. In any such inquiry, the burden of proof should rest upon the firm whose disqualification is sought.

Paragraphs (b) and (c) operate to disqualify the firm only when the lawyer involved has actual knowledge of information protected by Rules 1.6 and 1.9(b). Thus, if a lawyer while with one firm acquired no knowledge of 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.

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.

Adverse Positions

The second aspect of loyalty to client is the lawyer's obligation to decline subsequent representations involving positions adverse to a former client arising in substantially related matters. This obligation requires abstention from adverse representation by the individual lawyer involved, but does not properly entail abstention of other lawyers through imputed disqualification. Hence, this aspect of the problem is governed by Rule 1.9(a). Thus, if a lawyer left one firm for another, the new affiliation would not preclude the firms involved from continuing to represent clients with adverse interests in the same or related matters, so long as the conditions of paragraphs (b) and (c) concerning confidentiality have been met.

COMPARISON WITH FORMER ALABAMA CODE OF PROFESSIONAL RESPONSIBILITY

DR 5-105(D) provided that "if a lawyer is required to decline or to withdraw from employment under DR 5-105, no partner or associate of his or his firm, may accept or continue such employment."

RULE 1.11

SUCCESSIVE GOVERNMENT AND PRIVATE EMPLOYMENT

(a) Except as law may otherwise expressly permit, a lawyer shall not represent a private client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency consents after consultation. 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 screened from any participation in the matter and is apportioned no part of the fee therefrom; and

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

(b) Except as may otherwise be permitted by law, a lawyer, having information concerning a person, which was acquired when the lawyer was a public officer or employee and which the lawyer knows to be confidential government information, may not represent a private client whose interests are adverse to that person in a matter in which such information could be used to that person's material disadvantage. A firm with which that lawyer is associated may undertake or continue representation in the matter only if the disqualified lawyer is precluded from any participation in the matter and is apportioned no part of the fee therefrom.

(c) Except as law may otherwise expressly permit, a lawyer serving as a public officer or employee shall not:

(1) participate in a matter in which the lawyer participated personally and substantially while in private practice or non-governmental employment, unless under applicable law no one is, or by lawful delegation may be, authorized to act in the lawyer's stead in the matter; or

(2) negotiate for private employment with any person who is involved as a party or as attorney for a party in a matter in which the lawyer is 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).

(d) 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.

(e)As used in this rule, the term “confidential government information” means information which 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.

COMMENT

This Rule prevents a lawyer from exploiting public office for the advantage of a private client. It is a counterpart of Rule 1.10(b), which applies to lawyers moving from one firm to another.

A lawyer representing a government agency, whether employed or specially retained by the government, is subject to the Rules of Professional Conduct, including the prohibition against representing adverse interests stated in Rule 1.7 and the protections afforded former clients in Rule 1.9. In addition, such a lawyer is subject to Rule 1.11 and to statutes and government regulations regarding conflict of interest. Such statutes and regulations may circumscribe the extent to which the government agency may give consent under this Rule.

Where the successive clients are a public agency and a private client, the risk exists that power or discretion vested in public authority might be used for the special benefit of a private client. A lawyer should not be in a position where benefit to a private client might affect performance of the lawyer's professional functions on behalf of public authority. Also, unfair advantage could accrue to the private client by reason of access to confidential government information about the client's adversary obtainable only through the lawyer's government service. However, the rules governing lawyers presently or formerly employed by a government agency should not be so restrictive as to inhibit transfer of employment to and from the government. The government has a legitimate need to attract qualified lawyers as well as to maintain high ethical standards. The provisions for screening and waiver are necessary to prevent the disqualification rule from imposing too severe a deterrent against entering public service.

When the client is an agency of one government, that agency should be treated as a private client for purposes of this Rule if the lawyer thereafter represents an agency of another government, as when a lawyer represents a city and subsequently is employed by a federal agency.

Paragraphs (a)(1) and (b) do not prohibit a lawyer from receiving a salary or partnership share established by prior independent agreement. They prohibit directly relating the attorney's compensation to the fee in the matter in which the lawyer is disqualified.

Paragraph (a)(2) does not require that a lawyer give notice to the government agency at a time when premature disclosure would injure the client; a requirement for premature disclosure might preclude engagement of the lawyer. Such notice is, however, required to be given as soon as practicable in order that the government agency will have a reasonable opportunity to ascertain that the lawyer is complying with Rule 1.11 and to take appropriate action if it believes the lawyer is not complying.

Paragraph (b) 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.

Paragraphs (a) and (c) 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.

Paragraph (c) does not disqualify other lawyers in the agency with which the lawyer in question has become associated.

COMPARISON WITH FORMER ALABAMA CODE OF PROFESSIONAL RESPONSIBILITY

Paragraph (a) is similar to DR 9-101 (B), except that the latter used the terms “in which he had substantial responsibility while he was a public employee.”

Paragraphs (b), (c), (d) and (e) have no counterparts in the former Code.

RULE 1.12

FORMER JUDGE OR ARBITRATOR

(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, arbitrator or law clerk to such a person, unless all parties to the proceeding consent after consultation.

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

(b) 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 screened from any participation in the matter and is apportioned no part of the fee therefrom; and

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

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

COMMENT

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. Compliance Canons A(2), B(2) and C of the former Code of Judicial Conduct provide that a part-time judge, judge pro tempore or retired judge recalled to active service, may not “act as a lawyer in any proceeding in which he served as a judge or in any other proceeding related thereto.” Although phrased differently from this Rule, those rules correspond in meaning.

COMPARISON WITH FORMER ALABAMA CODE OF PROFESSIONAL RESPONSIBILITY

Paragraph (a) is substantially similar to DR 9-101 (A), which provided that a lawyer “shall not accept private employment in a matter upon the merits of which he has acted in a judicial capacity.” Paragraph (a) differs, however, in that it is broader in scope and states more specifically the persons to whom it applies. There was no counterpart in the former Code to paragraphs (b), (c) or (d).

With regard to arbitrators, EC 5-20 stated that “a lawyer who] has undertaken to act as an impartial arbitrator or mediator, . . . should not thereafter represent in the dispute any of the parties involved.” DR 9-101(A) did not permit a waiver of the disqualification applied to former judges by consent of the parties. However, DR 5-105(C) was similar in effect and could be construed to permit waiver.

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 which 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 information relating to the representation 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) If, 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 is likely to result in substantial injury to the organization, the lawyer may resign in accordance with Rule 1.16.

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

(e) 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.

COMMENT

The Entity as the Client

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.

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.

When constituents of the organization make decisions for it, the decisions ordinarily must be accepted by the lawyer even if their utility or prudence is doubtful. Decisions concerning policy

and operations, including ones entailing serious risk, are not as such in the lawyer's province. However, different considerations arise when the lawyer knows that the organization may be substantially injured by action of a constituent that is in violation of law. In such a circumstance, it may be reasonably necessary for the lawyer to ask the constituent to reconsider the matter. If that fails, or if the matter is of sufficient seriousness and importance to the organization, it may be reasonably necessary for the lawyer to take steps to have the matter reviewed by a higher authority in the organization. Clear justification should exist for seeking review over the head of the constituent normally responsible for it. The stated policy of the organization may define circumstances and prescribe channels for such review, and a lawyer should encourage the formulation of such a policy. Even in the absence of organization policy, however, the lawyer may have an obligation to refer a matter to higher authority, depending on the seriousness of the matter and whether the constituent in question has apparent motives to act at variance with the organization's interest.

Review by the chief executive officer or by the board of directors may be required when the matter is of importance commensurate with their authority. At some point it may be useful or essential to obtain an independent legal opinion.

In an extreme case, it may be reasonably necessary for the lawyer to refer the matter to the organization's highest authority. Ordinarily, that is the board of directors or similar governing body. However, applicable law may prescribe that under certain conditions highest authority reposes elsewhere; for example, in the independent directors of a corporation.

Relation to Other Rules

The authority and responsibility provided in paragraph (b) are concurrent with the authority and responsibility provided in other Rules. In particular, this Rule does not limit or expand the lawyer's responsibility under Rule 1.6, 1.8, 1.16, 3.3 and 4.1. If the lawyer's services are being used by an organization to further a crime or fraud by the organization, Rule 1.2(d) can be applicable.

Government Agency

The duty defined in this Rule applies to governmental organizations. However, when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful official act is prevented or rectified, for public business is involved. In addition, duties of lawyers employed by the government or lawyers in military service may be defined by statutes and regulation. Therefore, defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context. Although in some circumstances the client may be a specific agency, it is generally the government as a whole. For example, if the action or failure to act involves the head of a bureau, either the department of which the bureau is a part or the government as a whole may be the client for purpose of this Rule. Moreover, in a matter involving the conduct of government officials, a government lawyer may have authority to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances. This Rule does not limit that authority. See note on Scope.

Clarifying the Lawyer's Role

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. 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

Paragraph (e) recognizes that a lawyer for an organization may also represent a principal officer or major shareholder.

Derivative Actions

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. 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.

COMPARISON WITH FORMER ALABAMA CODE OF PROFESSIONAL RESPONSIBILITY

There was no counterpart to this Rule in the Disciplinary Rules. EC 5-18 stated that a "lawyer employed or retained by a corporation or similar entity owes his allegiance to the entity and not to a stockholder, director, officer, employee, representative, or other person connected with the entity. In advising the entity, a lawyer should keep paramount its interests and his professional judgment should not be influenced by the personal desires of any person or organization. Occasionally, a lawyer for an entity is requested by a stockholder, director, officer, employee, representative, or other person connected with the entity to represent him in an individual capacity; in such case the lawyer may serve the individual only if the lawyer is convinced that differing interests are not present." EC 5-24 stated that although a lawyer "may be employed by a business corporation with non-lawyers serving as directors or officers, and they necessarily have the right to make decisions of business policy, a lawyer must decline to accept direction of his professional judgment from any layman." DR 5-107(B) provided that a lawyer "shall not permit a person who . . . employs . . . him

to render legal services for another to direct or regulate his professional judgment in rendering such legal services.”

RULE 1.14

CLIENT UNDER A DISABILITY

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

(b) A lawyer may seek the appointment of a guardian or take other protective action with respect to a client, only when the lawyer reasonably believes that the client cannot adequately act in the client's own interest.

COMMENT

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 mental disorder or disability, however, maintaining the ordinary client-lawyer relationship may not be possible in all respects. In particular, an incapacitated person may have no power to make legally binding decisions. Nevertheless, a client lacking legal competence often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being. Furthermore, to an increasing extent the law recognizes intermediate degrees of competence. 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.

The fact that a client suffers a disability does not diminish the lawyer's obligation to treat the client with attention and respect. If the person has no guardian or legal representative, the lawyer often must act as de facto guardian. Even if the person does have a legal representative, the lawyer should as far as possible accord the represented person the status of client, particularly in maintaining communication.

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. If a legal representative has not been appointed, the lawyer should see to such an appointment where it would serve the client's best interests. Thus, if a disabled client has substantial property that should be sold for the client's benefit, effective completion of the transaction ordinarily requires appointment of a legal representative. In many circumstances, however, appointment of a legal representative may be expensive or traumatic for the client. Evaluation of these considerations is a matter of professional judgment on the lawyer's part. 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).

Disclosure of the Client's Condition

Rules of procedure in litigation generally provide that minors or persons suffering mental disability shall be represented by a guardian or next friend if they do not have a general guardian. However, disclosure of the client's disability can adversely affect the client's interests. For example, raising the question of disability could, in some circumstances, lead to proceedings for involuntary commitment. The lawyer's position in such cases is an unavoidably difficult one. The lawyer may seek guidance from an appropriate diagnostician.

COMPARISON WITH FORMER ALABAMA CODE OF PROFESSIONAL RESPONSIBILITY

There was no counterpart to this Rule in the Disciplinary Rules. EC 7-11 stated that the “responsibilities of a lawyer may vary according to the intelligence, experience, mental condition or age of a client.... Examples include the representation of an illiterate or an incompetent.” EC 7-12 stated that “[a]ny mental or physical condition of a client that renders him incapable of making a considered judgment on his own behalf casts additional responsibilities upon his lawyer. Where an incompetent is acting through a guardian or other legal representative, a lawyer must look to such representative for those decisions which are normally the prerogative of the client to make. If a client under disability has no legal representative, his lawyer may be compelled in court proceedings to make decisions on behalf of the client. If the client is capable of understanding the matter in question or of contributing to the advancement of his interests, regardless of whether he is legally disqualified from performing certain acts, the lawyer should obtain from him all possible aid. If the disability of a client and the lack of a legal representative compel the lawyer to make decisions for his client, the lawyer should consider all circumstances then prevailing and act with care to safeguard and advance the interests of his client. But obviously a lawyer cannot perform any act or make any decision which the law requires his client to perform or make, either acting for himself if competent, or by a duly constituted representative if legally incompetent.”

