The Supreme Court *of* Ohio

Board of Professional Conduct

Commissioner Handbook 2016

Board of Professional Conduct

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2016 Commissioner Handbook

Board of Professional Conduct

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Rules for the Government of the Bar

Rules III, IV, and V

RULE III. LEGAL PROFESSIONAL ASSOCIATIONS AUTHORIZED TO PRACTICE LAW

Section 1. Firm Organization

An attorney who is otherwise authorized to practice as an active attorney under Gov. Bar. R. VI may practice law in Ohio, to the same extent as individuals and groups of individuals, through a legal professional association, corporation, or legal clinic, formed under Chapters 1701. or 1785. or licensed under Chapter 1703. of the Revised Code, a limited liability company, formed or registered under Chapter 1705. of the Revised Code, or a limited liability partnership, registered under former Chapter 1775. or Chapter 1776. of the Revised Code.

Section 2. Name

The name of a legal professional association, corporation, legal clinic, limited liability company, or limited liability partnership shall comply with Rule 7.5 of the Ohio Rules of Professional Conduct. The name of a legal professional association or legal clinic shall end with the legend, "Co., LPA" or shall have immediately below it, in legible form, the words "A Legal Professional Association." The name of a corporation, limited liability company, or limited liability partnership shall include a descriptive designation as required under sections 1701.05(A), 1705.05(A), or 1776.82, respectively, of the Revised Code.

Section 3. Ethics and Discipline

(A) Participation in a legal professional association, corporation, legal clinic, limited liability company, or limited liability partnership shall not relieve an attorney of or diminish any obligation under the Ohio Rules of Professional Conduct or under these rules.

(B) An attorney shall not use a legal professional association, corporation, legal clinic, limited liability company, or limited liability partnership to share legal fees with a person not authorized to practice law in Ohio or elsewhere, except as permitted by Rule 5.4 of the Ohio Rules of Professional Conduct. An attorney shall not participate in a legal professional association, corporation, legal clinic, limited liability company, or limited liability partnership in which a member, partner, or other equity holder is a person not authorized to practice law in Ohio or elsewhere, except as permitted by Rule 5.4 of the Ohio Rules of Professional Conduct.

(C) An attorney shall not use a legal professional association, corporation, legal clinic, limited liability company, or limited liability partnership to attempt to limit liability for his or her personal malpractice in violation of Rule 1.8 of the Ohio Rules of Professional Conduct.

(D) A legal professional association, corporation, legal clinic, limited liability company, or limited liability partnership in which an attorney is an officer, director, agent, employee, manager, member, partner, or equity holder shall be considered the attorney's firm for purposes of the Ohio Rules of Professional Conduct and these rules.

Section 4. Financial Responsibility

(A) A legal professional association, corporation, legal clinic, limited liability company, or limited liability partnership shall maintain adequate professional liability insurance or other form of adequate financial responsibility for any liability of the firm arising from acts or omissions in the rendering of legal services by an officer, director, agent, employee, manager, member, partner, or equity holder.

(1) "Adequate professional liability insurance" means one or more policies of attorneys' professional liability insurance that insure the legal professional association, corporation, legal clinic, limited liability company, or limited liability partnership both:

(a) In an amount for each claim, in excess of any deductible, of at least fifty thousand dollars multiplied by the number of attorneys practicing with the firm; and

(b) An amount of one hundred thousand dollars for all claims during the policy year, multiplied by the number of attorneys practicing with the firm. No firm shall be required to carry insurance of more than five million dollars per claim, in excess of any deductible, or more than ten million dollars for all claims during the policy year, in excess of any deductible.

(2) "Other form of adequate financial responsibility" means funds, in an amount not less than the amount of professional liability insurance applicable to a firm under Section 4(A)(1) of this rule for all claims during the policy year, available to satisfy any liability of the firm arising from acts or omissions in the rendering of legal services by an officer, director, agent, employee, manager, member, partner, or equity holder. The funds shall be available in the form of a deposit in trust of cash, bank certificate of deposit, or United States Treasury obligation, a bank letter of credit, or a surety bond.

(B) Each member, partner, or other equity holder of a legal professional association, corporation, legal clinic, limited liability company, or limited liability partnership shall be jointly and severally liable for any liability of the firm based upon a claim arising from acts or omissions in the rendering of legal services while he or she was a member, partner, or equity holder, in an amount not to exceed the aggregate of both of the following:

(1) The per claim amount of professional liability insurance applicable to the firm under this rule, but only to the extent that the firm fails to have the professional liability insurance or other form of adequate financial responsibility required by this rule;

(2) The deductible amount of the professional liability insurance applicable to the claim.

The joint and several liability of the member, partner, or other equity holder shall be reduced to the extent that the liability of the firm has been satisfied by the assets of the firm.

(C) Each officer, director, agent, employee, manager, member, partner or equity holder of a legal professional association, corporation, legal clinic, limited liability company, or limited

liability partnership shall be liable for his or her own acts or omissions as provided by law, without prejudice to any contractual or other right that the person may be entitled to assert against a firm, an insurance carrier, or other third party.

[Effective: February 28, 1972; amended effective June 11, 1979; March 30, 1980; July 1, 1983; January 1, 1993; November 1, 1995; February 1, 2007; January 1, 2012.]

RULE IV. Professional Responsibility.

Section 1. Applicability.

The Ohio Rules of Professional Conduct, effective February 1, 2007, as amended, shall be binding upon all persons admitted to practice law in Ohio. The willful breach of the Rules shall be punished by reprimand, suspension, disbarment, or probation as provided in Gov. Bar R. V.

Section 2. Duty of Lawyers.

It is the duty of the lawyer to maintain a respectful attitude toward the courts, not for the sake of the temporary incumbent of the judicial office, but for the maintenance of its supreme importance. Judges and Justices, not being wholly free to defend themselves, are peculiarly entitled to receive the support of lawyers against unjust criticism and clamor. Whenever there is proper ground for serious complaint of a judicial officer, it is the right and duty of the lawyer to submit a grievance to proper authorities. These charges should be encouraged and the person making them should be protected.

[Effective: February 28, 1972; amended effective July 15, 1974; July 1, 1983; January 1, 1993; February 1, 2007.]

RULE V. DISCIPLINARY PROCEDURE

Section 1. Board of Professional Conduct of the Supreme Court.

(A) Composition. There shall be a Board of Professional Conduct of the Supreme Court consisting of twenty-eight commissioners as follows: seventeen attorneys admitted to the practice of law in Ohio, seven active or voluntarily retired judges of the state of Ohio or judges retired pursuant to Article IV, Section 6 of the Ohio Constitution, and four nonattorney commissioners.

(B) Distribution. The attorney commissioners shall be appointed from Ohio appellate districts as follows: First District, two commissioners; Second District, one commissioner; Third District, one commissioner; Fourth District, one commissioner; Fifth District, one commissioner; Sixth District, two commissioners; Seventh District, one commissioner; Eighth District, three commissioners; Ninth District, one commissioner; Tenth District, two commissioners; Eleventh District, one commissioner; and Twelfth District, one commissioner. The active and retired judge commissioners shall be appointed at-large from separate appellate districts, and the nonattorney commissioners shall be appointed at-large from separate appellate districts.

(C) Term of Office. The term of office of each commissioner of the Board shall be three years, beginning on the first day of January next following the commissioner's appointment. Any commissioner whose term has expired and who has an uncompleted assignment as a member of a panel may continue to serve for the purpose of the assignment until it is concluded before the Board. The successor commissioner shall take no part in the proceedings of the Board concerning the assignment.

(D) Appointments. The Chief Justice and Justices of the Supreme Court each shall appoint commissioners. Appointments to terms commencing the first day of January of any year shall be made prior to the first day of December of the preceding year. Vacancies for any cause shall be filled for the unexpired term by the justice who appointed the person causing the vacancy or by the successor of that justice. A commissioner appointed to a term of fewer than three years may be reappointed to not more than three, three-year terms. No person may be appointed to more than three, three-year terms on the Board. Three-year terms served prior to April 1, 2008 shall be included when determining whether a person is eligible for appointment or reappointment to the Board.

(E) Chair and Vice-chair. The Board shall each year elect a judge or attorney commissioner as chair and vice-chair. The chair and vice-chair shall serve in that capacity for a maximum of two years. The chair and vice-chair may execute entries on behalf of the Board and panels of the Board. In the absence or incapacity of the chair, the vice-chair shall perform the duties of the chair.

(F) Meetings. The Board shall meet in Columbus at least six times each year. The chair or vice-chair may call additional meetings of the Board when necessary.

(G) Campaign Contributions. Commissioners and employees of the Board, disciplinary counsel, or employees of the Office of Disciplinary Counsel shall not make any contribution to, or for the benefit of, or take part in the campaign of, or campaign for or against, any judicial candidate in this state. A commissioner who is a candidate for election or reelection to a judicial office may contribute to, may make a contribution for the benefit of, or take part in his or her own campaign.

(H) Confidentiality; Oath of Office. No commissioner, Board-appointed master, or employee of the Board shall disclose to any person any proceedings, documents, or deliberations of the Board or a Board committee. This rule shall not apply to an individual commissioner's personal opinion relating to matters of staffing or operational issues, which, at the commissioner's option, may be discussed with a justice upon the justice's request. Prior to taking office, each commissioner, Board-appointed master, and employee of the Board shall swear or affirm that he or she will abide by these rules.

Section 2. Jurisdiction and Powers of the Board.

(A) Exclusive Jurisdiction. Except as otherwise expressly provided in rules adopted by the Supreme Court, all grievances involving alleged misconduct by judicial officers or attorneys, proceedings with regard to the alleged mental illness, alcohol and other drug abuse, or disorder of a judicial officer or attorney, proceedings for the discipline of judicial officers, attorneys, persons under suspension or on probation, and proceedings for the reinstatement to the practice of law shall be brought, conducted, and disposed of in accordance with the provisions of this rule. The Board shall have authority to certify, recertify, and decertify grievance committees in accordance with Section 5 of this rule.

(B) Hearing Authority. The Board shall receive evidence, preserve the record, make findings, and submit recommendations to the Supreme Court as follows:

(1) Concerning complaints of misconduct that are alleged to have been committed by a judicial officer, an attorney, a person under suspension from the practice of law or a person on probation;

(2) Concerning the mental illness, alcohol and other drug abuse, or disorder of any judicial officer or attorney;

(3) Relating to petitions for reinstatement as an attorney;

(4) Upon reference by the Supreme Court of conduct by a judicial officer or an attorney affecting any proceeding under this rule, where the acts allegedly constitute a contempt of the Supreme Court or a breach of these rules but did not take place in the presence of the Supreme Court or a member of the Supreme Court, whether by willful disobedience of any order or judgment of the Supreme Court or the Board, by interference with any officer of the Supreme Court in the prosecution of any duty, or otherwise. This rule shall not limit or affect the plenary power of the Supreme Court to impose punishment for either contempt or breach of these rules

committed in its presence, or the plenary power of any other court for contempt committed in its presence.

(C) Subpoenas. Upon application of a special investigator, respondent, or authorized representative of the relator, the Board may issue subpoenas and cause testimony to be taken under oath before disciplinary counsel, a certified grievance committee, hearing panel, or the Board. Each subpoena shall be issued in the name and under the seal of the Supreme Court and shall be signed by the director, Board chair, Board vice-chair, or chair of a hearing panel and served as provided by the Rules of Civil Procedure. Witness fees and mileage shall be as provided in R.C. 2335.06. The refusal or neglect of a person subpoenaed as a witness to obey a subpoena, attend, be sworn or affirm, or to answer any proper question shall be considered a contempt of the Supreme Court and punishable accordingly.

(D) Advisory Opinions. The Board may issue nonbinding advisory opinions in response to prospective or hypothetical questions directed to the Board regarding the application of the Supreme Court Rules for the Government of the Bar of Ohio, the Supreme Court Rules for the Government of the Judiciary of Ohio, the Ohio Rules of Professional Conduct, the Code of Judicial Conduct, or the Attorney's Oath of Office.

(E) Regulations. The Board shall have authority to adopt regulations consistent with this rule. Proposed regulations and amendments to existing regulations shall be published for comment prior to adoption in a manner consistent with rule amendments proposed by the Supreme Court, and adopted regulations shall be published in the same manner as rules adopted by the Supreme Court. The regulations shall include the following provisions:

(1) Procedures for regularly reviewing the performance of certified grievance committees, identifying certified grievance committees that are not in compliance with the standards set forth in this rule, and for decertifying a certified grievance committee that fails to improve its performance after being notified of noncompliance;

(2) Time guidelines for the processing of disciplinary cases pending before the Board and panels of the Board;

(3) Procedures for the issuance of advisory opinions.

Section 3. Director of the Board.

(A) Director. The Board shall appoint a director of the Board. The director shall be an attorney admitted to the practice of law in Ohio, shall be appointed by a majority of the Board, and shall serve at the pleasure of the Board. The position of director shall be a fulltime position. Neither the director nor any other employee of the Board shall be employed by any trial or appellate court.

(B) Responsibilities. The director shall have the following responsibilities:

(1) Serve as the chief legal, administrative, and fiscal officer of the Board;

(2) Schedule all meetings of the Board and its committees and all hearings of Board panels;

(3) Maintain a docket of each complaint and of all proceedings on each complaint, which shall be retained permanently as a part of the records of the Board;

(4) Execute entries on behalf of the Board and its hearing panels and execute entries for extensions of time where appropriate;

(5) Issue subpoenas pursuant to Section 2(C) of this rule;

(6) Employ such personnel as are reasonably necessary to discharge the responsibilities set forth in this rule and shall establish the salaries of personnel, subject to approval by the Board;

(7) Maintain the records for the receipt and expenditure of money, and prepare financial reports and budgets as required by the Supreme Court Rules for the Government of the Bar of Ohio and the Supreme Court Rules for the Government of the Judiciary of Ohio;

(8) File with the Supreme Court annually a report of the activities and expenses of the Board;

(9) Take all necessary steps to see that office facilities, furnishings, stationery, equipment, and office supplies are available as needed;

(10) Assist the Board in preparing advisory opinions pursuant to Section 2(D) of this rule;

(11) Take any other action consistent with the director's position as chief legal, administrative, and fiscal officer that is not otherwise inconsistent with the Supreme Court Rules for the Government of the Bar of Ohio and the Supreme Court Rules for the Government of the Judiciary of Ohio.

Section 4. Office of Disciplinary Counsel.

(A) Disciplinary Counsel. With the approval of the Supreme Court, the Board, by majority vote, shall appoint a disciplinary counsel who shall perform all of the following duties:

(1) Investigate allegations of misconduct by judicial officers or attorneys and allegations of mental illness, alcohol and other drug abuse, or disorder affecting judicial officers or attorneys;

(2) Initiate and prosecute complaints as a result of investigations under the provisions of this rule;

(3) Certify bar counsel designated by certified grievance committees pursuant to Section 6 of this rule;

(4) Comply with the record retention standards set forth in Section 5 of this rule;

(5) In consultation with the Board, representatives of the certified grievance committees, and others, develop and offer an education curriculum for bar counsel and certified grievance committee members, including an orientation program for newly appointed certified grievance committee members.

(B) Appointment; In-term Removal. Disciplinary counsel shall be appointed for a term of four years and may be removed in-term only for just cause. In-term removal for just cause shall be instituted by the filing, with the Chief Justice, of a written petition by the chair, acting by authority of a two-thirds vote of the Board. Upon receipt of the petition, the Chief Justice shall cause it to be served on disciplinary counsel for response. Thereafter, the Chief Justice shall schedule a hearing before the Supreme Court, which shall determine whether there is just cause for the removal of disciplinary counsel. Disciplinary counsel shall be removed upon the affirmative vote of five or more members of the Supreme Court.

(C) Assistants; Staff. Disciplinary counsel may appoint assistants as necessary who shall be attorneys admitted to the practice of law in Ohio and who shall not engage in the private practice of law while serving in that capacity. Disciplinary counsel shall appoint staff as required to satisfactorily fulfill the duties of the Office of Disciplinary Counsel. Disciplinary counsel shall retain one or more investigators who may be assigned by disciplinary counsel to assist certified grievance committees in the investigation of grievances. Employees of the Office of Disciplinary Counsel shall serve at the pleasure of disciplinary counsel.

(D) Compensation; Supplies; Annual Report. The compensation of disciplinary counsel shall be fixed by the Supreme Court. The compensation of personnel employed by the Office of Disciplinary Counsel, including any assistant disciplinary counsel, shall be fixed by disciplinary counsel with the approval of the Supreme Court. The Supreme Court shall provide office facilities, furnishings, stationery, equipment, and office supplies for the Office of Disciplinary Counsel. Disciplinary counsel shall file annually with the Supreme Court and the Board a report of the activities and expenses of the office.

(E) Quarterly Report. By the fifteenth day of January, April, July, and October of each year, disciplinary counsel shall file with the Supreme Court and the Board a report of the number of grievances made to the Office of Disciplinary Counsel during the preceding quarter. The report shall be on a form prescribed by the Board and shall specify the types of grievances filed and state the number of grievances filed, the number pending in each prescribed category and the number terminated by action of the Office of Disciplinary Counsel during the reporting period.

(F) Confidentiality; Oath of Office. No employee of the Office of Disciplinary Counsel shall disclose to any person any proceedings, documents, or deliberations of the Office of Disciplinary Counsel. Prior to taking office, Disciplinary Counsel and each employee of the Office of Disciplinary Counsel shall swear or affirm that he or she will abide by these rules.

Section 5. Certified Grievance Committees.

(A) Certified Grievance Committees. A certified grievance committee shall be an organized committee of the Ohio State Bar Association or of one or more local bar associations in Ohio that permits the membership of any attorney practicing within the geographic area served by that association without reference to the attorney's area of practice, special interest, or other criteria. There shall be only one certified grievance committee in each county. Two or more bar associations may establish a joint certified grievance committee in accordance with the procedure outlined in division (C) of this section.

(B) Board Certification. Upon application by a bar association or bar associations and satisfaction of the standards set forth in division (D) of this section, the Board may certify a grievance committee to investigate allegations of misconduct by judicial officers or attorneys and mental illness, alcohol and other drug abuse, or disorder affecting judicial officers or attorneys and initiate and prosecute complaints as a result of investigations under the provisions of this rule. A certified grievance committee shall have authority to investigate a grievance filed against an attorney who resides or maintains an office in the geographic area served by the committee or where the misconduct alleged in the grievance occurred within the geographic area served by the committee. Except for a grievance that is referred by the director or Office of Disciplinary Counsel due to a conflict of interest, a certified grievance committee shall not have the authority to investigate allegations of misconduct against any of the following:

(1) An attorney who is an officer of the bar association that established the certified grievance committee or a member of the certified grievance committee;

(2) A judicial officer, except that the certified grievance committee of the Ohio State Bar Association may investigate allegations of misconduct against a judicial officer.

(C)(1) Joint Committees. A bar association seeking to establish a grievance committee or the bar associations seeking to establish a joint grievance committee shall file a petition with the Board seeking approval to establish a certified grievance committee or joint certified grievance committee. The petition shall include all of the following:

(a) The name of the bar association or bar associations seeking to form a grievance committee or joint grievance committee;

(b) The names of the chair and other members of the grievance committee, provided the membership of a joint grievance committee shall be in proportion to the number of attorneys employed in the geographic area served by each bar association establishing the joint committee;

(c) The name of the lawyer who will serve as bar counsel to the grievance committee;

(d) In the case of a petition to form a joint grievance committee, a copy of the written agreement between or among the sponsoring bar associations that establishes and governs the operation of the grievance committee;

(e) Any other information the Board considers necessary to evaluate the petition.

(2) Upon receipt of a completed petition, the Board promptly shall determine whether the proposed grievance committee satisfies the requirements to establish a grievance committee and the standards set forth in division (D) of this section. Upon determination that the grievance committee satisfies these requirements and standards and upon certification of bar counsel as required by Section 6 of this rule, the Board shall certify the grievance committee as eligible to accept and investigate grievances and file and prosecute formal complaints as set forth in this rule.

(D)(1) Standards for Certified Grievance Committees. To obtain and retain certification, each grievance committee shall satisfy all of the following standards:

(a) *Membership and term limits.* Consist of no fewer than fifteen persons, including a chair who shall not serve as chair for more than two consecutive years. A majority of the members of the certified grievance committee shall consist of attorneys admitted to the practice of law in Ohio, and at least three members or ten percent of the certified grievance committee, whichever is greater, shall consist of persons who are not admitted to the practice of law in Ohio or any other state. Not more than twenty percent of the committee or five members, whichever is less, shall consist of attorneys who practice in the same firm, as defined in Prof. Cond. R. 1.0, or governmental office.

(i) Each bar association responsible for appointing members to its certified grievance committee shall adopt and implement procedures that provide for the appointment of certified grievance committee members to specific terms of office, with the length of such terms to be determined by the appointing authority and subject to the ten-year limitation on consecutive service set forth in division (D)(1)(a)(ii) of this section. The expiration dates of the initial terms of office shall be established to ensure that the terms of members expire in different years.

(ii) Beginning January 1, 2016, no member of a certified grievance committee shall serve or have served on the committee for more than ten consecutive years. A member's tenure on a certified grievance committee prior to January 1, 2016 shall be considered for purposes of determining the member's consecutive service on the certified grievance committee. A member who served on the committee for ten consecutive years may be reappointed to the committee if two or more years have elapsed since the conclusion of the member's prior service.

(b) *Meetings.* Meet at least once every third month.

(c) *Office.* Maintain a fulltime, permanent office that is open during regular business hours, has a listed telephone number, and is staffed by a minimum of one fulltime employee to process grievances received by the certified grievance committee and assist with other work of the certified grievance committee. A joint certified grievance committee shall designate a single office within the geographical region served by the joint committee, and the fulltime employee designated to assist the committee may be employed jointly by the bar associations that have established the joint committee.

(d) *Bar counsel.* Designate bar counsel, who shall be certified by disciplinary counsel pursuant to Section 6 of this rule, to supervise the receipt and investigation of grievances, the prosecution of formal complaints, and perform such other duties required by this rule. Bar counsel may be a volunteer or be paid for services related to disciplinary activities by or through the certified grievance committee. Bar counsel shall devote the time necessary to performing the duties set forth in this rule, including but not limited to assisting in the intake and investigation of grievances, prosecuting formal complaints, advising the certified grievance committee on matters of professional conduct and disciplinary procedures, and participating in educational activities related to professional conduct and disciplinary procedures. Annually, bar counsel shall be required to complete a minimum of three hours of training offered or approved by disciplinary counsel in one or more of the following subject-matter areas:

(i) Legal ethics;

(ii) Judicial ethics;

(iii) Execution of the responsibilities outlined in this rule for the review and investigation of grievances and the preparation and prosecution of formal complaints.

(e) *Training for volunteer lawyers and bar counsel*. On or after January 1, 2016, any bar counsel or volunteer grievance committee member who is designated trial counsel of record in a case prosecuted before the Board shall attend and complete a training program that is offered or approved by disciplinary counsel and that relates to the preparation and prosecution of formal complaints. Bar counsel and volunteer grievance committee members shall be required to satisfy this training requirement a minimum of once every two calendar years. Any hours of training completed by bar counsel to satisfy this requirement may be applied to satisfying the three-hour annual training requirement set forth in division (D)(1)(d) of this section.

(f) *Files and records.* Maintain files and records of proceedings, in paper or electronic format and in accordance with the following schedule:

(i) Records of the proceedings of the certified grievance committee and files related to any matter in which the committee filed a formal complaint shall be retained permanently;

(ii) Files related to any matter in which the committee initiated an investigation shall be retained for ten years;

(iii) Files related to any matter that the committee dismissed without investigation shall be retained for two years.

(g) *Funding.* Be sufficiently funded by the sponsoring bar association or associations to perform the duties imposed by these rules.

(h) *Written procedures.* Establish and file with the Board written procedures for the processing of grievances. The written procedures shall provide a method for notifying potential

grievants that they have the option to file a grievance with the Office of Disciplinary Counsel rather than with the certified grievance committee.

(i) *Quarterly reports.* File quarterly reports with the Board on the form and by the dates prescribed in Section 4 of this rule. Each certified grievance committee shall include in the report the results of cases referred to the Board-approved alternative dispute resolution methods along with recommendations for further action, including discontinuance or amendment of alternative dispute resolution procedures.

(2) Continuing education. A certified grievance committee shall encourage each committee member, in the member's first full calendar year of service and each calendar year thereafter, to complete a minimum of one continuing education program or activity offered or approved by disciplinary counsel in one or more of the following subject-matter areas:

(a) Legal ethics;

(b) Judicial ethics;

(c) Execution of the responsibilities outlined in this rule for the review and investigation of grievances and the preparation and prosecution of formal complaints.

(3) Web Site. A certified grievance committee shall maintain an Internet site that includes the address and telephone number of its office and a description of its duties and responsibilities.

(E)(1) Annual Report and Biennial Recertification. On or before the first day of March, each certified grievance committee shall file with the Board a report of its activity in the preceding calendar year. The annual report shall be submitted on behalf of the certified grievance committee by the committee chair and bar counsel, and shall include all of the following:

(a) A current roster of all members of the certified grievance committee that identifies the committee chair, the nonattorney members of the committee, the tenure of each member's service on the committee, and the expiration date of each committee member's term;

(b) Information indicating compliance by bar counsel and volunteer grievance committee members with the education requirements set forth in division (D)(1)(d) and (D)(1)(e) of this section.

(c) Other information considered necessary by the Board to ascertain the certified grievance committee's compliance with the standards set forth in division (D) of this section.

(2) Based on the content of the annual reports for the two preceding years and other relevant information that may be available to the Board, the Board, on or before May 1, 2014 and every two years thereafter, shall do one of the following:

(a) Recertify the grievance committee;

(b) Notify the certified grievance committee of its noncompliance with specific minimum standards applicable to the operation of a certified grievance committee, the steps the certified grievance committee is required to take to remedy noncompliance, and the time in which the certified grievance committee must remedy noncompliance;

(c) Initiate decertification proceedings pursuant to division (F) of this section.

(F)(1) Decertification. The Board may decertify a certified grievance committee at the request of one or more of its sponsoring local bar associations or *sua sponte*. If the committee fails to adhere to the standards set forth in division (D) and (E) of this section and regulations adopted by the Board, if bar counsel fails to comply with the education requirements set forth in division (D)(1)(d) of this section, or if the committee substantially fails to perform the obligations set forth in these rules, the director may issue to the chair of the certified grievance committee and president of the sponsoring bar association an order to show cause why the grievance committee should not be decertified by the Board for the reasons set forth in the order. The Board shall hold a hearing before three commissioners, chosen by lot, who do not reside in the same appellate district where the certified grievance committee is located. If the panel of commissioners recommends decertification, it shall issue findings setting forth all of the following:

(a) The reasons for decertification;

(b) All of the certified grievance committee's pending matters;

(c) Any special circumstances by reason of which the committee should not be required to discharge its remaining responsibilities in any or all pending matters.

(2) The Board shall review the report and findings of the panel recommending decertification and, by majority vote, may decertify the committee. In the absence of special circumstances, the Board shall not decertify a certified grievance committee, either at the request of a sponsoring bar association or *sua sponte*, before the committee has discharged to the Board's satisfaction the committee's remaining responsibilities in its then-pending matters.

(G) Alternative Dispute Resolution. A certified grievance committee may adopt and utilize written procedures for handling allegations of client dissatisfaction that do not constitute disciplinary violations, to include mediation, office practice monitoring, and other alternative dispute resolution methods. Only alternative dispute resolution procedures developed by the Board shall be used by certified grievance committees. The procedures shall provide that mediators and facilitators shall not be members of or subject to the jurisdiction of the certified grievance committee.

(H) Confidentiality; Oath of Office. No employee, appointee, or member of a certified grievance committee shall disclose to any person any proceedings, documents, or deliberations of the committee. Prior to taking office, bar counsel and each employee, appointee, or member of a certified grievance committee shall swear or affirm that he or she will abide by these rules.

Section 6. Bar Counsel.

(A)(1) Certification of Bar Counsel. Disciplinary counsel shall certify bar counsel. With the prior approval of the Board, disciplinary counsel shall promulgate and make available to the certified grievance committees and bar counsel the criteria that will be used in certifying. The criteria for certification shall include, but not be limited to, all of the following:

(a) Legal experience, including substantive areas of practice and trial experience;

(b) Any experience as a member of a certified grievance committee;

(c) Experience in reviewing and investigating grievances or prosecuting formal complaints, or both, including but not limited to the approximate number of grievances reviewed and investigated, the number of cases presented to hearing panels of the Board, and the number of disciplinary hearings before the Supreme Court;

(d) References from at least three persons in the legal community who attest to the applicant's high ethical standards, professionalism, and integrity.

(2) Decertification. Disciplinary counsel may decertify bar counsel for failing to competently and diligently perform the duties set forth in Gov. Bar R. V, failing to comply with the education requirements set forth in Section 5 of this rule, or for other good cause shown. Before decertifying bar counsel, disciplinary counsel shall provide to bar counsel and the chair of the certified grievance committee that employs or retains bar counsel written notice proposing the decertification of bar counsel and shall afford bar counsel a reasonable opportunity to respond to the proposed decertification.

Section 7. Funding; Reimbursements to Certified Grievance Committees.

(A) Funding and Budgets. The Supreme Court shall allocate funds for the operation of the Board and the Office of Disciplinary Counsel and development and distribution of materials describing the disciplinary process from the Attorney Services Fund.

(B) Budget. At the request of the administrative director of the Supreme Court, the Board and the Office of Disciplinary Counsel shall prepare and submit a proposed annual or biennial budget for approval by the Supreme Court.

(C) Reimbursement for Expenses. The Board may reimburse certified grievance committees for expenses incurred by the committees in performing the obligations imposed on them by these rules. Any reimbursements authorized by the Board shall be paid from moneys allocated by the Court for that purpose from the Attorney Services Fund. Reimbursement is not permitted for costs associated with compliance with the standards contained in Section 5(D) of this rule, except for the costs listed in division (C)(2) of this section.

(1) Reimbursement of Direct Expenses. A certified grievance committee may be reimbursed for direct expenses incurred in performing the obligations imposed by this rule. Reimbursement shall be limited to costs for depositions, transcripts, copies of documents, necessary travel expenses for witnesses and volunteer attorneys, witness fees, costs of subpoenas and the service of subpoenas, and compensation of investigators and expert witnesses authorized in advance by the Board. There shall be no reimbursement for the costs of the time of other bar association personnel or attorneys in discharging these obligations. Reimbursement shall be made upon submission to the director of the Board of proof of expenditures. Upon approval by the Board, reimbursement shall be made from the Attorney Services Fund.

(2) Annual Reimbursement of Indirect Expenses. A certified grievance committee may apply to the Board prior to the first day of February each year for partial reimbursement of other expenses necessarily and reasonably incurred during the preceding calendar year in performing its obligations under these rules. The Board shall establish criteria for determining whether expenses under divisions (C)(2) and (3) of this section are necessary and reasonable. The Board shall deny reimbursement for any expense for which a certified grievance committee seeks reimbursement on or after the first day of March of the year immediately following the calendar year in which the expense was incurred. Expenses eligible for reimbursement are those specifically relating to professional conduct enforcement and include all of the following:

(a) The personnel costs for the portion of an employee's work that is dedicated to this area;

(b) The costs of bar counsel who is retained pursuant to written agreement with or employed by the certified grievance committee;

(c) Postal and delivery charges;

(d) Long distance telephone charges;

(e) Local telephone charges and other appropriate line charges including, but not limited to, per call charges;

(f) The cost of dedicated telephone lines;

(g) Subscriptions to professional journals, law books, and other legal research services and materials related to professional conduct;

(h) Organizational dues and educational expenses relating to professional conduct enforcement;

(i) All costs of defending grievance and disciplinary-related law suits and that portion of professional liability insurance premiums directly attributable to the operation of the committees in performing their obligations under this rule;

(j) The percentage of rent, insurance premiums not reimbursed pursuant to division (C)(2)(i) of this section, supplies and equipment, accounting costs, occupancy, utilities, office expenses, repair and maintenance, and other overhead expenses directly attributable to the operation of the committees in performing their obligations under this rule, as determined by the Board and provided that no certified grievance committee shall be reimbursed in excess of thirty thousand dollars per calendar year for such expenses. Reimbursement shall not be made for the costs of the time of other bar association personnel, volunteer attorneys, depreciation, or amortization. No expense reimbursed under division (C)(1) of this section is eligible for reimbursement under division (C)(2) of this section.

(3) Quarterly Reimbursement of Certain Indirect Expenses. In addition to applying annually for reimbursement pursuant to division (C)(2) of this section, a certified grievance committee may apply quarterly to the Board for reimbursement of the expenses set forth in divisions (C)(2)(a) and (b) of this section that were necessarily and reasonably incurred during the preceding calendar quarter. Quarterly reimbursement shall be submitted in accordance with the following schedule:

Reimbursement for the months of:	**Due by:**
January, February, and March	May 1
April, May, and June	August 1
July, August, and September	November 1
October, November, and December	February 1 (with annual reimbursement request)

Any expense that is eligible for quarterly reimbursement, but that is not submitted on a quarterly reimbursement application, shall be submitted no later than the appropriate annual reimbursement application pursuant to division (C)(2) of this section and shall be denied by the Board if not timely submitted. The application for quarterly reimbursement shall include an affidavit with documentation demonstrating that the certified grievance committee incurred the expenses set forth in divisions (C)(2)(a) and (b) of this section.

(D) Audit. Expenses incurred by certified grievance committees and reimbursed under division (C) of this section may be audited at the discretion of the Board or the Supreme Court. The costs of any audit shall be paid from the Attorney Services Fund.

(E) Availability of Funds. Reimbursement under division (C) of this section is subject to the availability of moneys in the Attorney Services Fund.

Section 8. Public Access to Disciplinary Documents and Proceedings.

(A)(1) Proceedings Prior to Probable Cause. Prior to a determination of probable cause by the Board, all proceedings, documents, and deliberations relating to review, investigation, and consideration of grievances shall be confidential except as follows:

(a) Where the respondent expressly and voluntarily waives confidentiality of the proceedings. A waiver of confidentiality does not entitle the respondent or any other person access to documents or deliberations expressly designated as confidential under this section.

(b) Where the proceedings reveal reasonable cause to believe that respondent is or may be addicted to alcohol or other chemicals, is abusing the use of alcohol or other chemicals, or may be experiencing a disorder that is substantially impairing the respondent's ability to practice law, the information giving rise to this belief shall be communicated to a committee or subcommittee of a bar association, or to an executive officer or employee of a nonprofit corporation established by a bar association, designed to assist lawyers with disorders.

(c) Where, in the course of an investigation by the Office of Disciplinary Counsel or a certified grievance committee, it is found that a person involved in the investigation may have violated federal or state criminal statutes, the entity conducting the investigation shall notify the appropriate law enforcement agency, prosecutorial authority, or regulatory agency of the alleged criminal violation and may provide the agency or authority with information concerning the criminal violation.

(2) The Office of Disciplinary Counsel and a certified grievance committee may share information with each other or with the disciplinary authority of another state or federal jurisdiction regarding the review, investigation and consideration of a grievance.

(3) Except as otherwise provided in division (A) of this section, all investigatory materials prepared in connection with an investigation conducted pursuant to Section 9 of this rule or submitted with a complaint filed pursuant to Section 10 of this rule shall be confidential prior to certification of a formal complaint pursuant to Section 11 of this rule. The materials shall remain confidential if the complaint is dismissed pursuant to Section 11.

(B) Proceedings Subsequent to Probable Cause. From the time a complaint has been certified to the Board by a probable cause panel, the complaint and all subsequent proceedings conducted and documents filed in connection with the complaint shall be public except as follows:

(1) Deliberations by the Board or a hearing panel of the Board shall be confidential.

(2) The report and recommendations of a hearing panel of the Board shall be confidential until the report of the full Board is filed with the Supreme Court. If the case is dismissed either by the hearing panel or the Board pursuant to Section 12(G) or (H) of this rule, any report of the hearing panel shall be public upon the filing of an order of dismissal. The report and recommendation of the Board shall be confidential until the report is filed with the Supreme Court.

(3) The summary of investigation prepared by the relator shall be confidential as work-product of the relator. All other investigatory materials and any attachments prepared in connection with an investigation conducted pursuant to Section 9 of this rule or submitted with a complaint filed pursuant to Section 10 of this rule shall be discoverable as provided in the Ohio Rules of Civil Procedure.

(4) The Board-approved ADR process shall be confidential, and any knowledge obtained by a mediator or facilitator shall be privileged for all purposes under Rule 8.3 of the Ohio Rules of Professional Conduct, provided the knowledge was obtained while the mediator or facilitator was acting as a mediator or facilitator.

(C) Restricted Access to Case Documents. A party to a matter pending before the Board may file a motion requesting that the Board restrict public access to all or a portion of a document filed with the Board. Additionally, the chair of a hearing panel or a master may request that the Board restrict public access to all or a portion of a document filed with the Board. In considering the motion or request, the Board chair shall apply the standards set forth in Sup. R. 45(E). If the Board chair finds that public access to a document should be restricted, the order shall direct the use of the least restrictive means available, including but not limited to redaction of the information rather than limiting access to the entire document.

(D) Personal Identifiers. A party to a matter pending before the Board shall be responsible for omitting personal identifiers from a case document filed with the Board, consistent with Sup. R. 45(D). As used in this rule, "personal identifiers" and "case document" shall have the same meaning as in Sup. R. 44.

(E) Response to Grievance. Notwithstanding the other provisions of this rule, the respondent's reply to the grievance, made during the course of an investigation by the Office of Disciplinary Counsel or a certified grievance committee, shall be furnished to the grievant without waiving any other right to confidentiality provided by this rule. If the respondent specifically requests, in writing, to the Office of Disciplinary Counsel or certified grievance committee that the reply not be furnished to the grievant, the Office of Disciplinary Counsel or certified grievance committee shall not furnish the reply to the grievant. Release to the grievant of the respondent's reply is, nevertheless, encouraged and consistent with the liberal construction of this rule for the protection of the public.

(F) Administrative and Financial Records. Except as otherwise provided in this section or in rules adopted by the Supreme Court, documents and records pertaining to the administration and finances of the Board and the Office of Disciplinary Counsel, including budgets, reports, and records of income and expenditures, shall be made available, upon request, as provided in Sup. R. 45.

Section 9. Filing and Investigation of Grievances.

(A) Referral by Board. The Board may refer to a certified grievance committee or the Office of Disciplinary Counsel any matter filed with it for investigation as provided in this section.

(B) Referral by Certified Grievance Committee. If a certified grievance committee determines in the course of a disciplinary investigation that the matters of alleged misconduct under investigation are sufficiently serious and complex as to require the assistance of the Office of Disciplinary Counsel, the chair of the certified grievance committee may direct a written request for assistance to the Disciplinary Counsel. The Office of Disciplinary Counsel shall review and may investigate all matters contained in the request and report the results of the investigation to the committee that requested it.

(C) Power and Duty to Investigate; Dismissal without Investigation.

(1) The Office of Disciplinary Counsel or a certified grievance committee shall review and may investigate a grievance that alleges facts that, if substantiated, would constitute misconduct by a judicial officer or attorney or that alleges facts that, if substantiated, would indicate that a judicial officer or attorney is mentally ill, is suffering from alcohol and other drug abuse, or is suffering from a disorder. The Office of Disciplinary Counsel and a certified grievance committee shall review and may investigate any matter filed with it or that comes to its attention and may file a complaint pursuant to this rule in cases where it finds probable cause to believe that misconduct has occurred or that a condition of mental illness, alcohol and other drug abuse, or disorder exists.

(2) A grievance may be dismissed without investigation if the grievance and any supporting material do not contain an allegation of misconduct, mental illness, alcohol and other drug abuse, or disorder on the part of a judicial officer or attorney. A certified grievance committee shall not dismiss a grievance without investigation unless bar counsel has reviewed the grievance.

(D) Time for Investigation. The investigation of grievances by Office of Disciplinary Counsel or a certified grievance committee shall be concluded within sixty days from the date of the receipt of the grievance. A decision as to the disposition of the grievance shall be made within thirty days after conclusion of the investigation.

(1) Extensions of Time. Extensions of time for completion of the investigation may be granted by the director of the Board. The Office of Disciplinary Counsel or a certified grievance committee shall submit a written request for an extension. Investigations for which an extension is granted shall be completed within one hundred fifty days from the date of receipt of the grievance. Time may be extended when all parties voluntarily enter into an alternative dispute resolution method for resolving fee disputes sponsored by the Ohio State Bar Association or a local bar association.

(2) Extension Limits. The director of the Board may extend time limits beyond one hundred fifty days from the date of filing in the event of pending litigation, appeals, unusually complex investigations, including the investigation of multiple grievances, time delays in obtaining evidence or testimony of witnesses, or for other good cause shown. A request for an extension of time beyond one hundred fifty days shall be in writing and include the reason for the extension request. If an investigation is not completed within one hundred fifty days from the date of filing the grievance or a good cause extension of that time, the director may refer the matter

either to a geographically appropriate certified grievance committee or the Office of Disciplinary Counsel. The investigation shall be completed within sixty days after referral. No investigation shall be extended beyond one year from the date of the filing of the grievance.

(3) Time Limits not Jurisdictional. Time limits set forth in this rule are not jurisdictional. No grievance filed shall be dismissed unless it appears that there has been an unreasonable delay and that the rights of the respondent to have a fair hearing have been violated. Investigations that extend beyond one year from the date of filing are prima facie evidence of unreasonable delay.

(E) Retaining Outside Experts. If a particular investigation may benefit from the services of an independent investigator, auditor, examiner, assessor, or other expert, a certified grievance committee may submit a written request to the director for permission to retain the services of the outside expert. The written request shall include a general statement of the purpose for which the request is being made and an estimate of the fees and costs expected to be incurred. The outside expert may be retained upon receipt of written approval of the director.

(F) Cooperation with Lawyers' Fund for Client Protection. Upon the receipt of any grievance presenting facts that may be the basis for an award from the Lawyers' Fund for Client Protection under Gov. Bar R. VIII, the Office of Disciplinary Counsel or a certified grievance committee shall notify the grievant of the potential right to an award from the fund and provide the grievant with the forms necessary to initiate a claim with the fund. The Office of Disciplinary Counsel, a certified grievance committee, and the Board shall provide the Board of Commissioners of the Lawyers' Fund for Client Protection with findings from investigations, grievances, or any other records it requests in connection with an investigation under Gov. Bar R. VIII. The transmittal of confidential information may be delayed pending the termination of the disciplinary investigation or proceedings.

(G) Duty to Cooperate. The Board, Disciplinary Counsel, and president, secretary, or chair of a certified grievance committee may call upon any judicial officer or attorney to assist in an investigation or testify in a hearing before the Board or a panel for which provision is made in this rule, including mediation and alternative dispute resolution procedures, as to any matter that he or she would not be bound to claim privilege as an attorney at law. No attorney, and no judicial officer, except as provided in Rule 3.3 of the Code of Judicial Conduct, shall neglect or refuse to assist or testify in an investigation or hearing.

(H) Referral of Procedural Questions to Board. In the course of an investigation, the chair of a certified grievance committee, bar counsel, or Disciplinary Counsel may direct a written inquiry regarding a procedural question to the director of the Board. Upon receipt of a written inquiry, the director shall consult with the chair of the Board and respond to the inquiry.

Section 10. Requirements for Filing a Complaint.

(A) Notice of Intent to File. No investigation conducted by the Office of Disciplinary Counsel or a certified grievance committee shall be completed, and no complaint shall be filed with the Board, without first giving the judicial officer or attorney who is the subject of the

grievance or investigation notice of each allegation and the opportunity to respond to each allegation. The Office of Disciplinary Counsel or a certified grievance committee shall provide the judicial officer or attorney with a minimum of fourteen days to respond to the allegations.

(B) Majority Vote Required. No complaint shall be filed by a certified grievance committee with the Board unless a majority of a quorum of that committee determines the complaint is warranted.

(C) Notice of Intent not to File. If, upon review or investigation of a grievance, a certified grievance committee or the Office of Disciplinary Counsel determines that the filing of a complaint with the Board is not warranted, the grievant and the judicial officer or attorney shall be notified in writing of that determination, with a statement of the reasons that a complaint was not filed with the Board. The written notice provided by a certified grievance committee shall advise the grievant of the right to have the committee's determination reviewed pursuant to division (D) of this section and the steps to obtain such review. Upon request, a certified grievance committee or the Office of Disciplinary Counsel shall provide the judicial officer or attorney with a copy of the grievance.

(D) Appeal. A grievant who is dissatisfied with a determination by a certified grievance committee not to file a complaint may secure a review of the determination by filing a written request with the director of the Board within fourteen days after the grievant is notified of the determination. The director shall refer the request for review to the Office of Disciplinary Counsel or, in the case of a conflict, to another certified grievance committee. The review shall be considered promptly by the Office of Disciplinary Counsel or certified grievance committee, a decision made within thirty days, and the grievant notified. The standard of review for an appeal shall be abuse of discretion or error of law. Extensions of time for completion of the review may be granted by the director, upon written request and for good cause shown. No further review or appeal by a grievant shall be authorized. If the original determination is not affirmed, any further proceedings shall be handled by the Office of Disciplinary Counsel or certified grievance committee.

(E)(1) Content of the Complaint. A complaint filed with the Board shall be filed in the name of either disciplinary counsel or the bar association that sponsors the certified grievance committee, as relator. The complaint shall include all of the following:

(a) Allegations of specific misconduct including citations to the rules allegedly violated by the respondent, provided that neither the panel nor the Board shall be limited to the citation to the disciplinary rule in finding violations based on all the evidence if the respondent has fair notice of the charged misconduct;

(b) If applicable, an allegation of the nature and amount of restitution that may be owed by the respondent or a statement that the relator cannot make a good faith allegation without engaging in further discovery;

(c) A list of any discipline or suspensions previously imposed against the respondent and the nature of the prior discipline or suspension;

(d) The respondent's attorney registration number and his or her last known address;

(e) The signatures of one or more attorneys admitted to the practice of law in Ohio, who shall be counsel for the relator and, where applicable, by bar counsel;

(f) A written certification, signed by disciplinary counsel or the president or chair of the certified grievance committee, that the counsel are authorized to represent the relator in the action and have accepted the responsibility of prosecuting the complaint to conclusion. The certification shall constitute the authorization of the counsel to represent the relator in the action as fully and completely as if designated and appointed by order of the Supreme Court with all the privileges and immunities of an officer of the Supreme Court.

(2) The complaint shall not include any documents, exhibits, or other attachments unless specifically required by Civ. R. 10.

(F) Materials Submitted with the Complaint. The relator shall submit with the complaint sufficient investigatory materials to demonstrate probable cause. The materials shall include any response submitted by or on behalf of the respondent to the notice of intent to file provided by the relator pursuant to Section 10(A) and an affidavit from bar counsel or other appropriate representative of the relator documenting relator's contacts with or attempts to contact the respondent prior to filing the complaint. The materials may include investigation reports, summaries, depositions, statements, and any other relevant material.

Section 11. Probable Cause Determinations; Certification and Service of Complaints.

(A) Probable Cause Panels. The Board shall establish two probable cause panels to review each complaint filed with the Board. The chair of the Board shall designate three commissioners to serve on each panel and shall designate one attorney or judge commissioner as chair. Each panel shall meet in person or by teleconference pursuant to a schedule established by the director of the Board. Except as provided in division (B) of this section, the director shall assign each complaint and the investigatory materials to a probable cause panel for review. Upon review solely of the complaint and any materials submitted with the complaint pursuant to Section 10 of this rule, the probable cause panel shall make an independent determination of whether probable cause exists for the filing of a complaint. The panel shall issue an order certifying the complaint, in whole or in part, to the Board or dismissing the complaint and investigation in its entirety.

(B) Waiver of Probable Cause. If the respondent has expressly waived, in writing, his or her right to an independent determination of probable cause by the Board, the director shall immediately certify the complaint to the Board and send a copy of the complaint to the Office of Disciplinary Counsel or the appropriate certified grievance committee and by certified mail to the respondent.

(C) Service, and Publication of Certified Complaint; Notice of Dismissal. The director shall take the following action based on the order of the probable cause panel:

(1) If the panel certifies the complaint in its entirety, the director shall serve the complaint on the respondent via certified mail and send a copy to the relator.

(2) If the panel certifies the complaint in part, the director shall instruct the relator to prepare and submit a new complaint that conforms to the order of the probable cause panel. Upon receipt of the new complaint, the director shall serve the complaint on the respondent via certified mail and send a copy to the relator.

(3) If the panel dismisses the complaint for want of probable cause, the director shall provide the relator and respondent with notice of dismissal. The notice shall advise the relator of its ability to appeal the dismissal to the full Board.

(4) Upon certification to the Board, the director shall publish or post a copy of each complaint on the Board's web page.

(D) Appeal of Dismissal. Within seven days of receipt of the decision of the probable cause panel to dismiss the complaint in its entirety, the Office of Disciplinary Counsel or certified grievance committee may appeal the decision to the full Board by filing a written appeal with the director of the Board. Upon review solely of the complaint and any materials submitted with the complaint pursuant to Section 10 of this rule, the Board shall make an independent determination as to whether probable cause exists for the filing of a complaint. The Board shall issue an order certifying or dismissing the complaint and notify the relator and respondent of its decision as set forth in division (C) of this section. There shall be no appeal from the decision of the Board.

(E) Retention and Destruction of Probable Cause Materials. The director shall retain the complaint, summary of investigation, and attached investigatory materials until such time as a probable cause panel makes a final determination regarding certification of the complaint, until the time for appealing a dismissal of the complaint has expired, or until the Board issues an order regarding any appeal of a dismissal, whichever is later. After a final determination regarding probable cause has been made by a panel or the Board, the director shall dispose of all documents and investigatory materials, other than the formal complaint certified to the Board.

Section 12. Proceedings Before the Board on Certified Complaints.

(A) Manner of Discipline. Any judicial officer or attorney found guilty of misconduct shall be disciplined as follows:

(1) Disbarment from the practice of law;

(2) Suspension from the practice of law for an indefinite period subject to reinstatement as provided in Section 25 of this rule;

(3) Suspension from the practice of law for a period of six months to two years subject to a stay in whole or in part;

(4) Probation for a period of time upon conditions as the Supreme Court determines, but only in conjunction with a suspension ordered pursuant to division (A)(3) of this section;

(5) Public reprimand.

(B) Disbarment or Resignation. A person who is disbarred, who has resigned with discipline pending, or, who has retired from the practice of law on or after September 1, 2007 shall not be readmitted to the practice of law in Ohio.

(C) Appointment of Hearing Panel. After the respondent has filed an answer or the time for filing an answer has elapsed, the director shall appoint a hearing panel consisting of three commissioners chosen by lot from commissioners who did not serve on the probable cause panel. The director shall designate one attorney or judge commissioner to serve as chair of the panel. No member of the hearing panel shall be a resident of the appellate district from which the complaint originated. Not more than one nonattorney shall serve on any hearing panel. A majority of the panel shall constitute a quorum. The panel chair shall rule on all motions and interlocutory matters. No ruling by the panel chair on a motion or interlocutory matter may be appealed other than in response to a show cause order issued by the Supreme Court.

(D) Notice to Respondent upon Filing of the Complaint. The director of the Board shall send a copy of the complaint by certified mail to the respondent with a notice requiring the respondent to file, within twenty days after the mailing of the notice, six copies of his or her answer and serve copies of the answer on counsel of record named in the complaint. Extensions of time for the filing of the answer may be granted by the director for good cause shown.

(E) Amendments to the Complaint. The relator may file an amended complaint, without filing a motion for leave to amend, prior to the filing of an answer by the respondent. After an answer has been filed, the relator may file an amended complaint only upon leave of the panel chair or the written consent of the respondent. The panel chair may grant the motion for leave to amend for good cause shown. The amended complaint shall be filed and served as set forth in this rule. The amended complaint shall not be subject to probable cause review.

(F) Hearing. Upon reasonable notice and at a time and location set by the panel chair pursuant to the regulations of the Board, the panel shall hold a formal hearing on the complaint. Requests for continuances may be granted by the panel chair for good cause shown. All hearings shall be recorded by a court reporter provided by the Board and a transcript filed with the director.

(G) Authority of Hearing Panel; Dismissal. If, at the end of the evidence presented by the relator or of all evidence, a unanimous hearing panel finds that the evidence is insufficient to support a charge or count of misconduct, the panel may order on the record or in its report that the complaint or count be dismissed. If a unanimous hearing panel dismisses a complaint in its entirety, the director shall send a dismissal entry to the relator, respondent, and all counsel of record.

(H) Referral by Panel. In the alternative, if the hearing panel determines that findings of fact and recommendations for dismissal should be referred to the Board for review and action by the full Board, the panel may submit its findings of fact to the Board and may recommend dismissal in the same manner as provided in this rule with respect to public reprimand, probation, suspension, or disbarment. If the Board dismisses a complaint in its entirety, the director shall send a dismissal entry to relator, respondent, and counsel of record.

(I) Public Reprimand, Probation, Suspension, or Disbarment; Duty of Hearing Panel. If the hearing panel determines, by clear and convincing evidence, that respondent is guilty of misconduct and that a public reprimand, suspension for a period of six months to two years, probation, suspension for an indefinite period, or disbarment is merited, the hearing panel shall submit a report of its findings of fact, conclusions of law, and recommended sanction to the director. If applicable, the panel shall include in its report any conditions of probation, a stayed suspension, or reinstatement to the practice of law. Such conditions may include a requirement that the respondent or petitioner take and receive a passing score on the Multistate Professional Responsibility Examination.

(J) Review by Entire Board. After review, the Board may refer the matter to the hearing panel for further hearing, order a further hearing before the Board, or proceed on the report of the prior proceedings before the hearing panel. After the final review, the Board may dismiss the complaint or find that the respondent is guilty of misconduct. If the complaint is dismissed, the dismissal shall be reported to the director of the Board, who shall notify the same persons and organizations that would have received notice if the complaint had been dismissed by the hearing panel.

(K) Public Reprimand; Probation, Suspension, or Disbarment; Duty of Board after Review. If the Board determines that a public reprimand, suspension for a period of six months to two years, probation, suspension for an indefinite period, or disbarment is merited, the Board shall file a certified report of its proceedings, including its findings of fact, conclusions of law, and recommended sanction, with the clerk of the Supreme Court. The report shall include the record of proceedings before the Board, a transcript of testimony taken, if any, and an itemized statement of the actual and necessary expenses incurred in connection with the proceedings. The Board forthwith shall notify the respondent and all counsel of record of the action, enclosing with the notice a copy of the Board's report and a copy of the statement of the actual and necessary expenses incurred.

Section 13. Aggravating and Mitigating Factors.

(A) In General. Each disciplinary case involves unique facts and circumstances. In striving for fair disciplinary standards, the Board shall give consideration to specific professional misconduct and to the existence of aggravating or mitigating factors. In determining the appropriate sanction, the Board shall consider all relevant factors, precedent established by the Supreme Court of Ohio, and the aggravating and mitigating factors set forth in this section.

(B) Aggravation. The following shall not control the discretion of the Board, but may be considered in favor of recommending a more severe sanction:

(1) Prior disciplinary offenses;

(2) A dishonest or selfish motive;

(3) A pattern of misconduct;

(4) Multiple offenses;

(5) A lack of cooperation in the disciplinary process;

(6) The submission of false evidence, false statements, or other deceptive practices during the disciplinary process;

(7) A refusal to acknowledge wrongful nature of conduct;

(8) The vulnerability of and resulting harm to victims of the misconduct;

(9) A failure to make restitution.

(C) Mitigation. The following shall not control the discretion of the Board, but may be considered in favor of recommending a less severe sanction:

(1) The absence of a prior disciplinary record;

(2) The absence of a dishonest or selfish motive;

(3) A timely, good faith effort to make restitution or to rectify consequences of misconduct;

(4) Full and free disclosure to the Board or cooperative attitude toward proceedings;

(5) Character or reputation;

(6) Imposition of other penalties or sanctions;

(7) Existence of a disorder when there has been all of the following:

(a) A diagnosis of a disorder by a qualified health care professional or qualified chemical dependency professional;

(b) A determination that the disorder contributed to cause the misconduct;

(c) In the case of mental disorder, a sustained period of successful treatment or in the case of substance use disorder or nonsubstance-related disorder, a certification of successful completion of an approved treatment program;

(d) A prognosis from a qualified health care professional or qualified chemical dependency professional that the attorney will be able to return to competent, ethical professional practice under specified conditions.

(8) Other interim rehabilitation.

Section 14. Default; Interim Default Suspension.

(A) Certification of Default. If the respondent has not filed an answer to a complaint on or before the answer date set forth in the notice to the respondent of the filing of the complaint or any extension of the answer date, the director of the Board shall provide the relator and respondent, in writing, a notice of intent to certify respondent's default to the Supreme Court. The certification of default shall be filed thirty days after the notice of intent to certify unless the respondent files an answer prior to expiration of the thirty-day period. The certification shall include a copy of the formal complaint pending before the Board and either a certificate indicating that the complaint has been served on the respondent or a certificate indicating that the complaint has been served on the clerk of the Supreme Court pursuant to Section 27 of this rule.

(B)(1) Entry of Interim Default Suspension. Upon receipt of the certification, the Supreme Court shall issue the respondent an order to show cause why an interim default suspension shall not be entered. Notice of the order to show cause shall be served by the clerk of the Supreme Court as set forth in Section 17 of this rule, and any response to the order and answer briefs may be filed as set forth in Section 17 of this rule. Upon receipt of a response or expiration of the time for objections, the Court may enter an order it considers appropriate, including an order immediately suspending the respondent from the practice of law. Upon entry of an order suspending the respondent pursuant to this section, the clerk of the Supreme Court shall mail certified copies of the order as provided in Section 17 of this rule.

(2) If the relator determines that the respondent owes restitution to clients or third parties as a result of the misconduct alleged in the formal complaint, the relator shall file a notice of restitution owed with the Supreme Court. The notice of restitution owed shall be filed within one hundred and eighty days of the date of the entry of an interim default suspension and shall be accompanied by sworn or certified documentary prima facie evidence in support of the claim of restitution. If relator files a motion to initiate default proceedings pursuant to division (D) of this section, the relator shall allege any claim of restitution owed in its motion and present evidence to the Board on remand in support of that claim.

(C) Motion for Leave to Answer. Within one hundred eighty days of the date of the entry of an interim default judgment suspension, the respondent may file a motion with the Supreme Court for leave to file an answer to the complaint pending before the Board. The motion shall include a copy of the respondent's answer as an attachment. The motion may include a

request from the respondent to terminate the interim default suspension for good cause shown. Upon receipt of the motion and any response from the relator, the Court may grant the motion and remand the matter to the Board for further proceedings under Section 12 of this rule. The order remanding the matter to the Board shall indicate that the interim default judgment suspension either remains in place while proceedings are pending before the Board or is terminated for good cause shown.

(D) Motion to Initiate Default Proceedings. Within one hundred eighty days of the date of the entry of an interim default judgment suspension, the relator may file a motion with the Supreme Court to have the case remanded to the Board for the purpose of seeking the permanent disbarment of the respondent. Upon receipt of the motion, the Court may grant the motion and remand the matter to the Board for default proceedings pursuant to division (F) of this section. The order remanding the matter to the Board shall indicate that the interim default judgment suspension remains in place while proceedings are pending before the Board.

(E)(1) Indefinite Suspension; Restitution. If the respondent has not filed a timely motion for leave to answer pursuant to division (C) of this section or if the relator has not filed a timely motion to initiate disbarment proceedings pursuant to division (D) of this section, the Court shall issue the respondent an order to show cause why the interim default judgment suspension should not be converted into an indefinite suspension. If the relator has filed a notice and supporting evidence pursuant to division (B)(2) of this section, the order shall also direct the respondent to show cause why the respondent should not be ordered to pay restitution in accordance with relator's notice and evidence. Notice of the order to show cause shall be served by the clerk of the Supreme Court as set forth in Section 17 of this rule, and any response to the order and answer briefs may be filed as set forth in Section 17 of this rule. Upon receipt of a response or expiration of the time for objections, the Court may enter an order it considers appropriate, including an order immediately converting the interim default suspension into an indefinite suspension and ordering the payment of restitution.

(2) Further proceedings to terminate the indefinite suspension and reinstate the respondent to the practice of law shall be conducted pursuant to Section 25 of this rule, except that the respondent may file a petition for reinstatement no earlier than two years after the date of the entry of the interim default judgment suspension pursuant to division (B)(1) of this section.

(F) Default Proceeding. Within thirty days of the issuance of a remand order pursuant to division (D) of this section, the relator shall file a motion for default with the Board. Prior to filing a motion for default, relator shall make reasonable efforts to contact the respondent.

(1) Motion. A motion for default shall contain all of the following:

(a) An affidavit from bar counsel or other appropriate representative of the relator documenting the efforts made to contact the respondent and the result;

(b) Sworn or certified documentary prima facie evidence in support of the allegations made;

(c) The recommendation of the relator that the respondent should be disbarred based on the misconduct alleged in the complaint and case law in support of the recommendation;

(d) A statement of any aggravating or mitigating factors of which the relator is aware;

(e) A certificate of service of the motion on respondent at the address shown for the respondent on the records of the Supreme Court and at the last address known to the relator, if different.

(2)(a) Disposition. The director of the Board shall refer the motion for default to a judge or attorney commissioner or Board-appointed master who shall rule on the motion. A commissioner or master appointed to rule on the motion for default shall rule on all motions and interlocutory matters, and no ruling by the commissioner or master on a motion or interlocutory matter may be appealed prior to entry of the final order. If a motion for default is granted, the commissioner or master shall prepare a certified report for review by the Board. After review, the Board shall file a final certified report in accordance with Section 12(K) of this rule finding one of the following:

(i) That the relator has failed to establish the allegations of the complaint by clear and convincing evidence and recommending that the complaint be dismissed and that the Court enter an order terminating the interim default judgment suspension;

(ii) That there is clear and convincing evidence to establish that respondent is guilty of misconduct and recommending the respondent be indefinitely suspended from the practice of law, subject to reinstatement as provided in Section 25 of this rule;

(iii) That there is clear and convincing evidence to establish that respondent is guilty of misconduct and recommending the respondent be disbarred.

(b) If the Supreme Court grants a motion for leave to answer and remands the matter to the Board pursuant to division (C) of this section, the chair of the Board shall set aside a default entry and order a panel hearing at any time before the report and recommendation of the Board are certified to the Supreme Court.

(G) Duty of Relator. The relator shall have a continuing duty to preserve evidence necessary to establish the misconduct alleged in the complaint filed with the Board.

Section 15. Impairment Suspension; Termination of Suspension.

(A) Suspension Based on Adjudication of Mental Illness.

(1) After an answer has been filed or the time for filing an answer has elapsed, the Board forthwith shall certify a complaint to the Supreme Court if the complaint, answer, or other subsequent pleading alleges mental illness that substantially impairs the ability of the respondent

to practice law and is supported by a certified copy of a journal entry of a court of competent jurisdiction adjudicating mental illness.

(2) Upon receipt of a certified complaint pursuant to division (A)(1) of this section, the Supreme Court may suspend the respondent from the practice of law.

(B) Suspension Based on Order of Treatment for Alcohol and Other Drug Abuse.

(1) After an answer has been filed or the time for filing an answer has elapsed, the Board forthwith shall certify a complaint to the Supreme Court if the complaint, answer, or subsequent pleading alleges the existence of alcohol or other drug abuse that substantially impairs the ability of the respondent to practice law and is supported by a certified copy of a journal entry of a court of competent jurisdiction issued pursuant to R.C. 5119.93.

(2) Upon receipt of a certified complaint pursuant to division (B)(1) of this section, the Supreme Court may suspend the respondent from the practice of law.

(C) Impairment Suspension Based on Examination and Finding.

(1) The Board or hearing panel, on its own motion or motion of either party, may order a medical, psychological, or psychiatric examination of the respondent if any of the following applies:

(a) The complaint, answer, or any subsequent pleading alleges an existing mental illness, alcohol and other drug abuse, or disorder that substantially impairs the ability of the respondent to practice law but is unsupported by a journal entry of a court of competent jurisdiction;

(b) Mental illness, alcohol and other drug abuse, or disorder that substantially impairs the ability of the respondent to practice law otherwise is placed in issue.

(2) The medical, psychological, or psychiatric examination of respondent shall be conducted by one or more physicians or psychologists designated by the Board or hearing panel. The findings of the physician or psychologist shall be presented to the Board or hearing panel as evidence and made available to both parties. The parties shall have an opportunity to file objections to the findings, and the hearing panel may conduct a hearing on the objections. After a hearing or if no objections are filed, the hearing panel shall prepare and submit a report and recommendation with the Board. The report may include a recommendation that the respondent be placed on an impairment suspension.

(3) If, after reviewing the report of the hearing panel, the Board concludes the record establishes that the respondent suffers from mental illness, alcohol and other drug abuse, or a disorder that substantially impairs the ability of the respondent to practice law, the Board shall prepare and certify a report and the record of the proceedings to the Supreme Court. The Board report shall be a matter of public record and shall be docketed by the clerk, but the report shall not be published or posted on the Supreme Court's web site. The Supreme Court may suspend the

respondent from the practice of law and order the respondent's registration status changed to inactive. If the Court orders a impairment suspension under this section, further proceedings before the Board on any misconduct alleged in the formal complaint shall be stayed until such time as the respondent applies to the Board to have the impairment suspension terminated and a hearing panel determines that the application should be granted.

(D) Duty of Clerk on Entering Order. Upon the entry of a suspension order under this section, the clerk of the Supreme Court shall mail certified copies of the order as provided in Section 17 of this rule. A copy of the order shall be provided to the Office of Attorney Services, and that office shall change the registration of respondent to inactive status. The order shall be a matter of public record and shall be docketed by the clerk, but the order shall not be published or posted on the Supreme Court's web site.

(E) Termination. A suspension under this section may be terminated on application of the respondent to the Board and a showing of removal of the cause for the suspension. The director of the Board shall assign the application to a hearing panel. If the hearing panel finds by clear and convincing evidence that the suspension should be terminated and if the adjudication of a complaint alleging misconduct has been stayed as a result of the imposition of the suspension, the hearing panel shall conduct proceedings on the complaint in accordance with in Section 12 of this rule. The hearing panel shall prepare a written report of its findings and a recommendation with regard to the termination of the suspension and the disposition of any misconduct alleged in the formal complaint, including a recommended sanction for the misconduct that is found. The report of the hearing panel shall be submitted to the Board, and the report of the Board and the record of the proceedings shall be certified to the Supreme Court.

Section 16. Consent to Discipline.

(A) Content of Agreement. The relator and respondent may enter into a written agreement wherein the respondent admits to alleged misconduct and the relator and respondent agree upon a sanction, other than an indefinite suspension or disbarment, to be imposed for that misconduct. The written agreement may be entered into after a complaint is certified by the Board, but no later than sixty days after appointment of a hearing panel. For good cause shown, the chair of the hearing panel or the Board chair may extend the time for the parties to file a written agreement by an additional thirty days. The written agreement shall be signed by the respondent, respondent's counsel, if the respondent is represented by counsel, and relator, and shall include all of the following:

(1) An admission by the respondent, conditioned upon acceptance of the agreement by the Board, that the respondent committed the misconduct listed in the agreement;

(2) The sanction agreed upon by the relator and respondent for the misconduct admitted by the respondent and any case law that supports the agreed sanction;

(3) Any aggravating and mitigating factors, including but not limited to those listed in Section 13, that are applicable to the misconduct and agreed sanction;

(4) An affidavit of the respondent that includes all of the following statements:

(a) That the respondent admits to having committed the misconduct listed in the agreement, that grounds exist for imposition of a sanction against the respondent for the misconduct, and that the agreement sets forth all grounds for discipline currently pending before the Board;

(b) That the respondent admits to the truth of the material facts relevant to the misconduct listed in the agreement;

(c) That the respondent agrees to the sanction to be recommended to the Board;

(d) That the respondent's admissions and agreement are freely and voluntarily given, without coercion or duress, and that the respondent is fully aware of the implications of the admissions and agreement on his or her ability to practice law in Ohio.

(e) That the respondent understands that the Supreme Court of Ohio has the final authority to determine the appropriate sanction for the misconduct admitted by the respondent.

(B) Filing and Consideration of the Agreement. The agreement shall be filed with the director of the Board and submitted to the hearing panel or a master. Relator and respondent may file a brief in support of the agreement. If the hearing panel, by majority vote, or master recommends acceptance of the agreement and concurs in the agreed sanction, the matter shall be scheduled for consideration by the Board. If the agreement is not accepted by the hearing panel or master, the matter shall be set for hearing.

(C) Board Consideration of the Agreement. If the agreement is submitted to the Board, the Board, by majority vote, may accept or reject the agreement. If the Board accepts the agreement, the agreement shall form the basis for the certified report submitted to the Supreme Court. If the Board rejects the agreement, the matter shall be returned to the hearing panel and set for a hearing.

(D) Rejected Agreement Not Admissible. If the agreement is not accepted by the hearing panel, the Board, or the Supreme Court, the agreement shall not be admissible or otherwise used in subsequent disciplinary proceedings.

Section 17. Supreme Court Review of Certified Report; Orders; Costs; Publication.

(A) Show Cause Order. Upon receipt of a final report of the Board, the Supreme Court shall issue the respondent an order to show cause why the report of the Board shall not be confirmed and a disciplinary order entered. Notice of the order to show cause shall be served by the clerk of the Supreme Court on the respondent and all counsel of record personally or by

certified mail. The clerk shall not issue a show cause order upon receipt of a report recommending the acceptance of a consent to discipline agreement.

(B) Response to Show Cause Order. Within twenty days after the issuance of an order to show cause, the respondent or relator may file objections to the findings or recommendations of the Board and to the entry of a disciplinary order or to the confirmation of the report on which the order to show cause was issued. The objections shall be accompanied by a brief in support of the objections and proof of service of copies of the objections and the brief on the director of the Board and all counsel of record. Objections and briefs shall be filed in the number and form required by the Rules of Practice of the Supreme Court of Ohio.

(C) Answer Briefs. Answer briefs and proof of service shall be filed within fifteen days after briefs in support of objections have been filed. All briefs shall be filed in the number and form required by the Rules of Practice of the Supreme Court of Ohio.

(D) Supreme Court Proceedings. After consideration of a matter submitted to it, the Supreme Court shall enter an order as it finds proper. If the Court rejects a consent to discipline agreement submitted pursuant to Section 16 of this rule, the Court shall remand the matter to the Board for further proceedings. Unless otherwise ordered by the Court, any disciplinary order or order accepting resignation shall be effective on the date that the order is announced. The order may provide for reimbursement of costs and expenses certified by the Board. An order imposing a suspension for an indefinite period or for a period of six months to two years may allow full or partial credit for any period of suspension imposed under Section 18 of this rule.

