CHAPTER 5: OPERATIONS AND GOVERNANCE

What are the legal and ethical obligations of the Board? How should they comply?

I. Operations and Governance: A Checklist

Return to Top

____ Develop and implement a conflict of interest policy and reporting procedure for Board of Directors and staff.

____ Develop and implement a privacy/ confidentiality policy for nonpublic personal information.

____ Compose a policies and procedures manual including the organization's overall objectives and goals, including the mission statement, financial plan, investment plan, operations, personnel and budget.

____ Create an orientation packet for board members and staff including important information about the policies, organization, and information on the legal and ethical responsibilities of board members and staff.

____ Revise policies and procedures as needed.

____ Hire an executive director and monitor her performance.

____ Appoint committees and/ or hire professionals to handle special functions of the organization, such as fundraising, public relations and finance.

____ Comply with record-keeping requirements for tax purposes and with reporting and disclosure requirements.

Recently, nonprofit operations and governance or stewardship (i.e., the way organizations function) have captured the attention of both the public and the media. Specifically, public scrutiny has been focused on the *failure* of organizational governance. Failed stewardship may lead to the demise of an organization, unemployment, and financial loss for workers. Additionally, the *way* in which some Boards of Directors choose to govern nonprofit agencies may present other problems that include; role confusion amongst board members, lack of board accountability, inaccessibility of board members and limited or no access to information.

The purpose of this section is to outline and address some of these problems and to recommend ways in which nonprofit entities can structure their operations and governance practices in a more effective manner. Topics to be covered include conflict of interest, legal ethics, confidentiality, and board duties such as loyalty and care, drafting appropriate policies for each; identifying any necessary record-keeping and reporting requirements, and drafting appropriate guidelines.

II. Conflicts Of Interest

Return to Top

Businesses operating under the watchful eye of the general public are subject to high levels of scrutiny. Just as private and publicly-traded for-profit companies have reformed their business

practices, not-for-profits have a similar obligation to conform to these accepted norms of operation. A successful business plan requires that appropriate policies are in place to mitigate conflicts of interest. Additionally, a comprehensive policy and sound procedure is reassuring to potential donors and could lead to greater confidence from your nonprofit's constituent-base. Any suspicion of self-dealing or benefits to insiders could be disastrous to your ability to elicit confidence from the community and, more importantly, from the donor base and grant-making entities that are the lifeblood of the organization.

In a small nonprofit, there are three primary conflicts that must be included in any plan. First, there are potential conflicts for board members that are in a position to derive a business gain through their role on the board. Second, there is a similar concern for employees who have significant decision-making authority over your organization. Finally, there is the ethical duty of volunteer and staff attorneys to comply with the Rules of Professional Conduct to ensure that conflicts of interest are handled in an appropriate manner.

A. Board Member, Director, and Officer Conflicts

Although smaller nonprofits will not face the same types of conflicts as larger nonprofits by virtue of size, scope, and geography, appropriate provisions must be in place to ensure transparency of operations for stakeholders and constituents. The pool of qualified potential board members will likely consist of local business leaders, professionals, and affected clients devoted to the work of the nonprofit. Small organizations in relatively small geographic areas may grow in the future as the needs of the organization's constituency change. The adoption of appropriate policies from the onset will allow seamless future expansion. A Sample conflict of interest policy is provided in the Appendix. conflictofinterestpolicy Also see the sample conflict of interest statement for disclosure of conflicts. conflictofinteresstatement

In addition to sharing the conflicts encountered by large, for-profit organizations, such as issues of self-dealing and conflicts involving unfair gains as a result of being a board member, nonprofit board members face an additional potential conflict. Because of the limited number of interested and qualified persons in the community able to serve on the boards of nonprofits, there may be a "duality of interests" for individual board members.[1] There is the potential for conflicts when making decisions that require a balancing of interests between two organizations that a board member serves.[2] If the board is called to make the decision whether to engage in activities that would affect both organizations, the conflicted board member should recuse herself from all decisions involving the conflicting organization.

B. The Business Judgment Rule

Generally, board members, directors, and officers are all bound by the "business judgment rule."[3] This "rule" requires that decisions be made "(i) in good faith and without a conflict of interest; (ii) on a reasonably informed basis; and (iii) with a rational belief (connoting broad

[1] VICTOR FUTTER, NONPROFIT GOVERNANCE AND MANAGEMENT 192-193 (2002).
[2] Id. at 193.
[3] Harvey J. Goldschmid, The Fiduciary Duties of Nonprofit Directors and Officers: Paradoxes, Problems, and Proposed Reforms, 23 Iowa J. Corp. L. 631, 643-44 (Summer 1998).

discretion and wide latitude) that the business judgment is in the best interests of the organization."[4] The duty to avoid conflicts of interest should guide all decision-making by your organization's leadership.

Adopting a comprehensive policy and conflict reporting procedure will permit issues regarding duality of interest and self-dealing to be reviewed on an annual basis. Self-dealing for smaller nonprofits is most likely to arise in the context of small business owners serving on the board of the nonprofit. For example, a board member who owns a local printing organization should be recused from any decisions or discussion where the services of her business are considered for use by the nonprofit. Likewise, a local banker on the board is conflicted out of any discussions related to any financial transactions or activities that involve his bank. This is not to say that these individuals cannot benefit from the activities of the organization, but any activities that could result in a financial gain for the board member or officer cannot be the result of the board members' involvement in the actual discussion or decision-making. In the context of larger nonprofit organization, there are additional self-dealing issues that don't arise immediately for smaller organization.

Just as there is great potential for conflicts for board members, similar concerns arise for staff with significant responsibility and decision-making authority for your organization. In the event that a staff member conflict is discovered, it is essential for that employee to recuse herself from any discussions or decisions involving the issue that gave rise to the conflict.[5]

C. Attorney Conflicts

Attorneys working for a nonprofit legal service providers are bound by the same conflict of interest regulations as all attorneys. Under the American Bar Association (ABA) Model Rules of Professional Conduct, "a lawyer shall not represent a client if the representation involves a concurrent conflict of interest."[6] In practical terms, the duty of the attorney is to limit representation of a new client if that representation would adversely affect another current client.[7] The lawyer must also avoid representation that could potentially lead to any material limitations on her duties to another client.[8] Although conflicts can be overcome by informed, written consent from the affected clients, the general rule is for lawyers to avoid conflicts if possible.

Legal service providers are in a unique position vis-à-vis the traditional conflicts rules. The provision of legal services by legal services organizations is often the last hope many low-income clients have for the resolution of their situation. When a legal services client is denied representation due to a conflict of interest, he is often left without any other form of representation.[9] It is also important to note that the types of conflicts that most often lead to the

[4] Id. (citing 1-2 American Law Institute, Principles of Corporate Governance: Analysis and Recommendations (1994)).
[5] Id. at 194.
[6] ABA Model Rules, Rule 1.7 (2005).
[7] Id.
[8] Id.
[9] David H. Taylor, Conflicts Of Interest And The Indigent Client: Barring The Door To The Last Lawyer In Town, 37 Ariz. L. Rev. 577, 579 (1995).

denial of representation do not involve any real prejudice to the client.[10] Nonprofits must carefully determine whether or not there is a true conflict before deciding that continued representation would result in a conflict of interest.

Under the Virginia Rules of Professional Conduct, modeled after the ABA Model Rules, lawyers have a duty to maintain a level of loyalty and trust with their clients not only during representation, but also once that representation is complete.[11] The types of conflicts that most often arise involve parties whose interests are contrary to one another. The most obvious example arises in divorce proceedings where both parties to the suit cannot be represented by the same counsel. Such a situation is relevant for a nonprofit legal services provider that serves diverse client needs.

If the attorney has received any privileged information from either party, he is limited in his ability to represent the conflicted client.[12] The more likely scenario for a client of a nonprofit providing legal services, however, involves the potential for conflict between various clients served by the NPO. In the event that a network attorney represents an adverse party to litigation, perhaps even unrelated to the legal services provided to NPO clients, that attorney must either ensure she either defers the representation to another network attorney, or receives informed, written consent to proceed in the representation. Absent this consent, it is essential that both the network attorney and NPO personnel enforce a strict policy of conflict avoidance in order to evade any questions regarding the provision of legal services and the ethical obligations network attorneys have to the Virginia State Bar.

D. Conflict Procedures

Policies must be implemented to ensure that conflicts are efficiently resolved and that the business records of the organization reflect this resolution. When board members face a conflict, the appropriate response procedure is for the board member to inform the board of the conflict. The minutes should reflect the disclosure of the conflict and the conflicted board member should recuse herself from the continued discussion regarding the particular issue that gave rise to the conflict. When a vote is taken on the particular matter, the minutes should again reflect the abstention of the conflicted board member from that particular decision. Furthermore, it is essential to maintain records of conflicts by implementing an annual disclosure of conflicts for all board members, officers, and directors. The maintenance of these records ensures that in the event that a decision is called to question by interested parties, the NPO can verify that the conflict was mitigated by a policy that ensured the conflicted board member did not take part in the decision.

[10] Id.
[11] Virginia Rules of Professional Conduct, Rule 1.7 (2005).
[12] Id.

Review of procedures upon discovery of a conflict for board members, officers, and directors:

1. Disclosure of conflict
2. Recusal from discussion
3. Abstention from voting
4. Recording in the minutes
5. Annual reporting of all conflicts

For attorneys who volunteer with legal nonprofit organizations, additional considerations apply. Since attorneys are bound by the ABA Model Rules (as discussed above and below under "Legal Ethics"), it is essential for attorneys to maintain appropriate records of all pro bono work conducted through the legal services provider along with other paying clients. If the attorneys fail to check for conflicts with their existing clients before undertaking representation of the nonprofit's clients, they run the risk of disciplinary action from the Virginia State Bar. For a sample conflicts screening form, see Appendix, Chapter 5, conflictscreeningform

III. Legal Ethics

Return to Top

Almost all nonprofit organizations will be involved with attorneys at one point during their existence. Some may only need an attorney to help form and begin running the organization; some may need an attorney to act as in-house counsel for the organization itself. Others may ask attorneys to serve on their boards of directors, while still others may actually provide legal services to their constituents or others in the community through either staff or outside attorneys.

The following section on legal ethics addresses several issues that concern attorneys specifically. It is divided between those ordinary nonprofit organizations and those that provide legal services. Those that do provide legal services may be further distinguished between staff attorneys and network attorneys. Please note, however, that those nonprofit organizations that do provide legal services should also read those sections for ordinary nonprofit organizations as they most likely are relevant to all nonprofit organizations.

Also, it is important to note that throughout this section, references are made to the American Bar Association (ABA) Model Rules of Professional Conduct. These are rules that the ABA has established as examples for states to follow in enacting their own legal ethics rules. While most states have adopted provisions similar to those of the ABA, some have made changes or additions to the rules, while others have not adopted certain rules at all. The nonprofit organization must check with its incorporating state to see which provisions apply and in what way these rules effect the organization. For the relevant rules from the ABA Model Rules, see Appendix, Chapter 5, ABAModelRules .

When a nonprofit organization needs pro bono attorneys to carry out its mission, it may be advantageous to know the following. Under ABA Model Rule of Professional Conduct 6.1, each

attorney should spend 50 hours per year on pro bono work. Therefore, making sure that the attorneys understand that their work will be considered pro bono may entice those attorneys who feel an ethical obligation to meet this standard. Such a rule encourages attorneys to help create a nonprofit organization or agree to represent it in any transactions or potential claims.

For those nonprofit organizations providing legal services, there is also an ethical obligation for attorneys to help those organizations. Besides encouraging attorneys to dedicate 50 hours to pro bono service, ABA Model Rule of Professional Conduct 6.3 encourages attorneys to support and participate in legal services organizations.

A. Ordinary Nonprofit Organizations

Attorneys have a duty to keep certain information private either through the duty of confidentiality or the attorney-client privilege. The difference between the two will not be elaborated here, but the duty of confidentiality includes everything that the attorney-client privilege protects.[13] The duty of confidentiality is an attorney and his firm's obligation to keep certain information related to the client's representation secret unless the client consents to the disclosure or certain exceptions are met. This duty applies not only to matters communicated in confidence by the client, but also to all other information gained in the professional relationship that the client does not want to be revealed or the disclosure of which would be embarrassing or detrimental to the client. This duty begins with confidential information revealed by a prospective client and continues even after the attorney-client relationship has ended.[14]

For an attorney who represents the nonprofit organization itself as in-house counsel, the duty covers communications between the attorney and any high-ranking corporate official. The only time it will cover communications with a normal employee is when three conditions are all met: (1) the employee's superior directs him to speak with the attorney; (2) the employee knows the attorney is trying to obtain legal information for the organization; and (3) the subject of the communication concerns the employee's duties to act for the organization.[15] Therefore, a nonprofit organization should inform its employees that the attorney owes no duty of confidentiality to them unless these three conditions are present.

Besides serving as in-house counsel or external counsel, an attorney may serve as a director of the nonprofit organization. When the attorney is acting as a director, he owes the same duties to the organization as any other director. As such, he should advise the board of directors that in some circumstances, the duty of confidentiality and attorney-client privilege will not cover conversations in board meetings where he is present in his capacity as a director.[16] Therefore, if there is anything another director wishes to remain confidential, he should either disclose it to the attorney outside the board meeting when the attorney is serving in his position as the organization's attorney or go into executive session where the attorney would serve in his legal capacity instead of as a director.

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[13] ABA Model Rule of Professional Conduct 1.6 (2003).
[14] ABA Model Rule of Professional Conduct 1.18 (2002). If the information learned from a prospective client is public knowledge and does not deserve confidentiality, then no duty exists.
[15] *Upjohn v. United States*, 449 U.S. 383, 394 (1981).
[16] Comment 35 to ABA Model Rule of Professional Conduct 1.7 (2002).

Certain considerations must be taken into account; however, if the board opts for the second alternative. A third party may only be present if he will help further the attorney-client relationship. For example, the board of directors may have the organization's accountant present to help explain the organization's financial records, and the attorney-client privilege will still exist. However, where the presence of a third party does not further the relationship, the attorney-client privilege will not exist.