RULE 1.15

SAFEKEEPING PROPERTY

- (a) A lawyer shall hold the property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate account maintained in the state where the lawyer's office is situated, or elsewhere with the consent of the client or third person. No personal funds of a lawyer shall ever be deposited in such a trust account, except (1) unearned attorney fees that are being held until earned, and (2) funds sufficient to cover maintenance fees, such as service charges, on the account. Interest, if any, on funds, less fees charged to the account, other than overdraft and returned item charges, shall belong to the client or third person, except as provided in Rule 1.15(g), and the lawyer shall have no right or claim to the interest. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and

other property shall be kept by the lawyer and shall be preserved for six (6) years after termination of the representation.

A lawyer shall designate all such trust accounts, whether general or specific, as well as deposit slips and all checks drawn thereon, as either an "Attorney Trust Account," an "Attorney Escrow Account," or an "Attorney Fiduciary Account." A lawyer shall designate all business accounts, as well as other deposit slips and all checks drawn thereon, as a "Business Account," a "Professional Account," an "Office Account," a "General Account," a "Payroll Account," or a "Regular Account." However, nothing in this Rule shall prohibit a lawyer from using any additional description or designation for a specific business or trust account, including, for example, fiduciary accounts maintained by the lawyer as executor, guardian, trustee, receiver, or agent or in any other fiduciary capacity.

(b) Upon receiving funds or other property in which a client or third person has an interest from a source other than the client or the third person, 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 that property.

(c) When in the course of representation a lawyer is in possession of property in which both the lawyer and another person claim interests, the property shall be kept separate by the lawyer until there is an accounting and a severance of their interests. If a dispute arises concerning their respective interests, the portion in dispute shall be kept separate by the lawyer until the dispute is resolved.

(d) A lawyer shall not make disbursements of a client's funds from separate accounts containing the funds of more than one client unless the client's funds are collected funds; provided, however, that if a lawyer has a reasonable and prudent belief that a deposit of an instrument payable at or through a bank representing the client's funds will be collected promptly, then the lawyer may, at the lawyer's own risk, disburse uncollected client's funds. If collection does not occur, then the lawyer shall, as soon as practical, but in no event more than five (5) working days after notice of non-collection, replace the funds in the separate account.

(e) A lawyer shall request that the financial institution where the lawyer maintains a trust account file a report to the Office of General Counsel of the Alabama State Bar in every instance where a properly payable item or order to pay is presented against a lawyer's trust account with insufficient funds to pay the item or order when presented and either (1) the item or payment order is returned because there are insufficient funds in the account to pay the item or order or, (2) if the request is honored by the financial institution, any overdraft created thereby is not paid within three (3) business days of the date the financial institution sends notification of the overdraft to the lawyer. The report of the financial institution shall contain the same information, or a copy of that information, forwarded to the lawyer who presented the item or order.

A lawyer shall enter into an agreement with the financial institution that holds the lawyer's trust account pursuant to which the financial institution agrees to file the report required by this Rule. Every lawyer shall have the duty to assure that his or her trust accounts maintained with a financial institution in Alabama are pursuant to such an agreement. This duty belongs to the lawyer and not to the financial institution. The filing of a report with the Office of General Counsel pursuant to this paragraph shall constitute a proper basis for an investigation by the Office of General Counsel of the lawyer who is the subject of the report, pursuant to the Alabama Rules of Disciplinary Procedure. Nothing in this Rule shall preclude a financial institution from charging a lawyer or a law firm a fee for producing the report and maintaining the records required by this Rule. Every lawyer and law firm maintaining a trust account in Alabama shall hereby be conclusively deemed to have consented to the reporting and production requirements mandated by this Rule and shall hold harmless the financial institution for its compliance with the aforesaid reporting and production requirements. Neither the agreement with the financial institution nor the reporting or production of records by a financial institution made pursuant to this Rule shall be deemed to create in the financial institution a duty to exercise a standard of care or a contract with third parties that may sustain a loss as a result of a lawyer's overdrawing a trust account.

A lawyer shall not fail to produce any of the records required to be maintained by these Rules at the request of the Office of General Counsel, the Disciplinary Commission, or the Disciplinary Board. This obligation shall be in addition to, and not in lieu of, any other requirements of the Rules of Professional Conduct or Rules of Disciplinary Procedure for the production of documents and evidence.

(f) A lawyer, except a lawyer not engaged in active practice pursuant to Alabama Code 1975, Sections 34-3-17 and -18, shall maintain a separate account to hold funds of a client. If a lawyer does not hold funds for a client, then he or she shall give written notice to the Secretary of the Alabama State Bar that the lawyer will not maintain such an account. A lawyer must so advise the Secretary of the Alabama State Bar within six (6) months of admission to practice or of a return to active practice. A lawyer who has previously given the notice required by this paragraph shall revoke that notice immediately upon establishing a separate account to hold the funds of a client by giving a written notice of revocation to the Secretary of the Alabama State Bar.

(g) Unless a lawyer shall have given the notice specified in Rule 1.15(h), a lawyer shall hold the funds of a client or of a third person that are nominal in amount of that the lawyer expects to be held for a short period in one or more interest-bearing deposit accounts maintained at a bank, savings bank, savings and loan association, or credit union, whose deposits are insured by an agency of the federal government. A lawyer shall use the account only for the purpose of holding funds of clients or third persons that are nominal in amount or that the lawyer expects to be held in the account for a short period. The account shall be maintained under a written agreement with the depository that provides, among other things, that the depository (1) will not permit the lawyer to receive any interest, (2) will remit interest, less fees charged to the account (other than overdraft and return item charges), at least quarterly to the Alabama Law Foundation or the Alabama Civil Justice Foundation, as the lawyer shall designate, (3) will transmit with each remittance a statement reflecting the name in which the account is maintained and the amount of interest remitted, with a copy to the lawyer, and (4) will provide information to the Alabama Law Foundation or the Alabama Civil Justice Foundation, as appropriate, as to the rate or rates of interest on the account.

(h) A lawyer, or a law firm on behalf of its lawyers as disclosed in the notice, may give written notice to the Secretary of the Alabama State Bar that the lawyer does not intend to maintain the interest-bearing account otherwise required by Rule 1.15(g). This notice must be given within six (6) months of the lawyer's admission to practice or return to active practice, and may later only be given during the period between April 1 and June 1 of each year, to be effective as of June 1. The notice shall remain in effect until revoked or changed by the lawyer, or by a law firm on behalf of its lawyers. Notice given by a lawyer or law firm in compliance with prior DR 9-102(D) (3) to the Executive Director of the Alabama State Bar, that the lawyer or law firm opted not to maintain the interest-bearing account required by prior DR 9-102(D)(2), shall remain effective without annual repetition.

(i)All interest transmitted to and received by the Alabama Law Foundation pursuant to Rule 1.15(g) shall be distributed by it for one or more of the following purposes:

- (1)to provide legal aid to the poor;
- (2)to provide law student loans;
- (3)to provide for the administration of justice;
- (4)to provide law-related educational programs to the public;
- (5)to help maintain public law libraries;
- (6)to help maintain a client security fund;
- (7)to help maintain an inquiry tribunal; and
- (8)for such other programs for the benefit of the public as the Supreme Court of the State of Alabama specifically approves from time to time.

(j)All interest transmitted to and received by the Alabama Civil Justice Foundation pursuant to Rule 1.15(g) shall be distributed by it for one or more of the following purposes:

- (1)to provide financial assistance to organizations or groups providing aid or assistance to:
 - (a)underprivileged children;
 - (b)traumatically injured children or adults;
 - (c)the needy;
 - (d)handicapped children or adults; or
 - (e)drug and alcohol rehabilitation programs.

(2)To be used in such other programs for the benefit of the public as the Supreme Court of the State of Alabama specifically approves from time to time.

(k) A lawyer shall not fail to produce, at the request of the Office of General Counsel, the Disciplinary Commission or the Disciplinary Board, any of the records required to be maintained by these Rules. This obligation shall be in addition to, and not in lieu of, any other requirements of the Rules of Professional Conduct or Rules of Disciplinary Procedure for the production of documents and evidence.

COMMENT TO RULE 1.15 AS AMENDED EFFECTIVE JULY 1, 1997

In addition to making stylistic changes, the amendment added the second paragraph in section (a) and added section (e) and section (k). It also added a sentence to the first paragraph of section (a) to set out the conditions under which a lawyer can deposit personal funds into a trust account.

COMPARISON WITH FORMER ALABAMA CODE OF PROFESSIONAL RESPONSIBILITY

With regard to paragraph (a), DR 9-102(A) provided that “funds of clients” are to be kept in an identifiable bank account in the state in which the lawyer's office is situated. DR 9-102(B)(2) provided that a lawyer shall “identify and label securities and properties of a client . . . and place them in ... safekeeping”

DR 9-102(B)(3) required that a lawyer “maintain complete records of all funds, securities, and other properties of a client”

Paragraph (a) extends these requirements to property of a third person that is in the lawyer's possession in connection with the representation.

Paragraph (b) is substantially similar to DR 9-102(B)(1), (3) and (4).

Paragraph (c) is similar to DR 9-102(A)(2), except that the requirement regarding disputes applies to property concerning which an interest is claimed by a third person as well as by a client.

Paragraph (d) is similar to a provision of DR 9-102, which was unique to Alabama. This provision is carried forward into the Rules.

Paragraphs (e), (f), and (g) implement the provisions of Alabama's Interest on Lawyers' Trust Accounts Rules (IOLTA).

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 withdrawal can be accomplished without material adverse effect on the interests of the client, or if:

- (1) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;
- (2) the client has used the lawyer's services to perpetrate a crime or fraud;
- (3) the client insists upon pursuing an objective that the lawyer considers repugnant or imprudent;
- (4) 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;
- (5) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or

(6) other good cause for withdrawal exists.

(c) When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee that has not been earned.

The lawyer may retain papers relating to the client to the extent permitted by other law.

COMMENT

A lawyer should not accept representation in a matter unless it can be performed competently, promptly, without improper conflict of interest and to completion.

Mandatory Withdrawal

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.

When a lawyer has been appointed to represent a client, withdrawal ordinarily requires approval of the appointing authority. See also Rule 6.2. Difficulty may be encountered if withdrawal is based on the client's demand that the lawyer engage in unprofessional conduct. The court may wish 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.

Discharge

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.

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 the client to represent himself. If the client is mentally incompetent, 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, in an extreme case, may initiate proceedings for a conservatorship or similar protection of the client. See Rule 1.14.

Optional Withdrawal

A lawyer may withdraw from representation in some circumstances. The lawyer has the option to withdraw if it can be accomplished without material adverse effect on the client's interests. Withdrawal is also justified if the client persists in a course of action that the lawyer reasonably believes is criminal or fraudulent, for a lawyer is not required to be associated with such conduct even if the lawyer does not further it. Withdrawal is also permitted if the lawyer's services were misused in the past even if that would materially prejudice the client. The lawyer also may withdraw where the client insists on a repugnant or imprudent objective.

A lawyer may withdraw if the client refuses to abide by the terms of an agreement relating to the representation, such as an agreement concerning fees or court costs or an agreement limiting the objectives of the representation.

Assisting the Client upon Withdrawal

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.

Whether or not a lawyer for an organization may under certain unusual circumstances have a legal obligation to the organization after withdrawing or being discharged by the organization's highest authority is beyond the scope of these Rules.

COMPARISON WITH FORMER ALABAMA CODE OF PROFESSIONAL RESPONSIBILITY

With regard to paragraph (a), DR 2-110(A) provided that a lawyer "shall not accept employment . . . if he knows or it is obvious that the prospective client] wishes to . . . b]ring a legal action . . . or otherwise have steps taken for him, merely for the purpose of harassing or maliciously injuring any person" DR 2-111(B) provided that a lawyer "shall withdraw from employment . . . if:

"(1) He knows or it is obvious that his continued employment will result in violation of a Disciplinary Rule."

"(2) He is discharged by his client."

"(3) He receives information that he is aiding or participating in conduct believed to be unlawful."