(1) Notice. Upon the entry of any disciplinary order pursuant to this rule or the acceptance of a resignation from the practice of law, the clerk of the Supreme Court shall mail certified copies of the entry or acceptance to counsel of record, to the Board, to respondent at his or her last known address, to the Office of Disciplinary Counsel, to the certified grievance committee for and the local bar association of the county or counties in which the respondent resides and maintains an office and the county or counties from which the complaint arose, to the Ohio State Bar Association, to the administrative judge of the court of common pleas for each county in which the respondent resides or maintains an office, and to the chief judges of the United States District Courts in Ohio, the United States Court of Appeals for the Sixth Circuit, to the disciplinary authority of any other jurisdiction in which the respondent is known to be admitted, and to the Supreme Court of the United States.

(2) Publication. Except as provided in Section 15 of this rule, the Supreme Court Reporter shall publish any disciplinary order or acceptance of a resignation from the practice of law entered by the Supreme Court under this rule in the *Ohio Official Reports*. The publication shall include the citation of the case in which the disciplinary order or the acceptance of a resignation was issued.

Section 18. Interim Suspension for a Felony Conviction or Default Under a Child Support Order.

(A)(1) Interim Suspension. A judicial officer or an attorney admitted to the practice of law in Ohio shall be subject to an interim suspension under either of the following circumstances:

(a) The judicial officer or attorney is convicted in Ohio of a felony or of an equivalent offense under the laws of any other state or federal jurisdiction;

(b) A final and enforceable determination has been made pursuant to Chapter 3123. of the Revised Code that the judicial officer or attorney is in default under a child support order.

(2) A certified copy of the entry of conviction of a judicial officer or an attorney of a felony offense shall be transmitted within ten days of the date of the entry by the judge entering the judgment to the director of the Board and to the Office of Disciplinary Counsel or the president, secretary, or chair of the geographically appropriate certified grievance committee. A certified copy of the court or child support enforcement agency determination that a judicial officer or attorney is in default under a child support order shall be transmitted as provided in R.C. 4705.021.

(3) Upon receipt from any source of a certified copy of the entry of conviction or of the determination of default under a child support order, the director promptly shall submit the entry or determination to the Supreme Court. The entry shall be submitted whether the conviction resulted from a plea of guilty or nolo contendere, from a verdict after trial, or otherwise and regardless of the pendency of an appeal.

(4) The Supreme Court may enter an order as it considers appropriate, including an order immediately suspending the judicial officer or attorney from the practice of law pending further proceedings pursuant to these rules.

(B) Conclusive Evidence. A certified copy of the entry of conviction of an offense or of a determination of default under a child support order shall be conclusive evidence of the commission of that offense or of the default in any disciplinary proceedings instituted against a judicial officer or an attorney based upon the conviction or default.

(C) Time for Hearing. Any disciplinary proceeding instituted against a judicial officer or an attorney based on a conviction of an offense or on default under a child support order shall not be brought to hearing until all direct appeals from the conviction or proceedings directly related to the default determination are concluded.

(D)(1) Reinstatement. A judicial officer or an attorney suspended under this rule or Rule II of the Supreme Court Rules for the Government of the Judiciary of Ohio shall be reinstated by the Supreme Court upon the filing with and submission to the Supreme Court by the director of any of the following:

(a) A certified copy of an entry reversing the conviction of the offense;

(b) A certified copy of an entry reversing the determination of default under a child support order;

(c) A notice from a court or child support enforcement agency that the judicial officer or attorney is no longer in default under a child support order or is subject to a withholding or deduction notice or a new or modified child support order to collect current support or any arrearage due under the child support order that was in default and is complying with that notice or order.

(2) Reinstatement shall not terminate any pending disciplinary proceeding.

(E) Duty of Clerk on Entering Order. Upon the entry of an order suspending or reinstating a judicial officer or an attorney pursuant to this section, the clerk of the Supreme Court shall mail certified copies of the order as provided in Section 17 of this rule.

Section 19. Interim Remedial Suspension.

(A)(1) Motion; Response. Upon receipt of substantial, credible evidence demonstrating that a judicial officer or attorney has committed a violation of the Code of Judicial Conduct or Ohio Rules of Professional Conduct and poses a substantial threat of serious harm to the public, the Office of Disciplinary Counsel or appropriate certified grievance committee shall do both of the following:

(a) Prior to filing a motion for an interim remedial suspension, make a reasonable attempt to provide the judicial officer or attorney with notice, which may include notice by telephone, that a motion requesting an order for an interim remedial suspension will be filed with the Supreme Court.

(b) File a motion with the Supreme Court requesting that the Court order an interim remedial suspension. The Office of Disciplinary Counsel or appropriate certified grievance committee shall include, in its motion, proposed findings of fact, proposed conclusions of law, and other information in support of the requested order. Evidence relevant to the requested order shall be attached to or filed with the motion. The motion may include a request for an immediate, interim remedial suspension pursuant to the Rules of Practice of the Supreme Court of Ohio. The motion shall include a certificate detailing the attempts made by the relator to provide advance notice to the respondent of the relator's intent to file the motion. The motion also shall include a certificate of service on the respondent at the most recent address provided by the respondent to the Office of Attorney Services and at the last address of the respondent known to the relator, if different.

(2) After the filing of a motion for an interim remedial suspension, the respondent may file a memorandum opposing the motion in accordance with the Rules of Practice of the Supreme Court of Ohio. The respondent shall attach to or file with the memorandum any rebuttal evidence.

(B) Order. Upon consideration of the motion and any memorandum opposing the motion, the Supreme Court may enter an interim remedial order immediately suspending the respondent, pending final disposition of disciplinary proceedings predicated on the conduct threatening the serious harm or may order other action as the Court considers appropriate. If requested by the relator, the Supreme Court may order an immediate interim remedial suspension, prior to receipt of a memorandum opposing the relator's motion, pursuant to the Rules of Practice of the Supreme Court of Ohio. If an order is entered pursuant to this division, an attorney may be appointed pursuant to Section 26 of this rule to protect the interest of the suspended attorney's clients.

(C)(1) Motion for Dissolution or Modification of the Suspension. The respondent may request dissolution or modification of the order of suspension by filing a motion with the Supreme Court. The motion shall be filed within thirty days of entry of the order imposing the suspension, unless the respondent first obtains leave of the Supreme Court to file a motion beyond that time. The motion shall include a statement and all available evidence as to why the respondent no longer poses a substantial threat of serious harm to the public. A copy of the motion shall be served by the respondent on the relator. The relator shall have ten days from the date the motion is filed to file a response to the motion. The Supreme Court promptly shall review the motion after a response has been filed or after the time for filing a response has passed.

(2) In addition to the motion allowed by division (C)(1) of this section, the respondent may file a motion requesting dissolution of the interim remedial suspension order, alleging that one hundred eighty days have elapsed since the entry of the order and the relator has failed to file with the Board a formal complaint predicated on the conduct that was the basis of the order. A copy of the motion shall be served by the respondent on the relator. The relator shall have ten days from the date the motion is filed to file a response to the motion. The Supreme Court promptly shall review the motion after a response has been filed or after the time for filing a response has passed.

(D) Procedure. The Rules of Practice of the Supreme Court of Ohio shall apply to interim remedial suspension proceedings filed pursuant to this section.

(E) Duty of Clerk on Entering Order. Upon the entry of an order suspending or reinstating the respondent pursuant to this section, the clerk of the Supreme Court shall mail certified copies of the order as provided in Section 17 of this rule.

Section 20. Reciprocal Discipline.

(A) Notification of Disciplinary Action. Within thirty days of the issuance of a disciplinary order in another jurisdiction, an attorney admitted to the practice of law in Ohio shall provide written notification to the Office of Disciplinary Counsel and the clerk of the Supreme Court of the action. Upon receiving notice from the attorney or another party that an attorney admitted to the practice of law in Ohio has been subjected to discipline in another jurisdiction, the Office of Disciplinary Counsel shall obtain a certified copy of the disciplinary order and file the copy with the clerk of the Supreme Court.

(B)(1) Show Cause Order. Upon receipt of a certified copy of an order demonstrating that an attorney admitted to the practice of law in Ohio has been subjected to discipline in another jurisdiction, the Supreme Court shall issue a notice directed to the attorney containing both of the following:

(a) A copy of the order from the other jurisdiction;

(b) An order directing that the attorney notify the Supreme Court, within twenty days from the service of notice, of any claim by the attorney predicated upon the grounds set forth in division (C)(1) of this section that the imposition of the identical or comparable discipline in Ohio would be unwarranted and the reasons for that claim.

(2) If the attorney files a response to a show cause order, Office of Disciplinary Counsel or a certified grievance committee may file a reply to the response within fifteen days.

(C) Disposition.

(1) After service of the notice issued pursuant to division (B)(1) of this section, the Supreme Court shall impose the identical or comparable discipline imposed in the other jurisdiction, unless the attorney proves either of the following by clear and convincing evidence:

(a) A lack of jurisdiction or fraud in the other jurisdiction's disciplinary proceeding;

(b) That the misconduct established warrants substantially different discipline in Ohio.

(2) Reciprocal discipline may be imposed even if the term of the attorney's discipline in the other jurisdiction has expired. In determining whether to impose reciprocal discipline after the attorney's discipline in the other jurisdiction has expired, the Supreme Court may consider whether the attorney provided timely written notification pursuant to division (A) of this section and, if the attorney delayed in providing written notification, whether the delay in notification was caused by factors beyond the attorney's control.

(3) Reciprocal discipline shall be effective on the date it is announced by the Supreme Court.

(D) Res Judicata. In all other respects, a final adjudication in another jurisdiction that an attorney has been subjected to discipline shall establish conclusively the misconduct for purposes of a disciplinary proceeding in Ohio.

(E) Enhancement of Sanction. If an attorney fails to report to the Office of Disciplinary Counsel and to the clerk of the Supreme Court that he or she has been subjected to discipline in another jurisdiction, the Supreme Court may enhance the sanction that it would have imposed had the attorney complied with division (A) of this section.

(F) Court Discretion. The Supreme Court may make its determination under this section from the pleadings filed, or may permit or require briefs or a hearing or both.

Section 21. Probation Procedures.

(A) Supervision. If the disciplinary order entered by the Supreme Court imposes a term of probation, the relator shall do all of the following:

(1) Supervise the term and conditions of probation;

(2) Maintain the probation file;

(3) Appoint, in any manner it considers appropriate, one or more monitoring attorneys who are admitted to the practice of law in Ohio and in good standing and are not members of a certified grievance committee or counsel for the relator and select one or more replacement monitoring attorneys, if necessary;

(4) Receive reports from the monitoring attorneys;

(5) Investigate reports of probation violations.

(6) If the probation involves recovery from a disorder, select as one of the monitoring attorneys a person designated by a committee or subcommittee of a bar association, or by a non-profit corporation established by a bar association, designed to assist lawyers with disorders, which person shall satisfy the requirements of division (A)(3) of this section and who shall monitor compliance with only that portion of the term of probation involving recovery from a disorder.

(B) Monitoring. The monitoring attorney shall, with respect to those aspects of the terms of probation assigned to that attorney, do all of the following:

(1) Monitor compliance by the respondent with the conditions of probation imposed by the Supreme Court;

(2) File with the relator, at least quarterly or as otherwise determined by the relator, written, certified reports regarding the status of the respondent and compliance with the conditions of probation;

(3) Immediately report to the relator any violations by the respondent of the conditions of probation.

(C) Duties of Respondent. The respondent shall do all of the following:

(1) Have a personal meeting with the monitoring attorneys at least once each month during the first year of probation, and at least quarterly thereafter, unless the monitoring attorneys require more frequent meetings;

(2) Provide the monitoring attorneys with a written release or waiver, on a form approved by the Board, for use in verifying compliance regarding medical, psychological, or other treatment and attendance at self-help programs;

(3) Cooperate fully with the efforts of each monitoring attorney to monitor the respondent's compliance.

(D) Termination of Probation. At the expiration of the probation period, the respondent shall apply for termination of probation. The application shall be in writing and filed with the clerk of the Supreme Court. The application shall indicate the date probation was ordered, include an affidavit by respondent stating that the respondent has complied with the conditions of probation, indicate whether any formal disciplinary proceedings are pending against the respondent, and request termination of probation. The Supreme Court shall order the termination of probation if all costs of the proceedings as ordered by the Supreme Court have been paid, the respondent has complied with the conditions of probation, and no formal disciplinary proceedings are pending against the respondent. The clerk of the Supreme Court shall provide notice of the termination of probation to all persons and organizations who received copies of the disciplinary order pursuant to Section 17 of this rule.

(E) Violation of Probation; Authority and Duty of Relator. The relator immediately shall investigate any report of a violation of the conditions of probation by the respondent. If it finds probable cause to believe that a significant or continuing violation of the conditions of probation has occurred, it shall notify the respondent of the report of probation violation and provide an opportunity to respond to the report. Thereafter, if warranted, the relator shall file a petition for the revocation of probation, reinstatement of any stayed suspension, and citation for contempt with the director of the Board within thirty days after its receipt of the report, in the same manner as provided in Section 10 of this rule. If, upon investigation of a report of a violation of probation, the relator determines that the filing of a petition for revocation of probation with the director of the Board is not warranted, the person reporting the alleged violation of probation shall be notified in writing of that determination.

(F) Duty of the Board upon Filing of Petition. Upon receipt of a petition for revocation of probation, the director of the Board shall send a copy of the petition by certified mail to the respondent with a notice requiring the respondent to file, within ten days after the mailing of the notice, six copies of the respondent's answer and serve copies on counsel of record. Extensions of time for the filing of the answer may be granted by the director of the Board for good cause shown.

(G) Hearing by Panel; Motion for Default.

(1) After the respondent has filed an answer, a formal hearing shall be held by a panel of three commissioners appointed in the same manner as provided in Section 12 of this rule. The panel shall conduct a hearing only on the issue of probation violation within thirty days after the answer date set forth in the notice to the respondent of the filing of the petition or any extension of the answer date.

(2) If no answer has been filed by the respondent within ten days after the answer date set forth in the notice to the respondent of the filing of the petition or any extension of the answer date, relator shall file a motion for default in accordance with Section 14 of this rule. If a motion for default is granted, the panel forthwith shall make its certified report to the Supreme Court, pursuant to division (H) of this section.

(H) Certification of Panel Report. If the panel determines by clear and convincing evidence that the respondent is guilty of a significant or continuing violation of the conditions of probation, the panel shall make a certified report of the proceedings before it, including findings of fact and recommendations, and shall file the report, together with the transcript of testimony taken or, in the case of a default, the documentary evidence received, and an itemized statement of the actual and necessary expenses incurred in connection with the proceedings, with the clerk of the Supreme Court. The panel promptly shall notify the respondent and all counsel of record of its action, enclosing with the notice a copy of the findings of fact and recommendations and a copy of the statement of the actual and necessary expenses incurred. If the panel finds that the evidence is insufficient to support a charge of a violation of probation, the panel shall order that the petition for revocation of probation be dismissed. The panel shall report its action to the director of the Board who shall give written notice of the action taken to those persons and organizations identified in Section 12 of this rule.

(I) Reinstatement of Stayed Suspension. On the filing of the final certified report by the panel, the Supreme Court may issue to the respondent an order reinstating any period of suspension previously stayed by the Supreme Court, pending the entry of a final order by the Supreme Court. Notice of an order reinstating any period of suspension previously stayed shall be served personally or by certified mail by the clerk of the Supreme Court on the respondent and all counsel of record.

(J) Show Cause Order; Objections; Answer Briefs. On the filing of the final certified report of the panel, the Supreme Court shall issue to the respondent an order to show cause in accordance with Section 17 of this rule. Any response or objections to the order to show cause, and any answer briefs, shall be filed in accordance with Section 17 of this rule.

(K) Review by Court. After a hearing on objections, or if objections are not filed within the prescribed time, the Supreme Court shall enter an order as it finds proper in accordance with Section 17 of this rule. If the Supreme Court finds that the respondent has not violated the conditions of probation, the Supreme Court shall issue an order that does all of the following:

(1) Dismisses the matter;

(2) Reinstates the respondent to the practice of law, if the Supreme Court suspended the respondent pursuant to division (I) of this section;

(3) Reinstates any remaining period of probation, subject to any full or partial credit allowed by the Supreme Court for any period of suspension imposed under division (I) of this section.

(L) Reimbursement of Expenses. A monitoring attorney may be reimbursed from the Attorney Services Fund for direct expenses incurred by the monitoring attorney in performing the obligations imposed on the monitoring attorney by this section. Reimbursement shall be limited to necessary costs for copies of documents, travel expenses, postage, and long distance telephone charges. No reimbursement shall be allowed for the cost of the time of the monitoring attorney or other personnel in discharging these obligations. Reimbursement shall be made on submission to the director of the Board of proof of expenditures.

Section 22. Duties of a Disbarred or Suspended Attorney.

(A) Content of Supreme Court Order. In its order disbarring or suspending an attorney or in any order pertaining to the resignation of an attorney, the Supreme Court shall include a time limit, not to exceed thirty days, within which the disqualified attorney shall do all of the following:

(1) Notify all clients being represented in pending matters and any co-counsel of his or her disbarment, suspension, or resignation and consequent disqualification to act as an attorney after the effective date of the order, and, in the absence of co-counsel, notify the clients to seek legal service elsewhere, calling attention to any urgency in seeking the substitution of another attorney in his or her place;

(2) Regardless of any fees or expenses due the attorney, deliver to all clients being represented in pending matters any papers or other property pertaining to the client, or notify the clients or co-counsel, if any, of a suitable time and place where the papers or other property may be obtained, calling attention to any urgency for obtaining the papers or other property;

(3) Refund any part of any fees or expenses paid in advance that are unearned or not paid and account for any trust money or property in his or her possession or control;

(4) Notify opposing counsel or, in the absence of counsel, the adverse parties in pending litigation, of his or her disqualification or resignation to act as an attorney after the effective date of the disqualification order and file a notice of disqualification of counsel with the court or agency before which the litigation is pending for inclusion in the respective file or files.

(B) Disqualified Attorney Address. All notices required by a disciplinary order of the Supreme Court shall be sent by certified mail and contain a return address where communications may be directed to the disqualified attorney.

(C) Affidavit. Within the time limit prescribed by the Supreme Court, the disqualified attorney shall file with the clerk of the Supreme Court and the Office of Disciplinary Counsel an affidavit showing compliance with the order entered pursuant to this rule and proof of service of notices required by the order. The affidavit also shall set forth the address where the affiant may receive communications and the disqualified attorney shall inform the clerk and the Office of Disciplinary Counsel of any subsequent change in address.

(D) Proof of Compliance. A disqualified attorney shall maintain a record of the various steps taken pursuant to the order entered by the Supreme Court so that, in any subsequent proceeding, proof of compliance with the order will be available for receipt in evidence.

Section 23. Employment of a Disqualified or Suspended Attorney.

(A) General Prohibitions. A disqualified or suspended attorney shall not do either of the following:

(1) Have any direct client contact, other than serving as an observer in any meeting, hearing or interaction between an attorney and a client;

(2) Receive, disburse, or otherwise handle client trust funds or property.

(B) Prohibited Relationships. On or after September 1, 2008, a disqualified attorney shall not enter into an employment, contractual, or consulting relationship with an attorney or law firm with which the disqualified attorney was associated as a partner, shareholder, member, or employee at the time the attorney engaged in misconduct that resulted in his or her disqualification from the practice of law.

(C) Registration of Relationship. An attorney or law firm seeking to enter into an employment, contractual, or consulting relationship with a disqualified or suspended attorney shall register the employment, contractual, or consulting relationship with the Office of Disciplinary Counsel. The registration shall be on a form provided by the Office of Disciplinary Counsel and shall include all of the following:

(1) The name of and contact information for the disqualified or suspended attorney;

(2) The name of and contact information for the attorney or law firm seeking to enter into the relationship with the disqualified or suspended attorney;

(3) The name of and contact information for the attorney responsible for directly supervising the disqualified or suspended attorney, if different than the attorney identified in division (C)(2) of this section;

(4) The capacity in which the disqualified or suspended attorney will be employed, including a description of duties to be performed or services to be provided;

(5) An affidavit executed by either the attorney filing the registration or the supervising attorney indicating that the attorney has read the Supreme Court's order disbarring, accepting the resignation of, or suspending the attorney to be employed and understands the limitations contained in that order;

(6) Any other information considered necessary by the Office of Disciplinary Counsel.

(D) Written Acknowledgement. Upon receipt of a completed registration form, the Office of Disciplinary Counsel shall send a written acknowledgement to the attorney or law firm that filed the registration form and any supervising attorney identified on the form. Upon receipt of the written acknowledgement, the employment, contractual, or consulting relationship may commence.

(E) Amendments to Registration. An attorney who registers the employment of a disqualified or suspended attorney shall file an amended registration form with the Office of Disciplinary Counsel when there is any material change in the information provided on a prior registration form and shall notify the Office of Disciplinary Counsel upon termination of the employment, contractual, or consulting relationship.

(F) Notice to Clients. If a disqualified or suspended attorney will perform work or provide services in connection with any client matter, the employing attorney or law firm shall inform the client of the status of the disqualified or suspended attorney. The notice shall be in writing and provided to the client before the disqualified or suspended attorney performs any work or provides any services in connection with the client matter.

Section 24. Reinstatement Proceedings; Term or Interim Suspension.

(A) Application for Reinstatement. Upon the dissolution of an interim remedial suspension imposed pursuant to Section 19 of this rule or expiration of a suspension for a period of six months to two years, including any period that the order of the Supreme Court has allowed as a credit for a suspension imposed under Section 18 of this rule, the respondent may apply for reinstatement to the practice of law.

(B) Contents of Application. The application shall be in writing and filed with the clerk of the Supreme Court with the number of copies required by the Rules of Practice of the Supreme Court of Ohio. The application shall include the date the suspension was ordered and a request for reinstatement. The application shall be accompanied by an affidavit executed by the respondent indicating all of the following:

(1) Whether any formal disciplinary proceedings are pending against the respondent;

(2) Whether the respondent has completed a term of probation, community control, intervention in lieu of conviction, or any sanction imposed as part of a sentence for a felony conviction;

(3) Whether the respondent has complied with the continuing legal education requirements of Gov. Bar R. X.

(C) Requisites for Reinstatement. The Supreme Court shall order the respondent reinstated if all of the following conditions are satisfied:

(1) All costs of the proceedings as ordered by the Supreme Court have been paid;

(2) The respondent has complied with the order of suspension;

(3) The respondent has complied with the continuing legal education requirements of Gov. Bar R. X;

(4) No formal disciplinary proceedings are pending against the respondent;

(5) The respondent has completed a term of probation, community control, intervention in lieu of conviction, or any sanction imposed as part of a sentence for a felony conviction.

(D) Reinstatement Prior to Completion of Probation or Other Sanction. Notwithstanding the requirement of division (C)(5) of this section, the respondent may apply for reinstatement prior to completing a term of probation, community control, intervention in lieu of conviction, or sanction imposed as part of a sentence for a felony conviction if the disciplinary order issued pursuant to Section 17 authorizes such an application. If an application is authorized, the application shall be in the form and content specified in division (A) of this section and shall include an affidavit from the trial judge, dated not more than thirty days prior to the date the application is filed, as evidence that the respondent is in compliance with the terms and conditions of probation, community control, intervention in lieu of conviction, or sanction imposed as part of a sentence for a felony conviction.

(E) Notice. The clerk of the Supreme Court shall provide notice of the reinstatement to all persons or organizations who received copies of the Supreme Court disciplinary order of suspension pursuant to Section 17 of this rule.

Section 25. Reinstatement Proceedings; Indefinite Suspension.

(A) Petition for Reinstatement. No petition for reinstatement to the practice of law may be filed or entertained by the Supreme Court within two years of either of the following:

(1) The entry of an order suspending the petitioner from the practice of law for an indefinite period, including any period that the order of the Supreme Court imposing the suspension has allowed as a credit for a suspension imposed under Section 18 of this rule;

(2) The denial of a petition for reinstatement to the practice of law filed by the petitioner.

(B) Contents of Petition for Reinstatement. Except as provided in division (A) of this section, a person who has been suspended from the practice of law for an indefinite period and who wishes to be reinstated may file with the clerk of the Supreme Court a verified petition and the number of copies of the petition as required by the Rules of Practice of the Supreme Court of Ohio. The petition shall include all of the following:

(1) The date on which the suspension was ordered and, if there was a reported opinion, a citation to the opinion;

(2) The dates on which all prior petitions for reinstatement were filed and denied or granted;

(3) The names of all persons and organizations, except the petitioner and the Board, who were or would be entitled under this rule to receive from the clerk of the Supreme Court certified copies of the disciplinary order of the Supreme Court against petitioner resulting in his or her suspension, the name of the bar association of the county or counties in which he or she resides at the time of the filing of the petition and of each county in which he or she proposes to maintain an office if reinstated, and the Ohio State Bar Association;

(4) An affidavit executed by the petitioner indicating whether the petitioner has any formal disciplinary proceedings pending, has complied with the continuing legal education requirements of Gov. Bar R. X, and has completed a term of probation, community control, intervention in lieu of conviction, or any sanction imposed as part of a sentence for a felony conviction;

(5) The facts upon which the petitioner relies to establish by clear and convincing evidence that he or she possesses all the mental, educational, and moral qualifications that were required of an applicant for admission to the practice of law in Ohio at the time of his or her original admission and that he or she is now a proper person to be readmitted to the practice of law in Ohio, notwithstanding the previous disciplinary action.

(C) Costs to be Deposited with Petition for Reinstatement. A petition for reinstatement shall be accompanied by a deposit, in an amount fixed by the clerk, for probable costs and expenses to be incurred in connection with the proceedings. The costs shall include any amounts unpaid under any prior order of the Supreme Court and any amounts owed to the Lawyers' Fund for Client Protection for reimbursement of an award made pursuant to Gov. Bar R. VIII as the result of petitioner's misconduct.

(D)(1) Requisites for Reinstatement. The petitioner shall not be reinstated unless he or she establishes all of the following by clear and convincing evidence to the satisfaction of the panel hearing the petition for reinstatement:

(a) That the petitioner has made appropriate restitution to the persons who were harmed by his or her misconduct;

(b) That the petitioner possesses all of the mental, educational, and moral qualifications that were required of an applicant for admission to the practice of law in Ohio at the time of his or her original admission;

(c) That the petitioner has complied with the order of suspension;

(d) That the petitioner has complied with the continuing legal education requirements of Gov. Bar R. X;

(e) That the petitioner has completed a term of probation, community control, intervention in lieu of conviction, or any sanction imposed as part of a sentence for a felony conviction;

(f) That the petitioner is now a proper person to be readmitted to the practice of law in Ohio, notwithstanding the previous disciplinary action.

(2) Notwithstanding provisions of this section to the contrary, the petitioner may file and the Board may consider a reinstatement petition from a petitioner prior to completing a term of probation, community control, intervention in lieu of conviction, or any sanction imposed as part of a sentence for a felony conviction. In addition to the requirements of division (B) of this section, the reinstatement petition shall include an affidavit from the trial judge, dated not more than thirty days prior to the date the petition is filed, as evidence that the respondent is in compliance with the terms and conditions of probation, community control, intervention in lieu of conviction, or sanction imposed as part of a sentence for a felony conviction and shall include the facts upon which the petitioner relies to establish by clear and convincing evidence that the petitioner should be reinstated to the practice of law in Ohio while subject to a term of probation, community control, intervention in lieu of conviction, or sanction imposed as part of a sentence for a felony conviction. The Board shall not recommend reinstatement of the petitioner unless it finds by clear and convincing evidence that good cause exists for waiving the reinstatement requirement of division (D)(1)(e) of this section and details that finding in its final report.

(E) Petition for Reinstatement Referred to Board. Unless denied forthwith for insufficiency in form or substance, the clerk shall forward five copies of the petition to the director of the Board. The Board shall conduct a hearing or hearings and take and report evidence relevant to the rehabilitation of the petitioner and his or her possession of all the mental, educational, and moral qualifications required of an applicant for admission to the practice of law in Ohio at the time of his or her original admission.

(F) Hearing of Petition; Appeal.

(1) Appointment of Panel. The director, by lot, shall appoint a hearing panel of three commissioners, none of whom shall be a resident of the appellate district in which the petitioner resides or of the appellate district in which the petitioner resided at the time of suspension. The director shall appoint an attorney or judge commissioner as chair of the panel, and the panel shall conduct a hearing on the petition.

(2) Notice; Hearing. The Board shall provide reasonable notice of any hearing to the petitioner or counsel for the petitioner and to all persons or organizations referred to in division (B)(3) of this section. Hearings shall be public and any interested person, member of the bar, and the Office of Disciplinary Counsel may appear before the hearing panel in support of or opposition to the petition.

(3) Referral to Disciplinary Counsel. If a certified grievance committee of a bar association referred to in division (B)(3) of this section determines that matters relating to petitioner's qualifications for reinstatement are sufficiently serious and complex as to require the assistance of Office of Disciplinary Counsel, the chair of the committee shall direct a written request for assistance to the Office of Disciplinary Counsel. The Office of Disciplinary Counsel shall investigate all referred matters and report the results of the investigation to the committee that requested it.

(4) Panel Report. The hearing panel shall make and certify a report to the Board of the proceedings before it, including its findings of fact and recommendations. All proceedings before the panel and the Board, whenever appropriate, shall be governed by the provisions of this rule governing disciplinary proceedings, including proceedings in the Supreme Court for an issuance of an order to show cause why the final report of the Board should not be confirmed.

(5) Conditional Grant; Denial; Appeal. The Board may recommend that the petitioner be required to take and pass a regular bar examination of the Supreme Court as a condition to readmission. If the final report recommends denial of the petition, the petitioner shall have twenty days from receipt of notice of the date of filing the report to file objections and a brief in support of the objections.

(6) Grant of Petition; Appeal. If the final report recommends granting the petition, any person or organization referred to in division (B)(3) of this section shall have twenty days from the receipt of notice of filing of the report to file objections to the recommendations and a brief in support of the objections. The Supreme Court shall enter an appropriate order that may include provisions for reimbursement of the costs and expenses incurred in connection with the proceedings. The order of reinstatement may be subject to conditions the Supreme Court considers appropriate including, but not limited to, requiring the petitioner to serve a period of probation under Section 21 of this rule on conditions the Supreme Court determines and requiring the petitioner to subsequently take and pass a regular bar examination of the Supreme Court and take the oath of office.

Section 26. Appointed Attorney to Inventory Files.

(A) Appointment. When an attorney dies, is suspended pursuant to Section 15 of this rule, fails to comply with Section 22 of this rule, or otherwise abandons his or her client files and no partner, executor, or other responsible party capable of conducting the attorney's affairs is available and willing to assume appropriate responsibility, disciplinary counsel or the chair of a certified grievance committee may appoint one or more attorneys to inventory the files of an attorney and take action, including the actions set forth in Section 22, as is necessary to protect the interest of clients of the attorney. An attorney is considered to have abandoned client files if the attorney has had no contact with the files or has not responded to inquiries about the files and either is incapacitated, has disappeared and, through reasonable efforts, cannot be found or contacted, or has been deported.

(B) Request for Appointment. Prior to making an appointment pursuant to division (A) of this section, the chair of a certified grievance committee shall submit a written request to the director of the Board for approval of the appointment and the fees to be charged by the appointed attorney. The appointed attorney shall submit an invoice, signed by the chair of the certified grievance committee, to the director of the Board for payment of fees. Upon receipt of a proper invoice, the director shall pay the fees from the Attorney Services Fund.

(C) Recovery of Costs. If the attorney whose files are inventoried has been disciplined or has resigned with discipline pending, the director or disciplinary counsel may certify the fees and expenses incurred in connection with the inventory to the Supreme Court and request that the Court issue an order directing the attorney to repay the fees and expenses incurred. If the attorney whose files are inventoried has died, the director or disciplinary counsel may file a claim, with the assistance of the Attorney General, against the estate of the deceased attorney to recover the fees and expenses incurred in connection with the inventory. Any moneys repaid or recovered pursuant to this division shall be deposited in the Attorney Services Fund.

(D) Confidentiality; Disqualification. Except as necessary to carry out the order of appointment by disciplinary counsel or chair of a certified grievance committee, the appointed attorney or attorneys shall not disclose any information contained in inventoried files without the written consent of the client to whom the files relate. An appointed attorney may not represent that client.

(E) Destruction of Inventoried Files. Seven years after completing an inventory of abandoned files, the Office of Disciplinary Counsel or a certified grievance committee may destroy abandoned files other than original legal documents such as deeds or unprobated wills. Before destroying any abandoned files, the Office of Disciplinary Counsel or a certified grievance committee shall make a reasonable effort to return files to the clients. File destruction shall be conducted in a manner that protects client confidentiality.

Section 27. Applicability of Rules; Special Service; Construction of Rule.

(A) Applicability of Rules. The Board and hearing panels shall follow the Ohio Rules of Civil Procedure and the Ohio Rules of Evidence wherever practicable unless a specific provision of this rule or Board hearing procedures and guidelines provides otherwise.

(B) Clerk is Agent for Service of Notices on Nonresident Judicial Officer or Attorney. Any nonresident of this state, having been admitted as an attorney by the rules of the Supreme Court, or any resident of this state, having been admitted as an attorney by the rules of the Supreme Court, who subsequently becomes a nonresident or conceals his or her whereabouts, by such admission to the practice of law within this state makes the clerk of the Supreme Court his or her agent for the service of any notice provided for in any proceeding instituted against such judicial officer or attorney, pursuant to this rule.

(C) Rule to be Liberally Construed. The process and procedure under this rule and regulations approved by the Supreme Court shall be as summary as reasonably may be.

Amendments to any notice, answer, objections, report, or order to show cause may be made at any time prior to final order of the Supreme Court. The party affected by an amendment shall be given reasonable opportunity to meet any new matter presented. No investigation or procedure shall be held to be invalid by reason of any nonprejudicial irregularity or for any error not resulting in a miscarriage of justice. This rule and regulations relating to investigation and proceedings involving complaints of misconduct and petitions for reinstatement shall be construed liberally for the protection of the public, the courts, and the legal profession and shall apply to all pending investigations and complaints so far as may be practicable and to all future investigations, complaints, and petitions whether the conduct involved occurred prior or subsequent to the amendment of this rule. To the extent that application of this amended rule to pending proceedings may not be practicable, the regulations in force at the time this amended rule became effective shall continue to apply.

Sections 28-34. RESERVED

Section 35. Definitions.

As used in this rule:

(A) "Alcohol and other drug abuse" has the same meaning as in R.C. 5119.90 [Involuntary Treatment].

(B) "Approved treatment program" means a chemical dependency treatment program approved by a state agency, Ohio Lawyers Assistance Program, or other appropriate authority.

(C) "Complaint" means a formal written allegation of misconduct, mental illness, mental disorder, substance use disorder, or nonsubstance-related disorder of a person designated as the respondent.

(D) "Confidential" acknowledges the oath of office of Sections 1, 4, and 5 of this rule, the necessity of confidentiality of all proceedings, documents, and deliberations of a certified grievance committee, the Office of Disciplinary Counsel, and the Board and its hearing panels.

(E) "Disorder" means a mental disorder, substance use disorder, or nonsubstance-related disorder.

(F) "Disqualified attorney" means a former attorney who has been disbarred or who has resigned with discipline pending.

(G) "Judicial officer" means any person who is subject to the Code of Judicial Conduct as set forth in the Application section of that code.

Board Rules & Regulations

APPENDIX II

PROCEDURAL REGULATIONS OF THE BOARD OF PROFESSIONAL CONDUCT OF THE SUPREME COURT OF OHIO

Reg. 1. Pleadings and Motions.

(A) Motions. Within the period of time permitted for an answer to the complaint, the respondent may file any motion appropriate under Civ. R. 12, supported by a brief and affidavits if necessary. A brief and affidavits, if appropriate, in opposition to such motion may be filed within fourteen days after service of such motion, unless a shorter or longer period is ordered by the chair of the Board or a hearing panel. No oral hearing will be granted, and rulings of the Board will be made by the chair or vice-chair of the Board or any commissioner designated by the director of the Board. All motions shall be made in accordance with Gov. Bar R. V and this regulation.

(B) Extensions of time. For good cause, the Board chair, or, after appointment of a panel, the chair or judge or lawyer commissioner appointed to the panel may grant extensions of time for the filing of any pleading, motion, brief or affidavit, either before or after the time permitted for filing. No extension of time may be requested or granted to file a consent to discipline agreement beyond the time set forth in Gov. Bar R. V, Section 16.

(C) Withdrawal of Counsel. Counsel seeking to withdraw from a pending case in which a hearing has been scheduled shall file a motion to withdraw. In the case of counsel for the respondent or petitioner, the motion shall include a certification that a copy of the motion to withdrawal has been provided to the respondent or petitioner and that withdrawing counsel has complied or will comply with the applicable requirements of Prof. Cond. R. 1.16. The panel chair may conduct a hearing or phone conference prior to ruling on the motion.

(D) Proof of Service. Every pleading after the complaint shall show proof of service.

Reg. 2. Miscellaneous Procedures.

(A) Depositions taken in disciplinary proceedings shall be filed with the director as prescribed in Civ. R. 32.

(B) If relator and respondent stipulate to facts, the panel chair or a judge or lawyer commissioner member of the panel may either cancel a hearing and deem the matter submitted in writing or order that a hearing be held with all counsel and the respondent present.

(C) Notwithstanding the agreement of relator and respondent on a stipulated violation or recommended sanction, neither the hearing panel nor the Board is bound by the joint recommendation. The panel retains discretion to make a recommendation to the Board, and the Board retains discretion to make a final recommendation to the Supreme Court on the violation or appropriate sanction.

Reg. 3. Filings; Required Number of Copies; Exhibits; Manner of Service.

(A) All pleadings, motions, briefs, stipulations, consent to discipline agreements, and other documents shall be filed with the director of the Board and contain a certificate of service. The certificate of service shall include a statement that service has been made on the opposing party and the manner of service and shall indicate whether the document has been served on the panel and, if so, the manner of service.

(B) Complaints shall be filed with the Board as required by Gov. Bar R. V. All other documents shall be filed with the Board in the following number:

(1) If no hearing panel has been appointed, the original document and four copies;

(2) If a hearing panel has been appointed and the document has not been served on the panel, the original document and four copies;

(3) If a hearing panel has been appointed and the document has been served on the panel, the original document and one copy.

(C) A party who files or presents exhibits for use at a hearing shall provide or have available sufficient copies for use at the hearing by the opposing party, witnesses, and the hearing panel.

(D) Whenever provision is made for the service of any notice, order, report, or other paper or copy upon any complainant, relator, respondent, petitioner, or other party, in connection with any proceeding under these rules, service may be made upon counsel of record for such complainant, relator, respondent, petitioner, or other party, either personally or by certified mail.

(E) The chair of a hearing panel may order the service of documents on the panel by electronic or other alternative means. Any order of the panel chair shall not relieve a party from filing documents with the Board as contained in this regulation.

Reg. 4. Quorum of Panel or Board.

Except as otherwise provided in Gov. Bar R. V, a majority of the Board or a hearing panel shall constitute a quorum for all purposes, and the action of a majority of those present comprising the quorum shall be the action of the Board or a hearing panel

Reg. 5. Manner of Service on Clerk; Record of Service a Public Record.

All notices shall be served by the director of the Board upon the clerk of the Supreme Court by filing with the clerk a true and attested copy of the notice and any accompanying document and by sending to respondent, by certified mail, postage prepaid, return receipt requested, a like, true, and attested copy, with an endorsement thereon of service, upon the clerk of the Supreme Court, addressed to the respondent at the respondent's last known address. The receipt indicating the certified mail number shall be attached to and made a part of the return of service of such notice

by the director. The panel or Board or court before which there is pending any proceeding in which notice has been given as provided in this section may order a continuance as is necessary to afford the respondent reasonable opportunity to appear and defend. The clerk of the Supreme Court shall keep a record of the day and hour of service upon the clerk of notice and any accompanying document, which shall be a public record in the office of the clerk.

Reg. 6. Issuance of Subpoenas; Foreign Subpoenas.

(A) Subpoenas. A subpoena shall be issued upon application of the special investigator, respondent, or authorized representative of the relator and submission of a praecipe to the director. A notice of subpoena is not required to be issued to the respondent unless probable cause has been found. If probable cause is found, any subpoena previously issued during the investigation into the alleged misconduct shall become public and available for disclosure upon request. A motion to quash a subpoena issued under this section shall be filed with the Board. If the motion to quash is filed prior to the appointment of a hearing panel, the motion shall be ruled upon by the chair or vice-chair of the Board. If a hearing panel has been appointed, the motion to quash shall be ruled on by the chair of the hearing panel.

(B)(1) Subpoena pursuant to law of another jurisdiction. A foreign disciplinary authority, pursuant to the law of that jurisdiction and where the issuance of the subpoena has been duly approved, if such approval is required by the law of that jurisdiction, may request issuance of a subpoena for use in an attorney or judicial discipline or impairment proceeding. The director shall issue a subpoena upon such request as provided in this rule.

(2) A subpoena issued pursuant to this rule may be issued to compel the attendance of witnesses and production of documents in the county where the witness resides, is employed or as otherwise agreed by the witness. Service, enforcement, and challenges to such subpoenas shall be as provided in Gov. Bar R. V and these regulations.

(C) Request for foreign subpoena in aid of proceeding in this jurisdiction. In furtherance of disciplinary or impairment proceedings in this state, a relator or respondent may apply for the issuance of subpoenas in another jurisdiction pursuant to the rules of that jurisdiction. The director may provide assistance to facilitate a request made under this division.

Reg. 7. Board-Appointed Master.

(A) Appointment. The Board may appoint one or more masters to perform duties set forth in Gov. Bar R. V and these regulations. A Board-appointed master shall have formerly served as a judge or attorney commissioner of the Board and shall be registered as active with the Supreme Court. At the request of a hearing panel chair, a master may assume any or all case management responsibilities occurring after the appointment of a hearing panel and before the formal hearing on the complaint, but shall not exercise adjudicatory powers under Gov. Bar R. V.

(B) Compensation. A Board-appointed master shall be entitled to a per diem and be reimbursed for travel on the same basis as commissioners of the Board.

(C) Proceedings and Powers. The order of reference to a master shall be signed by the chair of a hearing panel. The order of reference may specify or limit the master's powers and may direct the master to report only upon particular issues or to perform particular acts. Unless so specified or limited, the master may perform all of the following:

(1) Assist the parties and counsel in making all discovery disclosures including the use of interrogatories, depositions, and requests for admission;

(2) Conduct pre-trials with counsel and supervise the amendment of pleadings, the use of stipulations between the parties, the preparation of witness lists and exhibits;

(3) Rule on all motions and interlocutory matters, after consultation with the panel chair, that occur after the appointment of a hearing panel and before the formal hearing on the complaint;

(4) Fix a date for the formal hearing before the hearing panel after consultation with the panel chair.

(D) Report. The master shall prepare a written report upon the matters submitted to or considered by the master after consultation with the parties and the panel chair. The master shall serve a copy of the report on each party and file the report with the director. The report shall become the order of the Board unless a party files a written objection to the report within ten days of the filing with the Board. All objections shall be decided by the chair of the hearing panel as set forth in Gov. Bar R. V.

Reg. 8. Time Guidelines for Pending Cases.

(A) Pre-hearing Conference. Within forty days of the appointment of a hearing panel, the panel chair shall conduct a pre-hearing conference with the parties and counsel of record. At the discretion of the panel chair, a pre-hearing conference may be held by telephone, and may be continued from day-to-day. The pre-hearing conference shall be conducted to accomplish the following objectives:

(1) Simplification of the issues;

(2) Determine the necessity for any amendment to the pleadings;

(3) Establish a discovery timetable;

(4) Identify anticipated witnesses and the exchange of reports of anticipated expert witnesses;

(5) Identify and arrange for the exchange of copies of anticipated exhibits;

(6) Discuss the possibility of a consent to discipline agreement, obtaining stipulations of fact, and obtaining stipulations regarding the admissibility of exhibits;

(7) Establish a final hearing date;

(8) Discuss any other matters that may expedite the resolution of the case.

(B) Order. Following the pre-hearing conference, the panel chair shall file an order as appropriate in the case. The order may include deadlines for discovery, the exchange of witness lists, submission of stipulations, and a hearing date. The order of the panel chair shall be subject to modification *sua sponte* or for good cause.

(C) Hearing Date. The panel chair shall establish a hearing date in consultation with the parties and other panel members. The hearing date shall be no more than one hundred fifty days following the appointment of the panel. Continuances of the hearing date shall not thereafter be granted due to counsel's or respondent's scheduled appearance before any state court or public agency, except the Supreme Court of Ohio or this Board as set forth in Rule 41(B)(2) of the Rules of Superintendence for the Courts of Ohio.

(D) Submission of Panel Reports.

(1) The report of the panel for all hearings not conducted on an expedited basis shall be submitted to the director within forty days of the filing of the transcript for consideration at the next regularly scheduled meeting of the Board. For good cause shown and at the request of the panel chair, the director may extend the date for the filing of the hearing panel report with the Board.

(2) The panel report should be submitted to the director at least seven days prior to the Board meeting.

(E) Time Guidelines Not Jurisdictional. Failure by the Board to meet the time guidelines set forth in this regulation shall not be grounds for dismissal of the complaint.

Reg. 9. Voluntary Dismissal.

Following the filing of the complaint, the relator may not voluntarily dismiss the complaint without leave of the chair of the hearing panel. A motion to voluntarily dismiss shall be accompanied by a memorandum setting forth the basis for the dismissal and, if required by the panel, be accompanied by supporting affidavits, depositions, or documents. The panel chair may conduct a hearing on the motion to dismiss and may require the testimony of witnesses and production of documents.

Reg. 10-13. [Reserved]

Reg. 14. Biennial Review and Recertification of Certified Grievance Committees.

(A) Biennial Review. In each even-numbered year, the Board of Professional Conduct shall conduct a review of compliance by each certified grievance committee with the requirements of Gov. Bar R. V and this regulation. The Board chair may designate the responsibility for conducting the biennial review to a standing or ad hoc committee of the Board. Any committee designated by the Board chair shall present its recommendations to the Board at a regular or special meeting of the Board, and the Board may accept, reject, or modify the recommendations of the committee.

(B)(1) Standards for Review and Recertification. The director shall prepare a written report for the Board or a committee of the Board that details the compliance by each certified grievance committee with the requirements of Gov. Bar R. V. The report shall include all of the following:

(a) Any specific failure by the certified grievance committee to prosecute in a timely manner a matter pending before the Board to which the certified grievance committee is a party or to respond in a timely manner to any order from the Board, provided that the certified grievance committee has been notified, in writing, of such failure and been provided an opportunity to rectify the failure;

(b) The certified grievance committee's compliance with each of the following requirements set forth in Gov. Bar R. V, Section 5(D) and (E):

(i) Timely filing in each of the two immediately preceding years of a complete annual report of the activity of the certified grievance committee;

(ii) Reporting of compliance by bar counsel and volunteer grievance committee members with the education requirements set forth in Gov. Bar R. V, Section 5(D)(1);

(iii) Compliance with the requirement of Gov. Bar R. V, Section 5(D)(1) to file quarterly case activity reports with the Board, including any issues regarding the timeliness and accuracy of those reports;

(c) Compliance with the minimum standards for each certified grievance committee as established by the Supreme Court in Gov. Bar R. V, Section 5(D);

(d) Any other information considered necessary to enable the Board to ascertain compliance by a certified grievance committee with the standards set forth in Gov. Bar R. V, Section 5.

(2) In any instance in which the director identifies a failure to comply with the aforementioned standards, the director shall detail the efforts made to address noncompliance with the chair or bar counsel for the certified grievance committee.

(C) Request for Information. To facilitate the review and recertification process, the director may request that a certified grievance committee provide additional information to the Board. The Board may consider the failure of a certified grievance committee to respond to a request for additional information in making a determination to recertify the grievance committee.

(D) Recertification. The Board shall recertify each grievance committee that is in substantial compliance with the requirements of Gov. Bar R. V and this regulation. Written notice of recertification shall be provided to the certified grievance committee on or before the first day of June in each even-numbered year.

(E)(1) Deferral of Recertification. Except as otherwise provided in Gov. Bar R. V or division (G) of this regulation, the Board may defer the recertification of a certified grievance committee based on the failure of a certified grievance committee to comply substantially with the requirements of Gov. Bar R. V or these regulations. The Board shall provide written notice to the certified grievance committee of the deferral of recertification. The written notice shall include all of the following:

(a) The specific instance of noncompliance cited by the Board, including reference to applicable rules or regulations;

(b) The steps necessary to remedy each instance of noncompliance, including any deadlines for remedying a particular instance of noncompliance;

(c) A statement that the Board will defer recertification of the certified grievance committee until each instance of noncompliance cited in the notice is addressed to the satisfaction of the Board;

(d) A statement that the Board may initiate proceedings to decertify the grievance committee if it fails to timely rectify the instances of noncompliance cited in the notice.

(2) Conditions of Deferral. The Board may impose any conditions on the deferral of recertification that it deems necessary, including but not limited to denying the request for reimbursement of any indirect expense that is incurred or submitted by the certified grievance committee during the deferral period.

(3) Effect of Deferral. Notwithstanding the Board's deferral of recertification, a certified grievance committee may continue to exercise authority pursuant to Gov. Bar R. V and these regulations. The deferral of recertification shall not be cited as a basis for refusing to cooperate with an investigation or as a defense in any disciplinary proceeding.

(4) Recertification Following Deferral; Conditions. Upon proof that the certified grievance committee has rectified all issues of noncompliance identified in the notice of deferral, the Board may recertify the committee. The Board may impose any conditions on the recertification that it deems necessary to prevent future instances of noncompliance. Written notice of recertification and any conditions imposed by the Board shall be provided to the certified grievance committee.

(F) Decertification. If a certified grievance committee fails to timely address instances of noncompliance identified in the written notice of deferral of recertification, the Board shall initiate decertification proceedings. Decertification proceedings shall be conducted as provided in Gov. Bar R. V, Section 5(F).

(G) Immediate Decertification. If the Board determines that a certified grievance committee has substantially failed to execute its responsibilities pursuant to Gov. Bar R. V or these regulations and that such failure appears to have substantially compromised the investigation or prosecution of one or more disciplinary matters, the Board may by-pass the deferral and notification process and initiate decertification proceedings. Decertification proceedings shall be conducted as provided in Gov. Bar R. V, Section 5(F).

(**H) Authority.** The failure of the Board to provide timely notice of recertification or decertification shall not deprive a certified grievance committee of the authority to investigate or prosecute disciplinary matters and may not be cited as a basis for refusing to cooperate with an investigation or as a defense in any disciplinary proceeding.

(I) Notice. Any notice required by this regulation to a certified grievance committee shall be provided by regular mail to the president of the sponsoring bar association, chair of the certified grievance committee, and bar counsel. A copy of each notice shall be provided to the Office of Disciplinary Counsel.

Reg. 15. Advisory Opinions.

(A) Advisory Opinion Committee. There shall be an Advisory Opinion Committee that shall be a standing committee of the Board. Each year, the chair of the Board shall appoint five or more commissioners to serve on the committee and shall designate one of the committee members to serve as chair of the committee. A committee member shall serve a one-year term and may be reappointed to the committee. The committee shall meet at the call of the chair and may meet in person or by telephone conference.

(B)(1) Standards for Issuing Advisory Opinions. The Board may issue nonbinding advisory opinions regarding the application of the Supreme Court Rules for the Government of the Bar of Ohio, the Supreme Court Rules for the Government of the Judiciary of Ohio, the Ohio Rules of Professional Conduct, the Code of Judicial Conduct, or the Attorney's Oath of Office. Pursuant to R.C. 102.08, the Board may issue an advisory opinion upon the request of a judicial officer, court employee, or judicial candidate regarding the application of R.C. Chapter 102. or R.C. 2921.42 or 2921.43. The following standards shall govern the issuance of advisory opinions:

(a) The question presented shall be prospective or hypothetical in nature and shall not involve completed conduct or questions pending before a court;

(b) The question presented shall be one of broad interest or importance to the Ohio bar or judiciary;

(c) The question presented shall involve the conduct of the person requesting the opinion.

(2) The committee or Board may decline to issue an opinion regarding a question that does not satisfy the standards set forth in this regulation or that is overly broad, lacks sufficient information, or is of narrow interest. The Board staff shall notify the requester of a decision to decline the issuance of an opinion. If an opinion is not issued, the committee or Board may direct the Board staff to provide guidance in a staff letter. The staff letter may be based upon previous opinions of the Board, the views of the committee or the Board, or other relevant information. A staff letter will contain language to indicate that it is a nonbinding staff letter and not an advisory opinion of the Board.

(C) Procedure for Requesting an Advisory Opinion. A request for an advisory opinion shall be submitted in writing to the director. The Board staff will send the requester a written acknowledgment of the request.

(D) Procedure for Preparing and Issuing Advisory Opinions.

(1) Advisory opinion requests will be researched by the Board staff. If a decision is made to issue an opinion, the Board staff will prepare a draft opinion for review by the Advisory Opinion Committee. A draft opinion will be forwarded to the committee for review prior to the next scheduled committee meeting. The committee will review the draft, make comments or suggestions, and by majority decision approve or disapprove of the draft. The Board staff and committee will complete the process of researching, drafting, and reviewing an opinion as expeditiously as possible, preferably within two to six months after selection of the request.

(2) Each draft opinion approved by the committee will be sent to commissioners for review prior to a Board meeting and placed on the agenda for consideration at that meeting. Upon review, commissioners may direct comments, suggestions, or objections to the Board staff. The Board may vote to adopt or modify the draft opinion or to return the draft opinion to the committee for further review.

(E) Issuance of Advisory Opinions. A copy of an adopted opinion will be issued to the requester. Issued opinions shall not bear the name of the requester and shall not include the request letter. However, the requester's name and the request letter are not private and shall be made available upon request. Copies of issued opinions will be submitted for publication in the ABA/BNA Lawyers' Manual on Professional Conduct, the Ohio State Bar Association Report, and other publications or electronic communications as the Board deems appropriate. Copies of issued opinions will be forwarded to the Law Library of the Supreme Court of Ohio, county law libraries, Office of Disciplinary Counsel, and local and state bar associations with certified grievance committees. In addition, copies of opinions relating to judges will be forwarded to the Ohio Ethics Commission, Ohio Elections Commission, Ohio Judicial Conference, Ohio Judicial College, Secretary of State of Ohio, and the National Center for State Courts Center for Judicial Ethics.

(F) Maintenance of Advisory Opinions.

(1) Each advisory opinion shall be maintained in the Board's offices and posted on the Board's web page.

(2) An advisory opinion that becomes withdrawn, modified, not current, or affected by other significant changes will be marked with an appropriate designation to indicate the status of the opinion.

(3) The designation "Withdrawn" will be used when an opinion has been withdrawn by majority vote of the Board. The designation indicates that an opinion no longer represents the advice of the Board.

(4) The designation "Modified" will be used when an opinion has been modified by majority vote of the Board. The designation indicates that an opinion has been modified by a subsequent opinion.

(5) The designation "Not Current" will be used at the discretion of the Board's attorney staff to indicate that an opinion is not current in its entirety. The designation that an opinion is no longer current in its entirety may be used to indicate a variety of reasons such as subsequent amendments to rules or statutes, or developments in case law.

(6) The designation "CPR Opinion" will be used when an opinion provides guidance under the Ohio Code of Professional Responsibility that is superseded by the Ohio Rules of Professional Conduct, effective February 1, 2007. The designation indicates that the opinion provides guidance regarding the Board's advice under the superseded Code.

(7) The designation "Former CJC Opinion" will be used when an opinion provides guidance under the former Ohio Code of Judicial Conduct that is superseded by the Ohio Code of Judicial Conduct, effective March 1, 2009. The designation indicates that the opinion provides guidance regarding the Board's advice under the superseded Code.

(8) Other designations, as needed, may be used by majority vote of the Board

(9) The Advisory Opinion Index will include a status list identifying the opinions and the designations.

Reg. 20. Effective Dates.

(A) The Procedural Regulations of the Board of Professional Conduct take effect January 1, 2015.

(B) New Regulation 14, adopted by the Board of Professional Conduct on October 2, 2015, shall take effect on January 1, 2016.

Ohio Rules of Professional Conduct

Effective February 1, 2007

As Amended Effective December 1, 2015

OHIO RULES OF PROFESSIONAL CONDUCT

(Effective February 1, 2007; as amended effective December 1, 2015)

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Note: Except for Latin terms, words and phrases that appear in italicized type in each rule denote terms that are defined in Rule 1.0.

PREAMBLE: A LAWYER'S RESPONSIBILITIES

[1] As an officer of the court, a lawyer not only represents clients but has a special responsibility for the quality of justice.

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

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

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

[5] Lawyers play a vital role in the preservation of society. A lawyer's conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer's business and personal affairs. A lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others. A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers, and public officials. Adjudicatory officials, not being wholly free to defend themselves, are entitled to receive the support of the bar against unjustified criticism. Although a lawyer, as a citizen, has a right to criticize such officials, the lawyer should do so with restraint and avoid intemperate statements that tend to lessen public confidence in the legal system. While it is a lawyer's duty, when necessary, to challenge the rectitude of official action, it is also a lawyer's duty to uphold legal process.

[6] A lawyer should seek improvement of the law, ensure access to the legal system, advance the administration of justice, and exemplify the quality of service rendered by the legal profession. As a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients, employ that knowledge in reform of the law, and work to strengthen legal education. In addition, a lawyer should further the public's understanding of and confidence in the rule of law and the

justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority. A lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance. Therefore, all lawyers should devote professional time and resources and use civic influence to ensure equal access to our system of justice for all those who because of economic or social barriers cannot afford or secure adequate legal counsel. A lawyer should aid the legal profession in pursuing these objectives and should help the bar regulate itself in the public interest.

[7] [RESERVED]

[8] [RESERVED]

[9] The Ohio Rules of Professional Conduct often prescribe rules for a lawyer's conduct. Within the framework of these rules, however, many difficult issues of professional discretion can arise. These issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the rules.

[10] [RESERVED]

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

[12] [RESERVED]

[13] [RESERVED]

SCOPE

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

define a lawyer's professional role. Many of the comments use the term "should." Comments do not add obligations to the rules but provide guidance for practicing in compliance with the rules.

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

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

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

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

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

imposed for a violation, and the severity of a sanction, depend on all the circumstances, such as the willfulness and seriousness of the violation, extenuating factors, and whether there have been previous violations.

[20] Violation of a rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached. In addition, violation of a rule does not necessarily warrant any other nondisciplinary remedy, such as disqualification of a lawyer in pending litigation. The rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability. Furthermore, the purpose of the rules can be subverted when they are invoked by opposing parties as procedural weapons. The fact that a rule is a just basis for a lawyer's self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the rule. Nevertheless, since the rules do establish standards of conduct by lawyers, a lawyer's violation of a rule may be evidence of breach of the applicable standard of conduct.

[21] The comment accompanying each rule explains and illustrates the meaning and purpose of the rule. The Preamble and this note on Scope provide general orientation. The comments are intended as guides to interpretation, but the text of each rule is authoritative.

RULE 1.0: TERMINOLOGY

As used in these rules:

(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 division (f) 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 private or public legal aid or public defender organization, a legal services organization, or the legal department of a corporation or other organization.

(d) "Fraud" or "fraudulent" denotes conduct that has an intent to deceive and is either of the following:

(1) an actual or implied misrepresentation of a material fact that is made either with knowledge of its falsity or with such utter disregard and recklessness about its falsity that knowledge may be inferred;

(2) a knowing concealment of a material fact where there is a duty to disclose the material fact.

(e) "Illegal" denotes criminal conduct or a violation of an applicable statute or administrative regulation.

(f) "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.

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

(h) "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.

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

(j) "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.

(k) "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.

(l) "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.

(m) "Substantial" when used in reference to degree or extent denotes a matter of real importance or great consequence.

(n) "Substantially related matter" denotes one that involves the same transaction or legal dispute or one in which there is a substantial risk that confidential factual information that would normally have been obtained in the prior representation of a client would materially advance the position of another client in a subsequent matter.

(o) "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.

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

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 division (c) can depend on the specific facts. For example, a lawyer in an of-counsel relationship with a law firm will be treated as part of that firm. On the other hand, two practitioners who share office space and occasionally consult or assist each other ordinarily would not be regarded as constituting a firm for purposes of fee division in Rule 1.5(e). The terms of any 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.

[3] With respect to the law department of an organization, there is ordinarily no question that the members of the department constitute a firm within the meaning of the Ohio 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.

[4A] Government agencies are not included in the definition of "firm" because there are significant differences between a government agency and a group of lawyers associated to serve nongovernmental clients. Of course, all lawyers who practice law in a government agency are subject to these rules. Moreover, some of these rules expressly impose upon lawyers associated in a government agency the same or analogous duties to those required of lawyers associated in a firm. See Rules 3.6(d), 3.7(c), 5.1(c), and 5.3. Identifying the governmental client of a lawyer in a government agency is beyond the scope of these rules.

Fraud

[5] The terms "fraud" or "fraudulent" incorporate the primary elements of common law fraud. The terms do not include 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. Under division (d)(2), the duty to disclose a material fact may arise under these rules or other Ohio law.

Informed Consent

[6] Many of the Ohio 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 1.6(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 divisions (p) 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 division (p).

Screened

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

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

Substantial and "Substantially Related Matter"

[11] The definition of "substantial" does not extend to "substantially" as used in Rules 1.9, 1.10, 1.11, 1.12, 1.16, 1.18, and 7.4. The definition of "substantially related matter" is taken from Rule 1.9, Comment [3] and defines the term for purposes of Rules 1.9, 1.10, and 1.18. "Personally and substantially," as used in Rule 1.11, originated in 18 U.S.C. Sec. 207. Rule 1.12, Comment [1] defines "personally and substantially" for former adjudicative officers.

Comparison to former Ohio Code of Professional Responsibility

Rule 1.0 replaces and expands significantly on the Definition portion of the Code of Professional Responsibility. Rule 1.0 defines fourteen terms that are not defined in the Code and alters the Code definitions of "law firm" and "tribunal."

Comparison to ABA Model Rules of Professional Conduct

Rule 1.0 contains four substantive changes to the Model Rule terminology and revisions to the corresponding comments.

The definition in Model Rule 1.0(c) of "firm" and "law firm" is rewritten to expressly include legal aid and public defender offices. Comments [2] and [3] have been altered, and Comment [4A] has been added. Comment [2] is revised to address the status of of-counsel lawyers and practitioners who share office space. Comment [3] is amended to eliminate the reference to government lawyers. The rationale for this deletion and application of the Ohio Rules of Professional Conduct to lawyers in government practice are addressed in a new Comment [4A].

The Model Rule 1.0(d) definition of "fraud" or "fraudulent" is amended to replace the phrase "under the substantive or procedural law of the applicable jurisdiction" with the elements of fraud that have been established by Ohio law. See e.g., *Domo v. Stouffer* (1989), 64 Ohio App.3d 43, 51 and Ohio Jury Instructions, Sec. 307.03. Comment [5] is revised accordingly.

Added to Rule 1.0 is a definition of "illegal" in division (e). This definition clarifies that rules referring to "illegal or fraudulent conduct," including Rules 1.2(d), 1.6(b)(3), 1.16(b)(2), 4.1(b), and 8.4(c), apply to statutory and regulatory prohibitions that are not classified as crimes.

Model Rule 1.0(l), which defines "substantial," is relettered as Rule 1.0(m) and revised to incorporate a definition from Ohio case law. See *State v. Self* (1996), 112 Ohio App.3d 688,

693. The new definition of "substantially related" is taken from Rule 1.9, Comment [3]. A new Comment [11] is added to state that the definition of "substantial" does not extend to the term "substantially," as used in various rules, and to reference specific definitions in Rules 1.9, 1.11, and 1.12.

I. CLIENT-LAWYER RELATIONSHIP

RULE 1.1: COMPETENCE

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation *reasonably* necessary for the representation.

Comment

Legal Knowledge and Skill

[1] In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question. In many instances, the required proficiency is that of a general practitioner. Expertise in a particular field of law may be required in some circumstances.

[2] A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. A newly admitted lawyer can be as competent as a practitioner with long experience. Some important legal skills, such as the analysis of precedent, the evaluation of evidence and legal drafting, are required in all legal problems. Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge. A lawyer can provide adequate representation in a wholly novel field through necessary study. Competent representation can also be provided through the association of a lawyer of established competence in the field in question.

[3] [RESERVED]

[4] A lawyer may accept representation where the requisite level of competence can be achieved through study and investigation, as long as such additional work would not result in unreasonable delay or expense to the client. This applies as well to a lawyer who is appointed as counsel for an unrepresented person. See also Rule 6.2.

Thoroughness and Preparation

[5] Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more extensive treatment than matters of lesser complexity and consequence. An agreement between the lawyer and the client regarding the scope of the

representation may limit the matters for which the lawyer is responsible. See Rule 1.2(c). The lawyer should consult with the client about the degree of thoroughness and the level of preparation required, as well as the estimated costs involved under the circumstances.

Retaining or Contracting with Other Lawyers

[6] Before a lawyer retains or contracts with another lawyer outside the lawyer's own firm to provide or assist in the provision of legal services to a client, the lawyer should ordinarily obtain informed consent from the client and must reasonably believe that the other lawyer's services will contribute to the competent and ethical representation of the client. See also Rule 1.2, 1.4, 1.5(e), 1.6, and 5.5(a). The reasonableness of the decision to retain or contract with another lawyer outside the lawyer's own firm will depend on the circumstances, including the education, experience, and reputation of the nonfirm lawyer, the nature of the services assigned to the nonfirm lawyer, and the legal protections, professional conduct rules, and ethical environments of the jurisdiction in which the services will be performed, particularly relating to confidential information. The decision to contract with a lawyer for purposes other than the provision of legal services, such to serve as an expert witness, may be governed by other rules. See Rule 1.4 and 1.5.

[7] When lawyers from more than one law firm are providing legal services to the client on a particular matter, the lawyers should ordinarily consult with each other and the client about the scope of their respective representations and the allocation of responsibility between or among them. See Rule 1.2. When making allocations of responsibility in a matter pending before a tribunal, lawyers and parties may have additional obligations that are a matter of law and beyond the scope of these rules.

Maintaining Competence

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

Comparison to former Ohio Code of Professional Responsibility

Rule 1.1, requiring a lawyer to handle each matter competently, replaces DR 6-101(A)(1) and DR 6-101(A)(2). The rule eliminates the existing tension between DR 6-101(A)(1), which forbids a lawyer to handle a legal matter that the lawyer knows or should know that the lawyer is not competent to handle, without associating with a lawyer who is competent to handle the matter, and EC 6-3, which suggests that a lawyer can accept a matter that the lawyer is not initially competent to handle "if in good faith he expects to become qualified through study and investigation, as long as such preparation would not result in unreasonable delay or expense to his client." Rule 1.1 does not confine a lawyer to associating with competent counsel in order to satisfy the lawyer's duty to provide competent representation. As highlighted by the addition to Comment [4], no matter how a lawyer gains the necessary competence to handle a matter, the lawyer must be diligent and may charge no more than a reasonable fee.

Comparison to ABA Model Rules of Professional Conduct

Rule 1.1 is identical to Model Rule 1.1. Certain comments have been revised.

Comment [3] is stricken. The rule itself recognizes that competence is evaluated in the context of what is reasonably necessary under the circumstances. To the extent that Comment [3] was intended to affirm that this test would apply in an emergency situation, it does not add to the rule. On the other hand, Comment [3], as written, could erroneously be understood by practitioners to create an exception to the duty of competence.

Comment [4] is amended to incorporate language of EC 6-3. EC 6-3 cautions that if a lawyer intends to achieve the requisite competence to handle a matter through study and investigation, the lawyer's additional work must not result in unreasonable delay or expense to the client.

Although a lawyer must always perform competently, a lawyer can provide competent assistance within a range of thoroughness and preparation. Comment [5] is revised to suggest that a lawyer consult with a client regarding the costs and extent of work to be performed.

RULE 1.2: SCOPE OF REPRESENTATION AND ALLOCATION OF AUTHORITY BETWEEN CLIENT AND LAWYER

(a) Subject to divisions (c), (d), and (e) of this rule, a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer does not violate this rule by acceding to requests of opposing counsel that do not prejudice the rights of the client, being punctual in fulfilling all professional commitments, avoiding offensive tactics, and treating with courtesy and consideration all persons involved in the legal process. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision as to a plea to be entered, whether to waive a jury trial, and whether the client will testify.

(b) [RESERVED]

(c) A lawyer may limit the scope of a new or existing representation if the limitation is *reasonable* under the circumstances and communicated to the client, preferably in *writing*.

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

(e) Unless otherwise required by law, a lawyer shall not present, participate in presenting, or threaten to present criminal charges or professional misconduct allegations solely to obtain an advantage in a civil matter.

Comment

Allocation of Authority between Client and Lawyer

[1] Division (a) confers upon the client the ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations. The decisions specified in division (a), such as whether to settle a civil matter, must also be made by the client. See Rule 1.4(a)(1) for the lawyer's duty to communicate with the client about such decisions. With respect to the means by which the client's objectives are to be pursued, the lawyer shall consult with the client as required by Rule 1.4(a)(2) and may take such action as is impliedly authorized to carry out the representation.

[2] On occasion, however, a lawyer and a client may disagree about the means to be used to accomplish the client's objectives. Clients normally defer to the special knowledge and skill of their lawyer with respect to the means to be used to accomplish their objectives,

particularly with respect to technical, legal, and tactical matters. Conversely, lawyers usually defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected. Because of the varied nature of the matters about which a lawyer and client might disagree and because the actions in question may implicate the interests of a tribunal or other persons, this rule does not prescribe how such disagreements are to be resolved. Other law, however, may be applicable and should be consulted by the lawyer. The lawyer should also consult with the client and seek a mutually acceptable resolution of the disagreement. If such efforts are unavailing and the lawyer has a fundamental disagreement with the client, the lawyer may withdraw from the representation. See Rule 1.16(b)(4). Conversely, the client may resolve the disagreement by discharging the lawyer. See Rule 1.16(a)(3).

[3] At the outset of a representation, the client may authorize the lawyer to take specific action on the client's behalf without further consultation. Absent a material change in circumstances and subject to Rule 1.4, a lawyer may rely on such an advance authorization. The client may, however, revoke such authority at any time.

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

[4A] Division (a) makes it clear that regardless of the nature of the representation the lawyer does not breach a duty owed to the client by maintaining a professional and civil attitude toward all persons involved in the legal process. Specifically, punctuality, the avoidance of offensive tactics, and the treating of all persons with courtesy are viewed as essential components of professionalism and civility, and their breach may not be required by the client as part of the representation.

Independence from Client's Views or Activities

[5] A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social, or moral views or activities. Legal representation should not be denied to people who are unable to afford legal services or whose cause is controversial or the subject of popular disapproval. By the same token, representing a client does not constitute approval of the client's views or activities.