For the text of the confidentiality rules from the Virginia Code of Professional Responsibility, see Appendix, Chapter 5, VAattyconfidentialityrules

B. Nonprofit Organizations Providing Legal Services

i. Conflicts of Interest

Nonprofit organizations providing legal services must differentiate between staff and network attorneys for the conflict of interest rules. Staff attorneys are those that the organization hires to represent its constituents. Network attorneys are those on the organization's referral list that may offer their legal services at discounted rates or for free.

What creates a conflict of interest can sometimes be complicated but those most important to a nonprofit organization providing legal services will be discussed here. Imputed disqualification is the most basic consideration concerning such organizations. This means that if one attorney is disqualified because of a conflict, then all the attorneys in his firm are also disqualified. The key word in this statement is "firm," so it is important to discuss what constitutes a firm. There are generally five factors that determine whether a group of attorneys constitute a firm: (1) a formal agreement among the attorneys exists; (2) the attorneys hold themselves out as a firm; (3) they share revenues and responsibilities; (4) they share physical access to each other's files; and (5) they routinely talk among themselves about legal matters.[17] These factors are important to a nonprofit organization because a question arises whether a conflict with a network attorney disqualifies the organization or whether a referral to a network attorney creates a duty of loyalty between that client and the organization.

As to the first question, network attorneys are not members of the nonprofit organization or its internal "firm" for purposes of imputed disqualification. However, if the network attorneys work physically inside the nonprofit organization's building a problem will arise, specifically to factors 2, 4, and 5. Therefore, if an organization has a limited number of network attorneys, it may want to insure that they work in their own offices outside the organization's building so that the organization's staff attorneys are not disqualified due to conflicts with the network attorneys.

Once a referral is made to a network attorney outside the organization and outside the organization's building, that person becomes a client of the network attorney for the purpose of future conflicts of interest.[18] It is still important though that the organization obtain the client's informed, written consent to disclosure of the limited information given at an intake interview in

[17] ABA Model Rule of Professional Conduct 1.0(c) and Comments 2-4 (2002).
[18] Va. Legal Ethics Opinion 1633 (1995).

order to determine any conflicts of interest or make referrals.[19] Once a client is referred outside an organization to a network attorney, the worker and organization still owe a duty of confidentiality to the client and must not reveal that information to anyone. So long as the client has consented to the disclosure and no duty of confidentiality has developed, then it is much clearer that the organization is free to represent a future client whose interests are directly adverse to the potential client it referred.

In order to determine whether a referral is needed because of a conflict with a staff attorney, there should be a process ensuring some sort of invisible wall between the staff attorneys and potential client until a determination is made. An organization should have a non-attorney intake officer gather information from the potential client; assess the situation for conflicts; and reveal only vague, unidentifiable information to the staff attorneys where there is a question as to whether a conflict exists. If the intake officer decides either on his own or with the indirect assistance of a staff attorney that a conflict of interest does exist, he should refer the potential client to a network attorney if available.

If network attorneys are not available, staff attorneys will have to comply with the following guidelines. Network attorneys, too, will have to follow the same if they receive referrals that conflict with other clients. All attorneys, both staff and network who decide a conflict exists, must decide whether informed, written consent will cure the conflict. Informed, written consent will not be sufficient, and the attorney must turn the client away in the following two circumstances: (1) the client's interests are directly adverse to a present client of the attorney; or (2) there is a significant risk that representation of one client will be materially limited by the attorney's own interests or by the attorney's responsibilities to another client, former client, or third person.[20] If neither of these two circumstances are present and the attorney reasonably believes that he can represent both clients who caused the conflict, the informed written consent must be obtained from both affected clients in order for the attorney to continue representing both.[21] For a sample consent form, see Appendix, Chapter 5consenttoconflicts

ii. Referrals and Legal Fees

Like the previous section on conflicts of interest, there are special considerations for both staff and network attorneys regarding referrals and legal fees. The first two following paragraphs are relevant to network attorneys while the remainder of the section is pertinent to both staff and network attorneys.

An attorney must not give anything of value to a person for recommending the attorney's services.[22] "Anything of value" ranges from money for the referral to gossip in exchange for favorable publicity. However, this rule does not prevent an attorney from paying the usual charge to a nonprofit organization that advertises its legal services and refers clients to the network attorneys. For example, a nonprofit organization could charge attorneys a set fee in exchange for referrals or being included on a referral list. In effect the attorney is paying for the referral, but

[19] Va. Legal Ethics Opinion 1633 (1995).
[20] ABA Model Rule of Professional Conduct 1.7(b) (2002).
[21] Comments 14-15, 18, 20 to ABA Model Rule of Professional Conduct 1.7(b) (2002).
[22] ABA Model Rule of Professional Conduct 7.2(b) (2002).

this is an exception to the rule.

As for network attorneys who accept a referral from a nonprofit organization, it is unethical for the attorney to charge or collect a contingent fee for the representation.[23] If the nonprofit organization itself is going to pay the attorney's fees, the client must give informed, written consent. Additionally, the organization must not interfere with the attorney's professional judgment; and the arrangement cannot compromise the client's confidential information.[24]

If a network attorney is working collectively with one of the staff attorneys, then there can be no fee splitting, unless four conditions are met: (1) the attorneys work together, (2) the client has given informed, written consent to the fee agreement; (3) each attorney is paid proportionally to the work done; and (4) the total fee is reasonable. Therefore, if an organization uses a network attorney on the case, the client must sign a written fee agreement outlining all the details of the arrangement.

In addition, an attorney cannot ordinarily share legal fees with non-attorneys. Some ethics opinions, including some in Virginia, have allowed attorneys to share or turnover court-awarded fees to nonprofit organizations which sponsored the litigation.[25] In addition, the organization is allowed to collect more than the amount necessary to reimburse its costs so long as all fees are put into a fund used exclusively for litigation.[26] Note that these exceptions only apply in the litigation context. An attorney cannot charge for transactional work, such as preparing a will or filing tax returns, and then turn those fees over to a nonprofit organization.

It may be tempting for an attorney to attempt to get paid for his services through gifts from his clients, but attorneys should heed the next rule. It is unethical for an attorney to solicit a substantial gift from a client.[27] An attorney may accept a "simple gift" if it is comparable to the occasion and may even accept an unsolicited substantial gift with the understanding that the client may come back one day and claim undue influence, thus rendering the gift void.[28] Therefore, an attorney must neither solicit a gift nor prepare a legal instrument that creates a substantial gift to the attorney or the organization for which he works. If a client wishes to leave a testamentary gift to his attorney or the organization that referred the client, that client should have an outside, independent attorney assist him with his last will and testament.

Lastly, it is important for organizations to know that attorneys cannot assist clients financially in connection with pending or contemplated litigation.[29] The only exception is that an attorney may advance court costs or other litigation expenses. For example, an attorney may pay the filing fees, expert witness fees, court reporter fees, etc., but an attorney cannot under any circumstances give a client money for groceries, rent, or any other personal need while litigation is pending. For sample fee agreements, see Appendix, Chapter 5, retainersample

[23] Va. Legal Ethics Opinion 1691 (1996).
[24] ABA Model Rule of Professional Conducts 1.8(f), 1.7(b), and 5.4(c) (2002).
[25] Va. Legal Ethics Opinion 1744 (2000).
[26] *American Federation of Government Employees v. U.S. Dept. of Justice, et al.*, 944 F.2d 922, 934, (1991).
[27] ABA Model Rule of Professional Conduct 1.8(c) (2002).
[28] Comments 6-8 to ABA Model Rule of Professional Conduct 1.8 (2002).
[29] ABA Model Rule of Professional Conduct 1.8(e) (2002).

B. Unauthorized Practice of Law

Depending on the state in which one is incorporated and has its principal place of business, a nonprofit organization with staff attorneys may have to register with the state bar. Most states require organizations that employ attorneys engaged in the practice of law to register with the state bar. If those organizations do not register, then they are guilty of unauthorized practice of law. The question arises whether a nonprofit organization is exempt from this requirement.

Some states hold that nonprofit organizations who do not register with the state bar are in fact engaged in the unauthorized practice of law.[30] If the nonprofit organization does not register with the state bar, then it will have to forfeit any right to attorney's fees.

Other states allow an exception for organizations organized for charitable and benevolent purposes.[31] When nonprofit organizations are exempted from registering with the state bar, they should probably still be careful to meet the following four factors as outlined by a New Jersey court: (1) the role of the organization should be that of an intermediary between the attorney and client; (2) there can be no interference by the organization once an attorney has been assigned to the client; (3) the organization must be liable for any damages arising from its own attorneys' malpractice (this does not apply to attorneys outside the organization who should have their own malpractice insurance); and (4) an attorney, either individually or with a board of attorneys, must determine which cases to accept and how to handle those accepted.

In regards to the last factor, nonprofit organizations must permit only attorneys to make decisions regarding individual cases. Although a non-attorney board may still set overall program priorities, it must not make decisions about individual cases. These overall priorities include setting financial and similar eligibility criteria, allocating available resources and manpower, and determining what types of cases that will be handled.[32] Furthermore, if an attorney wants to provide further protection for herself against any future disciplinary actions, she may insist that the organization's charter provide that the organization will not attempt to interfere with or influence the attorney's independent professional judgment regarding selection and management of a case.[33]

IV. Confidentiality

Return to Top

Confidentiality is the discretion to keep secret information private. Confidentiality is the cornerstone of trust upon which the NPO client relationship is built. Every NPO will acquire information of a confidential nature. This could be as simple as the names, addresses, social

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[30] *See* District of Columbia Court of Appeals Rule 49 (2004); *In re Co-Operative Law Co.* (N.Y.); and *Frye v. Tenderloin Housing Clinic, Inc.*, S127641 (Ca. App. 2004) (California Supreme Court has granted review, and the case has been placed on the docket).

[31] *See In the Matter of Education Law Center, Inc.*, 429 A.2d 1051, 1058-1059 (N.J. 1981); and Dixon v. Georgia Indigent Legal Services, Inc., 388 F. Supp. 1156, 1165 (S.D. Ga. 1975).

[32] *See generally South Carolina Bar Ethics Advisory Committee*, Ethics Advisory Op. 02-04 (2002); and ABA Comm. on Ethics and Professional Responsibility, Formal Op. 324 (1970).

[33] Wayne Moore, *Are Organizations that Provide Free Legal Services Engaged in the Unauthorized Practice of Law?*, 67 FORDHAM L. REV. 2397, 2406-2407 (1999).

security numbers, and other personal information of clients and as complex as legally protected information (i.e. verbal communications between clients and the NPO, medical records, tax records, etc.). This type of information given to any NPO by a client must be guarded and held in the highest trust by all. There are no federal or state laws that tell NPO Board members how they are to maintain confidentiality information as a whole. This lack of clarity can be somewhat dangerous for new NPOs. In order to fulfill this duty and avoid abusing the rights of their clients there are three areas Board members need to look to: industry specific laws, sector regulation, and NPO specific policy. Nonprofits would be well served to seek legal counsel to assure adherence to and interpretation of the legal, industry, and NPO specific requirements.

A. Industry Specific Laws

The United States does not have an overall consumer protection law but instead a network of laws each applying to a particular sector or type of information. An industry wide law comes as result of continued public outcry that information considered highly sensitive is deserving of the protection under the law. This was the situation concerning medical records. With the technological advance of computers, the vulnerability of medical records to outside access increased. The government responded by passing a federal law entitled the Health Insurance Portability and Accountability Act (HIPAA). Now HIPPA sets a national standard for privacy of health information. For a NPO that deals with medical information, this legislation is important for Board members to know. Although every federal law in your sector will not necessarily apply to your NPO, Board members must be aware of which laws do apply. Once you have determined which laws concern your NPO you must then ascertain which portions of that law apply to you. In cases, such as HIPPA where some actions are beyond the reach of the law, only certain aspects of the law are applicable to NPOs.

Additionally, Board members need to be aware of state laws that might affect them. Many states adopt laws that are applicable only to individuals in that state. This is a concern for NPOs that want to serve multi-state clientele.

B. Individual Sector Regulation

The U.S. has generally chosen to allow industries to "self regulate." Unfortunately, this makes it hard for Board members to know what their clientele's privacy rights are if they don't particularly fit into in one sector. There are many instances where confidential information is being gathered by NPOs and there is no specific set of laws to cover the handling of that information. Most of the "self regulation" offered by industries has been to request that companies state their current policies with regard to the handling of confidential information, rather than to require conformity to specific practices.

Occasionally, sectors find themselves regulated by law, but most frequently the leaders of the sector establish a set of rules for the industry to abide by. When your NPO services a sector that has created a specific set of rules that apply to your NPO, you must adhere to those rules. This applies even if the rules were created for a body of professionals unrelated to your board. One group sure to have a general set of rules for handling confidential information that can serve as a guide for Board Members are the lawyers in the state. Each state has a specific set of rules

outlined in the Code of Professional Responsibility[34] for the lawyers of your specific state. Virginia Lawyers can go to http://www.vsb.org/profguides/index.html for the rules. This industry considers information confidential if it is (a) communicated during executive session; or (b) otherwise communicated with a mutual understanding of confidentiality. These are two general classifications that can be applied to most industries.

C. NPO Specific Policy

One of the major duties of the entire board, during the formation period of your organization, is a NPO specific policy on how you plan to handle confidential information. The Board should develop a set of organization specific rules regarding confidentiality, and ensure that all employees and volunteers are made aware of and adhere to such rules. A nonprofit should have policies in place, and should routinely and systematically implement those policies, to prevent actual, potential, or perceived breaches of confidentiality.

When drafting the documents that will convey the nonprofits' confidentiality agreement there are four things that should be included: (a) notice of privacy/confidentiality policy, (b) types of confidential information organization collects, (c) parties to whom the organization can lawfully disclose information, and the organization's stance on (d) confidentiality and security of nonpublic personal information.

What should be included in this policy?

1. The policy should be written;
2. The policy should be applicable to board members and staff, and volunteers of the organization;
3. The policy should identify the types of conduct or transactions that raise confidentiality concerns;
4. The policy should set forth procedures for legal disclosure of confidential information; and
5. The policy should provide for review and repercussions for breaches of the policy.