With regard to paragraph (b), DR 2-111(C) permitted withdrawal regardless of the effect on the client if:

"(1) His client: (a) Insists upon presenting a claim or defense that is not warranted under existing law and cannot be supported by good faith argument for an extension, modification, or reversal of existing law; (b) Personally seeks to pursue an illegal course of conduct; (c) Insists that the lawyer pursue a course of conduct that is illegal or that is prohibited under the Disciplinary Rules; (d) By other conduct renders it unreasonably difficult for the lawyer to carry out his employment effectively; (e) Insists, in a matter not pending before a tribunal, that the lawyer engage in conduct that is contrary to the judgment and advice of the lawyer but not prohibited under the Disciplinary Rules; (f) Fails to pay either fees or expenses."

"(2) His continued employment is likely to result in a violation of a Disciplinary Rule."

"(3) His inability to work with co-counsel indicates that the best interest of the client likely will be served by withdrawal."

“(4) His mental or physical condition renders it difficult for him to carry out the employment effectively.”

“(5) His client knowingly and freely assents to termination of his employment.”

“(6) He believes in good faith, in a proceeding pending before a tribunal, that the tribunal will find the existence of other good cause for withdrawal.”

With regard to paragraph (c), DR 2-111 (A)(1) provided: “If permission for withdrawal from employment is required by the rules of a tribunal, the lawyer shall not withdraw . . . without its permission.”

The provisions of paragraph (d) are substantially identical to DR 2-110(A)(2) and (3).

COUNSELOR

RULE 2.1

ADVISOR

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

COMMENT

Scope of Advice

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.

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

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.

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

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, duty to the client under Rule 1.4 may require that the lawyer act if the client's course of action is related to the representation. 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.

COMPARISON WITH FORMER ALABAMA CODE OF PROFESSIONAL RESPONSIBILITY

There was no direct counterpart to this Rule in the prior Alabama Code of Professional Responsibility. DR 5-107(B) provided that a lawyer "shall not permit a person who recommends, employs, or pays him to render legal services for another to direct or regulate his professional judgment in rendering such legal services." EC 7-8 stated that "a]dvice of a lawyer to his client need not be confined to purely legal considerations In assisting his client to reach a proper decision, it is often desirable for a lawyer to point out those factors which may lead to a decision that is morally just as well as legally permissible In the final analysis, however, . . . the decision whether to forego legally available objectives or methods because of non-legal factors is ultimately for the client"

RULE 2.2

INTERMEDIARY

(a) A lawyer may act as intermediary between clients if:

(1) the lawyer consults with each client concerning the implications of the common representation, including the advantages and risks involved, and the effect on the attorney-client privileges, and obtains each client's consent to the common representation;

(2) the lawyer reasonably believes that the matter can be resolved on terms compatible with the clients' best interests, that each client will be able to make adequately informed decisions in the matter and that there is little risk of material prejudice to the interests of any of the clients if the contemplated resolution is unsuccessful; and

(3) the lawyer reasonably believes that the common representation can be undertaken impartially and without improper effect on other responsibilities the lawyer has to any of the clients.

(b) While acting as intermediary, the lawyer shall 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.

(c) A lawyer shall withdraw as intermediary if any of the clients so requests, or if any of the conditions stated in paragraph (a) is no longer satisfied. Upon withdrawal, the lawyer shall not continue to represent any of the clients in the matter that was the subject of the intermediation.

COMMENT

A lawyer acts as intermediary under this Rule when the lawyer represents two or more parties with potentially conflicting interests. A key factor in defining the relationship is whether the parties share responsibility for the lawyer's fee, but the common representation may be inferred from other circumstances. Because confusion can arise as to the lawyer's role where each party is not separately represented, it is important that the lawyer make clear the relationship.

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

A lawyer acts as intermediary in seeking 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, arranging a property distribution in settlement of an estate or mediating a dispute between clients. The lawyer seeks to resolve potentially conflicting interests by developing the parties' mutual interests. The alternative can be that each party may have to obtain separate representation, with the possibility in some situations of incurring additional cost, complication or even litigation. Given these and other relevant factors, all the clients may prefer that the lawyer act as intermediary.

In considering whether to act as intermediary between clients, a lawyer should be mindful that if the intermediation fails the result can be additional cost, embarrassment and recrimination. In some situations the risk of failure is so great that intermediation is plainly impossible. For example, a lawyer cannot undertake common representation of clients between whom contentious litigation is imminent or who contemplate contentious negotiations. More generally, if the relationship between the parties has already assumed definite antagonism, the possibility that the clients' interests can be adjusted by intermediation ordinarily is not very good.

The appropriateness of intermediation can depend on its form. Forms of intermediation range from informal arbitration, where each client's case is presented by the respective client and the lawyer decides the outcome, to mediation, to common representation where the clients' interests are substantially though not entirely compatible. One form may be appropriate in circumstances where another would not. Other relevant factors are whether the lawyer subsequently will represent both parties on a continuing basis and whether the situation involves creating a relationship between the parties or terminating one.

Confidentiality and Privilege

A particularly important factor in determining the appropriateness of intermediation is the effect on client-lawyer confidentiality and the attorney-client privilege. In a common representation, the lawyer is still required both to keep each client adequately informed and to maintain confidentiality of information relating to the representation. See Rules 1.4 and 1.6. Complying with both requirements while acting as intermediary requires a delicate balance. If the balance cannot be maintained, the common representation is improper. With regard to the attorney-client privilege, the prevailing rule is that as between commonly represented clients the privilege does not attach. Hence, it must be assumed that if litigation eventuates between the clients, the privilege will not protect any such communications, and the clients should be so advised.

Since the lawyer is required to be impartial between commonly represented clients, intermediation is improper when that impartiality cannot be maintained. For example, a lawyer who has represented one of the clients for a long period and in a variety of matters might have difficulty being impartial between that client and one to whom the lawyer has only recently been introduced.

Consultation

In acting as intermediary between clients, the lawyer is required to consult with the clients on the implications of doing so, and proceed only upon consent based on such a consultation. The consultation should make clear that the lawyer's role is not that of partisanship normally expected in other circumstances.

Paragraph (b) is an application of the principle expressed in Rule 1.4. Where the lawyer is intermediary, the clients ordinarily must assume greater responsibility for decisions than when each client is independently represented.

Withdrawal

Common representation does not diminish the rights of each client in the client-lawyer relationship. Each has the right to loyal and diligent representation, the right to discharge the lawyer as stated in Rule 1.16, and the protection of Rule 1.9 concerning obligations to a former client.

Domestic Relations

Rule 1.8(k) prevents a lawyer from acting as intermediary in a divorce or domestic relations proceeding or in matters involving custody of children, alimony, or child support. Under Rule 1.8(k) only one of two spouses may be represented by the lawyer. However, Rule 2.2 contemplates that the lawyer may represent two or more clients and act as an intermediary between them. The absolute prohibition in Rule 1.8(k) against representation of both parties controls in divorce or domestic relations proceedings, and in matters involving custody of children, alimony, or child support, whether or not contested. Even if an unrepresented party in such proceedings executes a document acknowledging the matters set forth in Rule 1.8(k)(1)-(4), the lawyer still represents only one spouse. A lawyer acting pursuant to Rule 1.8(k)(1)-(4) would not fall within the scope of Rule 2.2, allowing intermediation between two parties represented by the lawyer. In addition, Rule 2.2 does not authorize the lawyer to represent both spouses in such a situation.

COMPARISON WITH FORMER ALABAMA CODE OF PROFESSIONAL RESPONSIBILITY

There was no direct counterpart to this Rule in the Disciplinary Rules. EC 5-20 stated that a “lawyer is often asked to serve as an impartial arbitrator or mediator in matters which involve present or former clients. He may serve in either capacity if he first discloses such present or former relationships.” DR 5-105(B) provided that a lawyer “shall not continue multiple employment if the exercise of his independent judgment in behalf of a client will be or is likely to be adversely affected by his representation of another client, or if it would be likely to involve him in representation of differing interests, except to the extent permitted under DR 5-105(C).” DR 5-105(C) provided that “a lawyer may represent multiple clients if it is obvious that he can adequately represent the interests of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each;...”

RULE 2.3

EVALUATION FOR USE BY THIRD PERSONS

(a) A lawyer may undertake an evaluation of a matter affecting a client for the use of someone other than the client if:

- (1) the lawyer reasonably believes that making the evaluation is compatible with other aspects of the lawyer's relationship with the client; and
- (2) the client consents after consultation.

(b) Except as disclosure is required in connection with a report of an evaluation, information relating to the evaluation is otherwise protected by Rule 1.6.

COMMENT

Definition

An evaluation may be performed at the client's direction but 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.

Lawyers for the government may be called upon to give a formal opinion on the legality of contemplated government agency action. In making such an evaluation, the government lawyer acts at the behest of the government as the client but for the purpose of establishing the limits of the agency's authorized activity. Such an opinion is to be distinguished from confidential legal advice given agency officials. The critical question is whether the opinion is to be made public.

A legal evaluation should be distinguished from an investigation of a person with whom the lawyer does not have a client-lawyer relationship. For example, a lawyer retained by a purchaser to analyze a vendor's title to property does not have a client-lawyer relationship with the vendor. So also, an investigation into a person's affairs by a government lawyer, or by special counsel employed by the government, is not an evaluation as that term is used in this Rule. The question is whether the lawyer is retained by the person whose affairs are being examined. When the lawyer is retained by that person, the general rules concerning loyalty to client and preservation of confidences apply, which is not the case if the lawyer is retained by someone else. For this reason, it is essential to identify the person by whom the lawyer is retained. This should be made clear not only to the person under examination, but also to others to whom the results are to be made available.

Duty to Third Person

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

The quality of an evaluation depends on the freedom and extent of the investigation upon which it is based. Ordinarily a lawyer should have whatever latitude of investigation seems necessary as a matter of professional judgment. Under some circumstances, however, the terms of the evaluation may be limited. For example, certain issues or sources may be categorically excluded, or the scope of search may be limited by time constraints or the noncooperation of persons having relevant information. Any such limitations which are material to the evaluation should be described in the report. If after a lawyer has commenced an evaluation, the client refuses to comply with the terms upon which it was understood the evaluation was to have been made, the lawyer's obligations are determined by law, having reference to the terms of the client's agreement and the surrounding circumstances.

Financial Auditors' Requests for Information

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.

COMPARISON WITH FORMER ALABAMA CODE OF PROFESSIONAL RESPONSIBILITY

There was no counterpart to this Rule in the former Alabama Code of Professional Responsibility.

ADVOCATE

RULE 3.1

MERITORIOUS CLAIMS AND CONTENTIONS

- (a) In his representation of a client, a lawyer shall not file a suit, assert a position, conduct a defense, delay a trial, or take other action on behalf of the lawyer's client when the lawyer knows or when it is obvious that such action would serve merely to harass or maliciously injure another.
- (b) 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.

COMMENT

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.

The filing of an action or defense or similar action taken for a client is not necessarily prohibited merely because the facts have not first been fully substantiated or because the lawyer expects to develop vital evidence only by discovery. Such action is not necessarily prohibited even though the lawyer believes that the client's position ultimately will not prevail.

COMPARISON WITH FORMER ALABAMA CODE OF PROFESSIONAL RESPONSIBILITY

DR 7-102(A)(1) provided that a lawyer may not “file a suit, assert a position, conduct a defense, delay a trial, or take other action on behalf of his client when he knows or when it is obvious that such action would serve merely to harass or maliciously injure another.” Rule 3.1 is to the same general effect as DR 7-102(A)(1), with the qualification that, in a criminal case, or a case in which incarceration of the client may result (for example, certain juvenile proceedings), the lawyer may put the prosecution to its proof even if there is no other basis for defense.

RULE 3.2

EXPEDITING LITIGATION

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

COMMENT

Dilatory practices bring the administration of justice into disrepute. Delay should not be indulged merely for the convenience of the advocates, or 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.

COMPARISON WITH FORMER ALABAMA CODE OF PROFESSIONAL RESPONSIBILITY

DR 7-101(A)(1) stated that a lawyer does not violate the duty to represent a client zealously "by being punctual in fulfilling all professional commitments." DR 7-102(A)(1) provided that a lawyer "shall not . . . file a suit, assert a position, conduct a defense or] delay a trial . . . when he knows or when it is obvious that such action would serve merely to harass or maliciously injure another.

RULE 3.3

CANDOR TOWARD THE TRIBUNAL

(a) A lawyer shall not knowingly:

- (1) make a false statement of material fact or law to a tribunal;
- (2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client;

or

(3) offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.

(b) The duties stated in paragraph (a) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(c) A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.

(d) In an ex parte proceeding other than a grand jury proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse.

COMMENT

The advocate's task is to present the client's case with persuasive force. Performance of that duty while maintaining confidences of the client is qualified by the advocate's duty of candor to the tribunal. However, an advocate does not vouch for the evidence submitted in a cause; the tribunal is responsible for assessing its probative value.