Agreements Limiting Scope of Representation

[6] [RESERVED]

[7] Although division (c) affords the lawyer and client substantial latitude in defining the scope of the representation, any limitation must be reasonable under the circumstances. If, for example, a client's objective is limited to securing general information about the law that the client needs in order to handle a common and typically uncomplicated legal problem, the lawyer and client may agree that the lawyer's services will be limited to a brief telephone consultation. Such a limitation would not be reasonable if the time allotted was not sufficient to yield advice upon which the client could rely. In addition, the terms upon which representation is undertaken may exclude specific means that might otherwise be used to accomplish the client's objectives.

Such limitations may exclude actions that the client thinks are too costly or that the lawyer regards as repugnant or imprudent. Although an agreement for a limited representation does not exempt a lawyer from the duty to provide competent representation, the limitation is a factor to be considered when determining the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation. See Rule 1.1.

[7A] Written confirmation of a limitation of a new or existing representation is preferred and may be any writing that is presented to the client that reflects the limitation, such as a letter or electronic transmission addressed to the client or a court order. A lawyer may create a form or checklist that specifies the scope of the client-lawyer relationship and the fees to be charged. An order of a court appointing a lawyer to represent a client is sufficient to confirm the scope of that representation.

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

Illegal, Fraudulent and Prohibited Transactions

[9] Division (d) prohibits a lawyer from knowingly counseling or assisting a client to commit an illegal act or fraud. This prohibition, however, does not preclude the lawyer from giving an honest opinion about the actual consequences that appear likely to result from a client's conduct. Nor does the fact that a client uses advice in a course of action that is illegal or fraudulent of itself make a lawyer a party to the course of action. There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which an illegal act or fraud might be committed with impunity.

[10] When the client's course of action has already begun and is continuing, the lawyer's responsibility is especially delicate. The lawyer is required to avoid assisting the client, for example, by drafting or delivering documents that the lawyer knows are fraudulent or by suggesting how the wrongdoing might be concealed. A lawyer may not continue assisting a client in conduct that the lawyer originally supposed was legally permissible but then discovers is improper. See Rules 3.3(b) and 4.1(b).

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

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

[13] If a lawyer comes to know or reasonably should know that a client expects assistance not permitted by the Ohio Rules of Professional Conduct or other law or if the lawyer

intends to act contrary to the client's instructions, the lawyer must consult with the client regarding the limitations on the lawyer's conduct. See Rule 1.4(a)(5).

Comparison to former Ohio Code of Professional Responsibility

Rule 1.2 replaces several provisions within Canon 7 of the Code of Professional Responsibility.

The first sentence of Rule 1.2(a) generally corresponds to EC 7-7 and makes what previously was advisory into a rule. The second sentence of Rule 1.2(a) states explicitly what is implied by EC 7-7. The third sentence of Rule 1.2(a) corresponds generally to DR 7-101(A)(1) and EC 7-10. Rule 1.2(a)(1) and (2) correspond to several sentences in EC 7-7.

Rule 1.2(c) does not correspond to any Disciplinary Rule or Ethical Consideration.

The first sentence of Rule 1.2(d) corresponds to DR 7-102(A)(7). The second sentence of Rule 1.2(d) is similar to EC 7-4.

Rule 1.2(e) is the same as DR 7-105 except for the addition of the prohibition against threatening "professional misconduct allegations."

Comparison to ABA Model Rules of Professional Conduct

Rule 1.2(a) is modified slightly from the Model Rule 1.2(a) by the inclusion of the third sentence, which does not exist in the Model Rules.

Model Rule 1.2(b) has been moved to Comment [5] of Rule 1.2 because the provision is more appropriately addressed in a comment rather than a black-letter rule.

Rule 1.2(c) differs from Model Rule 1.2(c) in that it requires only that the limitation be communicated to the client, preferably in writing. The Model Rule requires that the client give informed consent to the limitation.

Rule 1.2(d) is similar to Model Rule 1.2(d) but differs in two aspects. The Model Rule language "criminal" was changed to "illegal" in Rule 1.2(d), and Model Rule 1.2(d) was split into two sentences in Rule 1.2(d).

Rule 1.2(e) does not exist in the Model Rules.

RULE 1.3: DILIGENCE

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

Comment

[1] A lawyer should pursue a matter on behalf of a client despite opposition, obstruction, or personal inconvenience to the lawyer. A lawyer also must act with commitment and dedication to the interests of the client.

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

[3] Delay and neglect are inconsistent with a lawyer's duty of diligence, undermine public confidence, and may prejudice a client's cause. Reasonable diligence and promptness are expected of a lawyer in handling all client matters and will be evaluated in light of all relevant circumstances. The lawyer disciplinary process is particularly concerned with lawyers who consistently fail to carry out obligations to clients or consciously disregard a duty owed to a client.

[4] A lawyer should carry through to conclusion all matters undertaken for a client, unless the client-lawyer relationship is terminated as provided in Rule 1.16. Doubt about whether a client-lawyer relationship still exists should be clarified by the lawyer, preferably in writing, so that the client will not mistakenly suppose the lawyer is looking after the client's affairs when the lawyer has ceased to do so. For example, if a lawyer has handled a judicial or administrative proceeding that produced a result adverse to the client and the lawyer and the client have not agreed that the lawyer will handle the matter on appeal, the lawyer must consult with the client about post-trial alternatives including the possibility of appeal before relinquishing responsibility for the matter. See Rule 1.4(a)(2). Whether the lawyer is obligated to pursue those alternatives or prosecute the appeal for the client depends on the scope of the representation the lawyer has agreed to provide to the client. See Rules 1.2(c) and 1.5(b).

[5] To prevent neglect of client matters in the event of a sole practitioner's death or disability, the duty of diligence may require that each sole practitioner prepare a plan, in conformity with applicable rules, that designates another competent lawyer to review client files, notify each client of the lawyer's death or disability, and determine whether there is a need for immediate protective action. *Cf.* Rule V, Section 26 of the Supreme Court Rules for the Government of the Bar of Ohio.

Comparison to former Ohio Code of Professional Responsibility

Rule 1.3 replaces both DR 6-101(A)(3) (a lawyer shall not neglect a legal matter entrusted to him) and DR 7-101(A)(1) (with limited exceptions, a lawyer shall not fail to seek the lawful objectives of his client through reasonably available means permitted by law and the disciplinary rules).

Neither Model Rule 1.3 nor any of the Model Rules on advocacy states a duty of "zealous representation." The reference to acting "with zeal in advocacy" is deleted from Comment [1] because "zeal" is often invoked as an excuse for unprofessional behavior. Despite the title of Canon 7 of the Ohio Code of Professional Responsibility and the content of EC 7-1, no disciplinary rule requires "zealous" advocacy. Moreover, the disciplinary rules recognize that courtesy and punctuality are not inconsistent with diligent representation [DR 6-101(A)(3)], that a lawyer, where permissible, may exercise discretion to waive or fail to assert a right or position [DR 7-101(B)(1)], and that a lawyer may refuse to aid or participate in conduct the lawyer believes to be unlawful, even though there is some support for an argument that it is lawful [DR 7-101(B)(2)].

Comparison to ABA Model Rules of Professional Conduct

There is no change to the text of Model Rule 1.3.

The reference in Comment [1] to a lawyer's use of "whatever lawful and ethical measures are required to vindicate a client's cause or endeavor" and the last three sentences of the comment have been stricken. The choice of means to accomplish the objectives of the representation are governed by the lawyer's professional discretion, and the lawyer's duty to communicate with the client, as specified in Rules 1.2(a) and 1.4(a)(2).

The reference to a lawyer's duty to act "with zeal in advocacy upon the client's behalf" also is deleted. Zealous advocacy is often invoked as an excuse for unprofessional behavior.

Comment [3] is revised to state more concisely the consequences of lawyer delay and neglect in handling a client matter and explain when charges of neglect are likely to be the subject of professional discipline.

The first sentence of Comment [4] is reworded and the balance of that sentence and the second sentence are deleted. The content of the deleted language is addressed in Rule 1.2.

Comment [5] is revised to refer to Gov. Bar R. V, Section 26. That rule authorizes Disciplinary Counsel or the chair of a certified grievance committee to appoint a lawyer to inventory client files and protect the interests of clients when a lawyer does not or cannot (because of suspension or death) attend to clients and no partner, executor, or other responsible party capable of conducting the lawyer's practice is available and willing to assume responsibility.

RULE 1.4: COMMUNICATION

(a) A lawyer shall do all of the following:

(1) promptly inform the client of any decision or circumstance with respect to which the client's *informed consent* is required by these rules;

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

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

(4) comply as soon as practicable with *reasonable* requests for information from the client;

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

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

(c) A lawyer shall inform a client at the time of the client's engagement of the lawyer or at any time subsequent to the engagement if the lawyer does not maintain professional liability insurance in the amounts of at least one hundred thousand dollars per occurrence and three hundred thousand dollars in the aggregate or if the lawyer's professional liability insurance is terminated. The notice shall be provided to the client on a separate form set forth following this rule and shall be signed by the client.

(1) A lawyer shall maintain a copy of the notice signed by the client for five years after termination of representation of the client.

(2) A lawyer who is involved in the division of fees pursuant to Rule 1.5(e) shall inform the client as required by division (c) of this rule before the client is asked to agree to the division of fees.

(3) The notice required by division (c) of this rule shall not apply to either of the following:

(i) A lawyer who is employed by a governmental entity and renders services pursuant to that employment;

(ii) A lawyer who renders legal services to an entity that employs the lawyer as in-house counsel.

NOTICE TO CLIENT

Pursuant to Rule 1.4 of the Ohio Rules of Professional Conduct, I am required to notify you that I do not maintain professional liability (malpractice) insurance of at least $100,000 per occurrence and $300,000 in the aggregate.

_____
Attorney's Signature

CLIENT ACKNOWLEDGEMENT

I acknowledge receipt of the notice required by Rule 1.4 of the Ohio Rules of Professional Conduct that [insert attorney's name] does not maintain professional liability (malpractice) insurance of at least $100,000 per occurrence and $300,000 in the aggregate.

_____
Client's Signature

_____
Date

Comment

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

Communicating with Client

[2] If these rules require that a particular decision about the representation be made by the client, division (a)(1) requires that the lawyer promptly consult with and secure the client's consent prior to taking action unless prior discussions with the client have resolved what action the client wants the lawyer to take. For example, a lawyer who receives from opposing counsel an offer of settlement in a civil controversy or a proffered plea bargain in a criminal case must promptly inform the client of its substance unless the client has previously indicated that the proposal will be acceptable or unacceptable or has authorized the lawyer to accept or to reject the offer. See Rule 1.2(a).

[3] Division (a)(2) requires the lawyer to reasonably consult with the client about the means to be used to accomplish the client's objectives. In some situations, depending on both the importance of the action under consideration and the feasibility of consulting with the client, this duty will require consultation prior to taking action. In other circumstances, such as during a trial when an immediate decision must be made, the exigency of the situation may require the

lawyer to act without prior consultation. In such cases the lawyer must nonetheless act reasonably to inform the client of actions the lawyer has taken on the client's behalf. Additionally, division (a)(3) requires that the lawyer keep the client reasonably informed about the status of the matter, such as significant developments affecting the timing or the substance of the representation and the fees and costs incurred to date.

[4] A lawyer's regular communication with clients will minimize the occasions on which a client will need to request information concerning the representation. When a client makes a reasonable request for information, however, division (a)(4) requires prompt compliance with the request, or if a prompt response is not feasible, that the lawyer, or a member of the lawyer's staff, acknowledge receipt of the request and advise the client when a response may be expected. A lawyer should promptly respond to or acknowledge client communications.

Explaining Matters

[5] The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so. Adequacy of communication depends in part on the kind of advice or assistance that is involved. For example, when there is time to explain a proposal made in a negotiation, the lawyer should review all important provisions with the client before proceeding to an agreement. In litigation a lawyer should explain the general strategy and prospects of success and ordinarily should consult the client on tactics that are likely to result in significant expense or to injure or coerce others. On the other hand, a lawyer ordinarily will not be expected to describe trial or negotiation strategy in detail. The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests, and the client's overall requirements as to the character of representation.

[6] Ordinarily, the information to be provided is that appropriate for a client who is a comprehending and responsible adult. However, fully informing the client according to this standard may be impracticable, for example, where the client is a child or suffers from diminished capacity. See Rule 1.14. When the client is an organization or group, it is often impossible or inappropriate to inform every one of its members about its legal affairs; ordinarily, the lawyer should address communications to the appropriate officials of the organization. See Rule 1.13. Where many routine matters are involved, a system of limited or occasional reporting may be arranged with the client.

Withholding Information

[7] In some circumstances, a lawyer may be justified in delaying transmission of information when the client would be likely to react imprudently to an immediate communication. Thus, a lawyer might withhold a psychiatric diagnosis of a client when the examining psychiatrist indicates that disclosure would harm the client. A lawyer may not withhold information to serve the lawyer's own interest or convenience or the interests or convenience of another person. Rules or court orders governing litigation may provide that

information supplied to a lawyer may not be disclosed to the client. Rule 3.4(c) directs compliance with such rules or orders.

Professional Liability Insurance

[8] Although it is in the best interest of the lawyer and the client that the lawyer maintain professional liability insurance or another form of adequate financial responsibility, it is not required in any circumstance other than when the lawyer practices as part of a legal professional association, corporation, legal clinic, limited liability company, or limited liability partnership.

[9] The client may not be aware that maintaining professional liability insurance is not mandatory and may well assume that the practice of law requires that some minimum financial responsibility be carried in the event of malpractice. Therefore, a lawyer who does not maintain certain minimum professional liability insurance shall promptly inform a prospective client or client.

Comparison to former Ohio Code of Professional Responsibility

Rule 1.4(a) states the minimum required communication between attorney and client. This is a change from the aspirational nature of EC 7-8. Rule 1.4(a)(1) corresponds to several sentences in EC 7-8 and EC 9-2. Rules 1.4(a)(2) and (3) correspond to several sentences in EC 7-8. Rule 1.4(a)(4) explicitly states what is implied in EC 7-8 and EC 9-2. Rule 1.4(a)(5) states a new requirement that does not correspond to any DR or EC.

Rule 1.4(b) corresponds to several sentences in EC 7-8 and EC 9-2.

Rule 1.4(c) adopts the existing language in DR 1-104.

Comparison to ABA Model Rules of Professional Conduct

Rules 1.4(a)(1) through (a)(5) are the same as the Model Rule provisions except for division (a)(4), which is altered to require compliance with client requests "as soon as practicable" rather than "promptly."

Rule 1.4(b) is the same as the Model Rule provision.

Rule 1.4(c) does not have a counterpart in the Model Rules. The provision mirrors DR 1-104, adopted effective July 1, 2001. DR 1-104 provides the public with additional information and protection from attorneys who do not carry malpractice insurance. Ohio is one of only a few states that have adopted a similar provision, and this requirement is retained in the rules.

RULE 1.5: FEES AND EXPENSES

(a) A lawyer shall not make an agreement for, charge, or collect an *illegal* or clearly excessive fee. A fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a *reasonable* fee. The factors to be considered in determining the reasonableness of a fee include the following:

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

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

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

(4) the amount involved and the results obtained;

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

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

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

(8) whether the fee is fixed or contingent.

(b) The nature and scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in *writing*, before or within a *reasonable* time after commencing the representation, unless the lawyer will charge a client whom the lawyer has regularly represented on the same basis as previously charged. Any change in the basis or rate of the fee or expenses is subject to division (a) of this rule and shall promptly be communicated to the client, preferably in *writing*.

(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by division (d) of this rule or other law.

(1) Each contingent fee agreement shall be in a *writing* signed by the client and the lawyer and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial, or appeal; litigation and other expenses to be deducted from the recovery; and whether such expenses are to be deducted before or after the contingent fee is calculated. The agreement shall clearly

notify the client of any expenses for which the client will be liable whether or not the client is the prevailing party.

(2) If the lawyer becomes entitled to compensation under the contingent fee agreement and the lawyer will be disbursing funds, the lawyer shall prepare a closing statement and shall provide the client with that statement at the time of or prior to the receipt of compensation under the agreement. The closing statement shall specify the manner in which the compensation was determined under the agreement, any costs and expenses deducted by the lawyer from the judgment or settlement involved, and, if applicable, the actual division of the lawyer's fees with a lawyer not in the same *firm*, as required in division (e)(3) of this rule. The closing statement shall be signed by the client and lawyer.

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

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

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

(3) a fee denominated as "earned upon receipt," "nonrefundable," or in any similar terms, unless the client is simultaneously advised in *writing* that if the lawyer does not complete the representation for any reason, the client may be entitled to a refund of all or part of the fee based upon the value of the representation pursuant to division (a) of this rule.

(e) Lawyers who are not in the same *firm* may divide fees only if all of the following apply:

(1) the division of fees is in proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the representation and agrees to be available for consultation with the client;

(2) the client has given *written* consent after full disclosure of the identity of each lawyer, that the fees will be divided, and that the division of fees will be in proportion to the services to be performed by each lawyer or that each lawyer will assume joint responsibility for the representation;

(3) except where court approval of the fee division is obtained, the *written* closing statement in a case involving a contingent fee shall be signed by the client and each lawyer and shall comply with the terms of division (c)(2) of this rule;

(4) the total fee is *reasonable*.

(f) In cases of a dispute between lawyers arising under this rule, fees shall be divided in accordance with the mediation or arbitration provided by a local bar association. When a local bar association is not available or does not have procedures to resolve fee disputes between lawyers, the dispute shall be referred to the Ohio State Bar Association for mediation or arbitration.

Comment

Reasonableness of Fee

[1] Division (a) requires that lawyers charge fees that are reasonable under the circumstances. The factors specified in divisions (a)(1) through (8) are not exclusive. Nor will each factor be relevant in each instance.

Nature and Scope of Representation; Basis or Rate of Fee and Expenses

[2] The detail and specificity of the communication required by division (b) will depend on the nature of the client-lawyer relationship, the work to be performed, and the basis of the rate or fee. A writing that confirms the nature and scope of the client-lawyer relationship and the fees to be charged is the preferred means of communicating this information to the client and can clarify the relationship and reduce the possibility of a misunderstanding. When the lawyer has regularly represented a client, they ordinarily will have evolved an understanding concerning the basis or rate of the fee and the expenses for which the client will be responsible. In a new client-lawyer relationship, however, an understanding as to fees and expenses must be established promptly. Unless the situation involves a regularly represented client, the lawyer should furnish the client with at least a simple memorandum or copy of the lawyer's customary fee arrangements that states the general nature of the legal services to be provided, the basis, rate or total amount of the fee, and whether and to what extent the client will be responsible for any costs, expenses, or disbursements in the course of the representation. So long as the client agrees in advance, a lawyer may seek reimbursement for the reasonable cost of services performed in-house, such as copying.

[3] Contingent fees, like any other fees, are subject to the reasonableness standard of division (a) of this rule. In determining whether a particular contingent fee is reasonable, or whether it is reasonable to charge any form of contingent fee, a lawyer must consider the factors that are relevant under the circumstances. Applicable law may impose limitations on contingent fees, such as a ceiling on the percentage allowable, or may require a lawyer to offer clients an alternative basis for the fee. Applicable law also may apply to situations other than a contingent fee, for example, government regulations regarding fees in certain tax matters.

Terms of Payment

[4] A lawyer may require advance payment of a fee, but is obliged to return any unearned portion. See Rule 1.16(e). A lawyer may accept property in payment for services,

such as an ownership interest in an enterprise, providing this does not involve acquisition of a proprietary interest in the cause of action or subject matter of the litigation contrary to Rule 1.8 (i). However, a fee paid in property instead of money may be subject to the requirements of Rule 1.8(a) because such fees often have the essential qualities of a business transaction with the client.

[5] An agreement may not be made whose terms might induce the lawyer improperly to curtail services for the client or perform them in a way contrary to the client's interest. For example, a lawyer should not enter into an agreement whereby services are to be provided only up to a stated amount when it is foreseeable that more extensive services probably will be required, unless the situation is adequately explained to the client. Otherwise, the client might have to bargain for further assistance in the midst of a proceeding or transaction. However, it is proper to define the extent of services in light of the client's ability to pay. A lawyer should not exploit a fee arrangement based primarily on hourly charges by using wasteful procedures.

[5A] If all funds held by the lawyer are not disbursed at the time the closing statement required by division (c)(2) is prepared, the lawyer's obligation with regard to those funds is governed by Rule 1.15.

Prohibited Contingent Fees

[6] Division (d) prohibits a lawyer from charging a contingent fee in a domestic relations matter when payment is contingent upon the securing of a divorce or upon the amount of spousal or child support or property settlement to be obtained. This provision does not preclude a contract for a contingent fee for legal representation in connection with the recovery of post-judgment balances due under support or other financial orders because such contracts do not implicate the same policy concerns.

Retainer

[6A] Advance fee payments are of at least four types. The "true" or "classic" retainer is a fee paid in advance solely to ensure the lawyer's availability to represent the client and precludes the lawyer from taking adverse representation. What is often called a retainer is in fact an advance payment to ensure that fees are paid when they are subsequently earned, on either a flat fee or hourly fee basis. A flat fee is a fee of a set amount for performance of agreed work, which may or may not be paid in advance but is not deemed earned until the work is performed. An earned upon receipt fee is a flat fee paid in advance that is deemed earned upon payment regardless of the amount of future work performed. When a fee is earned affects whether it must be placed in the attorney's trust account, see Rule 1.15, and may have significance under other laws such as tax and bankruptcy. The reasonableness requirement and the application of the factors in division (a) may mean that a client is entitled to a refund of an advance fee payment even though it has been denominated "nonrefundable," "earned upon receipt," or in similar terms that imply the client would never receive a refund. So that a client is not misled by the use of such terms, division (d)(3) requires certain minimum disclosures that must be included in the written fee agreement. This does not mean the client will always be entitled to a refund upon early termination of the representation [*e.g.*, factor (a)(2) might justify the entire fee], nor does it

determine how any refund should be calculated (e.g., hours worked times a reasonable hourly rate, quantum meruit, percentage of the work completed, etc.), but merely requires that the client be advised of the possibility of a refund based upon application of the factors set forth in division (a). In order to be able to demonstrate the reasonableness of the fee in the event of early termination of the representation, it is advisable that lawyers maintain contemporaneous time records for any representation undertaken on a flat fee basis.

Division of Fee

[7] A division of fee is a single billing to a client covering the fee of two or more lawyers who are not in the same firm. A division of fee facilitates association of more than one lawyer in a matter in which neither alone could serve the client as well, and most often is used when the fee is contingent and the division is between a referring lawyer and a trial lawyer. Division (e) permits the lawyers to divide a fee either on the basis of the proportion of services they render or if each lawyer assumes responsibility for the representation as a whole. Within a reasonable time after disclosure of the identity of each lawyer, the client must give written approval that the fee will be divided and that the division of fees is in proportion to the services performed by each lawyer or that each lawyer assumes joint responsibility for the representation. Except where court approval of the fee division is obtained, closing statements must be in a writing signed by the client and each lawyer and must otherwise comply with division (c) of this rule. Joint responsibility for the representation entails financial and ethical responsibility for the representation as if the lawyers were associated in a partnership. A lawyer should only refer a matter to a lawyer whom the referring lawyer reasonably believes is competent to handle the matter. See Rules 1.1 and 1.17.

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

Disputes over Fees

[9] If a procedure has been established for resolution of fee disputes between a client and a lawyer, such as an arbitration or mediation procedure established by a local bar association, the Ohio State Bar Association, or the Supreme Court of Ohio, the lawyer must comply with the procedure when it is mandatory, and, even when it is voluntary, the lawyer should conscientiously consider submitting to it. Law may prescribe a procedure for determining a lawyer's fee, for example, in representation of an executor or administrator, a class or a person entitled to a reasonable fee as part of the measure of damages. The lawyer entitled to such a fee and a lawyer representing another party concerned with the fee should comply with the prescribed procedure.

[10] A procedure has been established for resolution of fee disputes between lawyers who are sharing a fee pursuant to division (e) of this rule. This involves use of an arbitration or mediation procedure established by a local bar association or the Ohio State Bar Association. The lawyer must comply with the procedure. A dispute between lawyers who are splitting a fee shall not delay disbursement to the client. See Rule 1.15.

Comparison to former Ohio Code of Professional Responsibility

Rule 1.5 replaces DR 2-106 and DR 2-107; makes provisions of EC 2-18 and EC 2-19 mandatory, as opposed to aspirational, with substantive modifications; and makes the provisions of R.C. 4705.15 mandatory, with technical modifications.

Rule 1.5(a) adopts the language contained in DR 2-106(A) and (B), which prohibits illegal or clearly excessive fees and establishes standards for determining the reasonableness of fees. Eliminated from Rule 1.5(a) is language regarding expenses.

Rule 1.5(b) expands on EC 2-18 by mandating that the nature and scope of the representation and the arrangements for fees and expenses shall promptly be communicated to the client, preferably in writing, to avoid potential disputes, unless the situation involves a regularly represented client who will be represented on the same basis as in the other matters for which the lawyer is regularly engaged.

Rule 1.5(c)(1) also expands on EC 2-18 and R.C. 4705.15(B) by requiring that all contingent fee agreements shall be reduced to a writing signed by the client and the lawyer. Rule 1.5(c)(2) directs that a closing statement shall be prepared and signed by both the lawyer and the client in matters involving contingent fees. It closely parallels the current R.C. 4705.15(C).

Rule 1.5(d) prohibits the use of a contingent fee arrangement when the contingency is securing a divorce, spousal support, or property settlement in lieu of support. It finds its basis in EC 2-19, which provides that "Because of the human relationships involved and the unique character of the proceedings, contingent fee arrangements in domestic relations cases are rarely justified." Rule 1.5(d)(2) prohibits the use of contingent fee arrangements in criminal cases and parallels DR 2-106(C).

Rule 1.5(d)(3) prohibits fee arrangements denominated as "earned upon receipt," "nonrefundable," or other similar terms that imply the client may never be entitled to a refund, unless the client is advised in writing that if the lawyer does not complete the representation for any reason, the client may be entitled to a refund so the client is not misled by such terms. The rationale for this rule is contained in Comment [6A].

Rule 1.5(e) deals with the division of fees among lawyers who are not in the same firm. Rule 1.5(e)(1) restates the provisions of DR 2-107(A)(1), with the additional requirement that in the event the division of fees is on the basis of joint responsibility, each lawyer must be available for consultation with the client. Rule 1.5(e)(2) clarifies DR 2-107(A)(2) and Advisory Opinion 2003-3 of the Board of Commissioners on Grievances and Discipline regarding the matters that must be disclosed in writing to the client.

Rule 1.5(e)(3) is a new provision directing that the closing statement contemplated by Rule 1.5(c)(2) must be signed by the client and all lawyers who are not in the same firm who will share in the fees, except where the fee division is court-approved. Rule 1.5(e)(4) is a restatement of DR 2-107(A)(3) regarding the requirement that the total fee must be reasonable.

Rule 1.5(f) is a restatement of DR 2-107(B) requiring mandatory mediation or arbitration regarding disputes between lawyers sharing a fee under this rule.

Comparison to ABA Model Rules of Professional Conduct

Model Rule 1.5 is amended to conform to Disciplinary Rules and ensure a better understanding of the relationship between the client and the lawyers representing the client, thereby reducing the likelihood of future disputes. Also, the comments are modified to bring them into conformity with the proposed changes to Model Rule 1.5 and clarify certain aspects of fees for the benefit of the bench, bar, and the public.

Although ABA Model Rule 1.5(a) directs that a lawyer shall not charge "unreasonable" fees or expenses, the terminology in DR 2-106 (A) prohibiting "illegal or clearly excessive" fees is more encompassing and better suited to use in Ohio. Charging an "illegal fee" differs from charging an "unreasonable fee" and, accordingly, the existing Ohio language is retained.

Model Rule 1.5(c), while dealing with contingent fees, is expanded and clarified. The closing statement provisions of the Model Rule are expanded to bring them in line with existing R.C. 4705.15(C). Additionally, the Model Rule is divided into two parts, the first dealing with the lawyer's obligations at the commencement of the relationship and the second dealing with the lawyer's obligations at the time a fee is earned.

The provisions of Model Rule 1.5(d) are modified to add division (d)(3) and Comment [6A] in light of the number of disciplinary cases involving "retainers."

Model Rule 1.5(e) and Comment [7] dealing with division of fees are modified to bring both the requirements of the rule and the commentary into line with existing practice in Ohio.

RULE 1.6: CONFIDENTIALITY OF INFORMATION

(a) A lawyer shall not reveal information relating to the representation of a client, including information protected by the attorney-client privilege under applicable law, unless the client gives *informed consent*, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by division (b) or required by division (d) of this rule.

(b) A lawyer may reveal information relating to the representation of a client, including information protected by the attorney-client privilege under applicable law, to the extent the lawyer *reasonably believes* necessary for any of the following purposes:

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

(2) to prevent the commission of a crime by the client or other person;

(3) to mitigate *substantial* injury to the financial interests or property of another that has resulted from the client's commission of an *illegal* or *fraudulent* act, 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, including any disciplinary matter, concerning the lawyer's representation of the client;

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

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

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

(d) A lawyer shall reveal information relating to the representation of a client, including information protected by the attorney-client privilege under applicable law, to the extent the lawyer *reasonably believes* necessary to comply with Rule 3.3 or 4.1.

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(f) 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.

[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 Ohio Rules of Professional Conduct or other law. See also Scope.

[4] Division (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] Permitting lawyers to reveal information relating to the representation of clients may create a chilling effect on the client-lawyer relationship, and discourage clients from revealing confidential information to their lawyers at a time when the clients should be making a full disclosure. 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. Division (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 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] Division (b)(2) recognizes the traditional "future crime" exception, which permits lawyers to reveal the information necessary to prevent the commission of the crime by a client or a third party.

[8] Division (b)(3) addresses the situation in which the lawyer does not learn of the illegal or fraudulent act of a client until after the client has used the lawyer's services to further it. Although the client no longer has the option of preventing disclosure by refraining from the wrongful conduct [see Rule 4.1], there will be situations in which the loss suffered by the affected person can be mitigated. In such situations, the lawyer may disclose information relating to the representation to the extent necessary to enable the affected persons to mitigate or recoup their losses. Division (b)(3) does not apply when a person is accused of or has committed an illegal or fraudulent act and thereafter employs a lawyer for representation concerning that conduct. In addition, division (b)(3) does not apply to a lawyer who has been engaged by an organizational client to investigate an alleged violation of law by the client or a constituent of the client.

[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, division (b)(4) permits such disclosure because of the importance of a lawyer's compliance with the Ohio Rules of Professional Conduct.

[10] Where a legal claim or disciplinary charge alleges complicity of the lawyer in the conduct of a client or a former client or other misconduct of the lawyer involving representation of the client or a former client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense. 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. Division (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 division (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, division (b)(6) permits the lawyer to make such disclosures as are necessary to comply with the law.

Detection of Conflicts of Interest

[13] Division (b)(7) recognizes that lawyers in different firms may need to disclose limited information to each other to detect and resolve conflicts of interest, such as when a lawyer is considering an association with another firm, two or more firms are considering a merger, or a lawyer is considering the purchase of a law practice. See Rule 1.17, Comment [7]. Under these circumstances, lawyers and law firms are permitted to disclose limited information, but only once substantive discussions regarding the new relationship have occurred. Any such disclosure should ordinarily include no more than the identity of the persons and entities involved in a matter, a brief summary of the general issues involved, and information about whether the matter has terminated. Even this limited information should be disclosed only to the extent reasonably necessary to detect and resolve conflicts of interest that might arise from the possible new relationship. Moreover, the disclosure of any information is prohibited if it would compromise the attorney-client privilege or otherwise prejudice the client (*e.g.*, the fact that a corporate client is seeking advice on a corporate takeover that has not been publicly announced; that a person has consulted a lawyer about the possibility of a divorce before the person's intentions are known to the person's spouse; or that a person has consulted a lawyer about a criminal investigation that has not led to a public charge). Under those circumstances, division (a) prohibits disclosure unless the client or former client gives informed consent. A lawyer's fiduciary duty to the lawyer's firm may also govern a lawyer's conduct when exploring an association with another firm and is beyond the scope of these rules.

[14] Any information disclosed pursuant to division (b)(7) may be used or further disclosed only to the extent necessary to detect and resolve conflicts of interest. Division (b)(7) does not restrict the use of information acquired by means independent of any disclosure pursuant to division (b)(7). Division (b)(7) also does not affect the disclosure of information within a law firm when the disclosure is otherwise authorized, such as when a lawyer in a firm discloses information to another lawyer in the same firm to detect and resolve conflicts of interest that could arise in connection with undertaking a new representation. See Comment [5].

[15] 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, division (b)(6) permits the lawyer to comply with the court's order.

[16] Division (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. 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. Before making a disclosure under division (b)(1), (2), or (3), a lawyer for an organization should ordinarily bring the issue of taking suitable action to higher authority within 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.

[17] Division (b) permits but does not require the disclosure of information relating to a client's representation to accomplish the purposes specified in divisions (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 division (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 division (b). See Rules 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.

Acting Competently to Preserve Confidentiality

[18] Division (c) requires a lawyer to act competently to safeguard information relating to the representation of a client against unauthorized access by third parties and against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. See Rules 1.1, 5.1, and 5.3. The unauthorized access to or the inadvertent or unauthorized disclosure of information related to the representation of a client does not constitute a violation of division (c) if the lawyer has made reasonable efforts to prevent the access or disclosure. Factors to be considered in determining the reasonableness of the lawyer's efforts include, but are not limited to, the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the cost of employing additional safeguards, the difficulty of implementing the

safeguards, and the extent to which the safeguards adversely affect the lawyer's ability to represent clients (*e.g.*, by making a device or important piece of software excessively difficult to use). A client may require the lawyer to implement special security measures not required by this rule or may give informed consent to forego security measures that would otherwise be required by this rule. Whether a lawyer may be required to take additional steps to safeguard a client's information in order to comply with other law, such as state or federal laws that govern data privacy or that impose specific notification requirements upon the loss of or unauthorized access to electronic information is beyond the scope of these rules. For a lawyer's duties when sharing information with nonlawyers outside the lawyer's own firm see Rule 5.3, Comments [3] and [4].

[19] 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. Whether a lawyer may be required to take additional steps in order to comply with other law, such as state and federal laws governing data privacy, is beyond the scope of these rules.

Former Client

[20] 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.

Comparison to former Ohio Code of Professional Responsibility

Rule 1.6 replaces Canon 4 (A Lawyer Should Preserve the Confidences and Secrets of a Client), including DR 4-101 (Preservation of Confidences and Secrets of a Client) and ECs 4-1 to 4-6 of the Ohio Code of Professional Responsibility.

Rule 1.6(a) generally corresponds to DR 4-101(A) by protecting the confidences and secrets of a client under the rubric of "information relating to the representation." To clarify that this includes privileged information, the rule is amended to add the phrase, "including information protected by the attorney-client privilege under applicable law." Rule 1.6(a) also corresponds to DR 4-101(B) by prohibiting the lawyer from revealing such information. Use of client information is governed by Rule 1.8(b).

Rule 1.6(a) further corresponds to DR 4-101(C)(1) by exempting disclosures where the client gives "informed consent," including situations where disclosure is "impliedly authorized" by the client's informed consent.

Rule 1.6(b) addresses the exceptions to confidentiality and generally corresponds to DR 4-101(C)(2) to (4). Rule 1.6(b)(1) is new and has no comparable Code provision. Rule 1.6(b)(2) is the future crime exception and corresponds to DR 4-101(C)(3), with the addition of "or other person" from the Model Rule. Rule 1.6(b)(3) expands on the provisions of DR 7-102(B)(1) by permitting disclosure of information related to the representation of a client, including privileged information, to mitigate substantial injury to the financial interests or property of another that has been caused by the client's illegal or fraudulent act and the client has used the lawyer's services to further the commission of the illegal or fraudulent act.

Rule 1.6(b)(4) is new, and codifies the common practice of lawyers to consult with other lawyers about compliance with these rules. Rule 1.6(b)(5) tracks DR 4-101(C)(4), adding "any disciplinary matter" to clarify the rule's application in that situation. Rule 1.6(b)(6) is the same as DR 4-101(C)(2).

Rule 1.6(c) makes explicit that other rules create mandatory rather than discretionary disclosure duties. For example, Rules 3.3 and 4.1 correspond to DR 7-102(B), which requires disclosure of client fraud in certain circumstances.

Comparison to ABA Model Rules of Professional Conduct

The additions to Rule 1.6(a) are intended to clarify that "information relating to the representation" includes information protected by the attorney-client privilege.

The exceptions to confidentiality in Rule 1.6(b) generally track those found in the Model Rule, although two of Ohio's exceptions [Rules 1.6(b)(2) and (3)] permit more disclosure than the Model Rule allows.

Rule 1.6(b)(1) is the same as the Model Rule and reflects the policy that threatened death or serious bodily harm, regardless of criminality, create the occasion for a lawyer's discretionary disclosure. Nineteen jurisdictions have such a provision.

Rule 1.6(b)(2) differs from the Model Rule by maintaining the traditional formulation of the future crime exception currently found in DR 4-101(C)(3), rather than the future crime/fraud provision in Model Rule 1.6(b)(2) that is tied to "substantial injury to the financial interests of another." Twenty-two jurisdictions, including Ohio, opt for this stand-alone future crime exception. This exception is retained because it mirrors the public policy embodied in the criminal law.

Rule 1.6(b)(3) differs from Model Rule 1.6(b)(3) in two ways: it deletes the words "prevent" and "rectify;" and it allows for disclosure to mitigate the effects of the client's commission of an illegal (as opposed to criminal) or fraudulent act. The prevention of fraud is deleted from Rule 1.6(b)(3) because it is addressed in Rule 4.1(b). The extension of "criminal" to "illegal" is consistent with the use of the term "illegal" in Rules 1.2(d), 1.16(b), 4.1(b), and 8.4(b), but it is not found in either the Model Rule or Ohio disciplinary rules as an exception to confidentiality. Only two jurisdictions have included illegal conduct as justification for disclosure in Rule 1.6.

Rule 1.6(b)(4) is similar to the Model Rule.

Rule 1.6(b)(5) adds “disciplinary matter” to clarify the application of the exception.

Rule 1.6(c) is substantially the same as Model Rule 1.6(b)(6), except that it clarifies the mandatory disclosure required by other rules.

RULE 1.7: CONFLICT OF INTEREST: CURRENT CLIENTS

(a) A lawyer's acceptance or continuation of representation of a client creates a conflict of interest if either of the following applies:

(1) the representation of that client will be directly adverse to another current client;

(2) there is a *substantial* risk that the lawyer's ability to consider, recommend, or carry out an appropriate course of action for that client will be materially limited by the lawyer's responsibilities to another client, a former client, or a third person or by the lawyer's own personal interests.

(b) A lawyer shall not accept or continue the representation of a client if a conflict of interest would be created pursuant to division (a) of this rule, unless all of the following apply:

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

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

(3) the representation is not precluded by division (c) of this rule.

(c) Even if each affected client consents, the lawyer shall not accept or continue the representation if either of the following applies:

(1) the representation is prohibited by law;

(2) the representation would involve the assertion of a claim by one client against another client represented by the lawyer in the same proceeding.

Comment

General Principles

[1] The principles of loyalty and independent judgment are fundamental to the attorney-client relationship and underlie the conflict of interest provisions of these rules. Neither the lawyer's personal interest, the interests of other clients, nor the desires of third persons should be permitted to dilute the lawyer's loyalty to the client. All potential conflicts of interest involving a new or current client must be analyzed under this rule. In addition, a lawyer must consider whether any of the specific rules in Rule 1.8, regarding certain conflicts of interest involving current clients, applies. For former clients, see Rule 1.9; for conflicts involving those who have consulted a lawyer about representation but did not retain that lawyer, see Rule 1.18. [analogous to Model Rule Comment 1]

[2] In order to analyze and resolve a conflict of interest problem under this rule, a lawyer must: (1) clearly identify the client or clients; (2) determine whether a conflict of interest exists; (3) decide whether the representation is barred by either criteria of division (c); (4) evaluate, under division (b)(1), whether the lawyer can competently and diligently represent all clients affected by the conflict of interest; and (5) if representation is otherwise permissible, consult with the clients affected by the conflict and obtain the informed consent of each of them, confirmed in writing. [analogous to Model Rule Comment 2]

[3] To determine whether a conflict of interest would be created by accepting or continuing a representation, a lawyer should adopt reasonable procedures, appropriate for the size and type of firm and practice, for collecting and reviewing information about the persons and issues in all matters handled by the lawyer. See also Comment to Rule 5.1. Ignorance caused by a failure to institute or follow such procedures will not excuse a lawyer's violation of this rule. [derived from Model Rule Comment 3]

[4] A lawyer must decline a new representation that would create a conflict of interest, unless representation is permitted under division (b). [derived from Model Rule Comment 3]

[5] If unforeseeable developments, such as changes in corporate and other organizational affiliations or the addition or realignment of parties in litigation, create a conflict of interest during a representation, the lawyer must withdraw from representation unless continued representation is permissible under divisions (b)(1) and (c) and the lawyer obtains informed consent, confirmed in writing, of each affected client under the conditions of division (b)(2). See Rule 1.16. [analogous to a portion of Model Rule Comment 4]

[6] Just as conflicts can emerge in the course of a representation, the nature of a known conflict of interest can change in the course of a representation. For example, the proposed joint representation of a driver and her passenger to sue a person believed to have caused a traffic accident may initially present only a material limitation conflict, as to which the proposed clients may give informed consent. However, if the lawyer's investigation suggests that the driver may be at fault, the interests of the driver and the passenger are then directly adverse, and the joint representation cannot be continued. A lawyer must be alert to the possibility that newly acquired information requires reevaluating of a conflict of interest, and taking different steps to resolve it. [derived from Model Rule Comment 5]

[7] When a lawyer withdraws from representation in order to avoid a 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 also continue to protect the confidences of the client from whose representation the lawyer has withdrawn. See Rule 1.9(c). [analogous to a portion of Model Rule Comment 5]

[8] When a conflict arises from a lawyer's representation of more than one client, whether the lawyer must withdraw from representing all affected clients or may continue to represent one or more of them depends upon whether: (1) the lawyer can both satisfy the duties owed to the former client and adequately represent the remaining client or clients, given the

lawyer's duties to the former client (see Rule 1.9); and (2) any necessary client consent is obtained. [analogous to a portion of Model Rule Comment 4]

Identifying the Client

[9] In large part, principles of substantive law outside these rules determine whether a client-lawyer relationship exists or is continuing. See Scope [17]. These rules, including Rules 1.2, 1.8(f)(2), 1.13, and 6.5, must also be considered.

Identifying Conflicts of Interest: Directly Adverse Representation

[10] The concurrent representation of clients whose interests are directly adverse always creates a conflict of interest. A directly adverse conflict can occur in a litigation or transactional setting. [derived from Model Rule Comment 6]

[11] *In litigation.* The representation of one client is directly adverse to another in litigation when one of the lawyer's clients is asserting a claim against another client of the lawyer. A directly adverse conflict also may arise when effective representation of a client who is a party in a lawsuit requires a lawyer to cross-examine another client, represented in a different matter, who appears as a witness in the suit. A lawyer may not represent, in the same proceeding, clients who are directly adverse in that proceeding. See Rule 1.7(c)(2). Further, absent consent, a lawyer may not act as an advocate in one proceeding against a person the lawyer represents in some other matter, even when the matters are wholly unrelated. [derived from Model Rule Comment 6]

[12] *Class-action conflicts.* 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 division (a)(1) of this rule. Thus, the lawyer does not typically need to get the consent of an unnamed class member 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. [analogous to Model Rule Comment 25]

[13] *In transactional and counseling practice.* The representation of one client can be directly adverse to another in a transactional matter. For example, a buyer and a seller or a borrower and a lender are directly adverse with respect to the negotiation of the terms of the sale or loan. [*Stark County Bar Assn v. Ergazos* (1982), 2 Ohio St. 3d 59; *Columbus Bar v. Ewing* (1992), 63 Ohio St. 3d 377]. If a lawyer is asked to represent the seller of a business in negotiations with a buyer whom the lawyer represents in another, unrelated matter, the lawyer cannot undertake the new representation without the informed, written consent of each client. [analogous to Model Rule Comment 7]

Identifying Conflicts of Interest: Material Limitation Conflicts

[14] Even where clients are not directly adverse, a conflict of interest exists if there is a substantial 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. The mere possibility of subsequent harm does not, itself, require disclosure and consent. The critical questions are: (1) whether a difference in interests between the client and lawyer or between two clients exists or is likely to arise; and (2) if it does, whether this difference in interests 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 any affected client. [analogous to Model Rule Comment 8]

Lawyer's Responsibility to Current Clients-Same Matter

[15] *In litigation*. A "material limitation" conflict exists when a lawyer represents co-plaintiffs or co-defendants in litigation and there is a substantial discrepancy in the clients' testimony, incompatible positions in relation to another party, potential cross-claims, or 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 matter is so grave that ordinarily a lawyer should decline to represent more than one co-defendant. On the other hand, common representation of persons having similar interests in civil litigation is proper if the requirements of division (b) are met. [analogous to Model Rule Comment 23]

[16] *In transactional practice.* In transactional and counseling practice, the potential also exists for material limitation conflicts in representing multiple clients in regard to one matter. Depending upon the circumstances, a material limitation conflict of interest may be present. Relevant factors in determining whether there is a material limitation conflict include the nature of the clients' respective interests in the matter, the relative duration and intimacy of the lawyer's relationship with each client involved, the functions being performed by the lawyer, the likelihood that disagreements will arise, and the likely prejudice to each client from the conflict. These factors and others will also be relevant to the lawyer's analysis of whether the lawyer can competently and diligently represent all clients in the matter, and whether the lawyer can make the disclosures to each client necessary to secure each client's informed consent. See Comments 24-30. [analogous to a portion of Model Rule Comment 26]

Lawyer's Responsibility to Current Client-Different Matters

[17] A material limitation conflict between the interests of current clients can sometimes arise when the lawyer represents each client in different matters. Simultaneous representation, in unrelated matters, of clients whose business or personal interests are only generally adverse, such as competing enterprises, does not present a material limitation conflict. Furthermore, a lawyer may ordinarily take inconsistent legal positions at different times on behalf of different clients. However, a material limitation conflict of interest exists, for example, if there is a substantial risk that a lawyer's action on behalf of one client in one case will materially limit the lawyer's effectiveness in concurrently representing another client in a

different case. For example, there is a material limitation conflict if a decision for which the lawyer must advocate on behalf of one client in one case will create a precedent likely to seriously weaken the position taken on behalf of another client in another case. Factors relevant in determining whether there is a material limitation of which the clients must be advised and for which consent must be obtained include: (1) where the cases are pending; (2) whether the issue is substantive or procedural; (3) the temporal relationship between the matters; (4) the significance of the issue to the immediate and long-term interests of the clients involved; and (5) the clients' reasonable expectations in retaining the lawyer. [derived from Model Rule Comments 6 and 24]

Lawyer's Responsibilities to Former Clients and Other Third Persons

[18] 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 family members or persons to whom the lawyer, in the capacity of a trustee, executor, or corporate director, owes fiduciary duties. [Model Rule Comment 9]

[19] If a lawyer for a corporation or other organization serves as a member of its board of directors, the dual roles may present a "material limitation" conflict. For example, a lawyer's ability to assure the corporate client that its communications with counsel are privileged may be compromised if the lawyer is also a board member. Alternatively, in order to participate fully as a board member, a lawyer may have to decline to advise or represent the corporation in a matter. Before starting to serve as a director of an organization, a lawyer must take the steps specified in division (b), considering whether the lawyer can adequately represent the organization if the lawyer serves as a director and, if so, reviewing the implications of the dual role with the board and obtaining its consent. Even with consent to the lawyer's acceptance of a dual role, if there is a material risk in a given situation that the dual role will compromise the lawyer's independent judgment or ability to consider, recommend, or carry out an appropriate course of action, the lawyer should abstain from participating as a director or withdraw as the corporation's lawyer as to that matter. [analogous to Model Rule Comment 35]

Personal Interest Conflicts

[20] *Types of personal interest.* 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, the lawyer may have difficulty or be unable to give a client detached advice in regard to the same manner. 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. A lawyer should 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 certain 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). [Model Rule Comment 10]

[21] *Related lawyers.* When lawyers who are closely related by blood or marriage represent different clients in the same matter or in substantially related matters, there may be a substantial 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 the related lawyer represents another party, unless each client gives informed, written 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. [Model Rule Comment 11]

[22] *Sexual activity with clients.* A lawyer is prohibited from engaging in sexual activity with a current client unless the sexual relationship predates the formation of the client-lawyer relationship. See Rule 1.8(j). [Model Rule Comment 12]

Interest of Person Paying for a Lawyer's Service

[23] 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), and the special notice requirement for clients of insurance defense counsel in Rule 1.8(f)(4). If acceptance of the payment from any other source presents a substantial 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 division (b) before accepting the representation. [analogous to Model Rule Comment 13]

Adequacy of Representation Burdened by a Conflict

[24] After a lawyer determines that accepting or continuing a representation entails a conflict of interest, the lawyer must assess whether the lawyer can provide competent and diligent representation to each affected client consistent with the lawyer's duties of loyalty and independent judgment. When the lawyer is representing more than one client, the question of adequacy of representation must be resolved as to each client. [derived from Model Rule Comment 15]

Special Considerations in Common Representation

[25] 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 is antagonistic, the possibility that the clients' interests can be adequately served by common representation is low. 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. [Model Rule Comment 29]

[26] Particularly important factors in determining the appropriateness of common representation are 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 does later occur between the clients, the privilege will not protect communications made on the subject of the joint representation, while it is in effect, and the clients should be so advised. [Model Rule Comment 30]

[27] 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 the 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 on behalf of a joint venture between the clients and agree to keep that information confidential with the informed consent of both clients. [Model Rule Comment 31]

[28] Any limitations on the scope of the representation made necessary as a result of the common representation must be fully explained to the clients at the outset of the representation and communicated to the client, preferably in writing. See Rule 1.2(c). Subject to such limitations, each client in a common representation has the right to loyal and diligent representation and to the protection of Rule 1.9 concerning the obligations to a former client. Each client also has the right to discharge the lawyer as stated in Rule 1.16. [analogous to Model Rule Comments 32 and 33]

Informed Consent

[29] Informed consent requires that each affected client be aware of the relevant circumstances and of the material and reasonably foreseeable ways that a conflict could have adverse effects on the interests of that client. See Rule 1.0(f). 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 advantages and risks of the common representation, including possible effects on loyalty, confidentiality, and the attorney-client privilege. [Model Rule Comment 18]

[30] 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. [analogous to Model Rule Comment 19]

Consent Confirmed in Writing

[31] Division (b)(2) requires the lawyer to obtain the informed consent of the client, confirmed in writing. Such a writing may consist of a document signed by the client or one that the lawyer promptly records and transmits to the client following an oral consent. See Rule 1.0(b) and (p) (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). Written confirmation of consent does not supplant the need, in most cases, for the lawyer to talk with the client: (1) to explain the risks and advantages, if any, of representation burdened with a conflict of interest, as well as reasonably available alternatives; and (2) to afford the client a reasonable opportunity to consider the risks and alternatives and to raise questions and concerns. 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 written consent. [Model Rule Comment 20]

Revoking Consent

[32] 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 clients and whether material detriment to the other clients or the lawyer would result. [Model Rule Comment 21]

Consent to Future Conflict

[33] Whether a lawyer may properly request a client to waive conflicts that might arise in the future is subject to the test of division (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 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, except when it is reasonably likely that the client will have understood the material risks involved. Such exceptional circumstances might be presented if the client is an experienced user of the legal services involved and is reasonably informed regarding the risk that a conflict may arise, particularly if 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 a waiver prohibited under division (b). [Model Rule Comment 22]

Prohibited Representations

[34] Often, clients may be asked to consent to representation notwithstanding a conflict. However, as indicated in divisions (c)(1) and (2) some conflicts cannot be waived as a matter of law, and the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent. [analogous to Model Rule Comment 14]

[35] Before requesting a conflict waiver from one or more clients in regard to a matter, a lawyer must determine whether either division (c)(1) or (2) bars the representation, regardless of waiver.

[36] As provided by division (c)(1), certain conflicts cannot be waived as a matter of law. For example, the Supreme Court of Ohio has ruled that regardless of client consent, a lawyer may not represent both husband and wife in the preparation of a separation agreement. [*Columbus Bar Assn v. Grelle* (1968), 14 Ohio St.2d 208] Similarly, federal criminal statutes prohibit certain representations by a former government lawyer, despite the informed consent of the former client. [analogous to Model Rule Comment 16]

[37] Division (c)(2) bars representation, in the same proceeding, of clients who are directly adverse because of the institutional interest in vigorous development of each client's position. A lawyer may not represent both a claimant and the party against whom the claim is asserted whether in proceedings before a tribunal or in negotiations or mediation of a claim pending before a tribunal. [derived from Model Rule Comment 17]

[38] Division (c)(2) does not address all nonconsentable conflicts. Some conflicts are nonconsentable because a lawyer cannot represent both clients competently and diligently or both clients cannot give informed consent. For example, a lawyer may not represent multiple parties to a negotiation whose interests are fundamentally antagonistic, regardless of their consent. [derived from Model Rule Comment 28]

Comparison to former Ohio Code of Professional Responsibility

Rule 1.7 replaces DR 5-101(A)(1) and 5-105(A), (B), and (C). Some of the Ethical Considerations in Canon 5 have direct parallels in the comments to Rule 1.7, although no effort has been made to conform the text of any comment to the analogous Ethical Consideration.

No change in the substance of the referenced Ohio rules on conflicts and conflict waivers is intended, except the requirement that conflict waivers be confirmed in writing. Specifically, the current "obviousness" test for the representation of multiple clients and the tests of Rule 1.7(b) and (c) are the same. In both instances, a lawyer must consider whether the lawyer can adequately represent all affected clients, whether there are countervailing public policy considerations against the representation, and whether the lawyer must obtain informed consent. Unlike DR 5-101(A)(1), Rule 1.7 makes clear that this same analysis must be applied when a lawyer's personal interests create a conflict with a client's interests.

Client consent is not required for every conceivable or remote conflict, as stated in Comment [14]. On the other hand, practicing lawyers recognize that many situations require the lawyer to evaluate the adequacy of representation and request client consent, not only those in which an adverse effect on the lawyer's judgment is patent or inevitable, as DR 5-105(B) can be interpreted to state. Rule 1.7 will more effectively guide lawyers in practice than DR 5-105(B) and anticipates that a lawyer will be subject to discipline for assuming or continuing a representation burdened by a conflict of interest only when a lawyer has failed to recognize a clear present or probable conflict and has not obtained informed consent, or where the conflict is not consentable. Nonconsentable conflicts include: (1) those where a lawyer could not possibly provide competent and diligent representation to the affected clients; (2) those where a lawyer cannot, because of conflicting duties, fully inform one or more affected clients of the implications of representation burdened by a conflict; and (3) representations prohibited under Rule 1.7(c).

Comparison to ABA Model Rules of Professional Conduct

Model Rule 1.7 is revised for clarity. Division (a) states the two broad circumstances in which a conflict of interest exists between the interests of two clients or the interest of a lawyer and a client. Division (b) prohibits a lawyer from accepting or continuing a representation that creates a conflict of interest unless certain conditions are satisfied. Division (c) defines certain conflicts of interest that are not waivable as a matter of public policy, even if clients consent. Lawyers are reminded that a conflict of interest may exist at the time that a representation begins or may arise later. The term "concurrent conflict," which was introduced in the most recent ABA revisions of Model Rule 1.7, is stricken as unnecessary. Division (a)(2) uses phrases borrowed from Model Rule 1.7, Comment [8] and DR 5-101 to explain the nature of a "material limitation" conflict and substitutes the defined term "substantial" in place of "significant."

Rule 1.7 differs in substance from the Ohio Code in its requirement that a client's consent to a conflict be confirmed in writing. Although the rule requires only the client's consent, and not the lawyer's disclosure to be confirmed in writing, the writing requirement will remind the lawyer to communicate to the client the information necessary to make an informed decision about this material aspect of the representation.

Division (c) has no parallel in the Code or Ohio law, except to the extent that it would be "obvious," under DR 5-105(C), that a lawyer could not engage in a representation prohibited by law or represent two parties in the same proceeding whose interests are directly adverse. The principles of division (c), which are drawn from Model Rule 1.7(b)(2) and (3), are

unexceptional, and their inclusion in the rule is appropriate. Note, however, that unlike Rule 1.7(c)(2), corresponding Model Rule 1.7(b)(3) was drafted to permit a lawyer to represent two parties with directly opposing interests in a mediation, although simultaneous representation of such parties in a related proceeding is prohibited. (See Model Rule 1.7, Comment [17]). Such a distinction is unacceptable.

The comments to Model Rule 1.7 are rewritten for clarity and are reordered to help practitioners find relevant comments. Portions of Comments [28] and [34] have been deleted because they appear to state conclusions of law for which we have found no precedent in Ohio law or advisory opinions of the Board of Commissioners on Grievances and Discipline.

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 all of the following apply:

(1) the transaction and terms on which the lawyer acquires the interest are fair and *reasonable* to the client and are fully disclosed to the client 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;

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

(c) A lawyer shall not solicit any *substantial* gift from a client. A lawyer shall not prepare on behalf of a client an instrument giving the lawyer, the lawyer's *partner*, associate, paralegal, law clerk, or other employee of the lawyer's *firm*, a lawyer acting "of counsel" in the lawyer's *firm*, or a person related to the lawyer any gift unless the lawyer or other recipient of the gift is related to the client. For purposes of division (c) of this rule:

(1) "person related to the lawyer" includes a spouse, child, grandchild, parent, grandparent, sibling, or other relative or individual with whom the lawyer or the client maintains a close, familial relationship;

(2) "gift" includes a testamentary gift.

(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 a lawyer may do either of the following:

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

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

(f) A lawyer shall not accept compensation for representing a client from someone other than the client unless divisions (f)(1) to (3) and, if applicable, division (f)(4) apply:

(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;

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

(4) if the lawyer is compensated by an insurer to represent an insured, the lawyer delivers a copy of the following Statement of Insured Client's Rights to the client in person at the first meeting or by mail within ten days after the lawyer receives notice of retention by the insurer:

STATEMENT OF INSURED CLIENT'S RIGHTS

An insurance company has retained a lawyer to defend a lawsuit or claim against you. This Statement of Insured Client's Rights is being given to you to assure that you are aware of your rights regarding your legal representation.

1. Your Lawyer: Your lawyer has been retained by the insurance company under the terms of your policy. If you have questions about the selection of the lawyer, you should discuss the matter with the insurance company or the lawyer.

2. Directing the Lawyer: Your policy may provide that the insurance company can reasonably control the defense of the lawsuit. In addition, your insurance company may establish guidelines governing how lawyers are to proceed in defending you—guidelines that you are entitled to know. However, the lawyer cannot act on the insurance company's instructions when they are contrary to your interest.

3. Communications: Your lawyer should keep you informed about your case and respond to your reasonable requests for information.

4. Confidentiality: Lawyers have a duty to keep secret the confidential information a client provides, subject to limited exceptions. However, the lawyer chosen to represent you also may have duty to share with the insurance company information relating to the defense or settlement of the claim. Whenever a waiver of lawyer-client confidentiality is needed, your lawyer has a duty to consult with you and obtain your informed consent.

5. Release of Information for Audits: Some insurance companies retain auditing companies to review the billing and files of the lawyers they hire to represent policyholders. If the lawyer believes an audit, bill review, or other action initiated by the insurance company may release confidential information in a manner that may be contrary to your interest, the lawyer must advise you regarding the matter and provide an explanation of the purpose of the audit and the procedure involved. Your written consent must be given in order for an audit to be conducted. If you withhold your consent, the audit shall not be conducted.

6. Conflicts of Interest: The lawyer is responsible for identifying conflicts of interest and advising you of them. If at any time you have a concern about a conflict of interest in your case, you should discuss your concern with the lawyer. If a conflict of interest exists that cannot be resolved, the insurance company may be required to provide you with another lawyer.

7. Settlement: Many insurance policies state that the insurance company alone may make a decision regarding settlement of a claim. Some policies, however, require your consent. You should discuss with your lawyer your rights under the policy regarding settlement. No settlement requiring you to pay money in excess of your policy limits can be reached without your agreement.

8. Fees and Costs: As provided in your insurance policy, the insurance company usually pays all of the fees and costs of defending the claim. If you are responsible for paying the lawyer any fees and costs, your lawyer must promptly inform you of that.

9. Hiring your own Lawyer: The lawyer hired by the insurance company is only representing you in defending the claim brought against you. If you desire to pursue a claim against someone, you will need to hire your own lawyer. You may also wish to hire your own lawyer if there is a risk that there might be a judgment entered against you for more than the amount of your insurance. Your lawyer has a duty to inform you of this risk and other reasonably foreseeable adverse results.

(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 the settlement or agreement is subject to court approval or 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 or agreement.

(h) A lawyer shall not do any of the following:

(1) make an agreement prospectively limiting the lawyer's liability to a client for malpractice or requiring arbitration of a claim against the lawyer unless the client is independently represented in making the agreement;

(2) settle a claim or potential claim for such liability unless all of the following apply:

(i) the settlement is not unconscionable, inequitable, or unfair;

(ii) the client or former client 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;

(iii) the client or former client gives *informed consent*.

(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 do either of the following:

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

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

(j) A lawyer shall not solicit or engage in sexual activity 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 divisions (a) to (i) of this rule 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 division (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 division (a) are unnecessary and impracticable.

[2] Division (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. Division (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. Division (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(f) (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 division (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, division (a)(2) of this rule is inapplicable, and the division (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 division (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. See also Rule 1.9(b). Division (b) applies whether or not 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 a land-use regulation during the representation of one client may properly use that information to benefit other clients. Division (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, division (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 division (c).

[7] If effectuation of a 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. Division (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 divisions (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 substantial 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.

[12A] Divisions (f)(1) to (f)(3) apply to insurance defense counsel compensated by an insurer to defend an insured, subject to the unique aspects of that relationship. Whether employed or retained by an insurance company, insurance defense counsel owes the insured the same duties to avoid conflicts, keep confidences, exercise independent judgment, and communicate as a lawyer owes any other client. These duties are subject only to the rights of the insurer, if any, pursuant to the policy contract with its insured, to control the defense, receive information relating to the defense or settlement of the claim, and settle the case. Insurance

defense counsel may not permit an insurer's right to control the defense to compromise the lawyer's independent judgment, for example, regarding the legal research or factual investigation necessary to support the defense. The lawyer may not permit an insurer's right to receive information to result in the disclosure to the insurer, or its agent, of confidences of the insured. The insured's consent to the insurer's payment of defense counsel, required by Rule 1.8(f)(1), can be inferred from the policy contract. Nevertheless, an insured may not understand how defense counsel's relationship with and duties to the insurer will affect the representation. Therefore, to ensure that such consent is informed, these rules require a lawyer who undertakes defense of an insured at the expense of an insurer to provide to the client insured, at the commencement of representation, the "Statement of Insured Client's Rights."

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(f) (definition of informed consent). Alternatively, where a settlement is subject to court approval, as in a class action, the interests of multiple clients are protected when the lawyer complies with applicable rules of civil procedure and orders of the court concerning review of the settlement.

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. Division (h)(1) also prohibits a lawyer from prospectively entering into an agreement with the client to arbitrate any claim unless the client is independently represented. This division, however, does not 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. However, the settlement may not be unconscionable, inequitable, or unfair, and, 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] Division (i) states the traditional general rule that lawyers are prohibited from acquiring a proprietary interest in litigation. Like division (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 division (e). In addition, division (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 division (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 engaging in sexual activity with a client regardless of whether the relationship is consensual and regardless of the absence of prejudice to the client, unless the sexual relationship predates the client-lawyer relationship. A lawyer also is prohibited from soliciting a sexual relationship with a 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, division (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 division (k), a prohibition on conduct by an individual lawyer in divisions (a) to (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 division (a), even if the first lawyer is not personally involved in the representation of the client. The prohibition set forth in division (j) is personal and is not applied to associated lawyers.

Comparison to former Ohio Code of Professional Responsibility

With the exception of division (f)(4), each part of Rule 1.8 corresponds to an Ohio disciplinary rule or decided case, as stated below.

Rule 1.8(a) corresponds, in substance, to DR 5-104(A) and the ruling in *Cincinnati Bar Assn v. Hartke* (1993), 67 Ohio St.3d 65, except for the addition of a requirement that the client's consent be in writing. This writing requirement is consistent with the requirement for confirmation of conflict waivers in Rule 1.7.

Rule 1.8(b) is similar to DR 4-101(B)(2), but the prohibition against adverse use of confidential information applies to all information relating to the representation, consistent with Rule 1.6(a). As suggested by Comment [5], these rules, unlike DR 4-101(B)(3), do not expressly prohibit the lawyer from using information relating to the representation for the benefit of the lawyer or another person. Because of the peril that such use would violate another duty that the lawyer has to the client (or to a third party, for example, by reason of a confidentiality agreement), lawyers should approach such issues carefully.

Rule 1.8(c) has been revised principally to conform it to the absolute ban, now stated in DR 5-101(A)(2), upon a lawyer's preparing an instrument for a client by which a gift would be made to the lawyer, or a relative or colleague of the lawyer. DR 5-101(A)(2) does not prohibit a lawyer from soliciting a gift. The first portion of Rule 1.8(c) addresses a matter not specifically addressed in the Ohio Code in that Rule 1.8(c) would permit a lawyer to solicit an insubstantial gift from a client. This rule would permit, for example, a lawyer to request that a client make a small gift to a charity on whose board the lawyer serves, but not to abuse the attorney-client relationship by requesting a substantial gift.

Rule 1.8(d) is similar to DR 5-104(B), but creates greater latitude for a lawyer to enter a contract for publication or media rights with a client because Rule 1.8(d) prohibits making such

an arrangement only during the representation, and only if the portrayal or account would be based, in substantial part, on information relating to the representation. In contrast, DR 5-104(B) forbids a lawyer to make any such arrangement during the pendency of the matter, even if the representation has ended.

Rule 1.8(e) is similar to DR 5-103(B). Unlike DR 5-103(B), Rule 1.8(e) expressly permits a lawyer to pay court costs and expenses on behalf of an indigent client.

Rule 1.8(f)(1), (2), and (3) use different terms, but are virtually identical to DR 5-107(A) and (B). Rule 1.8(f)(4) and the "Statement of Insured Client's Rights" is new and is based on the reports of the Ohio State Bar Association's House Counsel Task Force and the Insurance and Audit Practices and Controls Committee. Both reports were accepted by the House of Delegates of the Ohio State Bar Association.

Rule 1.8(g) corresponds to DR 5-106. Unlike DR 5-106, Rule 1.8(g) permits aggregate agreements in criminal cases and agreements subject to court approval.

Rule 1.8(h) corresponds to DR 6-102, as interpreted by the Supreme Court in *Disciplinary Counsel v. Clavner* (1997), 77 Ohio St.3d 431. A portion of Rule 1.8(h)(1) is based on Opinion 96-9 of the Board of Commissioners on Grievances and Discipline.

Rule 1.8(i) corresponds to DR 5-103(A).

Rule 1.8(j) has no analogue in the Disciplinary Rules, but is consistent with the Supreme Court's rulings in *Cleveland Bar Assn v. Feneli* (1999), 86 Ohio St.3d 102 and *Disciplinary Counsel v. Moore* (2004), 101 Ohio St.3d 261.

Rule 1.8(k) may be compared to DR 5-105(D).

Comparison to ABA Model Rules of Professional Conduct

Rule 1.8 contains several changes from the Model Rule. Rule 1.8(c) is revised to conform to DR 5-101(A)(2). Rule 1.8(f)(4) references specific obligations of insurance defense counsel. Rule 1.8(h) conforms the rule—on the circumstances in which a lawyer may enter into an agreement with a client settling a claim against the lawyer—with Ohio law as stated in *Clavner*.

Division (f)(4) and a "Statement of Insured Client's Rights" is added based on a recommendation from the Ohio State Bar Association's House Counsel Task Force. Comment [12A] also is added to correspond to speak directly to the insurance defense lawyer's ethical duties. The defense provided to an insured by a lawyer retained by an insurer is the most frequent situation in which a lawyer is paid by someone other than the lawyer's client. The comment is based on Advisory Opinions 2000-2 and 2000-3 of the Board of Commissioners on Grievances and Discipline, as well as the Report of the House Counsel Task Force of the Ohio State Bar Association, as adopted by the OSBA House of Delegates in November 2002, which the Supreme Court charged the Task Force to review, and the Report of the OSBA's Insurance and Audit Practices and Controls Committee, as adopted by the OSBA House of Delegates in May 2004.

RULE 1.9: DUTIES TO FORMER CLIENTS

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

(b) Unless the former client gives *informed consent, confirmed in writing*, a lawyer shall not *knowingly* represent a person in the same or a *substantially related matter* in which a *firm* with which the lawyer formerly was associated had previously represented a client where both of the following apply:

(1) the interests of the client are materially adverse to that person;

(2) the lawyer had acquired information about the client that is protected by Rules 1.6 and 1.9(c) and material to the matter.

(c) A lawyer who has formerly represented a client in a matter or whose present or former *firm* has formerly represented a client in a matter shall not thereafter do either of the following:

(1) use information relating to the representation to the disadvantage of the former client except as these rules would permit or require with respect to a client or when the information has become generally *known*;

(2) reveal information relating to the representation except as these rules would permit or require with respect to a client.

Comment

[1] After termination of a client-lawyer relationship, a lawyer has certain continuing duties with respect to confidentiality and conflicts of interest and thus may not represent another client except in conformity with this rule. Under this rule, for example, a lawyer could not properly seek to rescind on behalf of a new client a contract drafted on behalf of the former client. So also a lawyer who has prosecuted an accused person could not properly represent the accused in a subsequent civil action against the government concerning the same transaction. Nor could a lawyer who has represented multiple clients in a matter represent one of the clients against the others in the same or a substantially related matter after a dispute arose among the clients in that matter, unless all affected clients give informed consent, confirmed in writing. See Comment [9]. Current and former government lawyers must comply with this rule to the extent required by Rule 1.11.

[2] The scope of a "matter" for purposes of this rule depends on the facts of a particular situation or transaction. The lawyer's involvement in a matter can also be a question of degree. When a lawyer has been directly involved in a specific transaction, subsequent representation of other clients with materially adverse interests in that transaction clearly is

prohibited. On the other hand, a lawyer who recurrently handled a type of problem for a former client is not precluded from later representing another client in a factually distinct problem of that type even though the subsequent representation involves a position adverse to the prior client. Similar considerations can apply to the reassignment of military lawyers between defense and prosecution functions within the same military jurisdictions. The underlying question is whether the lawyer was so involved in the matter that the subsequent representation can be justly regarded as a changing of sides in the matter in question. For a former government lawyer, "matter" is defined in Rule 1.11(e).