[34] Although the rules differ from state to state they generally look like the provisions created for Virginia Lawyers. See Appendix.VAattyconfidentialityrules

Once the policy is in place remember to:

1. Provide board members, staff and volunteers with the organizations' confidentiality policy.[35]
2. Translate the policy into a written agreement entered into with all clients that disclose confidential information. consenttodisclosure
3. Provide and collect copies of the policy signed by board members, staff, and volunteers, both at the time of the individual's initial affiliation with the organization and at least annually thereafter.
4. Review the policy annually for needed upgrades as the NPO grows and/or ventures into new industry avenues. [36]

Examples of all these types of policies and agreements can be found in the Appendix. confidentialitypolicy

Return to Top

V. Board Duties

Governance has been defined as "the overall processes and structures used to direct and manage an organization's operations and activities."[37] On a more basic level, governance deals with the ways in which rights and responsibilities are shared between the various corporate participants, especially the management and the shareholders. Protecting the public interest is the overall goal of governance. In the nonprofit sector, the board of directors is comprised solely of volunteers and governance is their domain. According to the Alliance for Nonprofit Management, the board of directors must "stand outside the organization and hold it accountable to the public interest."

"The distinction between management and governance is not absolute."[38] However, many individuals believe that the governance role is the exclusive jurisdiction of the board of directors whereas the management role belongs solely to the executive director and senior staff members. Board Duties listed here are generic and not all encompassing. Additional duties may be developed and assigned as deemed necessary.

A. General

In its governance role, the board develops policies and procedures in order to provide guidance to the agency. In its management capacity, the board ensures the agency has the necessary financial and human resources in order for the agency to function. Some boards choose to actively participate in the operations of the agency. For example, the board and senior staff can agree to share management responsibilities in areas of public policy development and education, while at the same time designating as an exclusive staff function the management of finances, human resources, and administration. In the early stages of an organization's development, the Board will likely participate in management by necessity.

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[35] This should be done during the orientation period for these individuals and a copy should be included in their orientation packet for their records.
[36] This could easily be addressed during the board training that should be happening at least once a year.
[37] Panel on Accountability and Governance in the Voluntary Sector, http://www.vsr-trsb.net/pagvs/.
[38] The Internet Non-profit Center, http://www.nonprofits.org/.

B. Governance

Board responsibilities can be divided into minimum requirements for the board as a whole, and individual requirements for each member. At a minimum the board is responsible for:

- Development of mission statement
- Adopting policies and procedures for the organization
- Financial success of the organization including approval of an annual budget
- Adopting bylaws
- Ensuring legal requirements are met
- Ensuring effectiveness of the board
- Administration
- Appointment of committees for financial and planning functions
- Effective public relations and communications
- Hiring an executive director
- Monitoring and evaluating performance of the chief executive
- Working conditions

In addition to the minimum requirements listed above, the Board members are also individually responsible for knowing and understanding the organization's mission, vision, and mandate and legal obligations, ensuring legal obligations are strictly followed, understanding their fiduciary responsibility that is imposed by law, understanding financial and budget matters, and understanding tax law and employment legislation that is specific to the nonprofit organization.

In order to meet both general and individual requirements, a board member training program should be offered to all board member candidates. For start up nonprofit organizations, the training program should include at a minimum:

- An orientation packet with information on the nonprofit's goal and proposed mission statement, the Articles of Incorporation and the filing for tax-exempt status

- Expectations of nonprofit organizations, including time commitment expectations, attendance policy and an overview of general and individual requirements

- Literature on the board member's fiduciary responsibility imposed by law, and the requirements to ensure the organization's best interests come first and that conduct not be based on personal gain or for the benefit of family or friends

- Attestation process (See Attachment #1)

For established nonprofit organizations, it is good policy that the training program should include an orientation packet with the nonprofit's mission and vision statement, the Articles of Incorporation and the filing for tax-exempt status as well as an outline of expectations from the organization.

C. Legal Responsibility

"The courts have said that it is no longer possible to be a passive director. Lack of knowledge or passive participation will not absolve the director of legal responsibility."[39] It is imperative that board members not only understand their legal responsibility, but also take it very seriously. Board members must also understand the consequences of an organizational collapse. In such an instance, the board members may be personally liable for workers' unpaid wages, and vacation, severance and overtime compensation if they act in bad faith fail to apply the appropriate duty of care.

D. Duty of Loyalty and Care

Members of the board of directors assume legal responsibility for the actions of the nonprofit. There are three fundamental legal duties that all board members must follow. These three duties are commonly referred to as fiduciary duties and are applicable to everything that the board of directors does. If board members fail to keep in mind their fiduciary duties when taking action for the nonprofit, they can be held liable for any negative consequences of their actions.

The first fundamental duty is duty of care, which deals with the competence level expected of a board member and is commonly expressed as the duty of "care that an ordinarily prudent person would exercise in a like position and under similar circumstances." The board member owes the duty to exercise reasonable care when making any decision as a steward of the organization. It is important to note that the interpretation of the standard may vary by state. In order to meet the reasonable care standard, a board member is required to:

- Take an active and informed role in decision-making
- Attend board meetings regularly.
- Ask clarifying questions and make independent decisions based on information from committees, outside professionals, and staff members.

The second fundamental duty is the duty of loyalty is associated with the level of faithfulness expected of a board member. When making decisions as a steward of the organization, board members must give their undivided allegiance. It is unacceptable to use information they are privy to for personal gain. In order to meet the loyalty standard board members must:

- Disclose interest to board of directors (See Attachment #2)
- Receive transaction approval by majority of non-interested members of the board
- Adhere to the conflict of interest policy

A subset of duty of loyalty is the duty of obedience. This duty is specifically related to the level of faithfulness to the organization's mission. It is unacceptable for a board member to act in a manner that is inconsistent with the goals of the organization (mission statement, Articles of Incorporation, bylaws, tax-exemption documentation). The basis for the Duty of Obedience rule

[39] United Way of America, http://national.unitedway.org/.

is the public's trust given to the organization that donated funds will be properly managed in order to fulfill the organization's mission.

E. Policies and Procedure

The purpose of policies and procedures is to have a document in place to facilitate smooth transitions of individuals especially in organizations with high employee turnover. A well-written policies and procedures manual also serves as a useful training tool for new employees and those transitioning to new job responsibilities. This section addresses what to include in a policies and procedures manual, the steps in preparing a nonprofit policies and procedures manual, and common mistakes to avoid.

Simply defined, a policy is a statement of operating intent that explains the necessity for a particular action or function. It is important to write policies that allow some flexibility in interpretation. In order for policies to be effective, it is essential that employees have a clear understanding of the organization's overall objectives and goals. A procedure is a statement describing the method for implementing a policy. Statements should be extensively detailed and specifically limit the actions of those involved. One way to differentiate a policy versus a procedure, is to think of policy as "the why" and procedure as "the how."

In order to allow management the opportunity to prioritize the project and allocate the proper amount of resources to complete it, development/revision of policies and procedures should be listed as an item on the board meeting agenda. When preparing the Policies and Procedures Manual, it is important to explain the manual's purpose and goals by defining policy and procedure to all individuals at the nonprofit organization. For organizational purposes, the nonprofit should create a master file where all documents used in developing/revising policies and procedures can be kept.

The development of a well thought out manual can be an overwhelming task for anyone. For simplicity, the organization may wish to divide the manual into sections for each area including, but not limited to, Mission statement, Finance and accounting, Investment policy, Operations, Personnel, Budgeting, and other sections vital to the success of the nonprofit organization. After the draft of the policies and procedures for each section is complete, management and board members should review, comment and revise as necessary. Nonprofits should also include a section on process for updating manual on a quarterly/semiannual basis and an attestation form for sign off by every employee indicating they have read and understand the manual.

Common mistakes to avoid when developing a policies and procedures manual include:

- Get it done early. Be proactive not reactive. Decide on policies and procedures comprehensively in advance and write them down. Don't wait until a problem has arisen.

- Don't discount the value of policies and procedures. Written policies and procedures have no value by themselves. It is important to have employees sign off on the policies on an attestation form and to clearly document problems when employees violate policies or fail to perform their jobs' essential functions. Documentation can help protect the nonprofit

organization's rights and control possible litigation costs. If employee misconduct leads to dismissal, employees will generally seek unemployment compensation. The nonprofit organization may not be liable for the claim if they can show discharge was for a valid, business-related cause.

- Have a process in place to review the manual periodically. Accounting and computer policies particularly require updates to reflect changes and allow for more efficient training of new employees.

- Do not copy another nonprofit's manual. In the short run, this may be quicker and cheaper but in the long run, could cost more money due to implementation of policies and procedures that employees do not understand or that do not apply to the nonprofit organization.

- Language in the manual should not communicate distrust of employees. Manuals that read as though there is the expectation of trouble may create resentment and resistance. Employees may perceive the manual as something negative that is being imposed on them.

F. Record Keeping Requirements

Generally speaking, a nonprofit organization must keep books and records to show that it complies with tax rules. If a nonprofit organization fails to maintain required records, it may be unable to demonstrate that it qualifies for exemption and risks losing its tax-exempt status. An efficient recordkeeping system also allows the nonprofit agency to monitor the progress of programs and assist in the preparation of required financial statements and returns.

Efficient records management may directly contribute to the success of a nonprofit agency's program. Conversely, it may also directly contribute to the ability to identify quickly the potential failure of a program. Detailed records can show whether a particular program is successful, needs improvement or is destined for failure. In addition, records management can provide supporting evidence on recommended changes that should be implemented. One key document that is included in this category is minutes from board meetings. Some key items that should be included in the meeting minutes include attendance, takeaway assignments with assigned owners, voting results and notations if a board member leaves the room because of a conflict of interest.

In order to prepare accurate financial statements, it is imperative that revenue and expense statements and balance sheets are maintained. Since the sources of contributions to the organization are unlimited, it is important to have a records management system that identifies program vs. non-program receipts. This separation will assist the nonprofit organization with listing taxable vs. non-taxable income and completing Schedule A of Form 990. When working with banks, creditors and contributors, nonprofits should make sure they are clear and consistent with the information they provide. By referring to the financial statement in all cases, the nonprofit can limit their reputational risk by providing consistent, accurate information.

Income, expenses and credits included on Form 990 series and other tax returns must be supported by the nonprofit organization's records. Typically, these supporting records are the

same records used to monitor progress of programs and to prepare financial statements. In addition, a tax-exempt organization must provide its records to the IRS for inspection upon request. During the IRS's inspection, they may have questions regarding items reported. By having an efficient records management system, an organization will be able to quickly and efficiently address any of the IRS's concerns or questions.

The law does not mandate a certain kind of record, so organizations can develop a recordkeeping system that is customized to their activities as long as it clearly shows their income and expenses. The type of records an organization should maintain for federal tax purposes is contingent upon the type of activities an organization conducts. If an organization has more than one program, separate records must be maintained for each program. An efficient recordkeeping system should include a summary of transactions and kept in the organization's books. For example, the organization may have a binder for all meeting minutes, a binder for all accounting journals and ledgers. In smaller organizations, the checkbook may serve as the main record.

Supporting documentation that should be maintained including grant applications and awards, sales slips, paid bills, invoices, receipts, deposit slips and canceled checks. All of these documents support entries made in the books and on tax returns. These documents should be organized and kept in a safe place. For clarification purposes, the table below lists categories of supporting documentation and the documents associated with each category:

Category	**Description**	**Applicable Documents**
Gross Receipts	Amounts received from any and all sources.	Cash register tapes, bank deposit slips, receipt books, invoices, credit card charge slips and Form 1099-MISC, Miscellaneous Income
Purchases	Items bought including resold items. Documents also used to value inventory at year end.	Canceled checks, cash register tape receipts, credit card sales slips and invoices.
Expenses	Costs incurred by the organization to carry on its program, excluding purchases.	Canceled checks, cash register tapes, account statements, credit card sales slips, invoices and petty cash slips.
Employment Taxes	Only applicable if organization has employees.	Reference Publication 15, Circular E, Employer's Tax Guide
Assets	Property owned by the organization and used in its activities. Records must be kept on when and how the asset was acquired (including any debt financing), purchase price, depreciation and/or casualty deductions, how the asset was used, disposal method, selling price and expenses associated with the sale	Purchase and sales invoices, real estate closing statements, canceled checks and financing documents.

Generally speaking, an exempt organization must keep a record as long as it may be required to administer provisions of the Internal Revenue Code. Therefore, an organization must keep supporting documentation for an item of income or deduction on a return until the retention requirement for the return expires. Usually the retention requirement for returns is three years after the date the return is due or filed, whichever is later.

1. **Permanent Records.** Records include application for recognition of exempt status, the letter granting or denying exempt status and the organizing documents including articles of incorporation and by-laws with any amendments.

2. **Records Retained for Non-Tax Purposes.** In some cases, entities may mandate an organization retain records longer than what is required by the IRS. Entities include a grantor, an insurance organization, a creditor or a state agency.

3. **Employment Tax Records.** An organization with employees must keep employment tax records for a minimum of four years after the date the tax becomes due or is paid, whichever is later.

In order to comply with all applicable rules and regulations, including Sarbanes Oxley, it is important that the nonprofit have an established process for collection, and retention and destruction of documents and materials. This process protects the nonprofit from identity theft, reduces potential exposure to litigation, and protects the nonprofit's brand and reputation.

G. Reporting Requirements

501(c)(3) organizations must disclose certain documents to the public for inspection and provide copies for a reasonable charge. Organizations must disclose Form 1023, its exemption application along with all supporting documents. In addition, an organization must also disclose its exemption ruling letter from the IRS. Form 990 series including schedules, attachments and supporting documentation filed with the IRS must be made available for disclosure for three years after the due date or filing date of the return, whichever is later. The organization does not, however, have to disclose Schedule B of Form 990 or Form 990-T and does not need to identify its contributors. Penalties are assessed to organizations and to persons responsible for the failure to comply with disclosure requirements. A reasonable charge for copying, as defined by the state of Virginia, is the amount charged by the IRS. Currently, the IRS charges $1.00 for the first page and $0.15 for each subsequent page.

There are two general guidelines that organizations must follow in order to meet substantiation and disclosure requirements for federal income tax return reporting purposes:

1. A written acknowledgement must be provided to the donor for any single contribution greater than $250 before the donor may claim a charitable contribution on their federal income tax return.

2. A written disclosure must be provided to the donor from the charity for a payment greater than $75 that is partly for goods or services provided by the organization and partly for a contribution to the organization.