Representations by a Lawyer

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).

Misleading Legal Argument

Legal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal. A lawyer is not required to make a disinterested exposition of the law, but must recognize the existence of pertinent legal authorities.

False Evidence

When evidence that a lawyer knows to be false is provided by a person who is not the client, the lawyer must refuse to offer it regardless of the client's wishes.

When false evidence is offered by the client, however, a conflict may arise between the lawyer's duty to keep the client's revelations confidential and the duty of candor to the court. Upon ascertaining that material evidence is false, the lawyer should seek to persuade the client that the evidence should not be offered or, if it has been offered, that its false character should immediately be disclosed. If the persuasion is ineffective, the lawyer must take reasonable remedial measures.

Except in the defense of a criminal accused, the rule generally recognized is that, if necessary to rectify the situation, an advocate must disclose the existence of the client's deception to the court or to the other party. Such a disclosure 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 truthfinding 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.

Perjury by a Criminal Defendant

Whether an advocate for a criminally accused has the same duty of disclosure has been intensely debated. While it is agreed that the lawyer should seek to persuade the client to refrain from perjurious testimony, there has been dispute concerning the lawyer's duty when that persuasion fails. If the confrontation with the client occurs before trial, the lawyer ordinarily can withdraw. Withdrawal before trial may not be possible, however, either because trial is imminent, or because

the confrontation with the client does not take place until the trial itself, or because no other counsel is available. The most difficult situation, therefore, arises in a criminal case where the accused insists on testifying when the lawyer knows that the testimony is perjurious. The lawyer's effort to rectify the situation can increase the likelihood of the client's being convicted as well as open the possibility of a prosecution for perjury. On the other hand, if the lawyer does not exercise control over the proof, the lawyer participates, although in a merely passive way, in deception of the court. Three resolutions of this dilemma have been proposed. One is to permit the accused to testify by a narrative without guidance through the lawyer's questioning. This compromises both contending principles; it exempts the lawyer from the duty to disclose false evidence but subjects the client to an implicit disclosure of information imparted to counsel. Another suggested resolution, of relatively recent origin, is that the advocate be entirely excused from the duty to reveal perjury if the perjury is that of the client. This is a coherent solution but makes the advocate a knowing instrument of perjury.

The other resolution of the dilemma is that the lawyer must reveal the client's perjury if necessary to rectify the situation. A criminal accused has a right to the assistance of an advocate, a right to testify and a right of confidential communication with counsel. However, an accused should not have a right to assistance of counsel in committing perjury. Furthermore, an advocate has an obligation, not only in professional ethics but under the law as well, to avoid implication in the commission of perjury or other falsification of evidence. See Rule 1.2(d).

Remedial Measures

If perjured testimony or false evidence has been offered, the advocate's proper course ordinarily is to remonstrate with the client confidentially. If that fails, the advocate should seek to withdraw if that will remedy the situation. If withdrawal will not remedy the situation or is impossible, the advocate should make disclosure to the court. It is for the court then to determine what should be done--making a statement about the maker to the trier of fact, ordering a mistrial, or perhaps nothing. If the false testimony was that of the client, the client may controvert the lawyer's version of their communication when the lawyer discloses the situation to the court. If there is an issue whether the client has committed perjury, the lawyer cannot represent the client in resolution of the issue, and a mistrial may be unavoidable. An unscrupulous client might in this way attempt to produce a series of mistrials and thus escape prosecution. However, a second such encounter could be construed as a deliberate abuse of the right to counsel and as such a waiver of the right to further representation.

Constitutional Requirements

The general rule--that an advocate must disclose the existence of perjury with respect to a material fact, even that of a client--applies to defense counsel in criminal cases, as well as in other instances. However, the definition of the lawyer's ethical duty in such a situation may be qualified by constitutional provisions for due process and the right to counsel in criminal cases. In some jurisdictions these provisions have been construed to require that counsel present an accused as a witness if the accused wishes to testify, even if counsel knows the testimony will be false. The obligation of the advocate under these Rules is subordinate to such a constitutional requirement.

Duration of Obligation

A practical time limit on the obligation to rectify the presentation of false evidence has to be established. The conclusion of the proceeding is a reasonably definite point for the termination of the obligation.

Refusing to Offer Proof Believed to Be False

Generally speaking, a lawyer has authority to refuse to offer testimony or other proof that the lawyer believes is untrustworthy. 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. In criminal cases, however, a lawyer may, in some jurisdictions, be denied this authority by constitutional requirements governing the right to counsel.

Ex Parte Proceedings

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 an 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. Since a grand jury proceeding is a preliminary step in the institution of a criminal charge, the prosecutor is not required to present all "material" facts. Otherwise, the grand jury proceeding could become unduly burdened with numerous witnesses, every piece of tangible evidence, and inquiries into possible defense theories, both as to guilt and as to punishment.

COMPARISON WITH FORMER ALABAMA CODE OF PROFESSIONAL RESPONSIBILITY

Paragraph (a)(1) is substantially identical to DR 7-102(A)(5), which provided that a lawyer shall not "knowingly make a false statement of law or fact."

Paragraph (a)(2) is implicit in DR 7-102(A)(3), which provided that "a lawyer shall not . . . knowingly fail to disclose that which he is required by law to reveal."

With regard to paragraph (a)(3), the first sentence of this subparagraph is similar to DR 7-102(A)(4), which provided that a lawyer shall not "knowingly use" perjured testimony or false evidence. The second sentence of paragraph (a)(3) resolves an ambiguity in the former Code concerning the action required of a lawyer who discovers that the lawyer has offered perjured testimony or false evidence. DR 7-102(A)(4), quoted above, did not expressly deal with this situation, but the prohibition against "use" of false evidence can be construed to preclude carrying through with a case based on such evidence when that fact has become known during the trial.

Prior Alabama DR 7-102(B)(1) provided that a lawyer “who receives information clearly establishing that . . . his client has . . . perpetrated a fraud upon a person or tribunal shall promptly call upon his client to rectify the same, and if his client refuses or is unable to do so, he shall withdraw from employment.”

Paragraph (c) confers discretion on the lawyer to refuse to offer evidence that the lawyer “reasonably believes” is false. This gives the lawyer more latitude than DR 7-102(A)(4), which prohibited the lawyer from offering evidence the lawyer “knows” is false.

There was no counterpart in the former Code to paragraph (d).

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; or

(d)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 the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information;

(2)the person may be required by law to refrain from disclosing the information; or

(3)the information pertains to covert law enforcement investigations in process, such as the use of undercover law enforcement agents.

COMMENT

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.

Documents and other items of evidence are often essential to establish a claim or defense. Subject to evidentiary privileges, the right of an opposing party, including the government, to obtain evidence through discovery or subpoena is an important procedural right. The exercise of that right can be frustrated if relevant material is altered, concealed or destroyed. Applicable law in many jurisdictions makes it an offense to destroy material for purpose of impairing its availability in a pending proceeding or one whose commencement can be foreseen. Falsifying evidence is also

generally a criminal offense. Paragraph (a) applies to evidentiary material generally, including computerized information.

With regard to paragraph (b), it is not improper to pay a witness's expenses or to compensate an expert witness on terms permitted by law. The common law rule in most jurisdictions is that it is improper to pay an occurrence witness any fee for testifying and that it is improper to pay an expert witness a contingent fee.

Paragraph (d) 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.

COMPARISON WITH FORMER ALABAMA CODE OF PROFESSIONAL RESPONSIBILITY

With regard to paragraph (a), DR 7-109(A) provided that a lawyer “shall not suppress any evidence that he or his client has a legal obligation to reveal.” DR 7-109(B) provided that a lawyer “shall not advise or cause a person to secrete himself . . . for the purpose of making him unavailable as a witness” DR 7-106(B)(3) provided that a lawyer shall not “[i]ntentionally or habitually violate any established rule of procedure or of evidence.”

With regard to paragraph (b), DR 7-102(A)(6) provided that a lawyer shall not participate “in the creation or preservation of evidence when he knows or it is obvious that the evidence is false.” DR 7-109(C) provided that a lawyer “shall not pay, offer to pay, or acquiesce in the payment of compensation to a witness contingent upon the content of his testimony or the outcome of the case. EC 7-28 stated that witnesses “should always testify truthfully and should be free from any financial inducements that might tempt them to do otherwise.”

Paragraph (c) is substantially similar to DR 7-106(A), which provided that a lawyer “shall not disregard . . . a standing rule of a tribunal or a ruling of a tribunal made in the course of a proceeding, but he may take appropriate steps in good faith to test the validity of such rule or ruling.”

With regard to paragraph (d), DR 7-104(A)(2) provided that a lawyer shall not “[g]ive advice to a person who is not represented . . . other than the advice to secure counsel, if the interests of such person are or have a reasonable possibility of being in conflict with the interests of his client.”

Paragraph (d)(2) permits a lawyer to advise third parties that they may be required by law to refrain from disclosure, such as under statutes regulating grand jury secrecy or providing for the protection of trade secrets. The lawyer may, on behalf of a client, urge others to abide by secrecy restrictions imposed by law.

Paragraph (d)(3) permits a lawyer, such as a prosecutor, to urge third parties not to disclose covert law enforcement investigations such as operations by undercover agents, stings, and the like. This Rule is limited to investigations in process, and the lawyer should make no effort to prevent disclosure of relevant information to those who have been accused of a crime as a result of the covert investigation.

RULE 3.5

IMPARTIALITY AND DECORUM OF THE TRIBUNAL

A lawyer shall not:

- (a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law;
 - (b) communicate ex parte with such a person except as permitted by law;
- or
- (c) engage in conduct intended to disrupt a tribunal.

COMMENT

Many forms of improper influence upon a tribunal are proscribed by criminal law. Others are specified in the ABA former Code of Judicial Conduct, with which an advocate should be familiar. A lawyer is required to avoid contributing to a violation of such provisions.

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.

COMPARISON WITH FORMER ALABAMA CODE OF PROFESSIONAL RESPONSIBILITY

With regard to paragraphs (a) and (b), DR 7-108(A) provided that “b]efore the trial of a case a lawyer ... shall not communicate with ... anyone he knows to be a member of the venire ...” DR 7-108(B) provided that during the trial of a case a lawyer “shall not communicate with ... any member of the jury.” DR 7-110(A) provided that a lawyer may make legitimate campaign contributions under appropriate circumstances to a judge or an official of a tribunal or a candidate for any such office. DR 7-110(B) provided that a lawyer shall not give or lend anything of value to a judge, official or employee of a tribunal except legitimate campaign contributions under appropriate circumstances with intent to influence his official conduct or action. DR 7-110(C) provided that a lawyer shall not “communicate ... as to the merits of the cause with a judge or an official before whom the proceeding is pending, except ... in the course of official proceedings in the cause; in writing if he promptly delivers a copy of the writing to opposing counsel or to the adverse party if he is not represented by a lawyer; orally upon adequate notice . . .; or as otherwise authorized by law.”

With regard to paragraph (c), DR 7-106(B)(2) provided that a lawyer shall not engage in “undignified or discourteous conduct which is degrading to a tribunal.”

RULE 3.6

TRIAL PUBLICITY

(a) A lawyer shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding.

(b) A statement referred to in paragraph (a) ordinarily is likely to have such an effect when it refers to a civil matter triable to a jury, a criminal matter, or any other proceeding that could result in incarceration, and the statement relates to:

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

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

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

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

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

or

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

(c) Notwithstanding paragraphs (a) and (b)(1-5), a lawyer involved in the investigation or litigation of a matter may state without elaboration:

(1) the general nature of the claim or defense;

(2) the information contained in a public record;

(3) that an investigation of the matter is in progress, including the general scope of the investigation, the offense or claim or defense involved and, except when prohibited by law, the identity of the persons involved;

(4) the scheduling or result of any step in litigation;

(5) a request for assistance in obtaining evidence and information necessary thereto;

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

and

(7) in a criminal case:

(i) the identity, residence, occupation and family status of the accused;

(ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person;

(iii) the fact, time and place of arrest; and

(iv) the identity of investigating and arresting officers or agencies and the length of the investigation.

COMMENT

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.

No body of rules can simultaneously satisfy all interests of fair trial and all those of free expression. The formula in this Rule is based upon the ABA former Code of Professional Responsibility and the ABA Standards Relating to Fair Trial and Free Press, as amended in 1978. The standard to be applied in Rule 3.6(a) is the “serious and imminent threat” test developed in the case of *Chicago Counsel of Lawyers v. Bauer*, 522 F.2d 242 (7th Cir. 1975).