[3] See Rule 1.0(n) for a definition of "substantially related matter". For example, a lawyer who has represented a businessperson and learned extensive private financial information about that person may not then represent that person's spouse in seeking a divorce. Similarly, a lawyer who has previously represented a client in securing environmental permits to build a shopping center would be precluded from representing neighbors seeking to oppose rezoning of the property on the basis of environmental considerations; however, the lawyer would not be precluded, on the grounds of substantial relationship, from defending a tenant of the completed shopping center in resisting eviction for nonpayment of rent. Information that has been disclosed to the public or to other parties adverse to the former client ordinarily will not be disqualifying. Information acquired in a prior representation may have been rendered obsolete by the passage of time, a circumstance that may be relevant in determining whether two representations are substantially related. In the case of an organizational client, general knowledge of the client's policies and practices ordinarily will not preclude a subsequent representation; on the other hand, knowledge of specific facts gained in a prior representation that are relevant to the matter in question ordinarily will preclude such a representation. A former client is not required to reveal the confidential information learned by the lawyer in order to establish a substantial risk that the lawyer has confidential information to use in the subsequent matter. A conclusion about the possession of such information may be based on the nature of the services the lawyer provided the former client and information that would in ordinary practice be learned by a lawyer providing such services.

Lawyers Moving Between Firms

[4] When lawyers have been associated within a firm but then end their association, the question of whether a lawyer should undertake representation is more complicated. There are several competing considerations. First, the client previously represented by the former firm must be reasonably assured that the principle of loyalty to the client is not compromised. Second, the rule should not be so broadly cast as to preclude other persons from having reasonable choice of legal counsel. Third, the rule should not unreasonably hamper lawyers from forming new associations and taking on new clients after having left a previous association. In this connection, it should be recognized that today many lawyers practice in firms, that many lawyers to some degree limit their practice to one field or another, and that many move from one association to another several times in their careers. If the concept of imputation were applied with unqualified rigor, the result would be radical curtailment of the opportunity of lawyers to move from one practice setting to another and of the opportunity of clients to change counsel.

[5] Division (b) operates to disqualify the lawyer only when the lawyer involved has actual knowledge of information protected by Rules 1.6 and 1.9(c). Thus, if a lawyer while with one firm acquired no knowledge or information relating to a particular client of the firm, and that lawyer later joined another firm, neither the lawyer individually nor the second firm is disqualified from representing another client in the same or a related matter even though the interests of the two clients conflict. See Rule 1.10(b) for the restrictions on a firm once a lawyer has terminated association with the firm.

[6] Application of division (b) depends on a situation's particular facts, aided by inferences, deductions, or working presumptions that reasonably may be made about the way in which lawyers work together. A lawyer may have general access to files of all clients of a law firm and may regularly participate in discussions of their affairs; it should be inferred that such a lawyer in fact is privy to all information about all the firm's clients. In contrast, another lawyer may have access to the files of only a limited number of clients and participate in discussions of the affairs of no other clients; in the absence of information to the contrary, it should be inferred that such a lawyer in fact is privy to information about the clients actually served but not those of other clients. In such an inquiry, the burden of proof should rest upon the lawyer whose disqualification is sought.

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

[8] Division (c) provides that information acquired by the lawyer in the course of representing a client may not subsequently be used or revealed by the lawyer to the disadvantage of the client. However, the fact that a lawyer has once served a client does not preclude the lawyer from using generally known information about that client when later representing another client.

[9] The provisions of this rule are for the protection of former clients and can be waived if the client gives informed consent, which consent must be confirmed in writing under divisions (a) and (b). See Rule 1.0(f). With regard to the effectiveness of an advance waiver, see Comment [33] to Rule 1.7. With regard to disqualification of a firm with which a lawyer is or was formerly associated, see Rule 1.10.

Comparison to former Ohio Code of Professional Responsibility

Rule 1.9 addresses the lawyer's continuing duty of client confidentiality when the lawyer-client relationship ends. The rule articulates the substantial relationship test adopted by the Supreme Court in *Kala v. Aluminum Smelting & Refining Co., Inc.* (1998), 81 Ohio St. 3d 1, citing with approval Advisory Opinion 89-013 of the Board of Commissioners on Grievances and Discipline, which also relied on the substantial relationship test to judge former client conflicts.

In *Kala,* the Court extended the confidentiality protection of DR 4-101 to former clients by creating a presumption of shared confidences between the former client and lawyer [Rule

1.9(a)]. It further held that this presumption could be rebutted by evidence that the lawyer had no personal contact with or knowledge of the former client matter [Rule 1.9(b)]. In doing so it clarified that the DR 4-101(B) prohibition against using or revealing client confidences or secrets without consent applied to former clients [Rule 1.9(c)].

Kala did not address the issue of what constitutes a substantial relationship, because the lawyer in question switched sides in the same case. The comments are consistent with appellate decisions, as well as with the Restatement (Third) of the Law Governing Lawyers §132 (2000). The only change from current Ohio law is the requirement that conflict waivers be "confirmed in writing," consistent with other conflict provisions such as Rules 1.7 and 1.8.

Division (a) restates the substantial relationship test, which extends confidentiality protection to clients the lawyer has formerly represented. This test presumes that the lawyer obtained and cannot use information relating to the representation of the former client in the same or substantially related matters, the first prong of the *Kala* test.

Division (b) applies where the lawyer's firm (but not the lawyer personally) represented a client, and requires that the former client show that the lawyer in question actually acquired confidential information, the second prong of the *Kala* test.

Division (c) provides that in either actual or law firm prior representation, the prohibitions against use [Model Rule 1.8(b)] and disclosure (Model Rule 1.6) that protect current clients also extend to former clients. This is the foundation of the *Kala* opinion, which extended the prohibitions against use or disclosure of client confidences or secrets in DR 4-101(B) to former clients.

Comparison to ABA Model Rules of Professional Conduct

Rule 1.9 is substantively identical to Model Rule 1.9. The definition of "substantially related matter," which appears in Comment [3] of the Model Rule is moved to Rule 1.0(n).

RULE 1.10: IMPUTATION OF CONFLICTS OF INTEREST: GENERAL RULE

(a) While lawyers are associated in a *firm*, none of them shall represent a client when the lawyer *knows* or *reasonably should know* that any one of them practicing alone would be prohibited from doing so by Rule 1.7 or 1.9, unless the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the *firm*.

(b) When a lawyer is no longer associated with a *firm*, no lawyer in that *firm* shall thereafter represent a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the *firm*, if the lawyer *knows* or *reasonably should know* that either of the following applies:

(1) the formerly associated lawyer represented the client in the same or a *substantially related matter*;

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

(c) When a lawyer has had *substantial* responsibility in a matter for a former client and becomes associated with a new *firm*, no lawyer in the new *firm* shall *knowingly* represent, in the same matter, a person whose interests are materially adverse to the interests of the former client.

(d) In circumstances other than those covered by Rule 1.10(c), when a lawyer becomes associated with a new *firm*, no lawyer in the new *firm* shall *knowingly* represent a person in a matter in which the lawyer is personally disqualified under Rule 1.9 unless both of the following apply:

(1) the new *firm* timely *screens* the personally disqualified lawyer from any participation in the matter and that lawyer is apportioned no part of the fee from that matter;

(2) *written* notice is given as soon as practicable to any affected former client.

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

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

Comment

Definition of "Firm"

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

Principles of Imputed Disqualification

[2] The rule of imputed disqualification stated in division (a) gives effect to the principle of loyalty to the client as it applies to lawyers who practice in a law firm. Such situations can be considered from the premise that a firm of lawyers is essentially one lawyer for purposes of the rules governing loyalty to the client, or from the premise that each lawyer is vicariously bound by the obligation of loyalty owed by each lawyer with whom the lawyer is associated. Division (a) operates only among the lawyers currently associated in a firm. When a lawyer moves from one firm to another, imputation of that lawyer's conflict to the lawyers remaining in the firm is governed by Rules 1.9(b) and 1.10(b).

[3] The rule in division (a) does not prohibit representation where neither questions of client loyalty nor protection of confidential information are presented. Where the usual concerns justifying imputation are not present, the rule eliminates imputation in the case of conflicts between the interests of a client and a lawyer's own personal interest. Note that the specific personal conflicts governed by Rule 1.8 are imputed to the firm by Rule 1.8(k). Where one lawyer in a firm could not effectively represent a given client because of strong political beliefs, for example, but that lawyer will do no work on the case and the personal beliefs of the lawyer will not materially limit the representation by others in the firm, the firm should not be disqualified. On the other hand, if an opposing party in a case were owned by a lawyer in the law firm, and others in the firm would be materially limited in pursuing the matter because of loyalty to that lawyer, the personal disqualification of the lawyer would be imputed to all others in the firm.

[4] The rule in division (a) also does not prohibit representation by others in the law firm where the person prohibited from involvement in a matter is a nonlawyer, such as a paralegal or legal secretary. Nor does division (a) prohibit representation if the lawyer is prohibited from acting because of events before the person became a lawyer, for example, work that the person did while a law student. Such persons, however, ordinarily must be screened from any personal participation in the matter to avoid communication to others in the firm of confidential information that both the nonlawyers and the firm have a legal duty to protect. See Rules 1.0(l) and 5.3.

[5] Rule 1.10(b) prohibits lawyers in a law firm from representing a person with interests directly adverse to those of a client represented by a lawyer who formerly was

associated with the firm where the matter is the same or substantially related to that in which the formerly associated lawyer represented the client or any other lawyer currently in the firm has material information protected by Rule 1.6 or 1.9(c). "Substantially related matter" is defined in Rule 1.0(n), and examples are given in Rule 1.9, Comment [3].

Removing Imputation

[5A] Divisions (c) and (d) address imputation to lawyers in a new firm when a personally disqualified lawyer moves from one law firm to another. Division (c) imputes the conflict of a lawyer who has had substantial responsibility in a matter to all lawyers in a law firm to which the lawyer moves and prohibits the new law firm from assuming or continuing the representation of a client in the same matter if the client's interests are materially adverse to those of the former client. Division (d) provides for removal of imputation of a former client conflict of one lawyer to a new firm in all other instances in which a personally disqualified lawyer moves from one firm to another, provided that the personally disqualified lawyer is properly screened from participation in the matter and the former client or client's counsel is given notice.

[5B] Screening is not effective to avoid imputed disqualification of other lawyers in the firm if the personally disqualified lawyer had substantial responsibility for representing the former client in the same matter in which the lawyer's new firm represents an adversary of the former client. A lawyer who was sole or lead counsel for a former client in a matter had substantial responsibility for the matter. Determining whether a lawyer's role in representing the former client was substantial in other circumstances involves consideration of such factors as the lawyer's level of responsibility in the matter, the duration of the lawyer's participation, the extent to which the lawyer advised or had personal contact with the former client and the former client's personnel, and the extent to which the lawyer was exposed to confidential information of the former client likely to be material in the matter.

[5C] Requirements for effective screening procedures are stated in Rule 1.0(l). Division (d) does not prohibit the screened lawyer from receiving compensation established by prior independent agreement, but that lawyer may not receive compensation directly related to the matter in which the lawyer is disqualified.

[5D] Notice of the screened lawyer's prior representation and that screening procedures have been employed, generally should be given as soon as practicable after the need for screening becomes apparent. When disclosure is likely to significantly injure the current client, a reasonable delay may be justified.

[5E] Screening will not remove imputation where screening is not timely undertaken, or where the circumstances provide insufficient assurance that confidential information known by the personally disqualified lawyer will remain protected. Factors to be considered in deciding whether an effective screen has been created are the size and structure of the firm, the likelihood of contact between the disqualified lawyer and lawyers involved in the current representation, and the existence of safeguards or procedures that prevent the disqualified lawyer from access to information relevant to the current representation.

[6] Rule 1.10(e) removes imputation with the informed consent of the affected client or former client under the conditions stated in Rule 1.7. The conditions stated in Rule 1.7 require the lawyer to determine that the lawyer can represent all affected clients competently, diligently, and loyally, that the representation is not prohibited by Rule 1.7(c), and that each affected client or former client has given informed consent to the representation, confirmed in writing. In some cases, the risk may be so severe that the conflict may not be cured by client consent. For a discussion of the effectiveness of client waivers of conflicts that might arise in the future, see Rule 1.7, Comment [33]. For a definition of informed consent, see Rule 1.0(f).

[7] Where a lawyer has joined a private firm after having represented the government, imputation is governed by Rule 1.11(b) and (c), not this rule. Under Rule 1.11(d), where a lawyer represents the government after having served clients in private practice, nongovernmental employment or in another government agency, former-client conflicts are not imputed to government lawyers associated with the individually disqualified lawyer.

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

Comparison to former Ohio Code of Professional Responsibility

Rule 1.10 governs imputed conflicts of interest and replaces Ohio DR 5-105(D), which imputes the conflict of any lawyer in the firm to all others in the firm. Rule 1.10(a) embodies this rule. The text of DR 5-105(D) lacks clarity about whether its provisions extended to all conflicts, including personal conflicts. Rule 1.10(a) imputes all conflicts, except personal conflicts that are not likely to affect adversely the representation of a client by other lawyers in the firm. Rule 1.10(b) clarifies that imputation generally ends when the personally disqualified lawyer leaves the firm, unless the firm proposes to represent a client in the same or substantially related case or another lawyer in the firm has confidential information about the former client.

Divisions (c) and (d) are added to codify the rule in *Kala v. Aluminum Smelting & Refining Co., Inc.* (1998), 81 Ohio St.3d 1, where the Supreme Court allowed law firm screens in some cases when personally disqualified lawyers change law firms. Rule 1.10(c) is consistent with the holding in *Kala* that imputes to a new firm the disqualification of a lawyer who had substantial responsibility for a matter and prevents any lawyer in that firm from representing, in that matter, a client whose interests are materially adverse to the former client. Consistent with the syllabus in *Kala*, Rule 1.10(d) allows the presumption of shared confidences within the new firm to be rebutted by effective screening when a personally disqualified lawyer did not have substantial responsibility in the matter or the new firm is asked to represent a client in a different matter.

Comparison to ABA Model Rules of Professional Conduct

Rule 1.10 corresponds to the Model Rule, with the addition of divisions (c) and (d), which separately address the issue of imputation and removing imputation to lawyers in a new

firm when a lawyer changes law firms and no longer represents a former client. Rule 1.10(b) is stated in the form of a disciplinary rule. Rule 1.10 (d) permits the use of law firm screens to remove imputation, consistent with *Kala*, except in the circumstances stated in Rule 1.10(c)—that is where a lawyer who is changing firms had a substantial role in the same matter in which the lawyer's new firm represents or proposes to represent a client with adverse interests. Comments [5A] to [5E] explain Rules 1.10(c) and (d), including a cross-reference to Rule 1.0(l), which defines the requirements for proper screening procedures. Comments [5A] and [5B] are added to explain the *Kala* rule. Comments [5C] and [5D] are based on the original ABA Ethics 2000 proposal. Comment [5E] is based on *Kala*.

RULE 1.11: SPECIAL CONFLICTS OF INTEREST FOR FORMER AND CURRENT GOVERNMENT OFFICERS AND EMPLOYEES

(a) A lawyer who has formerly served as a public officer or employee of the government shall comply with both of the following:

(1) all applicable laws and Rule 1.9(c) regarding conflicts of interest;

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

(b) When a lawyer is disqualified from representation under division (a), no lawyer in a *firm* with which that lawyer is associated may *knowingly* undertake or continue representation in such a matter unless both of the following apply:

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

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

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

(d) Except as law may otherwise expressly permit, a lawyer currently serving as a public officer or employee shall comply with both of the following:

(1) Rules 1.7 and 1.9;

(2) shall not do either of the following:

(i) participate in a matter in which the lawyer participated personally and *substantially* while in private practice or nongovernmental

employment, unless the appropriate government agency gives its *informed consent, confirmed in writing*;

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

(e) As used in this rule, the term "matter" includes both of the following:

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

(2) any other matter covered by the conflict of interest rules of the appropriate government agency.

Comment

[1] A lawyer who has served or is currently serving as a public officer or employee is personally subject to the Ohio Rules of Professional Conduct, including the prohibition against concurrent conflicts of interest stated in Rule 1.7 and provisions regarding former client conflicts contained in Rule 1.9(c). For purposes of Rule 1.9(c), which applies to former government lawyers, the definition of "matter" in division (e) applies. In addition, such a lawyer may be subject to criminal statutes and other government regulations regarding conflict of interest. See R.C. Chapters 102. and 2921. Such statutes and regulations may circumscribe the extent to which and length of time before the government agency may give consent under this rule. See Rule 1.0(f) for the definition of informed consent.

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

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

on behalf of a private client may not pursue the claim on behalf of the government, except when authorized to do so by division (d). As with divisions (a)(1) and (d)(1), Rule 1.10 is not applicable to the conflicts of interest addressed by these paragraphs.

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

[5] When a lawyer has been employed by one government agency and then moves to a second government agency, it may be appropriate to treat that second agency as another client for purposes of this rule, as when a lawyer is employed by a city and subsequently is employed by a federal agency. However, because the conflict of interest is governed by division (d), the latter agency is not required to screen the lawyer as division (b) requires a law firm to do. The question of whether two government agencies should be regarded as the same or different clients for conflict of interest purposes is beyond the scope of these rules. See Rule 1.13, Comment [9].

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

[7] Notice of the screened lawyer's prior representation and that screening procedures have been employed, generally should be given as soon as practicable after the need for screening becomes apparent. When disclosure is likely to significantly injure the current client, a reasonable delay may be justified.

[8] Division (c) operates only when the lawyer in question has knowledge of the information, which means actual knowledge; it does not operate with respect to information that merely could be imputed to the lawyer. See R.C. 102.03(B).

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

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

Comparison to former Ohio Code of Professional Responsibility

Rule 1.11 spells out special conflict of interest rules for lawyers who are current or former government employees. The movement of lawyers from public service and practice to private practice and involvement in the same or similar issues and controversies requires rules that expressly spell out when a conflict exists that prevents representation or permits such representation if certain conditions are met, including screening where appropriate. The rule likewise governs the conduct of lawyers moving from private practice into the public sector. DR 9-101(B) includes only a broad prohibition forbidding a lawyer from accepting private employment in a matter in which he or she had substantial responsibility while a public employee. This prohibition is based on avoiding the appearance of impropriety and gives no specific guidance to former government lawyers.

Comparison to ABA Model Rules of Professional Conduct

Rule 1.11 reflects the Model Rule except for minor changes. The rule makes clear that a lawyer subject to these special rules on conflicts shall comply with all the conditions set forth in Rule 1.11(a), (b), and (d). Also division (a)(1) requires compliance with all applicable laws and Rule 1.9(c) regarding conflicts of interest. This includes provisions of the Ohio Ethics Law contained in R.C. Chapters 102. and 2921. as well as the regulations of the Ohio Ethics Commission. These statutes and regulations include specific definitions of a prohibited conflict of interest and language forbidding the same for present and former government employees.

RULE 1.12: FORMER JUDGE, ARBITRATOR, MEDIATOR, OR OTHER THIRD-PARTY NEUTRAL

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

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

(c) If a lawyer is disqualified by division (a), no lawyer in a *firm* with which that lawyer is associated may *knowingly* undertake or continue representation in the matter unless both of the following apply:

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

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

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

Comment

[1] This rule generally parallels Rule 1.11. The term "personally and substantially" signifies that a judge who was a member of a multimember court, and thereafter left judicial office to practice law, is not prohibited from representing a client in a matter pending in the court, but in which the former judge did not participate. So also the fact that a former judge exercised administrative responsibility in a court does not prevent the former judge from acting as a lawyer in a matter where the judge had previously exercised remote or incidental administrative responsibility that did not affect the merits. Compare the Comment to Rule 1.11. The term "adjudicative officer" includes such officials as judges pro tempore, magistrates, special masters, hearing officers, and other parajudicial officers, and also lawyers who serve as parttime judges. Part III of the Application section of the Ohio Code of Judicial Conduct provides that a parttime judge shall not "act as a lawyer in any proceeding in which the judge served as a judge or in any other related proceeding." Although phrased differently from this rule, the provisions correspond in meaning.

[2] Like former judges, lawyers who have served as arbitrators, mediators, or other third-party neutrals may be asked to represent a client in a matter in which the lawyer

participated personally and substantially. This rule forbids such representation unless all of the parties to the proceedings give their informed consent, confirmed in writing. See Rule 1.0(f) and (b). Other law or codes of ethics governing third-party neutrals may impose more stringent standards of personal or imputed disqualification. Lawyers who serve as mediators and other third-party neutrals also are governed by Rule 2.4.

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

[4] Requirements for screening procedures are stated in Rule 1.0(l). Division (c)(1) does not prohibit the screened lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly related to the matter in which the lawyer is disqualified.

[5] Notice of the screened lawyer's prior representation and that screening procedures have been employed, generally should be given as soon as practicable after the need for screening becomes apparent. When disclosure is likely to significantly injure the current client, a reasonable delay may be justified.

[6] By its terms, Rule 1.12(b) prohibits a lawyer from negotiating for employment with a party or lawyer involved in a matter in which the lawyer is presently acting as an adjudicative officer or neutral, during the time that the lawyer has such a role. The lawyer should not negotiate for such employment during the pendency of the matter, regardless of whether the lawyer is active in the matter at the time that the employment opportunity arises, except where the lawyer's role has completely ended. Thus, a lawyer who, while acting as an independent mediator, attempted to settle a matter that remains pending is not prohibited from negotiating for employment with one of the parties or one of the lawyers in the matter after the mediation has concluded but while the case is still pending. If the lawyer were to be hired, however, Rule 1.12(a) would prohibit the lawyer from being involved in the matter on behalf of a party, and Rule 1.12(c) would effect the disqualification of the rest of the firm, absent effective screening and notice to the other parties and the tribunal.

Comparison to former Ohio Code of Professional Responsibility

Rule 1.12 addresses the duty of arbitrators, mediators, other third-party neutrals, and former judges to promote public confidence in our legal system and in the legal profession. DR 9-101(A) and (B) prohibit a lawyer from accepting private employment in a matter upon the merits of which the lawyer acted in a judicial capacity or the lawyer had substantial responsibility while the lawyer was a public employee. Because the same potential for misunderstanding exists with respect to lawyers acting as arbitrators or mediators, EC 5-21 recommends that lawyers be prohibited from thereafter representing in the dispute any of the parties involved in the mediation or arbitration. Rule 1.12 codifies the aspirational goal of EC 5-21, creates a standard for disqualification of a lawyer who "personally and substantially"

participated in the same matter while serving as a judge, mediator, arbitrator, or third party neutral, establishes an informed consent standard by which the lawyer may avoid personal disqualification, and provides a process through which the personally disqualified lawyer's firm may avoid disqualification.

Comparison to ABA Model Rules of Professional Conduct

Rule 1.12 is substantively identical to Model Rule 1.12. Comment [6] has been added to provide further clarification regarding application of the rule.

RULE 1.13: ORGANIZATION AS CLIENT

(a) A lawyer employed or retained by an organization represents the organization acting through its constituents. A lawyer employed or retained by an organization owes allegiance to the organization and not to any constituent or other person connected with the organization. The constituents of an organization include its owners and its duly authorized officers, directors, trustees, and employees.

(b) If a lawyer for an organization *knows* or *reasonably should know* that its constituent's action, intended action, or refusal to act (1) violates a legal obligation to the organization, or (2) is 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 necessary in the best interest of the organization. When it is necessary to enable the organization to address the matter in a timely and appropriate manner, the lawyer shall 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.

(c) The discretion or duty of a lawyer for an organization to reveal information relating to the representation outside the organization is governed by Rule 1.6(b) and (c).

(d) In dealing with an organization's directors, officers, employees, members, shareholders, or other constituents, a lawyer shall explain the identity of the client when 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.

(e) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders, or other constituents, subject to the provisions of Rule 1.7. If the organization's *written* 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. "Other constituents" as used in this rule and comment means the positions equivalent to officers, directors, employees, and shareholders held by persons acting for organizational clients that are not corporations. The duties defined in this rule apply equally to unincorporated associations.

[2] When one of the constituents of an organizational client communicates with the organization's lawyer in that person's organizational capacity, the lawyer must keep the

communication confidential as to persons other than the organizational client as required 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 disclose to the organizational client a communication related to the representation that a constituent made to the lawyer, but the lawyer may not disclose such information to others 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] Division (b) explains when a lawyer may have an obligation to report "up the ladder" within an organization as part of discharging the lawyer's duty to communicate with the organizational client. When constituents of the organization make decisions for it, their 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. Division (b) makes clear, however, that when the lawyer knows or reasonably should know 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 a 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(g), knowledge can be inferred from circumstances, and a lawyer cannot ignore the obvious.

[4] In determining whether "up-the-ladder" reporting is required under division (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. In some circumstances, referral to a higher authority may be unnecessary; for example, if the circumstances involve a constituent's innocent misunderstanding of the law and subsequent acceptance of the lawyer's advice. In contrast, if a constituent persists in conduct contrary to the lawyer's advice, or if the matter is of sufficient seriousness and importance or urgency to the organization, whether or not the lawyer has not communicated with the constituent, it will be necessary for the lawyer to take steps to have the matter reviewed by a higher authority in the organization. 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 interests of the organization.

[5] Division (b) also makes clear that, if warranted by the circumstances, a lawyer must refer a matter to 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] Division (c) makes clear that a lawyer for an organization has the same discretion and obligation to reveal information relating to the representation to persons outside the client as any other lawyer, as provided in Rule 1.6(b) and (c) (which incorporates Rules 3.3 and 4.1 by reference). As stated in Comment [14] to Rule 1.6, where practicable, before revealing information, the lawyer should first seek to persuade the client to take suitable action to obviate the need for disclosure. Even where such consultation is not practicable, the lawyer should consider whether giving notice to a higher authority within the organization of the lawyer's intent to disclose confidential information pursuant to Rule 1.6(b) or Rule 1.6(c) would advance or interfere with the purpose of the disclosure.

[7] [RESERVED]

[8] [RESERVED]

Government Agency

[9] The duty to "report up the ladder" defined in this rule also applies to lawyers for 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]. In addition, the duties of lawyers employed by the government or lawyers in military service may be defined by statute and regulation. Under this rule, if the lawyer's client is one branch of government, the public, or the government as a whole, the lawyer must consider what is in the best interests of that client when the lawyer becomes aware of an agent's wrongful action or inaction, as defined by the rule, and must disclose the information to an appropriate official. 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 ensure 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] Division (e) recognizes that a lawyer for an organization may also represent one or more constituents of an organization, if the conditions of Rule 1.7 are satisfied.

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.

Comparison to former Ohio Code of Professional Responsibility

Ohio has no Disciplinary Rule directly addressing the responsibility of a lawyer for an organization. However, Rule 1.13 draws substantially upon EC 5-19.

Comparison to ABA Model Rules of Professional Conduct

Rule 1.13 more closely resembles the substance of Model Rule 1.13 as it existed prior to its last revision by the ABA in August 2003. Specifically, Rule 1.13 identifies to whom a lawyer for an organization owes loyalty and requires that a lawyer for an organization effectively communicate to the organization concerning matters of material risk to the organization of which the lawyer becomes aware. Rule 1.13 does not include a provision of Model Rule 1.13 that imposes a "whistle-blowing" requirement upon lawyers for organizations.

Rule 1.13 alters Model Rule 1.13 in the following respects:

- Rule 1.13(a) is augmented to define the term "constituent" and to add the principle of EC 5-19 to the black letter rule.

- The rule and comment have been edited for greater simplicity and clarity. Among the changes are reconciliation of the apparent contradiction in Model Rule 1.13(b) between the direction to "proceed as reasonably necessary," which leaves the approach to the lawyer's discretion, and the mandatory direction to report to higher authority.

- The special "reporting out" requirement of Model Rule 1.13(c) has been stricken. Instead, a lawyer for an organization has the same "reporting out" discretion or duty as other lawyers have under Rule 1.6(b) and (c). Model Rule 1.13(d) and Comments [6] and [7] are unnecessary in light of its revision of Rule 1.13(b).

- Model Rule 1.13(e) is deleted. That provision requires that a lawyer who has quit or been discharged because of "reporting up" or "reporting out" make sure that the governing board knows of the lawyer's withdrawal or termination. Such a provision seems out of place in a code of ethics.

The comments to Rule 1.13 are revised to reflect changes to the rule.

RULE 1.14: CLIENT WITH DIMINISHED CAPACITY

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

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

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

Comment

[1] The normal client-lawyer relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters. When the client is a minor or suffers from a diminished mental capacity, however, maintaining the ordinary client-lawyer relationship may not be possible in all respects. In particular, a severely incapacitated person may have no power to make legally binding decisions. Nevertheless, a client with diminished capacity often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being. For example, children as young as five or six years of age, and certainly those of ten or twelve, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody. So also, it is recognized that some persons of advanced age can be quite capable of handling routine financial matters while needing special legal protection concerning major transactions.

[2] The fact that a client suffers a disability does not diminish the lawyer's obligation to treat the client with attention and respect. Even if the person has a legal representative, the lawyer should as far as possible accord the represented person the status of client, particularly in maintaining communication.

[3] The client may wish to have family members or other persons participate in discussions with the lawyer. When necessary to assist in the representation, the presence of such persons generally does not affect the applicability of the attorney-client evidentiary privilege. Nevertheless, the lawyer must keep the client's interests foremost and, except for protective action authorized under division (b), must look to the client, and not family members, to make decisions on the client's behalf.

[4] If a legal representative has already been appointed for the client, the lawyer should ordinarily look to the representative for decisions on behalf of the client. In matters involving a minor, whether the lawyer should look to the parents as natural guardians may depend on the type of proceeding or matter in which the lawyer is representing the minor. If the lawyer represents the guardian as distinct from the ward, and is aware that the guardian is acting adversely to the ward's interest, the lawyer may have an obligation to prevent or rectify the guardian's misconduct. See Rule 1.2(d).

Taking Protective Action

[5] If a lawyer reasonably believes that a client is at risk of substantial physical, financial or other harm unless action is taken, and that a normal client-lawyer relationship cannot be maintained as provided in division (a) because the client lacks sufficient capacity to communicate or to make adequately considered decisions in connection with the representation, then division (b) permits the lawyer to take protective measures deemed necessary. Such measures could include: consulting with family members; using a reconsideration period to permit clarification or improvement of circumstances; using voluntary surrogate decision-making tools such as durable powers of attorney; or consulting with support groups professional services, adult-protective agencies, or other individuals or entities that have the ability to protect the client. In taking any protective action, the lawyer should be guided by such factors as the wishes and values of the client to the extent known, the client's best interests, and the goals of intruding into the client's decision-making autonomy to the least extent feasible, maximizing client capacities and respecting the client's family and social connections.

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

[7] If a legal representative has not been appointed, the lawyer should consider whether appointment of a guardian *ad litem*, conservator, or guardian is necessary to protect the client's interests. Thus, if a client with diminished capacity has substantial property that should be sold for the client's benefit, effective completion of the transaction may require appointment of a legal representative. In addition, rules of procedure in litigation sometimes provide that minors or persons with diminished capacity must be represented by a guardian or next friend if they do not have a general guardian. In many circumstances, however, appointment of a legal representative may be more expensive or traumatic for the client than circumstances in fact require. Evaluation of such circumstances is a matter entrusted to the professional judgment of the lawyer. In considering alternatives, however, the lawyer should be aware of any law that requires the lawyer to advocate the least restrictive action on behalf of the client.

Disclosure of the Client's Condition

[8] Disclosure of the client's diminished capacity could adversely affect the client's interests. For example, raising the question of diminished capacity could, in some circumstances, lead to proceedings for involuntary commitment. Information relating to the representation is protected by Rule 1.6. Therefore, unless authorized to do so, the lawyer may not disclose such information. When taking protective action pursuant to division (b), the lawyer is impliedly authorized to make the necessary disclosures, even when the client directs the lawyer to the contrary. Nevertheless, given the risks of disclosure, division (c) limits what the lawyer may disclose in consulting with other individuals or entities or seeking the appointment of a legal representative. At the very least, the lawyer should determine whether it is likely that the person or entity consulted with will act adversely to the client's interests before discussing matters related to the client. The lawyer's position in such cases is an unavoidably difficult one.

Emergency Legal Assistance

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

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

Comparison to former Ohio Code of Professional Responsibility

There are no Disciplinary Rules that cover directly the representation of a client with diminished capacity. The only comparable provisions are EC 7-11 and 7-12, which discuss the representation of a client with a mental or physical disability that renders the client incapable of making independent decisions.

Rule 1.14 is both broader and narrower than EC 7-12. It is broader to the extent that it explicitly permits a lawyer to ask for the appointment of a guardian *ad litem* in the appropriate circumstance, it explicitly permits the lawyer to take reasonably necessary protective action, and

it explicitly permits the disclosure of confidential information to the extent necessary to protect the client's interest.

Rule 1.14 is narrower to the extent that it does not explicitly permit the lawyer representing a client with diminished capacity to make decisions that the ordinary client would normally make. The rule does not address the matter of decision-making, as is the case in EC 7-12, but merely states that the lawyer should maintain a normal client-lawyer relationship as far as reasonably possible.

Comparison to ABA Model Rules of Professional Conduct

Rule 1.14 is identical to the ABA Model Rule.

RULE 1.15: SAFEKEEPING FUNDS AND PROPERTY

(a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate interest-bearing account in a financial institution authorized to do business in Ohio and maintained in the state where the lawyer's office is situated. The account shall be designated as a "client trust account," "IOLTA account," or with a clearly identifiable fiduciary title. Other property shall be identified as such and appropriately safeguarded. Records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of seven years after termination of the representation or the appropriate disbursement of such funds or property, whichever comes first. For other property, the lawyer shall maintain a record that identifies the property, the date received, the person on whose behalf the property was held, and the date of distribution. For funds, the lawyer shall do all of the following:

(1) maintain a copy of any fee agreement with each client;

(2) maintain a record for each client on whose behalf funds are held that sets forth all of the following:

(i) the name of the client;

(ii) the date, amount, and source of all funds received on behalf of such client;

(iii) the date, amount, payee, and purpose of each disbursement made on behalf of such client;

(iv) the current balance for such client.

(3) maintain a record for each bank account that sets forth all of the following:

(i) the name of such account;

(ii) the date, amount, and client affected by each credit and debit;

(iii) the balance in the account.

(4) maintain all bank statements, deposit slips, and cancelled checks, if provided by the bank, for each bank account;

(5) perform and retain a monthly reconciliation of the items contained in divisions (a)(2), (3), and (4) of this rule.

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

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

(d) Upon receiving funds or other property in which a client or third person has a lawful interest, a lawyer shall promptly notify the client or third person. For purposes of this rule, the third person's interest shall be one of which the lawyer has actual knowledge and shall be limited to a statutory lien, a final judgment addressing disposition of the funds or property, or a written agreement by the client or the lawyer on behalf of the client guaranteeing payment from the specific funds or property. Except as stated in this rule or otherwise permitted by law or by agreement with the client or a third person, *confirmed in writing*, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive. Upon request by the client or third person, the lawyer shall promptly render a full accounting regarding such funds or other property.

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

(f) Upon dissolution of any *law firm*, the former *partners*, managing *partners*, or supervisory lawyers shall promptly account for all client funds and shall make appropriate arrangements for one of them to maintain all records generated under division (a) of this rule.

(g) A lawyer, *law firm*, or estate of a deceased lawyer who sells a law practice shall account for and transfer all funds held pursuant to this rule to the lawyer or *law firm* purchasing the law practice at the time client files are transferred.

(h) A lawyer, a lawyer in the lawyer's *firm*, or a *firm* that owns an interest in a business that provides a law-related service shall:

(1) maintain funds of clients or third persons that cannot earn any net income for the clients or third persons in an interest-bearing trust account that is established in an eligible depository institution as required by sections 3953.231, 4705.09, and 4705.10 of the Revised Code or any rules adopted by the Ohio Legal Assistance Foundation pursuant to section 120.52 of the Revised Code.

(2) notify the Ohio Legal Assistance Foundation, in a manner required by rules adopted by the Ohio Legal Assistance Foundation pursuant to section 120.52 of the Revised Code, of the existence of an interest-bearing trust account;

(3) comply with the reporting requirement contained in Gov. Bar R. VI, Section 1(F).

Comment

[1] A lawyer should hold property of others with the care required of a professional fiduciary. Securities should be kept in a safe deposit box, except when some other form of safekeeping is warranted by special circumstances. All property that is the property of clients or third persons, including prospective clients, must be kept separate from the lawyer's business and personal property and, if moneys, in one or more trust accounts. A lawyer should maintain separate trust accounts when administering estate moneys. A lawyer must maintain the records listed in division (a)(1) to (5) of this rule to effectively safeguard client funds and fulfill the role of professional fiduciary. The records required by this rule may be maintained electronically.

[2] While normally it is impermissible to commingle the lawyer's own funds with client funds, division (b) provides that it is permissible when necessary to pay or obtain a waiver of bank service charges on that account. The following charges or fees assessed by an IOLTA depository may be deducted from account proceeds: (1) bank transaction charges (*i.e.*, per check, per deposit charge); and (2) standard monthly maintenance charges. The following charges or fees assessed by a client trust account depository may not be deducted from account proceeds: (1) check printing charges; (2) not-sufficient-funds charges; (3) stop payment fees; (4) teller and ATM fees; (5) electronic fund transfer fees (*i.e.*, wire transfer fees); (6) brokerage and credit card charges; and (7) other business-related expenses, which are not part of the two permissible types of fees. Accurate records must be kept regarding which part of the funds are the lawyer's.

[3] Lawyers often receive funds from which the lawyer's fee will be paid. The lawyer is not required to remit to the client funds that the lawyer reasonably believes represent fees owed. However, a lawyer may not hold funds to coerce a client into accepting the lawyer's contention. The disputed portion of the funds must be kept in a trust account and the lawyer should suggest means for prompt resolution of the dispute, such as arbitration. The undisputed portion of the funds shall be promptly distributed.

[3A] Client funds shall be deposited in a lawyer's or law firm's IOLTA account unless the lawyer determines the funds can otherwise earn income for the client in excess of the costs incurred to secure such income (*i.e.*, net income). In determining whether a client's funds can earn income in excess of costs, the lawyer or law firm should consider the following factors: (1) the amount of the funds to be deposited; (2) the expected duration of the deposit, including the likelihood of delay in the matter for which the funds are held; (3) the rates of interest or yield at the financial institutions where the funds are to be deposited; (4) the cost of establishing and administering non-IOLTA accounts for the client's benefit, including service charges, the costs of the lawyer's services, and the costs of preparing any tax reports required for income accruing

to the client's benefit; (5) the capability of financial institutions, lawyers or law firms to calculate and pay income to individual clients; (6) any other circumstances that affect the ability of the client's funds to earn a net return for the client. The lawyer or law firm should review its IOLTA account at reasonable intervals to determine whether changed circumstances require action with respect to the funds of any client.

[4] Divisions (d) and (e) address situations in which third persons may claim a lawful interest in specific funds or other property in a lawyer's custody. A lawyer may have a duty under applicable law to protect third-person interests of which the lawyer has actual knowledge against wrongful interference by the client. When there is no dispute regarding the funds or property in the lawyer's possession, the lawyer's ethical duty is to promptly notify and deliver the funds or property to which the client or third person is entitled. When the lawyer has actual knowledge of a dispute between the client and a third person who has a lawful interest in the funds or property in the lawyer's possession, the lawyer's ethical duty is to notify both the client and the third person, hold the disputed funds in accordance with division (a) of this rule until the dispute is resolved, and consider whether it is necessary to file an action to have a court resolve the dispute. The lawyer should not unilaterally assume to resolve the dispute between the client and the third person. When the lawyer knows a third person's claimed interest is not a lawful one, a lawyer's ethical duty is to notify the client of the interest claimed and promptly deliver the funds or property to the client.

[5] [RESERVED]

[6] [RESERVED]

[7] A lawyer's fiduciary duties are independent of the lawyer's employment at a particular firm or the rendering of legal services. Law firms frequently merge or dissolve. Division (f) provides that whenever a law firm dissolves, the former partners, managing partners, or supervisory lawyers must appropriately account for all client funds. This responsibility may be satisfied by an appropriate designee.

[8] All lawyers involved in the sale or purchase of a law practice as provided by Rule 1.17 should make reasonable efforts to safeguard and account for client property. Division (g) requires the lawyer, law firm or estate of a deceased lawyer who sells a practice to account for and transfer all client property at the time the client files are transferred.

Comparison to former Ohio Code of Professional Responsibility

Rule 1.15 replaces DR 9-102, which is silent on the handling of property belonging to third persons.

Rule 1.15(a) includes several provisions which are not explicitly provided for in DR 9-102. The rule requires that client and third-person funds are maintained:

1. In an insured, interest-bearing account;

2. In a financial institution permitted under Ohio law and in the state where the lawyer's office is situated; and

3. In an account designated as "client trust account," "IOLTA account," or with another identifiable fiduciary title.

To ensure the proper handling of funds, Rule 1.15 requires the lawyer to maintain the following financial records for a period of seven years:

1. Any fee agreements.

2. A record for each client's funds that sets forth:

   a. the client's name,
   b. the date, amount, and source of the funds received,
   c. the date, amount, payee, and purpose of each disbursement,
   d. the current balance.

3. A record of each bank account that sets forth:

   a. the name of the account,
   b. the date, amount, and client affected by each credit and debit,
   c. the balance in the account.

4. All bank statements, all deposit slips, and canceled checks, if provided by the bank, for each account.

5. A monthly reconciliation of the items listed in 2, 3, and 4 above.

Under DR 9-102 lawyers must keep financial records indefinitely.

Rule 1.15(b) is a restatement of DR 9-102(A)(1), which authorizes lawyers to deposit their own funds into the trust account for the sole purpose of paying or obtaining a waiver of bank service charges.

Rule 1.15(c) directs lawyers to place advances on expenses into the trust account. This is a change from DR 9-102(A), which precludes a lawyer from placing advances for expenses in the lawyer's trust account. The vast majority of jurisdictions consider advances for expenses to be client funds that must be deposited in the trust account.

There are no Disciplinary Rules comparable to Rules 1.15(d), (e), (f), and (g).

Rule 1.15(h) requires lawyers to comply with R.C. 120.52, 3953.231, 4705.09, and 4705.10, all rules adopted by the Ohio Legal Assistance Foundation, and Gov. Bar R. VI, (1)(F). This provision is the same as the requirements of DR 9-102(D) and (E).

Comparison to ABA Model Rules of Professional Conduct

Rule 1.15 is altered from the ABA Model Rule to clarify the lawyer's fiduciary responsibility. The primary divergence from the Model Rule is the adoption of the specific recordkeeping requirements in Rule 1.15(a)(1) to (5). These provisions are based on analogous rules adopted in Arizona, California, Colorado, Connecticut, Florida, Hawaii, Indiana, New Jersey, New York, Massachusetts, Minnesota, Oregon, Rhode Island, South Carolina, Vermont, and Virginia, as well as the ABA Model Rule on Financial Recordkeeping. Each of these jurisdictions, as well as the ABA Model Rule, incorporates similar recordkeeping requirements. The rules help ensure that Ohio lawyers fulfill their fiduciary duties.

Model Rule 1.15(a) requires lawyers to identify and appropriately safeguard all property other than funds. Rule 1.15(a) requires the lawyer to maintain a journal that identifies the property, the date received, the person on whose behalf the property was held, and the date of distribution.

Rule 1.15(c) directs lawyers to place advances on expenses into the trust account. This is the same as the Model Rule.

Rule 1.15(f) designates persons responsible for distributing client funds and maintaining financial records upon the dissolution of a law firm. This provision is not in the Model Rule. The frequency with which law firms are dissolved necessitates this requirement.

Rule 1.15(g), which also is not in the Model Rule, provides for the handling of funds upon the sale of a law practice. This provision is consistent with the careful attention to protecting client's interests during the sale of a law practice pursuant to Rule 1.17.

Rule 1.15(h) incorporates the requirements of DR 9-102(D) and (E).

RULE 1.16: DECLINING OR TERMINATING REPRESENTATION

(a) Subject to divisions (c), (d), and (e) of this rule, a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if any of the following applies:

(1) the representation will result in violation of the Ohio Rules of Professional Conduct or other law;

(2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client;

(3) the lawyer is discharged.

(b) Subject to divisions (c), (d), and (e) of this rule, a lawyer may withdraw from the representation of a client if any of the following applies:

(1) withdrawal can be accomplished without material adverse effect on the interests of the client;

(2) the client persists in a course of action involving the lawyer's services that the lawyer *reasonably believes* is *illegal* or *fraudulent*;

(3) the client has used the lawyer's services to perpetrate a crime or *fraud*;

(4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;

(5) the client fails *substantially* to fulfill an obligation, financial or otherwise, to the lawyer regarding the lawyer's services and has been given *reasonable* warning that the lawyer will withdraw unless the obligation is fulfilled;

(6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client;

(7) the client gives *informed consent* to termination of the representation;

(8) the lawyer sells the law practice in accordance with Rule 1.17;

(9) other good cause for withdrawal exists.

(c) If permission for withdrawal from employment is required by the rules of a *tribunal*, a lawyer shall not withdraw from employment in a proceeding before that *tribunal* without its permission.

(d) As part of the termination of representation, a lawyer shall take steps, to the extent *reasonably* practicable, to protect a client's interest. The steps include giving due notice to the client, allowing *reasonable* time for employment of other counsel, delivering to the client all papers and property to which the client is entitled, and complying with applicable laws and rules. Client papers and property shall be promptly delivered to the client. "Client papers and property" may include correspondence, pleadings, deposition transcripts, exhibits, physical evidence, expert reports, and other items *reasonably* necessary to the client's representation.

(e) A lawyer who withdraws from employment shall refund promptly any part of a fee paid in advance that has not been earned, except when withdrawal is pursuant to Rule 1.17.

Comment

[1] A lawyer shall not accept representation in a matter unless it can be performed competently, promptly, without improper conflict of interest, and to completion. Ordinarily, a representation in a matter is completed when the agreed-upon assistance has been concluded. See Rules 1.2(c) and 6.5. See also Rule 1.3, Comment [4].

Mandatory Withdrawal

[2] A lawyer ordinarily must decline or withdraw from representation if the client demands that the lawyer engage in conduct that is illegal or violates the Ohio Rules of Professional Conduct or other law. The lawyer is not obliged to decline or withdraw simply because the client suggests such a course of conduct; a client may make such a suggestion in the hope that a lawyer will not be constrained by a professional obligation.

[3] When a lawyer has been appointed to represent a client, withdrawal ordinarily requires approval of the appointing authority. See also Rule 6.2. Similarly, court approval or notice to the court is often required by applicable law before a lawyer withdraws from pending litigation. Difficulty may be encountered if withdrawal is based on the client's demand that the lawyer engage in unprofessional conduct. The court may request an explanation for the withdrawal, while the lawyer may be bound to keep confidential the facts that would constitute such an explanation. The lawyer's statement that professional considerations require termination of the representation ordinarily should be accepted as sufficient. Lawyers should be mindful of their obligations to both clients and the court under Rules 1.6 and 3.3.

Discharge

[4] A client has a right to discharge a lawyer at any time, with or without cause, subject to liability for payment for the lawyer's services. Where future dispute about the discharge may be anticipated, it may be advisable to prepare a written statement reciting the circumstances.

[5] Whether a client can discharge appointed counsel may depend on applicable law. A client seeking to do so should be given a full explanation of the consequences. These consequences may include a decision by the appointing authority that appointment of successor counsel is unjustified, thus requiring self-representation by the client.

[6] If the client has severely diminished capacity, the client may lack the legal capacity to discharge the lawyer, and in any event the discharge may be seriously adverse to the client's interests. The lawyer should make special effort to help the client consider the consequences and may take reasonably necessary protective action as provided in Rule 1.14.

Optional Withdrawal

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

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

Assisting the Client upon Withdrawal

[8A] A decision by a lawyer to withdraw should be made only on the basis of compelling circumstances, and in a matter pending before a tribunal he must comply with the rules of the tribunal regarding withdrawal. A lawyer should not withdraw without considering carefully and endeavoring to minimize the possible adverse effect on the rights of the client and the possibility of prejudice to the client as a result of the withdrawal. Even when the lawyer justifiably withdraws, a lawyer should protect the welfare of the client by giving due notice of the withdrawal, suggesting employment of other counsel, delivering to the client all papers and property to which the client is entitled, cooperating with counsel subsequently employed, and otherwise endeavoring to minimize the possibility of harm. Clients receive no benefit from a lawyer keeping a copy of the file and therefore can not be charged for any copying costs. Further, the lawyer should refund to the client any compensation not earned during the employment.

[9] Even if the lawyer has been unfairly discharged by the client, a lawyer must take all reasonable steps to mitigate the consequences to the client.

Comparison to former Ohio Code of Professional Responsibility

Rule 1.16 governs withdrawal from representation and replaces DR 2-110.

Rule 1.16(a)(1) corresponds to DR 2-110(B)(1) and (2), Rule 1.16(a)(2) corresponds to DR 2-110(B)(3), and Rule 1.16(a)(3) corresponds to DR 2-110(B)(4).

Rule 1.16(b)(1) generally corresponds to DR 2-110(A)(2).

Rule 1.16(b)(2) corresponds to DR 2-110(C)(1)(b).

Rule 1.16(b)(3) corresponds to DR 2-110 (C)(1)(c).

Rule 1.16(b)(4) corresponds to DR 2-110(C)(1)(c) and (d).

Rule 1.16(b)(5) corresponds to DR 2-110(C)(1)(f).

Rule 1.16(b)(6) corresponds to DR 2-110(C)(1)(d).

Rule 1.16(b)(7) corresponds to DR 2-110(C)(5).

Rule 1.16(b)(8) corresponds to DR 2-110(C)(7).

Rule 1.16(b)(9) corresponds to DR 2-110(C)(6).

Rule 1.16(c) is identical to DR 2-110(A)(1).

Rule 1.16(d) corresponds to DR 2-110(A)(2) and also requires the withdrawing lawyer to promptly return client papers and property to the client. "Client papers and property" are defined as including correspondence, pleadings, deposition transcripts, exhibits, physical evidence, expert reports, and other items reasonably necessary to the client's representation.

Rule 1.16(e) is identical to DR 2-110(A)(3) except that the reference to the sale of a law practice rule is appropriately designated as Rule 1.17.

Comparison to ABA Model Rules of Professional Conduct

Rule 1.16(b)(2) is revised to change "criminal" to "illegal." This allows the lawyer to withdraw when the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is illegal. This would include violations of statutes or administrative regulations for which there are no criminal penalties.

Rules 1.16(b)(7) and (8) are added to recognize additional circumstances in which withdrawal may be permitted.

Rule 1.16(d) is revised to include a list of items typically included in "client papers and property." This provision is further modified to require that a withdrawing lawyer must afford the client a reasonable time to secure new counsel. Comment [8A] is added to elaborate on the duties of a lawyer who is contemplating or effectuating withdrawal from representation.

RULE 1.17: SALE OF LAW PRACTICE

(a) Subject to the provisions of this rule, a lawyer or *law firm* may sell or purchase a law practice, including the good will of the practice. The law practice shall be sold in its entirety, except where a conflict of interest is present that prevents the transfer of representation of a client or class of clients. This rule shall not permit the sale or purchase of a law practice where the purchasing lawyer is buying the practice for the sole or primary purpose of reselling the practice to another lawyer or *law firm*.

(b) As used in this rule:

(1) "Purchasing lawyer" means either an individual lawyer or a *law firm*;

(2) "Selling lawyer" means an individual lawyer, a *law firm*, the estate of a deceased lawyer, or the representatives of a disabled or disappeared lawyer.

(c) The selling lawyer and the prospective purchasing lawyer may engage in general discussions regarding the possible sale of a law practice. Before the selling lawyer may provide the prospective purchasing lawyer with information relative to client representation or confidential material contained in client files, the selling lawyer shall require the prospective purchasing lawyer to execute a confidentiality agreement. The confidentiality agreement shall bind the prospective purchasing lawyer to preserve information relating to the representation of the clients of the selling lawyer, consistent with Rule 1.6, as if those clients were clients of the prospective purchasing lawyer.

(d) The selling lawyer and the purchasing lawyer may negotiate the terms of the sale of a law practice, subject to all of the following:

(1) The sale agreement shall include a statement by selling lawyer and purchasing lawyer that the purchasing lawyer is purchasing the law practice in good faith and with the intention of delivering legal services to clients of the selling lawyer and others in need of legal services.

(2) The sale agreement shall provide that the purchasing lawyer will honor any fee agreements between the selling lawyer and the clients of the selling lawyer relative to legal representation that is ongoing at the time of the sale. The purchasing lawyer may negotiate fees with clients of the selling lawyer for legal representation that is commenced after the date of the sale.

(3) The sale agreement may include terms that *reasonably* limit the ability of the selling lawyer to reenter the practice of law, including, but not limited to, the ability of the selling lawyer to reenter the practice of law for a specific period of time or to practice in a specific geographic area. The sale agreement shall not include terms limiting the ability of the selling lawyer to practice law or reenter the practice of law if the selling lawyer is selling his or her law practice to

enter academic, government, or public service or to serve as in-house counsel to a business.

(e) Prior to completing the sale, the selling lawyer and purchasing lawyer shall provide *written* notice of the sale to the clients of the selling lawyer. For purposes of this rule, clients of the selling lawyer include all current clients of the selling lawyer and any closed files that the selling lawyer and purchasing lawyer agree to make subject of the sale. The *written* notice shall include all of the following:

(1) The anticipated effective date of the proposed sale;

(2) A statement that the purchasing lawyer will honor all existing fee agreements for legal representation that is ongoing at the time of sale and that fees for legal representation commenced after the date of sale will be negotiated by the purchasing lawyer and client;

(3) The client's right to retain other counsel or take possession of case files;

(4) The fact that the client's consent to the sale will be presumed if the client does not take action or otherwise object within ninety days of the receipt of the notice;

(5) Biographical information relative to the professional qualifications of the purchasing lawyer, including but not limited to applicable information consistent with Rule 7.2, information regarding any disciplinary action taken against the purchasing lawyer, and information regarding the existence, nature, and status of any pending disciplinary complaint certified by a probable cause panel pursuant to Gov. Bar R. V, Section 11.

(f) If the seller is the estate of a deceased lawyer or the representative of a disabled or disappeared lawyer, the purchasing lawyer shall provide the *written* notice required by division (e) of this rule, and the purchasing lawyer shall obtain *written* consent from each client to act on the client's behalf. The client's consent shall be presumed if no response is received from the client within ninety days of the date the notice was sent to the client at the client's last *known* address as shown on the records of the seller or the client's rights would be prejudiced by a failure to act during the ninety day period.

(g) If a client cannot be given the notice required by division (e) of this rule, the representation of that client may be transferred to the purchaser only after the selling lawyer and purchasing lawyer have caused notice of the sale to be made by at least one publication in a newspaper of general circulation in the county in which the sale will occur or in an adjoining county if no newspaper is published in the county in which the sale will occur. Upon completion of the publication, the client's consent to the sale is presumed.

(h) The *written* notice to clients required by division (e) and (f) of this rule shall be provided by regular mail with a certificate of mailing or other comparable proof of mailing. In lieu of providing notice by mail, either the selling lawyer or purchasing lawyer, or both, may personally deliver the notice to a client. In the case of personal delivery, the lawyer providing the notice shall obtain *written* acknowledgement of the delivery from the client.

(i) Neither the selling lawyer nor the purchasing lawyer shall attempt to exonerate the lawyer or *law firm* from or limit liability to the former or prospective client for any malpractice or other professional negligence. The provisions of Rule 1.8(h) shall be incorporated in all agreements for the sale or purchase of a law practice. The selling lawyer or the purchasing lawyer, or both, may agree to provide for the indemnification or other contribution arising from any claim or action in malpractice or other professional negligence.

Comment

[1] The practice of law is a profession, not merely a business. Clients are not commodities that can be purchased and sold at will. Pursuant to this rule, when a lawyer or an entire firm ceases to practice, and other lawyers or firms take over the representation, the selling lawyer or firm may obtain compensation for the reasonable value of the practice as may withdrawing partners of law firms. See Rules 5.4 and 5.6. A sale of a law practice is prohibited where the purchasing lawyer does not intend to engage in the practice of law but is buying the practice for the purpose of reselling the practice to another lawyer or law firm.

[2] [RESERVED]

[3] The purchasing and selling lawyer may agree to a reasonable limitation on the selling lawyer's ability to reenter the practice of law following consummation of the sale. These limitations may preclude the selling lawyer from engaging in the practice of law for a specific period of time or in a defined geographical area, or both. However, the sale agreement may not include such limitations if the selling lawyer is selling his practice to enter academic service, assume employment as a lawyer on the staff of a public agency or a legal services entity that provides legal services to the poor, or as in-house counsel to a business.

[4] [RESERVED]

[5] [RESERVED]

Sale of Entire Practice

[6] The rule requires that the seller's entire practice~~,~~ be sold. This requirement protects those clients whose matters are less lucrative and who might find it difficult to secure other counsel if a sale could be limited to substantial fee-generating matters. The purchasers are required to undertake all client matters in the practice, subject to conflict clearance, client

consent, and the purchasing lawyer's competence to assume representation in those matters. This requirement is satisfied even if a purchaser is unable to undertake a particular client matter because of a conflict of interest or if the seller, in good faith, makes the entire practice available for sale to the purchasers. The fact that a number of the seller's clients decide not to be represented by the purchasers but take their matters elsewhere, therefore, does not result in a violation. Pursuant to Rule 1.1, the purchasing lawyer may be required to associate with other counsel in order to provide competent representation.

Client Confidences, Consent, and Notice

[7] Negotiations between seller and prospective purchaser prior to disclosure of information relating to a specific representation of an identifiable client no more violate the confidentiality provisions of Rule 1.6 than do preliminary discussions concerning the possible association of another lawyer or mergers between firms, with respect to which client consent is not required. See Rule 1.6(b)(7). Providing the purchaser access to detailed information relating to the representation and to client files requires the purchaser and seller to take steps to ensure confidentiality of information related to the representation. The rule provides that before such information can be disclosed by the seller to the purchaser, the purchaser and seller must enter into a confidentiality agreement that binds the purchaser to preserve information related to the representation in a manner consistent with Rule 1.6. This agreement binds the purchaser as if the seller's clients were clients of the purchaser and regardless of whether the sale is eventually consummated by the parties. After the confidentiality agreement has been signed and before the prospective purchaser reviews client-specific information, a conflict check should be completed to assure that the prospective purchaser does not review client-specific information concerning a client whom the prospective purchaser cannot represent because of a conflict of interest.

[7A] Before a sale is completed, written notice of the proposed sale must be provided to the clients of the selling lawyer whose matters are included within the scope of the proposed sale. The notice must be provided jointly by the selling and purchasing lawyers, except where the seller is the estate or representative of a deceased, disabled, or disappeared lawyer, in which case the notice is provided by the purchaser. At a minimum, the notice must include information about the proposed sale and the purchasing lawyer that will allow each client to make an informed decision regarding consent to the sale. A client may elect to opt out of the sale and seek other representation. However, consent is presumed if the client does not object or take other action within ninety days of receiving the notice of the proposed sale.

[8] A lawyer or law firm ceasing to practice cannot be required to remain in practice because some clients cannot be given actual notice of the proposed purchase. Since these clients cannot themselves consent to the purchase or direct any other disposition of their files, the rule requires the parties to provide notice of the proposed sale via a newspaper publication.

[9] All elements of client autonomy, including the client's absolute right to discharge a lawyer and transfer the representation to another, survive the sale of the practice.

Fee Arrangements Between Client and Purchaser

[10] The sale may not be financed by increases in fees charged the clients of the practice. Existing arrangements between the seller and the client as to fees and the scope of the work must be honored by the purchaser. However, the purchaser may negotiate new fee agreements with clients of the seller for representation that is undertaken after the sale is completed.

Other Applicable Ethical Standards

[11] Lawyers participating in the sale of a law practice are subject to the ethical standards applicable to involving another lawyer in the representation of a client. These include, for example, the seller's obligation to exercise competence in identifying a purchaser qualified to assume the practice and the purchaser's obligation to undertake the representation competently (see Rule 1.1); the obligation to avoid disqualifying conflicts, and to secure the client's informed consent for those conflicts that can be agreed to (see Rule 1.7 regarding conflicts and Rule 1.0(f) for the definition of informed consent); the obligation to avoid agreements limiting a lawyer's liability to a client for malpractice (see Rule 1.8(h)); and the obligation to protect information relating to the representation (see Rules 1.6 and 1.9).

[12] If approval of the substitution of the purchasing lawyer for the selling lawyer is required by the rules of any tribunal in which a matter is pending, such approval must be obtained before the matter can be included in the sale (see Rule 1.16).

Applicability of the Rule

[13] This rule applies to the sale of a law practice of a deceased, disabled, or disappeared lawyer. Thus, the seller may be represented by a nonlawyer representative not subject to these rules. Since, however, no lawyer may participate in a sale of a law practice that does not conform to the requirements of this rule, the representatives of the seller as well as the purchasing lawyer can be expected to see to it that they are met.

[14] Admission to or retirement from a law partnership or professional association, retirement plans, and similar arrangements, and a sale of tangible assets of a law practice, do not constitute a sale or purchase governed by this rule.

[15] This rule does not apply to the transfers of legal representation between lawyers when such transfers are unrelated to the sale of a practice.

[16] The purchaser can not continue to use the seller's name unless the seller is deceased, disabled, or retired pursuant to Rule VI of the Supreme Court Rules for the Government of the Bar of Ohio.

Comparison to former Ohio Code of Professional Responsibility

Rule 1.17 restates the existing provisions of DR 2-111, substituting "information relating to the representation" in place of "confidences and secrets."

Although there is little textual similarity between Rule 1.17 and the ABA Model Rule, most of the substantive provisions of the Model Rule are incorporated into the rule, with the major exceptions being that Rule 1.17 (1) does not permit the sale of only a portion of a law practice, and (2) allows a missing client to be provided notice of the proposed sale by publication. The comments are modified to track the rule and Ohio law.

Comment [1] is modified to clearly indicate that the provisions of the rule are not intended to permit sale to a lawyer who will merely act as a "broker" and resell the practice.

Comment [2] is relocated to Comment [6] where the language of the Model Rule comment is revised to address the unanticipated return to practice of the selling lawyer. The latter modification is deemed unnecessary due to the prohibition in division (d)(3) directing that the sale agreement may not restrict the ability of the selling lawyer to reenter the practice if the sale is the result of the lawyer selling the practice "to enter academic, government, or public service or to serve as in-house counsel to a business" and the commentary contained in Comment [3].

Comments [4] and [5] are deleted, and comments [6], [9], and [15] are modified, to reflect the fact that Rule 1.17 does not permit the sale of a part of a lawyer's practice.

Comments [7] and [7A] are modified to reflect the actual mechanisms contained in the rule respecting the preservation of information related to the representation of clients.

Comment [10] is clarified to indicate that new fee arrangements may be negotiated with clients after the sale of a law practice "for representation that is undertaken after the sale is completed."

Comment [11] is modified to specifically ensure that the parties to the sale of a law practice understand that the sale may not limit the liability of either the buyer or the seller for malpractice.

Comment [16] is added to give notice to prospective purchasers that it is improper to utilize the seller's name in the practice unless the seller is deceased, disabled, or retired pursuant to Gov. Bar R. VI.

Comparison to ABA Model Rules of Professional Conduct

Rule 1.17 differs from Model Rule 1.17 as noted above.

RULE 1.18: DUTIES TO PROSPECTIVE CLIENT

(a) A person who consults with a lawyer about 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 learned information from a prospective client shall not use or reveal that information, except as Rule 1.9 would permit with respect to information of a former client.

(c) A lawyer subject to division (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 division (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 division (d).

(d) When the lawyer has received disqualifying information as defined in division (c), representation is permissible if either of the following applies:

(1) both the affected client and the prospective client have given *informed consent, confirmed in writing*;

(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 both of the following apply:

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

(ii) *written* notice is promptly given to 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 consultations 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] A person becomes a prospective client by consulting with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter. Whether communications, including written, oral, or electronic communications, constitute a consultation depends on the circumstances. For example, a consultation is likely to have occurred if a lawyer, either in person or through the lawyer's advertising in any medium, specifically requests or

invites the submission of information about a potential representation without clear and reasonably understandable warnings and cautionary statements that limit the lawyer's obligations, and a person provides information in response. See also Comment [4]. In contrast, a consultation does not occur if a person provides information to a lawyer in response to advertising that merely describes the lawyer's education, experience, areas of practice and contact information, or provides legal information of general interest. Such a person 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, and thus is not a "prospective client."

[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. Division (b) prohibits the lawyer from using or revealing that information, except as permitted by Rule 1.9, even if the client or lawyer decides not to proceed with the representation. The duty exists regardless of how brief the initial conference may be.

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

[5] [RESERVED]

[6] Under division (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 division (c), the prohibition in this rule is imputed to other lawyers as provided in Rule 1.10, but, under division (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 division (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(l) (requirements for screening procedures). Division (d)(2)(i) does not prohibit the screened lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly related to the matter in which the lawyer is disqualified.

[8] Notice, including a general description of the subject matter about which the lawyer was consulted and of the screening procedures employed, generally should be given as soon as practicable after the need for screening becomes apparent.

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

Comparison to former Ohio Code of Professional Responsibility

Rule 1.18 addresses the lawyer's duty relating to the formation of the client-lawyer relationship. This duty implicates the lawyer's obligations addressed by Canon 4 (confidentiality) and Canon 6 (competence) of the Code of Professional Responsibility. The only mention of prospective clients in the Ohio Code occurs in EC 4-1, which states that "[b]oth the fiduciary relationship existing between lawyer and client and the proper functioning of the legal system require the preservation by the lawyer of confidences and secrets of one who has employed or sought to employ him." To the extent the Code encourages seeking legal advice as soon as possible, it does not provide a clear statement as to when the lawyer-client relationship is established so as to determine when the lawyer's duty of confidentiality arises. However, Ohio case law indicates that the lawyer-client relationship may be created by implication based upon the conduct of the parties and the reasonable expectations of the person seeking representation. See *e.g., Cuyahoga County Bar Assn v. Hardiman*, 100 Ohio St.3d 260, 2003-Ohio-5596. Therefore, Rule 1.18 does not materially change the current law of Ohio, but clarifies the directives set forth by the Supreme Court in *Hardiman*.

Comparison to ABA Model Rules of Professional Conduct

Rule 1.18 attempts to address the realities of the practice of law. There are no substantive changes between Rule 1.18 and the Model Rule. Rule 1.18 defines a "prospective client." Rule 1.18(b) prohibits the lawyer from using or revealing information learned in the consultation when no professional relationship ensues. This prohibition applies regardless of whether the information learned in the consultation may be defined as a "confidence or secret." Rule 1.18(c) disqualifies the lawyer from representing a client in "the same or a substantially related matter" when that client's interests are "materially adverse to those of a prospective client" and the "information received" is harmful to the prospective client in the matter, and prohibits lawyers in the disqualifying lawyer's law firm from "knowingly undertaking or continuing representation in such a matter." Rule 1.18(d) negates the disqualification if appropriate "notice" is provided to the affected parties and "screening" established to eliminate the potential harm from the use of the information learned during the consultation.

Comment [5] of Model Rule 1.18 is stricken.

II. COUNSELOR

RULE 2.1: ADVISOR

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

Comment

Scope of Advice

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

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

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

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

Offering Advice

[5] In general, a lawyer is not expected to give advice until asked by the client. However, when a lawyer knows that a client proposes a course of action that is likely to result in substantial adverse legal consequences to the client, the lawyer's duty to the client under Rule 1.4 may require that the lawyer offer advice if the client's course of action is related to the representation. Similarly, when a matter is likely to involve litigation, it may be necessary under Rule 1.4 to inform the client of forms of dispute resolution that might constitute reasonable alternatives to litigation. A lawyer ordinarily has no duty to initiate investigation of a client's affairs or to give advice that the client has indicated is unwanted, but a lawyer may initiate advice to a client when doing so appears to be in the client's interest.

Comparison to former Ohio Code of Professional Responsibility

There are no Disciplinary Rules comparable to Rule 2.1. However, EC 7-8 addresses the scope of the rule.

Comparison to ABA Model Rules of Professional Conduct

Rule 2.1 is identical to Model Rule 2.1.

RULE 2.3: EVALUATION FOR USE BY THIRD PERSONS

(a) A lawyer may agree to provide an evaluation of a matter affecting a client for the use of someone other than the client if the lawyer *reasonably believes* that making the evaluation is compatible with other aspects of the lawyer's relationship with the client.

(b) When the lawyer *knows* or *reasonably should know* that the evaluation is likely to affect the client's interests materially and adversely, the lawyer shall not provide the evaluation unless the client gives *informed consent*.

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

Comment

Definition

[1] An evaluation may be performed at the client's direction or when impliedly authorized in order to carry out the representation. See Rule 1.2. Such an evaluation may be for the primary purpose of establishing information for the benefit of third parties; for example, an opinion concerning the title of property rendered at the behest of a vendor for the information of a prospective purchaser, or at the behest of a borrower for the information of a prospective lender. In some situations, the evaluation may be required by a government agency; for example, an opinion concerning the legality of the securities registered for sale under the securities laws. In other instances, the evaluation may be required by a third person, such as a purchaser of a business.

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

Duties Owed to Third Person and Client

[3] Because an evaluation for someone other than the client involves a departure from the normal client-lawyer relationship, careful analysis of the situation is required. The lawyer must be satisfied as a matter of professional judgment that making the evaluation is compatible with other functions undertaken in behalf of the client. For example, if the lawyer is acting as

advocate in defending the client against charges of fraud, it would normally be incompatible with that responsibility for the lawyer to perform an evaluation for others concerning the same or a related transaction. Even when making an evaluation is consistent with the lawyer's responsibilities to the client, the lawyer should advise the client of the implications of the evaluation, particularly the necessity to disclose information relating to the representation and the duties to the third person that these rules and the law impose upon the lawyer with respect to the evaluation. The legal duties, if any, that the lawyer may have to the third person are beyond the scope of these rules.

Access to and Disclosure of Information

[4] The quality of an evaluation depends on the freedom and extent of the investigation upon which it is based. Ordinarily a lawyer should have whatever latitude of investigation seems necessary as a matter of professional judgment. Under some circumstances, however, the terms of the evaluation may be limited. For example, certain issues or sources may be categorically excluded, or the scope of search may be limited by time constraints or the noncooperation of persons having relevant information. Any such limitations that are material to the evaluation should be described in the report. If after a lawyer has commenced an evaluation, the client refuses to comply with the terms upon which it was understood the evaluation was to have been made, the lawyer's obligations are determined by law, having reference to the terms of the client's agreement and the surrounding circumstances. In no circumstances is the lawyer permitted to knowingly make a false statement of material fact or law in providing an evaluation under this rule. See Rule 4.1.