CHAPTER 5 APPENDIX: OPERATIONS AND GOVERNANCE DOCUMENTS

Return to Top

Sample Conflict of Interest Statement[40]

For Officers, Directors, Committee Members, Staff Members, Institute Faculty and certain Consultants to the Legal Information Network for Cancer (LINC).

No member of the LINC Board of Directors, or any of its Committees, shall derive any personal profit or gain, directly or indirectly, by reason of his or her participation with LINC. Each individual shall disclose to LINC any personal interest which he or she may have in any matter pending before LINC and shall refrain from participation in any decision on such matter.

Any member of the LINC Board, any Committee or Staff who is an officer, board member, a committee member or staff member of a borrower organization or a loan applicant agency shall identify his or her affiliation with such agency or agencies; further, in connection with any credit policy committee or board action specifically directed to that agency, he/she shall not participate in the decision affecting that agency and the decision must be made and/or ratified by the full board.

Any member of the LINC Board, any Committee, Staff of Institute Faculty shall refrain from obtaining any list of NFC clients for personal or private solicitation purposes at any time during the term of their affiliation.

At this time, I am a Board member, a committee member, or an employee of the following organizations:

NAME	CONTACT INFORMATION
1.	
2.	
3.	
4.	
5.	

Now this is to certify that I, except as described below, am not now nor at any time during the past year have been:

1) A participant, directly or indirectly, in any arrangement, agreement, investment, or other activity with any vendor, supplier, or other party; doing business with LINC which has resulted or could result in person benefit to me.

2) A recipient, directly or indirectly, of any salary payments or loans or gifts of any kind or any free service or discounts or other fees from or on behalf of any person or organization engaged in any transaction with LINC.

[40] Adapted from Internet Nonprofit Center sample policy, available at http://www.nonprofits.org/npofaq/16/59.html, accessed on April 17, 2005.

Any exceptions to 1 or 2 above are stated below with a full description of the transactions and of the interest, whether direct or indirect, which I have (or have had during the past year) in the persons or organizations having transactions with LINC.

TRANSACTION	DESCRIPTION
1.	
2.	
3.	
4.	
5.	

Date: _____

Signature: _____

Printed name: _____

Legal Information Network for Cancer (LINC)
Roanoke Valley Regional Office
Roanoke, Virginia

CHAPTER 5 APPENDIX: AVOIDING CONFLICTS

Return to Top

Sample Conflict of Interest Policy[41]

A conflict of interest is defined as an actual or perceived interest by a (staff member/board member/network attorney) in an action that results in or has the appearance of resulting in, personal, organizational or professional gain. A conflict of interest occurs when a (staff member/board member/network attorney) has a direct or fiduciary interest which include:

- Ownership with; or
- Employment of or by; or
- Contractual relationship with; or
- Creditor or debtor to; or
- Consultative or consumer relationship to:

a member of the Board of Directors/Trustees or an employee where one or the other has supervisory authority over the other or with a client who receives services. (In other organizations the definition of conflict of interest includes any bias or the appearance of bias in a decision-making process that would reflect a dual role played by a member of the organization or group. An example, for instance, involves a person who is an employee and a Board member, or a person who is an employee and who hires family members as consultants.)

It is in the interest of the organization, individual staff and Board members to strengthen trust and confidence in each other, to expedite resolution of problems, to mitigate the effect and to minimize organizational and individual stress that can be caused by a conflict of interest.

Employees are to avoid any conflict of interest and even the appearance of a conflict of interest. This organization serves the Roanoke community as a whole rather than only serving a special interest group. The appearance of a conflict of interest can cause embarrassment to the organization and jeopardize the credibility of the organization. Any conflict of interest, potential conflict of interest or the appearance of a conflict of interest is to be reported to the Executive Director or your supervisor immediately. Employees are to maintain independence and objectivity with clients, the community and organization. Employees are called to maintain a sense of fairness, civility, ethics and personal integrity even though law, regulation or custom does not require them.

Employees, members of employee's immediate family, and members of the Board are prohibited from accepting gifts, money or gratuities from the following:

- Persons receiving benefits or services from the organization;
- Any person or entity performing or seeking to perform services under contract with the organization; and

[41] Donald A. Griesmann, *What Must We, What Can We Disclose to the Public, Staff, Board and Clients?*, Aug. 10, 2002, updated Jul. 14, 2003), available at http://www.nonprofits.org/npofaq/misc/020120dag.html, accessed on April 17, 2004.

- Persons who are otherwise in a position to benefit from the actions of any employee of the organization.

Employees may, with the prior written approval of the Executive Director, receive honoraria for lectures and other such activities while on personal days, compensatory time, annual leave or leave without pay. If the employee is acting in any official capacity, honoraria received by an employee in connection with activities relating to employment with the organization are to be paid to the organization.

Return to Top

Sample Lawyer-Client Conflicts Screening Form

Upon contact from a potential LINC client, please note the following information during the initial telephone screening interview. This information should then be sent via email or interoffice mail to the staff attorneys at LINC for review and consideration. Any potential conflicts of interest should be recorded on this form and filed appropriately with all other initial screening forms. The email can include this form and a simple statement such as:

"Please let me know if there is any reason why we may not undertake the representation of Jane Doe, a cancer patient from Roanoke Valley who has never been previously represented by an attorney. Her relevant information is attached. A conflict exists if:

- Representation will be directly adverse to another client; or
- There is a significant risk that the representation of this client will be materially limited by representation of another client, a former client, or a third person, or the personal interest of the lawyer; and
- You do not reasonably believe that you can provide diligent and competent representation to each conflict without violating the law or other Rules of Professional Responsibility, and you receive written, informed consent from each affected client."[42]

If a network attorney is contacted regarding this client's case, he/she should review this information to ensure that no present conflict exists. In the event that a conflict does exist, that attorney shall be appropriately screened from all information and discussion related to this case.

Name	
Address	
Phone	
Email	
Previous Legal Representations	
Current Legal Issue	
Temporary File No.	
Conflicts	

Recorded By:

_____ _____

Signed Date

_____

Printed Name

[42] ABA Model Rule 1.7.

Return to Top

SAMPLE FEE AGREEMENT *(ordinary)*

THIS AGREEMENT, made and entered into this ___ day of _____, 20___, by and between _____, hereinafter referred to as Attorney, and _____, hereinafter referred to as Client provides as follows:

1. Attorney shall represent Client on the following matter:_____

2. Client shall pay Attorney a fee of _____ Dollars, which shall be paid as follows: _____

3. Client shall further reimburse to Attorney all costs and expenses as they become due. These may include, but are not limited to, court reporter fees, investigator's fees, expert witness fees, costs of testing, photographic services, travel expenses, exhibit preparations, and copying costs.

4. Legal fees [*shall/shall not*] include representation or services for any appeal or retrial.

5. Client shall fully co-operate with attorney and truthfully disclose all facts about this case.

6. In the event Attorney must withdraw or cannot continue in the representation of Client, Attorney shall refund the unearned portion of any legal fees paid. Attorney shall be entitled to keep fees for services rendered up to the time of termination at a rate of _____ Dollars per hour.

1. Client states that he/she has read this Agreement and has had all his/her questions about it answered and fully understands and agrees to it.
2.

Witness the following signatures and seals.

_____ Date: _____
Attorney

_____ Date: _____
Client

SAMPLE FEE AGREEMENT

Return to Top

(when organization is paying attorney)

THIS AGREEMENT, made and entered into this ___ day of _____, 20___, by and between _____, hereinafter referred to as Attorney, and *Legal Information Network for Cancer (LINC)*, hereinafter referred to as Organization, and _____, hereinafter referred to as Client provides as follows:

1. Attorney shall represent Client on the following matter: *preparing a last will and testament*.

2. Organization shall pay Attorney a fee of _____ Dollars, which shall be paid as follows: *in one payment upon completion of services*.

3. Organization shall further reimburse to Attorney all costs and expenses as they become due. These may include, but are not limited to, court reporter fees, investigator's fees, expert witness fees, costs of testing, photographic services, travel expenses, exhibit preparations, and copying costs.

4. Legal fees [*shall/shall not*] include representation or services for any appeal or retrial.

5. Attorney shall ensure that Organization will not interfere with Attorney's professional independence or seek to compromise Client's confidential information.

6. Client shall fully co-operate with attorney and truthfully disclose all facts about this case.

7. In the event Attorney must withdraw or cannot continue in the representation of Client, Attorney shall refund the unearned portion of any legal fees paid to Organization. Attorney shall be entitled to keep fees for services rendered up to the time of termination at a rate of _____ Dollars per hour.

8. Client states that he/she has read this Agreement and has had all his/her questions about it answered and fully understands and agrees to it.

Witness the following signatures and seals.

_____ Date: _____
Attorney

_____ Date: _____
Client

_____ Date: _____
Organization

Return to Top

SAMPLE CONSENT TO FUTURE CONFLICTS

I, the undersigned client, do hereby retain and employ the law firm of _____ as my attorneys to represent me in my claim against *ABC Insurance Company*, "Defendant," arising out of *Defendant's denial to cover the medical costs of my breast augmentation that I received on the ___ day of _____, 2005, following a mastectomy, which was needed to remove a cancerous lump.*

I hereby consent to future conflicts *involving the law firm's possible representation of ABC Insurance Company as a defendant in a different matter with a different plaintiff. (Note: The reason must be specific and Client must fully understand the potential conflict. See Comment 22 to ABA Rule 1.7.)*

Following consideration of the aforesaid future conflict, I hereby state that I consent and agree to my representation by the law firm of _____.

Given under my hand and seal this ___ day of _____, 2005.

_____(SEAL)
Client

The above employment is accepted upon the terms stated herein.

Law Firm

By: _____(SEAL)

Return to Top

CONSENT TO DISCLOSURE OF INTAKE INTERVIEW INFORMATION

I understand that the following information is protected by the ABA Model Rules and cannot be released without written consent unless otherwise provided for in the rules. I also understand that I may revoke this consent in writing at any time unless action has already been taken upon this consent. I further understand that by consenting to this disclosure the organization collecting this information owes no duty of loyalty to me, so that no future conflict of interest can result so long as the organization does not represent me.

I hereby consent to disclosure of the following information related to my request for legal representation for the purposes of determining whether I qualify for representation by the organization within its set priorities and limitations and for determining whether a conflict of interest exists with an attorney within the organization.

[The organization's questions would follow which would probably include the person's name, income, basic problem, etc.]

_____ Date: _____

Client

RETAINER AGREEMENT LIMITING REPRESENTATION

Return to Top

THIS AGREEMENT, made and entered into this ___ day of _____, 20___, by and between _____, hereinafter referred to as Attorney, and _____, hereinafter referred to as Client,

WITNESSETH:

THAT FOR AND IN CONSIDERATION of the mutual covenants contained herein, the parties hereby agree as follows:

1. Attorney will represent Client in certain legal matters as counsel, to-wit: *warrant in debt brought by MCV Physicians*. It is understood that this Agreement does not include representation on appeal, retrial or for any other purpose except those expressly stated herein.

2. Client understands that Attorney cannot effectively represent Client without the cooperation and total honesty of Client, and accordingly, Client agrees to be open, cooperative and honest with Attorney in all matters.

1. Client acknowledges being fully advised on the availability of and information about other counsel, including court-appointed counsel where appropriate, and after due consideration, Client desires to have Attorney represent him as his counsel, and therefore enters into this Agreement.
2.

Witness the following signatures and seals:

_____SEAL)
Client

_____SEAL)
Attorney

VIRGINIA CODE OF PROFESSIONAL RESPONSIBILITY
RULES ADDRESSING CONFIDENTIALITY

Return to Top

In Virginia the issue of confidentiality is addressed in three separate provisions found in the Virginia Code of Professional Responsibility. They read as such :

3-104 (C) Nonlawyer Personnel.
A lawyer or law firm that employs nonlawyer personnel shall exercise a high standard of care to assure compliance by the nonlawyer personnel with the applicable provisions of the Code of Professional Responsibility. The initial and the continuing relationship with the client must be the responsibility of the employing attorney.

4-101 Preservation of Confidences and Secrets of a Client.

(A) "Confidence" refers to information protected by the attorney-client privilege under applicable law, and "secret" refers to other 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.

(B) Except as provided by DR 4-101(C) and (D), a lawyer shall not knowingly:

(1) Reveal a confidence or secret of his client.

(2) Use a confidence or secret of his client to the disadvantage of the client.

(3) Use a confidence or secret of his client for the advantage of himself or a third person, unless the client consents after full disclosure.

(C) A lawyer may reveal:

(1) Confidences or secrets with the consent of the client or clients affected, but only after a full disclosure to them.

(2) Confidences or secrets when required by law or court order.

(3) Information which clearly establishes that his client has, in the course of the representation, perpetrated upon a third party a fraud related to the subject matter of the representation.

(4) Confidences or secrets necessary to establish the reasonableness of his fee or to defend himself or his employees or associates against an accusation of wrongful conduct.

(D) A lawyer shall reveal:

(1) The intention of his client, as stated by the client, to commit a crime and the information necessary to prevent the crime, but before revealing such information, the attorney shall,

> where feasible, advise his client of the possible legal consequences of his action, urge the client not to commit the crime, and advise the client that the attorney must reveal the client's criminal intention unless thereupon abandoned, and, if the crime involves perjury by the client, that the attorney shall seek to withdraw as counsel.
>
> (2) Information which clearly establishes that his client has, in the course of the representation, perpetrated a fraud related to the subject matter of the representation upon a tribunal. Before revealing such information, however, the lawyer shall request that his client advise the tribunal of the fraud. Information is clearly established when the client acknowledges to the attorney that he has perpetrated a fraud upon a tribunal.

(E) 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, except that a lawyer may reveal the information allowed by DR 4-101(C) through an employee.

5-105 Refusing to Accept or Continue Employment if the Interests of Another Client May Impair the Independent Professional Judgment of the Lawyer.

(A) 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, except to the extent permitted under DR 5-105(C).

(B) A lawyer shall not continue multiple employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by his representation of another client, except to the extent permitted under DR 5-105(C).

(C) In the situations covered by DR 5-105(A) and (B), a lawyer may represent multiple clients if it is 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.

(D) A lawyer who has represented a client in a matter shall not thereafter represent another person in the same or substantially related matter if the interest of that person is adverse in any material respect to the interest of the former client unless the former client consents after disclosure.