Special rules of confidentiality may validly govern proceedings in juvenile, domestic relations and mental disability proceedings, and perhaps other types of litigation. Rule 3.4(c) requires compliance with such Rules.

COMPARISON WITH FORMER ALABAMA CODE OF PROFESSIONAL RESPONSIBILITY

Rule 3.6 is similar to DR 7-107, except as follows: First, Rule 3.6 adopts the general criteria of “substantial likelihood of materially prejudicing an adjudicative proceeding” to describe impermissible conduct. Second, Rule 3.6 transforms the particulars in DR 7-107 into an illustrative compilation that gives fair notice of conduct ordinarily posing unacceptable dangers to the fair administration of justice. Finally, Rule 3.6 omits DR 7-107(B)(7), which provided that a lawyer may reveal “[a]t the time of seizure, a description of the physical evidence seized, other than a confession, admission or statement.” Such revelations may be substantially prejudicial and are frequently the subject of pretrial suppression motions, which, if successful, may be circumvented by prior disclosure to the press.

RULE 3.7

LAWYER AS WITNESS

(a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness, except where:

- (1) the testimony relates to an uncontested issue;
- (2) the testimony relates to the nature and value of legal services rendered in the case; or
- (3) disqualification of the lawyer would work substantial hardship on the client.

(b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness, unless precluded from doing so by Rule 1.7 or Rule 1.9.

COMMENT

Combining the roles of advocate and witness can prejudice the opposing party and can involve a conflict of interest between the lawyer and client.

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.

Paragraph (a)(1) recognizes that if the testimony will be uncontested, the ambiguities in the dual role are purely theoretical.

Paragraph (a)(2) recognizes that where the testimony concerns the extent and value of legal services rendered in the action in which the testimony is offered, permitting the lawyers to testify avoids the need for a second trial with new counsel to resolve that issue. Moreover, in such a situation the judge has firsthand knowledge of the matter in issue; hence, there is less dependence on the adversary process to test the credibility of the testimony.

Apart from these two exceptions, paragraph (a)(3) recognizes that a balancing is required between the interests of the client and those of the opposing party. Whether the opposing party is likely to suffer prejudice depends on the nature of the case, the importance and probable tenor of the lawyer's testimony, and the probability that the lawyer's testimony will conflict with that of other witnesses. Even if there is risk of such prejudice, in determining whether the lawyer should be disqualified due regard must be given to the effect of disqualification on the lawyer's client. It is relevant that one or both parties could reasonably foresee that the lawyer would probably be a witness. The principle of imputed disqualification stated in Rule 1.10 has no application to this aspect of the problem.

Whether the combination of roles involves an improper conflict of interest with respect to the client is determined by Rule 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 or a member of the lawyer's firm, the representation is improper. 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. See Comment to Rule 1.7. If a lawyer who is a member of a firm may not act as both advocate and witness by reason of conflict of interest, Rule 1.10 disqualifies the firm also.

COMPARISON WITH FORMER ALABAMA CODE OF PROFESSIONAL RESPONSIBILITY

DR 5-102(A) prohibited a lawyer, or the lawyer's firm, from serving as advocate if the lawyer "learned or it is obvious that he or a lawyer in his firm ought to be called as a witness on behalf of his client." DR 5-102(B) provided that a lawyer, and the lawyer's firm, may continue representation if the "lawyer learns or it is obvious that he or a lawyer in his firm may be called as a witness other than on behalf of his client . . . until it is apparent that his testimony is or may be prejudicial to his

client.” DR 5-101 (B) permitted a lawyer to testify while representing a client: “(1) If the testimony will relate solely to an uncontested matter; (2) If the testimony will relate solely to a matter of formality and there is no reason to believe that substantial evidence will be offered in opposition to the testimony; (3) If the testimony will relate solely to the nature and value of legal services rendered in the case by the lawyer or his firm to the client; (4) As to any matter if refusal would work a substantial hardship on the client because of the distinctive value of the lawyer or his firm as counsel in the particular case.”

The exception stated in paragraph (a)(1) consolidates provisions of DR 5-101(B)(1) and (2). Testimony relating to a formality, referred to in DR 5-101(B)(2), in effect defined the phrase “uncontested issue,” and was redundant.

RULE 3.8

SPECIAL RESPONSIBILITIES OF A PROSECUTOR

(1)The prosecutor in a criminal case shall:

- (a)refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;
- (b)make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;
- (c)not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;
- (d)not willfully fail to make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;
- (e)exercise reasonable care to prevent anyone under the control or direct supervision of the prosecutor from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6, and shall not cause or influence anyone to make a statement that the prosecutor would be prohibited from making under Rule 3.6; and

(2)The prosecutor shall represent the government and shall be subject to these Rules as is any other lawyer, except:

- (a)notwithstanding Rules 5.3 and 8.4, the prosecutor, through orders, directions, advice and encouragement, may cause other agencies and offices of government, and may cause nonlawyers employed or retained by or associated with the prosecutor, to engage in any action that is not prohibited by law, subject to the special responsibilities of the prosecutor established in (1) above; and

(b)to the extent an action of the government is not prohibited by law but would violate these Rules if done by a lawyer, the prosecutor (1) may have limited participation in the action, as provided in (2)(a) above, but (2) shall not personally act in violation of these Rules.

COMMENT

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. Although Alabama has not adopted the ABA Standards of Criminal Justice Relating to the Prosecution Function, many jurisdictions have, and the ABA Standards, which are the product of prolonged and careful deliberation by lawyers experienced in both criminal prosecution and defense, should be reviewed and used in interpreting the requirements of Rule 3.8, except, of course, when Rule 3.8 would obviously conflict with the ABA Standards of Criminal Justice Relating to the Prosecution Function. 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.

Paragraph (1)(c) does not apply to an accused appearing pro se with the approval of the tribunal. Nor does it forbid the lawful questioning of an accused who has knowingly waived the rights to counsel and silence.

Paragraph (1)(d) imposes an ethical responsibility that ordinarily already exists. The disciplinary standard is limited to a willful failure to make the required disclosures. The exception in paragraph (1)(d) recognizes that a prosecutor may seek an appropriate protective order from the tribunal if disclosure of information to the defense could result in substantial harm to an individual or to the public interest.

Paragraph (2) deals with situations in which the ethical obligation of the prosecutor as lawyer might prevent the government from taking action that would not otherwise be prohibited by any law. For example, in undercover and sting operations, the making of false statements is the essence of the activity. The prosecutor is prohibited by Rule 4.1(a) from making false statements and is prohibited by Rule 8.4(a) from knowingly assisting or inducing another to violate the Rules. In order to make clear that the prosecutor may cause the government to act in the fight against crime to the fullest extent permitted to the government by existing law, paragraph (2)(a) makes clear that the prosecutor may order, direct, encourage and advise with respect to any lawful governmental action. However, where lawyers generally are prohibited by the Rules from taking an action, the prosecutor is likewise prohibited from personally violating the Rules. In such situations, the prosecutor's actions, as distinct from those of other governmental entities, are limited so as to preserve the integrity of the profession of law.

Paragraph (2) is applicable only to lawyers acting as prosecutors. It is designed to accommodate the prosecutor's special responsibility in governmental law-enforcement activities and is not applicable otherwise.

COMPARISON WITH FORMER ALABAMA CODE OF PROFESSIONAL RESPONSIBILITY

Rule 3.8 has no counterpart in the prior Alabama Code of Professional Responsibility; however, ABA Model DR 7-103(A) provided that a “public prosecutor . . . shall not institute . . . criminal charges when he knows or it is obvious that the charges are not supported by probable cause.” DR 7-103(B) provides that “[a] public prosecutor . . . shall make timely

disclosure . . . of the existence of evidence, known to the prosecutor . . . that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment.”

RULE 3.9

ADVOCATE IN NONADJUDICATIVE PROCEEDINGS

A lawyer representing a client before a legislative or administrative tribunal 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.

COMMENT

In representation before bodies such as legislatures, municipal councils, and executive and administrative agencies acting in a rulemaking or policy-making capacity, lawyers present facts, formulate issues and advance argument in the matters under consideration. The decision-making body, like a court, should be able to rely on the integrity of the submissions made to it. A lawyer appearing before such a body should deal with the tribunal honestly and in conformity with applicable rules of procedure.

Lawyers have no exclusive right to appear before nonadjudicative bodies, as they do before a court. The requirements of this Rule therefore may subject lawyers to regulations inapplicable to advocates who are not lawyers. However, legislatures and administrative agencies have a right to expect lawyers to deal with them as they deal with courts. This Rule does not apply to representation of a client in a negotiation or other bilateral transaction with a governmental agency; representation in such a transaction is governed by Rules 4.1 through 4.4.

COMPARISON WITH FORMER ALABAMA CODE OF PROFESSIONAL RESPONSIBILITY

EC 7-15 stated that a lawyer “appearing before an administrative agency, regardless of the nature of the proceeding it is conducting, has the continuing duty to advance the cause of his client within the bounds of the law.” EC 7-16 stated that “w]hen a lawyer appears in connection with proposed legislation, he . . . should comply with applicable laws and legislative rules.” EC 8-5 stated that “[f]raudulent, deceptive, or otherwise illegal conduct by a participant in a proceeding before a . . . legislative body . . . should never be participated in . . . by lawyers.” DR 7-111 requires that a lawyer appearing on behalf of a client before a public officer, board, committee or body disclose, if requested by that body, that he is representing such a client.

RULE 3.10

THREATENING CRIMINAL PROSECUTION

A lawyer shall not present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter.

COMMENT

The civil adjudicative process is primarily designed for the settlement of disputes between parties, while the criminal process is designed for the protection of society as a whole. Threatening to use, or using, the criminal process to coerce adjustment of private civil claims or controversies is a subversion of that process; further, the person against whom the criminal process is so misused may be deterred from asserting his or her legal rights and when that happens the usefulness of the civil process in settling private disputes is impaired. As in all cases of abuse of judicial process, the improper use of the criminal process tends to diminish public confidence in our legal system.

This amendment shall be effective January 1, 1994.

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

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 failure to act.

Statements of Fact

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 in this category, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud.

Fraud by Client

Paragraph (b) recognizes that substantive law may require a lawyer to disclose certain information to avoid being deemed to have assisted the client's crime or fraud. The requirement of disclosure created by this paragraph is, however, subject to the obligations created by Rule 1.6.

COMPARISON WITH FORMER ALABAMA CODE OF[nk] PROFESSIONAL RESPONSIBILITY

Paragraph (a) is substantially similar to DR 7-102(A)(5), which stated that “[i]n his representation of a client, a lawyer shall not . . . k]nowingly make a false statement of law or fact.”

With regard to paragraph (b), DR 7-102(A)(3) provided that a lawyer shall not “[c]onceal or knowingly fail to disclose that which he is required by law to reveal.”

RULE 4.2

COMMUNICATION WITH PERSON REPRESENTED BY COUNSEL

In representing a client, a lawyer shall not communicate about the subject of the representation with a party 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 by law to do so.

COMMENT

This Rule does not prohibit communication with a party, or an employee or agent of a party, 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. Also, parties to a matter may communicate directly with each other and a lawyer having independent justification for communicating with the other party is permitted to do so. Communications authorized by law include, for example, the right of a party to a controversy with a government agency to speak with government officials about the matter.

In the case of an organization, this Rule prohibits communications by a lawyer for one party concerning the matter in representation with persons having a managerial responsibility on behalf of the organization, and with any other person whose act or omission in connection with that matter may be imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization. If an agent or employee 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(d).

This rule also covers any person, whether or not a party to a formal proceeding, who is represented by counsel concerning the matter in question.

COMPARISON WITH FORMER ALABAMA CODE OF PROFESSIONAL RESPONSIBILITY

This Rule is substantially identical to DR 7-104(A)(1).

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.

COMMENT

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. During the course of a lawyer's representation of a client, the lawyer should not give advice to an unrepresented person other than the advice to obtain counsel.

COMPARISON WITH FORMER ALABAMA CODE OF PROFESSIONAL RESPONSIBILITY

There was no direct counterpart to this Rule in the former Code. DR 7-104(A)(2) provided that a lawyer shall not “give advice to a person who is not represented by a lawyer, other than the advice to secure counsel”

RULE 4.4

RESPECT FOR RIGHTS OF THIRD PERSONS

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.

COMMENT

Responsibility to a client requires a lawyer to subordinate the interests of others to those of the client, but that responsibility does not imply that a lawyer may disregard the rights of third persons. It is impractical to catalogue all such rights, but they include legal restrictions on methods of obtaining evidence from third persons. This Rule does not apply to the subpoena of a material witness (one who has relevant information).