Obtaining Client's Informed Consent

[5] Information relating to an evaluation is protected by Rule 1.6. In many situations, providing an evaluation to a third party poses no significant risk to the client; thus, the lawyer may be impliedly authorized to disclose information to carry out the representation. See Rule 1.6(a). Where, however, it is reasonably likely that providing the evaluation will affect the client's interests materially and adversely, the lawyer must first obtain the client's consent after the client has been adequately informed concerning the important possible effects on the client's interests. See Rules 1.6(a) and 1.0(f).

Financial Auditors' Requests for Information

[6] When a question concerning the legal situation of a client arises at the instance of the client's financial auditor and the question is referred to the lawyer, the lawyer's response may be made in accordance with procedures recognized in the legal profession. Such a procedure is set forth in the American Bar Association Statement of Policy Regarding Lawyers' Responses to Auditors' Requests for Information, adopted in 1975.

Comparison to former Ohio Code of Professional Responsibility

There is no Disciplinary Rule comparable to Rule 2.3.

Comparison to ABA Model Rules of Professional Conduct

Model Rule 2.3(a) and Comment [3] are revised to clarify the intent of the rule.

RULE 2.4: LAWYER SERVING AS ARBITRATOR, MEDIATOR, OR THIRD-PARTY NEUTRAL

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

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

Comment

[1] Alternative dispute resolution has become a substantial part of the civil justice system. Aside from representing clients in dispute-resolution processes, lawyers often serve as third-party neutrals. A third-party neutral is a person, such as a mediator, arbitrator, conciliator, or evaluator, who assists the parties, represented or unrepresented, in the resolution of a dispute or in the arrangement of a transaction. Whether a third-party neutral serves primarily as a facilitator, evaluator, or decision-maker depends on the particular process that is either selected by the parties or mandated by a court.

[2] In the role of a third-party neutral, the lawyer may be subject to statutes, court rules, or other laws that apply either to third-party neutrals generally or to lawyers serving as third-party neutrals. Lawyer-neutrals may also be subject to various codes of ethics, including but not limited to the Code of Ethics for Arbitration in Commercial Disputes prepared by a joint committee of the American Bar Association and the American Arbitration Association or the Model Standards of Conduct for Mediators jointly prepared by the American Bar Association, the American Arbitration Association, and the Association for Conflict Resolution.

[3] Unlike nonlawyers who serve as third-party neutrals, lawyers serving in this role may experience unique problems as a result of differences between the role of a third-party neutral and a lawyer's service as a client representative. The potential for confusion is significant when the parties are unrepresented in the process. Thus, division (b) requires a lawyer-neutral to inform unrepresented parties that the lawyer is not representing them. For some parties, particularly parties who frequently use dispute-resolution processes, this information will be sufficient. For others, particularly those who are using the process for the first time, more information will be required. Where appropriate, the lawyer should inform unrepresented parties of the important differences between the lawyer's role as third-party neutral and a lawyer's role as a client representative, including the inapplicability of the attorney-client evidentiary privilege. The extent of disclosure required under this division will depend on the particular parties involved and the subject matter of the proceeding, as well as the particular features of the dispute-resolution process selected.

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

[5] Lawyers who represent clients in alternative dispute-resolution processes are governed by the Rules of Professional Conduct. When the dispute-resolution process takes place before a tribunal, as in binding arbitration [see Rule 1.0(o)], the lawyer's duty of candor is governed by Rule 3.3. Otherwise, the lawyer's duty of candor toward both the third-party neutral and other parties is governed by Rule 4.1.

Comparison to former Ohio Code of Professional Responsibility

There is no Disciplinary Rule comparable to Rule 2.4. EC 5-21, while not specifically addressing the exact same role of the lawyer, nonetheless does embody some of the same responsibilities as contained in the rule.

Comparison to ABA Model Rules of Professional Conduct

Comment [2] is modified to include "statutes" that may govern the conduct of a third-party neutral. This is consistent with the Ohio situation in which mediators are governed by statutory requirements.

III. ADVOCATE

RULE 3.1: MERITORIOUS CLAIMS AND CONTENTIONS

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue in a proceeding, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification, or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

Comment

[1] The advocate has a duty to use legal procedure for the fullest benefit of the client's cause, but also a duty not to abuse legal procedure. The law, both procedural and substantive, establishes the limits within which an advocate may proceed. However, the law is not always clear and never is static. Accordingly, in determining the proper scope of advocacy, account must be taken of the law's ambiguities and potential for change.

[2] The filing of an action or defense or similar action taken for a client is not frivolous merely because the facts have not first been fully substantiated or because the lawyer expects to develop vital evidence only by discovery. What is required of lawyers, however, is that they inform themselves about the facts of their clients' cases and the applicable law and determine that they can make good faith arguments in support of their clients' positions. Such action is not frivolous even though the lawyer believes that the client's position ultimately will not prevail. The action is frivolous, however, if the lawyer is unable either to make a good faith argument on the merits of the action taken or to support the action taken by a good faith argument for an extension, modification, or reversal of existing law.

[3] The lawyer's obligations under this rule are subordinate to federal or state constitutional law that entitles a defendant in a criminal matter to the assistance of counsel in presenting a claim or contention that otherwise would be prohibited by this rule.

Comparison to former Ohio Code of Professional Responsibility

DR 7-102(A)(2) and EC 7-25 address the scope of Rule 3.1.

Comparison to ABA Model Rules of Professional Conduct

Rule 3.1 is identical to Model Rule 3.1.

RULE 3.2: EXPEDITING LITIGATION

Note

ABA Model Rule 3.2 is not adopted in Ohio. The substance of Model Rule 3.2 is addressed by other provisions of the Ohio Rules of Professional Conduct, including Rules 1.3 [Diligence], 3.1 [Meritorious Claims and Contentions], and 4.4(a) [Respect for Rights of Third Persons].

RULE 3.3: CANDOR TOWARD THE TRIBUNAL

(a) A lawyer shall not *knowingly* do any of the following:

(1) make a false statement of fact or law to a *tribunal* or fail to correct a false statement of material fact or law previously made to the *tribunal* by the lawyer;

(2) fail to disclose to the *tribunal* legal authority in the controlling jurisdiction *known* to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel;

(3) offer evidence that the lawyer *knows* to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer has offered material evidence and the lawyer comes to *know* of its falsity, the lawyer shall take *reasonable* measures to remedy the situation, including, if necessary, disclosure to the *tribunal*. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer *reasonably believes* is false.

(b) A lawyer who represents a client in an adjudicative proceeding and who *knows* that a person, including the client, intends to engage, is engaging, or has engaged in criminal or *fraudulent* conduct related to the proceeding shall take *reasonable* measures to remedy the situation, including, if necessary, disclosure to the *tribunal*.

(c) The duties stated in divisions (a) and (b) of this rule continue until the issue to which the duty relates is determined by the highest *tribunal* that may consider the issue, or the time has expired for such determination, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

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

Comment

[1] This rule governs the conduct of a lawyer who is representing a client in the proceedings of a tribunal. See Rule 1.0(o) for the definition of "tribunal." It also applies when the lawyer is representing a client in an ancillary proceeding conducted pursuant to the tribunal's adjudicative authority, such as a deposition. Thus, for example, division (a)(3) requires a lawyer to take reasonable remedial measures if the lawyer comes to know that a client who is testifying in a deposition has offered evidence that is false.

[2] This rule sets forth the special duties of lawyers as officers of the court to avoid conduct that undermines the integrity of the adjudicative process. A lawyer acting as an advocate in an adjudicative proceeding has an obligation to present the client's case with

persuasive force. Performance of that duty while maintaining confidences of the client, however, is qualified by the advocate's duty of candor to the tribunal. Consequently, although a lawyer in an adversary proceeding is not required to present an impartial exposition of the law or to vouch for the evidence submitted in a cause, the lawyer must not allow the tribunal to be misled by false statements of law or fact or evidence that the lawyer knows to be false.

Representations by a Lawyer

[3] An advocate is responsible for pleadings and other documents prepared for litigation, but is usually not required to have personal knowledge of matters asserted therein, for litigation documents ordinarily present assertions by the client, or by someone on the client's behalf, and not assertions by the lawyer. Compare Rule 3.1. However, an assertion purporting to be on the lawyer's own knowledge, as in an affidavit by the lawyer or in a statement in open court, may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry. There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation. The obligation prescribed in Rule 1.2(d) not to counsel a client to commit or assist the client in committing a fraud applies in litigation. Regarding compliance with Rule 1.2(d), see the Comment to that rule. See also the Comment to Rule 8.4(b).

Legal Argument

[4] Legal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal. A lawyer is not required to make a disinterested exposition of the law, but must recognize the existence of pertinent legal authorities. Furthermore, as stated in division (a)(2), an advocate has a duty to disclose directly adverse authority in the controlling jurisdiction that has not been disclosed by the opposing party. The underlying concept is that legal argument is a discussion seeking to determine the legal premises properly applicable to the case.

Offering Evidence

[5] Division (a)(3) requires that the lawyer refuse to offer evidence that the lawyer knows to be false, regardless of the client's wishes. This duty is premised on the lawyer's obligation as an officer of the court to prevent the trier of fact from being misled by false evidence. A lawyer does not violate this rule if the lawyer offers the evidence for the purpose of establishing its falsity.

[6] If a lawyer knows that the client intends to testify falsely or wants the lawyer to introduce false evidence, the lawyer should seek to persuade the client that the evidence should not be offered. If the persuasion is ineffective and the lawyer continues to represent the client, the lawyer must refuse to offer the false evidence. If only a portion of a witness's testimony will be false, the lawyer may call the witness to testify but may not elicit or otherwise permit the witness to present the testimony that the lawyer knows is false.

[7] [RESERVED]

[8] The prohibition against offering false evidence only applies if the lawyer knows that the evidence is false. A lawyer's reasonable belief that evidence is false does not preclude its presentation to the trier of fact. A lawyer's knowledge that evidence is false, however, can be inferred from the circumstances. See Rule 1.0(g). Thus, although a lawyer should resolve doubts about the veracity of testimony or other evidence in favor of the client, the lawyer cannot ignore an obvious falsehood.

[9] [RESERVED]

Remedial Measures

[10] Having offered material evidence in the belief that it was true, a lawyer may subsequently come to know that the evidence is false. Or, a lawyer may be surprised when the lawyer's client, or another witness called by the lawyer, offers testimony the lawyer knows to be false, either during the lawyer's direct examination or in response to cross-examination by the opposing lawyer. In such situations or if the lawyer knows of the falsity of testimony elicited from the client during a deposition, the lawyer must take reasonable remedial measures. In such situations, the advocate's proper course is to remonstrate with the client confidentially, advise the client of the lawyer's duty of candor to the tribunal, and seek the client's cooperation with respect to the withdrawal or correction of the false statements or evidence. If that fails, the advocate must take further remedial action including making such disclosure to the tribunal as is reasonably necessary to remedy the situation, even if doing so requires the lawyer to reveal information that otherwise would be protected by Rule 1.6. It is for the tribunal then to determine what should be done.

[11] The disclosure of a client's false testimony can result in grave consequences to the client, including not only a sense of betrayal but also loss of the case and perhaps a prosecution for perjury. But the alternative is that the lawyer cooperate in deceiving the court, thereby subverting the truth-finding process which the adversary system is designed to implement. See Rule 1.2(d). Furthermore, unless it is clearly understood that the lawyer will act upon the duty to disclose the existence of false evidence, the client can simply reject the lawyer's advice to reveal the false evidence and insist that the lawyer keep silent. Thus the client could in effect coerce the lawyer into being a party to fraud on the court.

Preserving Integrity of Adjudicative Process

[12] Lawyers have a special obligation to protect a tribunal against criminal or fraudulent conduct that undermines the integrity of the adjudicative process, such as bribing, intimidating or otherwise unlawfully communicating with a witness, juror, court official, or other participant in the proceeding, unlawfully destroying or concealing documents or other evidence, or failing to disclose information to the tribunal when required by law to do so. Thus, division (b) requires a lawyer to take reasonable remedial measures, including disclosure if necessary, whenever the lawyer knows that a person, including the lawyer's client, intends to engage, is engaging, or has engaged in criminal or fraudulent conduct related to the proceeding.

Duration of Obligation

[13] A practical time limit on the obligation to rectify false evidence or false statements of law or fact must be established. A final determination of the issue to which the duty relates by the highest tribunal that may consider the issue, or the expiration of the time for such consideration, is a reasonably definite point for the termination of the obligation. Division (c) modifies the rule set forth in *Disciplinary Counsel v. Heffernan* (1991), 58 Ohio St.3d 260 to the extent that *Heffernan* imposed an obligation to disclose false evidence or statements that is unlimited in time.

***Ex Parte* Proceedings**

[14] Ordinarily, an advocate has the limited responsibility of presenting one side of the matters that a tribunal should consider in reaching a decision; the conflicting position is expected to be presented by the opposing party. However, in any *ex parte* proceeding, such as an application for a temporary restraining order, there is no balance of presentation by opposing advocates. The object of an *ex parte* proceeding is nevertheless to yield a substantially just result. The judge has an affirmative responsibility to accord the absent party just consideration. The lawyer for the represented party has the correlative duty to make disclosures of material facts known to the lawyer and that the lawyer reasonably believes are necessary to an informed decision.

Withdrawal

[15] Normally, a lawyer's compliance with the duty of candor imposed by this rule does not require that the lawyer withdraw from the representation of a client whose interests will be or have been adversely affected by the lawyer's disclosure. The lawyer may, however, be required by Rule 1.16(c) to seek permission of the tribunal to withdraw if the lawyer's compliance with this rule's duty of candor results in such an extreme deterioration of the client-lawyer relationship that the lawyer can no longer competently represent the client. Also see Rule 1.16(b) for the circumstances in which a lawyer will be permitted to seek a tribunal's permission to withdraw. In connection with a request for permission to withdraw that is premised on a client's misconduct, a lawyer may reveal information relating to the representation only to the extent reasonably necessary to comply with this rule or as otherwise permitted by Rule 1.6.

Comparison to former Ohio Code of Professional Responsibility

Rule 3.3(a)(1) is comparable to DR 7-102(A)(5), Rule 3.3(a)(2) is comparable to DR 7-106(B)(1), and Rule 3.3(a)(3) is comparable to DR 7-102(A)(1) and (4).

Rule 3.3(b) is comparable to DR 7-102(B)(1) and (2). There are two differences. First, Rule 3.3(b) does not necessarily require disclosure to the tribunal. Rather, the rule requires the lawyer to take steps to remedy the situation, including, if necessary, disclosure to the tribunal. Second, the rule does not adopt the DR 7-102(B)(1) requirement that the lawyer reveal the client's fraudulent act, during the course of the representation, upon any person. Requiring a lawyer to disclose any and all frauds a client commits during the course of the representation is

unworkable. There is no Ohio precedent where a lawyer was disciplined for failing to disclose a client's fraud upon a third person. This rule requires a lawyer to take remedial measures with respect to criminal or fraudulent conduct relating to a proceeding in which the lawyer represents or has represented a client.

Rule 3.3(c) provides that the duties set forth in divisions (a) and (b) continue until a final determination on the issue to which the duty relates has been made by the highest tribunal that may consider the issue or the expiration of time for such a determination. The Code provisions that correspond to Rule 3.3 have no comparable time limitation. But see *Disciplinary Counsel v. Heffernan* (1991), 58 Ohio St.3d 260, which is modified by Rule 3.3(c) to the extent that *Heffernan* imposed an obligation to disclose false evidence or statements that is unlimited in time.

Rule 3.3(d) has no analogous Disciplinary Rule.

Comparison to ABA Model Rules of Professional Conduct

Model Rule 3.3(c) is replaced by a standard analogous to that used in Rule 3.3 of the North Dakota Rules of Professional Conduct.

RULE 3.4: FAIRNESS TO OPPOSING PARTY AND COUNSEL

A lawyer shall not do any of the following:

(a) unlawfully obstruct another party's access to evidence; unlawfully alter, destroy, or conceal a document or other material having potential evidentiary value; or counsel or assist another person to do any such act;

(b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;

(c) *knowingly* disobey an obligation under the rules of a *tribunal*, except for an open refusal based on a good faith assertion that no valid obligation exists;

(d) in pretrial procedure, intentionally or habitually make a frivolous motion or discovery request or fail to make *reasonably* diligent effort to comply with a legally proper discovery request by an opposing party;

(e) in trial, allude to any matter that the lawyer does not *reasonably believe* is relevant or that will not be supported by admissible evidence or by a good-faith belief that such evidence may exist, assert personal *knowledge* of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant, or the guilt or innocence of an accused;

(f) [RESERVED]

(g) advise or cause a person to hide or to leave the jurisdiction of a *tribunal* for the purpose of becoming unavailable as a witness.

Comment

[1] The procedure of the adversary system contemplates that the evidence in a case is to be marshaled competitively by the contending parties. Fair competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery procedure, and the like. However, a lawyer representing an organization, in accordance with law, may request an employee of the client to refrain from giving information to another party. See Rule 4.2, Comment [7].

[2] Division (a) applies to all evidence, whether testimonial, physical, or documentary. Subject to evidentiary privileges, the right of an opposing party, including the government, to obtain evidence through discovery or subpoena is an important procedural right. The exercise of that right can be frustrated if relevant material is altered, concealed, or destroyed, or if the testimony of a person with knowledge is unavailable, incomplete, or false. Applicable law in many jurisdictions makes it an offense to destroy material for the purpose of impairing its availability in a pending proceeding or one whose commencement can be foreseen. Falsifying

evidence is also generally a criminal offense. A lawyer is permitted to take temporary possession of physical evidence of client crimes for the purpose of conducting a limited examination that will not alter or destroy material characteristics of the evidence. In such a case, the lawyer is required to turn the evidence over to the police or other prosecuting authority, depending on the circumstances. Applicable law also prohibits the use of force, intimidation, or deception to delay, hinder, or prevent a person from attending or testifying in a proceeding.

[3] With regard to division (b), it is not improper to pay a witness's expenses or to compensate an expert witness on terms permitted by law. It is improper to pay an occurrence witness any fee for testifying and it is improper to pay an expert witness a contingent fee.

[3A] Division (e) does not prohibit a lawyer from arguing, based on the lawyer's analysis of the evidence, for any position or conclusion with respect to matters referenced in that division.

[4] [RESERVED]

Comparison to former Ohio Code of Professional Responsibility

DR 7-102, DR 7-106(C), DR 7-109, and EC 7-24, 7-25, 7-26, 7-27 and 7-28 address the scope of Rule 3.4.

Comparison to ABA Model Rules of Professional Conduct

Rule 3.4 is revised to add a "good-faith belief" provision consistent with the holding in *State v. Gillard* (1988), 40 Ohio St.3d 226. Model Rule 3.4(f) is deleted because its provisions are inconsistent with a lawyer's obligations under Ohio law, and the corresponding Comment [4] also is removed. Division (g) is inserted to incorporate Ohio DR 7-109(B).

RULE 3.5: IMPARTIALITY AND DECORUM OF THE TRIBUNAL

(a) A lawyer shall not do any of the following:

(1) seek to influence a judicial officer, juror, prospective juror, or other official by means prohibited by law;

(2) lend anything of value or give anything of more than *de minimis* value to a judicial officer, official, or employee of a *tribunal*;

(3) communicate *ex parte* with either of the following:

(i) a judicial officer or other official as to the merits of the case during the proceeding unless authorized to do so by law or court order;

(ii) a juror or prospective juror during the proceeding unless otherwise authorized to do so by law or court order.

(4) communicate with a juror or prospective juror after discharge of the jury if any of the following applies:

(i) the communication is prohibited by law or court order;

(ii) the juror has made *known* to the lawyer a desire not to communicate;

(iii) the communication involves misrepresentation, coercion, duress, or harassment;

(5) engage in conduct intended to disrupt a *tribunal*;

(6) engage in undignified or discourteous conduct that is degrading to a *tribunal*.

(b) A lawyer shall reveal promptly to the *tribunal* improper conduct by a juror or prospective juror, or by another toward a juror, prospective juror, or family member of a juror or prospective juror, of which the lawyer has *knowledge*.

Comment

[1] Many forms of improper influence upon a tribunal are proscribed by criminal law. Others are specified in the Ohio Code of Judicial Conduct, with which an advocate should be familiar. A lawyer is required to avoid contributing to a violation of such provisions. As used in division (a)(2), "*de minimis*" means an insignificant item or interest that could not raise a reasonable question as to the impartiality of a judicial officer, official, or employee of a tribunal.

[2] During a proceeding a lawyer may not communicate *ex parte* with persons serving in an official capacity in the proceeding, such as judges, masters, magistrates, or jurors, unless authorized to do so by law, court order, or these rules.

[3] A lawyer may on occasion want to communicate with a juror or prospective juror after the jury has been discharged. The lawyer may do so unless the communication is prohibited by law or a court order but must respect the desire of the juror not to talk with the lawyer. The lawyer may not engage in improper conduct during the communication.

[4] The advocate's function is to present evidence and argument so that the cause may be decided according to law. Refraining from abusive or obstreperous conduct is a corollary of the advocate's right to speak on behalf of litigants. A lawyer may stand firm against abuse by a judge but should avoid reciprocation; the judge's default is no justification for similar dereliction by an advocate. An advocate can present the cause, protect the record for subsequent review, and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics.

[5] The duty to refrain from disruptive, undignified, or discourteous conduct applies to any proceeding of a tribunal, including a deposition. See Rule 1.0(o).

Comparison to former Ohio Code of Professional Responsibility

Rule 3.5 corresponds to DR 7-108 (communication with or investigation of jurors) and DR 7-110 (contact with officials).

Rule 3.5(a)(1) prohibits an attorney from seeking to "influence a judicial officer, juror, prospective juror, or other official." This provision generally corresponds to DR 7-108(A) and (B) and DR 7-110, which contain express prohibitions against improper conduct toward court officials and jurors, both seated and prospective.

Rule 3.5(a)(2) restates the prohibition contained in DR 7-110(A), and Rule 3.5(a)(3) incorporates the prohibitions on improper *ex parte* communications contained in DR 7-108(A) and 7-110(B). Rule 3.5(a)(4) corresponds to DR 7-108(D) and prohibits certain communications with a juror or prospective juror following the juror's discharge from a case. Rule 3.5(a)(5) has no analogue in the Code of Professional Responsibility. Rule 3.5(a)(6) corresponds to DR 7-106(C)(6).

Rule 3.5(b) is revised to add the provisions of DR 7-108(G).

Comparison to ABA Model Rules of Professional Conduct

Rule 3.5 differs from the Model Rule in four respects. First, a new division (a)(2) is added that incorporates the language of DR 7-110(A). The change makes clear the Ohio rule that a lawyer can never give or loan anything of more than *de minimis* value to a judicial officer, juror, prospective juror, or other official. "*De minimis*" is defined in Comment [1] to incorporate the definition contained in the Ohio Code of Judicial Conduct.

The second revision is to division (a)(3), which has been divided into two parts to treat separately communications with judicial officers and jurors. Division (a)(3)(i) follows DR 7-110(B) by prohibiting *ex parte* communications with judicial officers only with regard to the merits of the case. This language states that *ex parte* communications with judicial officers concerning matters not involving the merits of the case are excluded from the rule. In contrast, division (a)(3)(ii) prohibits any communication with a juror or prospective juror, except as permitted by law or court order.

The third change in the rule is a new division (a)(6) that incorporates DR 7-106(C)(6). Rule 3.5(a)(5) addresses a wide range of conduct that, although disruptive to a pending proceeding, may not be directed to the tribunal itself, such as comments directed toward opposing counsel or a litigant before the jury. Rule 3.5(a)(6) speaks to conduct that is degrading to a tribunal, without regard to whether the conduct is disruptive to a pending matter. See *Disciplinary Counsel v. Gardner*, 99 Ohio St.3d 416, 2003-Ohio-4048 and *Disciplinary Counsel v. LoDico*, 106 Ohio St.3d 229, 2005-Ohio-4630.

The fourth change in the rule is a new division (b) that incorporates DR 7-108(G). The rule mandates that a lawyer must reveal promptly to a court improper conduct by a juror or prospective juror or the conduct of another toward a juror, prospective juror, or member of the family of a juror or prospective juror.

Comment [1] is revised to explain that, with regard to Rule 3.5(a)(2), the impartiality of a public servant may be impaired by the receipt of gifts or loans and, therefore, it is never justified for a lawyer to make a gift or loan to a judge, hearing officer, magistrate, official, or employee of a tribunal.

RULE 3.6: TRIAL PUBLICITY

(a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer *knows* or *reasonably should know* will be disseminated by means of public communication and will have a *substantial* likelihood of materially prejudicing an adjudicative proceeding in the matter.

(b) Notwithstanding division (a) of this rule and if permitted by Rule 1.6, a lawyer may state any of the following:

(1) the claim, offense, or defense involved and, except when prohibited by law, the identity of the persons involved;

(2) information contained in a public record;

(3) that an investigation of a matter is in progress;

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

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

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

(7) in a criminal case, in addition to divisions (b)(1) to (6) of this rule, any of the following:

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

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

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

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

(c) Notwithstanding division (a) of this rule, a lawyer may make a statement that a *reasonable* lawyer would *believe* is required to protect a client from the *substantial* undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this division shall be limited to information necessary to mitigate the recent adverse publicity.

(d) No lawyer associated in a *firm* or government agency with a lawyer subject to division (a) of this rule shall make a statement prohibited by division (a) of this rule.

Comment

[1] It is difficult to strike a balance between protecting the right to a fair trial and safeguarding the right of free expression. Preserving the right to a fair trial necessarily entails some curtailment of the information that may be disseminated about a party prior to trial, particularly where trial by jury is involved. If there were no such limits, the result would be the practical nullification of the protective effect of the rules of forensic decorum and the exclusionary rules of evidence. On the other hand, there are vital social interests served by the free dissemination of information about events having legal consequences and about legal proceedings themselves. The public has a right to know about threats to its safety and measures aimed at assuring its security. It also has a legitimate interest in the conduct of judicial proceedings, particularly in matters of general public concern. Furthermore, the subject matter of legal proceedings is often of direct significance in debate and deliberation over questions of public policy.

[2] Special rules of confidentiality may validly govern proceedings in juvenile, domestic relations, disciplinary, and mental disability proceedings, and perhaps other types of litigation. Rule 3.4(c) requires compliance with such rules. The provisions of this rule do not supersede the confidentiality provisions of Rule 1.6.

[3] The rule sets forth a basic general prohibition against a lawyer's making statements that the lawyer knows or should know will have a substantial likelihood of materially prejudicing an adjudicative proceeding. Recognizing that the public value of informed commentary is great and the likelihood of prejudice to a proceeding by the commentary of a lawyer who is not involved in the proceeding is small, the rule applies only to lawyers who are, or who have been involved in the investigation or litigation of a case, and their associates.

[4] Division (b) identifies specific matters about which a lawyer's statements would not ordinarily be considered to present a substantial likelihood of material prejudice, and should not in any event be considered prohibited by the general prohibition of division (a). Division (b) is not intended to be an exhaustive listing of the subjects upon which a lawyer may make a statement, but statements on other matters may be subject to division (a).

[5] There are, on the other hand, certain subjects that are more likely than not to have a material prejudicial effect on a proceeding, particularly when they refer to a civil matter triable to a jury, a criminal matter, or any other proceeding that could result in incarceration. These subjects relate to:

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

(2) in a criminal case or proceeding that could result in incarceration, the possibility of a plea of guilty to the offense or the existence or contents of any confession,

admission, or statement given by a defendant or suspect or that person's refusal or failure to make a statement;

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

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

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

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

[6] Another relevant factor in determining prejudice is the nature of the proceeding involved. Criminal jury trials will be most sensitive to extrajudicial speech. Civil trials may be less sensitive. Nonjury hearings and arbitration proceedings may be even less affected. The rule will still place limitations on prejudicial comments in these cases, but the likelihood of prejudice may be different depending on the type of proceeding.

[7] Finally, extrajudicial statements that might otherwise raise a question under this rule may be permissible when they are made in response to statements made publicly by another party, another party's lawyer, or third persons, where a reasonable lawyer would believe a public response is required in order to avoid prejudice to the lawyer's client. When prejudicial statements have been publicly made by others, responsive statements may have the salutary effect of lessening any resulting adverse impact on the adjudicative proceeding. Such responsive statements should be limited to contain only such information as is necessary to mitigate undue prejudice created by the statements made by others.

[8] [RESERVED]

Comparison to former Ohio Code of Professional Responsibility

Rule 3.6 reflects DR 7-107 in the Model Rule format. Ohio adopted Model Rule 3.6 in 1996.

Comparison to ABA Model Rules of Professional Conduct

Rule 3.6 is identical to Model Rule 3.6 in format and substance, except for the addition to division (b) that makes clear a lawyer may not engage in trial publicity if doing so would violate a duty of confidentiality under Rule 1.6. Also, Comment [8] is stricken to reflect the deletion of Model Rule 3.8(f).

RULE 3.7: LAWYER AS WITNESS

(a) A lawyer shall not act as an advocate at a trial in which the lawyer is likely to be a necessary witness unless one or more of the following applies:

(1) the testimony relates to an uncontested issue;

(2) the testimony relates to the nature and value of legal services rendered in the case;

(3) the disqualification of the lawyer would work *substantial* hardship on the client.

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

(c) A government lawyer participating in a case shall not testify or offer the testimony of another lawyer in the same government agency, except where division (a) applies or where permitted by law.

Comment

[1] Combining the roles of advocate and witness can prejudice the tribunal and the opposing party and can also involve a conflict of interest between the lawyer and client.

Advocate-Witness Rule

[2] The tribunal has proper objection when the trier of fact may be confused or misled by a lawyer serving as both advocate and witness. The opposing party has proper objection where the combination of roles may prejudice that party's rights in the litigation. A witness is required to testify on the basis of personal knowledge, while an advocate is expected to explain and comment on evidence given by others. It may not be clear whether a statement by an advocate-witness should be taken as proof or as an analysis of the proof.

[3] To protect the tribunal, division (a) prohibits a lawyer from simultaneously serving as counsel and necessary witness except in those circumstances specified in divisions (a)(1) to (3). Division (a)(1) recognizes that if the testimony will be uncontested, the ambiguities in the dual role are purely theoretical. Division (a)(2) recognizes that where the testimony concerns the extent and value of legal services rendered in the action in which the testimony is offered, permitting the lawyers to testify avoids the need for a second trial with new counsel to resolve that issue. Moreover, in such a situation the judge has firsthand knowledge of the matter in issue; hence, there is less dependence on the adversary process to test the credibility of the testimony.

[4] Apart from these exceptions, division (a)(3) recognizes that a balancing is required between the interests of the client and those of the tribunal and the opposing party. Whether the tribunal is likely to be misled or the opposing party is likely to suffer prejudice depends on the nature of the case, the importance and probable tenor of the lawyer's testimony, and the probability that the lawyer's testimony will conflict with that of other witnesses. Even if there is risk of such prejudice, in determining whether the lawyer should be disqualified, due regard must be given to the effect of disqualification on the lawyer's client.

[5] Because the tribunal is not likely to be misled when a lawyer acts as advocate in a trial in which another lawyer in the lawyer's firm will testify as a necessary witness, division (b) permits the lawyer to do so except in situations involving a conflict of interest.

Conflict of Interest

[6] In determining if it is permissible to act as advocate in a trial in which the lawyer will be a necessary witness, the lawyer also must consider that the dual role may give rise to a conflict of interest that will require compliance with Rule 1.7 or 1.9. For example, if there is likely to be substantial conflict between the testimony of the client and that of the lawyer, the representation involves a conflict of interest that requires compliance with Rule 1.7. This would be true even though the lawyer might not be prohibited by division (a) from simultaneously serving as advocate and witness because the lawyer's disqualification would work a substantial hardship on the client. Similarly, a lawyer who might be permitted to serve simultaneously as an advocate and witness by division (a)(3) might be precluded from doing so by Rule 1.9. The problem can arise whether the lawyer is called as a witness on behalf of the client or is called by the opposing party. Determining whether such a conflict exists is primarily the responsibility of the lawyer involved. If there is a conflict of interest, the lawyer must secure the client's informed consent, confirmed in writing. In some cases, the lawyer will be precluded from seeking the client's consent. See Rule 1.7. See Rule 1.0(b) for the definition of "confirmed in writing" and Rule 1.0(f) for the definition of "informed consent."

[7] Division (b) provides that a lawyer is not disqualified from serving as an advocate because a lawyer with whom the lawyer is associated in a firm is precluded from doing so by division (a). If, however, the testifying lawyer also would be disqualified by Rule 1.7 or 1.9 from representing the client in the matter, other lawyers in the firm will be precluded from representing the client by Rule 1.10, unless the client gives informed consent under the conditions stated in Rule 1.7.

[8] Government agencies are not included in the definition of "firm." See Rule 1.0(c) and Comment [4A]. Nonetheless, the ethical reasons for restrictions in serving as an advocate and a witness apply with equal force to lawyers in government offices and lawyers in private practice. Division (c) reflects the difference between relationships among salaried lawyers working in government agencies and relationships between law firm lawyers where financial ties among the partners and associates in the firm are intertwined. Division (c) permits a lawyer to testify, or offer the testimony of a lawyer in the same government agency as the lawyers participating in the case, where permitted by division (a) or by common law.

Comparison to former Ohio Code of Professional Responsibility

Rule 3.7 replaces DR 5-101(B) and 5-102 and changes the rule governing the ability of other lawyers who are associated in a firm with a testifying lawyer to continue the representation of a client.

Comparison to ABA Model Rules of Professional Conduct

Rule 3.7 is identical to ABA Model Rule 3.7 with the exception of the addition of division (c) and Comment [8].

Rule 3.7(c) and Comment [8] are added to recognize the difference between relationships among salaried lawyers in government agencies and relationships between law firm lawyers, where "financial ties among the partners and associates of the firm are intertwined." See *In re Disqualification of Carr*, 105 Ohio St. 3d 1233, 1235-36, 2004-Ohio-7357, ¶13-16. The testimony of a prosecutor, who is effectively screened from any participation in the case, may be permitted in extraordinary circumstances. *State v. Coleman* (1989), 45 Ohio St. 3d 298 was a death penalty case. In allowing such testimony, the Court said: "We recognize that a prosecuting attorney should avoid being a witness in a criminal prosecution, where it is a complex proceeding where substitution of counsel is impractical, and where the attorney so testifying is not engaged in the active trial of the cause and it is the only testimony available, such testimony is admissible and not a violation of DR 5-102." *Id.* at 302.

RULE 3.8: SPECIAL RESPONSIBILITIES OF A PROSECUTOR

The prosecutor in a criminal case shall not do any of the following:

(a) pursue or prosecute a charge that the prosecutor *knows* is not supported by probable cause;

(b) [RESERVED]

(c) [RESERVED]

(d) fail to make timely disclosure to the defense of all evidence or information *known* to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, fail to disclose to the defense all unprivileged mitigating information *known* to the prosecutor, except when the prosecutor is relieved of this responsibility by an order of the *tribunal*;

(e) subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor *reasonably believes* all of the following apply:

(1) the information sought is not protected from disclosure by any applicable privilege;

(2) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution;

(3) there is no other feasible alternative to obtain the information.

(f) [RESERVED]

Comment

[1] A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded justice and that guilt is decided upon the basis of sufficient evidence. Applicable law may require other measures by the prosecutor and knowing disregard of those obligations or a systematic abuse of prosecutorial discretion could constitute a violation of Rule 8.4. A prosecutor also is subject to other applicable rules such as Rules 3.6, 4.2, 4.3, 5.1, and 5.3.

[2] [RESERVED]

[3] The exception in division (d) recognizes that a prosecutor may seek an appropriate order from the tribunal if disclosure of information to the defense could result in substantial harm to an individual or to the public interest.

[4] Division (e) is intended to limit the issuance of lawyer subpoenas in grand jury and other criminal proceedings to those situations in which there is a genuine need to intrude into the client-lawyer relationship.

[5] [RESERVED]

[6] [RESERVED]

Comparison to former Ohio Code of Professional Responsibility

Rule 3.8(a) corresponds to DR 7-103(A) (no charges without probable cause), and Rule 3.8(d) corresponds to DR 7-103(B) (disclose evidence that exonerates defendant or mitigates degree of offense or punishment).

EC 7-13 recognizes the distinctive role of prosecutors:

> The responsibility of a public prosecutor differs from that of the usual advocate; his [her] duty is to seek justice, not merely to convict. This special duty exists because: (1) the prosecutor represents the sovereign and therefore should use restraint in the discretionary exercise of governmental powers, such as in the selection of cases to prosecute; (2) during trial the prosecutor is not only an advocate but he [she] also may make decisions normally made by an individual client, and those affecting the public interest should be fair to all; and (3) in our system of criminal justice the accused is to be given the benefit of all reasonable doubt.

Comparison to ABA Model Rules of Professional Conduct

Rule 3.8 modifies Model Rule 3.8 as follows:

- The introductory phrase of the rule is reworded to state a prohibition, consistent with other rules;
- Division (a) is expanded to prohibit either the pursuit or prosecution of unsupported charges and, thus, would include grand jury proceedings;
- Division (b) is deleted because ensuring that the defendant is advised about the right to counsel is a police and judicial function and because Rule 4.3 sets forth the duties of all lawyers in dealing with unrepresented persons;
- Division (c) is deleted because of its breadth and potential adverse impact on defendants who seek continuances that would be beneficial to their case or who seek to participate in diversion programs;
- Division (d) is modified to comport with Ohio law;
- Division (f) is deleted because a prosecutor, like all lawyers, is subject to Rule 3.6.

RULE 3.9: ADVOCATE IN NONADJUDICATIVE PROCEEDINGS

A lawyer representing a client before a legislative body or administrative agency in a nonadjudicative proceeding shall disclose that the appearance is in a representative capacity and shall conform to the provisions of Rules 3.3(a) to (c), 3.4(a) to (c), and 3.5.

Comment

[1] In representation before bodies such as legislatures, municipal councils, and executive and administrative agencies acting in a rule-making or policy-making capacity, lawyers present facts, formulate issues, and advance argument in the matters under consideration. The decision-making body, like a court, should be able to rely on the integrity of the submissions made to it. A lawyer appearing before such a body must deal with it honestly and in conformity with applicable rules of procedure. See Rules 3.3(a) to (c), 3.4(a) to (c), and 3.5.

[2] Lawyers have no exclusive right to appear before nonadjudicative bodies, as they do before a court. The requirements of this rule therefore may subject lawyers to regulations inapplicable to advocates who are not lawyers. However, legislative bodies and administrative agencies have a right to expect lawyers to deal with them as they deal with courts.

[3] This rule applies only when a lawyer represents a client in connection with an official hearing or meeting of a governmental agency or a legislative body to which the lawyer or the lawyer's client is presenting evidence or argument. It does not apply to representation of a client in a negotiation or other bilateral transaction with a governmental agency or in connection with an application for a license or other privilege or the client's compliance with generally applicable reporting requirements, such as the filing of income tax returns. Nor does it apply to the representation of a client in connection with an investigation or examination of the client's affairs conducted by government investigators or examiners. Representation in such matters is governed by Rules 4.1 to 4.4.

Comparison to former Ohio Code of Professional Responsibility

Rule 3.9 has no analogous provision in Ohio law. Rule 3.9 may be considered as having antecedents in DR 7-102(A)(3) and DR 9-101(C).

Comparison to ABA Model Rules of Professional Conduct

Rule 3.9 is identical to Model Rule 3.9.

IV. TRANSACTIONS WITH PERSONS OTHER THAN CLIENTS

RULE 4.1: TRUTHFULNESS IN STATEMENTS TO OTHERS

In the course of representing a client a lawyer shall not *knowingly* do either of the following:

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

(b) fail to disclose a material fact when disclosure is necessary to avoid assisting an *illegal* or *fraudulent* act by a client.

Comment

Misrepresentation

[1] A lawyer is required to be truthful when dealing with others on a client's behalf. A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false. Misrepresentations can also occur by partially true but misleading statements or omissions that are the equivalent of affirmative false statements. For dishonest conduct that does not amount to a false statement or for misrepresentations by a lawyer other than in the course of representing a client, see Rule 8.4.

Statements of Fact

[2] This rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are ordinarily in this category, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud. Lawyers should be mindful of their obligations under applicable law to avoid criminal and tortious misrepresentation.

Disclosure to Prevent Illegal or Fraudulent Client Acts

[3] Under Rule 1.2(d), a lawyer is prohibited from counseling or assisting a client in conduct that the lawyer knows is illegal or fraudulent. Rule 4.1(b) requires a lawyer to disclose a material fact, including one that may be protected by the attorney-client privilege, when the disclosure is necessary to avoid the lawyer's assistance in the client's illegal or fraudulent act. See also Rule 8.4(c). The client can, of course, prevent such disclosure by refraining from the wrongful conduct. If the client persists, the lawyer usually can avoid assisting the client's illegal or fraudulent act by withdrawing from the representation. If withdrawal is not sufficient to avoid such assistance, division (b) of the rule requires disclosure of material facts necessary to prevent the assistance of the client's illegal or fraudulent act. Such disclosure may include disaffirming

an opinion, document, affirmation, or the like, or may require further disclosure to avoid being deemed to have assisted the client's illegal or fraudulent act. Disclosure is not required unless the lawyer is unable to withdraw or the client is using the lawyer's work product to assist the client's illegal or fraudulent act.

[4] Division (b) of this rule addresses only ongoing or future illegal or fraudulent acts of a client. With respect to past illegal or fraudulent client acts of which the lawyer later becomes aware, Rule 1.6(b)(3) permits, but does not require, a lawyer to reveal information reasonably necessary to mitigate substantial injury to the financial or property interests of another that has resulted from the client's commission of an illegal or fraudulent act, in furtherance of which the client has used the lawyer's services.

Comparison to former Ohio Code of Professional Responsibility

Rule 4.1 addresses the same issues contained in several provisions of the Ohio Code of Professional Responsibility. Division (a) of the rule is virtually identical to DR 7-102(A)(5). Division (b) parallels DR 7-102(A)(3) and the "fraud on a person" portion of DR 7-102(B)(1). The "fraud on a tribunal" portion of DR 7-102(B)(1) is now found in Rule 3.3.

No Ohio case has construed DR 7-102(B) in the context of a lawyer failing to disclose a fraud on a person. Nevertheless, revealing such an ongoing or future fraud is justified under Rule 4.1(b) when the client refuses to prevent it, and the lawyer's withdrawal from the matter is not sufficient to prevent assisting the fraud.

The mitigation of past fraud on a person, addressed in DR 7-102(B), is now found in Rule 1.6(b)(3).

Comparison to ABA Model Rules of Professional Conduct

Rule 4.1 incorporates two changes in Model Rule 4.1(b) that are intended to track Ohio law. First, division (b) prohibits lawyers from assisting "illegal" and fraudulent acts of clients, (rather than "criminal" and fraudulent acts) consistent with proposed Rule 1.2(d) and DR 7-102(A)(7). Second, the "unless" clause at the end of division (b), which conditions the lawyer's duty to disclose on exceptions in Rule 1.6, is deleted. Deleting this phrase results in a clearer stand alone anti-fraud rule because it does not require reference to Rule 1.6, and also because such a provision is more consistent with DR 7-102(B)(1).

Comment [3] is rewritten and Comment [4] inserted to clarify the scope and meaning of division (b), and to add appropriate cross-references to other rules.

RULE 4.2: COMMUNICATION WITH PERSON REPRESENTED BY COUNSEL

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer *knows* to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

Comment

[1] This rule contributes to the proper functioning of the legal system by protecting a person who has chosen to be represented by a lawyer in a matter against possible overreaching by other lawyers who are participating in the matter, interference by those lawyers with the client-lawyer relationship, and the uncounselled disclosure of information relating to the representation.

[2] This rule applies to communications with any person who is represented by counsel concerning the matter to which the communication relates.

[3] The rule applies even though the represented person initiates or consents to the communication. A lawyer must immediately terminate communication with a person if, after commencing communication, the lawyer learns that the person is one with whom communication is not permitted by this rule.

[4] This rule does not prohibit communication with a represented person, or an employee or agent of such a person, concerning matters outside the representation. For example, the existence of a controversy between a government agency and a private party, or between two organizations, does not prohibit a lawyer for either from communicating with nonlawyer representatives of the other regarding a separate matter. Nor does this rule preclude communication with a represented person who is seeking advice from a lawyer who is not otherwise representing a client in the matter. A lawyer may not make a communication prohibited by this rule through the acts of another. See Rule 8.4(a). Parties to a matter may communicate directly with each other, and a lawyer is not prohibited from advising a client concerning a communication that the client is legally entitled to make. Also, a lawyer having independent justification or legal authorization for communicating with a represented person is permitted to do so.

[5] Communications authorized by law may include communications by a lawyer on behalf of a client who is exercising a constitutional or other legal right to communicate with the government. Communications authorized by law may also include investigative activities of lawyers representing governmental entities, directly or through investigative agents, prior to the commencement of criminal or civil enforcement proceedings. When communicating with the accused in a criminal matter, a government lawyer must comply with this rule in addition to honoring the constitutional rights of the accused. The fact that a communication does not violate a state or federal constitutional right is insufficient to establish that the communication is permissible under this rule.

[6] A lawyer who is uncertain whether a communication with a represented person is permissible may seek a court order. A lawyer may also seek a court order in exceptional circumstances to authorize a communication that would otherwise be prohibited by this rule, for example, where communication with a person represented by counsel is necessary to avoid reasonably certain injury.

[7] In the case of a represented organization, this rule prohibits communications with a constituent of the organization who supervises, directs, or regularly consults with the organization's lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability. Consent of the organization's lawyer is not required for communication with a former constituent. If a constituent of the organization is represented in the matter by his or her own counsel, the consent by that counsel to a communication will be sufficient for purposes of this rule. In communicating with a current or former constituent of an organization, a lawyer must not use methods of obtaining evidence that violate the legal rights of the organization.

[8] The prohibition on communications with a represented person applies only in circumstances where the lawyer knows that the person is in fact represented in the matter to be discussed. This means that the lawyer has actual knowledge of the fact of the representation; but such actual knowledge may be inferred from the circumstances. See Rule 1.0(g). Thus, the lawyer cannot evade the requirement of obtaining the consent of counsel by closing eyes to the obvious.

[9] In the event the person with whom the lawyer communicates is not known to be represented by counsel in the matter, the lawyer's communications are subject to Rule 4.3.

Comparison to former Ohio Code of Professional Responsibility

Rule 4.2 is analogous to DR 7-104(A)(1), with the addition of language that allows an otherwise prohibited communication with a represented person to be made pursuant to court order. Also see Advisory Opinions 96-1 and 2005-3 from the Board of Commissioners on Grievances and Discipline.

Comparison to ABA Model Rules of Professional Conduct

Rule 4.2 is identical to Model Rule 4.2.

RULE 4.3: DEALING WITH UNREPRESENTED PERSON

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer *knows* or *reasonably should know* that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make *reasonable* efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer *knows* or *reasonably should know* that the interests of such a person are or have a *reasonable* possibility of being in conflict with the interests of the client.

Comment

[1] An unrepresented person, particularly one not experienced in dealing with legal matters, might assume that a lawyer is disinterested in loyalties or is a disinterested authority on the law even when the lawyer represents a client. In order to avoid a misunderstanding, a lawyer will typically need to identify the lawyer's client and, where necessary, explain that the client has interests opposed to those of the unrepresented person. For misunderstandings that sometimes arise when a lawyer for an organization deals with an unrepresented constituent, see Rule 1.13(d).

[2] The rule distinguishes between situations involving unrepresented persons whose interests may be adverse to those of the lawyer's client and those in which the person's interests are not in conflict with the client's. In the former situation, the possibility that the lawyer will compromise the unrepresented person's interests is so great that the rule prohibits the giving of any advice, apart from the advice to obtain counsel. Whether a lawyer is giving impermissible advice may depend on the experience and sophistication of the unrepresented person, as well as the setting in which the behavior and comments occur. This rule does not prohibit a lawyer from negotiating the terms of a transaction or settling a dispute with an unrepresented person. So long as the lawyer has explained that the lawyer represents an adverse party and is not representing the person, the lawyer may inform the person of the terms on which the lawyer's client will enter into an agreement or settle a matter, prepare documents that require the person's signature, and explain the lawyer's own view of the meaning of the document or the lawyer's view of the underlying legal obligations.

Comparison to former Ohio Code of Professional Responsibility

Rule 4.3 is analogous to DR 7-104(A)(2). The first and second sentences of Rule 4.3 expand on DR 7-104(A)(2) by requiring a lawyer to: (1) refrain from stating or implying that the lawyer is disinterested in the matter at issue; and (2) take reasonable steps to correct any misunderstanding that the unrepresented person may have with regard to the lawyer's role in the matter. The third sentence of Rule 4.3 tracks DR 7-104(A)(2), but provides that the prohibition on giving legal advice to an unrepresented person applies only where the lawyer knows or reasonably should know that the unrepresented person and the lawyer's client have conflicting interests.

Comparison to ABA Model Rules of Professional Conduct

Rule 4.3 is identical to Model Rule 4.3.

RULE 4.4: RESPECT FOR RIGHTS OF THIRD PERSONS

(a) In representing a client, a lawyer shall not use means that have no *substantial* purpose other than to embarrass, harass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

(b) A lawyer who receives a document or electronically stored information relating to the representation of the lawyer's client and *knows* or *reasonably should know* that the document or electronically stored information was inadvertently sent shall promptly notify the sender.

Comment

[1] Responsibility to a client requires a lawyer to subordinate the interests of others to those of the client, but that responsibility does not imply that a lawyer may disregard the rights of third persons. It is impractical to catalogue all such rights, but they include legal restrictions on methods of obtaining evidence from third persons and unwarranted intrusions into privileged relationships, such as the client-lawyer relationship.

[2] Division (b) recognizes that lawyers sometimes receive a document or electronically stored information that was inadvertently sent or produced by opposing parties or their lawyers. A document or electronically stored information is inadvertently sent when it is accidentally transmitted, such as when an email or letter is misaddressed or a document or electronically stored information is accidentally included with information that was intentionally transmitted. If a lawyer knows or reasonably should know that such a document or electronically stored information was sent inadvertently, then this rule requires the lawyer to promptly notify the sender. For purposes of this rule, "document or electronically stored information" includes paper and electronic documents, electronic communications, and other forms of electronically stored information, including embedded data (commonly referred to as "metadata"), that is subject to being read or put into readable form. Metadata in electronic documents creates an obligation under this rule only if the receiving lawyer knows or reasonably should know that the metadata was sent inadvertently to the receiving lawyer.

[3] Some lawyers may choose to return a document or delete electronically stored information unread, for example, when the lawyer learns before receiving it that it was sent inadvertently. Where a lawyer is not required by applicable law to do so, the decision to voluntarily return such a document or delete electronically stored information is a matter of professional judgment ordinarily reserved to the lawyer, subject to applicable law that may govern deletion. See Rules 1.2 and 1.4.

Comparison to former Ohio Code of Professional Responsibility

Rule 4.4(a) incorporates elements addressed by several provisions of the Ohio Code of Professional Responsibility. Specifically, it contains elements of: (1) DR 7-102(A)(1), which, in part, prohibits a lawyer from taking action on behalf of a client that serves merely to harass another; (2) DR 7-106(C)(2), which, in part, prohibits a lawyer from asking any question that the

lawyer has no reasonable basis to believe is relevant and that is intended to degrade a third person; and (3) DR 7-108(D) and (E), which, in part, prohibit a lawyer from taking action that merely embarrasses or harasses a juror.

Rule 4.4(b) addresses the situation of when a lawyer receives a document that was inadvertently sent to the lawyer. There is no Disciplinary Rule comparable to Rule 4.4(b).

Comparison to ABA Model Rules of Professional Conduct

Rule 4.4(a) is identical to Model Rule 4.4(a), with the additional prohibition of actions that have no substantial purpose other than to "harass" a third person.

Rule 4.4(b) is identical to Model Rule 4.4(b).

V. LAW FIRMS AND ASSOCIATIONS

RULE 5.1: RESPONSIBILITIES OF PARTNERS, MANAGERS, AND SUPERVISORY LAWYERS

(a) [RESERVED]

(b) [RESERVED]

(c) A lawyer shall be responsible for another lawyer's violation of the Ohio Rules of Professional Conduct if either of the following applies:

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

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

Comment

[1] [RESERVED]

[2] Lawyers with managerial authority within a firm or government agency should make reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance that all lawyers in the firm or government agency will conform to the Ohio Rules of Professional Conduct. Such policies and procedures could include those designed to detect and resolve conflicts of interest, identify dates by which actions must be taken in pending matters, account for client funds and property, and ensure that inexperienced lawyers are properly supervised.

[3] Other measures may be advisable depending on the firm's structure and the nature of its practice. In a small firm of experienced lawyers, informal supervision and periodic review of compliance with the firm's policies may be appropriate. In a large firm, or in practice situations in which difficult ethical problems frequently arise, more elaborate measures may be prudent. Some firms, for example, have a procedure whereby junior lawyers can make confidential referral of ethical problems directly to a designated senior partner or special committee. See Rule 5.2. In any event, the ethical atmosphere of a firm can influence the conduct of all its members, and lawyers with managerial authority should not assume that all lawyers associated with the firm will inevitably conform to the rules. These principles apply to lawyers practicing in government agencies.

[4] Division (c) expresses a general principle of personal responsibility for acts of another. See also Rule 8.4(a).

[5] Division (c)(2) defines the duty of a partner or other lawyer having comparable managerial authority in a law firm or government agency, as well as a lawyer who has direct supervisory authority over performance of specific legal work by another lawyer. Whether a lawyer has supervisory authority in particular circumstances is a question of fact. Lawyers with managerial authority have at least indirect responsibility for all work being done by the firm or government agency, while a partner or manager in charge of a particular matter ordinarily also has supervisory responsibility for the work of other firm or government agency lawyers engaged in the matter. Appropriate remedial action by a partner or managing lawyer would depend on the immediacy of that lawyer's involvement and the seriousness of the misconduct. A supervisor is required to intervene to prevent avoidable consequences of misconduct if the supervisor knows that the misconduct occurred. Thus, if a supervising lawyer knows that a subordinate misrepresented a matter to an opposing party in negotiation, the supervisor as well as the subordinate has a duty to correct the resulting misapprehension.

[6] [RESERVED]

[7] Apart from this rule and Rule 8.4(a), a lawyer does not have disciplinary liability for the conduct of a partner, associate, or subordinate. Whether a lawyer may be liable civilly or criminally for another lawyer's conduct is a question of law beyond the scope of these rules.

[8] The duties imposed by this rule on managing and supervising lawyers do not alter the personal duty of each lawyer in a firm or government agency to abide by the Ohio Rules of Professional Conduct. See Rule 5.2(a).

Comparison to former Ohio Code of Professional Responsibility

There is no Disciplinary Rule comparable to Rule 5.1

Comparison to ABA Model Rules of Professional Conduct

Rule 5.1 revises Model Rule 5.1 to delete divisions (a) and (b) and insert references to "government agency" in division (c)(2) and the corresponding comments. Some of the principles contained in Model Rule 5.1(a) and (b) are retained as aspirational provisions of the comments. The addition of "government agency" is consistent with deletion of the reference to "government" in Rule 1.0, Comment [3] and the addition of Rule 1.0, Comment [4A]. One sentence from Comment [3] is deleted in light of Ohio's mandatory continuing legal education requirements.

RULE 5.2: RESPONSIBILITIES OF A SUBORDINATE LAWYER

(a) A lawyer is bound by the Ohio Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person.

(b) A subordinate lawyer does not violate the Ohio Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer's *reasonable* resolution of a question of professional duty.

Comment

[1] Although a lawyer is not relieved of responsibility for a violation by the fact that the lawyer acted at the direction of a supervisor, that fact may be relevant in determining whether a lawyer had the knowledge required to render conduct a violation of the rules. For example, if a subordinate filed a frivolous pleading at the direction of a supervisor, the subordinate would not be guilty of a professional violation unless the subordinate knew of the document's frivolous character.

[2] When lawyers in a supervisor-subordinate relationship encounter a matter involving professional judgment as to ethical duty, the supervisor may assume responsibility for making the judgment. Otherwise a consistent course of action or position could not be taken. If the question can reasonably be answered only one way, the duty of both lawyers is clear and they are equally responsible for fulfilling it. However, if the resolution is unclear, someone has to decide upon the course of action. That authority ordinarily reposes in the supervisor, and a subordinate may be guided accordingly. For example, if a question arises whether the interests of two clients conflict under Rule 1.7, the supervisor's reasonable resolution of the question should protect the subordinate professionally if the resolution is subsequently challenged.

Comparison to former Ohio Code of Professional Responsibility

There is no Disciplinary Rule comparable to Rule 5.2.

Comparison to ABA Model Rules of Professional Conduct

Rule 5.2 contains one change from Model Rule 5.2. Division (b) is revised to strike the word "arguable." Some wording in Comment [2] is altered to clarify the duty of a supervising attorney to resolve close calls.

RULE 5.3: RESPONSIBILITIES REGARDING NONLAWYER ASSISTANTS

With respect to a nonlawyer employed by, retained by, or associated with a lawyer, all of the following apply:

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

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

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

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

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

Comment

[1] Division (a) requires lawyers with managerial authority within a law firm or government agency to make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that nonlawyers in the firm or government agency, and nonlawyers outside the firm or agency who work on firm or agency matters, will act in a way compatible with the professional obligations of the lawyer. See Rule 1.1, Comment [6]. Division (b) applies to lawyers who have supervisory authority. Division (c) specifies the circumstances in which a lawyer is responsible for the conduct of a nonlawyer, within or outside the firm or government agency, that would be a violation of the Ohio Rules of Professional Conduct if engaged in by a lawyer.

Nonlawyers within the Firm or Agency

[2] Lawyers generally employ assistants in their practice, including secretaries, investigators, law student interns, and paraprofessionals. Such assistants, whether employees or independent contractors, act for the lawyer in rendition of the lawyer's professional services. A lawyer must give such assistants appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information

relating to representation of the client, and should be responsible for their work product. The measures employed in supervising nonlawyers should take account of the fact that they do not have legal training and are not subject to professional discipline.

Nonlawyers Outside the Firm or Agency

[3] A lawyer may use nonlawyers outside the firm or government agency to assist the lawyer in rendering legal services to the client. Examples include the retention of an investigative or paraprofessional service, hiring a document management company to create and maintain a database for complex litigation, sending client documents to a third party for printing or scanning, or using an Internet-based service to store client information. When using such services outside the firm or agency, the lawyer must make reasonable efforts to ensure that the services are provided in a manner compatible with the lawyer's professional obligations. The extent of the obligation to make reasonable efforts will depend on the circumstances, including the education, experience, and reputation of the nonlawyer; the nature of the services involved; the terms of any arrangements concerning the protection of client information; and the legal and ethical environments of the jurisdictions in which the services will be performed, particularly with regard to confidentiality. See also Rules 1.1, 1.2, 1.4, 1.6, 5.4(a), and 5.5(a). When retaining or directing a nonlawyer outside the firm or agency, a lawyer should communicate directions appropriate under the circumstances to give reasonable assurance that the nonlawyer's conduct is compatible with the professional obligations of the lawyer.

[4] When the client directs the selection of a particular nonlawyer service provider outside the firm or agency, the lawyer ordinarily should agree with the client concerning the allocation of responsibility for monitoring as between the client and the lawyer. See Rule 1.2. When making an allocation in a matter pending before a tribunal, lawyers and parties may have additional obligations that are a matter of law beyond the scope of these rules.

Comparison to former Ohio Code of Professional Responsibility

There is no Disciplinary Rule comparable to Rule 5.3. DR 4-101(D) and EC 4-2 speak to a lawyer's obligation in selecting and training secretaries so that a client's confidences and secrets are protected. The Supreme Court of Ohio cited Model Rule 5.3 with approval as establishing a lawyer's duty to maintain a system of office procedure that ensures delegated legal duties are completed properly. See *Disciplinary Counsel v. Ball* (1993), 67 Ohio St.3d 401 and *Mahoning Cty. Bar Assn v. Lavelle*, 107 Ohio St.3d 92, 2005-Ohio-5976.

Comparison to ABA Model Rules of Professional Conduct

Rule 5.3 is similar to the Model Rule with changes to conform the rule and comments to Rule 5.1.

RULE 5.4: PROFESSIONAL INDEPENDENCE OF A LAWYER

(a) A lawyer or *law firm* shall not share legal fees with a nonlawyer, except in any of the following circumstances:

(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;

(4) a lawyer may share court-awarded legal fees with a nonprofit organization that employed or retained the lawyer in the matter;

(5) a lawyer may share legal fees with a nonprofit organization that recommended employment of the lawyer in the matter, if the nonprofit organization complies with Rule XVI of the Supreme Court Rules for the Government of the Bar of Ohio.

(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 any of the following applies:

(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;

(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 division (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).

Comparison to former Ohio Code of Professional Responsibility

Rule 5.4 addresses the same subject addressed by DR 3-102(A), which prohibits dividing fees with nonlawyers, DR 3-103 and DR 5-107(C), which prohibit forming a partnership or practicing in a professional corporation with nonlawyers, and DR 5-107(B), which prohibits direction or regulation of a lawyer's professional judgment by any person who recommends, employs, or pays the lawyer to render legal services to another.

Rule 5.4 is not intended to change any of the provisions in the Ohio Code. Slight modifications in language between Ohio Code provisions and the Model Rule are intended to promote clarity of meaning. Rule 5.4(a) is substantially the same as DR 3-102(A). Rule 5.4(b) is identical to DR 3-103. Rule 5.4(c) is substantially the same as DR 5-107(B). Rule 5.4(d) is substantially the same as DR 5-107(C).

Comparison to ABA Model Rules of Professional Conduct

Rule 5.4(a) contains two changes from the Model Rule. Division (a)(4) is modified to retain the ability of a lawyer to share court-awarded legal fees with a nonprofit organization that employed or retained the lawyer in the matter.

Division (a)(5) is added to limit the ability of a lawyer to share legal fees with a nonprofit organization that recommended employment of the lawyer. Unlike Model Rule 5.4, the Ohio version of the rule limits the ability of a lawyer to share legal fees under these circumstances to nonprofit organizations that comply with provisions of the Supreme Court Rules for the Government of the Bar of Ohio that regulate lawyer referral and information services. See Gov. Bar R. XVI.

RULE 5.5: UNAUTHORIZED PRACTICE OF LAW; MULTIJURISDICTIONAL PRACTICE OF LAW

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

(b) A lawyer who is not admitted to practice in this jurisdiction shall not do either of the following:

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

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

(c) A lawyer who is admitted in another United States jurisdiction, is in good standing in the jurisdiction in which the lawyer is admitted, and regularly practices law may provide legal services on a temporary basis in this jurisdiction if one or more of the following apply:

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

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

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

(4) the lawyer engages in negotiations, investigations, or other nonlitigation activities that arise out of or are *reasonably* related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.

(d) A lawyer admitted and in good standing in another United States jurisdiction may provide legal services in this jurisdiction through an office or other systematic and continuous presence in either of the following circumstances:

(1) the lawyer is registered in compliance with Gov. Bar R. VI, Section 3 and is providing services to the employer or its organizational affiliates for which the permission of a *tribunal* to appear *pro hac vice* is not required;

(2) the lawyer is providing services that the lawyer is authorized to provide by federal or Ohio law;

(3) the lawyer is registered in compliance with and is providing pro bono legal services as permitted by Gov. Bar R. VI, Section 6.

Comment

[1] A lawyer may practice law only in a jurisdiction in which the lawyer is authorized to practice. A lawyer may be admitted to practice law in a jurisdiction on a regular basis or may be authorized by court rule or order or by law to practice for a limited purpose or on a restricted basis. Division (a) applies to unauthorized practice of law by a lawyer, whether through the lawyer's direct action or by the lawyer assisting another person. For example, a lawyer may not assist a person in practicing law in violation of the rules governing professional conduct in that person's jurisdiction.

[2] The definition of the practice of law is established by law and varies from one jurisdiction to another. Whatever the definition, limiting the practice of law to members of the bar protects the public against rendition of legal services by unqualified persons. This rule does not prohibit a lawyer from employing the services of paraprofessionals and delegating functions to them, so long as the lawyer supervises the delegated work and retains responsibility for their work. See Rule 5.3.

[3] A lawyer may provide professional advice and instruction to nonlawyers whose employment requires knowledge of the law; for example, claims adjusters, employees of financial or commercial institutions, social workers, accountants, and persons employed in government agencies. Lawyers also may assist independent nonlawyers, such as paraprofessionals, who are authorized by the law of a jurisdiction to provide particular law-related services. In addition, a lawyer may counsel nonlawyers who wish to proceed *pro se*.

[4] Other than as authorized by law or this rule, a lawyer who is not admitted to practice generally in this jurisdiction violates division (b)(1) if the lawyer establishes an office or other systematic and continuous presence in this jurisdiction for the practice of law. Presence may be systematic and continuous even if the lawyer is not physically present here. For example, advertising in media specifically targeted to Ohio residents or initiating contact with Ohio residents for solicitation purposes could be viewed as a systematic and continuous presence. Such a lawyer must not hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction. See also Rules 7.1 and 7.5(b).

[5] There are occasions in which a lawyer admitted to practice in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction under circumstances that do not create an unreasonable risk to the interests of their clients, the public, or the courts. Division (c) identifies four such circumstances. The fact that conduct is not so identified does not imply that the

conduct is or is not authorized. With the exception of divisions (d)(1) and (d)(2), this rule does not authorize a lawyer to establish an office or other systematic and continuous presence in this jurisdiction without being admitted to practice generally here.

[6] There is no single test to determine whether a lawyer's services are provided on a "temporary basis" in this jurisdiction, and may therefore be permissible under division (c). Services may be "temporary" even though the lawyer provides services in this jurisdiction on a recurring basis, or for an extended period of time, as when the lawyer is representing a client in a single lengthy negotiation or litigation.

[7] Divisions (c) and (d) apply to lawyers who are admitted to practice law in any United States jurisdiction, which includes the District of Columbia and any state, territory, or commonwealth of the United States. The word "admitted" in division (c) contemplates that the lawyer is authorized to practice in the jurisdiction in which the lawyer is admitted and excludes a lawyer who while technically admitted is not authorized to practice, because, for example, the lawyer is on inactive status.

[8] Division (c)(1) recognizes that the interests of clients and the public are protected if a lawyer admitted only in another jurisdiction associates with a lawyer licensed to practice in this jurisdiction. For this provision to apply, however, the lawyer admitted to practice in this jurisdiction must actively participate in and share responsibility for the representation of the client.

[9] After registering with the Supreme Court Office of Attorney Services pursuant to Gov. Bar R. XII, lawyers not admitted to practice generally in this jurisdiction may be authorized by order of a tribunal to appear *pro hac vice* before the tribunal. Under division (c)(2), a lawyer does not violate this rule when the lawyer appears before a tribunal pursuant to such authority. To the extent that a court rule or other law of this jurisdiction requires a lawyer who is not admitted to practice in this jurisdiction to obtain admission *pro hac vice* before appearing before a tribunal, this rule requires the lawyer to obtain that authority. "Tribunal" is defined in Gov. Bar R. XII, Section 1(A), as "a court, legislative body, administrative agency, or other body acting in an adjudicative capacity."

[10] Division (c)(2) also provides that a lawyer rendering services in this jurisdiction on a temporary basis does not violate this rule when the lawyer engages in conduct in anticipation of a proceeding or hearing in a jurisdiction in which the lawyer is authorized to practice law or in which the lawyer reasonably expects to be admitted *pro hac vice*. Examples of such conduct include meetings with the client, interviews of potential witnesses, and the review of documents. Similarly, a lawyer admitted only in another jurisdiction may engage in conduct temporarily in this jurisdiction in connection with pending litigation in another jurisdiction in which the lawyer is or reasonably expects to be authorized to appear, including taking depositions in this jurisdiction.

[11] When a lawyer has been or reasonably expects to be admitted to appear before a tribunal, division (c)(2) also permits conduct by lawyers who are associated with that lawyer in the matter, but who do not expect to appear before the tribunal. For example, subordinate

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

[12] Division (c)(3) permits a lawyer admitted to practice law in another jurisdiction to perform services on a temporary basis in this jurisdiction if those services are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice. The lawyer, however, must obtain admission *pro hac vice* in the case of a court-annexed arbitration or mediation or otherwise if court rules or law so require.

[13] Division (c)(4) permits a lawyer admitted in another jurisdiction to provide certain legal services on a temporary basis in this jurisdiction that arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted but are not within divisions (c)(2) or (c)(3). These services include both legal services and services that nonlawyers may perform but that are considered the practice of law when performed by lawyers.

[14] Divisions (c)(3) and (c)(4) require that the services arise out of or be reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted. A variety of factors evidence such a relationship. The lawyer's client may have been previously represented by the lawyer, or may be resident in or have substantial contacts with the jurisdiction in which the lawyer is admitted. The matter, although involving other jurisdictions, may have a significant connection with that jurisdiction. In other cases, significant aspects of the lawyer's work might be conducted in that jurisdiction or a significant aspect of the matter may involve the law of that jurisdiction. The necessary relationship might arise when the client's activities or the legal issues involve multiple jurisdictions, such as when the officers of a multinational corporation survey potential business sites and seek the services of their lawyer in assessing the relative merits of each. In addition, the services may draw on the lawyer's recognized expertise developed through the regular practice of law on behalf of clients in matters involving a particular body of federal, nationally-uniform, foreign, or international law.

[15] Division (d) identifies two circumstances in which a lawyer who is admitted to practice in another United States jurisdiction and in good standing may establish an office or other systematic and continuous presence in this jurisdiction for the practice of law as well as provide legal services on a temporary basis. Except as provided in divisions (d)(1) and (d)(2), a lawyer who is admitted to practice law in another jurisdiction and who establishes an office or other systematic or continuous presence in this jurisdiction must become admitted to practice law generally in this jurisdiction.

[16] [RESERVED]

[17] If a lawyer employed by a nongovernmental entity establishes an office or other systematic presence in this jurisdiction for the purpose of rendering legal services to the employer, division (d)(1) requires the lawyer to comply with the registration requirements set forth in Gov. Bar R. VI, Section 3.

[18] Division (d)(2) recognizes that a lawyer may provide legal services in a jurisdiction in which the lawyer is not licensed when authorized to do so by federal or Ohio law, which includes statute, court rule, executive regulation, or judicial precedent.

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

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

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

Comparison to former Ohio Code of Professional Responsibility

No change in Ohio law or ethics rules is intended by adoption of Rule 5.5.

Rule 5.5(a) is analogous to DR 3-101.

Rules 5.5(b), (c), and (d) describe when a lawyer who is not admitted in Ohio may engage in activities within the scope of the practice of law in this state. The Ohio Code of Professional Responsibility contains no provisions comparable to these proposed rules; rather, the boundaries of permitted activities in Ohio by a lawyer admitted elsewhere are currently reflected in case law and the Supreme Court Rules for the Government of the Bar of Ohio.