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

EXAMPLE OF NPO SPECIFIC CONFIDENTIALITY POLICY

Return to Top

LINC maintains a strict policy on the use of client identification and related information. We value your privacy and know how important it is to you to have complete peace of mind regarding our use of information about you. We have always used personal information ONLY when necessary to fulfill requests made by you. We restrict access to our facilities and records in order to assure the security of client information. We NEVER exchange, sell or otherwise provide other organizations with client information. We will continue to work hard to protect client information so that you can sleep easier knowing we care about you and your privacy.

Confidentiality is the cornerstone of all LINC programs. All client records are clearly marked confidential and are secured at all times. A client must sign a completed disclosure form prior to the release of any information. Client confidentiality will only be breached when a client is in eminent danger of hurting themselves or others.

EXAMPLE OF NPO SPECIFIC CONFIDENTIALITY AND NONDISCLOSURE AGREEMENT FOR BOARD MEMBERS AND EMPLOYEES

Return to Top

LINC maintains strict confidentiality and security of records in compliance with the Health Insurance Portability and Accountability Act (HIPAA), in addition to other federal and state laws. These laws pertain to the security and privacy of all records that contain information that identifies or could lead to the identification of a client or that could reveal private information concerning an employee or client.

Employees are authorized access to such private information as a condition of employment to the extent necessary to perform their duties. As an employee/volunteer/ board member/third-party administrator of LINC, you are required to protect against unauthorized access to such information, ensure the security and privacy of such information, and disclose any anticipated threats or hazards to such information. You must be very careful not to release this information to the public or to other individuals, including but not limited to employees who have not been authorized or who do not have a **legitimate business need to know**. Any questions regarding release of such information to another person should be directed to your supervisor or their designee.

LINC defines unauthorized access to be:

1. Access to client, employee or organizational information not necessary to carry out your job responsibilities.
2. Non-business access to the records of clients or employees. This includes employee and client children, spouse, parents and other relatives as well as friends and acquaintances.
3. Release of client or employee information to unauthorized internal or external users.
4. Release of additional or excessive client or employee information to an authorized individual/agency than is essential to meeting the stated purpose of an approved request.

Information may not be divulged, copied, released, sold, loaned, reviewed, altered or destroyed except as properly authorized by the appropriate organization official within the scope of applicable federal or state laws, including record retention schedules and corresponding Internal Governing Policies.

As an employee/volunteer/board member/third-party administrator of LINC, you must abide by the rules, regulations, policies and procedures of LINC as well as federal and state laws applicable to your position in this organization. LINC may at any time revoke employee/volunteer/board member/third-party access, other authorization or other access to confidential information. Additionally, failure to comply with any of the acts, rules, regulations, LINC policies and corresponding procedures may result in disciplinary action, including termination of employment. Criminal or civil penalties may also be imposed, depending upon the nature and severity of the breach of confidentiality.

Having read and understood this policy

AGREED AND ACCEPTED BY:

Date: _____

By_____ Witness:_____

Title:_____

EXAMPLE OF NPO SPECIFIC CONFIDENTIALITY AND NONDISCLOSURE AGREEMENT FOR CLIENT

Return to Top

CONFIDENTIALITY AND NONDISCLOSURE AGREEMENT

WHEREAS, _____ [YOUR NAME] agrees to furnish certain confidential information relating to [insert what type of information may be collected];

WHEREAS, _____ [NPO NAME] agrees to review, examine, inspect or obtain such confidential information only for the purposes described above, and to otherwise hold such information confidential pursuant to the terms of this Agreement.

BE IT KNOWN, that _____ [YOUR NAME] has or shall furnish to _____ [NPO NAME] certain confidential information and may further allow _____ [NPO NAME] the right to discuss or share this information on the following conditions:

1. _____[NPO NAME] agrees to hold confidential or proprietary information in trust and confidence and agrees that it shall be used only for the contemplated purposes, shall not be used for any other purpose, or disclosed to any third party unless expressly authorized by this agreement or further written authorization by _____ [YOUR NAME].

2. At the conclusion of any discussions, or upon demand by _____ [YOUR NAME], all confidential information shall be returned to_____ [YOUR NAME].

3. Confidential information shall not be disclosed to any employee, consultant or third party unless they agree to execute and be bound by the terms of this Agreement, and have been approved by_____ [YOUR NAME].

4. This Agreement and its validity, construction and effect shall be governed by the laws of [insert jurisdiction].

AGREED AND ACCEPTED BY:

Date: _____

By _____ Witness: _____

Title: _____

By: _____

Title: _____

Return to Top

ABA MODEL RULES OF PROFESSIONAL CONDUCT
RELEVANT CODE SECTIONS

RULE 1.0 TERMINOLOGY

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

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

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

(d) "Fraud" or "fraudulent" denotes conduct that is fraudulent under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive.

(e) "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.

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

(g) "Partner" denotes a member of a partnership, a shareholder in a law firm organized as a professional corporation, or a member of an association authorized to practice law.
(h) "Reasonable" or "reasonably" when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer.

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

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

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

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

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

(n) "Writing" or "written" denotes a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photostatting, photography, audio or video recording and e-mail. A "signed" writing includes an electronic sound, symbol or process attached to or logically associated with a writing and executed or adopted by a person with the intent to sign the writing.

Comment

Confirmed in Writing

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

Firm

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

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

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

Fraud

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

Informed Consent

[6] Many of the Rules of Professional Conduct require the lawyer to obtain the informed consent of a client or other person (e.g., a former client or, under certain circumstances, a prospective client) before accepting or continuing representation or pursuing a course of conduct. See, e.g., Rules 1.2(c), 1.6(a) and 1.7(b). The communication necessary to obtain such consent will vary according to the Rule involved and the circumstances giving rise to the need to obtain informed consent. The lawyer must make reasonable efforts to ensure that the client or other person possesses information reasonably adequate to make an informed decision. Ordinarily, this will require communication that includes a disclosure of the facts and circumstances giving rise to the situation, any explanation reasonably necessary to inform the client or other person of the material advantages and disadvantages of the proposed course of conduct and a discussion of the client's or other person's options and alternatives. In some circumstances it may be appropriate for a lawyer to advise a client or other person to seek the advice of other counsel. A lawyer need not inform a client or other person of facts or implications already known to the client or other person; nevertheless, a lawyer who does not personally inform the client or other person assumes the risk that the client or other person is inadequately informed and the consent is invalid. In determining whether the information and explanation provided are reasonably adequate, relevant factors include whether the client or other person is experienced in legal matters generally and in making decisions of the type involved, and whether the client or other person is independently represented by other counsel in giving the consent. Normally, such persons need less information and explanation than others, and generally a client or other person who is independently represented by other counsel in giving the consent should be assumed to have given informed consent.

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

Screened

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

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

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

RULE 1.6 CONFIDENTIALITY OF INFORMATION

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

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

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

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

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

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

(5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the

lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or

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

Comment

[1] This Rule governs the disclosure by a lawyer of information relating to the representation of a client during the lawyer's representation of the client. See Rule 1.18 for the lawyer's duties with respect to information provided to the lawyer by a prospective client, Rule 1.9(c)(2) for the lawyer's duty not to reveal information relating to the lawyer's prior representation of a former client and Rules 1.8(b) and 1.9(c)(1) for the lawyer's duties with respect to the use of such information to the disadvantage of clients and former clients.

[2] A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation. See Rule 1.0(e) for the definition of informed consent. This contributes to the trust that is the hallmark of the client-lawyer relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld.

[3] The principle of client-lawyer confidentiality is given effect by related bodies of law: the attorney-client privilege, the work product doctrine and the rule of confidentiality established in professional ethics. The attorney-client privilege and work product doctrine apply in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule, for example, applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law. See also Scope.

[4] Paragraph (a) prohibits a lawyer from revealing information relating to the representation of a client. This prohibition also applies to disclosures by a lawyer that do not in themselves reveal protected information but could reasonably lead to the discovery of such information by a third person. A lawyer's use of a hypothetical to discuss issues relating to the representation is permissible so long as there is no reasonable likelihood that the listener will be able to ascertain the identity of the client or the situation involved.

Authorized Disclosure

[5] Except to the extent that the client's instructions or special circumstances limit that authority, a lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation. In some situations, for example, a lawyer may be impliedly authorized to admit a fact that cannot properly be disputed or to make a disclosure that facilitates a satisfactory conclusion to a matter. Lawyers in a firm may, in the course of the firm's practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers.

Disclosure Adverse to Client

[6] Although the public interest is usually best served by a strict rule requiring lawyers to preserve the confidentiality of information relating to the representation of their clients, the confidentiality rule is subject to limited exceptions. Paragraph (b)(1) recognizes the overriding value of life and physical integrity and permits disclosure reasonably necessary to prevent reasonably certain death or substantial bodily harm. Such harm is reasonably certain to occur if it will be suffered imminently or if there is a present and substantial threat that a person will suffer such harm at a later date if the lawyer fails to take action necessary to eliminate the threat. Thus, a lawyer who knows that a client has accidentally discharged toxic waste into a town's water supply may reveal this information to the authorities if there is a present and substantial risk that a person who drinks the water will contract a life-threatening or debilitating disease and the lawyer's disclosure is necessary to eliminate the threat or reduce the number of victims.

[7] Paragraph (b)(2) is a limited exception to the rule of confidentiality that permits the lawyer to reveal information to the extent necessary to enable affected persons or appropriate authorities to prevent the client from committing a crime or fraud, as defined in Rule 1.0(d), that is reasonably certain to result in substantial injury to the financial or property interests of another and in furtherance of which the client has used or is using the lawyer's services. Such a serious abuse of the client-lawyer relationship by the client forfeits the protection of this Rule. The client can, of course, prevent such disclosure by refraining from the wrongful conduct. Although paragraph (b)(2) does not require the lawyer to reveal the client's misconduct, the lawyer may not counsel or assist the client in conduct the lawyer knows is criminal or fraudulent. See Rule 1.2(d). See also Rule 1.16 with respect to the lawyer's obligation or right to withdraw from the representation of the client in such circumstances, and Rule 1.13(c), which permits the lawyer, where the client is an organization, to reveal information relating to the representation in limited circumstances.

[8] Paragraph (b)(3) addresses the situation in which the lawyer does not learn of the client's crime or fraud until after it has been consummated. Although the client no longer has the option of preventing disclosure by refraining from the wrongful conduct, there will be situations in which the loss suffered by the affected person can be prevented, rectified or mitigated. In such situations, the lawyer may disclose information relating to the representation to the extent necessary to enable the affected persons to prevent or mitigate reasonably certain losses or to attempt to recoup their losses. Paragraph (b)(3) does not apply when a person who has

committed a crime or fraud thereafter employs a lawyer for representation concerning that offense.

[9] A lawyer's confidentiality obligations do not preclude a lawyer from securing confidential legal advice about the lawyer's personal responsibility to comply with these Rules. In most situations, disclosing information to secure such advice will be impliedly authorized for the lawyer to carry out the representation. Even when the disclosure is not impliedly authorized, paragraph (b)(4) permits such disclosure because of the importance of a lawyer's compliance with the Rules of Professional Conduct.

[10] Where a legal claim or disciplinary charge alleges complicity of the lawyer in a client's conduct or other misconduct of the lawyer involving representation of the client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense. The same is true with respect to a claim involving the conduct or representation of a former client. Such a charge can arise in a civil, criminal, disciplinary or other proceeding and can be based on a wrong allegedly committed by the lawyer against the client or on a wrong alleged by a third person, for example, a person claiming to have been defrauded by the lawyer and client acting together. The lawyer's right to respond arises when an assertion of such complicity has been made. Paragraph (b)(5) does not require the lawyer to await the commencement of an action or proceeding that charges such complicity, so that the defense may be established by responding directly to a third party who has made such an assertion. The right to defend also applies, of course, where a proceeding has been commenced.

[11] A lawyer entitled to a fee is permitted by paragraph (b)(5) to prove the services rendered in an action to collect it. This aspect of the rule expresses the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary.

[12] Other law may require that a lawyer disclose information about a client. Whether such a law supersedes Rule 1.6 is a question of law beyond the scope of these Rules. When disclosure of information relating to the representation appears to be required by other law, the lawyer must discuss the matter with the client to the extent required by Rule 1.4. If, however, the other law supersedes this Rule and requires disclosure, paragraph (b)(6) permits the lawyer to make such disclosures as are necessary to comply with the law.

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

[14] Paragraph (b) permits disclosure only to the extent the lawyer reasonably believes the disclosure is necessary to accomplish one of the purposes specified. Where practicable, the lawyer should first seek to persuade the client to take suitable action to obviate the need for

disclosure. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to accomplish the purpose. If the disclosure will be made in connection with a judicial proceeding, the disclosure should be made in a manner that limits access to the information to the tribunal or other persons having a need to know it and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.

[15] Paragraph (b) permits but does not require the disclosure of information relating to a client's representation to accomplish the purposes specified in paragraphs (b)(1) through (b)(6). In exercising the discretion conferred by this Rule, the lawyer may consider such factors as the nature of the lawyer's relationship with the client and with those who might be injured by the client, the lawyer's own involvement in the transaction and factors that may extenuate the conduct in question. A lawyer's decision not to disclose as permitted by paragraph (b) does not violate this Rule. Disclosure may be required, however, by other Rules. Some Rules require disclosure only if such disclosure would be permitted by paragraph (b). See Rules 1.2(d), 4.1(b), 8.1 and 8.3. Rule 3.3, on the other hand, requires disclosure in some circumstances regardless of whether such disclosure is permitted by this Rule. See Rule 3.3(c).

Acting Competently to Preserve Confidentiality

[16] A lawyer must act competently to safeguard information relating to the representation of a client against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. See Rules 1.1, 5.1 and 5.3.

[17] When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty, however, does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to the use of a means of communication that would otherwise be prohibited by this Rule.

Former Client

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

RULE 1.7 CONFLICT OF INTEREST: CURRENT CLIENTS

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

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

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

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

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

(2) the representation is not prohibited by law;

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

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

Comment

General Principles

[1] Loyalty and independent judgment are essential elements in the lawyer's relationship to a client. Concurrent conflicts of interest can arise from the lawyer's responsibilities to another client, a former client or a third person or from the lawyer's own interests. For specific Rules regarding certain concurrent conflicts of interest, see Rule 1.8. For former client conflicts of interest, see Rule 1.9. For conflicts of interest involving prospective clients, see Rule 1.18. For definitions of "informed consent" and "confirmed in writing," see Rule 1.0(e) and (b).