COMPARISON WITH FORMER ALABAMA CODE OF PROFESSIONAL RESPONSIBILITY

DR 7-102(A)(1) provided that a lawyer shall not “take . . . action on behalf of his client when he knows or when it is obvious that such action would serve merely to harass or maliciously injure another.” DR 7-108(D) provided that “[a]fter discharge of the jury . . . the lawyer shall not ask questions or make comments to a member of that jury that are calculated merely to harass or embarrass the juror” DR 7-108(E) provided that a lawyer “shall not conduct . . . a vexatious or harassing investigation of either a venireman or a juror.” DR 7-108(F) further provided that all restrictions imposed in DR 7-108 “also apply to communications with or investigations of members of a family of a venireman or a juror.”

LAW FIRMS AND ASSOCIATIONS

RULE 5.1

RESPONSIBILITIES OF A PARTNER OR SUPERVISORY LAWYER

(a) A partner 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 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

Paragraphs (a) and (b) refer to lawyers who have supervisory authority over the professional work of a firm or legal department of a government agency. This includes members of a partnership and the shareholders in a law firm organized as a professional corporation; lawyers having supervisory authority in the law department of an enterprise or government agency; and lawyers who have intermediate managerial responsibilities in a firm.

The measures required to fulfill the responsibility prescribed in paragraphs (a) and (b) can depend on the firm's structure and the nature of its practice. In a small firm, informal supervision and occasional admonition ordinarily might be sufficient. In a large firm, or in practice situations in which intensely difficult ethical problems frequently arise, more elaborate procedures 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 a lawyer having authority over the work of another may not assume that the subordinate lawyer will inevitably conform to the Rules.

Paragraph (c)(1) expresses a general principle of responsibility for acts of another. See also Rule 8.4(a).

Paragraph (c)(2) defines the duty of a lawyer having direct supervisory authority over performance of specific legal work by another lawyer. Whether a lawyer has such supervisory authority in particular circumstances is a question of fact. Partners of a private firm have at least indirect responsibility for all work being done by the firm, while a partner in charge of a particular matter ordinarily has direct authority over other firm lawyers engaged in the matter. Appropriate remedial

action by a partner would depend on the immediacy of the partner's involvement and the seriousness of the misconduct. The 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.

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.

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. As to the lawyer's responsibility for reporting professional misconduct, see Rule 8.3.

COMPARISON WITH FORMER ALABAMA CODE OF PROFESSIONAL RESPONSIBILITY

There was no direct counterpart to this Rule in the former Code. DR 4-101(D) provided that a "lawyer shall exercise reasonable care to prevent his employees, associates, and others whose services are utilized by him from disclosing or using confidences or secrets of a client...."

DR 7-107(1) provided that a "lawyer shall exercise reasonable care to prevent his employees and associates from making an extrajudicial statement that he would be prohibited from making under DR 7-107 dealing with trial publicity."

See also Rule 5.3 and the comparison of that Rule with the former Alabama Code of Professional Responsibility.

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

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.

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.

COMPARISON WITH FORMER ALABAMA CODE OF PROFESSIONAL RESPONSIBILITY

There was no counterpart to this Rule in the former Code.

RULE 5.3

RESPONSIBILITIES REGARDING NONLAWYER ASSISTANTS

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

- (a) a partner in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;
- (b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and
- (c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer, if:
 - (1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or
 - (2) the lawyer is a partner 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

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 should 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.

COMPARISON WITH FORMER ALABAMA CODE OF PROFESSIONAL RESPONSIBILITY

There was no direct counterpart to this Rule in the former Code. DR 4-101(D) provided that a lawyer “shall exercise reasonable care to prevent his employees, associates, and others whose services are utilized by him from disclosing or using confidences or secrets of a client”

DR 7-107(1) provided that “[a] lawyer shall exercise reasonable care to prevent his employees and associates from making an extrajudicial statement that he would be prohibited from making under DR 7-107.”

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; and

(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.

(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

(3) a nonlawyer has the right to direct or control the professional judgment of a lawyer.

COMMENT

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. A lawyer's payment or absorption of discount charges on fees paid by credit or under a prepaid legal services plan does not interfere with the lawyer's professional judgment or independence and is permitted.

Alabama Code 1975, §10-4-380, et seq. (Supp. 1986), allows the formation of professional corporations (P.C.) in Alabama. Alabama Code 1975, §10-4-390a, (Supp. 1986), provides that

“[e]very individual who renders professional services as an employee of a . . . professional corporation shall be liable for any negligent or wrongful act or omission in which he personally participates to the same extent as if he rendered such services as a sole practitioner.”

COMPARISON WITH FORMER ALABAMA CODE OF PROFESSIONAL RESPONSIBILITY

Paragraph (a) is substantially identical to DR 3-102(A). DR 3-102(B) provided that “a lawyer . . . may pay the discount charge incident to the use of an approved credit card plan for financing legal fees, cost and expenses”; there is no counterpart to this in these Rules, but such payments should be permitted the same as other overhead costs of operating a law practice.

Paragraph (b) is substantially identical to DR 3-103(A).

Paragraph (c) is substantially identical to DR 5-107(B).

Paragraph (d) is similar to DR 3-103(C).

RULE 5.5

UNAUTHORIZED PRACTICE OF LAW

A lawyer shall not:

(a) practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction; or

(b) assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law.

COMMENT

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. Paragraph (b) 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. Likewise, it does not prohibit lawyers from providing professional advice and instruction to nonlawyers whose employment requires knowledge of law, for example, claims adjusters, employees of financial or commercial institutions, social workers, accountants and persons employed in government agencies. In addition, a lawyer may counsel nonlawyers who wish to proceed pro se.

COMPARISON WITH FORMER ALABAMA CODE OF PROFESSIONAL RESPONSIBILITY

Paragraph (a) is substantially identical to DR 3-101 (B).

Paragraph (b) is substantially identical to DR 3-101 (A).

RULE 5.6

RESTRICTIONS ON RIGHT TO PRACTICE

A lawyer shall not participate in offering or making:

(a) a partnership or employment 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 controversy between private parties.

COMMENT

An agreement restricting the right of partners or associates 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.

Paragraph (b) prohibits a lawyer from agreeing not to represent other persons in connection with settling a claim on behalf of a client.

COMPARISON WITH FORMER ALABAMA CODE OF PROFESSIONAL RESPONSIBILITY

This Rule is substantially similar to DR 2-109. Alabama Code 1975, §8-1-1(a) provides that “e]very contract by which anyone is restrained from exercising a lawful profession, trade or business of any kind otherwise than is provided by this section is to that extent void.”

PUBLIC SERVICE

RULE 6.1

PRO BONO PUBLICO SERVICE

A lawyer should render public interest legal service. A lawyer may discharge this responsibility by providing professional services at no fee or a reduced fee to persons of limited means or to public service or charitable groups or organizations, by service in activities for improving the law, the legal system or the legal profession, and by financial support for organizations that provide legal services to persons of limited means.

COMMENT

The ABA House of Delegates has formally acknowledged “the basic responsibility of each lawyer engaged in the practice of law to provide public interest legal services” without fee, or at a substantially reduced fee, in one or more of the following areas: poverty law, civil rights law, public rights law, charitable organization representation, and the administration of justice. This Rule expresses that policy but is not intended to be enforced through disciplinary process. The rights and responsibilities of individuals and organizations in the United States are increasingly defined in legal terms. As a consequence, legal assistance in coping with the web of statutes, rules and regulations is imperative for persons of modest and limited means, as well as for the relatively well-to-do.

The basic responsibility for providing legal services for those unable to pay ultimately rests upon the individual lawyer, and personal involvement in the problems of the disadvantaged can be one of the most rewarding experiences in the life of a lawyer. Every lawyer, regardless of professional prominence or professional workload, should find time to participate in or otherwise support the provision of legal services to the disadvantaged. The provision of free legal services to those unable to pay reasonable fees continues to be an obligation of each lawyer as well as the profession generally, but the efforts of individual lawyers are often not enough to meet the need. Thus, it has been necessary for the profession and government to institute additional programs to provide legal services.

Accordingly, legal aid offices, lawyer referral services and other related programs have been developed, and others will be developed by the profession and government. Every lawyer should support all proper efforts to meet this need for legal services.

COMPARISON WITH FORMER ALABAMA CODE OF PROFESSIONAL RESPONSIBILITY

There was no counterpart of this Rule in the Disciplinary Rules. EC 2-25 stated that the “basic responsibility for providing legal services for those unable to pay ultimately rests upon the individual lawyer Every lawyer, regardless of professional prominence or professional workload, should find time to participate in serving the disadvantaged.)” EC 8-9 stated that “[t]he advancement of our legal system is of vital importance in maintaining the rule of law . . . and lawyers should encourage, and should aid in making, needed changes and improvements.” EC 8-3 stated that “[t]hose persons unable to pay for legal services should be provided needed services.”

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

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

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.

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.

COMPARISON WITH FORMER ALABAMA CODE OF PROFESSIONAL RESPONSIBILITY

There was no counterpart to this Rule in the Disciplinary Rules. EC 2-29 stated that when a lawyer is “appointed by a court or requested by a bar association to undertake representation of a person unable to obtain counsel, whether for financial or other reasons, he should not seek to be excused from undertaking the representation except for compelling reasons. Compelling reasons do not include such factors as the repugnance of the subject matter of the proceeding, the identity or position of a person involved in the case, the belief of the lawyer that the defendant in a criminal proceeding is guilty, or the belief of the lawyer regarding the merits of the civil case.” EC 2-30 stated that “a lawyer should decline employment if the intensity of his personal feelings, as distinguished from a community attitude, may impair his effective representation of a prospective client.”

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

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.

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.

COMPARISON WITH FORMER ALABAMA CODE OF PROFESSIONAL RESPONSIBILITY

There was no counterpart to this Rule in the former Code.

RULE 6.4

LAW REFORM ACTIVITIES AFFECTING CLIENT INTERESTS

A lawyer may serve as a director, officer or member of an organization involved in reform of the law or its administration, notwithstanding that the reform may affect the interests of a client of the lawyer. When the lawyer knows that the interests of a client may be materially benefited by a decision in which the lawyer participates, the lawyer shall disclose that fact but need not identify the client.

COMMENT

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 benefited.

COMPARISON WITH FORMER ALABAMA CODE OF PROFESSIONAL RESPONSIBILITY

There was no counterpart to this Rule in the former Code.

INFORMATION ABOUT LEGAL SERVICES

RULE 7.1

COMMUNICATIONS CONCERNING A LAWYER'S SERVICES

A lawyer shall not make or cause to be made a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it:

- (a) contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading;
- (b) is likely to create an unjustified expectation about results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate the Rules of Professional Conduct or other law;
- (c) compares the quality of the lawyer's services with the quality of other lawyers' services, except as provided in Rule 7.4; or
- (d) communicates the certification of the lawyer by a certifying organization, except as provided in Rule 7.7.

COMMENT

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 should be truthful. The prohibition in paragraph (b) of statements that may create "unjustified expectations" would ordinarily preclude advertisements about results obtained on behalf of a client, such as the amount of a damage award or the lawyer's record in obtaining favorable verdicts, and advertisements containing client endorsements. Such information may create the unjustified expectation that similar results can be obtained for others without reference to the specific factual and legal circumstances.

COMPARISON WITH FORMER ALABAMA CODE OF PROFESSIONAL RESPONSIBILITY

Rule 7.1 is a direct counterpart to Temporary DR 2-101, which was substantially adopted from Model Rule 7.1.

RULE 7.2

ADVERTISING

A lawyer who advertises concerning legal services shall comply with the following:

- (a) subject to the requirements of Rule 7.1, a lawyer may advertise services through public media, such as a telephone directory, legal directory, newspaper or other periodical, outdoor displays, radio, television, or written communication not involving solicitation as defined in Rule 7.3.
- (b) A true copy or recording of any such advertisement shall be delivered or mailed to the office of the general counsel of the Alabama State Bar at its then current headquarters within three (3) days after the date on which any such advertisement is first disseminated; the contemplated duration thereof and the identity of the publisher or broadcaster of such advertisement, either within the advertisement or by separate communication accompanying said advertisement, shall be stated. Also, a copy or recording of any such advertisement shall be kept by the lawyer responsible for its content, as provided hereinafter by Rule 7.2(d), for six (6) years after its last dissemination.

(c) A lawyer shall not give anything of value to a person for recommending the lawyer's services, except that a lawyer may pay the reasonable cost of any advertisement or written communication permitted by this rule and may pay the usual charges of a not-for-profit lawyer referral service.