Pro hac vice admission of an out-of-state lawyer to represent a client before a tribunal was formerly a matter within the sole discretion of the tribunal before which the out-of-state lawyer sought to appear, without any registration requirements. See Gov. Bar R. I, Section 9(H) and *Royal Indemnity Co. v. J.C. Penney Co.* (1986), 27 Ohio St.3d 31, 33. Effective January 1, 2011, however, out-of-state lawyers must register with the Supreme Court of Ohio Office of Attorney Services prior to being granted permission to appear *pro hac vice* by a tribunal. See Gov. Bar R. XII.

Comparison to ABA Model Rules of Professional Conduct

Rule 5.5(d)(1) substitutes a reference to the corporate registration requirement of Gov. Bar R. VI, Section 3 for the more general language used in the Model Rule. Comment [16] is stricken and Comment [17] is modified to conform to the change in division (d)(1).

Comment [4] is modified to warn lawyers that advertising or solicitation of Ohio residents may be considered a "systematic and continuous" presence, as that term is used in division (b).

Comments [9] and [11] are modified effective January 1, 2011, to recognize Gov. Bar R. XII, which also became effective on that date. Gov. Bar R. XII governs *pro hac vice* registration and defines "tribunal" for purposes of such registrations.

RULE 5.6: RESTRICTIONS ON RIGHT TO PRACTICE

A lawyer shall not participate in offering or making either of the following:

(a) a partnership, shareholders, operating, employment, or other similar type of agreement that restricts the right of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement;

(b) an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a claim or controversy.

Comment

[1] An agreement restricting the right of lawyers to practice after leaving a firm not only limits their professional autonomy but also limits the freedom of clients to choose a lawyer. Division (a) prohibits such agreements except for restrictions incident to provisions concerning retirement benefits for service with the firm.

[2] Division (b) prohibits a lawyer from agreeing not to represent other persons in connection with settling a claim or controversy.

[3] This rule does not apply to prohibit restrictions that may be included in the terms of the sale of a law practice pursuant to Rule 1.17.

Comparison to former Ohio Code of Professional Responsibility

Rule 5.6 is analogous to DR 2-108.

Rule 5.6(a) tracks DR 2-108(A) by prohibiting restrictive agreements, except in conjunction with payment of retirement benefits. Unlike DR 2-108(A), however, Rule 5.6(a) does not reference an exception in conjunction with a sale of a law practice, as that situation is addressed separately in Rule 1.17.

Rule 5.6(b) is substantially similar to DR 2-108(B), except that Rule 5.6(b) prohibits restrictive agreements in connection with settling "a claim or controversy." DR 2-108(B) uses the phrase "controversy or suit."

Comparison to ABA Model Rules of Professional Conduct

Rule 5.6(b) is modified to track current Ohio prohibitions relative to restrictive agreements. Specifically, Model Rule 5.6(b) prohibits restrictive agreements only in conjunction with the settlement of a "client controversy." The Ohio version of Rule 5.6(b) does not limit the prohibition in conjunction with settling a claim on behalf of a client but, instead, prohibits restrictive agreements in conjunction with any "claim or controversy."

RULE 5.7: RESPONSIBILITIES REGARDING LAW-RELATED SERVICES

(a) A lawyer shall be subject to the Ohio Rules of Professional Conduct with respect to the provision of law-related services, as defined in division (e) of this rule, if the law-related services are provided in either of the following circumstances:

(1) by the lawyer in circumstances that are not distinct from the lawyer's provision of legal services to clients;

(2) in other circumstances by an entity controlled or owned by the lawyer individually or with others, unless the lawyer takes *reasonable* measures to ensure that a person obtaining the law-related services *knows* that the services are not legal services and that the protections of the client-lawyer relationship do not exist.

(b) A lawyer who controls or owns an interest in a business that provides a law-related service shall not require any customer of that business to agree to legal representation by the lawyer as a condition of the engagement of that business. A lawyer who controls or owns an interest in a business that provides law-related services shall disclose the interest to a customer of that business, and the fact that the customer may obtain legal services elsewhere, before performing legal services for the customer.

(c) A lawyer who controls or owns an interest in a business that provides a law-related service shall not require the lawyer's client to agree to use that business as a condition of the engagement for legal services. A lawyer who controls or owns an interest in a business that provides a law-related service shall disclose the interest to the client, and the fact that the client may obtain the law-related services elsewhere, before providing the law-related services to the client.

(d) Limitations or obligations imposed by this rule on a lawyer shall apply to both of the following:

(1) every lawyer in a *firm* who *knows* that another lawyer in his or her *firm* controls or owns an interest in a business that provides a law-related service;

(2) every lawyer in a *firm* that controls or owns an interest in a business that provides a law-related service.

(e) The term "law-related services" denotes services that might *reasonably* be performed in conjunction with the provision of legal services and that are not prohibited as unauthorized practice of law when provided by a nonlawyer.

Comment

[1] When a lawyer performs law-related services, sometimes referred to as "ancillary business," or controls an organization that does so, there exists the potential for ethical problems. Principal among these is the possibility that the person for whom the law-related services are performed fails to understand that the services may not carry with them the protections normally afforded as part of the client-lawyer relationship. The recipient of the law-related services may expect, for example, that the protection of client confidences, prohibitions against representation of persons with conflicting interests, and obligations of a lawyer to maintain professional independence apply to the provision of law-related services when that may not be the case.

[2] Rule 5.7 applies to the provision of law-related services by a lawyer even when the lawyer does not provide any legal services to the person for whom the law-related services are performed and whether the law-related services are performed through a law firm or a separate entity. The rule identifies the circumstances in which all of the Ohio Rules of Professional Conduct apply to the provision of law-related services. Even when those circumstances do not exist, however, the conduct of a lawyer involved in the provision of law-related services is subject to those rules that apply generally to lawyer conduct, regardless of whether the conduct involves the provision of legal services. See, *e.g.,* Rule 8.4.

[3] When law-related services are provided by a lawyer under circumstances that are not distinct from the lawyer's provision of legal services to clients, the lawyer in providing the law-related services must adhere to the requirements of the Ohio Rules of Professional Conduct as provided in division (a)(1). Even when the law-related and legal services are provided in circumstances that are distinct from each other, for example through separate entities or different support staff within the law firm, the Ohio Rules of Professional Conduct apply to the lawyer as provided in division (a)(2) unless the lawyer takes reasonable measures to assure that the recipient of the law-related services knows that the services are not legal services and that the protections of the client-lawyer relationship do not apply.

[4] Law-related services also may be provided through an entity that is distinct from that through which the lawyer provides legal services. If the lawyer individually or with others has control of such an entity's operations or owns an interest in the entity, the rule requires the lawyer to take reasonable measures to assure that each person using the services of the entity knows that the services provided by the entity are not legal services and that the Ohio Rules of Professional Conduct that relate to the client-lawyer relationship do not apply. A lawyer's control of an entity extends to the ability to direct its operation. Whether a lawyer has control will depend upon the circumstances of the particular case.

[5] When a client-lawyer relationship exists with a person who is referred by a lawyer to a separate law-related service entity controlled by the lawyer, individually or with others, the lawyer must comply with Rule 1.8(a).

[6] In taking the reasonable measures referred to in division (a)(2) to assure that a person using law-related services understands the practical effect or significance of the inapplicability of the Ohio Rules of Professional Conduct, the lawyer should communicate to the

person receiving the law-related services, in a manner sufficient to ensure that the person understands the significance of the fact, that the relationship of the person to the business entity will not be a client-lawyer relationship. The communication should be made before entering into an agreement for provision of or providing law-related services and preferably should be in writing.

[7] The burden is upon the lawyer to show that the lawyer has taken reasonable measures under the circumstances to communicate the desired understanding.

[8] A lawyer should take special care to keep separate the provision of law-related and legal services to minimize the risk that the recipient will assume that the law-related services are legal services. The risk of such confusion is especially acute when the lawyer renders both types of services with respect to the same matter. Under some circumstances the legal and law-related services may be so closely entwined that they cannot be distinguished from each other, and the requirement of disclosure and consultation imposed by division (a)(2) of the rule cannot be met. In such a case a lawyer will be responsible for assuring that both the lawyer's conduct and, to the extent required by Rule 5.3, that of nonlawyer employees in the distinct entity that the lawyer controls complies in all respects with the Ohio Rules of Professional Conduct.

[9] A broad range of economic and other interests of clients may be served by lawyers' engaging in the delivery of law-related services. Examples of law-related services include providing title insurance, financial planning, accounting, trust services, real estate counseling, legislative lobbying, economic analysis, social work, psychological counseling, tax preparation, and patent, medical, or environmental consulting.

[10] When a lawyer is obliged to accord the recipients of such services the protections of those rules that apply to the client-lawyer relationship, the lawyer must take special care to heed the proscriptions of the rules addressing conflict of interest [Rules 1.7 to 1.11, especially Rules 1.7(a)(2) and 1.8(a), (b) and (f)], and scrupulously adhere to the requirements of Rule 1.6 relating to disclosure of confidential information. The promotion of the law-related services must also in all respects comply with Rules 7.1 to 7.3, dealing with advertising and solicitation. In that regard, lawyers should take special care to identify the obligations that may be imposed as a result of a jurisdiction's decisional law.

[11] When the full protections of all of the Ohio Rules of Professional Conduct do not apply to the provision of law-related services, principles of law external to the rules, for example, the law of principal and agent, govern the legal duties owed to those receiving the services. Those other legal principles may establish a different degree of protection for the recipient with respect to confidentiality of information, conflicts of interest and permissible business relationships with clients. See also Rule 8.4.

[12] Division (d) makes the prohibitions and disclosures imposed in divisions (b) and (c) applicable to all lawyers in a lawyer's firm where the lawyer knows that another lawyer in the firm controls or owns an interest in a business that provides law-related services, and every lawyer in a firm that controls or owns an interest in a business that provides law-related services.

Comparison to former Ohio Code of Professional Responsibility

The Ohio Code of Professional Responsibility contains no provision analogous to Rule 5.7. However, the rule is consistent with Advisory Opinion No. 94-7 of the Board of Commissioners on Grievances and Discipline.

Comparison to ABA Model Rules of Professional Conduct

Rule 5.7(a)(2) is expanded to include a lawyer who owns an interest in an entity, in addition to a lawyer who controls an entity.

Added to Rule 5.7 are divisions (b) and (c), which contain reciprocal prohibitions and disclosures when a lawyer controls or owns an interest in a business that provides law-related services. Specifically, division (b) prohibits a lawyer who controls or owns an interest in a business that provides a law-related service from requiring customers of the business to agree to legal representation by the lawyer as a condition of engagement of the law-related services. Additionally, prior to performing legal services for a customer of a business that provides law-related services, division (b) requires the lawyer to notify the customer that the customer may obtain legal services elsewhere.

Conversely, division (c) prohibits a lawyer who controls or owns an interest in a business that provides law-related services from requiring a client to use the services of the law-related business as a condition of the engagement for legal services. Additionally, a lawyer who controls or owns an interest in a business that provides law-related services must disclose the interest to the client, and the fact that the client may obtain the law-related services elsewhere, prior to providing the law-related services to the client.

Rule 5.7 also includes a new division (d), which makes the prohibitions and disclosures imposed in divisions (b) and (c) applicable to (1) all lawyers in a lawyer's firm who know about the lawyer's interest in a law-related business, and (2) all lawyers who work in a firm that controls or owns an interest in a business that provides a law-related service.

Model Rule 5.7(b) has been redesignated as division (e) with no substantive changes.

VI. PUBLIC SERVICE

RULE 6.1: VOLUNTARY PRO BONO PUBLICO SERVICE

Note

The Supreme Court of Ohio has deferred consideration of Model Rule 6.1 in light of recommendations contained in the final report of the Supreme Court Task Force on Pro Se and Indigent Representation and recommendations from the Ohio Legal Assistance Foundation.

RULE 6.2: ACCEPTING APPOINTMENTS

A lawyer shall not seek to avoid appointment by a court to represent a person except for good cause, such as either of the following:

(a) representing the client is likely to result in violation of the Ohio Rules of Professional Conduct or other law;

(b) representing the client is likely to result in an unreasonable financial burden on the lawyer.

Comment

[1] A lawyer ordinarily is not obliged to accept a client whose character or cause the lawyer regards as repugnant. The lawyer's freedom to select clients is, however, qualified. All lawyers have a responsibility to assist in providing *pro bono publico* service. An individual lawyer fulfills this responsibility by accepting a fair share of unpopular matters or indigent or unpopular clients. A lawyer may also be subject to appointment by a court to serve unpopular clients or persons unable to afford legal services.

Appointed Counsel

[2] For good cause a lawyer may seek to decline an appointment to represent a person who cannot afford to retain counsel or whose cause is unpopular. Good cause exists if the lawyer could not handle the matter competently, see Rule 1.1, or if undertaking the representation would result in an improper conflict of interest, for example, when the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client. A lawyer may also seek to decline an appointment if acceptance would be unreasonably burdensome, for example, when it would impose a financial sacrifice so great as to be unjust.

[3] An appointed lawyer has the same obligations to the client as retained counsel, including the obligations of loyalty and confidentiality, and is subject to the same limitations on the client-lawyer relationship, such as the obligation to refrain from assisting the client in violation of the rules.

Comparison to former Ohio Code of Professional Responsibility

Rule 6.2 is similar to Ohio Code of Professional Responsibility EC 2-25 through EC 2-32, Acceptance and Retention of Employment, and, in particular, EC 2-28.

Comparison to ABA Model Rules of Professional Conduct

Stricken from Rule 6.2 is division (c) of the Model Rule, the substance of which is addressed in Rule 1.1, which mandates that a lawyer shall provide competent representation to a client. In addition, the word "court" is substituted for "tribunal" in the first line of the rule to reflect that the inherent authority to make appointments is limited to courts and does not extend to other bodies included within the Rule 1.0(o) definition of "tribunal."

RULE 6.3: MEMBERSHIP IN LEGAL SERVICES ORGANIZATION

Note

ABA Model Rule 6.3 is not adopted in Ohio. The substance of Model Rule 6.3 is addressed by other provisions of the Ohio Rules of Professional Conduct that address conflicts of interest, including Rule 1.7(a) [Conflicts of Interest: Current Clients].

RULE 6.4: LAW REFORM ACTIVITIES AFFECTING CLIENT INTERESTS

Note

ABA Model Rule 6.4 is not adopted in Ohio. The substance of Model Rule 6.4 is addressed by other provisions of the Ohio Rules of Professional Conduct that address conflicts of interest.

RULE 6.5: NONPROFIT AND COURT-ANNEXED LIMITED LEGAL SERVICES PROGRAMS

(a) A lawyer who, under the auspices of a program sponsored by a nonprofit organization or court, provides short-term limited legal services to a client without expectation by either the lawyer or the client that the lawyer will provide continuing representation in the matter is subject to both of the following:

(1) Rules 1.7 and 1.9(a) only if the lawyer *knows* that the representation of the client involves a conflict of interest;

(2) Rule 1.10 only if the lawyer *knows* that another lawyer associated with the lawyer in a *law firm* is disqualified by Rule 1.7 or 1.9(a) with respect to the matter.

(b) Except as provided in division (a)(2) of this rule, Rule 1.10 is inapplicable to a representation governed by this rule.

Comment

[1] Legal services organizations, courts, and various nonprofit organizations have established programs through which lawyers provide short-term limited legal services—such as advice or the completion of legal forms—that will assist persons to address their legal problems without further representation by a lawyer. In these programs, such as legal-advice hotlines, advice-only clinics, or *pro se* counseling programs, a client-lawyer relationship is established, but there is no expectation that the lawyer's representation of the client will continue beyond the limited consultation. Such programs are normally operated under circumstances in which it is not feasible for a lawyer to systematically screen for conflicts of interest as is generally required before undertaking a representation. See *e.g.*, Rules 1.7, 1.9, and 1.10.

[2] A lawyer who provides short-term limited legal services pursuant to this rule must communicate with the client, preferably in writing, regarding the limited scope of the representation. See Rule 1.2(c). If a short-term limited representation would not be reasonable under the circumstances, the lawyer may offer advice to the client but must also advise the client of the need for further assistance of counsel. Except as provided in this rule, the Ohio Rules of Professional Conduct, including Rules 1.6 and 1.9(c), are applicable to the limited representation.

[3] Because a lawyer who is representing a client in the circumstances addressed by this rule ordinarily is not able to check systematically for conflicts of interest, division (a) requires compliance with Rules 1.7 or 1.9(a) only if the lawyer knows that the representation presents a conflict of interest for the lawyer, and with Rule 1.10 only if the lawyer knows that another lawyer in the lawyer's firm is disqualified by Rules 1.7 or 1.9(a) in the matter.

[4] Because the limited nature of the services significantly reduces the risk of conflicts of interest with other matters being handled by the lawyer's firm, division (b) provides

that Rule 1.10 is inapplicable to a representation governed by this rule except as provided by division (a)(2). Division (a)(2) requires the participating lawyer to comply with Rule 1.10 when the lawyer knows that the lawyer's firm is disqualified by Rules 1.7 or 1.9(a). By virtue of division (b), however, a lawyer's participation in a short-term limited legal services program will not preclude the lawyer's firm from undertaking or continuing the representation of a client with interests adverse to a client being represented under the program's auspices. Nor will the personal disqualification of a lawyer participating in the program be imputed to other lawyers participating in the program.

[5] If, after commencing a short-term limited representation in accordance with this rule, a lawyer undertakes to represent the client in the matter on an ongoing basis, Rules 1.7, 1.9(a), and 1.10 become applicable.

Comparison to former Ohio Code of Professional Responsibility

The Ohio Code of Professional Responsibility does not have a specifically comparable rule regarding short-term limited legal services for programs sponsored by a nonprofit organization or court. Rule 6.5 codifies an exception to the general conflict provisions of Rule 1.7 (formerly DR 5-105) in order to encourage lawyers in firms to participate in short-term legal service projects sponsored by courts or nonprofit organizations.

Comparison to ABA Model Rules of Professional Conduct

Rule 6.5 contains no substantive changes to the Model Rule.

VII. INFORMATION ABOUT LEGAL SERVICES

RULE 7.1: COMMUNICATIONS CONCERNING A LAWYER'S SERVICES

A lawyer shall not make or use a false, misleading, or nonverifiable communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law or omits a fact necessary to make the statement considered as a whole not materially misleading.

Comment

[1] This rule governs all communications about a lawyer's services, including advertising permitted by Rule 7.2. Whatever means are used to make known a lawyer's services, statements about them must be truthful.

[2] Truthful statements that are misleading are also prohibited by this rule. A truthful statement is misleading if it omits a fact necessary to make the lawyer's communication considered as a whole not materially misleading. A truthful statement is also misleading if there is a substantial likelihood that it will lead a reasonable person to formulate a specific conclusion about the lawyer or the lawyer's services for which there is no reasonable factual foundation.

[3] An advertisement that truthfully reports a lawyer's achievements on behalf of clients or former clients may be misleading if presented so as to lead a reasonable person to form an unjustified expectation that the same results could be obtained for other clients in similar matters without reference to the specific factual and legal circumstances of each client's case. Similarly, an unsubstantiated comparison of the lawyer's services or fees with the services or fees of other lawyers may be misleading if presented with such specificity as would lead a reasonable person to conclude that the comparison can be substantiated. The inclusion of an appropriate disclaimer or qualifying language may preclude a finding that a statement is likely to create unjustified expectations or otherwise mislead the public.

[4] Characterization of rates or fees chargeable by the lawyer or law firm such as "cut-rate," "lowest," "giveaway," "below cost," "discount," or "special" is misleading.

[5] See also Rule 8.4(e) for the prohibition against stating or implying an ability to influence improperly a government agency or official or to achieve results by means that violate the Ohio Rules of Professional Conduct or other law.

Comparison to former Ohio Code of Professional Responsibility

Rule 7.1 corresponds to DR 2-101. Rule 7.1 does not contain the prohibitions found in DR 2-101 on client testimonials or self-laudatory claims. However, the rule does retain the DR 2-101 prohibition on unverifiable claims.

In addition, Rule 7.1 contains none of the other directives found in DR 2-101(B), the definition of misleading found in DR 2-101(C) (see comment [2] of Rule 7.1), or the directives found in DR 2-101(D), (E), and (G).

For DR 2-101(F) and DR 2-101(H) see Rule 7.3.

Comparison to ABA Model Rules of Professional Conduct

Rule 7.1 is similar to Model Rule 7.1 except for the inclusion of a prohibition on the use of nonverifiable communications about the lawyer or the lawyer's services.

RULE 7.2: ADVERTISING AND RECOMMENDATION OF PROFESSIONAL EMPLOYMENT

(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 pay any of the following:

(1) the *reasonable* costs of advertisements or communications permitted by this rule;

(2) the usual charges of a legal service plan;

(3) the usual charges for a nonprofit or lawyer referral service that complies with Rule XVI of the Supreme Court Rules for the Government of the Bar of Ohio;

(4) for a law practice in accordance with Rule 1.17.

(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.

(d) A lawyer shall not seek employment in connection with a matter in which the lawyer or *law firm* does not intend to participate actively in the representation, but that the lawyer or *law firm* intends to refer to other counsel. This provision shall not apply to organizations listed in Rules 7.2(b)(2) or (3) or if the advertisement is in furtherance of a transaction permitted by Rule 1.17.

Comment

[1] To assist the public in learning about and 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, email address, website, 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 and other forms of advertising, advertising going beyond specified facts about a lawyer, or "undignified" advertising. Television, the Internet, and other forms of electronic communication are among the most powerful media for getting information to the public, particularly persons of low and moderate income. Prohibiting television, Internet, or other forms of electronic advertising 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. But see Rule 7.3(a) for the prohibition against solicitation through a real-time electronic exchange initiated by the lawyer.

[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] Except as provided by these rules, lawyers are not permitted to give anything of value to another for recommending the lawyer's services or channeling professional work in a manner that violates Rule 7.3. A communication contains a recommendation if it endorses or vouches for a lawyer's credentials, abilities, competence, character, or other professional qualities. A reciprocal referral agreement between lawyers, or between a lawyer and a nonlawyer, is prohibited. *Cf.* Rule 1.5.

[5A] Division (b)(1) 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, Internet-based advertisements, 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. Moreover, a lawyer may pay others for generating client leads, including Internet-based client leads, provided the lead generator does not recommend the lawyer, any payment to the lead generator is consistent with Rules 1.5 and 5.4, and the lead generator's communications are consistent with Rule 7.1. To comply with Rule 7.1, a lawyer shall not pay a lead generator that states, implies, or creates a reasonable impression that it is recommending the lawyer, is making the referral without payment from the lawyer, or has analyzed a person's legal problems when determining which lawyer should receive the referral. See Rules 5.3 and 8.4(a).

[6] A lawyer may pay the usual charges of a legal service plan or a nonprofit or qualified lawyer referral service. A legal service plan is a prepaid or group legal service plan or a similar delivery system that assists people who seek 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 the public 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 nonprofit or qualified lawyer referral service. A qualified lawyer referral service is one that is approved pursuant to Rule XVI of the Supreme Court Rules for the Government of the Bar of Ohio. Relative to fee sharing, see Rule 5.4(a)(5).

[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 the public, 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 the public 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] [RESERVED]

Comparison to former Ohio Code of Professional Responsibility

Rule 7.2(a) directs attention to Rules 7.1 and 7.3, each of which includes or deletes language from the advertising and solicitation rules contained in DR 2-101 through DR 2-104.

The following are provisions of DR 2-101 that have not been included in Rule 7.1, 7.2, or 7.3:

- The specific reference to types of fees or descriptions, such as "give-away" or "below cost" found in DR 2-101(A)(5), although Rule 7.1, Comment [4] specifically indicates that these characterizations are misleading;

- Specific references to media types and words, as set forth in DR 2-101(B)(1) and (2);

- Specific reference that brochures or pamphlets can be disclosed to "others" as set forth in DR 2-101(B)(3);

- The list of items that were permissible for inclusion in advertising, contained in DR 2-101(D).

Comparison to ABA Model Rules of Professional Conduct

Rule 7.2(b)(3) is modified to remove a reference to a qualified legal referral service and substitute a reference to the lawyer referral service provisions contained in Rule XVI of the Supreme Court Rules for the Government of the Bar of Ohio. Rule 7.2 does not include Model Rule 7.2(b)(4) and thus prohibits reciprocal referral agreements between two lawyers or between a lawyer and a nonlawyer professional. Rule 7.2(d) is added to incorporate the prohibition contained in DR 2-101(A)(2) relative to soliciting employment where the lawyer does not intend to participate in the matter but instead will refer the matter to other counsel.

RULE 7.3: SOLICITATION OF CLIENTS

(a) A lawyer shall not by in-person, live telephone, or real-time electronic contact solicit professional employment when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain, unless either of the following applies:

(1) the person contacted is a lawyer;

(2) the person contacted has a family, close personal, or prior professional relationship with the lawyer.

(b) A lawyer shall not solicit professional employment by *written*, recorded, or electronic communication or by in-person, telephone, or real-time electronic contact even when not otherwise prohibited by division (a), if any of the following applies:

(1) the person being solicited has made *known* to the lawyer a desire not to be solicited by the lawyer;

(2) the solicitation involves coercion, duress, or harassment;

(3) the lawyer *knows* or *reasonably should know* that the person to whom the communication is addressed is a minor or an incompetent or that the person's physical, emotional, or mental state makes it unlikely that the person could exercise reasonable judgment in employing a lawyer.

(c) Unless the recipient of the communication is a person specified in division (a)(1) or (2) of this rule, every *written*, recorded, or electronic communication from a lawyer soliciting professional employment from anyone whom the lawyer *reasonably believes* to be in need of legal services in a particular matter shall comply with all of the following:

(1) Disclose accurately and fully the manner in which the lawyer or *law firm* became aware of the identity and specific legal need of the addressee;

(2) Disclaim or refrain from expressing any predetermined evaluation of the merits of the addressee's case;

(3) Conspicuously include in its text and on the outside envelope, if any, and at the beginning and ending of any recorded or electronic communication the recital - "ADVERTISING MATERIAL" or "ADVERTISEMENT ONLY."

(d) Prior to making a communication soliciting professional employment pursuant to division (c) of this rule to a party who has been named as a defendant in a civil action, a lawyer or *law firm* shall verify that the party has been served with notice of the action filed against that party. Service shall be verified by consulting the docket of

the court in which the action was filed to determine whether mail, personal, or residence service has been perfected or whether service by publication has been completed. Division (d) of this rule shall not apply to the solicitation of a debtor regarding representation of the debtor in a potential or actual bankruptcy action.

(e) If a communication soliciting professional employment from anyone is sent within thirty days of an accident or disaster that gives rise to a potential claim for personal injury or wrongful death, the following "Understanding Your Rights" shall be included with the communication.

UNDERSTANDING YOUR RIGHTS*

If you have been in an accident, or a family member has been injured or killed in a crash or some other incident, you have many important decisions to make. It is important for you to consider the following:

1. Make and keep records - If your situation involves a motor vehicle crash, regardless of who may be at fault, it is helpful to obtain a copy of the police report, learn the identity of any witnesses, and obtain photographs of the scene, vehicles, and any visible injuries. Keep copies of receipts of all your expenses and medical care related to the incident.

2. You do not have to sign anything - You may not want to give an interview or recorded statement without first consulting with an attorney, because the statement can be used against you. If you may be at fault or have been charged with a traffic or other offense, it may be advisable to consult an attorney right away. However, if you have insurance, your insurance policy probably requires you to cooperate with your insurance company and to provide a statement to the company. If you fail to cooperate with your insurance company, it may void your coverage.

3. Your interests versus interests of insurance company - Your interests and those of the other person's insurance company are in conflict. Your interests may also be in conflict with your own insurance company. Even if you are not sure who is at fault, you should contact your own insurance company and advise the company of the incident to protect your insurance coverage.

4. There is a time limit to file an insurance claim - Legal rights, including filing a lawsuit, are subject to time limits. You should ask what time limits apply to your claim. You may need to act immediately to protect your rights.

5. Get it in *writing* - You may want to request that any offer of settlement from anyone be put in *writing*, including a *written* explanation of the type of damages which they are willing to cover.

6. Legal assistance may be appropriate - You may consult with an attorney before you sign any document or release of claims. A release may cut off all future rights against others, obligate you to repay past medical bills or disability benefits, or jeopardize future benefits. If your interests conflict with your own insurance company, you always have the right to discuss the matter with an attorney of your choice, which may be at your own expense.

7. How to find an attorney - If you need professional advice about a legal problem but do not know an attorney, you may wish to check with relatives, friends, neighbors, your employer, or co-workers who may be able to recommend an attorney. Your local bar association may have a lawyer referral service that can be found in the Yellow Pages or on the Internet.

8. Check a lawyer's qualifications - Before hiring any lawyer, you have the right to know the lawyer's background, training, and experience in dealing with cases similar to yours.

9. How much will it cost? - In deciding whether to hire a particular lawyer, you should discuss, and the lawyer's written fee agreement should reflect:

   a. How is the lawyer to be paid? If you already have a settlement offer, how will that affect a contingent fee arrangement?

   b. How are the expenses involved in your case, such as telephone calls, deposition costs, and fees for expert witnesses, to be paid? Will these costs be advanced by the lawyer or charged to you as they are incurred? Since you are obligated to pay all expenses even if you lose your case, how will payment be arranged?

   c. Who will handle your case? If the case goes to trial, who will be the trial attorney?

This information is not intended as a complete description of your legal rights, but as a checklist of some of the important issues you should consider.

*__THE SUPREME COURT OF OHIO, WHICH GOVERNS THE CONDUCT OF LAWYERS IN THE STATE OF OHIO, NEITHER PROMOTES NOR PROHIBITS THE DIRECT SOLICITATION OF PERSONAL INJURY VICTIMS. THE COURT DOES REQUIRE THAT, IF SUCH A SOLICITATION IS MADE, IT MUST INCLUDE THE ABOVE DISCLOSURE.__

(f) Notwithstanding the prohibitions in division (a) of this rule, a lawyer may participate with a prepaid or group legal service plan operated by an organization not owned or directed by the lawyer that uses in-person or telephone contact to solicit memberships or subscriptions for the plan from persons who are not *known* to need legal services in a particular matter covered by the plan.

Comment

[1] A solicitation is a communication initiated by the lawyer that is directed to a specific person and that offers to provide, or can reasonably be understood as offering to provide, legal services. In contrast, a lawyer's communication typically does not constitute a solicitation if it is (a) directed to the general public, such as through a billboard, an Internet-based advertisement, a web site, or a commercial, (b) in response to a request for information, or (c) automatically generated in response to Internet searches.

[2] There is a potential for abuse when a solicitation involves direct in-person, live telephone, or real-time electronic contact by a lawyer with someone known to need legal services. These forms of contact subject the person to the private importuning of the trained advocate in a direct interpersonal encounter. The person, who may already feel overwhelmed by the circumstances giving rise to the need for legal services, may find it difficult fully to evaluate all available alternatives with reasoned judgment and appropriate self-interest in the face of the lawyer's presence and insistence upon being retained immediately. The situation is fraught with the possibility of undue influence, intimidation, and over-reaching.

[3] This potential for abuse inherent in direct in-person, live telephone, or real-time electronic solicitation justifies its prohibition, particularly since a lawyer has alternative means of conveying necessary information to those who may be in need of legal services. Communications can be mailed or transmitted by email or other electronic means that do not involve real-time contact and do not violate other laws governing solicitations. These forms of communication make it possible for the public to be informed about the need for legal services, and about the qualifications of available lawyers and law firms, without subjecting the public to direct in-person, telephone, or real-time electronic persuasion that may overwhelm the person's judgment. In using any telephone or other electronic communication, a lawyer remains subject to all applicable state and federal telemarketing laws and regulations.

[4] The use of general advertising and written, recorded, or electronic communications to transmit information from lawyer to the public, rather than direct in-person, live telephone, or real-time electronic contact, will help to ensure that the information flows cleanly as well as freely. The contents of advertisements and communications permitted under Rule 7.2 can be permanently recorded so that they cannot be disputed and may be shared with others who know the lawyer. This potential for informal review is itself likely to help guard against statements and claims that might constitute false and misleading communications, in violation of Rule 7.1. The contents of direct in-person, live telephone, or real-time electronic contact can be disputed and may not be subject to third-party scrutiny. Consequently, they are much more likely to approach, and occasionally cross, the dividing line between accurate representations and those that are false and misleading.

[5] There is far less likelihood that a lawyer would engage in abusive practices against a former client, a person with whom the lawyer has close personal or family relationship, or in situations in which the lawyer is motivated by considerations other than the lawyer's pecuniary gain. Nor is there a serious potential for abuse when the person contacted is a lawyer. Consequently, the general prohibition in Rule 7.3(a) and the requirements of Rule 7.3(c) are not applicable in those situations. Also, division (a) is not intended to prohibit a lawyer from

participating in constitutionally protected activities of public or charitable legal service organizations or bona fide political, social, civic, fraternal, employee, or trade organizations whose purposes include providing or recommending legal services to members or beneficiaries.

[6] Even permitted forms of solicitation can be abused. Thus, any solicitation that contains information that is false or misleading within the meaning of Rule 7.1, that involves coercion, duress, or harassment within the meaning of Rule 7.3(b)(2), or that involves contact with someone who has made known to the lawyer a desire not to be solicited by the lawyer within the meaning of Rule 7.3(b)(1) is prohibited. Moreover, if after sending a letter or other communication as permitted by Rule 7.2 the lawyer receives no response, any further effort to communicate with the recipient may violate Rule 7.3(b).

[7] This rule is not intended to prohibit a lawyer from contacting representatives of organizations or groups that may be interested in establishing a group or prepaid legal plan for their members, insureds, beneficiaries, or other third parties for the purpose of informing such entities of the availability of and details concerning the plan or arrangement that the lawyer or lawyer's firm is willing to offer. This form of communication is not directed to people who are seeking legal services for themselves. Rather, it is usually addressed to an individual acting in a fiduciary capacity seeking a supplier of legal services for others who may, if they choose, become prospective clients of the lawyer. Under these circumstances, the activity that the lawyer undertakes in communicating with such representatives and the type of information transmitted to the individual are functionally similar to and serve the same purpose as advertising permitted under Rule 7.2.

[8] None of the requirements of Rule 7.3 applies to communications sent in response to requests from clients or others. General announcements by lawyers, including changes in personnel or office location, do not constitute communications soliciting professional employment from a person known to be in need of legal services within the meaning of this rule.

[8A] The use of written, recorded, and electronic communications to solicit persons who have suffered personal injuries or the loss of a loved one can potentially be offensive. Nonetheless, it is recognized that such communications assist potential clients in not only making a meaningful determination about representation, but also can aid potential clients in recognizing issues that may be foreign to them. Accordingly, the information contained in division (e) must be communicated when the solicitation occurs within thirty days of an accident or disaster that gives rise to a potential claim for personal injury or wrongful death.

[9] Division (f) of this rule permits a lawyer to participate with an organization that uses personal contact to solicit members for its group or prepaid legal service plan, provided that the personal contact is not undertaken by any lawyer who would be a provider of legal services through the plan. The organization must not be owned or directed, whether as manager or otherwise, by any lawyer or law firm that participates in the plan. For example, division (f) would not permit a lawyer to create an organization controlled directly or indirectly by the lawyer and use the organization for the in-person or telephone solicitation of legal employment of the lawyer through memberships in the plan or otherwise. The communication permitted by these organizations also must not be directed to a person known to need legal services in a particular matter, but is to be designed to inform potential plan members generally of another

means of affordable legal services. Lawyers who participate in a legal service plan must reasonably ensure that the plan sponsors are in compliance with Rules 7.1, 7.2, and 7.3(b). See Rule 8.4(a).

Comparison to former Ohio Code of Professional Responsibility

Rule 7.3 embraces the provisions of DR 2-104(A), DR 2-101(F) and DR 2-101(H), with modifications.

At division (c), the rule broadens the types of communications that are permitted by authorizing the use of recorded telephone messages and electronic communication via the Internet. Further, in keeping with the new methods of communication that are authorized, the provisions of DR 2-101(F) regarding disclosures are incorporated and modified to apply to all forms of permissible direct solicitations.

The provisions of DR 2-101(F)(2) have been incorporated in division (c) and modified to reduce the micromanagement of lawyer contact, which previously had been the subject of abuse, by requiring that the disclaimers "ADVERTISEMENT ONLY" and "ADVERTISING MATERIAL" be "conspicuously" displayed. The requirements contained in DR 2-101(F)(2)(b) regarding disclaimers of prior acquaintance or contact with the addressee and avoidance of personalization have not been retained.

The provisions of DR 2-101(F)(4) [pre-service solicitation of defendants in civil actions] have been inserted as a new division (d), and the provisions of DR 2-101(H) [solicitation of accident or disaster victims] have been inserted as a new division (e).

Comparison to ABA Model Rules of Professional Conduct

Rule 7.3 contains the following substantive changes to Model Rule 7.3:

- With the modifications discussed above, the requirements placed upon the lawyer involved in the direct solicitation of prospective clients are more stringent than the requirements contained in division (c) of the Model Rule. Because a lawyer is not likely to have actual knowledge [Rule 1.0(g)] of a prospective client's need for legal services, the Model Rule standard contained in division (c) is changed to "* * * soliciting professional employment from a prospective client whom the lawyer *reasonably believes* to be in need of legal services * * *." See Rule 1.0(j).

- Division (d), regarding preservice solicitation of defendants in civil actions, has been inserted.

- Division (e), regarding direct solicitation requirements respecting solicitation of accident or disaster victims and their families, has been inserted.

Added to the rule is Comment [7A], which discusses the rationale for inclusion of the new division (e).

RULE 7.4: COMMUNICATION OF FIELDS OF PRACTICE AND SPECIALIZATION

(a) A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law or limits his or her practice to or concentrates in particular fields of law.

(b) A lawyer admitted to engage in patent practice before the United States Patent and Trademark Office may use the designation "Patent Attorney" or a *substantially* similar designation.

(c) A lawyer engaged in trademark practice may use the designation "Trademarks," "Trademark Attorney," or a *substantially* similar designation.

(d) A lawyer engaged in Admiralty practice may use the designation "Admiralty," "Proctor in Admiralty," or a *substantially* similar designation.

(e) A lawyer shall not state or imply that a lawyer is a specialist in a particular field of law, unless both of the following apply:

(1) the lawyer has been certified as a specialist by an organization approved by the Supreme Court Commission on Certification of Attorneys as Specialists;
(2) the name of the certifying organization is clearly identified in the communication.

Comment

[1] Division (a) of this rule permits a lawyer to indicate areas of practice in communications about the lawyer's services. If a lawyer practices only in certain fields, or will not accept matters except in a specified field or fields, the lawyer is permitted to so indicate.

[2] Divisions (b) and (c) recognize the long-established policy of the Patent and Trademark Office for the designation of lawyers practicing before the office. Division (d) recognizes that designation of Admiralty practice has a long historical tradition associated with maritime commerce and the federal courts.

[3] Division (e) permits a lawyer to state that the lawyer is a specialist in a field of law if such certification is granted by an organization approved by the Supreme Court Commission on Certification of Attorneys as Specialists. Certification signifies that an objective entity has recognized an advanced degree of knowledge and experience in the specialty area greater than is suggested by general licensure to practice law. Certifying organizations may be expected to apply standards of experience, knowledge, and proficiency to ensure that a lawyer's recognition as a specialist is meaningful and reliable. In order to ensure that consumers can obtain access to useful information about an organization granting certification, the name of the certifying organization must be included in any communication regarding the certification.

Comparison to former Ohio Code of Professional Responsibility

Rule 7.4 is comparable to DR 2-105 except that it permits a lawyer to state that he or she is a "specialist," practices a "specialty," or "specializes in" particular fields, subject to the "false and misleading" standard contained in Rule 7.1.

Comparison to ABA Model Rules of Professional Conduct

Rule 7.4(a) is modified to include the existing ability of a lawyer to indicate that the lawyer's practice is limited to or concentrates in particular fields of law. Division (c) is added from DR 2-105(A)(1) and the remaining divisions are relettered.

RULE 7.5: FIRM NAMES AND LETTERHEADS

(a) A lawyer shall not use a *firm* name, letterhead or other professional designation that violates Rule 7.1. A lawyer in private practice shall not practice under a trade name, a name that is misleading as to the identity of the lawyer or lawyers practicing under the name, or a *firm* name containing names other than those of one or more of the lawyers in the *firm*, except that the name of a professional corporation or association, legal clinic, limited liability company, or limited liability partnership shall contain symbols indicating the nature of the organization as required by Gov. Bar R. III. If otherwise lawful, a *firm* may use as, or continue to include in, its name the name or names of one or more deceased or retired members of the *firm* or of a predecessor *firm* in a continuing line of succession.

(b) A *law firm* with offices in more than one jurisdiction that lists attorneys associated with the *firm* shall indicate the jurisdictional limitations on those not licensed to practice in Ohio.

(c) The name of a lawyer holding a public office shall not be used in the name of a *law firm*, or in communications on its behalf, during any *substantial* period in which the lawyer is not actively and regularly practicing with the *firm*.

(d) Lawyers may state or imply that they practice in a partnership or other organization only when that is the fact.

Comment

[1] A firm may be designated by the names of all or some of its members or by the names of deceased members where there has been a continuing succession in the firm's identity. The letterhead of a law firm may give the names and dates of predecessor firms in a continuing line of succession. A lawyer or law firm may also be designated by a distinctive website address or comparable professional designation. It may be observed that any firm name including the name of a deceased partner is, strictly speaking, a trade name. The use of such names to designate law firms has proven a useful means of identification. However, it is misleading to use the name of a lawyer not associated with the firm or a predecessor of the firm or the name of a nonlawyer.

[2] With regard to division (d), lawyers sharing office facilities, but who are not in fact associated with each other in a law firm, may not denominate themselves as, for example, "Smith and Jones," for that title suggests that they are practicing law together in a firm. The use of a disclaimer such as "not a partnership" or "an association of sole practitioners" does not render the name or designation permissible.

[3] A lawyer may be designated "Of Counsel" if the lawyer has a continuing relationship with a lawyer or law firm, other than as a partner or associate.

[4] A legal clinic operated by one or more lawyers may be organized by the lawyer or lawyers for the purpose of providing standardized and multiple legal services. The name of the law office shall consist only of the names of one or more of the active lawyers in the organization, and may include the phrase "legal clinic" or words of similar import. The use of a trade name or geographical or other type of identification or description is prohibited. The name of any active lawyer in the clinic may be retained in the name of the legal clinic after the lawyer's death, retirement, or inactivity because of age or disability, and the name must otherwise conform to other provisions of the Ohio Rules of Professional Conduct and the Supreme Court Rules for the Government of the Bar of Ohio. The legal clinic cannot be owned by, and profits or losses cannot be shared with, nonlawyers or lawyers who are not actively engaged in the practice of law in the organization.

Comparison to former Ohio Code of Professional Responsibility

With the exception of DR 2-102(E) and (F), Rule 7.5 is comparable to DR 2-102.

The provisions of DR 2-102(E), which prohibits truthful statements about a lawyer's actual businesses and professions, are not included in Rule 7.5. The Rules of Professional Conduct should not preclude truthful statements about a lawyer's professional status, other business pursuits, or degrees.

DR 2-102(F) is an exception to DR 2-102(E) and is unnecessary in light of the decision to not retain DR 2-102(E).

Comment [3] is substantially the same as the Ohio provision on the "of counsel" designation.

Comment [4] addresses the restrictions of DR 2-102(G) relative to operating a "legal clinic" and using the designation "legal clinic."

Comparison to ABA Model Rules of Professional Conduct

Rule 7.5 combines Model Rule 7.5 with DR 2-102, with one exception. Rule 7.5(a) retains the prohibition in DR 2-102(B) that a lawyer shall not practice under a trade name. The Model Rule prohibition extends only to the use of a trade name that implies a connection to a governmental, charitable, or public legal services organization.

RULE 7.6: POLITICAL CONTRIBUTIONS TO OBTAIN GOVERNMENT LEGAL ENGAGEMENTS OR APPOINTMENTS BY JUDGES

Note

ABA Model Rule 7.6 is not adopted in Ohio. The substance of Model Rule 7.6 is addressed by provisions of the Ohio Ethics Law, particularly R.C. 102.03(F) and (G), and other criminal prohibitions relative to bribery and attempts to influence the conduct of elected officials. A lawyer or law firm that violates these statutory prohibitions would be in violation of other provisions of the Ohio Rules of Professional Conduct, such as Rule 8.4.

VIII. MAINTAINING THE INTEGRITY OF THE PROFESSION

RULE 8.1: BAR ADMISSION AND DISCIPLINARY MATTERS

In connection with a bar admission application or in connection with a disciplinary matter, a lawyer shall not do any of the following:

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

(b) in response to a demand for information from an admissions or disciplinary authority, fail to disclose a material fact or *knowingly* fail to respond, except that this rule does not require disclosure of information otherwise protected by Rule 1.6.

Comment

[1] The duty imposed by this rule applies to a lawyer's own admission or discipline as well as that of others. Thus, it is a separate professional offense for a lawyer to knowingly make a misrepresentation or omit a material fact in connection with a disciplinary investigation of the lawyer's own conduct. Rule I of the Supreme Court Rules for the Government of the Bar of Ohio addresses the obligations of applicants for admission to the bar.

[2] This rule is subject to the provisions of the Fifth Amendment of the United States Constitution and Article I, Section 10 of the Ohio Constitution. A person relying on such a provision in response to a question, however, should do so openly and not use the right of nondisclosure as a justification for failure to comply with this rule.

[3] A lawyer representing an applicant for admission to the bar, or representing a lawyer who is the subject of a disciplinary inquiry or proceeding, is governed by the rules applicable to the client-lawyer relationship, including Rule 1.6 and, in some cases, Rule 3.3.

Comparison to former Ohio Code of Professional Responsibility

Rule 8.1 is comparable to DR 1-101.

Comparison to ABA Model Rules of Professional Conduct

Rule 8.1 differs from Model Rule 8.1 in two respects.

Rule 8.1(a) is modified to strike the provision that would make the rule applicable to bar applicants. The constraints and obligations placed upon applicants for admission to the bar are more appropriately and distinctly addressed in Rule I of the Supreme Court Rules for the Government of the Bar of Ohio.

Rule 8.1(b) is modified for clarity. The clause, "fail to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter," is too unwieldy and creates a standard too difficult for explanation and comprehension. The elimination of that clause does not lessen the standard of candor expected of a lawyer in bar admission or disciplinary matters.

RULE 8.2: JUDICIAL OFFICIALS

(a) A lawyer shall not make a statement that the lawyer *knows* to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judicial officer, or candidate for election or appointment to judicial office.

(b) A lawyer who is a candidate for judicial office shall not violate the provisions of the Ohio Code of Judicial Conduct applicable to judicial candidates.

(c) A lawyer who is a retired or former judge or magistrate may use a title such as "justice," "judge," "magistrate," "Honorable" or "Hon." when the title is preceded or followed by the word "retired," if the lawyer retired in good standing with the Supreme Court, or "former," if the lawyer, due to the loss of an election, left judicial office in good standing with the Supreme Court.

(d) A lawyer who is a retired or former judge shall not state or imply that the lawyer's former service as a judge enables the lawyer to improperly influence any person or entity, including a government agency or official, or to achieve results by means that violate the Ohio Rules of Professional Conduct or other law.

Comment

[1] Assessments by lawyers are relied on in evaluating the professional or personal fitness of persons being considered for election or appointment to judicial office. Expressing honest and candid opinions on such matters contributes to improving the administration of justice. Conversely, false statements by a lawyer can unfairly undermine public confidence in the administration of justice.

[2] [RESERVED]

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

[4] This rule controls over any conflicts with Advisory Opinion 93-8 and Advisory Opinion 2013-3 of the Board of Commissioners on Grievances and Discipline.

Comparison to former Ohio Code of Professional Responsibility

Rule 8.2(a) is comparable to DR 8-102 and does not depart substantively from that rule. Rule 8.2(b) corresponds to DR 1-102(A)(1).

Comparison to ABA Model Rules of Professional Conduct

Rule 8.2(a) has been modified from the Model Rule to remove the phrase "public legal officers." Those officers are not included in DR 8-102, and disciplinary authorities should not be responsible for investigating statements made during campaigns for county attorney, attorney

general, or any other public legal position. The title of Rule 8.2 is modified to reflect this revision. Rule 8.2(b) is recast in terms of an express prohibition consistent with DR 1-102(A)(1).

RULE 8.3: REPORTING PROFESSIONAL MISCONDUCT

(a) A lawyer who possesses unprivileged knowledge of a violation of the Ohio Rules of Professional Conduct that raises a question as to any lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects, shall inform a disciplinary authority empowered to investigate or act upon such a violation.

(b) A lawyer who possesses unprivileged knowledge that a judge has committed a violation of the Ohio Rules of Professional Conduct or applicable rules of judicial conduct shall inform the appropriate authority.

(c) Any information obtained by a member of a committee or subcommittee of a bar association, or by a member, employee, or agent of a nonprofit corporation established by a bar association, designed to assist lawyers with substance abuse or mental health problems, provided the information was obtained while the member, employee, or agent was performing duties as a member, employee, or agent of the committee, subcommittee, or nonprofit corporation, shall be privileged for all purposes under this rule.

Comment

[1] Self-regulation of the legal profession requires that a member of the profession initiate disciplinary investigation when the lawyer knows of a violation of the Ohio Rules of Professional Conduct involving that lawyer or another lawyer. A lawyer has a similar obligation with respect to judicial misconduct. An apparently isolated violation may indicate a pattern of misconduct that only a disciplinary investigation can uncover. Reporting a violation is especially important where the victim is unlikely to discover the offense.

[2] A report about misconduct is not required where it would involve the disclosure of privileged information. However, a lawyer should encourage a client to consent to disclosure where it would not substantially prejudice the client's interests.

[3] [RESERVED]

[4] The duty to report professional misconduct does not apply to a lawyer retained to represent a lawyer whose professional conduct is in question. Such a situation is governed by the rules applicable to the client-lawyer relationship. See Rule 1.6.

[5] Information about a lawyer's or judge's misconduct or fitness may be received by a lawyer in the course of that lawyer's participation in an approved lawyers or judges assistance program. In that circumstance, providing for an exception to the reporting requirements of divisions (a) and (b) of this rule encourages lawyers and judges to seek treatment through such a program. Conversely, without such an exception, lawyers and judges may hesitate to seek assistance from these programs, which may then result in additional harm to their professional careers and additional injury to the welfare of clients and the public.

Comparison to former Ohio Code of Professional Responsibility

Rule 8.3 is comparable to DR 1-103 but differs in two respects. First, Rule 8.3 does not contain the strict reporting requirement of DR 1-103. DR 1-103 requires a lawyer to report all misconduct of which the lawyer has unprivileged knowledge. Rule 8.3 requires a lawyer to report misconduct only when the lawyer possesses unprivileged knowledge that raises a question as to any lawyer's honesty, trustworthiness, or fitness in other respects. Second, Rule 8.3 requires a lawyer to self-report.

Comparison to ABA Model Rules of Professional Conduct

Rule 8.3 is revised to comport more closely to DR 1-103. Division (a) is rewritten to require the self-reporting of disciplinary violations. In addition, the provisions of divisions (a) and (b) are broadened to require reporting of (1) any violation by a lawyer that raises a question regarding the lawyer's honesty, trustworthiness, or fitness, and (2) any ethical violation by a judge. In both provisions, language is included to limit the reporting requirement to circumstances where a lawyer's knowledge of a reportable violation is unprivileged.

Division (c), which deals with confidentiality of information regarding lawyers and judges participating in lawyers' assistance programs, has been strengthened to reflect Ohio's position that such information is not only confidential, but "shall be privileged for all purposes" under DR 1-103(C). The substance of DR 1-103(C) has been inserted in place of Model Rule 8.3(c).

In light of the substantive changes made in divisions (a) and (b), Comment [3] is no longer applicable and is stricken. Further, due to the substantive changes made to confidentiality of information regarding lawyers and judges participating in lawyers' assistance programs, the last sentence in Comment [5] has been stricken.

RULE 8.4: MISCONDUCT

It is professional misconduct for a lawyer to do any of the following:

(a) violate or attempt to violate the Ohio Rules of Professional Conduct, *knowingly* assist or induce another to do so, or do so through the acts of another;

(b) commit an *illegal* act that reflects adversely on the lawyer's honesty or trustworthiness;

(c) engage in conduct involving dishonesty, *fraud*, deceit, or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice;

(e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Ohio Rules of Professional Conduct or other law;

(f) *knowingly* assist a judge or judicial officer in conduct that is a violation of the Ohio Rules of Professional Conduct, the applicable rules of judicial conduct, or other law;

(g) engage, in a professional capacity, in conduct involving discrimination prohibited by law because of race, color, religion, age, gender, sexual orientation, national origin, marital status, or disability;

(h) engage in any other conduct that adversely reflects on the lawyer's fitness to practice law.

Comment

[1] Lawyers are subject to discipline when they violate or attempt to violate the Ohio Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another, as when they request or instruct an agent to do so on the lawyer's behalf. Division (a), however, does not prohibit a lawyer from advising a client concerning action the client is legally entitled to take.

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

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

[2A] Division (c) does not prohibit a lawyer from supervising or advising about lawful covert activity in the investigation of criminal activity or violations of constitutional or civil rights when authorized by law.

[3] Division (g) does not apply to a lawyer's confidential communication to a client or preclude legitimate advocacy where race, color, religion, age, gender, sexual orientation, national origin, marital status, or disability is relevant to the proceeding where the advocacy is made.

[4] A lawyer may refuse to comply with an obligation imposed by law upon a good faith belief that no valid obligation exists. The provisions of Rule 1.2(d) concerning a good faith challenge to the validity, scope, meaning, or application of the law apply to challenges of legal regulation of the practice of law.

[5] Lawyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer's abuse of public office can suggest an inability to fulfill the professional role of lawyers. The same is true of abuse of positions of private trust such as trustee, executor, administrator, guardian, agent, and officer, director, or manager of a corporation or other organization.

Comparison to former Ohio Code of Professional Responsibility

Rule 8.4 is substantively comparable to DR 1-102 and 9-101(C).

Rule 8.4 removes the "moral turpitude" standard of DR 1-102(A)(3) and replaces it with Rule 8.4(b), which states that a lawyer engages in professional misconduct if the lawyer "commit[s] an illegal act that reflects adversely on the lawyer's honesty or trustworthiness."

Comparison to ABA Model Rules of Professional Conduct

Rule 8.4 is substantially similar to Model Rule 8.4 except for the additions of the anti-discrimination provisions of DR 1-102(B) and the fitness to practice provision of DR 1-102(A)(6). Comment [2A] is added to indicate that a lawyer's involvement in lawful covert activities is not a violation of Rule 8.4(c). The last sentence of DR 1-102(B) is inserted in place of Model Rule Comment [3].

RULE 8.5 DISCIPLINARY AUTHORITY; CHOICE OF LAW

(a) **Disciplinary Authority.** A lawyer admitted to practice in Ohio is subject to the disciplinary authority of Ohio, regardless of where the lawyer's conduct occurs. A lawyer not admitted in Ohio is also subject to the disciplinary authority of Ohio if the lawyer provides or offers to provide any legal services in Ohio. A lawyer may be subject to the disciplinary authority of both Ohio and another jurisdiction for the same conduct.

(b) **Choice of Law.** In any exercise of the disciplinary authority of Ohio, the rules of professional conduct to be applied shall be as follows:

(1) for conduct in connection with a matter pending before a *tribunal*, the rules of the jurisdiction in which the *tribunal* sits, unless the rules of the *tribunal* provide otherwise;

(2) for any other conduct, the rules of the jurisdiction in which the lawyer's conduct occurred, or, if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction shall be applied to the conduct. A lawyer shall not be subject to discipline if the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer *reasonably believes* the predominant effect of the lawyer's conduct will occur.

Comment

Disciplinary Authority

[1] It is longstanding law that the conduct of a lawyer admitted to practice in Ohio is subject to the disciplinary authority of Ohio. Extension of the disciplinary authority of Ohio to other lawyers who provide or offer to provide legal services in Ohio is for the protection of the citizens of Ohio. Reciprocal enforcement of a jurisdiction's disciplinary findings and sanctions will further advance the purposes of this rule. See Rule V, Section 20 of the Supreme Court Rules for the Government of the Bar of Ohio. A lawyer who is subject to the disciplinary authority of this jurisdiction under Rule 8.5(a) appoints an official to be designated by this Court to receive service of process in this jurisdiction. The fact that the lawyer is subject to the disciplinary authority of Ohio may be a factor in determining whether personal jurisdiction may be asserted over the lawyer for civil matters.

[1A] A lawyer admitted in another state, but not Ohio, may seek permission from a tribunal to appear *pro hac vice*. Effective January 1, 2011, out-of-state lawyers must register with the Supreme Court of Ohio Office of Attorney Services prior to being granted permission to appear *pro hac vice* by a tribunal. See Gov. Bar R. XII. Once *pro hac vice* status is extended, the tribunal retains the authority to revoke the status as part of its inherent power to regulate the practice before the tribunal and protect the integrity of its proceedings. Revocation of *pro hac vice* status and disciplinary proceedings are separate methods of addressing lawyer misconduct, and a lawyer may be subject to disciplinary proceedings for the same conduct that led to revocation of *pro hac vice* status.

Choice of Law

[2] A lawyer may be potentially subject to more than one set of rules of professional conduct that impose different obligations. The lawyer may be licensed to practice in more than one jurisdiction with differing rules, or may be admitted to practice before a particular court with rules that differ from those of the jurisdiction or jurisdictions in which the lawyer is licensed to practice. Additionally, the lawyer's conduct may involve significant contacts with more than one jurisdiction.

[3] Division (b) seeks to resolve such potential conflicts. Its premise is that minimizing conflicts between rules, as well as uncertainty about which rules are applicable, is in the best interest of both clients and the profession (as well as the bodies having authority to regulate the profession). Accordingly, it takes the approach of (i) providing that any particular conduct of a lawyer shall be subject to only one set of rules of professional conduct, (ii) making the determination of which set of rules applies to particular conduct as straightforward as possible, consistent with recognition of appropriate regulatory interests of relevant jurisdictions, and (iii) providing protection from discipline for lawyers who act reasonably in the face of uncertainty.

[4] Division (b)(1) provides that as to a lawyer's conduct relating to a proceeding pending before a tribunal, the lawyer shall be subject only to the rules of the jurisdiction in which the tribunal sits unless the rules of the tribunal, including its choice of law rule, provide otherwise. As to all other conduct, including conduct in anticipation of a proceeding not yet pending before a tribunal, division (b)(2) provides that a lawyer shall be subject to the rules of the jurisdiction in which the lawyer's conduct occurred, or, if the predominant effect of the conduct is in another jurisdiction, the rules of that jurisdiction shall be applied to the conduct. In the case of conduct in anticipation of a proceeding that is likely to be before a tribunal, the predominant effect of such conduct could be where the conduct occurred, where the tribunal sits or in another jurisdiction.

[5] When a lawyer's conduct involves significant contacts with more than one jurisdiction, it may not be clear whether the predominant effect of the lawyer's conduct will occur in a jurisdiction other than the one in which the conduct occurred. So long as the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect will occur, the lawyer shall not be subject to discipline under this rule. With respect to conflicts of interest and determining a lawyer's reasonable belief pursuant to division (b)(2), a written agreement between the lawyer and client that reasonably specifies a particular jurisdiction as within the scope of that division may be considered if the agreement was obtained with the client's informed consent, confirmed in the agreement.

[6] If two admitting jurisdictions were to proceed against a lawyer for the same conduct, they should, applying this rule, identify the same governing ethics rules. They should take all appropriate steps to see that they do apply the same rule to the same conduct, and in all events should avoid proceeding against a lawyer on the basis of two inconsistent rules.

[7] The choice of law provision applies to lawyers engaged in transnational practice, unless international law, treaties, or other agreements between competent regulatory authorities in the affected jurisdictions provide otherwise.

Comparison to former Ohio Code of Professional Responsibility

The Ohio Code of Professional Responsibility has no provision analogous to Rule 8.5.

Comparison to ABA Model Rules of Professional Conduct

Rule 8.5 is substantively identical to Model Rule 8.5. Comment [1A] is modified, effective January 1, 2011, to reflect Ohio law regarding extension of *pro hac vice* status to out-of-state lawyers.

FORM OF CITATION, EFFECTIVE DATE, APPLICATION

(a) These rules shall be known as the Ohio Rules of Professional Conduct and cited as "Prof. Cond. Rule _____."

(b) The Ohio Rules of Professional Conduct shall take effect February 1, 2007, at which time the Ohio Rules of Professional Conduct shall supersede and replace the Ohio Code of Professional Responsibility to govern the conduct of lawyers occurring on or after that effective date. The Ohio Code of Professional Responsibility shall continue to apply to govern conduct occurring prior to February 1, 2007 and shall apply to all disciplinary investigations and prosecutions relating to conduct that occurred prior to February 1, 2007.

(c) The Supreme Court of Ohio adopted amendments to Prof. Cond. Rule 5.5(d) and Comment [17] of the Ohio Rules of Professional Conduct effective September 1, 2007.

(d) The Supreme Court of Ohio adopted amendments to Prof. Cond. Rule 7.4 of the Ohio Rules of Professional Conduct effective April 1, 2009.

(e) The Supreme Court of Ohio adopted amendments to Prof. Cond. Rule 1.15 of the Ohio Rules of Professional Conduct effective January 1, 2010.

(f) The Supreme Court of Ohio adopted amendments to Prof. Cond. Rules 5.5 and 8.5 of the Ohio Rules of Professional Conduct effective January 1, 2011.

(g) The Supreme Court of Ohio adopted amendments to Prof. Cond. Rules 1.4, Comment [8], and 7.5 of the Ohio Rules of Professional Conduct effective January 1, 2012.

(h) The Supreme Court of Ohio adopted amendments to Prof. Cond. Rule 8.2(c) and (d) and Comment [4] of the Ohio Rules of Professional Conduct effective June 1, 2014.

(i) The Supreme Court of Ohio adopted amendments to Prof. Cond. Rules 1.3, Comment [5], 1.17(e)(5), and 8.5, Comment [1] of the Ohio Rules of Professional Conduct effective January 1, 2015.

(j) The Supreme Court of Ohio adopted amendments to Prof. Cond. R. 1.0, 1.1, 1.4, 1.6, 1.12, 1.17, 1.18, 4.4, 5.3, 5.5, 7.1, 7.2, 7.3, and 8.5 effective April 1, 2015.

(k) The Supreme Court of Ohio adopted amendments to Prof. Cond. R. 5.5 effective December 1, 2015.

APPENDIX A

CORRELATION TABLE
OHIO RULES OF PROFESSIONAL CONDUCT TO
OHIO CODE OF PROFESSIONAL RESPONSIBILITY

The following is a numerical listing of the Ohio Rules of Professional Conduct with cross-references to provisions of the Ohio Code of Professional Responsibility or other Ohio law that address substantially similar subject-matter. A cross-reference does not indicate that a provision of the Ohio Code of Professional Responsibility or other Ohio law has been incorporated in the Ohio Rules of Professional Conduct. Please consult the code comparisons that follow each rule for a more detailed treatment of corresponding provisions.

Ohio Rules of Professional Conduct	Ohio Code of Professional Responsibility or Other Law
Rule 1.1 Competence	DR 6-101(A)(1) & (2)
Rule 1.2 Scope of Representation and Allocation of Authority	
Rule 1.2(a)	DR 7-101(A)(1), EC 7-7, 7-8, 7-10
Rule 1.2(c)	None
Rule 1.2(d)	DR 7-102(A)(7); EC 7-4
Rule 1.2(e)	DR 7-105
Rule 1.3 Diligence	DR 6-101(A)(3), 7-101(A)(1)
Rule 1.4 Communication	
Rule 1.4(a) & (b)	EC 7-8, 9-2
Rule 1.4(c)	DR 1-104
Rule 1.5 Fees and Expenses	
Rule 1.5(a)	DR 2-106(A) & (B)
Rule 1.5(b)	EC 2-18
Rule 1.5(c)	EC 2-18; R.C. 4705.15
Rule 1.5(d)	DR 2-106(C); EC 2-19
Rule 1.5(e) & (f)	DR 2-107
Rule 1.6 Confidentiality	
Rule 1.6(a)	DR 4-101(A), (B), & (C)(1)
Rule 1.6(b)(1)	None
Rule 1.6(b)(2)	DR 4-101(C)(3)
Rule 1.6(b)(3)	DR 7-102(B)(1)
Rule 1.6(b)(4)	None
Rule 1.6(b)(5)	DR 4-101(C)(4)

Rule 1.6(b)(6)	DR 4-101(C)(2)
Rule 1.6(c)	None
Rule 1.7 Conflict of Interest: Current Clients	DR 5-101(A)(1), 5-105(A), (B), & (C)
Rule 1.8 Conflict of Interest: Current Clients: Specific Rules	
Rule 1.8(a)	DR 5-104(A); *Cincinnati Bar Assn v. Hartke* (1993), 67 Ohio St.3d 65
Rule 1.8(b)	DR 4-101(B)(2)
Rule 1.8(c)	DR 5-101(A)(2) & (3)
Rule 1.8(d)	DR 5-104(B)
Rule 1.8(e)	DR 5-103(B)
Rule 1.8(f)(1), (2), & (3)	DR 5-107(A) & (B)
Rule 1.8(f)(4)	None
Rule 1.8(g)	DR 5-106
Rule 1.8(h)	DR 6-102; *Disciplinary Counsel v. Clavner* (1997), 77 Ohio St.3d 431
Rule 1.8(i)	DR 5-103(A)
Rule 1.8(j)	*Cleveland Bar Assn v. Feneli* (1996), 86 Ohio St. 3d 102 & *Disciplinary Counsel v. Moore* (2004), 101 Ohio St.3d 261
Rule 1.8(k)	DR 5-105(D)
Rule 1.9 Duties to Former Clients	DR 4-101(B); *Kala v. Aluminum Smelting & Refining Co*. (1998), 81 Ohio St. 3d 1
Rule 1.10 Imputation of Conflicts of Interest: General Rule	DR 5-105(D); *Kala v. Aluminum Smelting & Refining Co*. (1998), 81 Ohio St. 3d 1
Rule 1.11 Special Conflicts of Interest for Former and Current Governmental Employees	DR 9-101(B)
Rule 1.12 Former Judge, Arbitrator, Mediator, or Other Third Party Neutral	DR 9-101(A) & (B); EC 5-21
Rule 1.13 Organization as Client	EC 5-19
Rule 1.14 Client With Diminished Capacity	EC 7-11 & 7-12

Rule 1.15 Safekeeping Property	
Rule 1.15(a)	DR 9-102
Rule 1.15(b)	DR 9-102(A)(1)
Rule 1.15(c)	DR 9-102(A)
Rule 1.15(d), (e), (f), & (g)	None
Rule 1.15(h)	DR 9-102(D) & (E)
Rule 1.16 Terminating Representation	
Rule 1.16(a)	DR 2-110(B)
Rule 1.16(b)	DR 2-110(A)(2), (C)(1), (C)(2), (C)(5), (C)(6), & (C)(7)
Rule 1.16(c)	DR 2-110(A)(1)
Rule 1.16(d)	DR 2-110(A)(2)
Rule 1.16(e)	DR 2-110(A)(3)
Rule 1.17 Sale of Law Practice	DR 2-111
Rule 1.18 Duties to Prospective Client	EC 4-1; *Cuyahoga Cty Bar Assn v. Hardiman* (2003), 100 Ohio St.3d 260
Rule 2.1 Advisor	EC 7-8
Rule 2.3 Evaluation for Use by Third Persons	None
Rule 2.4 Lawyer Serving as Arbitrator, Mediator, or Third-Party Neutral	EC 5-21
Rule 3.1 Meritorious Claims and Contentions	DR 7-102(A)(2); EC 7-25
Rule 3.3 Candor Toward the Tribunal	
Rule 3.3(a)	DR 7-102(A)(1), (4), & (5) & 7-106(B)(1)
Rule 3.3(b)	DR 7-102(B)
Rule 3.3(c)	DR 7-106(B)
Rule 3.3(d)	None
Rule 3.4 Fairness to Opposing Party and Counsel	
Rule 3.4(a)	DR 7-102(A)(8) & 7-109(A); EC 7-27

Rule 3.4(b)	DR 7-102(A)(6) & 7-109(C); EC 7-26 & 7-28
Rule 3.4(c)	DR 7-106(A)
Rule 3.4(d)	DR 7-106(C)(7); EC 7-25
Rule 3.4(e)	DR 7-106(C)(1) & (4); EC 7-24
Rule 3.4(g)	DR 7-109(B); EC 7-27
Rule 3.5 Impartiality and Decorum of the Tribunal	
Rule 3.5(a)	DR 7-106(C)(6), 7-108(A) & (B), & 7-110
Rule 3.5(b)	DR 7-108(G)
Rule 3.6 Trial Publicity	DR 7-107
Rule 3.7 Lawyer as Witness	DR 5-101(B) & 5-102
Rule 3.8 Special Responsibilities of Prosecutor	
Rule 3.8(a)	DR 7-103(A)
Rule 3.8(d)	DR 7-103(B), EC 7-13
Rule 3.8(e)	None
Rule 3.8(g)	None
Rule 3.9 Advocate in Nonadjudicative Proceedings	None
Rule 4.1 Truthfulness in Statements to Others	
Rule 4.1(a)	DR 7-102(A)(5)
Rule 4.1(b)	DR 7-102(A)(3) & 7-102(B)(1)
Rule 4.2 Communication with Person Represented by Counsel	DR 7-104(A)(1)
Rule 4.3 Dealing with Unrepresented Persons	DR 7-104(A)(2)
Rule 4.4 Respect for Rights of Third Persons	
Rule 4.4(a)	DR 7-102(A)(1), 7-106(C)(2), & 7-108(D) & (E)
Rule 4.4(b)	None

Rule 5.1 Responsibilities of Partners and Supervisory Lawyers	None
Rule 5.2 Responsibilities of a Subordinate Lawyer	None
Rule 5.3 Responsibilities Regarding Nonlawyer Assistants	DR 4-101(D); EC 4-2; *Disciplinary Counsel v. Ball* (1993), 67 Ohio St. 3d 401 & *Mahoning Cty. Bar Assn v. Lavelle* (2005), 107 Ohio St.3d 92
Rule 5.4 Professional Independence of a Lawyer	
Rule 5.4(a)	DR 3-102(A)
Rule 5.4(b)	DR 3-103
Rule 5.4(c)	DR 5-107(B)
Rule 5.4(d)	DR 5-107(C)
Rule 5.5 Unauthorized Practice of Law	
Rule 5.5(a)	DR 3-101
Rule 5.5(b)	None
Rule 5.5(c)	None
Rule 5.5(d)	None
Rule 5.6 Restrictions on Right to Practice	
Rule 5.6(a)	DR 2-108(A)
Rule 5.6(b)	DR 2-108(B)
Rule 5.7 Responsibilities Regarding Law-Related Services	None
Rule 6.2 Accepting Appointments	EC 2-25, 2-26, 2-27, 2-28, 2-29, 2-30, 2-31, & 2-32
Rule 6.5 Non-Profit and Court Annexed Limited Legal Service Programs	None
Rule 7.1 Communications Concerning a Lawyer's Services	DR 2-101

Rule 7.2 Advertising and Recommendation of Professional Employment	DR 2-101, 2-103, & 2-104(B)
Rule 7.3 Direct Contact with Prospective Clients	DR 2-104(A)
Rule 7.3(a)	DR 2-101(F)(1)
Rule 7.3(b)	None
Rule 7.3(c)	DR 2-101(F)(2)
Rule 7.3(d)	DR 2-101(F)(4)
Rule 7.3(e)	DR 2-101(H)
Rule 7.3(f)	DR 2-103(D)(4)
Rule 7.4 Communication of Fields of Practice and Specialization	DR 2-105
Rule 7.5 Firm Names and Letterheads	DR 2-102
Rule 8.1 Bar Admission and Disciplinary Matters	DR 1-101
Rule 8.2 Judicial Officials	
Rule 8.2(a)	DR 8-102
Rule 8.2(b)	DR 2-102(A)(1)
Rule 8.3 Reporting Professional Misconduct	DR 1-103
Rule 8.4 Misconduct	
Rule 8.4(a)	DR 1-102(A)(1) & (2)
Rule 8.4(b)	DR 1-102(A)(3)
Rule 8.4(c)	DR 1-102(A)(4)
Rule 8.4(d)	DR 1-102(A)(5)
Rule 8.4(e)	DR 1-102(A)(5) & 9-101(C)
Rule 8.4(f)	DR 1-102(A)(5)
Rule 8.4(g)	DR 1-102(B)
Rule 8.4(h)	DR 1-102(A)(6)
Rule 8.5 Disciplinary Authority, Choice of Law	None

APPENDIX B

CORRELATION TABLE
OHIO CODE OF PROFESSIONAL RESPONSIBILITY TO
OHIO MODEL RULES OF PROFESSIONAL CONDUCT

The following is a numerical listing of the Ohio Code of Professional Responsibility with cross-references to provisions of the Ohio Rules of Professional Conduct that address substantially similar subject-matter. A cross-reference does not indicate that a provision of the Ohio Code of Professional Responsibility has been incorporated in the Ohio Rules of Professional Conduct. Please consult the code comparisons that follow each rule for a more detailed treatment of corresponding provisions.