[2] Resolution of a conflict of interest problem under this Rule requires the lawyer to: 1) clearly identify the client or clients; 2) determine whether a conflict of interest exists; 3) decide whether the representation may be undertaken despite the existence of a conflict, i.e., whether the conflict is consentable; and 4) if so, consult with the clients affected under paragraph (a) and obtain their informed consent, confirmed in writing. The clients affected under paragraph (a) include both of the clients referred to in paragraph (a)(1) and the one or more clients whose representation might be materially limited under paragraph (a)(2).

[3] A conflict of interest may exist before representation is undertaken, in which event the representation must be declined, unless the lawyer obtains the informed consent of each client under the conditions of paragraph (b). To determine whether a conflict of interest exists, a lawyer should adopt reasonable procedures, appropriate for the size and type of firm and practice, to determine in both litigation and non-litigation matters the persons and issues involved. See also Comment to Rule 5.1. Ignorance caused by a failure to institute such procedures will not excuse

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

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

[5] Unforeseeable developments, such as changes in corporate and other organizational affiliations or the addition or realignment of parties in litigation, might create conflicts in the midst of a representation, as when a company sued by the lawyer on behalf of one client is bought by another client represented by the lawyer in an unrelated matter. Depending on the circumstances, the lawyer may have the option to withdraw from one of the representations in order to avoid the conflict. The lawyer must seek court approval where necessary and take steps to minimize harm to the clients. See Rule 1.16. The lawyer must continue to protect the confidences of the client from whose representation the lawyer has withdrawn. See Rule 1.9(c).

Identifying Conflicts of Interest: Directly Adverse

[6] Loyalty to a current client prohibits undertaking representation directly adverse to that client without that client's informed consent. Thus, absent consent, a lawyer may not act as an advocate in one matter against a person the lawyer represents in some other matter, even when the matters are wholly unrelated. The client as to whom the representation is directly adverse is likely to feel betrayed, and the resulting damage to the client-lawyer relationship is likely to impair the lawyer's ability to represent the client effectively. In addition, the client on whose behalf the adverse representation is undertaken reasonably may fear that the lawyer will pursue that client's case less effectively out of deference to the other client, i.e., that the representation may be materially limited by the lawyer's interest in retaining the current client. Similarly, a directly adverse conflict may arise when a lawyer is required to cross-examine a client who appears as a witness in a lawsuit involving another client, as when the testimony will be damaging to the client who is represented in the lawsuit. On the other hand, simultaneous representation in unrelated matters of clients whose interests are only economically adverse, such as representation of competing economic enterprises in unrelated litigation, does not ordinarily constitute a conflict of interest and thus may not require consent of the respective clients.

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

Identifying Conflicts of Interest: Material Limitation

[8] Even where there is no direct adverseness, a conflict of interest exists if there is a significant risk that a lawyer's ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer's other responsibilities or interests. For example, a lawyer asked to represent several individuals seeking to form a joint venture is likely to be materially limited in the lawyer's ability to recommend or advocate all possible positions that each might take because of the lawyer's duty of loyalty to the others. The conflict in effect forecloses alternatives that would otherwise be available to the client. The mere possibility of subsequent harm does not itself require disclosure and consent. The critical questions are the likelihood that a difference in interests will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client.

Lawyer's Responsibilities to Former Clients and Other Third Persons

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

Personal Interest Conflicts

[10] The lawyer's own interests should not be permitted to have an adverse effect on representation of a client. For example, if the probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice. Similarly, when a lawyer has discussions concerning possible employment with an opponent of the lawyer's client, or with a law firm representing the opponent, such discussions could materially limit the lawyer's representation of the client. In addition, a lawyer may not allow related business interests to affect representation, for example, by referring clients to an enterprise in which the lawyer has an undisclosed financial interest. See Rule 1.8 for specific Rules pertaining to a number of personal interest conflicts, including business transactions with clients. See also Rule 1.10 (personal interest conflicts under Rule 1.7 ordinarily are not imputed to other lawyers in a law firm).

[11] When lawyers representing different clients in the same matter or in substantially related matters are closely related by blood or marriage, there may be a significant risk that client confidences will be revealed and that the lawyer's family relationship will interfere with both loyalty and independent professional judgment. As a result, each client is entitled to know of the existence and implications of the relationship between the lawyers before the lawyer agrees to undertake the representation. Thus, a lawyer related to another lawyer, e.g., as parent, child, sibling or spouse, ordinarily may not represent a client in a matter where that lawyer is representing another party, unless each client gives informed consent. The disqualification arising from a close family relationship is personal and ordinarily is not imputed to members of firms with whom the lawyers are associated. See Rule 1.10.

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

Interest of Person Paying for a Lawyer's Service

[13] A lawyer may be paid from a source other than the client, including a co-client, if the client is informed of that fact and consents and the arrangement does not compromise the lawyer's duty of loyalty or independent judgment to the client. See Rule 1.8(f). If acceptance of the payment from any other source presents a significant risk that the lawyer's representation of the client will be materially limited by the lawyer's own interest in accommodating the person paying the lawyer's fee or by the lawyer's responsibilities to a payer who is also a co-client, then the lawyer must comply with the requirements of paragraph (b) before accepting the representation, including determining whether the conflict is consentable and, if so, that the client has adequate information about the material risks of the representation.

Prohibited Representations

[14] Ordinarily, clients may consent to representation notwithstanding a conflict. However, as indicated in paragraph (b), some conflicts are nonconsentable, meaning that the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent. When the lawyer is representing more than one client, the question of consentability must be resolved as to each client.

[15] Consentability is typically determined by considering whether the interests of the clients will be adequately protected if the clients are permitted to give their informed consent to representation burdened by a conflict of interest. Thus, under paragraph (b)(1), representation is prohibited if in the circumstances the lawyer cannot reasonably conclude that the lawyer will be able to provide competent and diligent representation. See Rule 1.1 (competence) and Rule 1.3 (diligence).

[16] Paragraph (b)(2) describes conflicts that are nonconsentable because the representation is prohibited by applicable law. For example, in some states substantive law provides that the same lawyer may not represent more than one defendant in a capital case, even with the consent of the clients, and under federal criminal statutes certain representations by a former government lawyer are prohibited, despite the informed consent of the former client. In addition, decisional law in some states limits the ability of a governmental client, such as a municipality, to consent to a conflict of interest.

[17] Paragraph (b)(3) describes conflicts that are nonconsentable because of the institutional interest in vigorous development of each client's position when the clients are aligned directly against each other in the same litigation or other proceeding before a tribunal. Whether clients are aligned directly against each other within the meaning of this paragraph requires examination of the context of the proceeding. Although this paragraph does not preclude a lawyer's multiple representation of adverse parties to a mediation (because mediation is not a proceeding before a "tribunal" under Rule 1.0(m)), such representation may be precluded by paragraph (b)(1).

Informed Consent

[18] Informed consent requires that each affected client be aware of the relevant circumstances and of the material and reasonably foreseeable ways that the conflict could have adverse effects on the interests of that client. See Rule 1.0(e) (informed consent). The information required depends on the nature of the conflict and the nature of the risks involved. When representation of multiple clients in a single matter is undertaken, the information must include the implications of the common representation, including possible effects on loyalty, confidentiality and the attorney-client privilege and the advantages and risks involved. See Comments [30] and [31] (effect of common representation on confidentiality).

[19] Under some circumstances it may be impossible to make the disclosure necessary to obtain consent. For example, when the lawyer represents different clients in related matters and one of the clients refuses to consent to the disclosure necessary to permit the other client to make an informed decision, the lawyer cannot properly ask the latter to consent. In some cases the alternative to common representation can be that each party may have to obtain separate representation with the possibility of incurring additional costs. These costs, along with the benefits of securing separate representation, are factors that may be considered by the affected client in determining whether common representation is in the client's interests.

Consent Confirmed in Writing

[20] Paragraph (b) requires the lawyer to obtain the informed consent of the client, confirmed in writing. Such a writing may consist of a document executed by the client or one that the lawyer promptly records and transmits to the client following an oral consent. See Rule 1.0(b). See also Rule 1.0(n) (writing includes electronic transmission). If it is not feasible to obtain or transmit the writing at the time the client gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter. See Rule 1.0(b). The requirement of a writing does not supplant the need in most cases for the lawyer to talk with the client, to explain the risks and advantages, if any, of representation burdened with a conflict of interest, as well as reasonably available alternatives, and to afford the client a reasonable opportunity to consider the risks and alternatives and to raise questions and concerns. Rather, the writing is required in order to impress upon clients the seriousness of the decision the client is being asked to make and to avoid disputes or ambiguities that might later occur in the absence of a writing.

Revoking Consent

[21] A client who has given consent to a conflict may revoke the consent and, like any other client, may terminate the lawyer's representation at any time. Whether revoking consent to the client's own representation precludes the lawyer from continuing to represent other clients depends on the circumstances, including the nature of the conflict, whether the client revoked consent because of a material change in circumstances, the reasonable expectations of the other client and whether material detriment to the other clients or the lawyer would result.

Consent to Future Conflict

[22] Whether a lawyer may properly request a client to waive conflicts that might arise in the future is subject to the test of paragraph (b). The effectiveness of such waivers is generally determined by the extent to which the client reasonably understands the material risks that the waiver entails. The more comprehensive the explanation of the types of future representations that might arise and the actual and reasonably foreseeable adverse consequences of those representations, the greater the likelihood that the client will have the requisite understanding. Thus, if the client agrees to consent to a particular type of conflict with which the client is already familiar, then the consent ordinarily will be effective with regard to that type of conflict. If the consent is general and open-ended, then the consent ordinarily will be ineffective, because it is not reasonably likely that the client will have understood the material risks involved. On the other hand, if the client is an experienced user of the legal services involved and is reasonably informed regarding the risk that a conflict may arise, such consent is more likely to be effective, particularly if, e.g., the client is independently represented by other counsel in giving consent and the consent is limited to future conflicts unrelated to the subject of the representation. In any case, advance consent cannot be effective if the circumstances that materialize in the future are such as would make the conflict nonconsentable under paragraph (b).

Conflicts in Litigation

[23] Paragraph (b)(3) prohibits representation of opposing parties in the same litigation, regardless of the clients' consent. On the other hand, simultaneous representation of parties whose interests in litigation may conflict, such as coplaintiffs or codefendants, is governed by paragraph (a)(2). A conflict may exist by reason of substantial discrepancy in the parties' testimony, incompatibility in positions in relation to an opposing party or the fact that there are substantially different possibilities of settlement of the claims or liabilities in question. Such conflicts can arise in criminal cases as well as civil. The potential for conflict of interest in representing multiple defendants in a criminal case is so grave that ordinarily a lawyer should decline to represent more than one codefendant. On the other hand, common representation of persons having similar interests in civil litigation is proper if the requirements of paragraph (b) are met.

[24] Ordinarily a lawyer may take inconsistent legal positions in different tribunals at different times on behalf of different clients. The mere fact that advocating a legal position on behalf of one client might create precedent adverse to the interests of a client represented by the lawyer in an unrelated matter does not create a conflict of interest. A conflict of interest exists, however, if there is a significant risk that a lawyer's action on behalf of one client will materially limit the lawyer's effectiveness in representing another client in a different case; for example, when a decision favoring one client will create a precedent likely to seriously weaken the position taken on behalf of the other client. Factors relevant in determining whether the clients need to be advised of the risk include: where the cases are pending, whether the issue is substantive or procedural, the temporal relationship between the matters, the significance of the issue to the immediate and long-term interests of the clients involved and the clients' reasonable expectations in retaining the lawyer. If there is significant risk of material limitation, then absent informed

consent of the affected clients, the lawyer must refuse one of the representations or withdraw from one or both matters.

[25] When a lawyer represents or seeks to represent a class of plaintiffs or defendants in a class-action lawsuit, unnamed members of the class are ordinarily not considered to be clients of the lawyer for purposes of applying paragraph (a)(1) of this Rule. Thus, the lawyer does not typically need to get the consent of such a person before representing a client suing the person in an unrelated matter. Similarly, a lawyer seeking to represent an opponent in a class action does not typically need the consent of an unnamed member of the class whom the lawyer represents in an unrelated matter.

Nonlitigation Conflicts

[26] Conflicts of interest under paragraphs (a)(1) and (a)(2) arise in contexts other than litigation. For a discussion of directly adverse conflicts in transactional matters, see Comment [7]. Relevant factors in determining whether there is significant potential for material limitation include the duration and intimacy of the lawyer's relationship with the client or clients involved, the functions being performed by the lawyer, the likelihood that disagreements will arise and the likely prejudice to the client from the conflict. The question is often one of proximity and degree. See Comment [8].

[27] For example, conflict questions may arise in estate planning and estate administration. A lawyer may be called upon to prepare wills for several family members, such as husband and wife, and, depending upon the circumstances, a conflict of interest may be present. In estate administration the identity of the client may be unclear under the law of a particular jurisdiction. Under one view, the client is the fiduciary; under another view the client is the estate or trust, including its beneficiaries. In order to comply with conflict of interest rules, the lawyer should make clear the lawyer's relationship to the parties involved.

[28] Whether a conflict is consentable depends on the circumstances. For example, a lawyer may not represent multiple parties to a negotiation whose interests are fundamentally antagonistic to each other, but common representation is permissible where the clients are generally aligned in interest even though there is some difference in interest among them. Thus, a lawyer may seek to establish or adjust a relationship between clients on an amicable and mutually advantageous basis; for example, in helping to organize a business in which two or more clients are entrepreneurs, working out the financial reorganization of an enterprise in which two or more clients have an interest or arranging a property distribution in settlement of an estate. The lawyer seeks to resolve potentially adverse interests by developing the parties' mutual interests. Otherwise, each party might have to obtain separate representation, with the possibility of incurring additional cost, complication or even litigation. Given these and other relevant factors, the clients may prefer that the lawyer act for all of them.