(d) Any communication made pursuant to this rule shall include the name of at least one lawyer responsible for its content.

(e) No communication concerning a lawyer's services shall be published or broadcast, unless it contains the following language, which shall be clearly legible or audible, as the case may be: "No representation is made that the quality of the legal services to be performed is greater than the quality of legal services performed by other lawyers."

(f) If fees are stated in the advertisement, the lawyer or law firm advertising must perform the advertised services at the advertised fee, and the failure of the lawyer and/or law firm advertising to perform an advertised service at the advertised fee shall be prima facie evidence of misleading advertising and deceptive practices. The lawyer or law firm advertising shall be bound to perform the advertised services for the advertised fee and expenses for a period of not less than sixty (60) days

following the date of the last publication or broadcast.

COMMENT

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.

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.

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.

Neither this Rule nor Rule 7.3 prohibits communications authorized by law, such as notice to members of a class in class action litigation.

Record of Advertising

Paragraph (b) requires that a record of the content and use of advertising be kept in order to facilitate enforcement of this Rule. It does not require that advertising be subject to review prior to dissemination. Such a requirement would be burdensome and expensive relative to its possible benefits, and may be of doubtful constitutionality.

Paying Others to Recommend a Lawyer

A lawyer is allowed to pay for advertising permitted by this Rule, but otherwise is not permitted to pay another person for channeling professional work. This restriction does not prevent an organization or person other than the lawyer from advertising or recommending the lawyer's services. Thus, a legal aid agency or prepaid legal services plan may pay to advertise legal services provided under its auspices. Likewise, a lawyer may participate in not-for-profit lawyer referral programs and pay the usual fees charged by such programs. Paragraph (c) does not prohibit paying regular compensation to an assistant, such as a secretary, to prepare communications permitted by this Rule.

COMPARISON WITH FORMER ALABAMA CODE OF PROFESSIONAL RESPONSIBILITY

Rule 7.2 is a direct counterpart to Temporary DR 2-102, which was substantially adopted from Model Rule 7.2.

RULE 7.3

DIRECT CONTACT WITH PROSPECTIVE CLIENTS

(a) A lawyer shall not solicit professional employment from a prospective client with whom the lawyer has no familial or current or prior professional relationship, in person or otherwise, when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain. A lawyer shall not permit employees or agents of the lawyer to solicit on the lawyer's behalf. A lawyer shall not enter into an agreement for or charge or collect a fee for professional employment obtained in violation of this rule. The term "solicit" includes contact in person, by telephone, telegraph, or facsimile transmission, or by other communication directed to a specific recipient and includes contact by any written form of communication directed to a specific recipient and not meeting the requirements of subdivision (b) (2) of this rule.

(b) Written Communication

(1) A lawyer shall not send, or knowingly permit to be sent, on a lawyer's behalf or on behalf of the lawyer's firm or on behalf of a partner, an associate, or any other lawyer affiliated with the lawyer or the lawyer's firm, a written communication to a prospective client for the purpose of obtaining professional employment if:

(i) the written communication concerns an action for personal injury or wrongful death arising out of, or otherwise related to, an accident or disaster involving the person to whom the communication is addressed or a relative of that person, unless the accident or disaster giving rise to the cause of action occurred more than thirty (30) days before the mailing of the communication;

- (ii) the written communication concerns a specific matter, and the lawyer knows or reasonably should know that the person to whom the communication is directed is represented by a lawyer in the matter;
 - (iii) it has been made known to the lawyer that the person to whom the communication is addressed does not want to receive the communication;
 - (iv) the communication involves coercion, duress, fraud, overreaching, harassment, intimidation, or undue influence by the lawyer;
 - (v) the communication contains a false, fraudulent, misleading, deceptive, or unfair statement or claim or is improper under Rule 7.1; or
 - (vi) the lawyer knows or reasonably should know that the person to whom the communication is addressed is a minor or is incompetent, or that the person's physical, emotional, or mental state makes it unlikely that the person would exercise reasonable judgment in employing a lawyer.
- (2) In addition to the requirements of Rule 7.2, written communications to prospective clients for the purpose of obtaining professional employment are subject to the following requirements:
- (i) a sample copy of each written communication and a sample of the envelope to be used in conjunction with the communication, along with a list of the names and addresses of the recipients, shall be filed with the office of general counsel of the Alabama State Bar before or concurrently with the first dissemination of the communication to the prospective client or clients. A copy of the written communication must be retained by the lawyer for six (6) years. If the communication is subsequently sent to additional prospective clients, the lawyer shall file with the office of general counsel of the Alabama State Bar a list of the names and addresses of those clients either before or concurrently with that subsequent dissemination. If the lawyer regularly sends the identical communication to additional prospective clients, the lawyer shall, once a month, file with the office of general counsel a list of the names and addresses of those clients contacted since the previous list was filed;
 - (ii) written communications mailed to prospective clients shall be sent only by regular mail, and shall not be sent by registered mail or by any other form of restricted delivery or by express mail;
 - (iii) no reference shall be made either on the envelope or in the written communication that the communication is approved by the Alabama State Bar;
 - (iv) the written communication shall not resemble a legal pleading, official government form or document (federal or state), or other legal document, and the manner of mailing the written communication shall not make it appear to be an official document;
 - (v) the word "Advertisement" shall appear prominently in red ink on each page of the written communication, and the word "Advertisement" shall also appear in the lower left-hand corner of the envelope in 14-point or larger type and in red ink. If the communication is a self-mailing brochure or pamphlet, the word "Advertisement" shall appear prominently in red ink on the address panel in 14-point or larger type;
 - (vi) if a contract for representation is mailed with the written communication, it will be considered a sample contract and the top of each page of the contract shall be marked "SAMPLE". The word "SAMPLE" shall be in red ink in a type size at least one point larger than the largest type used in the contract. The words "DO NOT SIGN" shall appear on the line provided for the client's signature;
 - (vii) the first sentence of the written communication shall state: "If you have already hired or retained a lawyer in connection with state the general subject matter of the solicitation, please disregard this letter pamphlet, brochure, or written communication";

- (viii) if the written communication is prompted by a specific occurrence (e.g., death, recorded judgment, garnishment) the communication shall disclose how the lawyer obtained the information prompting the communication;
- (ix) a written communication seeking employment by a specific prospective client in a specific matter shall not reveal on the envelope, or on the outside of a self-mailing brochure or pamphlet, the nature of the client's legal problem; and
- (x) a lawyer who uses a written communication must be able to prove the truthfulness of all the information contained in the written communication.
- (Amended effective May 1, 1996.)

COMMENT

There is a potential for abuse inherent in direct solicitation by a lawyer in person or by telephone, telegraph, or facsimile transmission of prospective clients known to need legal services. Direct solicitation subjects the non-lawyer to the private importuning of a trained advocate, in a direct interpersonal encounter. A prospective client often feels overwhelmed by the situation giving rise to the need for legal services and may have an impaired capacity for reason, judgment, and protective self-interest. Furthermore, the lawyer seeking to be retained is faced with a conflict stemming from the lawyer's own interest, which may color the advice and representation offered the vulnerable prospect. The situation is therefore fraught with the possibility of undue influence, intimidation, and overreaching. This potential for abuse inherent in direct solicitation of prospective clients justifies some restrictions, particularly since the advertising permitted under Rule 7.2 offers an alternative means of communicating necessary information to those who may be in need of legal services.

Advertising makes it possible for a prospective client to be informed about the need for legal services, and about the qualifications of available lawyers and law firms, without subjecting the prospective client to direct personal persuasion that may overwhelm the client's judgment. The use of general advertising, rather than direct private contact, to transmit information from lawyer to prospective client will help to assure that the information flows cleanly as well as freely. Advertising is in the public view and thus subject to scrutiny by those who know the lawyer. This informal review is likely to help guard against statements and claims that might constitute false or misleading communications in violation of Rule 7.1. Direct, private communications from a lawyer to a prospective client are not subject to such third-person scrutiny and consequently are much more likely to approach (and occasionally cross) the line between accurate representations and those that are false and misleading.

Direct written communication seeking employment by specific prospective clients generally presents less potential for abuse or overreaching than in-person solicitation and is therefore not prohibited for most types of legal matters, but is subject to reasonable restrictions, as set forth in this rule, designed to minimize or preclude abuse and overreaching and to ensure the lawyer's accountability if abuse should occur. This rule allows targeted mail solicitation of potential plaintiffs or claimants in personal injury and wrongful death causes of action or other causes of action that relate to an accident, disaster, death, or injury, but only if the communication is not

mailed until thirty (30) days after the incident. This restriction is reasonably required by the sensitized state of the potential clients, who may be either injured or grieving over the loss of a family member, and the abuses that experience has shown can exist in this type of solicitation.

Common examples of written communications that must meet the requirements of subparagraph (b) of this rule are direct mail solicitation sent to individuals or groups selected because they share common characteristics, e.g., persons named in traffic accident reports or notices of foreclosure. Communications not ordinarily sent on an unsolicited basis to prospective clients are not covered by this rule. Also not covered by this rule are responses by lawyers and law firms to requests for information from a prospective client or newsletters or brochures published for clients, former clients, those requesting it, or those whom the lawyer or law firm has a familial or current or prior professional relationship.

Letters of solicitation and the envelopes in which they are mailed should be clearly marked "Advertisement." This will avoid the perception by the recipient that there is a need to open the envelope because it is from a lawyer or law firm, when the envelope contains only a solicitation for legal services. With the envelopes and letters clearly marked "Advertisement," the recipient can choose to read the solicitation or not to read it, without fear of legal repercussions.

In addition, the lawyer or law firm sending the letter of solicitation shall reveal the source of information used to determine that the recipient has a potential legal problem. Disclosure of the source will help the recipient to understand the extent of knowledge the lawyer or law firm has regarding the recipient's particular situation and will avoid misleading the recipient into believing that the lawyer has particularized knowledge about the recipient's matter if the lawyer does not. General mailings to persons not known to need legal services, as well as mailings targeted to specific persons or potential clients, are permitted by this rule. However, these mailings constitute advertisement and are thus subject to the requirements of Rule 7.2 concerning delivery of copies to the general counsel, record keeping, inclusion of a disclaimer, and performance of the services offered at the advertised fee.

This Rule would not prohibit a lawyer from contacting representatives of organizations or groups that may be interested in establishing a group or prepaid legal plan for its 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 that the lawyer or the law firm is willing to offer. This form of communication is not directed to a specific prospective client known to need legal services related to a particular matter. 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.

COMPARISON WITH FORMER ALABAMA CODE OF PROFESSIONAL RESPONSIBILITY

There is no comparable rule in the former Alabama Code of Professional Responsibility. Rule 7.3, before its amendment effective May 1, 1996, was a direct counterpart to Temporary DR 2-103,

which was substantially adopted from Model Rule 7.3. The amendment, effective May 1, 1996, changed the rule substantially from what was Temporary DR 2-103.

RULE 7.4

COMMUNICATION OF FIELDS OF PRACTICE

A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law. A lawyer shall not state or imply that the lawyer is a specialist except as follows:

(a) 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;

(b) a lawyer engaged in admiralty practice may use the designation "Admiralty," "Proctor in Admiralty," or a substantially similar designation; or

(c) a lawyer may communicate the fact that the lawyer has been certified as a specialist in a field of law by a named organization or authority, but only if such certification is granted by an organization previously approved by the Alabama State Bar Board of Legal Certification to grant such certifications.

COMMENT

This Rule permits a lawyer to indicate areas of practice in communications about the lawyer's services, for example, in a telephone directory or other advertising. If a lawyer practices only in certain fields, or will not accept matters except in such fields, the lawyer is permitted so to indicate. However, stating that the lawyer is a "specialist," practices a "specialty," or "specializes in" a particular field is not permitted unless in accordance with Rule 7.4(c). These terms have acquired a secondary meaning implying formal recognition as a specialist. Hence, use of these terms may be misleading.

Recognition of specialization in patent matters is a matter of long-established policy of the Patent and Trademark Office. Designation of admiralty practice has a long historical tradition associated with maritime commerce and the federal courts.

Paragraph (c) provides for certification as a specialist in a field of law where the Alabama State Bar Board of Legal Specialization has granted an organization the right to grant certification.

Certification procedures imply that an objective entity has recognized a lawyer's higher degree of specialized ability than is suggested by general licensure to practice law.

Those objective entities may be expected to apply standards of competence, experience, and knowledge 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 or agency must be included in any communication regarding certification.