Ohio Code of Professional Responsibility	**Ohio Rules of Professional Conduct**
CANON 1	
DR 1-101 Maintaining Integrity and Competence of the Legal Profession	Rule 8.1
DR 1-102 Misconduct	
DR 1-102(A)(1)	Rules 8.2(b) & 8.4(a)
DR 1-102(A)(2)	Rule 8.4(a)
DR 1-102(A)(3)	Rule 8.4(b)
DR 1-102(A)(4)	Rule 8.4(c)
DR 1-102(A)(5)	Rules 8.4(d), (e), & (f)
DR 1-102(A)(6)	Rule 8.4(h)
DR 1-102(B)	Rule 8.4(g)
DR 1-103 Disclosure of Information to Authorities	Rule 8.3
DR 1-104 Disclosure of Information to the Clients	Rule 1.4(c)
CANON 2	
DR 2-101 Publicity	Rules 7.1, 7.2(a), (c), & (d), & 7.3(a), (c), (d), & (e)
DR 2-102 Professional Notices, Letterheads, and Offices	Rules 7.5 & 8.2(b)
DR 2-103 Recommendation of Professional Employment	Rules 7.2 & 7.3(f)

DR 2-104 Suggestion of Need of Legal Services	
DR 2-104(A)	Rule 7.3
DR 2-104(B)	Rule 7.2
DR 2-105 Limitation of Practice	Rule 7.4
DR 2-106 Fees for Legal Services	
DR 2-106(A) & (B)	Rule 1.5(a)
DR 2-106(C)	Rule 1.5(d)
DR 2-107 Division of Fees Among Lawyers	Rules 1.5(e) & (f)
DR 2-108 Agreements Restricting the Practice of a Lawyer	Rule 5.6
DR 2-109 Acceptance of Employment	None
DR 2-110 Withdrawal from Employment	Rule 1.16
DR 2-111 Sale of Law Practice	Rule 1.17
CANON 3	
DR 3-101 Aiding Unauthorized Practice of Law	Rule 5.5(a)
DR 3-102 Dividing Legal Fees with a Nonlawyer	Rule 5.4(a)
DR 3-103 Forming a Partnership with a Nonlawyer	Rule 5.4(b)
CANON 4	
DR 4-101 Preservation of Confidences and Secrets of a Client	
DR 4-101(A), (B), & (C)(1)	Rule 1.6(a)
DR 4-101(B)	Rule 1.9
DR 4-101(B)(2)	Rule 1.8(b)
DR 4-101(C)(2)	Rule 1.6(b)(6)
DR 4-101(C)(3)	Rule 1.6(b)(2)
DR 4-101(C)(4)	Rule 1.6(b)(5)
DR 4-101(D)	Rule 5.3

CANON 5

DR 5-101 Refusing Employment When the Interests of the Lawyer May Impair the Lawyer's Independent Professional Judgment	
DR 5-101(A)(1)	Rule 1.7
DR 5-101(A)(2) & (3)	Rule 1.8(c)
DR 5-101(B)	Rule 3.7
DR 5-102 Withdrawal as Counsel When the Lawyer Becomes a Witness	Rule 3.7
DR 5-103 Avoiding Acquisition of Interest in Litigation	
DR 5-103(A)	Rule 1.8(i)
DR 5-103(B)	Rule 1.8(e)
DR 5-104 Limiting Business Relations with a Client	
DR 5-104(A)	Rule 1.8(a)
DR 5-104(B)	Rule 1.8(d)
DR 5-105 Refusing to Accept or Continue Employment if the Interests of Another Client May Impair the Independent Professional Judgment of the Lawyer	
DR 5-105(A), (B), & (C)	Rule 1.7
DR 5-105(D)	Rules 1.8(k) & 1.10
DR 5-106 Settling Similar Claims of Clients	Rule 1.8(g)
DR 5-107 Avoiding Influence by Others Than the Client	
DR 5-107(A) & (B)	Rule 1.8(f)(1), (2), & (3)
DR 5-107(B) & (C)	Rule 5.4(c) & (d)

CANON 6

DR 6-101 Failing to Act Competently	
DR 6-101(A)(1) & (2)	Rule 1.1
DR 6-101(A)(3)	Rule 1.3
DR 6-102 Limiting Liability to Client	Rule 1.8(h)

CANON 7

DR 7-101 Representing a Client Zealously	
DR 7-101(A)(1)	Rules 1.2(a) & 1.3
DR 7-102 Representing a Client Within the Bounds of the Law	
DR 7-102(A)(1)	Rules 3.3(a)(3) & 4.4(a)
DR 7-102(A)(2)	Rule 3.1
DR 7-102(A)(3), (4), & (5)	Rules 3.3 & 4.1
DR 7-102(A)(4) & (6)	Rule 3.3(a)
DR 7-102(A)(6)	Rule 3.4(b)
DR 7-102(A)(7)	Rule 1.2(d)
DR 7-102(A)(8)	Rule 3.4(a)
DR 7-102(B)	Rules 1.6(b)(3), 3.3(b), & 4.1
DR 7-103 Performing the Duty of Public Prosecutor or Other Government Lawyer	Rule 3.8
DR 7-104 Communicating With One of Adverse Interest	
DR 7-104(A)(1)	Rule 4.2
DR 7-104(A)(2)	Rule 4.3
DR 7-105 Threatening Criminal Prosecution	Rule 1.2(e)
DR 7-106 Trial Conduct	
DR 7-106(A)	Rule 3.4(c)
DR 7-106(B)(1)	Rule 3.3(a) & (c)
DR 7-106(C)(1) & (4)	Rule 3.4(e)
DR 7-106(C)(2)	Rule 4.4(a)
DR 7-106(C)(6)	Rule 3.5(a)(6)
DR 7-106(C)(7)	Rule 3.4(d)
DR 7-107 Trial Publicity	Rule 3.6
DR 7-108 Communication With or Investigation of Jurors	
DR 7-108(A) & (B)	Rule 3.5(a)
DR 7-108(D) & (E)	Rule 4.4(a)
DR 7-108(G)	Rule 3.5(b)

DR 7-109 Contact With Witnesses	
DR 7-109(A)	Rule 3.4(a)
DR 7-109(B)	Rule 3.4(g)
DR 7-109(C)	Rule 3.4(b)
DR 7-110 Contact With Officials	Rule 3.5
DR 7-111 Confidential Information	None
CANON 8	
DR 8-101 Action as a Public Official	None
DR 8-102 Statements Concerning Judges and Other Adjudicatory Officers	Rule 8.2(a)
CANON 9	
DR 9-101 Avoiding Even the Appearance of Impropriety	
DR 9-101(A)	Rule 1.12
DR 9-101(B)	Rules 1.11 & 1.12
DR 9-101(C)	Rule 8.4(e)
DR 9-102 Preserving Identity of Funds and Property of a Client	Rule 1.15
Definitions	Rule 1.0

OHIO ETHICAL CONSIDERATIONS ADDRESSED IN OHIO RULES OF PROFESSIONAL CONDUCT

EC 2-18 Agreement with Client with Respect to Fees	Rules 1.5(b) & (c)
EC 2-19 Contingent Fee Arrangements	Rule 1.5(d)(1)
EC 2-25 – 2-32 Acceptance and Retention of Employment	Rule 6.2
EC 4-1 Confidences and Secrets	Rule 1.18
EC 4-2 Confidences and Secrets	Rule 5.3
EC 5-19 Organizational Clients	Rule 1.13
EC 5-21 Arbitrator or Mediator	Rules 1.12 & 2.4
EC 7-4 Construction of Law; Frivolous Conduct	Rule 1.2(d)
EC 7-7 Decision-Making Authority	Rule 1.2(a)
EC 7-8 Informing Client of Relevant Considerations; Withdrawal from Employment	Rules 1.2(a), 1.4(a) & (b), and 2.1
EC 7-10 Zealous Advocacy	Rule 1.2(a)
EC 7-11 Varying Responsibilities Dependent Upon Client	Rule 1.14
EC 7-12 Incompetent Client	Rule 1.14
EC 7-13 Responsibility of Prosecutor	Rule 3.8
EC 7-24 Expression by Attorney of Personal Opinion in Court	Rule 3.4
EC 7-25 Adherence to Procedural Rules	Rules 3.1 & 3.4
EC 7-26 False Testimony	Rule 3.4
EC 7-27 Suppression of Evidence	Rule 3.4
EC 7-28 Fees to Witnesses	Rule 3.4
EC 9-2 Promoting Public Confidence in Legal Profession	Rules 1.4(a) & (b)

Ohio Code of Judicial Conduct

Effective March 1, 2009
As Amended Effective August 11, 2015

OHIO CODE OF JUDICIAL CONDUCT
(Effective March 1, 2009; as amended August 11, 2015)

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Note: Except for Latin terms, words and phrases that appear in italicized type in each rule denote terms that are defined in Terminology or Rule 4.6.

Appendix A: Correlation Table—2009 Ohio Code to Former Ohio Code

Appendix B: Correlation Table—Former Ohio Code to 2009 Ohio Code

Preamble

[1] An independent, fair, and impartial judiciary is indispensable to our system of justice. The United States legal system is based upon the principle that an independent, impartial, and competent judiciary, composed of men and women of integrity, will interpret and apply the law that governs our society. Thus, the judiciary plays a central role in preserving the principles of justice and the rule of law. Inherent in all the rules contained in this code are the precepts that judges, individually and collectively, must respect and honor the judicial office as a public trust and strive to maintain and enhance confidence in the legal system.

[2] Judges should maintain the dignity of judicial office at all times and avoid both impropriety and the appearance of impropriety in their professional and personal lives. They should aspire at all times to conduct that ensures the greatest possible public confidence in their independence, impartiality, integrity, and competence.

[3] The Ohio Code of Judicial Conduct establishes standards for the ethical conduct of judges and judicial candidates. The code is not intended as an exhaustive guide for the conduct of judges and judicial candidates, who are governed in their judicial and personal conduct by general ethical standards as well as by the code. The code is intended, however, to provide guidance and assist judges in maintaining the highest standards of judicial and personal conduct and to provide a basis for regulating their conduct through disciplinary agencies.

Scope

[1] The Ohio Code of Judicial Conduct consists of four canons, numbered rules under each canon, and comments that generally follow and explain each rule. Scope and Terminology sections provide additional guidance in interpreting and applying the code. The Application section establishes when the various rules apply to a judge or judicial candidate.

[2] The canons state overarching principles of judicial ethics that all judges must observe. Although a judge may be disciplined only for violating a rule, the canons provide important guidance in interpreting the rules. Where a rule contains a permissive term, such as “may” or “should,” the conduct being addressed is committed to the personal and professional discretion of the judge or candidate in question, and no disciplinary action should be taken for action or inaction within the bounds of such discretion.

[3] The comments that accompany the rules serve two functions. First, they provide guidance regarding the purpose, meaning, and proper application of the rules. They contain explanatory material and, in some instances, provide examples of permitted or prohibited conduct. Comments neither add to nor subtract from the binding obligations set forth in the rules. Therefore, when a comment contains the term “must,”

it does not mean that the comment itself is binding or enforceable; it signifies that the rule in question, properly understood, is obligatory as to the conduct at issue.

[4] Second, the comments identify aspirational goals for judges. To implement fully the principles of this code as articulated in the canons, judges should strive to exceed the standards of conduct established by the rules, holding themselves to the highest ethical standards and seeking to achieve those aspirational goals, thereby enhancing the dignity of the judicial office.

[5] The rules of the Ohio Code of Judicial Conduct are rules of reason that should be applied consistent with constitutional requirements, statutes, other court rules, and decisional law, and with due regard for all relevant circumstances. The rules should not be interpreted to impinge upon the essential independence of judges in making judicial decisions.

[6] Although the black letter of the rules is binding and enforceable, it is not contemplated that every transgression will result in the imposition of discipline. Whether discipline should be imposed should be determined through a reasonable and reasoned application of the rules and should depend upon factors such as the seriousness of the transgression, the facts and circumstances that existed at the time of the transgression, the extent of any pattern of improper activity, whether there have been previous violations, and the effect of the improper activity upon the judicial system or others.

[7] The code is not designed or intended as a basis for civil or criminal liability. Neither is it intended to be the basis for litigants to seek collateral remedies against each other or to obtain tactical advantages in proceedings before a court.

Comparison to Ohio Code of Judicial Conduct

The Preamble is new and contains statements not found in the Ohio Code. Scope [1], [2], [3], and [4] have antecedents in the first paragraph of the existing Preamble, and portions of Scope [5], [6], and [7] are found in the second, third, and fourth paragraphs of the Preamble to the Ohio Code.

Comparison to ABA Model Code of Judicial Conduct

The Preamble and Scope are substantively identical to the Model Code provisions.

Application

The Application section establishes how and when the various rules apply to a judge or judicial candidate.

I. Applicability of this Code

(A) This code applies to all fulltime judges. The Application section identifies provisions that do not apply to distinct categories of judges. Canon 4 applies to judicial candidates.

(B) A judge, within the meaning of this code, is a lawyer who is authorized to perform judicial functions within a court, including an officer such as a magistrate, court commissioner, or special master.

Comment

[1] The rules in this code have been formulated to address the ethical obligations of any person who serves a judicial function and are premised upon the supposition that a uniform system of ethical principles should apply to all those authorized to perform judicial functions.

[2] The determination of which category and, accordingly, which specific rules apply to an individual judicial officer, depends upon the facts of the particular judicial service.

[3] [RESERVED]

II. Retired Judge Subject to Recall

This code applies to a retired judge subject to recall for service, who by law is not permitted to practice law, except that a retired judge is not required to comply with either of the following:

(A) Rule 3.9, except while serving as a judge;

(B) Rule 3.8, at any time.

Comment

[1] For the purposes of this section, as long as a retired judge is subject to being recalled for service, the judge is considered to be performing judicial functions.

III. Parttime Judge

(A) This code applies to a judge who serves repeatedly on a parttime basis by election or appointment, except that a parttime judge is not required to comply with Rules 3.4, 3.8, 3.9, 3.10, and 3.11(A) and (B), at any time.

(B) A parttime judge shall not practice law in the court on which the judge serves or in any court subject to the appellate jurisdiction of the court on which the judge serves, and shall not act as a lawyer in a proceeding in which the judge has served as a judge or in any other related proceeding.

Comment

[1] When a person who has been a parttime judge is no longer a parttime judge, including a retired judge no longer subject to recall, that person may act as a lawyer in a proceeding in which he or she has served as a judge or in any other related proceeding only with the informed consent of all parties and pursuant to Rule 1.12 of the Ohio Rules of Professional Conduct.

[2] Division (B) prohibits a parttime judge from appearing in his or her own court and from appearing in another court from which matters may be appealed to the parttime judge's court. For example, a parttime judge could not practice in a mayor's court within the territorial jurisdiction of the court on which the parttime judge serves.

IV. [RESERVED]

V. Acting Judge

This code applies to an acting judge who serves or expects to serve once or only sporadically on a parttime basis by appointment made pursuant to R.C. 1901.10, 1901.12, or 1907.14, except that an acting judge is not required to comply with any of the following:

(A) Rules 1.2, 2.4, 2.10, 3.2, 3.12, or 3.13, except while serving as an acting judge;

(B) Rules 3.4, 3.7, 3.8, 3.9, 3.10, 3.11, 3.15, 4.1, 4.2, 4.3, 4.4, 4.5, and 4.6, at any time.

Comment

[1] An acting judge violates Rule 1.3 by engaging in the solicitation or receipt of campaign contributions on behalf of the judge who appointed the acting judge while serving as an acting judge.

[2] Although division (B) exempts an acting judge from compliance with Rules 4.1 to 4.6, this exemption does not apply to an acting judge who is a judicial candidate as defined in Rule 4.6. See Rule 8.2(b) of the Ohio Rules of Professional Conduct.

VI. Time for Compliance

A person to whom this code becomes applicable shall comply immediately with its provisions, except as otherwise provided in Rules 3.8 and 3.11.

Comment

[1] [RESERVED]

Comparison to Ohio Code of Judicial Conduct

The Application section is analogous to the Compliance section of the Ohio Code.

Part I corresponds to division (A) of the Compliance section.

Part II (retired judges) corresponds to division (D) of the Compliance section. Part II is more restrictive than the Compliance section of the Ohio Code in that it does not include exemptions from compliance by a retired judge with prohibitions related to outside business activities [*c.f.*, Ohio Canon 2(C)(3) and Rule 3.11(B)] and accepting appointments to governmental committees and commissions [*c.f.*, Ohio Canon 4(C)(2) and Rule 3.4].

The exemptions contained in Part III (parttime judges) are analogous to those contained in division (B) of the Compliance section, except that Part III exempts a parttime judge from compliance with Rule 3.9 (Service as an Arbitrator or Mediator).

Part V (acting judges) corresponds to, but is structured differently from, division (C) of the Compliance section. The Ohio Code lists certain provisions from which an acting judge is exempt while serving in that capacity. The new Compliance section adds several exemptions in division (A), but specifies that the acting judge must adhere to the exempted provisions while serving in that capacity. The exemptions listed in division (B) apply at anytime and, except for the addition of Rule 3.7, are substantively identical to those contained in the Ohio Code.

Part V, Comment [1] is intended to clarify that an acting judge, consistent with Rule 1.3, may not engage in political activity, including fundraising on behalf of the appointing judge, while serving as an acting judge. This comment has no antecedent in the Ohio Code. Comment [2] is a restatement of Ohio law as reflected in Rule 4.6(E) [former Ohio Canon 7(A)(1)] and Rule 8.2(b) of the Ohio Rules of Professional Conduct.

Part VI corresponds to the Effective Date of Compliance section of the Ohio Code.

Comparison to ABA Model Code of Judicial Conduct

Part I of the Application section is modified from the Model Code to conform to Ohio law. As executive branch employees, administrative hearing officers are excluded from application of the Code as is the case in the existing Ohio Code. Comment [3] is stricken because it suggests that a court, through the adoption of local rules, can nullify provisions of the Code of Judicial Conduct. Such a suggestion is contrary to the plenary authority of the Supreme Court to regulate the conduct of the judiciary and the concept of prescribing a uniform set of standards applicable to all judicial officers.

Part II contains minor, stylistic changes.

Part III is modified to reflect the nature of parttime judges in Ohio as elected public officials. Comment [2] is added to clarify the limitations on the practice of law by parttime judges.

Part IV is stricken as inapplicable in Ohio.

Part V is modified to reflect the designation of "acting judge" used in Ohio law and other provisions relative to the appointment of acting judges. Two comments are added to Part V to expand on limits on political activity by acting judges and application of Canon 4 to an acting judge who is a candidate for judicial office.

Part VI is modified to reflect Ohio law and the provisions of Rules 3.8 and 3.11.

Terminology

As used in Canons 1 to 3 of this Code:

"Appropriate authority" means the authority having responsibility for initiation of disciplinary process in connection with the violation to be reported. See Rule 2.15.

"Contribution" means both financial and in-kind contributions, such as goods, professional or volunteer services, advertising, and other types of assistance, which, if obtained by the recipient otherwise, would require a financial expenditure. See Rule 3.7.

"*De minimis*," in the context of interests pertaining to disqualification of a judge, means an insignificant interest that could not raise a reasonable question regarding the judge's impartiality. See Rule 2.11.

"Domestic partner" means a person with whom another person maintains a household and an intimate relationship, other than a person to whom he or she is legally married. See Rules 2.11, 3.13, and 3.14.

"Economic interest" means ownership of more than a *de minimis* legal or equitable interest. Except for situations in which the judge participates in the management of such a legal or equitable interest or the interest could be substantially affected by the outcome of a proceeding before a judge, "economic interest" does not include any of the following:

(1) An interest in the individual holdings within a mutual or common investment fund;

(2) An interest in securities held by an educational, religious, charitable, fraternal, or civic organization in which the judge or the judge's spouse, domestic partner, parent, or child serves as a director, an officer, an advisor, or other participant;

(3) A deposit in a financial institution or deposits or proprietary interests the judge may maintain as a member of a mutual savings association or credit union, or similar proprietary interests;

(4) An interest in the issuer of government securities held by the judge.

See Rules 1.3, 2.11, and 3.2.

"*Ex parte* communication" means a communication, concerning a *pending* or *impending matter*, between counsel or an unrepresented party and the court when

opposing counsel or an unrepresented party is not present or any other communication made to the judge outside the presence of the parties or their lawyers. See Rule 2.9.

"Fiduciary" includes relationships such as executor, administrator, trustee, or guardian. See Rules 2.11, 3.2, and 3.8.

"Impartial," "impartiality," and "impartially" mean absence of bias or prejudice in favor of, or against, particular parties or classes of parties, as well as maintenance of an open mind in considering issues that may come before a judge. See Canons 1 and 2 and Rules 1.2, 2.2, 2.10, 2.11, 2.13, 3.1, 3.7, 3.12, 3.13, and 3.14.

"Impending" references a matter or proceeding that is imminent or expected to occur in the near future. See Rules 2.9, 2.10, and 3.13.

"Impropriety" includes conduct that violates the law, court rules, or provisions of this code, and conduct that undermines a judge's independence, integrity, or impartiality. See Canon 1 and Rule 1.2.

"Independence" means a judge's freedom from influence or controls other than those established by law. See Canon 1 and Rules 1.2, 3.1, 3.7, 3.12, 3.13, and 3.14

"Integrity" means probity, fairness, honesty, uprightness, and soundness of character. See Canon 1 and Rules 1.2, 3.1, 3.7, 3.12, 3.13, and 3.14.

"Judicial candidate" has the same meaning as in Rule 4.6. See Rule 2.11.

"Knowingly," "knowledge," "known," and "knows" mean actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances. See Rules 2.11, 2.15, 2.16, 3.5, and 3.6.

"Law" encompasses court rules, including this code and the Ohio Rules of Professional Conduct, statutes, constitutional provisions, and decisional law. See Rules 1.1, 2.1, 2.2, 2.6, 2.7, 2.9, 3.1, 3.2, 3.4, 3.7, 3.9, 3.12, and 3.13.

"Member of the judge's family" means a spouse, domestic partner, child, grandchild, parent, grandparent, or other relative or person with whom the judge maintains a close familial relationship. See Rules 3.7, 3.8, 3.10, and 3.11.

"Member of a judge's family residing in the judge's household" means any relative of a judge by blood or marriage, or a person treated by a judge as a member of the judge's family, who resides in the judge's household. See Rules 2.11 and 3.13.

"Nonpublic information" means information that is not available to the public. Nonpublic information may include, but is not limited to, information that is sealed by statute or court order or impounded or communicated in camera, and information

offered in grand jury proceedings, presentencing reports, dependency cases, or psychiatric reports. See Rule 3.5.

"Pending" references a matter or proceeding that has commenced. A matter continues to be pending through any appellate process until final disposition. See Rules 2.9, 2.10, and 3.13.

"Specialized docket" means a particular session of court that has received initial or final certification from the Supreme Court pursuant to Rule 36.24 or 36.26 of the Rules of Superintendence of the Courts of Ohio. "Specialized docket" includes, but is not limited to, drug courts, mental health courts, domestic violence courts, child support enforcement courts, sex offender courts, OVI courts, and reentry courts. Courts created in the Ohio Constitution or Revised Code, including appellate courts, common pleas courts, and divisions of a common pleas court, municipal courts, and county courts are not, without more, a specialized docket. See Rule 2.9.

"Third degree of relationship" includes the following persons: great-grandparent, grandparent, parent, uncle, aunt, brother, sister, child, grandchild, great-grandchild, nephew, and niece. See Rule 2.11.

Comparison to Ohio Code of Judicial Conduct

The words and phrases defined in the Terminology section are comparable to those found in the corresponding section of the Ohio Code, with the following exceptions:

- "Appropriate authority," "contribution," "domestic partner," "*ex parte* communication," "impartial," "impending matter," "impropriety," "independence," "integrity," "judicial candidate," "pending matter," and "specialized docket" are newly defined terms;

- The Ohio Code definition of "court personnel" is not included in the Terminology section.

Comparison to ABA Model Code of Judicial Conduct

The following modifications are made to the ABA Terminology section:

- The definition of "aggregate" is stricken, due to the deletion of Rule 2.11(A)(4), and moved to Rule 4.6;

- The definition of "judicial candidate" is modified to reference the definition in Rule 4.6;

- The definition of "law" is modified to reference specifically the Ohio Code of Judicial Conduct and the Ohio Rules of Professional Conduct;

- The definitions of “member of the candidate’s family,” “personally solicit,” “political organization,” and “public election” are stricken because those terms are not used in Canons 1-3;

- Definitions of “*ex parte* communication” and “specialized docket” are added to correspond to modifications made to Rules 2.9 and 2.11.

Canon 1

A judge shall uphold and promote the *independence, integrity, and impartiality* of the judiciary, and shall avoid *impropriety* and the appearance of *impropriety*.

Rule 1.1. Compliance with the Law

A judge shall comply with the *law*.

Comparison to Ohio Code of Judicial Conduct

Rule 1.1 is comparable to the first portion of Canon 2 of the Ohio Code.

Comparison to ABA Model Code of Judicial Conduct

Rule 1.1 is identical to Model Rule 1.1, except that the phrase "including the Code of Judicial Conduct" is deleted. See the definition of "law" in the Terminology section.

RULE 1.2 Promoting Confidence in the Judiciary

A judge shall act at all times in a manner that promotes public confidence in the *independence, integrity, and impartiality* of the judiciary, and shall avoid *impropriety* and the appearance of *impropriety*.

Comment

[1] Public confidence in the judiciary is eroded by improper conduct and conduct that creates the appearance of impropriety. This principle applies to both the professional and personal conduct of a judge.

[2] A judge should expect to be the subject of public scrutiny that might be viewed as burdensome if applied to other citizens, and must accept the restrictions imposed by the code.

[3] Conduct that compromises or appears to compromise the independence, integrity, and impartiality of a judge undermines public confidence in the judiciary. Because it is not practicable to list all such conduct, the rule is necessarily cast in general terms.

[4] Judges should participate in activities that promote ethical conduct among judges and lawyers, support professionalism within the judiciary and the legal profession, and promote access to justice for all.

[5] Actual improprieties include violations of law, court rules, or provisions of this code. The test for appearance of impropriety is an objective standard that focuses on whether the conduct would create, in reasonable minds, a perception that the judge violated this code, engaged in conduct that is prejudicial to public confidence in the judiciary, or engaged in other conduct that reflects adversely on the judge's honesty, impartiality, temperament, or fitness to serve as a judge.

[6] A judge should initiate and participate in activities for the purpose of promoting public understanding of and confidence in the administration of justice. In conducting such activities, the judge must act in a manner consistent with this code. See Rules 3.1 and 3.7.

Comparison to Ohio Code of Judicial Conduct

Rule 1.2 substantially combines the first portion of Canon 2 and the provisions of Canon 1 of the Ohio Code.

Comparison to ABA Model Code of Judicial Conduct

Rule 1.2 is identical to Model Rule 1.2.

Comment [5] is modified to be consistent with *In re Complaint Against Harper* (1996), 77 Ohio St.3d 211 and *Office of Disciplinary Counsel v. Medley* (2001), 93 Ohio St.3d 474.

Comment [6] is modified to broaden the scope of activities that are encouraged.

RULE 1.3 Avoiding Abuse of the Prestige of Judicial Office

A judge shall not abuse the prestige of judicial office to advance the personal or *economic interests* of the judge or others, or allow others to do so.

Comment

[1] It is improper for a judge to use or attempt to use his or her position to gain personal advantage or deferential treatment of any kind. For example, it would be improper for a judge to allude to his or her judicial status to gain favorable treatment in encounters with traffic officials. Similarly, a judge must not use judicial letterhead to gain an advantage in conducting his or her personal business.

[2] A judge may provide a reference or recommendation for an individual based upon the judge's personal knowledge. The judge may use official letterhead for such reference.

[3] Judges may participate in the process of judicial selection by cooperating with appointing authorities and screening committees, and by responding to inquiries from such entities concerning the professional qualifications of a person being considered for judicial office. However, a judge should not serve on any screening committee.

[4] Special considerations arise when judges write or contribute to publications of for-profit entities. A judge should not permit anyone associated with the publication of such materials to exploit the judge's office in a manner that violates this rule or other applicable law. A judge who writes or contributes to a publication does not violate this rule by allowing his or her title and judicial experience to be used as a means of identification or to demonstrate an expertise in the subject-matter of the publication.

Comparison to Ohio Code of Judicial Conduct

Rule 1.3, in many respects, is comparable to Ohio Canon 4(A). However, Canon 4(A) uses the standard "lend the prestige of judicial office" as the test for a violation. Rule 1.3 adopts a test that prohibits the "abuse of judicial office." The test for a violation may be less restrictive than under the Ohio Code.

Comparison to ABA Model Code of Judicial Conduct

Rule 1.3 is identical to Model Rule 1.3.

Comment [2] is less restrictive than the Model Rule comment in that it does not require the judge to indicate that the reference is personal, and the perception requirement is removed. Further, Comment [2] is consistent with Advisory Opinions 95-5 and 98-4 issued by the Board of Commissioners on Grievances and Discipline.

Comment [3] is clarified to advise that while a judge may participate in the process of judicial selection, participation as a member of a screening committee is prohibited.

Comment [4] regarding publications has been amended to provide more definitive guidance.

Canon 2

A judge shall perform the duties of judicial office *impartially*, competently, and diligently.

RULE 2.1 Giving Precedence to the Duties of Judicial Office

The duties of judicial office, as prescribed by *law*, shall take precedence over all of a judge's other activities.

Comment

[1] To ensure that judges are available to fulfill their judicial duties, judges must conduct their personal and extrajudicial activities to minimize the risk of conflicts that would result in frequent disqualification or unavailability. See Canon 3.

[2] Although it is not a duty of judicial office unless prescribed by law, judges are encouraged to participate in activities that promote public understanding of and confidence in the justice system.

Comparison to Ohio Code of Judicial Conduct

Rule 2.1 is comparable to Ohio Canon 3(A) and does not depart substantively from that rule.

Comparison to ABA Model Code of Judicial Conduct

Rule 2.1 is modified to substitute the word "other" for the phrase "personal and extrajudicial," thus retaining language found in the Ohio Code. "Other" is broader and more encompassing than the Model Code language.

RULE 2.2 Impartiality and Fairness

A judge shall uphold and apply the *law*, and shall perform all duties of judicial office fairly and *impartially*.

Comment

[1] To ensure impartiality and fairness to all parties, a judge must be objective and open-minded.

[2] Although each judge comes to the bench with a unique background and personal philosophy, a judge must interpret and apply the law without regard to whether the judge approves or disapproves of the law in question.

[3] When applying and interpreting the law, a judge sometimes may make good-faith errors of fact or law. Errors of this kind do not violate this rule.

[4] To ensure self-represented litigants the opportunity to have their matters fairly heard, a judge may make reasonable accommodations to a self-represented litigant consistent with the law. See also Rule 2.6, Comment [1A].

Comparison to Ohio Code of Judicial Conduct

Rule 2.2 is comparable to Ohio Canons 3(B)(2) and (B)(5). Canon 3(B)(2) specifies a judge's duty to be competent in the law and avoid being swayed by outside influences, and the first sentence of Canon 3(B)(5) requires a judge to perform judicial duties without bias or prejudice. By contrast, Rule 2.2 addresses these duties in terms of a judge's responsibility to uphold and apply the law and perform all judicial duties fairly and impartially. Avoiding external influences and maintaining competency are addressed by Rules 2.4 and 2.5, respectively.

Comparison to ABA Model Code of Judicial Conduct

Rule 2.2 is the same as Model Rule 2.2. Comment [4] is modified to be consistent with Ohio law concerning a judge's duties toward self-represented litigants.

RULE 2.3 Bias, Prejudice, and Harassment

(A) A judge shall perform the duties of judicial office, including administrative duties, without bias or prejudice.

(B) A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, or engage in harassment, including but not limited to bias, prejudice, or harassment based upon race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation, and shall not permit court staff, court officials, or others subject to the judge's direction and control to do so.

(C) A judge shall require lawyers in proceedings before the court to refrain from manifesting bias or prejudice, or engaging in harassment, based upon attributes including but not limited to race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation, against parties, witnesses, lawyers, or others.

(D) The restrictions of divisions (B) and (C) of this rule do not preclude judges or lawyers from making legitimate reference to the listed factors, or similar factors, when they are relevant to an issue in a proceeding.

Comment

[1] A judge who manifests bias or prejudice in a proceeding impairs the fairness of the proceeding and brings the judiciary into disrepute.

[2] Examples of manifestations of bias or prejudice include, but are not limited to: epithets; slurs; demeaning nicknames; negative stereotyping; attempted humor based upon stereotypes; threatening, intimidating, or hostile acts; suggestions of connections between race, ethnicity, or nationality and crime; and irrelevant references to personal characteristics. Even facial expressions and body language can convey to parties and lawyers in the proceeding, jurors, the media, and others an appearance of bias or prejudice. A judge must avoid conduct that may reasonably be perceived as prejudiced or biased.

[3] Harassment, as referred to in divisions (B) and (C), is verbal or physical conduct that denigrates or shows hostility or aversion toward a person on bases such as race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation.

[4] Sexual harassment includes, but is not limited to, sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature that is unwelcome.

Comparison to Ohio Code of Judicial Conduct

Rule 2.3 is substantially comparable to Ohio Canons 3(B)(5) and (6). Rules 2.3(B) and (C) add "sex," "marital status," and "political affiliation" to the categories of prohibited discrimination.

Comparison to ABA Model Code of Judicial Conduct

Rule 2.3 is identical to Model Rule 2.3.

RULE 2.4 External Influences on Judicial Conduct

(A) A judge shall not be swayed by public clamor or fear of criticism.

(B) A judge shall not permit family, social, political, financial, or other interests or relationships to influence the judge's judicial conduct or judgment.

(C) A judge shall not convey or permit others to convey the impression that any person or organization is in a position to influence the judge.

Comment

[1] An independent judiciary requires that judges decide cases according to the law and facts, without regard to whether particular laws or litigants are popular or unpopular with the public, the media, government officials, or the judge's friends or family. Confidence in the judiciary is eroded if judicial decision making is perceived to be subject to inappropriate outside influences.

Comparison to Ohio Code of Judicial Conduct

Rule 2.4(A) is comparable to a sentence contained in Ohio Canon 3(B)(2), and Rule 2.4(B) is comparable to a sentence in Canon 4(A). Rule 2.4(B) uses the phrase "interests or relationships," which is more precise, and therefore preferable to the word "relationships " used in Canon 4(A).

Rule 2.4(C) is comparable to a sentence of Canon 4(A). However, the rule clarifies that a judge must not allow others to convey the impression that any person or organization is in a position to influence the judge.

The comment explains that the purpose of the rule is not only that actual external influences should not influence a judge in the performance of his or her judicial duties, but the judge should not give the impression that he or she can be influenced by persons or organizations or permit others to do so. The Ohio Code commentary does not address this purpose.

Comparison to ABA Model Code of Judicial Conduct

Rule 2.4 is identical to Model Rule 2.4.

RULE 2.5 Competence, Diligence, and Cooperation

(A) A judge shall perform judicial and administrative duties competently and diligently and shall comply with guidelines set forth in the Rules of Superintendence for the Courts of Ohio.

(B) A judge shall cooperate with other judges and court officials in the administration of court business.

Comment

[1] Competence in the performance of judicial duties requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary to perform a judge's responsibilities of judicial office.

[2] A judge should seek the necessary docket time, court staff, expertise, and resources to discharge all adjudicative and administrative responsibilities.

[3] Prompt disposition of the court's business requires a judge to devote adequate time to judicial duties, be punctual in attending court and expeditious in determining matters under submission, and take reasonable measures to ensure that court officials, litigants, and their lawyers cooperate with the judge to that end.

[4] In disposing of matters promptly and efficiently, a judge must demonstrate due regard for the rights of parties to be heard and to have issues resolved without unnecessary cost or delay. A judge should monitor and supervise cases in ways that reduce or eliminate dilatory practices, avoidable delays, and unnecessary costs.

[5] In discharging the obligation to cooperate with other judges and court officials in the performance of administrative duties, a judge must place the public's interest in an efficient and well-run court system above any personal or partisan interests. Where good faith differences of opinion exist, unrelated to personal or partisan interests but relative to the administration of court business, the duty to cooperate requires the judge to engage in efforts to reach compromise for the good of the court but does not require compromise.

Comparison to Ohio Code of Judicial Conduct

Rule 2.5 addresses matters previously found in Ohio Canons 3(B)(8) and (C). Rule 2.5(B) contains language from Canon 3(C)(1) regarding cooperation with judges and court officials on administrative matters. "Should," as used in the Canon, is changed to "shall" to reflect the mandatory obligation of the rule.

Comparison to ABA Model Code of Judicial Conduct

Rule 2.5(A) is modified to include language from Ohio Canon 3(B)(8) requiring compliance with the Ohio Rules of Superintendence. Among other requirements, the Rules of Superintendence include time guidelines for the disposition of cases and statistical reporting requirements applicable to Ohio judges. This language was added to the Ohio Code in 1997 and provides a specific basis for charging misconduct arising from noncompliance with requirements contained in the Rules of Superintendence.

Comment [5] is added to more fully address the cooperation required by Rule 2.5(B).

RULE 2.6 Ensuring the Right to Be Heard

(A) A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to *law*.

(B) A judge may encourage parties to a proceeding and their lawyers to settle matters in dispute but shall not act in a manner that coerces any party into settlement.

Comment

[1] The right to be heard is an essential component of a fair and impartial system of justice. Substantive rights of litigants can be protected only if procedures protecting the right to be heard are observed.

[1A] The rapid growth in litigation involving self-represented litigants and increasing awareness of the significance of the role of the courts in promoting access to justice have led to additional flexibility by judges and other court officials in order to facilitate a self-represented litigant's ability to be heard. By way of illustration, individual judges have found the following affirmative, nonprejudicial steps helpful in this regard: (1) providing brief information about the proceeding and evidentiary and foundational requirements; (2) modifying the traditional order of taking evidence; (3) refraining from using legal jargon; (4) explaining the basis for a ruling; and (5) making referrals to any resources available to assist the litigant in the preparation of the case.

[2] The judge plays an important role in overseeing the settlement of disputes, but should be careful that efforts to further settlement do not undermine any party's right to be heard according to law. The judge should keep in mind the effect that the judge's participation in settlement discussions may have, not only on the judge's own views of the case, but also on the perceptions of the lawyers and the parties if the case remains with the judge after settlement efforts are unsuccessful. Among the factors that a judge should consider when deciding upon an appropriate settlement practice for a case are: (1) whether the parties have requested or voluntarily consented to a certain level of participation by the judge in settlement discussions; (2) whether the parties and their counsel are relatively sophisticated in legal matters; (3) whether the case will be tried by the judge or a jury; (4) whether the parties participate with their counsel in settlement discussions; (5) whether any parties are unrepresented by counsel; and (6) whether the matter is civil or criminal.

[3] Judges must be mindful of the effect settlement discussions can have, not only on their objectivity and impartiality, but also on the appearance of their objectivity and impartiality. Despite a judge's best efforts, there may be instances when information obtained during settlement discussions could influence a judge's decision making during trial, and, in such instances, the judge should consider whether disqualification may be appropriate. See Rule 2.11(A)(1).

Comparison to Ohio Code of Judicial Conduct

The Ohio Code contains no provision analogous to Rule 2.6.

Comparison to ABA Model Code of Judicial Conduct

Rule 2.6 and Comments [1], [2], and [3] are identical to Model Rule 2.6.

Comment [1A] is new language not found in the Model Rule. The first sentence acknowledges that the number of litigants who represent themselves, voluntarily or involuntarily, is increasing and that for many of those litigants, the lack of familiarity with the law and the rules of procedure may prevent them from participating in a meaningful way. Judges sometimes struggle with the need to facilitate access while maintaining appropriate neutrality. The second sentence of the comment is included to provide some guidance, particularly to trial judges, about how to facilitate access while maintaining appropriate neutrality. The language is adapted, in part, from a comment proposed to the American Bar Association for inclusion in Model Rule 2.6 by Chief Justice Karla Gray of the Montana Supreme Court.

RULE 2.7 Responsibility to Decide

A judge shall hear and decide matters assigned to the judge, except when disqualification is required by Rule 2.11 or other *law*.

Comment

[1] Judges must be available to decide the matters that come before the court. Although there are times when disqualification is necessary to protect the rights of litigants and preserve public confidence in the independence, integrity, and impartiality of the judiciary, judges must be available to decide matters that come before the courts. Unwarranted disqualification may bring public disfavor to the court and to the judge personally. The dignity of the court, the judge's respect for fulfillment of judicial duties, and a proper concern for the burdens that may be imposed upon the judge's colleagues require that a judge not use disqualification to avoid cases that present difficult, controversial, or unpopular issues.

Comparison to Ohio Code of Judicial Conduct

Rule 2.7 is comparable to Ohio Canon 3(B)(1).

Comparison to ABA Model Code of Judicial Conduct

Rule 2.7 is identical to Model Rule 2.7.

RULE 2.8 Decorum, Demeanor, and Communication with Jurors

(A) A judge shall require order and decorum in proceedings before the court.

(B) A judge shall be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, court staff, court officials, and others with whom the judge deals in an official capacity, and shall require similar conduct of lawyers, court staff, court officials, and others subject to the judge's direction and control.

(C) A judge shall not commend or criticize jurors for their verdict other than in a court order or opinion in a proceeding.

Comment

[1] The duty to hear all proceedings with patience and courtesy is not inconsistent with the duty imposed in Rule 2.5 to dispose promptly of the business of the court. Judges can be efficient and businesslike while being patient and deliberate.

[2] Commending or criticizing jurors for their verdict may imply a judicial expectation in future cases and may impair a juror's ability to be fair and impartial in a subsequent case. This rule does not preclude a judge from expressing appreciation to jurors for their service to the judicial system and the community or from communicating with jurors personally, in writing, or through court personnel to obtain information for the purpose of improving the administration of justice.

[3] A judge who is not otherwise prohibited by law from doing so may meet with jurors who choose to remain after trial but should be careful not to discuss the merits of the case.

Comparison to Ohio Code of Judicial Conduct

Rule 2.8(A) is identical to Ohio Canon 3(B)(3).

Rule 2.8(B) is identical to Ohio Canon 3(B)(4).

Rule 2.8(C) is identical to Ohio Canon 3(B)(10).

Comparison to ABA Model Code of Judicial Conduct

Rule 2.8 and Comments [1] and [3] are identical to Model Rule 2.8.

Comment [2] is expanded to set forth permissible conduct involving jurors.

RULE 2.9 *Ex Parte* Contacts and Communications with Others

(A) A judge shall not initiate, receive, permit, or consider *ex parte* communications, except as follows:

(1) When circumstances require it, an *ex parte* communication for scheduling, administrative, or emergency purposes, that does not address substantive matters or issues on the merits, is permitted, provided the judge reasonably believes that no party will gain a procedural, substantive, or tactical advantage as a result of the *ex parte* communication;

(2) A judge may obtain the advice of a disinterested expert on the *law* applicable to a proceeding before the judge, if the judge gives notice to the parties of the person consulted and the subject-matter of the advice solicited, and affords the parties a reasonable opportunity to object or respond to the advice received;

(3) A judge may consult with court staff and court officials whose functions are to aid the judge in carrying out the judge's adjudicative responsibilities, or with other judges, provided the judge makes reasonable efforts to avoid receiving factual information that is not part of the record and does not abrogate the responsibility personally to decide the matter;

(4) A judge, with the consent of the parties, may confer separately with the parties and their lawyers in an effort to settle matters pending before the judge;

(5) A judge may initiate, receive, permit, or consider an *ex parte* communication when expressly authorized by *law* to do so;

(6) A judge may initiate, receive, permit, or consider an *ex parte* communication when administering a *specialized docket*, provided the judge reasonably believes that no party will gain a procedural, substantive, or tactical advantage while in the specialized docket program as a result of the *ex parte* communication.

(B) If a judge receives an unauthorized *ex parte* communication bearing upon the substance of a matter, the judge shall make provision promptly to notify the parties of the substance of the communication and provide the parties with an opportunity to respond.

(C) A judge shall not investigate facts in a matter independently, and shall consider only the evidence presented and any facts that may properly be judicially noticed.

(D) A judge shall make reasonable efforts, including providing appropriate supervision, to ensure that this rule is not violated by court staff, court officials, and others subject to the judge's direction and control.

Comment

[1] To the extent reasonably possible, all parties or their lawyers shall be included in communications with a judge.

[2] Whenever the presence of a party or notice to a party is required by this rule, it is the party's lawyer, or if the party is unrepresented, the party, who is to be present or to whom notice is to be given.

[3] The proscription against communications concerning a proceeding includes communications with lawyers, law teachers, and other persons who are not participants in the proceeding, except to the limited extent permitted by this rule.

[4] A judge may initiate, receive, permit, or consider *ex parte* communications expressly authorized by law, such as when: (1) an indigent defendant demonstrates a particularized need to retain an expert witness and has not determined whether the expert will testify at trial; (2) the judge obtains information that may result in a confidential referral of counsel to a lawyers assistance program [see Rule 2.14]; or (3) in order to comply with Crim. R. 46(C) provided the prosecutor and accused, or accused's attorney, are apprised of the information prior to any decision that is made as a result of the information gathered by the judge or member of the judge's staff.

[4A] A judge may initiate, receive, permit, or consider *ex parte* communications when administering a specialized docket established under the authority of the Rules of Superintendence or other law. In this capacity, judges may assume a more interactive role with parties, treatment providers, probation officers, social workers, and others.

[5] A judge may consult with other judges on pending matters, but must avoid *ex parte* discussions of a case with judges who have previously been disqualified from hearing the matter and with judges who have appellate jurisdiction over the matter.

[6] The prohibition against a judge investigating the facts in a matter extends to information available in all mediums, including electronic.

[7] A judge may consult ethics advisory committees, outside counsel, or legal experts concerning the judge's compliance with this code. Such consultations are not subject to the restrictions of division (A)(2).

Comparison to Ohio Code of Judicial Conduct

Rule 2.9(A) is substantially comparable to Ohio Canon 3(B)(7).

Rule 2.9(A)(1) is substantially the same as Ohio Canon 3(B)(7)(a).

Rule 2.9(A)(2) is comparable to Ohio Canon 3(B)(7)(b).

Rule 2.9(A)(3) expands upon Ohio Canon 3(B)(7)(c) by describing conduct a judge should attempt to avoid when consulting with court staff and officials and other judges.

Rule 2.9(A)(4), dealing with the judge's settlement authority, has no comparable provision in the Ohio Code.

Rule 2.9(A)(5) is comparable to Ohio Canon 3(B)(7)(d).

Rule 2.9(A)(6), addressing the conduct of a judge who presides over a specialized docket, has no comparable provision in the Ohio Code.

Rules 2.9(B), (C), and (D) have no comparable provisions in the Ohio Code.

Comparison to ABA Model Code of Judicial Conduct

The title to Rule 2.9 is modified to reflect more accurately the content of the rule.

Rule 2.9(A) is modified to add a prohibition against the receipt of an *ex parte* communication, a concept contained in Ohio Canon 3(B)(7). Deleted from division (A) is a reference to a judge's consideration of other communications outside the presence of the parties or their lawyers concerning a pending or impending matter. This phrase is incorporated in the definition of "*ex parte* communication" found in the Terminology section of the Code.

Rule 2.9(A)(1) is modified to retain the provisions of Ohio Canon 3(B)(7)(a). Further, Model Rule 2.9(A)(1)(b) is deleted because if a judge complies with provisions of the modified rule, notice to the other parties is unnecessary.

Rule 2.9(A)(2) retains the concept of after-the-fact notification to the parties when the judge obtains advice from a legal expert, as compared to the before-the-fact notice requirements contained in Model Rule 2.9(A)(2). The advance notice requirements contained in the Model Rules would be unworkable in many situations.

Rule 2.9(A)(6) is added due the increasing prevalence of specialized dockets in Ohio and the necessity to make provision for the manner in which communications with parties and others must occur to facilitate the proper administration of a specialized docket.

Comment [4] is divided into [4] and [4A] to treat two separate and distinct matters. Comment [4] deals with *ex parte* communications authorized by law and addresses the

requirements in *State v. Mason* (1998), 82 Ohio St.3d 144 and *State v. Smith* (1991), 61 Ohio St.3d 284, as well as the well-recognized confidentiality in Ohio for referrals to a lawyer assistance program. Comment [4A] deals with *ex parte* communications that are necessary for proper administration of a specialized docket.

RULE 2.10 Judicial Statements on Pending and Impending Cases

(A) A judge shall not make any public statement that might reasonably be expected to affect the outcome or impair the fairness of a matter *pending* or *impending* in any court, or make any nonpublic statement that might substantially interfere with a fair trial or hearing.

(B) A judge shall not, in connection with cases, controversies, or issues that are likely to come before the court, make pledges, promises, or commitments that are inconsistent with the *impartial* performance of the adjudicative duties of judicial office.

(C) A judge shall require court staff, court officials, and others subject to the judge's direction and control to refrain from making statements that the judge would be prohibited from making by divisions (A) and (B) of this rule.

(D) Notwithstanding the restrictions in division (A) of this rule, a judge may make public statements in the course of official duties, may explain court procedures, and may comment on any proceeding in which the judge is a litigant in a personal, nonjudicial capacity.

(E) Subject to the requirements of division (A) of this rule, a judge may respond directly or through a third-party to allegations in the media or elsewhere concerning the judge's conduct in a matter.

Comment

[1] This rule's restrictions on judicial speech are essential to the maintenance of the independence, integrity, and impartiality of the judiciary.

[2] This rule does not prohibit a judge from commenting on proceedings in which the judge is a litigant in a personal, nonjudicial capacity. In cases in which the judge is a litigant in a judicial capacity, such as a writ of mandamus, the judge must not comment publicly.

[3] Depending upon the circumstances, the judge should consider whether it may be preferable for a third party, rather than the judge, to respond or issue statements in connection with allegations concerning the judge's conduct in a matter.

Comparison to Ohio Code of Judicial Conduct

Rule 2.10(A) corresponds to Ohio Canons 3(B)(9) and 7(B)(2)(e).

Rule 2.10(B) corresponds to Ohio Canons 7(B)(2)(c) and (d), except that it does not encompass judicial candidates and it is narrower with respect to its prohibitions. Placing this particular restriction in Rule 2.10 makes it clear that the prohibition applies to pledges and

promises made by a judge even when made outside the context of a political campaign. However, in light of the decision issued by the United States Supreme Court in *Republican Party of Minnesota v. White,* 536 U. S. 765 (2002), the prohibition is limited to pledges, promises, or commitments that are made in connection with cases, controversies, or issues likely to come before the court and that are inconsistent with the impartial performance of a judge's adjudicative duties. For the same reason, the reference in Canon 7(B)(2)(d) to "statements that commit or appear to commit the judge" is not retained in this rule.

Rule 2.10(C) corresponds to the second sentence of Ohio Canon 3(B)(9), but replaces the phrase "court personnel" with "court staff, court officials, and others" so as to include all persons subject to the judge's direction and control.

Rule 2.10(D) corresponds with the third and fourth sentences of Ohio Canon 3(B)(9).

Rule 2.10(E) is new and is intended to allow a judge to respond to allegations in the media or elsewhere concerning the judge's conduct in a particular matter, so long as the response would not affect the outcome or impair the fairness of that proceeding.

Comparison to ABA Model Code of Judicial Conduct

Rule 2.10 is identical to ABA Model Rule 2.10, except for the addition of wording in Rule 2.10(D) and Comment [2]. The added language distinguishes between lawsuits in which a judge may be named personally, but arising out of his or her judicial conduct, and those in which a judge is involved in a purely personal, nonjudicial capacity.

RULE 2.11 Disqualification

(A) A judge shall disqualify himself or herself in any proceeding in which the judge's *impartiality* might reasonably be questioned, including but not limited to the following circumstances:

(1) The judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal *knowledge* of facts that are in dispute in the proceeding.

(2) The judge *knows* that the judge, the judge's spouse or *domestic partner*, or a person within the *third degree of relationship* to either of them, or the spouse or *domestic partner* of such a person is any of the following:

(a) A party to the proceeding, or an officer, director, general partner, managing member, or trustee of a party;

(b) Acting as a lawyer in the proceeding;

(c) Has more than a *de minimis* interest that could be substantially affected by the proceeding;

(d) Likely to be a material witness in the proceeding.

(3) The judge *knows* that he or she, individually or as a *fiduciary*, or the judge's spouse, *domestic partner*, parent, or child, or any other member of the *judge's family residing in the judge's household*, has an *economic interest* in the subject matter in controversy or in a party to the proceeding.

(4) [RESERVED]

(5) The judge, while a judge or a *judicial candidate*, has made a public statement, other than in a court proceeding, judicial decision, or opinion, that commits or appears to commit the judge to reach a particular result or rule in a particular way in the proceeding or controversy.

(6) The judge *knows* that the judge's spouse or *domestic partner*, or a person within the *third degree of relationship* to either of them, or the spouse or *domestic partner* of such a person has acted as a judge in the proceeding.

(7) The judge meets any of the following criteria:

(a) The judge served as a lawyer in the matter in controversy or was associated with a lawyer who participated substantially as a lawyer in the matter during such association;

(b) The judge served in governmental employment, and in such capacity participated personally and substantially as a lawyer or public official concerning the particular matter, or has publicly expressed in such capacity an opinion concerning the merits of the particular matter in controversy;

(c) The judge was a material witness concerning the matter;

(d) The judge previously presided as a judge over the matter in another court.

(B) A judge shall keep informed about the judge's personal and *fiduciary economic interests*, and make a reasonable effort to keep informed about the personal economic interests of the judge's spouse or *domestic partner* and minor children residing in the judge's household.

(C) A judge subject to disqualification under this rule, other than for personal bias or prejudice under division (A)(1) of this rule, may disclose on the record the basis of the judge's disqualification and may ask the parties and their lawyers to consider, outside the presence of the judge and court personnel, whether to waive disqualification. If, following the disclosure, the parties and lawyers agree, without participation by the judge or court personnel, that the judge should not be disqualified, the judge may participate in the proceeding. The agreement shall be incorporated into the record of the proceeding.

Comment

[1] Under this rule, a judge is disqualified whenever the judge's impartiality might reasonably be questioned, regardless of whether any of the specific provisions of divisions (A)(1) to (6) apply. A judge's knowledge that a lawyer, law firm, or litigant in a proceeding contributed to the judge's election campaign within the limits set forth in Rules 4.4(J) and (K), or publicly supported the judge in the campaign, does not, in and of itself, disqualify the judge.

[2] A judge's obligation not to hear or decide matters in which disqualification is required applies regardless of whether a motion to disqualify is filed.

[3] The rule of necessity may override the rule of disqualification. For example, a judge might be required to participate in judicial review of a judicial salary statute or might be the only judge available in a matter requiring immediate judicial action, such as a hearing on probable cause or a temporary restraining order. In matters that require immediate action, the judge must disclose on the record the basis for possible disqualification and make reasonable efforts to transfer the matter to another judge as soon as practicable.

[4] The fact that a lawyer in a proceeding is affiliated with a law firm with which a relative of the judge is affiliated does not itself disqualify the judge. If, however, the judge's

impartiality might reasonably be questioned under division (A), or the relative is known by the judge to have an interest in the law firm that could be substantially affected by the proceeding under division (A)(2)(c), the judge's disqualification is required.

[5] A judge should disclose on the record information that the judge believes the parties or their lawyers might reasonably consider relevant to a possible motion for disqualification, even if the judge believes there is no basis for disqualification.

[6] [RESERVED]

Comparison to Ohio Code of Judicial Conduct

Rule 2.11 is comparable to Ohio Canons 3(E) and (F) with the exception of Rule 2.11(A)(5), which has no comparable provision in the Ohio Code.

Comparison to ABA Model Code of Judicial Conduct

With two exceptions, Rule 2.11 is comparable to Model Rule 2.11. Division (A)(4), relative to the disqualification of a judge who receives a campaign contribution in excess of a specific amount, is not adopted, in part because Rule 4.4 contains what are considered reasonable contribution limits applicable to individuals and organizations, including parties, lawyers, and law firms.

Division (A)(6) is new language that addresses disqualification when a judge's spouse has previously acted as a judge in the same proceeding. This provision is comparable to Ohio Canon 3(E)(1)(d)(iii) but is not found in the Model Code.

Comment [1] is modified to remove a reference to the fact that some jurisdictions use interchangeably the terms "recusal" and "disqualification" and to indicate that the mere receipt of a campaign contribution within the permissible limits set forth in Rule 4.4 is not grounds for disqualification. Comment [6] is stricken because it merely restates the definition of "economic interest" found in the Terminology section.

RULE 2.12 Supervisory Duties

(A) A judge shall require court staff, court officials, and others subject to the judge's direction and control to act in a manner consistent with the judge's obligations under this code.

(B) A judge with supervisory authority for the performance of other judges shall take reasonable measures to ensure that those judges properly discharge their judicial responsibilities, including the prompt disposition of matters before them.

Comment

[1] A judge is responsible for his or her own conduct and for the conduct of others when those persons are acting at the judge's direction or control. A judge may not direct court personnel to engage in conduct on the judge's behalf or as the judge's representative when such conduct would violate the code if undertaken by the judge.

[2] Public confidence in the judicial system depends upon timely justice. To promote the efficient administration of justice, a judge with supervisory authority must take the steps needed to ensure that judges under his or her supervision administer their workloads promptly.

Comparison to Ohio Code of Judicial Conduct

Rule 2.12(A) is comparable to Ohio Canon 3(C)(2), and Rule 2.12(B) is comparable to Ohio Canon 3(C)(3).

Comparison to ABA Model Code of Judicial Conduct

Rule 2.12 is identical to Model Rule 2.12, except for the deletion of surplus language in Comment [1].

RULE 2.13 Administrative Appointments

(A) In making administrative appointments, a judge shall do both of the following:

(1) Exercise the power of appointment *impartially* and on the basis of merit;

(2) Avoid nepotism, favoritism, and unnecessary appointments.

(B) [RESERVED]

(C) A judge shall not approve compensation of appointees beyond the fair value of services rendered.

Comment

[1] Appointees of a judge include assigned counsel, officials such as magistrates, commissioners, special masters, receivers, and guardians, and personnel such as clerks, secretaries, and bailiffs. Consent by the parties to an appointment or an award of compensation does not relieve the judge of the obligation prescribed by division (A).

[2] Unless otherwise defined by law, nepotism is the appointment or hiring of any relative within the third degree of relationship of either the judge or the judge's spouse or domestic partner, or the spouse or domestic partner of such relative.

[3] [RESERVED]

Comparison to Ohio Code of Judicial Conduct

Rule 2.13(A) and (C) are substantially similar to Ohio Canon 3(C)(4).

Comparison to ABA Model Code of Judicial Conduct

Model Rule 2.13(B) and the corresponding Comment [3] are not adopted. Rule 4.4 contains limitations on campaign contributions applicable to lawyers and requires that court appointees be specifically identified on campaign finance reports. Rule 8 of the Rules of Superintendence contains additional procedures applicable to court appointments. These provisions are substitutes for the disqualification provisions of the Model Rule.

Comment [1] is modified to substitute "magistrate" for "referee."

RULE 2.14 Disability and Impairment

(A) A judge having a reasonable belief that the performance of a lawyer or another judge is impaired by drugs or alcohol, or by a mental, emotional, or physical condition, shall take appropriate action, which may include a confidential referral to a lawyer or judicial assistance program.

(B) Any information obtained by a member or agent of a committee or subcommittee of a bar or judicial association or by a member, employee, or agent of a nonprofit corporation established by a bar association, designed to assist lawyers and judges with substance abuse or mental health problems, shall be privileged for all purposes under this rule, provided the information was obtained while the member, employee, or agent was performing duties as a member, employee, or agent of the committee, subcommittee, or nonprofit corporation.

Comment

[1] "Appropriate action" means action intended and reasonably likely to help the judge or lawyer in question address the problem and prevent harm to the justice system. Depending upon the circumstances, appropriate action may include, but is not limited to, speaking directly to the impaired person and notifying a partner, a colleague, or an individual with supervisory responsibility over the impaired person, or making a referral to an assistance program.

[2] Taking or initiating corrective action by way of referral to an assistance program may satisfy a judge's responsibility under this rule. Assistance programs have many approaches for offering help to impaired judges and lawyers, such as intervention, counseling, or referral to appropriate health care professionals. Depending upon the gravity of the conduct that has come to the judge's attention, however, the judge may be required to take other action, such as reporting the impaired judge or lawyer to the appropriate authority, agency, or body. See Rule 2.15.

Comparison to Ohio Code of Judicial Conduct

There is no Ohio Canon comparable to Rule 2.14(A). Rule 2.14(B) corresponds to Ohio Canon 3(D)(4).

Comparison to ABA Model Code of Judicial Conduct

Model Rule 2.14 is modified to add division (B) that is taken from Ohio Canon 3(D)(4).

RULE 2.15 Responding to Judicial and Lawyer Misconduct

(A) A judge having *knowledge* that another judge has committed a violation of this Code that raises a question regarding the judge's honesty, trustworthiness, or fitness as a judge in other respects shall inform the *appropriate authority*.

(B) A judge having *knowledge* that a lawyer has committed a violation of the Ohio Rules of Professional Conduct that raises a question regarding the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects shall inform the *appropriate authority*.

(C) [RESERVED]

(D) [RESERVED]

Comment

[1] Taking action to address known misconduct is a judge's obligation. Divisions (A) and (B) impose an obligation on the judge to report to the appropriate disciplinary authority the known misconduct of another judge or a lawyer that raises a question regarding the honesty, trustworthiness, or fitness of that judge or lawyer. Ignoring or denying known misconduct among one's judicial colleagues or members of the legal profession undermines a judge's responsibility to participate in efforts to ensure public respect for the justice system. This rule limits the reporting obligation to those offenses that an independent judiciary must vigorously endeavor to prevent.

[2] A judge who does not have actual knowledge, but who receives information indicating a substantial likelihood that another judge or a lawyer has committed misconduct, should take appropriate action. Appropriate action may include, but is not limited to, communicating directly with the judge or lawyer involved, communicating with a supervisor, partner, or colleague, or reporting the suspected violation to the appropriate disciplinary authority.

Comparison to Ohio Code of Judicial Conduct

Rule 2.15 corresponds to Ohio Canon 3(D)(1) and (2), although the latter imposes a strict reporting requirement once a judge has knowledge of a violation by a lawyer or judge. Rule 2.15 follows the standard created in Rule 8.3 of the Ohio Rules of Professional Conduct for reporting attorney misconduct: reporting is required when the conduct raises a question about the honesty, trustworthiness, or fitness of a lawyer or judge.

Comparison to ABA Model Code of Judicial Conduct

Rules 2.15(A) and (B) are altered to require a judge to report misconduct when the judge possesses knowledge that raises a "question" about a lawyer or judge's honesty, trustworthiness, or fitness. Model Rule 2.15(A) and (B) imposes a reporting requirement when the judge possesses knowledge that raises a "substantial question." With these changes, Rules 2.15(A) and (B) conform to the reporting requirement in Rule 8.3 of the Ohio Rules of Professional Conduct.

Model Rules 2.15(C) and (D), which are stricken from Rule 2.15, address a judge's responsibility when the judge receives information indicating a disciplinary violation may have occurred but does not possess actual knowledge regarding the alleged violation. In lieu of a mandatory reporting obligation, Comment [2] suggests courses of action a judge may consider in this circumstance.

RULE 2.16 Cooperation with Disciplinary Authorities

(A) A judge shall cooperate and be candid and honest with judicial and lawyer disciplinary agencies.

(B) A judge shall not retaliate, directly or indirectly, against a person *known* or suspected to have assisted or cooperated with an investigation of a judge or a lawyer.

Comment

[1] Cooperation with investigations and proceedings of judicial and lawyer discipline agencies, as required in division (A), instills confidence in the commitment of judges to the integrity of the judicial system and the protection of the public.

Comparison to Ohio Code of Judicial Conduct

There is no Ohio Canon comparable to Rule 2.16, although Canon 3(D)(3) addresses a judge's duty to respond to requests from disciplinary authorities.

Comparison to ABA Model Code of Judicial Conduct

Rule 2.16 is substantially the same as Model Rule 2.16.

Canon 3

A judge shall conduct the judge's personal and extrajudicial activities so as to minimize the risk of conflict with the obligations of judicial office.

RULE 3.1 Extrajudicial Activities in General

A judge may engage in extrajudicial activities, except as prohibited by *law*. However, when engaging in extrajudicial activities, a judge shall not do any of the following:

(A) Participate in activities that will interfere with the proper performance of the judge's judicial duties;

(B) Participate in activities that will lead to frequent disqualification of the judge;

(C) Participate in activities that would appear to a reasonable person to undermine the judge's *independence*, *integrity*, or *impartiality*;

(D) Engage in conduct that would appear to a reasonable person to be coercive;

(E) Make use of court premises, staff, stationery, equipment, or other resources, except for incidental use for extrajudicial activities permitted by *law*.

Comment

[1] To the extent that time permits, and judicial independence and impartiality are not compromised, judges are encouraged to engage in appropriate extrajudicial activities. Judges are uniquely qualified to engage in extrajudicial activities that concern the law, the legal system, and the administration of justice, such as by: (1) speaking, writing, teaching, or participating in scholarly research projects; (2) participating in judicial or bar association activities; or (3) serving on a board, commission, committee or task force established by the Supreme Court or a judicial or bar association. In addition, judges are permitted and encouraged to engage in educational, religious, charitable, fraternal, or civic extrajudicial activities not conducted for profit, even when the activities do not involve the law. See Rule 3.7. However, a judge should consider whether engaging in a particular extrajudicial activity could give rise to an unlawful interest in a public contract as prohibited by R.C. 2921.42.

[2] Participation in both law-related and other extrajudicial activities helps integrate judges into their communities and furthers public understanding of and respect for courts and the judicial system.

[3] Discriminatory actions and expressions of bias or prejudice by a judge, even outside the judge's official or judicial actions, are likely to appear to a reasonable person to call into question the judge's integrity and impartiality. Examples include jokes or other remarks that demean individuals based upon their race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, or socioeconomic status. For the same reason, a judge's

extrajudicial activities must not be conducted in connection or affiliation with an organization that practices invidious discrimination. See Rule 3.6.

[4] While engaged in permitted extrajudicial activities, judges must not coerce others or take action that would reasonably be perceived as coercive. For example, depending upon the circumstances, a judge's solicitation of contributions or memberships for an organization, even as permitted by Rule 3.7(A), might create the risk that the person solicited would feel obligated to respond favorably, or would do so to curry favor with the judge.

Comparison to Ohio Code of Judicial Conduct

Rules 3.1(A), (D), and (E) have no counterparts in the Ohio Code. Rules 3.1(B) and (C) are found in Ohio Canon 2(A).

Comparison to ABA Model Code of Judicial Conduct

Rule 3.1 is identical to Model Rule 3.1, other than a modification to division (E) to extend the "incidental use" exception to any extrajudicial activity. The Model Code limits the "incidental use" exception to those extrajudicial activities that concern the law, legal system, or administration of justice. Comment [1] is modified to provide other examples of generally permissible extrajudicial activities and to remind judges that it may not be permissible to engage in certain extrajudicial activities given statutory prohibitions applicable to public officials. See Advisory Opinion 2006-7 issued by the Board of Commissioners on Grievances and Discipline.

RULE 3.2 Appearances before Governmental Bodies and Consultation with Government Officials

A judge shall not appear voluntarily at a public hearing before, or otherwise consult with, an executive or a legislative body or official, except as follows:

(A) In connection with matters concerning the *law*, the legal system, or the administration of justice;

(B) In connection with matters about which the judge acquired knowledge or expertise in the course of the judge's judicial duties;

(C) When the judge is acting *pro se* in a matter involving the judge's legal or *economic interests*, or when the judge is acting in a *fiduciary* capacity.

Comment

[1] Judges possess special expertise in matters of law, the legal system, and the administration of justice, and may properly share that expertise with governmental bodies and executive or legislative branch officials.

[2] In appearing before governmental bodies or consulting with government officials, judges must be mindful that they remain subject to other provisions of this code, such as Rule 1.3, prohibiting judges from using the prestige of office to advance their own or others' interests, Rule 2.10, governing public comment on pending and impending matters, and Rule 3.1(C), prohibiting judges from engaging in extrajudicial activities that would appear to a reasonable person to undermine the judge's independence, integrity, or impartiality.