Special Considerations in Common Representation

[29] In considering whether to represent multiple clients in the same matter, a lawyer should be mindful that if the common representation fails because the potentially adverse interests cannot

be reconciled, the result can be additional cost, embarrassment and recrimination. Ordinarily, the lawyer will be forced to withdraw from representing all of the clients if the common representation fails. In some situations, the risk of failure is so great that multiple representation is plainly impossible. For example, a lawyer cannot undertake common representation of clients where contentious litigation or negotiations between them are imminent or contemplated. Moreover, because the lawyer is required to be impartial between commonly represented clients, representation of multiple clients is improper when it is unlikely that impartiality can be maintained. Generally, if the relationship between the parties has already assumed antagonism, the possibility that the clients' interests can be adequately served by common representation is not very good. Other relevant factors are whether the lawyer subsequently will represent both parties on a continuing basis and whether the situation involves creating or terminating a relationship between the parties.

[30] A particularly important factor in determining the appropriateness of common representation is the effect on client-lawyer confidentiality and the attorney-client privilege. With regard to the attorney-client privilege, the prevailing rule is that, as between commonly represented clients, the privilege does not attach. Hence, it must be assumed that if litigation eventuates between the clients, the privilege will not protect any such communications, and the clients should be so advised.

[31] As to the duty of confidentiality, continued common representation will almost certainly be inadequate if one client asks the lawyer not to disclose to the other client information relevant to the common representation. This is so because the lawyer has an equal duty of loyalty to each client, and each client has the right to be informed of anything bearing on the representation that might affect that client's interests and the right to expect that the lawyer will use that information to that client's benefit. See Rule 1.4. The lawyer should, at the outset of the common representation and as part of the process of obtaining each client's informed consent, advise each client that information will be shared and that the lawyer will have to withdraw if one client decides that some matter material to the representation should be kept from the other. In limited circumstances, it may be appropriate for the lawyer to proceed with the representation when the clients have agreed, after being properly informed, that the lawyer will keep certain information confidential. For example, the lawyer may reasonably conclude that failure to disclose one client's trade secrets to another client will not adversely affect representation involving a joint venture between the clients and agree to keep that information confidential with the informed consent of both clients.

[32] When seeking to establish or adjust a relationship between clients, the lawyer should make clear that the lawyer's role is not that of partisanship normally expected in other circumstances and, thus, that the clients may be required to assume greater responsibility for decisions than when each client is separately represented. Any limitations on the scope of the representation made necessary as a result of the common representation should be fully explained to the clients at the outset of the representation. See Rule 1.2(c).

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

Organizational Clients

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

[35] A lawyer for a corporation or other organization who is also a member of its board of directors should determine whether the responsibilities of the two roles may conflict. The lawyer may be called on to advise the corporation in matters involving actions of the directors. Consideration should be given to the frequency with which such situations may arise, the potential intensity of the conflict, the effect of the lawyer's resignation from the board and the possibility of the corporation's obtaining legal advice from another lawyer in such situations. If there is material risk that the dual role will compromise the lawyer's independence of professional judgment, the lawyer should not serve as a director or should cease to act as the corporation's lawyer when conflicts of interest arise. The lawyer should advise the other members of the board that in some circumstances matters discussed at board meetings while the lawyer is present in the capacity of director might not be protected by the attorney-client privilege and that conflict of interest considerations might require the lawyer's recusal as a director or might require the lawyer and the lawyer's firm to decline representation of the corporation in a matter.

RULE 1.8 CONFLICT OF INTEREST: CURRENT CLIENTS: SPECIFIC RULES

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

> (1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;
> (2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and
> (3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

(b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules.

(c) A lawyer shall not solicit any substantial gift from a client, including a testamentary gift, or prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer

any substantial gift unless the lawyer or other recipient of the gift is related to the client. For purposes of this paragraph, related persons include a spouse, child, grandchild, parent, grandparent or other relative or individual with whom the lawyer or the client maintains a close, familial relationship.

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

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

(1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and
(2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

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

(1) the client gives informed consent;
(2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and
(3) information relating to representation of a client is protected as required by Rule 1.6.

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

(h) A lawyer shall not:

(1) make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client is independently represented in making the agreement; or
(2) settle a claim or potential claim for such liability with an unrepresented client or former client unless that person is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel in connection therewith.

(i) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:

(1) acquire a lien authorized by law to secure the lawyer's fee or expenses; and
(2) contract with a client for a reasonable contingent fee in a civil case.

(j) A lawyer shall not have sexual relations with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced.

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

Comment

Business Transactions Between Client and Lawyer

[1] A lawyer's legal skill and training, together with the relationship of trust and confidence between lawyer and client, create the possibility of overreaching when the lawyer participates in a business, property or financial transaction with a client, for example, a loan or sales transaction or a lawyer investment on behalf of a client. The requirements of paragraph (a) must be met even when the transaction is not closely related to the subject matter of the representation, as when a lawyer drafting a will for a client learns that the client needs money for unrelated expenses and offers to make a loan to the client. The Rule applies to lawyers engaged in the sale of goods or services related to the practice of law, for example, the sale of title insurance or investment services to existing clients of the lawyer's legal practice. See Rule 5.7. It also applies to lawyers purchasing property from estates they represent. It does not apply to ordinary fee arrangements between client and lawyer, which are governed by Rule 1.5, although its requirements must be met when the lawyer accepts an interest in the client's business or other nonmonetary property as payment of all or part of a fee. In addition, the Rule does not apply to standard commercial transactions between the lawyer and the client for products or services that the client generally markets to others, for example, banking or brokerage services, medical services, products manufactured or distributed by the client, and utilities' services. In such transactions, the lawyer has no advantage in dealing with the client, and the restrictions in paragraph (a) are unnecessary and impracticable.

[2] Paragraph (a)(1) requires that the transaction itself be fair to the client and that its essential terms be communicated to the client, in writing, in a manner that can be reasonably understood. Paragraph (a)(2) requires that the client also be advised, in writing, of the desirability of seeking the advice of independent legal counsel. It also requires that the client be given a reasonable opportunity to obtain such advice. Paragraph (a)(3) requires that the lawyer obtain the client's informed consent, in a writing signed by the client, both to the essential terms of the transaction and to the lawyer's role. When necessary, the lawyer should discuss both the material risks of the proposed transaction, including any risk presented by the lawyer's involvement, and the existence of reasonably available alternatives and should explain why the advice of independent legal counsel is desirable. See Rule 1.0(e) (definition of informed consent).

[3] The risk to a client is greatest when the client expects the lawyer to represent the client in the transaction itself or when the lawyer's financial interest otherwise poses a significant risk that the lawyer's representation of the client will be materially limited by the lawyer's financial interest in the transaction. Here the lawyer's role requires that the lawyer must comply, not only with the requirements of paragraph (a), but also with the requirements of Rule 1.7. Under that Rule, the lawyer must disclose the risks associated with the lawyer's dual role as both legal adviser and

participant in the transaction, such as the risk that the lawyer will structure the transaction or give legal advice in a way that favors the lawyer's interests at the expense of the client. Moreover, the lawyer must obtain the client's informed consent. In some cases, the lawyer's interest may be such that Rule 1.7 will preclude the lawyer from seeking the client's consent to the transaction.

[4] If the client is independently represented in the transaction, paragraph (a)(2) of this Rule is inapplicable, and the paragraph (a)(1) requirement for full disclosure is satisfied either by a written disclosure by the lawyer involved in the transaction or by the client's independent counsel. The fact that the client was independently represented in the transaction is relevant in determining whether the agreement was fair and reasonable to the client as paragraph (a)(1) further requires.

Use of Information Related to Representation

[5] Use of information relating to the representation to the disadvantage of the client violates the lawyer's duty of loyalty. Paragraph (b) applies when the information is used to benefit either the lawyer or a third person, such as another client or business associate of the lawyer. For example, if a lawyer learns that a client intends to purchase and develop several parcels of land, the lawyer may not use that information to purchase one of the parcels in competition with the client or to recommend that another client make such a purchase. The Rule does not prohibit uses that do not disadvantage the client. For example, a lawyer who learns a government agency's interpretation of trade legislation during the representation of one client may properly use that information to benefit other clients. Paragraph (b) prohibits disadvantageous use of client information unless the client gives informed consent, except as permitted or required by these Rules. See Rules 1.2(d), 1.6, 1.9(c), 3.3, 4.1(b), 8.1 and 8.3.

Gifts to Lawyers

[6] A lawyer may accept a gift from a client, if the transaction meets general standards of fairness. For example, a simple gift such as a present given at a holiday or as a token of appreciation is permitted. If a client offers the lawyer a more substantial gift, paragraph (c) does not prohibit the lawyer from accepting it, although such a gift may be voidable by the client under the doctrine of undue influence, which treats client gifts as presumptively fraudulent. In any event, due to concerns about overreaching and imposition on clients, a lawyer may not suggest that a substantial gift be made to the lawyer or for the lawyer's benefit, except where the lawyer is related to the client as set forth in paragraph (c).

[7] If effectuation of a substantial gift requires preparing a legal instrument such as a will or conveyance, the client should have the detached advice that another lawyer can provide. The sole exception to this Rule is where the client is a relative of the donee.

[8] This Rule does not prohibit a lawyer from seeking to have the lawyer or a partner or associate of the lawyer named as executor of the client's estate or to another potentially lucrative fiduciary position. Nevertheless, such appointments will be subject to the general conflict of interest provision in Rule 1.7 when there is a significant risk that the lawyer's interest in obtaining the appointment will materially limit the lawyer's independent professional judgment in advising the

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

Literary Rights

[9] An agreement by which a lawyer acquires literary or media rights concerning the conduct of the representation creates a conflict between the interests of the client and the personal interests of the lawyer. Measures suitable in the representation of the client may detract from the publication value of an account of the representation. Paragraph (d) does not prohibit a lawyer representing a client in a transaction concerning literary property from agreeing that the lawyer's fee shall consist of a share in ownership in the property, if the arrangement conforms to Rule 1.5 and paragraphs (a) and (i).

Financial Assistance

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

Person Paying for a Lawyer's Services

[11] Lawyers are frequently asked to represent a client under circumstances in which a third person will compensate the lawyer, in whole or in part. The third person might be a relative or friend, an indemnitor (such as a liability insurance company) or a co-client (such as a corporation sued along with one or more of its employees). Because third-party payers frequently have interests that differ from those of the client, including interests in minimizing the amount spent on the representation and in learning how the representation is progressing, lawyers are prohibited from accepting or continuing such representations unless the lawyer determines that there will be no interference with the lawyer's independent professional judgment and there is informed consent from the client. See also Rule 5.4(c) (prohibiting interference with a lawyer's professional judgment by one who recommends, employs or pays the lawyer to render legal services for another).

[12] Sometimes, it will be sufficient for the lawyer to obtain the client's informed consent regarding the fact of the payment and the identity of the third-party payer. If, however, the fee arrangement creates a conflict of interest for the lawyer, then the lawyer must comply with Rule. 1.7. The lawyer must also conform to the requirements of Rule 1.6 concerning confidentiality.

Under Rule 1.7(a), a conflict of interest exists if there is significant risk that the lawyer's representation of the client will be materially limited by the lawyer's own interest in the fee arrangement or by the lawyer's responsibilities to the third-party payer (for example, when the third-party payer is a co-client). Under Rule 1.7(b), the lawyer may accept or continue the representation with the informed consent of each affected client, unless the conflict is nonconsentable under that paragraph. Under Rule 1.7(b), the informed consent must be confirmed in writing.

Aggregate Settlements

[13] Differences in willingness to make or accept an offer of settlement are among the risks of common representation of multiple clients by a single lawyer. Under Rule 1.7, this is one of the risks that should be discussed before undertaking the representation, as part of the process of obtaining the clients' informed consent. In addition, Rule 1.2(a) protects each client's right to have the final say in deciding whether to accept or reject an offer of settlement and in deciding whether to enter a guilty or nolo contendere plea in a criminal case. The rule stated in this paragraph is a corollary of both these Rules and provides that, before any settlement offer or plea bargain is made or accepted on behalf of multiple clients, the lawyer must inform each of them about all the material terms of the settlement, including what the other clients will receive or pay if the settlement or plea offer is accepted. See also Rule 1.0(e) (definition of informed consent). Lawyers representing a class of plaintiffs or defendants, or those proceeding derivatively, may not have a full client-lawyer relationship with each member of the class; nevertheless, such lawyers must comply with applicable rules regulating notification of class members and other procedural requirements designed to ensure adequate protection of the entire class.

Limiting Liability and Settling Malpractice Claims

[14] Agreements prospectively limiting a lawyer's liability for malpractice are prohibited unless the client is independently represented in making the agreement because they are likely to undermine competent and diligent representation. Also, many clients are unable to evaluate the desirability of making such an agreement before a dispute has arisen, particularly if they are then represented by the lawyer seeking the agreement. This paragraph does not, however, prohibit a lawyer from entering into an agreement with the client to arbitrate legal malpractice claims, provided such agreements are enforceable and the client is fully informed of the scope and effect of the agreement. Nor does this paragraph limit the ability of lawyers to practice in the form of a limited-liability entity, where permitted by law, provided that each lawyer remains personally liable to the client for his or her own conduct and the firm complies with any conditions required by law, such as provisions requiring client notification or maintenance of adequate liability insurance. Nor does it prohibit an agreement in accordance with Rule 1.2 that defines the scope of the representation, although a definition of scope that makes the obligations of representation illusory will amount to an attempt to limit liability.

[15] Agreements settling a claim or a potential claim for malpractice are not prohibited by this Rule. Nevertheless, in view of the danger that a lawyer will take unfair advantage of an unrepresented client or former client, the lawyer must first advise such a person in writing of the appropriateness of independent representation in connection with such a settlement. In addition,

the lawyer must give the client or former client a reasonable opportunity to find and consult independent counsel.

Acquiring Proprietary Interest in Litigation

[16] Paragraph (i) states the traditional general rule that lawyers are prohibited from acquiring a proprietary interest in litigation. Like paragraph (e), the general rule has its basis in common law champerty and maintenance and is designed to avoid giving the lawyer too great an interest in the representation. In addition, when the lawyer acquires an ownership interest in the subject of the representation, it will be more difficult for a client to discharge the lawyer if the client so desires. The Rule is subject to specific exceptions developed in decisional law and continued in these Rules. The exception for certain advances of the costs of litigation is set forth in paragraph (e). In addition, paragraph (i) sets forth exceptions for liens authorized by law to secure the lawyer's fees or expenses and contracts for reasonable contingent fees. The law of each jurisdiction determines which liens are authorized by law. These may include liens granted by statute, liens originating in common law and liens acquired by contract with the client. When a lawyer acquires by contract a security interest in property other than that recovered through the lawyer's efforts in the litigation, such an acquisition is a business or financial transaction with a client and is governed by the requirements of paragraph (a). Contracts for contingent fees in civil cases are governed by Rule 1.5.