COMPARISON WITH FORMER ALABAMA CODE OF PROFESSIONAL RESPONSIBILITY

Original Rule 7.4 is a direct counterpart to Temporary DR 2-104, which was substantially adopted from original Model Rule 7.4. On August 31, 1993, §(c) of Rule 7.4 was amended in conformity with the August 12, 1992, amendments of Model Rule 7.4 to allow the advertisement of specialists, with the exception that Model Rule 7.4(c)(2) was not adopted. Model Rule

7.4(c)(2) would have allowed the advertisement of a specialty designated by a non-approved organization if the appropriate disclaimer was included. To allow this type of advertisement would cause confusion and would be misleading to the public. Deletion of “limited to” or “concentrated in” particular fields conforms to the 1989 amendment of Model Rule 7.4 deleting the same language.

This amendment shall be effective January 1, 1994.

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 organization and is not otherwise in violation of Rule 7.1 or Rule 7.4.

(b) A law firm with offices in another jurisdiction may use in Alabama the name it uses in the other jurisdiction, provided the use of that name would comply with these rules. A firm with any lawyers not licensed to practice in Alabama must, if such lawyer's name appears on the firm's letterhead, state that the lawyer is not licensed to practice in Alabama.

(c) A lawyer or law firm may indicate on any letterhead or other communication permitted by these rules other jurisdictions in which the lawyer or the members or associates of the law firm are admitted to practice.

(d) 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 practicing with the firm.

COMMENT

A firm may be designated by the names of all or some of its members, by the names of deceased members where there has been a continuing succession in the firm's identity, or by a trade name such as the “ABC Legal Clinic.” 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.

COMPARISON WITH FORMER ALABAMA CODE OF PROFESSIONAL RESPONSIBILITY

Rule 7.5 is a direct counterpart to Temporary DR 2-105, which was substantially adopted from Model Rule 7.5. However, Alabama did not adopt the provisions of Model Rule 7.5(d) which

expressly prohibited the false implication in advertising that a partnership or organization of lawyers existed.

RULE 7.6

PROFESSIONAL CARDS OF NONLAWYERS

A lawyer shall not cause or permit a business card of a nonlawyer which contains the lawyer's or firm's name to contain a false or misleading statement or omission to the effect that the nonlawyer is a lawyer. A business card of a nonlawyer is not false and misleading which clearly identifies the nonlawyer as a "Legal Assistant," provided that the individual is employed in that capacity by a lawyer or law firm, that the lawyer or law firm supervises and is responsible for the law related tasks assigned to and performed by such individual, and that the lawyer or law firm has authorized the use of such cards.

COMMENT

Lawyers employ various persons who are nonlawyers to engage in activities on behalf of the lawyers. These nonlawyer employees are not subject to the disciplinary process of the Alabama State Bar, although the lawyer may be disciplined for their conduct in appropriate cases. See Rule 5.3. These employees include secretaries, investigators, legal assistants, paralegals, librarians, law clerks, messengers, accountants, bookkeepers, office managers, firm administrators, etc. In many cases, these employees will come into contact with clients and with the general public. In these cases, a professional card or calling card may be useful to the employee, the client, and the public.

The Rule is directed against false and misleading business cards. A lawyer must not permit or cause a business card of a nonlawyer employee to be either false or misleading. Particular care should be taken to ensure that no false impression is given that a nonlawyer is a lawyer. In the design of business cards, the position of nonlawyer employee should be legibly and prominently indicated in close proximity to the employee's name. Cards that visually present a lawyer's or law firm's name in such a prominent manner as to obscure the employee's nonlawyer status are prohibited. The card should

serve the function of identifying the name of the individual employee, but it should not be susceptible to an interpretation by the casual observer that it is the card of a lawyer, as opposed to that of an employee of a lawyer or law firm.

Because the term "legal assistant" contains the designation "legal" and thus might reasonably be considered as prohibited by this Rule, a safe harbor was provided so as to permit use of the term on business cards.

COMPARISON WITH FORMER ALABAMA CODE OF PROFESSIONAL RESPONSIBILITY

Rule 7.6 is a direct counterpart to Temporary DR 2-106. There is no Model Rule counterpart.

MAINTAINING THE INTEGRITY OF THE PROFESSION

RULE 8.1

BAR ADMISSION AND DISCIPLINARY MATTERS

An applicant for admission to the bar, or a lawyer in connection with a bar admission application or in connection with a disciplinary matter; shall not:

(a) knowingly make a false statement of material fact; or

(b) fail to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter, or knowingly fail to respond to a lawful demand for information from an admissions or disciplinary authority, except that this rule does not require disclosure of information otherwise protected by Rule 1.6.

COMMENT

The duty imposed by this Rule extends to persons seeking admission to the bar as well as to lawyers. Hence, if a person makes a material false statement in connection with an application for admission, it may be the basis for subsequent disciplinary action if the person is admitted, and in any event may be relevant in a subsequent admission application. The duty imposed by this Rule applies to a lawyer's own admission or discipline as well as that of others. Thus, it is a separate professional offense for a lawyer to knowingly make a misrepresentation or omission in connection with a disciplinary investigation of the lawyer's own conduct. This Rule also requires affirmative clarification of any misunderstanding on the part of the admissions or disciplinary authority of which the person involved becomes aware.

This Rule is subject to the provisions of the fifth amendment of the United States Constitution and corresponding provisions of state constitutions. A person relying on such a provision in response to a question, however, should do so openly and not use the right of nondisclosure as a justification for failure to comply with this Rule.

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.

COMPARISON WITH FORMER ALABAMA CODE OF PROFESSIONAL RESPONSIBILITY

DR 1-101(A) provided that a lawyer is "subject to discipline if he has made a materially false statement in, or if he has deliberately failed to disclose a material fact requested in connection with, his application for admission to the bar." DR 1-101(B) provided that a lawyer "shall not further the application for admission to the bar of another person known by him to be unqualified in respect to character, education, or other relevant attribute. With respect to paragraph (b), DR 1-102(A)(5) provided that a lawyer shall not engage in "conduct that is prejudicial to the administration of justice."

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 Alabama Canons of Judicial Ethics, and failure to so comply with the Alabama Canons of Judicial Ethics shall constitute a violation of this disciplinary rule.

COMMENT

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.

When a lawyer seeks judicial office, the lawyer should be bound by applicable limitations on political activity.

A lawyer campaigning for judicial office shall comply with Canon 7 of the Alabama Canons of Judicial Ethics, which applies not only to judges but also to candidates for election to judicial office.

To maintain the fair and independent administration of justice, lawyers are encouraged to continue traditional efforts to defend judges and courts unjustly criticized.

COMPARISON WITH FORMER ALABAMA CODE OF PROFESSIONAL RESPONSIBILITY

With regard to paragraph (a), DR 8-102(A) provided that a lawyer “shall not knowingly make false statements of fact concerning the qualifications of a candidate for election or appointment to a judicial office.” DR 8-102(B) provided that a lawyer “shall not knowingly make false accusations against a judge or other adjudicatory officer.”

Paragraph (b) has no counterpart in the former Alabama Code of Professional Responsibility.

RULE 8.3

REPORTING PROFESSIONAL MISCONDUCT

(a) A lawyer possessing unprivileged knowledge of a violation of Rule 8.4 shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation.

(b) A lawyer possessing unprivileged knowledge or evidence concerning another lawyer or a judge shall reveal fully such knowledge or evidence upon proper request.

(c) A lawyer who is on the Committee on Impaired Lawyers or on the ALA-Pals Committee or who is a member of any committee, or sub-committee of the Bar designed to assist lawyers with substance abuse problems shall not be under any obligation to disclose any knowledge or evidence acquired from any other person (including judges and lawyers) during communications made by either party during such communications shall be privileged, and no claims or disciplinary action

based on the lawyer's failure to disclose the knowledge or evidence acquired during such communications may be instituted.

“(Adopted effective April 7, 1992 former subdivision (c) moved to (d).)

“(d) This rule does not require disclosure of information otherwise protected by Rule 1.6.

“(Amended by renumbering, effective April 7, 1992 formerly subdivision (C)1.)

COMMENT

Self-regulation of the legal profession requires that members of the profession initiate disciplinary investigation when they know of a violation of the Rules of Professional Conduct. 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.

A report about misconduct is not required where it would involve violation of Rule 1.6. However, a lawyer should encourage a client to consent to disclosure where prosecution would not substantially prejudice the client's interests.

A lawyer is obliged to report every violation of the Rules. The failure to report a violation would itself be a professional offense. A report should be made to the Alabama State Bar.

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.

Comment to Rule 8.3(c), adopted effective April 7, 1992 “In order to encourage a lawyer or judge who has or believes he or she may have a substance abuse problem to seek help with the problem, that person can be assured that disclosure to any lawyer who is on the Committee on Impaired Lawyers or on a ALA-Pals Committee or who is a member of any committee or sub-committee of the Bar designed to assist lawyers with substance abuse problems, will be treated with confidentiality as though a client-lawyer relationship exists.

COMPARISON WITH FORMER ALABAMA CODE OF PROFESSIONAL RESPONSIBILITY

Paragraph (a) carries forward the provisions of DR 1-103(A).

Regarding paragraph (b), DR 1-103(B) provided that “[a] lawyer possessing unprivileged knowledge or evidence concerning another lawyer or a judge shall reveal fully such knowledge or evidence upon proper request of a tribunal or other authority empowered to investigate or act upon the conduct of lawyers or judges.”

This amendment shall be effective immediately.

RULE 8.4

MISCONDUCT

It is professional misconduct for a lawyer to:

- (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
- (b) commit a criminal 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;
- (f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable Canons of Judicial Ethics or other law; or
- (g) Engage in any other conduct that adversely reflects on his fitness to practice law.

COMMENT

Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offense carry no such implication. Traditionally, the distinction was drawn in terms of offenses involving "moral turpitude." That concept can be construed to include offenses concerning some matters of personal morality, such as adultery and comparable offenses, that have no specific connection to fitness for the practice of law. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice.

Offenses involving violence, dishonesty, breach of trust, or serious interference with the administration of justice are in that category. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation. 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.

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 attorney. 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.

This rule does not repeal, abrogate or modify Rule 14 of the Rules of Disciplinary Enforcement, which provide for mandatory disbarment or suspension under specified circumstances. (Amended effective October 9, 1991.)

COMPARISON WITH FORMER ALABAMA CODE OF PROFESSIONAL RESPONSIBILITY

With regard to paragraphs (a) through (d), DR 1-102(A) provided that a lawyer shall not:

“(1) Violate a Disciplinary Rule.

“(2) Circumvent a Disciplinary Rule through actions of another.

“(3) Engage in illegal conduct involving moral turpitude.

“(4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.

“(5) Engage in conduct that is prejudicial to the administration of justice.

“(6) Engage in any other conduct that adversely reflects on his fitness to practice law.”

Former DR 7-102(A)(B) provided that “[i]n his representation of a client, a lawyer shall not . . . (8) Knowingly engage in other illegal conduct ...”

Paragraph (e) is substantially similar to DR 9-101 (C).

There is no direct counterpart to paragraph (f) in the former Alabama Code of Professional Responsibility. EC 7-34 stated in part that “[a] lawyer . . . is never justified in making a gift or a loan to a judicial officer except legitimate political campaign contributions under appropriate circumstances.” EC 9-1 stated that a lawyer “should promote public confidence in our legal] system and in the legal profession.”

Paragraph (g) was not included within the ABA Model Rules, but was carried from the former Alabama Code of Professional Responsibility DR 1-102(A)(6).

RULE 8.5

JURISDICTION

A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of the jurisdiction, although engaged in practice elsewhere.

COMMENT

In modern practice lawyers frequently act outside the territorial limits of the jurisdiction in which they are licensed to practice, either in another state or outside the United States. In doing so, they remain subject to the governing authority of the jurisdiction in which they are licensed to practice. If their activity in another jurisdiction is substantial and continuous, it may constitute practice of law in that jurisdiction. See Rule 5.5.

If the rules of professional conduct in the two jurisdictions differ, principles of conflict of laws may apply. Similar problems can arise when a lawyer is licensed to practice in more than one jurisdiction.

Where the lawyer is licensed to practice law in two jurisdictions which impose conflicting obligations, applicable rules of choice of law may govern the situation. A related problem arises with respect to practice before a federal tribunal, where the general authority of the states to

regulate the practice of law must be reconciled with such authority as federal tribunals may have to regulate practice before them.

COMPARISON WITH FORMER ALABAMA CODE OF PROFESSIONAL RESPONSIBILITY

There was no counterpart to this Rule in the former Alabama Code of Professional Responsibility.