Client-Lawyer Sexual Relationships

[17] The relationship between lawyer and client is a fiduciary one in which the lawyer occupies the highest position of trust and confidence. The relationship is almost always unequal; thus, a sexual relationship between lawyer and client can involve unfair exploitation of the lawyer's fiduciary role, in violation of the lawyer's basic ethical obligation not to use the trust of the client to the client's disadvantage. In addition, such a relationship presents a significant danger that, because of the lawyer's emotional involvement, the lawyer will be unable to represent the client without impairment of the exercise of independent professional judgment. Moreover, a blurred line between the professional and personal relationships may make it difficult to predict to what extent client confidences will be protected by the attorney-client evidentiary privilege, since client confidences are protected by privilege only when they are imparted in the context of the client-lawyer relationship. Because of the significant danger of harm to client interests and because the client's own emotional involvement renders it unlikely that the client could give adequate informed consent, this Rule prohibits the lawyer from having sexual relations with a client regardless of whether the relationship is consensual and regardless of the absence of prejudice to the client.

[18] Sexual relationships that predate the client-lawyer relationship are not prohibited. Issues relating to the exploitation of the fiduciary relationship and client dependency are diminished when the sexual relationship existed prior to the commencement of the client-lawyer relationship. However, before proceeding with the representation in these circumstances, the lawyer should consider whether the lawyer's ability to represent the client will be materially limited by the relationship. See Rule 1.7(a)(2).

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

Imputation of Prohibitions

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

RULE 1.13 ORGANIZATION AS CLIENT

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

(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances, to the highest authority that can act on behalf of the organization as determined by applicable law.

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

> (1) despite the lawyer's efforts in accordance with paragraph (b) the highest authority that can act on behalf of the organization insists upon or fails to address in a timely and appropriate manner an action or a refusal to act, that is clearly a violation of law, and
> (2) the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization,

then the lawyer may reveal information relating to the representation whether or not Rule 1.6 permits such disclosure, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.

(d) Paragraph (c) shall not apply with respect to information relating to a lawyer's representation of an organization to investigate an alleged violation of law, or to defend the organization or an officer, employee or other constituent associated with the organization against a claim arising out of an alleged violation of law.

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

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

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

Comment

The Entity as the Client

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

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

[3] When constituents of the organization make decisions for it, the decisions ordinarily must be accepted by the lawyer even if their utility or prudence is doubtful. Decisions concerning policy and operations, including ones entailing serious risk, are not as such in the lawyer's province. Paragraph (b) makes clear, however, that when the lawyer knows that the organization is likely to be substantially injured by action of an officer or other constituent that violates a legal obligation to the organization or is in violation of law that might be imputed to the organization, the lawyer must proceed as is reasonably necessary in the best interest of the organization. As

defined in Rule 1.0(f), knowledge can be inferred from circumstances, and a lawyer cannot ignore the obvious.

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

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

Relation to Other Rules

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

may also be applicable, in which event, withdrawal from the representation under Rule 1.16(a)(1) may be required.

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

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

Government Agency

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

Clarifying the Lawyer's Role

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

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

Dual Representation

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

Derivative Actions

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

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

RULE 1.18 DUTIES TO PROSPECTIVE CLIENT

(a) A person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.

(b) Even when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation, except as Rule 1.9 would permit with respect to information of a former client.

(c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).

(d) When the lawyer has received disqualifying information as defined in paragraph (c), representation is permissible if:

(1) both the affected client and the prospective client have given informed consent, confirmed in writing, or:
(2) the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; and
(i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee there from; and
(ii) written notice is promptly given to the prospective client.

Comment

[1] Prospective clients, like clients, may disclose information to a lawyer, place documents or other property in the lawyer's custody, or rely on the lawyer's advice. A lawyer's discussions with a prospective client usually are limited in time and depth and leave both the prospective client and the lawyer free (and sometimes required) to proceed no further. Hence, prospective clients should receive some but not all of the protection afforded clients.

[2] Not all persons who communicate information to a lawyer are entitled to protection under this Rule. A person who communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship, is not a ""prospective client" within the meaning of paragraph (a).

[3] It is often necessary for a prospective client to reveal information to the lawyer during an initial consultation prior to the decision about formation of a client-lawyer relationship. The lawyer often must learn such information to determine whether there is a conflict of interest with an existing client and whether the matter is one that the lawyer is willing to undertake. Paragraph (b) prohibits the lawyer from using or revealing that information, except as permitted by Rule

1.9, even if the client or lawyer decides not to proceed with the representation. The duty exists regardless of how brief the initial conference may be.

[4] In order to avoid acquiring disqualifying information from a prospective client, a lawyer considering whether or not to undertake a new matter should limit the initial interview to only such information as reasonably appears necessary for that purpose. Where the information indicates that a conflict of interest or other reason for non-representation exists, the lawyer should so inform the prospective client or decline the representation. If the prospective client wishes to retain the lawyer, and if consent is possible under Rule 1.7, then consent from all affected present or former clients must be obtained before accepting the representation.

[5] A lawyer may condition conversations with a prospective client on the person's informed consent that no information disclosed during the consultation will prohibit the lawyer from representing a different client in the matter. See Rule 1.0(e) for the definition of informed consent. If the agreement expressly so provides, the prospective client may also consent to the lawyer's subsequent use of information received from the prospective client.

[6] Even in the absence of an agreement, under paragraph (c), the lawyer is not prohibited from representing a client with interests adverse to those of the prospective client in the same or a substantially related matter unless the lawyer has received from the prospective client information that could be significantly harmful if used in the matter.

[7] Under paragraph (c), the prohibition in this Rule is imputed to other lawyers as provided in Rule 1.10, but, under paragraph (d)(1), imputation may be avoided if the lawyer obtains the informed consent, confirmed in writing, of both the prospective and affected clients. In the alternative, imputation may be avoided if the conditions of paragraph (d)(2) are met and all disqualified lawyers are timely screened and written notice is promptly given to the prospective client. See Rule 1.0(k) (requirements for screening procedures). Paragraph (d)(2)(i) does not prohibit the screened lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly related to the matter in which the lawyer is disqualified.

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

[9] For the duty of competence of a lawyer who gives assistance on the merits of a matter to a prospective client, see Rule 1.1. For a lawyer's duties when a prospective client entrusts valuables or papers to the lawyer's care, see Rule 1.15.

RULE 5.4 PROFESSIONAL INDEPENDENCE OF A LAWYER

(a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that:

(1) an agreement by a lawyer with the lawyer's firm, partner, or associate may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;
(2) a lawyer who purchases the practice of a deceased, disabled, or disappeared lawyer may, pursuant to the provisions of Rule 1.17, pay to the estate or other representative of that lawyer the agreed-upon purchase price;
(3) a lawyer or law firm may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement; and
(4) a lawyer may share court-awarded legal fees with a nonprofit organization that employed, retained or recommended employment of the lawyer in the matter.

(b) A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.

(c) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

(d) A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if:

(1) a nonlawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration;
(2) a nonlawyer is a corporate director or officer thereof or occupies the position of similar responsibility in any form of association other than a corporation; or
(3) a nonlawyer has the right to direct or control the professional judgment of a lawyer.

Comment

[1] The provisions of this Rule express traditional limitations on sharing fees. These limitations are to protect the lawyer's professional independence of judgment. Where someone other than the client pays the lawyer's fee or salary, or recommends employment of the lawyer, that arrangement does not modify the lawyer's obligation to the client. As stated in paragraph (c), such arrangements should not interfere with the lawyer's professional judgment.

[2] This Rule also expresses traditional limitations on permitting a third party to direct or regulate the lawyer's professional judgment in rendering legal services to another. See also Rule 1.8(f) (lawyer may accept compensation from a third party as long as there is no interference with the lawyer's independent professional judgment and the client gives informed consent).

RULE 7.2: ADVERTISING

(a) Subject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise services through written, recorded or electronic communication, including public media.

(b) A lawyer shall not give anything of value to a person for recommending the lawyer's services except that a lawyer may

(1) pay the reasonable costs of advertisements or communications permitted by this Rule;
(2) pay the usual charges of a legal service plan or a not-for-profit or qualified lawyer referral service. A qualified lawyer referral service is a lawyer referral service that has been approved by an appropriate regulatory authority;
(3) pay for a law practice in accordance with Rule 1.17; and
(4) refer clients to another lawyer or a nonlawyer professional pursuant to an agreement not otherwise prohibited under these Rules that provides for the other person to refer clients or customers to the lawyer, if

(i) the reciprocal referral agreement is not exclusive, and
(ii) the client is informed of the existence and nature of the agreement.

(c) Any communication made pursuant to this rule shall include the name and office address of at least one lawyer or law firm responsible for its content.

Comment

[1] To assist the public in obtaining legal services, lawyers should be allowed to make known their services not only through reputation but also through organized information campaigns in the form of advertising. Advertising involves an active quest for clients, contrary to the tradition that a lawyer should not seek clientele. However, the public's need to know about legal services can be fulfilled in part through advertising. This need is particularly acute in the case of persons of moderate means who have not made extensive use of legal services. The interest in expanding public information about legal services ought to prevail over considerations of tradition. Nevertheless, advertising by lawyers entails the risk of practices that are misleading or overreaching.

[2] This Rule permits public dissemination of information concerning a lawyer's name or firm name, address and telephone number; the kinds of services the lawyer will undertake; the basis on which the lawyer's fees are determined, including prices for specific services and payment and credit arrangements; a lawyer's foreign language ability; names of references and, with their consent, names of clients regularly represented; and other information that might invite the attention of those seeking legal assistance.

[3] Questions of effectiveness and taste in advertising are matters of speculation and subjective judgment. Some jurisdictions have had extensive prohibitions against television advertising, against advertising going beyond specified facts about a lawyer, or against "undignified" advertising. Television is now one of the most powerful media for getting information to the

public, particularly persons of low and moderate income; prohibiting television advertising, therefore, would impede the flow of information about legal services to many sectors of the public. Limiting the information that may be advertised has a similar effect and assumes that the bar can accurately forecast the kind of information that the public would regard as relevant. Similarly, electronic media, such as the Internet, can be an important source of information about legal services, and lawful communication by electronic mail is permitted by this Rule. But see Rule 7.3(a) for the prohibition against the solicitation of a prospective client through a real-time electronic exchange that is not initiated by the prospective client.

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

Paying Others to Recommend a Lawyer

[5] Lawyers are not permitted to pay others for channeling professional work. Paragraph (b)(1), however, allows a lawyer to pay for advertising and communications permitted by this Rule, including the costs of print directory listings, on-line directory listings, newspaper ads, television and radio airtime, domain-name registrations, sponsorship fees, banner ads, and group advertising. A lawyer may compensate employees, agents and vendors who are engaged to provide marketing or client-development services, such as publicists, public-relations personnel, business-development staff and website designers. See Rule 5.3 for the duties of lawyers and law firms with respect to the conduct of nonlawyers who prepare marketing materials for them.

[6] A lawyer may pay the usual charges of a legal service plan or a not- for-profit or qualified lawyer referral service. A legal service plan is a prepaid or group legal service plan or a similar delivery system that assists prospective clients to secure legal representation. A lawyer referral service, on the other hand, is any organization that holds itself out to the public as a lawyer referral service. Such referral services are understood by laypersons to be consumer-oriented organizations that provide unbiased referrals to lawyers with appropriate experience in the subject matter of the representation and afford other client protections, such as complaint procedures or malpractice insurance requirements. Consequently, this Rule only permits a lawyer to pay the usual charges of a not-for-profit or qualified lawyer referral service. A qualified lawyer referral service is one that is approved by an appropriate regulatory authority as affording adequate protections for prospective clients. See, e.g., the American Bar Association's Model Supreme Court Rules Governing Lawyer Referral Services and Model Lawyer Referral and Information Service Quality Assurance Act (requiring that organizations that are identified as lawyer referral services (i) permit the participation of all lawyers who are licensed and eligible to practice in the jurisdiction and who meet reasonable objective eligibility requirements as may be established by the referral service for the protection of prospective clients; (ii) require each participating lawyer to carry reasonably adequate malpractice insurance; (iii) act reasonably to assess client satisfaction and address client complaints; and (iv) do not refer prospective clients to lawyers who own, operate or are employed by the referral service.)

[7] A lawyer who accepts assignments or referrals from a legal service plan or referrals from a lawyer referral service must act reasonably to assure that the activities of the plan or service are compatible with the lawyer's professional obligations. See Rule 5.3. Legal service plans and

lawyer referral services may communicate with prospective clients, but such communication must be in conformity with these Rules. Thus, advertising must not be false or misleading, as would be the case if the communications of a group advertising program or a group legal services plan would mislead prospective clients to think that it was a lawyer referral service sponsored by a state agency or bar association. Nor could the lawyer allow in-person, telephonic, or real-time contacts that would violate Rule 7.3.

[8] A lawyer also may agree to refer clients to another lawyer or a nonlawyer professional, in return for the undertaking of that person to refer clients or customers to the lawyer. Such reciprocal referral arrangements must not interfere with the lawyer's professional judgment as to making referrals or as to providing substantive legal services. See Rules 2.1 and 5.4(c). Except as provided in Rule 1.5(e), a lawyer who receives referrals from a lawyer or nonlawyer professional must not pay anything solely for the referral, but the lawyer does not violate paragraph (b) of this Rule by agreeing to refer clients to the other lawyer or nonlawyer professional, so long as the reciprocal referral agreement is not exclusive and the client is informed of the referral agreement. Conflicts of interest created by such arrangements are governed by Rule 1.7. Reciprocal referral agreements should not be of indefinite duration and should be reviewed periodically to determine whether they comply with these Rules. This Rule does not restrict referrals or divisions of revenues or net income among lawyers within firms comprised of multiple entities.