[3] In general, it would be an unnecessary and unfair burden to prohibit judges from appearing before governmental bodies or consulting with government officials on matters that are likely to affect them as private citizens, such as zoning proposals affecting their real property. In engaging in such activities, however, judges must not refer to their judicial positions, and must otherwise exercise caution to avoid using the prestige of judicial office.

Comparison to Ohio Code of Judicial Conduct

Rule 3.2(A) is comparable to Ohio Canon 2(A)(2).

Rule 3.2(B) has no comparable provision in the Ohio Code.

Rule 3.2(C) is comparable to a portion of Ohio Canon 4(C)(1).

Comparison to ABA Model Code of Judicial Conduct

Rule 3.2 is identical to Model Rule 3.2.

RULE 3.3 Testifying as a Character Witness

A judge shall not testify as a character witness in a judicial, administrative, or other adjudicatory proceeding or otherwise vouch for the character of a person in a legal proceeding, except when duly summoned.

Comment

[1] A judge who, without being subpoenaed, testifies as a character witness abuses the prestige of judicial office to advance the interests of another. See Rule 1.3. Except in unusual circumstances where the demands of justice require, a judge should discourage a party from requiring the judge to testify as a character witness.

Comparison to Ohio Code of Judicial Conduct

Rule 3.3 is comparable to the last sentence in Ohio Canon 4(A).

Comparison to ABA Model Code of Judicial Conduct

Rule 3.3 is identical to Model Rule 3.3.

RULE 3.4 Appointments to Governmental Positions

A judge shall not accept appointment to a governmental committee, board, commission, or other governmental position, unless it is one that concerns the *law*, the legal system, or the administration of justice.

Comment

[1] Rule 3.4 implicitly acknowledges the value of judges accepting appointments to entities that concern the law, the legal system, or the administration of justice. Even in such instances, however, a judge should assess the appropriateness of accepting an appointment, paying particular attention to the subject matter of the appointment and the availability and allocation of judicial resources, including the judge's time commitments, and giving due regard to the requirements of the independence and impartiality of the judiciary.

[2] A judge may represent his or her country, state, or locality on ceremonial occasions or in connection with historical, educational, or cultural activities. Such representation does not constitute acceptance of a government position.

Comparison to Ohio Code of Judicial Conduct

Rule 3.4 is comparable to the first sentence in Ohio Canon 4(C)(2), and Comment [2] is identical to the second sentence in Ohio Canon 4(C)(2).

Comparison to ABA Model Code of Judicial Conduct

Rule 3.4 is identical to Model Rule 3.4.

RULE 3.5 Use of Nonpublic Information

A judge shall not *knowingly* disclose or use *nonpublic information* acquired in a judicial capacity for any purpose unrelated to the judge's judicial duties.

Comment

[1] In the course of performing judicial duties, a judge may acquire information of commercial or other value that is unavailable to the public. The judge must not reveal or use such information for personal gain or for any purpose unrelated to his or her judicial duties.

[1A] The premature disclosure of confidential information regarding the outcome of pending cases gives the appearance of partiality and fosters obvious public distrust of the judiciary and legal profession. Among other things, premature disclosure creates the potential for the release of inaccurate information and allows attorneys, litigants, and others with access to the information to use it for personal gain before it becomes public knowledge.

[2] This rule is not intended, however, to affect a judge's ability to act on information as necessary to protect the health or safety of the judge or a member of a judge's family, court personnel, or other judicial officers if consistent with other provisions of this code.

[3] Nothing in this rule shall prohibit the disclosure of any of the following: (1) a decision that has been announced on the record or in open court, but that has not been journalized in a written opinion, entry, or other document; (2) information regarding the probable or actual decision in a pending case or legal proceeding to a judge or employee of the court in which the matter is pending; (3) other information that is a matter of public record or that may be disclosed pursuant to law.

[4] The imposition of discipline upon a judge for violation of this rule shall not preclude prosecution for a violation of any applicable provision of the Revised Code, including, but not limited to, R.C. 102.03(B).

Comparison to Ohio Code of Judicial Conduct

Other than Ohio Canon 3(B)(11), addressing the disclosure of information regarding pending matters before the Supreme Court of Ohio, the courts of appeals, and a panel of judges in the common pleas courts, there is no Ohio rule comparable to Rule 3.5.

Comments [1A], [3], and [4] are taken from Ohio Canon 3(B)(11).

Comparison to ABA Model Code of Judicial Conduct

Rule 3.5 is modified to incorporate the standard of "knowingly" contained in Ohio Canon 3(B)(11), instead of the "intentionally" standard contained in Model Rule 3.5.

Comments [1A], [3], and [4] were added from Ohio Canon 3(B)(11).

RULE 3.6 Affiliation with Discriminatory Organizations

(A) A judge shall not hold membership in any organization that practices invidious discrimination on the basis of race, sex, gender, religion, national origin, ethnicity, or sexual orientation.

(B) A judge shall not use the benefits or facilities of an organization if the judge *knows* or should know that the organization practices invidious discrimination on one or more of the bases identified in division (A) of this rule. A judge's attendance at an event in a facility of an organization that the judge is not permitted to join is not a violation of this rule when the judge's attendance is an isolated event that could not reasonably be perceived as an endorsement of the organization's practices.

Comment

[1] A judge's public manifestation of approval of invidious discrimination on any basis gives rise to the appearance of impropriety and diminishes public confidence in the integrity and impartiality of the judiciary. A judge's membership in an organization that practices invidious discrimination creates the perception that the judge's impartiality is impaired.

[2] An organization is generally said to discriminate invidiously if it arbitrarily excludes from membership on the basis of race, sex, gender, religion, national origin, ethnicity, or sexual orientation persons who would otherwise be eligible for admission. Whether an organization practices invidious discrimination is a complex question to which judges should be attentive. The answer cannot be determined from a mere examination of an organization's current membership rolls, but rather, depends upon how the organization selects members, as well as other relevant factors, such as whether the organization is dedicated to the preservation of religious, ethnic, or cultural values of legitimate common interest to its members, or whether it is an intimate, purely private organization whose membership limitations could not constitutionally be prohibited.

[3] When a judge learns that an organization to which the judge belongs engages in invidious discrimination, the judge must resign immediately from the organization.

[4] A judge's membership in a religious organization as a lawful exercise of the freedom of religion is not a violation of this rule.

[5] This rule does not apply to national or state military service.

Comparison to Ohio Code of Judicial Conduct

Rule 3.6(A) is substantially the same as Ohio Canon 4(B). Rule 3.6(A) adds to the list of organizations to which a judge may not belong any organizations that discriminate on the basis of sex, ethnicity, or sexual orientation.

There is no Ohio Canon comparable to Rule 3.6(B).

Comparison to ABA Model Code of Judicial Conduct

Rule 3.6 is identical to Model Rule 3.6.

RULE 3.7 Participation in Educational, Religious, Charitable, Fraternal, or Civic Organizations and Activities

(A) Subject to the requirements of Rule 3.1, a judge may participate in activities sponsored by organizations or governmental entities concerned with the *law*, the legal system, or the administration of justice, and those sponsored by or on behalf of educational, religious, charitable, fraternal, or civic organizations not conducted for profit, including but not limited to the following activities:

(1) Assisting such an organization or entity in planning related to fundraising, and participating in the management and investment of the organization's or entity's funds;

(2) Soliciting *contributions* for such an organization or entity, but only from *members of the judge's family*, or from judges over whom the judge does not exercise supervisory or appellate authority;

(3) Participating in but not soliciting funds for *de minimis* fundraising activities that are directed at a broad range of the community and that may be performed by other volunteers who do not hold judicial office;

(4) Soliciting membership for such an organization or entity, even though the membership dues or fees generated may be used to support the objectives of the organization or entity, but only if the organization or entity is concerned with the *law*, the legal system, or the administration of justice;

(5) Appearing or speaking at, receiving an award or other recognition at, being featured on the program of, and permitting his or her title to be used in connection with an event of such an organization or entity, provided the participation does not reflect adversely on the judge's *independence*, *integrity*, or *impartiality*;

(6) Making recommendations to such a public or private fund-granting organization or entity in connection with its programs and activities, but only if the organization or entity is concerned with the *law*, the legal system, or the administration of justice;

(7) Serving as an officer, director, trustee, or nonlegal advisor of such an organization or entity, unless it is likely that the organization or entity will be engaged in either of the following:

(a) Proceedings that would ordinarily come before the judge;

(b) Frequently in adversary proceedings in the court of which the judge is a member, or in any court subject to the appellate jurisdiction of the court of which the judge is a member.

(B) A judge may encourage lawyers to provide *pro bono publico* legal services.

Comment

[1] The activities permitted by division (A) generally include those sponsored by or undertaken on behalf of public or private not-for-profit educational institutions, and other not-for-profit organizations, including law-related, charitable, and other organizations.

[2] Even for law-related organizations, a judge should consider whether the membership and purposes of the organization, or the nature of the judge's participation in or association with the organization, would conflict with the judge's obligation to refrain from activities that reflect adversely upon a judge's independence, integrity, and impartiality.

[3] Mere attendance at an event, whether or not the event serves a fundraising purpose, does not constitute a violation of division (A)(5). It is also generally permissible for a judge to serve as an usher or a food server or preparer, or to perform similar functions, at fundraising events sponsored by educational, religious, charitable, fraternal, or civic organizations. Such activities are not solicitation and do not present an element of coercion or abuse the prestige of judicial office.

[4] Identification of a judge's position in educational, religious, charitable, fraternal, or civic organizations on letterhead used for fundraising or membership solicitation does not violate this rule. The letterhead may list the judge's title or judicial office if comparable designations are used for other persons.

[5] In addition to appointing lawyers to serve as counsel for indigent parties in individual cases, a judge may promote broader access to justice by encouraging lawyers to participate in *pro bono publico* legal services, if in doing so the judge does not employ coercion, or abuse the prestige of judicial office. Such encouragement may take many forms, including providing lists of available programs, training lawyers to do *pro bono publico* legal work, and participating in events recognizing lawyers who have done *pro bono publico* work.

Comparison to Ohio Code of Judicial Conduct

Rule 3.7(A)(1) corresponds to the first portion of Ohio Canon 2(B)(2)(a). Rule 3.7(A)(2) corresponds to Ohio Canon 2(B)(2)(a)(i), with the addition that a judge may solicit contributions from members of the judge's family

Rule 3.7(A)(3) is identical to Ohio Canon 2(B)(2)(a)(ii).

Rule 3.7(A)(4) is similar to Ohio Canon 2(B)(2)(c) in that it allows judges to solicit persons for membership in civic organizations, but the rule alters the test for determining

whether membership solicitations are permissible. Under the Ohio Canon, membership solicitation is prohibited if it might reasonably be perceived as coercive and is essentially a fundraising mechanism for the organization. Rule 3.7(A)(4) deletes the coercion test but allows membership solicitation only if the organization is concerned with the law, legal system, or administration of justice and even if the membership dues or fees will be used to support the organization's objectives.

Rule 3.7(A)(5) allows a judge to participate in certain activities sponsored by educational, religious, charitable, fraternal, and civic organizations, including those that might have a fundraising purpose, provided the judge's participation does not reflect adversely on his or her independence, integrity, or impartiality. Ohio Canons 2(B)(2)(a) and (d) limit a judge's involvement in these activities if there is a fundraising component.

Rules 3.7(A)(6) corresponds to Ohio Canon 2(B)(2)(b), and Rule 3.7(A)(7) corresponds to Ohio Canon 2(B)(1).

Rule 3.7(B) has no counterpart in the Ohio Code.

Comparison to ABA Model Code of Judicial Conduct

Rule 3.7 differs from Model Rule 3.7 in two respects. Division (A)(3) incorporates a 2004 amendment to the Ohio Code that specifically authorizes judicial participation in certain *de minimis* fundraising activities. Division (A)(5) is modified to alter the test for determining whether a judge may participate in an event sponsored by an educational, religious, charitable, fraternal, or civic organizations. Where such an event serves a fundraising purpose, the Model Code permits judicial participation only if the event concerns the law, legal system, or the administration of justice. The Ohio version of Rule 3.7 allows a judge to participate in these activities, without regard to whether they have a fundraising purpose, provided the participation does not reflect adversely on the judge's independence, integrity, or impartiality. This is consistent with the test used elsewhere in the Code.

Comment [3] is modified to correct a cross-reference to the rule.

RULE 3.8 Appointments to Fiduciary Positions

(A) A judge shall not accept appointment to serve in a *fiduciary* position, such as executor, administrator, trustee, guardian, attorney in fact, or other personal representative, except for the estate, trust, or person of a *member of the judge's family*, and then only if such service will not interfere with the proper performance of judicial duties.

(B) A judge shall not serve in a *fiduciary* position if the judge as *fiduciary* will likely be engaged in proceedings that would ordinarily come before the judge, or if the estate, trust, or ward becomes involved in adversary proceedings in the court on which the judge serves, or one under its appellate jurisdiction.

(C) A judge acting in a *fiduciary* capacity shall be subject to the same restrictions on engaging in financial activities that apply to a judge personally.

(D) If a person who is serving in a *fiduciary* position becomes a judge, he or she must comply with this rule as soon as reasonably practicable, but in no event later than six months after becoming a judge.

Comment

[1] A judge should recognize that other restrictions imposed by this code may conflict with a judge's obligations as a fiduciary; in such circumstances, a judge should resign as fiduciary. For example, serving as a fiduciary might require frequent disqualification of a judge under Rule 2.11 because a judge is deemed to have an economic interest in shares of stock held by a trust if the amount of stock held is more than *de minimis*.

Comparison to Ohio Code of Judicial Conduct

Rule 3.8(A), (B), and (C) are substantially the same as Ohio Canon 4(D)(1), (2), and (3). There is no Ohio Canon comparable to Rule 3.8(D).

Comparison to ABA Model Code of Judicial Conduct

Rule 3.8 is identical to Model Rule 3.8. Ohio chose to adopt a six-month compliance window in division (D).

RULE 3.9 Service as Arbitrator or Mediator

A judge shall not act as an arbitrator or a mediator or perform other judicial functions apart from the judge's official duties unless expressly authorized by *law*.

Comment

[1] This rule does not prohibit a judge from participating in arbitration, mediation, or settlement conferences performed as part of assigned judicial duties. Rendering dispute resolution services apart from those duties, whether or not for economic gain, is prohibited unless it is expressly authorized by law.

Comparison to Ohio Code of Judicial Conduct

Rule 3.9 is substantially the same as Ohio Canon 4(E).

Comparison to ABA Model Code of Judicial Conduct

Rule 3.9 is identical to Model Rule 3.9.

RULE 3.10 Practice of Law

A judge shall not practice law. A judge may act *pro se* and may, without compensation, give legal advice to and draft or review documents for a *member of the judge's family*, but is prohibited from serving as the family member's lawyer in any forum.

Comment

[1] A judge may act *pro se* in all legal matters, including matters involving litigation and matters involving appearances before or other dealings with governmental bodies. A judge must not use the prestige of office to advance the judge's personal or family interests. See Rule 1.3.

Comparison to Ohio Code of Judicial Conduct

Rule 3.10 is substantially the same as Ohio Canon 4(F).

Comparison to ABA Model Code of Judicial Conduct

Rule 3.10 is identical to Model Rule 3.10.

RULE 3.11 Financial, Business, or Remunerative Activities

(A) A judge may hold and manage investments of the judge and *members of the judge's family*.

(B) A judge shall not serve as an officer, director, manager, general partner, advisor, or employee of or independent contractor for any business entity except that a judge may do any of the following:

(1) Manage or participate in a business closely held by the judge or *members of the judge's family*;

(2) Manage or participate in a business entity primarily engaged in investment of the financial resources of the judge or *members of the judge's family*;

(3) Write or teach.

(C) A judge shall not engage in financial activities permitted under divisions (A) and (B) of this rule if they will do any of the following:

(1) Interfere with the proper performance of judicial duties;

(2) Lead to frequent disqualification of the judge;

(3) Involve the judge in frequent transactions or continuing business relationships with lawyers or other persons likely to come before the court on which the judge serves;

(4) Result in violation of other provisions of this code.

(D) As soon as practicable without serious financial detriment, the judge shall divest himself or herself of investments and other financial interests that might require frequent disqualification or otherwise violate this rule.

Comment

[1] Judges are generally permitted to engage in financial activities, including managing real estate and other investments for themselves or for members of their families. Participation in these activities, like participation in other extrajudicial activities, is subject to the requirements of this code. For example, it would be improper for a judge to spend so much time on business activities that it interferes with the performance of judicial duties. See Rule 2.1. Similarly, it would be improper for a judge to use his or her official title or appear in judicial robes in business advertising or to conduct his or her business or financial affairs in such a way that disqualification is frequently required. See Rules 1.3 and 2.11. With regard to writing or teaching relationships authorized by division (B)(3), also see Rule 3.12.

[2] [RESERVED]

Comparison to Ohio Code of Judicial Conduct

Rule 3.11 is comparable to Ohio Canon 2(C)(1) to (4).

Comparison to ABA Model Code of Judicial Conduct

Rule 3.11 is modified to add "independent contractor" to the list of prohibited relationships with a business entity and to add a general exemption for writing and teaching activities. Comment [1] is modified to include a cross-reference to Rule 3.12. Comment [2], which is comparable to Canon 2(C)(4), is moved to division (D) to emphasize in the text of the rule that a judge must divest himself or herself of financial interests that might lead to frequent disqualification or are otherwise contrary to Rule 3.11.

RULE 3.12 Compensation for Extrajudicial Activities

A judge may accept compensation for extrajudicial activities permitted by *law* unless such acceptance would appear to a reasonable person to undermine the judge's *independence*, *integrity*, or *impartiality*. The compensation shall be reasonable and commensurate to the task performed.

Comment

[1] Unless otherwise prohibited by law, a judge is permitted to accept compensation for extrajudicial activities. The judge should be mindful, however, that judicial duties must take precedence over other activities. See Rule 2.1.

[1A] A judge is prohibited by R.C. 102.03(H) from receiving an honorarium, including any payment made in consideration for a speech given, article published, or attendance at a public or private conference, convention, meeting, social event, meals, or similar gathering. See R.C. 102.01(H).

[1B] Compensation for an extrajudicial activity shall not exceed a reasonable amount or what a person who is not a judge would receive for the same activity.

[2] Compensation derived from extrajudicial activities is subject to public reporting. See Rule 3.15.

Comparison to Ohio Code of Judicial Conduct

Rule 3.12 corresponds to Ohio Canon 2(D), except that the receipt of compensation for extrajudicial activities is permitted only where such receipt would not "appear to a reasonable person to undermine the judge's independence, integrity or impartiality." Receipt of compensation under Ohio Canon 2(D) is prohibited where "the source of the compensation * * * give[s] the appearance of influencing the judge in his or her judicial duties or otherwise give[s] the appearance of impropriety." The new standard gives clearer and more objective guidance to judges and is consistent with the standard used elsewhere in the Model Code.

Reimbursement of expenses, which is included in Ohio Canon 2(D), is now addressed in Rule 3.14.

Comment [1] makes it clear that any extrajudicial activities must not take precedence over the judge's judicial duties.

Comment [1A] corresponds to the referenced statutory prohibitions against the solicitation or receipt of honorarium by public officials. Comment [1B] reflects the pronouncement in current Canon 2(D)(1) that the compensation "shall not exceed a reasonable amount or what a person who is not a judge would receive for the same act."

Comparison to ABA Model Code of Judicial Conduct

Rule 3.12 is modified to incorporate in the black-letter the standard of "reasonable and commensurate" found in the comments to Model Rule 3.12. Comment [1] is modified remove the list of specific types of compensation and extrajudicial activities, and Comment [1A] is added to reflect the statutory ban on the solicitation or receipt of honorarium. See R.C. 102.03(H). Comment [1B] is added from Ohio Canon 2(D)(1).

RULE 3.13 Acceptance and Reporting of Gifts, Loans, Bequests, Benefits, or Other Things of Value

(A) A judge shall not accept, and shall urge the judge's spouse, *domestic partner*, and other *members of the judge's family residing in the judge's household* not to accept, any gifts, loans, bequests, benefits, or other things of value, except as follows:

(1) Items with little intrinsic value, such as plaques, certificates, trophies, and greeting cards;

(2) Gifts, loans, bequests, benefits, or other things of value from friends, relatives, or other persons, including lawyers, whose appearance or interest in a proceeding *pending* or *impending* before the judge would in any event require disqualification of the judge under Rule 2.11;

(3) Ordinary social hospitality;

(4) Commercial or financial opportunities and benefits, including special pricing and discounts, and loans from lending institutions in their regular course of business, if the same opportunities and benefits or loans are made available on the same terms to similarly situated persons who are not judges;

(5) Rewards and prizes given to competitors or participants in random drawings, contests, or other events that are open to persons who are not judges;

(6) Scholarships, fellowships, and similar benefits or awards, if they are available to similarly situated persons who are not judges, based upon the same terms and criteria;

(7) Books, magazines, journals, audiovisual materials, and other resource materials supplied by publishers on a complimentary basis for official use;

(8) Gifts, awards, or benefits associated with the business, profession, or other separate activity of a spouse, a *domestic partner*, or other *member of the judge's family residing in the judge's household*, but that incidentally benefit the judge, provided the gift, award, or benefit does not give the appearance of influencing the judge in his or her judicial duties or otherwise appear to a reasonable person to undermine the judge's *independence*, *integrity*, or *impartiality*;

(9) A gift from a relative or friend for a social occasion, such as a wedding, anniversary, or birthday, if the gift is commensurate with the relationship and occasion;

(10) A gift incident to a public testimonial;

(11) An invitation to the judge and the judge's spouse, *domestic partner*, or guest to attend without charge either of the following:

(a) An event associated with a bar-related function or other activity related to the *law*, the legal system, or the administration of justice;

(b) An event associated with any of the judge's educational, religious, charitable, fraternal, or civic activities permitted by this code, if the same invitation is offered to nonjudges who are engaged in similar ways in the activity as is the judge.

(12) Any other thing of value, if the donor is neither of the following:

(a) A party or other person who has come or is likely to come or whose interests have come or are likely to come before the judge;

(b) A person who is doing or seeking to do business with the court.

(B) A judge shall report the acceptance of any gift, loan, bequest, benefit, or other thing of value as required by Rule 3.15.

Comment

[1] Whenever a judge accepts a gift or other thing of value without paying fair market value, there is a risk that the benefit might be viewed as intended to influence the judge's decision in a case. Rule 3.13 prohibits the acceptance of such benefits, except in circumstances where the risk of improper influence is low and subject to applicable financial disclosure requirements. See Rule 3.15 and R.C. 102.02.

[2] Gift-giving between friends and relatives is a common occurrence, and ordinarily does not create an appearance of impropriety or cause reasonable persons to believe that the judge's independence, integrity, or impartiality has been compromised. In addition, when the appearance of friends or relatives in a case would require the judge's disqualification under Rule 2.11, there would be no opportunity for a gift to influence the judge's decision making. Division (A)(2) places no restrictions upon the ability of a judge to accept gifts or other things of value from friends or relatives under these circumstances, but requires public reporting.

[3] Businesses and financial institutions frequently make available special pricing, discounts, and other benefits, either in connection with a temporary promotion or for preferred customers, based upon longevity of the relationship, volume of business transacted, and other factors. A judge may freely accept such benefits if they are available to the general public, or if the judge qualifies for the special price or discount according to the same criteria as are applied to persons who are not judges. As an example, loans provided at generally prevailing interest rates are not gifts, but a judge could not accept a loan from a financial institution at below-

market interest rates unless the same rate was being made available to the general public for a certain period of time or only to borrowers with specified qualifications that the judge also possesses.

[4] [RESERVED]

[5] Rule 3.13 does not apply to contributions to a judge's campaign for judicial office. Such contributions are governed by other rules of this code, including Rules 4.3 and 4.4.

Comparison to Ohio Code of Judicial Conduct

Rule 3.13 corresponds to Ohio Canon 2(C)(5). That provision, together with R.C. 102.03, generally bars a judge from accepting gifts, loans, bequests, or benefits, except for those items specifically permitted in Canon 2(C)(5)(a) to (h). The new rule is essentially the same as the existing standards, with the exception that Rules 3.13(A)(1), (A)(5), and (A)(11)(b) are new provisions with no counterpart in the Ohio Code. Specifically:

- Rule 3.13(A)(2) corresponds to Ohio Canon 2(C)(5)(e);
- Rule 3.13(A)(3) corresponds to Ohio Canon 2(C)(5)(c);
- Rule 3.13(A)(4) corresponds to Ohio Canon 2(C)(5)(f);
- Rule 3.13(A)(6) corresponds to Ohio Canon 2(C)(5)(g);
- Rule 3.13(A)(7) corresponds to a portion of Ohio Canon 2(C)(5)(a);
- Rule 3.13(A)(8) corresponds to Ohio Canon 2(C)(5)(b) but adds "domestic partner" and incorporates the "independence, integrity, or impartiality" standards used throughout the Code;
- Rule 3.13(A)(9) corresponds to Ohio Canon 2(C)(5)(d);
- Rules 3.13(A)(10) and (A)(11)(a) correspond to portions of Ohio Canon 2(C)(5)(a);
- Rule 3.13(A)(12) corresponds to Ohio Canon 2(C)(5)(h), but is expanded to address gifts from a person who is doing or seeking to do business with the court.

Comment [3] provides guidance to judges in situations where special pricing, discounts, and other benefits are made available by businesses and financial institutions.

Requirements for the reporting of gifts and other things of value are addressed in Rule 3.15.

Comparison to ABA Model Code of Judicial Conduct

Model Rule 3.13 is reorganized entirely to be consistent with Ohio law. The Model Rule 3.13 divides gifts and other things of value into three categories: those that a judge may not accept under any circumstances [Model Rule 3.13(A)]; those that a judge may accept without having to report the acceptance of the item [Model Rule 3.13(B)]; and those that a judge may accept, provided the acceptance is publicly reported [Model Rule 3.13(C)]. By contrast, the Ohio version of Rule 3.13(A) prohibits the acceptance of any gift or item of value, except those expressly listed that would not create an appearance of impropriety or cause a reasonable person to believe that the judge's independence, integrity, or impartiality has been compromised. Rule 3.13(B) requires disclosure of any gift or other item of value as required by Rule 3.15. The comments are revised to correspond to the rule.

Rule 3.14 Reimbursement of Expenses and Waivers of Fees or Charges

(A) A judge may accept reimbursement of necessary and reasonable expenses for travel, food, lodging, or other incidental expenses, or a waiver or partial waiver of fees or charges for registration, tuition, and similar items if both of the following apply:

(1) The expenses or charges are associated with the judge's participation in activities permitted by this code;

(2) The source of the reimbursement or waiver does not give the appearance of influencing the judge in his or her judicial duties or otherwise appear to a reasonable person to undermine the judge's *independence*, *integrity*, or *impartiality*.

(B) Reimbursement of expenses for necessary travel, food, lodging, or other incidental expenses shall be limited to the actual costs reasonably incurred by the judge and, when appropriate to the occasion, by the judge's spouse, *domestic partner*, or guest. Any reimbursement in excess of actual cost is compensation and shall be publicly reported as required by Rule 3.15.

(C) A judge who accepts reimbursement of expenses or waivers or partial waivers of fees or charges on behalf of the judge or the judge's spouse, *domestic partner*, or guest shall publicly report such acceptance as required by Rule 3.15.

Comment

[1] Educational, civic, religious, fraternal, and charitable organizations often sponsor meetings, seminars, symposia, dinners, awards ceremonies, and similar events. Judges are encouraged to attend educational programs, as both teachers and participants, in law-related and academic disciplines, in furtherance of their duty to remain competent in the law. Participation in a variety of other extrajudicial activity is also permitted and encouraged by this code.

[2] Not infrequently, sponsoring organizations invite certain judges to attend seminars or other events on a fee-waived or partial fee-waived basis, and sometimes include reimbursement for necessary travel, food, lodging, or other incidental expenses. A judge's decision whether to accept reimbursement of expenses or a waiver or partial waiver of fees or charges in connection with these or other extrajudicial activities must be based upon an assessment of all the circumstances. The judge must undertake a reasonable inquiry to obtain the information necessary to make an informed judgment about whether acceptance would be consistent with the requirements of this code.

[3] A judge must determine whether acceptance of reimbursement or fee waivers would appear to a reasonable person to undermine the judge's independence, integrity, or

impartiality. The factors that a judge should consider when deciding whether to accept reimbursement or a fee waiver for attendance at a particular activity include:

(a) whether the sponsor is an accredited educational institution or bar association rather than a trade association or a for-profit entity;

(b) whether the funding comes largely from numerous contributors rather than from a single entity and is earmarked for programs with specific content;

(c) whether the content is related or unrelated to the subject matter of litigation pending or impending before the judge, or to matters that are likely to come before the judge;

(d) whether the activity is primarily educational rather than recreational, and whether the costs of the event are reasonable and comparable to those associated with similar events sponsored by the judiciary, bar associations, or similar groups;

(e) whether information concerning the activity and its funding sources is available upon inquiry;

(f) whether the sponsor or source of funding is generally associated with particular parties or interests currently appearing or likely to appear in the judge's court, thus possibly requiring disqualification of the judge under Rule 2.11;

(g) whether differing viewpoints are presented;

(h) whether a broad range of judicial and nonjudicial participants are invited, whether a large number of participants are invited, and whether the program is designed specifically for judges.

Comparison to Ohio Code of Judicial Conduct

Rule 3.14 is generally comparable to Ohio Canon 2(D). However, the existing prohibition on the acceptance of compensation, expenses, or fee waivers that give the appearance of impropriety is replaced by a standard that looks to whether the acceptance of the compensation, expense, or fee waiver would appear to a reasonable person to undermine the judge's independence, integrity, or impartiality. This modification is consistent with the independence, integrity, and impartiality standard used elsewhere in the code.

As is the case with other rules, Rules 3.14(B) and (C) include a reference to "domestic partner."

Comparison to ABA Model Code of Judicial Conduct

Model Rule 3.14(A) is modified in two respects. First, Ohio law contains no exemption for expense reimbursements and fee waivers that a judge receives from his or her employing entity, thus necessitating removal of the exemption that appears in the Model Code. Second, Model Rule 3.14(A) conditions the acceptance of expense reimbursements or fee waivers solely on whether the expenses or charges are associated with the judges' participation in permissible extrajudicial activities. Rule 3.14(A) sets a higher standard by requiring an Ohio judge to consider whether the source of the reimbursement or waiver gives the appearance of influencing the judge or otherwise appears to a reasonable person to undermine the judge's independence, integrity, or impartiality. Rule 3.14(A)(1) applies this standard to expense reimbursements or fee waivers that a judge may receive for any activity permitted by the Code, and not only extrajudicial activities.

Rule 3.14(B) adds language taken from Ohio Canon 2(D)(2) providing that reimbursement in excess of actual cost is compensation and must be publicly reported.

RULE 3.15 Reporting Requirements

A judge shall file annually the disclosure statement required by R.C. 102.02 with the director of the Board of Professional Conduct of the Supreme Court of Ohio. The completion and filing of the annual disclosure statement fulfills the reporting requirements set forth in Rules 3.12, 3.13, and 3.14.

(B) [RESERVED]

(C) [RESERVED]

(D) [RESERVED]

Comment

[1] The information required to be reported by Rules 3.12, 3.13, and 3.14 is a portion of the information that must be included on the annual financial disclosure statement mandated by R.C. 102.02. A judge is obligated to disclose fully and accurately all information requested on the annual disclosure statement and does not fulfill the statutory obligation by reporting only the information required by Rules 3.12, 3.13, and 3.14.

[2] Previously, judges were required to report extrajudicial income and gifts on both the statutorily mandated form and on a quasi-judicial or extrajudicial activity compensation report that was required to be filed with the Board of Professional Conduct. Rule 3.15 simplifies the reporting requirements by allowing judges to complete a single form to satisfy the reporting requirements of this Code and the Revised Code.

Comparison to Ohio Code of Judicial Conduct

Rule 3.15 continues the requirement of Ohio Canon 2(D)(3)(a) to file the annual financial disclosure statement required by R.C. 102.02. This filing satisfied the reporting requirements of Rules 3.12, 3.13, and 3.14.

Comment [1] explains that a judge shall report other information on the annual financial disclosure statement mandated by R.C. 102.02. This is implied, but not expressed, in Canon 2(D)(3)(a).

Rule 3.15 no longer requires a judge to file a separate statement of quasijudicial or extrajudicial compensation as prescribed by Ohio Canon 2(D)(3)(b). The content of this statement is included within the statutorily mandated financial disclosure statement, and Rule 3.15 requires the filing of only the statement required by R.C. 102.02.

Comparison to ABA Model Code of Judicial Conduct

The reporting requirements and detail of the Model Rule are eliminated from Rule 3.15 in favor of a reference to the annual financial disclosure statement required by R.C. 102.02.

Canon 4

A judge or *judicial candidate* shall not engage in political or campaign activity that is inconsistent with the *independence*, *integrity*, or *impartiality* of the judiciary.

RULE 4.1 Political and Campaign Activities of Judges and Judicial Candidates

(A) A judge or *judicial candidate* shall not do any of the following:

(1) Act as a leader of, or hold an office in, a *political party*;

(2) Make speeches on behalf of a *political party* or another candidate for public office;

(3) Publicly endorse or oppose a candidate for another public office;

(4) Solicit funds for or make a *contribution* or expenditure of campaign funds to a *political party* or a candidate for public office, except as permitted by division (B)(2) or (3) of this rule;

(5) Comment on any substantive matter relating to a specific case pending on the docket of any judge;

(6) Make any statement that would reasonably be expected to affect the outcome or impair the fairness of a matter pending or impending in any court;

(7) In connection with cases, controversies, or issues that are likely to come before the court, make pledges, promises, or commitments that are inconsistent with the *impartial* performance of the adjudicative duties of judicial office.

(B) A judge or judicial candidate may do any of the following, subject to limitations set forth in this canon:

(1) Attend or speak to a political gathering;

(2) Make a *contribution* or expenditure of campaign funds to purchase a ticket to attend a social or fundraising event held by or on behalf of another public official or candidate for public office;

(3) Make a *contribution* or expenditure of campaign funds to a *political party* or to purchase a ticket to attend a social event sponsored by a *political party*, provided the *contribution* or expenditure will be used for any of the purposes set forth in R.C. 3517.18(A) and will not be used for any of the purposes set forth in R.C. 3517.18(B).

Comment

General Considerations

[1] Though subject to public election, a judge plays a role different from that of a legislator or executive branch official. Rather than making decisions based upon the expressed views or preferences of the electorate, a judge makes decisions based upon the law and the facts of each case. Therefore, in furtherance of this interest, judges and judicial candidates must, to the greatest extent possible, be free and appear to be free from political influence and political pressure. Canon 4 imposes narrowly tailored restrictions upon the political and campaign activities of all judges and judicial candidates.

[2] When a person becomes a judicial candidate, Canon 4 becomes applicable to his or her conduct. See Rule 4.6.

Participation in Political Activities

[3] Public confidence in the independence and impartiality of the judiciary is eroded if judges or judicial candidates are perceived to be subject to political influence. Although judges and judicial candidates may register to vote as members of a political party, they are prohibited by division (A)(1) from assuming leadership roles in political organizations.

[4] Divisions (A)(2) and (A)(3) prohibit judges and judicial candidates from making speeches on behalf of political organizations or publicly endorsing or opposing candidates for public office to prevent them from abusing the prestige of judicial office to advance the interests of others. See Rule 1.3. These rules do not prohibit candidates from campaigning on their own behalf or from other permitted conduct. See Rule 4.2(C).

[5] Although members of the families of judges and judicial candidates are free to engage in their own political activity, including running for public office, there is no "family exception" to the prohibition in division (A)(3) against a judge or candidate publicly endorsing candidates for public office. A judge or judicial candidate must not become publicly involved in, or publicly associated with, a family member's political activity or campaign for public office. To avoid public misunderstanding, judges and judicial candidates should take, and should urge members of their families to take, reasonable steps to avoid any implication that they endorse any family member's candidacy or other political activity.

[6] Judges and judicial candidates retain the right to participate in the political process as voters in both primary and general elections.

Statements and Comments Made during a Campaign for Judicial Office

[7] Divisions (A)(5) and (A)(6) prohibit judicial candidates from making comments that might impair the fairness of pending or impending judicial proceedings. This provision does not restrict arguments or statements to the court or jury by a lawyer who is a judicial candidate,

or rulings, statements, or instructions by a judge that may appropriately affect the outcome of a matter.

Pledges, Promises, or Commitments Inconsistent with Impartial Performance of the Adjudicative Duties of Judicial Office.

[8] The role of a judge is different from that of a legislator or executive branch official, even when the judge is subject to public election. A judge must at all times strive for the respect and confidence of all persons who come before the judge and decide each case on the law and facts presented. Campaigns for judicial office must be conducted differently from campaigns for other offices so as to foster and enhance respect and confidence for the judiciary. Judicial candidates have a special obligation to ensure the judicial system is viewed as fair, impartial, and free from partisanship. To that end, judicial candidates are urged to conduct their campaigns in such a way that will allow them, if elected, to maintain an open mind and uncommitted spirit with respect to cases or controversies coming before them. The narrowly drafted restrictions upon political and campaign activities of judicial candidates provided in Canon 4 allow candidates to conduct campaigns that provide voters with sufficient information to permit them to distinguish between candidates and make informed electoral choices.

[9] Division (A)(7) makes applicable to both judges and judicial candidates the prohibition that applies to judges in Rule 2.10(B), relating to pledges, promises, or commitments that are inconsistent with the impartial performance of the adjudicative duties of judicial office.

[10] The making of a pledge, promise, or commitment is not dependent upon, or limited to, the use of any specific words or phrases; instead, the totality of the statement must be examined to determine if a reasonable person would believe that the candidate for judicial office has specifically undertaken to reach a particular result. Pledges, promises, or commitments must be contrasted with statements or announcements of personal views on legal, political, or other issues, which are not prohibited. When making such statements or announcements, a judge should acknowledge the overarching judicial obligation to apply and uphold the law without regard to his or her personal views.

[11] A judicial candidate may make campaign promises related to judicial organization, administration, and court management, such as a promise to dispose of a backlog of cases, start court sessions on time, or avoid favoritism in appointments and hiring. A candidate may also pledge to take action outside the courtroom, such as working toward jury selection system, or advocating for more funds to improve the physical plant and amenities of the courthouse.

[12] Judicial candidates may receive questionnaires or requests for interviews from the media and from issue advocacy or other community organizations that seek to learn their views on disputed or controversial legal or political issues. Division (A)(7) does not specifically address responses to such inquiries. Depending upon the wording and format of such questionnaires, judicial candidates' responses might be viewed as pledges, promises, or commitments to perform the adjudicative duties of office other than in an impartial way. To avoid violating division (A)(7), therefore, candidates who respond to media and other inquiries

should also give assurances that they will keep an open mind and will carry out their adjudicative duties faithfully and impartially if elected. Candidates who do not respond may state their reasons for not responding, such as the danger that answering might be perceived by a reasonable person as undermining a successful candidate's independence or impartiality, or that it might lead to frequent disqualification. See Rule 2.11.

Permitted Conduct

[13] Subject to the other requirements in this canon, a judge or judicial candidate may attend and speak to a political gathering and may make contributions and expend campaign funds to attend a social or fundraising event on behalf of or sponsored by another office holder or candidate.

Comparison to Ohio Code of Judicial Conduct

Rule 4.1 contains the provisions applicable to judges and judicial candidates that are found in Ohio Canons 7(B) and (C)(7)(b) and (c). Specifically:

- Rules 4.1(A)(1) to (3) correspond to Ohio Canons 7(B)(2)(a) and (b);
- Rules 4.1(A)(4) and (B)(2) and (3) correspond to Ohio Canons 7(C)(7)(b) and (c);
- Rule 4.1(A)(5) corresponds to Ohio Canon 7(B)(2)(e);
- Rule 4.1(B)(1) corresponds to Ohio Canons 7(B)(3)(a)(i) and (ii).

Rule 4.1(A)(6) is a new rule insofar as it addresses a statement made by a judge or judicial candidate in the course of political and campaign activity. However, the rule is similar to Ohio Canons 3(B)(9) and 7(B)(2)(e). Also see Rule 2.10(A)(1).

Rule 4.1(A)(7) replaces Ohio Canons 7(B)(2)(c) and (d), with the primary difference being elimination of the phrase "appear to commit" found in Canon 7(B)(2)(d).

Comparison to ABA Model Code of Judicial Conduct

Rule 4.1 is analogous to portions of Model Rule 4.1. Specifically:

- Rule 4.1 retains, with minor modifications, the provisions of Model Rules 4.1(A)(1), (2), (3), (12), and (13);
- Rules 4.1(A)(4) and (B)(2) and (3) replace Model Rules 4.1(A)(4) and (5);
- Model Rules 4.1(A)(6) and (7) are not adopted since Rule 4.2 permits judicial candidates to solicit political party endorsements and advertise or otherwise state party affiliation, membership, nominations, and endorsements;

- Model Rule 4.1(A)(8) is moved to Rule 4.4;

- Model Rules 4.1(A)(9) and (10) contain prohibitions found in the Ohio Revised Code and are thus duplicative;

- Model Rule (A)(11) is moved to Rule 4.3(A);

- Model Rule 4.1(B) is moved to Rule 4.2(A)(3).

Comments [1] to [6] are taken from the corresponding comments to Model Rule 4.1. Comment [1] does not contain a phrase found in the Model Rule comment that references different judicial selection methods. Comment [4] is modified to remove a phrase contained in the Model Rule comment that would permit candidate endorsements prohibited by Rule 4.1(A)(3). Comment [6] is revised to delete a reference to caucus elections.

Comment [7] corresponds to Model Rule 4.1, Comment [10], and Comments [8] to [12] correspond to Model Rule Comments [11] to [15]. Comment [8] is revised to further underscore the need for narrowly tailored limitations on the campaign activity of judicial candidates. The inserted language is based on the public reprimand administered by the Supreme Court of Florida to Judge Carven Angel in 2004. See *Florida Bar News*, July 1, 2004. Comment [13] is added to acknowledge conduct that is permissible under Rule 4.1(C).

RULE 4.2 Political and Campaign Activities of Judicial Candidates

(A) A *judicial candidate* shall be responsible for all of the following:

(1) Acting at all times in a manner consistent with the *independence*, *integrity*, and *impartiality* of the judiciary;

(2) Reviewing and approving the content of all campaign statements and materials produced by the *judicial candidate* or his or her campaign committee before their dissemination;

(3) The content of any statement communicated in any medium by his or her campaign committee and for compliance by his or her campaign committee with the limitations on campaign solicitations and *contributions* contained in Rule 4.4, if the candidate knew of the statement, solicitation, or *contribution*;

(4) No earlier than one year prior to or no later than sixty days after certification of his or her candidacy by the election authority, completing a two-hour course in campaign practices, finance, and ethics accredited by the Commission on Continuing Legal Education and certifying such completion within five days of the date of the course to the Board of Professional Conduct.

(B) A *judicial candidate* shall not do any of the following:

(1) Jointly raise funds with a candidate for nonjudicial office, except as permitted by division (C) of this rule;

(2) Appear in a joint campaign advertisement with a candidate for nonjudicial office, except as permitted by division (C) of this rule;

(3) Expend funds in a judicial campaign that have been contributed to the *judicial candidate* to promote his or her candidacy for a nonjudicial office.

(C) A *judicial candidate* may do any of the following:

(1) Conduct joint fundraising activities with other *judicial candidates*;

(2) Appear in joint campaign advertisements with other *judicial candidates*;

(3) Participate with *judicial* and nonjudicial *candidates* in fundraising activities organized or sponsored by a *political party*;

(4) Appear with other candidates for public office on slate cards, sample ballots, and other publications of a *political party* that identify all of the candidates endorsed by the party in an election;

(5) Seek, accept, or use endorsements from any person or *organization*;

(6) State in person or in advertising that he or she is a member of, affiliated with, nominee of, or endorsed by a *political party.*

Comment

[1] A judicial candidate remains subject to Rules 4.1, 4.3, and 4.4, in addition to the requirements of this rule. For example, a candidate continues to be prohibited from soliciting funds for a political party, knowingly making false or misleading statements during a campaign, or making certain promises, pledges, or commitments related to future adjudicative duties. See Rule 4.1(A), 4.3, and 4.4(F).

[2] In elections for judicial office, a candidate may be nominated by or otherwise publicly identified or associated with a political party. This relationship may be maintained through the period of the campaign, and a judicial candidate may include political party affiliation or similar designations in his or her campaign communications. Although these affiliations and others may be communicated to the electorate, a judicial candidate should consider the effect that partisanship has on the principles of judicial independence, integrity, and impartiality.

Comparison to Ohio Code of Judicial Conduct

Rule 4.2 contains many of the provisions found in Ohio Canons 7(B), (C), and (F). The rule is organized in three parts: division (A) sets forth activities for which a judicial candidate is responsible during the campaign; division (B) sets forth prohibited campaign activities; and division (C) lists permissible campaign activities.

Rule 4.2(A)(1) reflects the "independence, integrity, and impartiality" standard used elsewhere in the Code and replaces the "maintain the dignity appropriate to judicial office" standard found in Ohio Canon 7(B)(1). Rules 4.2(A)(2) and (3) are analogous to Ohio Canon 7(F), with the addition of placing an affirmative duty on a judicial candidate to review and approve the content of campaign statements and materials prior to dissemination. Rule 4.2(A)(4) is identical to the substance of Ohio Canon 7(B)(5).

Rules 4.2(B)(1) and (2) retain the prohibitions on fundraising and advertising with nonjudicial candidates found in Ohio Canon 7(B)(2)(g). Rule 4.2(B)(3) is identical to Ohio Canon 7(C)(7)(a), and Rule 4.2(B)(4) corresponds to Ohio Canon 7(B)(3)(b).

Rules 4.2(C)(1), (2), (3), and (4) correspond to conduct that is permissible under Ohio Canon 7(B)(2)(g). Rule 4.2(C)(5) affirms what is permissible under Canon 7—that a judicial candidate may seek, accept, and use endorsements from persons and organizations. Rule 4.3 and case law govern the manner in which endorsements are used in campaign communications. See *In re Judicial Campaign Complaint Against Roberts* (1996), 82 Ohio Misc.2d 59; *In re Judicial*

Campaign Complaint Against Burick (1999), 95 Ohio Misc.2d 1; and *Disciplinary Counsel v. Kaup* 102 Ohio St.3d 29, 2004-Ohio-1525.

Rule 4.2(C)(6) permits the use of party nominations and endorsements in campaign communications throughout a judicial campaign, and Rule 4.2(C)(7) allow party affiliation or membership to be communicated in person or in advertising through the date of the primary election. These provisions continue the standards contained in Ohio Canons 7(B)(3)(a)(iii) and (iv).

Comparison to ABA Model Code of Judicial Conduct

Model Rule 4.2 sets forth standards applicable to judicial candidates who are subject to public election, whether the election is a retention election or partisan or nonpartisan in nature. Rule 4.2 retains many of these standards and modifies or eliminates others to reflect the present system of selecting judges in Ohio.

Model Rule 4.2(A)(1) is retained in Rule 4.2(A)(1).

Model Rule 4.2(A)(2) is unnecessary in light of statutory provisions contained in Title 35 of the Revised Code applicable to all candidates for public office.

Model Rule 4.2(A)(3) is identical in substance to Rule 4.2(A)(2), and Model Rule 4.2(A)(4) is replaced by the more definitive requirement found in Rule 4.2(A)(3). Rule 4.2(A)(4) has no counterpart in the Model Code.

Model Rules 4.2(B) and (C) are replaced by the provisions of Rule 4.2(B) and (C) that are taken from Ohio Canon 7.

Comments [1] and [2] correspond to Model Rule 4.2, Comments [2] and [3], with modifications to conform the comments to the rule. Comments [1] and [4] to [7] of the Model Rule are inconsistent with Rule 4.2 and other provisions of Canon 4 and are not adopted.

RULE 4.3 Campaign Standards and Communications

During the course of any campaign for nomination or election to judicial office, a *judicial candidate*, by means of campaign materials, including sample ballots, advertisements on radio or television or in a newspaper or periodical, electronic communications, a public speech, press release, or otherwise, shall not *knowingly* or with reckless disregard do any of the following:

(A) Post, publish, broadcast, transmit, circulate, or distribute information concerning the *judicial candidate* or an opponent, either *knowing* the information to be false or with a reckless disregard of whether or not it was false;

(B) Manifest bias or prejudice toward an opponent based on race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status;

(C) Use the title of a public office or position immediately preceding or following the name of the *judicial* candidate, when the judicial candidate does not hold that office or position;

(D) Use the term "judge" when the *judicial candidate* is not a judge unless that term appears after or below the name of the *judicial candidate* and is accompanied by either or both of the following:

(1) The words "elect" or "vote," in *prominent lettering*, before the *judicial candidate's* name;

(2) The word "for," in *prominent lettering*, between the name of the *judicial candidate* and the term "judge;"

(E) Use the term "former" or "retired" immediately preceding the term "judge" unless the term "former" or "retired" appears each time the term "judge" is used and the term "former" or "retired" appears in *prominent lettering*;

(F) Use the term "re-elect" in either of the following circumstances:

(1) When the *judicial candidate* has never been elected at a general or special election to the office for which he or she is a *judicial candidate*;

(2) When the *judicial candidate* is not the current occupant of the office for which he or she is a *judicial candidate*;

(G) Misrepresent his or her identity, qualifications, present position, or other fact or the identity, qualifications, present position, or other fact of an opponent;

(H) Make a false statement concerning the formal schooling or training completed or attempted by a *judicial candidate*; a degree, diploma, certificate,

scholarship, grant, award, prize of honor received, earned, or held by a *judicial candidate*; or the period of time during which a *judicial candidate* attended any school, college, community technical school, or institution;

(I) Make a false statement concerning the professional, occupational, or vocational licenses held by a *judicial candidate*, or concerning any position a *judicial candidate* held for which he or she received a salary or wages;

(J) Make a false statement that a *judicial candidate* has been arrested, indicted, or convicted of a crime;

(K) Make a statement that a *judicial candidate* has been arrested, indicted, or convicted of any crime without disclosing the outcome of all pending or concluded legal proceedings resulting from the arrest, indictment, or conviction;

(L) Make a false statement that a *judicial candidate* has a record of treatment or confinement for mental disorder;

(M) Make a false statement that a *judicial candidate* has been subjected to military discipline for criminal misconduct or dishonorably discharged from the armed services;

(N) Falsely identify the source of a statement, issue statements under the name of another person without authorization, or falsely state the endorsement of or opposition to a *judicial candidate* by a person, *organization*, *political party*, or publication.

Comment

[1] A judicial candidate must be scrupulously fair and accurate in all statements made by the candidate and his or her campaign committee. This rule obligates the candidate and the committee to refrain from making statements that are false or misleading or that omit facts necessary to make the communication considered as a whole not materially misleading. Also see Rule 4.2.

[2] A sitting judge, who is a judicial candidate for a judicial office other than the court on which he or she currently serves, violates Rule 4.3(C) if he or she uses the title “judge" without identifying the court on which the judge currently serves.

[3] The use of the title of a public office or position is reserved for those persons who contemporaneously hold the office by election or appointment. The use of the title by one not entitled by law to the office or position falsely states incumbency and thus is inherently misleading and deceptive. A judicial candidate who uses the title in contravention of the rule is acting in a manner inconsistent with the independence, integrity, and impartiality of the judiciary.

Comparison to Ohio Code of Judicial Conduct

Rule 4.3 contains standards governing the content of campaign communications that are taken from Ohio Canons 7(B), (D), and (E). Specifically:

- Rules 4.3(A) and (B) correspond to Ohio Canons 7(E)(1) and (2);
- Rule 4.3(C) corresponds to Ohio Canon 7(D)(1);
- Rule 4.3(D) corresponds to Ohio Canon 7(D)(3);
- Rule 4.3(E) corresponds to Ohio Canon 7(D)(4), with a modification to preclude a former judge from using the term "re-elect" when seeking to return to the office to which he or she was previously elected. See *In re Judicial Campaign Complaint Against Lilly* (2008), 117 Ohio St.3d 1467.
- Rule 4.3(F) corresponds to Ohio Canon 7(B)(2)(f);
- Rules 4.3(G) to (M) correspond to Ohio Canons 7(D)(5) to (11).

Comment [2] indicates that use of the title "judge" by an incumbent judge who is running for a different judicial office is a violation of Rule 4.3(C) if the incumbent does not identify the court on which he or she presently serves. See Ohio Canon 7(D)(2).

Comparison to ABA Model Code of Judicial Conduct

Because Ohio judges are elected, Model Rule 4.3, which governs the conduct of candidates for appointive judicial office, is not adopted in Ohio. The Ohio version of Rule 4.3 contains standards governing the content of campaign communications by judicial candidates.

Comment [1] corresponds to Model Rule 4.1, Comment [7]. Comment [2] is added to note that the prohibition contained in Canon 7(D)(2) is now encompassed by the prohibition in Rule 4.3(C) against misusing the title of an office not currently held by the judicial candidate.

RULE 4.4 Campaign Solicitations and Contributions

(A) A *judicial candidate* shall not personally solicit campaign *contributions*, except as expressly authorized in this division, and shall not personally receive campaign *contributions*. A *judicial candidate* may establish a campaign committee to manage and conduct a campaign for the candidate, subject to the provisions of this Code. The *judicial candidate* is responsible for ensuring that his or her campaign committee complies with applicable provisions of this Code and other applicable *law*. A *judicial candidate* may solicit campaign contributions in the following manner:

(1) A judicial candidate may make a general request for campaign *contributions* when speaking to an audience of twenty or more individuals;

(2) A *judicial candidate* may sign letters soliciting campaign *contributions* if the letters are for distribution by the *judicial candidate's* campaign committee and the letters direct *contributions* to be sent to the campaign committee and not to the *judicial candidate;*

(3) A *judicial candidate* may make a general request for campaign *contributions* via an electronic communication that is in text format if *contributions* are directed to be sent to the campaign committee and not to the *judicial candidate*.

(B) A *judicial candidate* shall prohibit public employees subject to his or her direction or control from soliciting or receiving campaign *contributions*.

(C) The campaign committee of a *judicial candidate* shall not *knowingly* solicit or receive, directly or indirectly, for any political or personal purpose any of the following:

(1) A *contribution* from any employee of the court or person who does business with the court in the form of a contractual or other arrangement in which the person, in the current year or any of the previous six calendar years, received as payment for goods or services *aggregate* funds or fees regardless of the source in excess of two hundred fifty dollars. The committee may receive campaign *contributions* from lawyers who are not employees of the court or doing business with the court in the form of a contractual or other arrangement.

(2) A *contribution* from any appointee of the court unless the campaign committee, on its campaign *contribution* and expenditure statement, reports the name, address, occupation, and employer of the appointee, identifies the person as an appointee of the court, and indicates whether the appointee, in the current year or in any of the previous six calendar years, received *aggregate* compensation from court appointments in excess of two hundred fifty dollars.

(3) A *contribution* from a *political party* unless the *contribution* is made from a separate fund established by the *political party* solely to receive donations for *judicial candidates* and the *political party* reports on the *contribution* and expenditure statements filed by the party the name, address, occupation, and employer of each person who contributed to the separate fund established by the *political party*.

(D) As used in division (C) of this rule:

(1) "Appointee" does not include a person whose appointment is approved, ratified, or made by the court based on an intention expressed in a document such as a will, trust, agreement, or contract.

(2) "Court" means the court for which the *judicial candidate* is seeking election and, if applicable, the court on which he or she currently serves. If the *judicial candidate* is seeking election to a division of a court of common pleas or a municipal court, "court" means the division of the court for which the *judicial candidate* is seeking election and, if applicable, the court or division of the court on which he or she currently serves.

(3) "Division" means any of the following whether separate or in combination: general division of the court of common pleas; domestic relations division of the court of common pleas; juvenile division of the court of common pleas; probate division of the court of common pleas; housing or environmental division of the municipal court.

(4) "Compensation" does not include reasonable reimbursement for travel, meals, and other expenses received by an appointee who serves in a volunteer capacity.

(E) The campaign committee of a *judicial candidate* may begin soliciting and receiving *contributions* no earlier than one hundred twenty days before the first Tuesday after the first Monday in May of the year in which the general election is held. If the general election is held in 2012 or any fourth year thereafter, the campaign committee of a *judicial candidate* may begin soliciting and receiving *contributions* no earlier than one hundred twenty days before the first Tuesday after the first Monday in March of the year in which the general election is held. Except as provided in divisions (F) and (G) of this rule, the solicitation and receipt of *contributions* may continue until one hundred twenty days after the general election.

(F) If the candidate is defeated prior to the general election, the solicitation and receipt of *contributions* may continue until such time as the *contributions* solicited are sufficient to pay the campaign debts and obligations of the *judicial candidate* incurred on or before the date of the primary election, plus the costs of solicitation incurred after the date of the primary election, but in no event shall the solicitation or receipt of *contributions* continue beyond one hundred twenty days after the date of the

election at which the defeat occurred. Notwithstanding division (J) of this rule, the limits on *contributions* in a primary election period shall apply to any *contributions* solicited or received by the campaign committee of the defeated *judicial candidate* after the date of the primary election.

(G) In the case of the death or withdrawal of a *judicial candidate*, the solicitation and receipt of *contributions* may continue until such time as the *contributions* solicited are sufficient to pay the campaign debts and obligations of the *judicial candidate* incurred on or before the date of death or withdrawal, plus the costs of solicitation incurred after the date of death or withdrawal, but in no event shall the solicitation or receipt of *contributions* continue beyond one hundred twenty days after the date of death or withdrawal.

(H) Notwithstanding any provision of division (E) of this rule to the contrary, a *judicial candidate* may do either or both of the following:

(1) Not more than ninety days prior to the commencement of the one hundred twenty-day fundraising period described in division (E) of this rule, contribute personal funds to his or her campaign committee;

(2) After the conclusion of the applicable fundraising period described in division (E), (F), or (G) of this rule, contribute personal funds to his or her campaign committee for the express purpose of satisfying any campaign debt that was incurred during the applicable fundraising period and that remains unpaid at the conclusion of the applicable fundraising period. The name of the individual or entity to whom the debt is owed, the amount of the debt, and the date on which the debt was incurred shall be clearly noted on the appropriate campaign contribution and expenditure statement.

(I) Except as otherwise provided in division (J) of this rule, the campaign committee of a *judicial candidate* shall not directly or indirectly solicit or receive in the fundraising period allowed by division (E), (F), or (G) of this rule a campaign *contribution aggregating* more than the following:

(1) From an individual other than the *judicial candidate* or a member of his or her *immediate family*, three thousand six hundred dollars in the case of a *judicial candidate* for chief justice or justice of the Supreme Court, one thousand two hundred dollars in the case of a *judicial candidate* for the court of appeals, or six hundred dollars in the case of a *judicial candidate* for the court of common pleas, municipal court, or county court.

(2) From any *organization*, six thousand seven hundred dollars in the case of a *judicial candidate* for chief justice or justice of the Supreme Court or three thousand six hundred dollars in the case of all other *judicial candidates*.

(3) From a *political party*:

(a) Three hundred thirty-three thousand dollars in the case of a *judicial candidate* for chief justice or justice of the Supreme Court;

(b) Seventy-two thousand seven hundred dollars in the case of a *judicial candidate* for the court of appeals;

(c) Seventy-two thousand seven hundred dollars in the case of a *judicial candidate* for a court of common pleas, municipal court, or county court that serves a territorial jurisdiction with a population of more than seven hundred fifty thousand;

(d) Sixty thousand five hundred dollars in the case of a *judicial candidate* for a court of common pleas, municipal court, or county court that serves a territorial jurisdiction with a population of seven hundred fifty thousand or less;

(J) If a *judicial candidate* is opposed in a primary election, the campaign committee of that *judicial candidate* shall not directly or indirectly solicit or receive either of the following:

(1) A campaign *contribution* from an individual or an *organization aggregating* more than the applicable limitation contained in division (I)(1) or (2) of this rule in a primary election period or in a general election period;

(2) A campaign *contribution* from a *political party aggregating* more than the applicable limitation contained in division (I)(3) of this rule in a general election period or aggregating more than the following during a primary election period:

(a) One hundred eighty-one thousand six hundred dollars in the case of a *judicial candidate* for chief justice or justice of the Supreme Court;

(b) Thirty-six thousand three hundred dollars in the case of a *judicial candidate* for the court of appeals;

(c) Thirty-six thousand three hundred dollars in the case of a *judicial candidate* for a court of common pleas, municipal court, or county court that serves a territorial jurisdiction with a population of more than seven hundred fifty thousand;

(d) Thirty thousand three hundred dollars in the case of a *judicial candidate* for a court of common pleas, municipal court, or county court that serves a territorial jurisdiction with a population of seven hundred fifty thousand or less.

(K) As used in division (J) of this rule, “primary election period” begins on the first day on which *contributions* may be solicited and received pursuant to division (E) of this rule and ends on the day of the primary election, and “general election period” begins on the day after the primary election and ends on the last day on which *contributions* may be solicited or received pursuant to division (E) of this rule.

(L) For purposes of division (I), (J), and (K) of this rule:

(1) *Contributions* received from *political action committees* that are established, financed, maintained, or controlled by the same corporation, nonprofit corporation, partnership, limited liability company, association, professional association, continuing association, estate, trust, business trust, or other entity, including any parent, subsidiary, local, division, or department of that same corporation, nonprofit corporation, partnership, limited liability company, association, professional association, continuing association, estate, trust, business trust, or other entity, shall be considered to have been received from a single *political action committee*.

(2) All *contributions* received by a *judicial candidate* from a national, state, or county *political party* shall be combined in applying the limits set forth in division (J)(3) of this rule.

(3) *In-kind contributions* consisting of goods and compensated services shall be assigned a fair market value by the campaign committee and shall be subject to the same limitations and reporting requirements as other *contributions*.

(4) A *loan* made to a campaign committee by a person other than the *judicial candidate* or a member of his or her *immediate family* shall not exceed an amount equal to two times the applicable *contribution* limit, and amounts in excess of the applicable *contribution* limit shall be repaid within the fundraising period allowed by division (E) of this rule. A debt remaining at the end of the fundraising period shall be treated as a *contribution* and subject to the applicable *contribution* limit.

(5) A debt incurred by a judge or *judicial candidate* in a previous campaign for public office and forgiven by the individual, *organization*, or *political party* to whom the debt is owed shall not be considered a campaign *contribution*.

(M) In applying the *contribution* limits contained in division (I) and (J) of this rule, the *contribution*s of an individual or *organization* to a *judicial candidate* fund established by a *political party* shall not be *aggregated* with other *contributions* from the same individual or *organization* made directly to the campaign committee of a *judicial candidate* unless the campaign committee of the *judicial candidate* directly or indirectly solicited the *contribution* to the *judicial candidate* fund.

(N) On or before the first day of December beginning in 2008 and every four years thereafter, the director of the Board of Professional Conduct shall determine the percentage change over the preceding forty-eight months in the Consumer Price Index for All Urban Consumers, or its successive equivalent, as determined by the United States Department of Labor, Bureau of Labor Statistics, or its successor in responsibility, for all items, Series A. The director shall apply that percentage change to the *contribution* limitations then in effect and notify the Supreme Court of the results of that calculation. The Supreme Court may adopt revised *contribution* limitations based on the director's calculation or other factors that the Court considers appropriate.

CONTRIBUTION LIMITS
Effective January 1, 2013

CANDIDATE FOR:	**INDIVIDUAL**		**ORGANIZATION**		**POLITICAL PARTY**	
	Primary*	**General**	**Primary***	**General**	**Primary***	**General**
Supreme Court Chief Justice and Justice	$3,600	$3,600	$6,700	$6,700	$181,600	$333,000
Court of Appeals	$1,200	$1,200	$3,600	$3,600	$36,300	$72,700
Common Pleas, Municipal, and County Court more than 750,000	$600	$600	$3,600	$3,600	$36,300	$72,700
750,000 or less	$600	$600	$3,600	$3,600	$30,300	$60,500

*Primary limits apply only if the judicial candidate has a contested primary. If there is no contested primary, the general election limits apply throughout the permissible fundraising period.

Comment

[1] A judicial candidate is prohibited from personally soliciting campaign contributions and personally receiving campaign contributions. These limitations protect four vital interests: (1) avoiding the appearance of coercion or *quid pro quo*, especially when a judicial candidate engages in a one-on-one solicitation of a lawyer or party who appears before the court; (2) preserving both the appearance and reality of an impartial, independent, and noncorrupt judiciary; (3) ensuring the public's right to due process and fairness; and (4) furthering the public trust and confidence in the impartiality of the judicial decision-maker. Rule 4.4(A) recognizes that some forms of solicitation are less coercive and less intrusive than others and permits a candidate to engage in solicitations that are less personal and directed at a wider

audience. A judicial candidate who directly solicits campaign contributions in a manner authorized by Rule 4.4(A)(1)-(3) is subject to the limitations relating to the solicitation and receipt of campaign contributions contained in Canon 4. Public employees subject to the direction or control of a judicial candidate are prohibited from soliciting or receiving campaign contributions.

[2] A judicial candidate may establish a judicial campaign committee to solicit and accept campaign contributions, manage the expenditure of campaign funds, and generally conduct the campaign. In so doing, the campaign committee shall follow the provisions of the rule regarding the solicitation and receipt of contributions. A campaign committee shall follow all time guidelines controlling when judicial fundraising shall begin and end in reference to a particular judicial election.

[3] The campaign committee may accept contributions that do not exceed the limitations established for individuals, organizations, and political parties. The judicial candidate is responsible under Rule 4.2(A)(3) for compliance by his or her campaign committee with the limitations established on campaign solicitations and contributions.

Comparison to Ohio Code of Judicial Conduct

Rule 4.4 corresponds to Ohio Canon 7(C), with two substantive differences:

- The provisions of Ohio Canon 7(C)(7), governing the use of campaign funds, are moved to Rules 4.1(A)(4), 4.1(B)(2) and (3), and 4.2(B)(3);

- The requirement of Ohio Canon 7(C)(8), requiring a successful candidate to file copies of his or her campaign finance reports with the clerk of court, is not retained. Increasingly, campaign finance statements are available electronically, through web sites maintained by the Secretary of State and county boards of election.

Comparison to ABA Model Code of Judicial Conduct

Model Rule 4.4, governing the conduct of judicial campaign committees, is replaced by Ohio's more comprehensive provisions regulating the solicitation and receipt of campaign contributions. The Ohio version of Rule 4.4 has provisions analogous to Model Rule 4.4(B)(1) and (2).

Rule 4.4, Comments [1] and [2] correspond to the same comments in Model Rule 4.4, with modifications to reflect the content of the Ohio rule. Comment [3] is new and does not correspond to Comment [3] of the Model Rule.

RULE 4.5 Activities of a Judge Who Becomes a Candidate for Nonjudicial Office

Upon becoming a candidate in a primary or general election for a nonjudicial elective office, a judge shall resign from judicial office. A judge may continue to hold judicial office while he or she is a candidate for election to or serving as a delegate in a state constitutional convention, if the judge is otherwise permitted by law to do so.

Comment

[1] In campaigns for nonjudicial elective public office, candidates may make pledges, promises, or commitments related to positions they would take and ways they would act if elected to office. Although appropriate in nonjudicial campaigns, this manner of campaigning is inconsistent with the role of a judge, who must remain fair and impartial to all who come before him or her. The potential for misuse of the judicial office, and the political promises that the judge would be compelled to make in the course of campaigning for nonjudicial elective office, together dictate that a judge who wishes to run for such an office must resign upon becoming a candidate.

[2] The "resign to run" rule ensures that a judge cannot use the judicial office to promote his or her candidacy, and prevents post-campaign retaliation from the judge in the event the judge is defeated in the election.

Comparison to Ohio Code of Judicial Conduct

Rule 4.5 is identical in substance to Ohio Canon 7(B)(4).

Comparison to ABA Model Code of Judicial Conduct

Rule 4.5 is similar to Model Rule 4.5. However, the Ohio rule contains an absolute requirement that a judge resign from judicial office upon becoming a candidate for nonjudicial office, without drawing a distinction between elective and appointive office. The Ohio rule also includes language that allows a judge to remain in office while seeking election to or serving as a delegate in a state constitutional convention.

RULE 4.6 Definitions

As used in Canon 4:

(A) "Aggregate" means not only contributions in cash or in-kind made directly to a candidate's campaign committee, but also all contributions made indirectly with the understanding that they will be used to support the election of a candidate or to oppose the election of the candidate's opponent.

(B) "Contribution" has the same meaning as in R.C. 3517.01 and includes an in-kind contribution.

(C) "Immediate family" means a spouse or domestic partner or any of the following who are related by blood or marriage to the judicial candidate:

(1) Parent;

(2) Child;

(3) Brother or sister;

(4) Grandparent;

(5) Grandchild;

(6) Uncle or aunt;

(7) Nephew or niece;

(8) Great-grandparent;

(9) First cousin.

(D) "Domestic partner," "independence," "integrity," "impartiality," "impending," and "pending" have the same meaning as in the Terminology section of this code.

(E) "In-kind contribution" has the same meaning as in R.C. 3517.01.

(F) "Judicial candidate" means a person who has made a public announcement of candidacy for judicial office, declared or filed as a candidate for judicial office with the election authority, or authorized the solicitation or receipt of contributions or support for judicial office, whichever occurred first.

(G) "Knowingly" means actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.

(H) "Law firm" means a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship, or other association authorized to practice law or lawyers engaged in a private or public legal aid or public defender organization, a legal services organization, the legal department of a corporation or other organization, or the attorney general, prosecuting attorney, law director, or other public office.

(I) "Loan" means an advance of money with an absolute promise to pay, with or without interest, and includes loan guarantees.

(J) "Organization" means any entity or combination of two or more persons, other than a political party, including, but not limited to, a corporation, nonprofit corporation, partnership, limited liability company, association, professional association, continuing association, estate, trust, business trust, political action committee as defined in R.C. 3517.01, law firm, organization affiliated with a political party, labor organization, campaign committee of another candidate for public office, or caucus campaign committee.

(K) "Organization affiliated with a political party" means a combination of two or more persons, other than a political party or an organization, that is identified by its name or association with a national, state, or county political party or expressly promotes the interests, philosophy, or candidates of a political party.

(L) "Political action committee" has the same meaning as in R.C. 3517.01.

(M) "Political party" has the same meaning as in R.C. 3517.01 and includes any national, state, or county political party.

(N) "Prominent lettering" means not less than the size of the largest type used to display the title of office or the court to which the judicial candidate seeks election.

Comparison to Ohio Code of Judicial Conduct

Rule 4.6 is analogous to Ohio Canon 7(A). The following definitions in Rule 4.6 have been added to or modified from those contained in Ohio Canon 7(A):

- A definition of "aggregate" has been added based on the definition contained in the Terminology section of the Model Code;
- "Immediate family" has been modified to include a reference to "domestic partner" and specify that the definition includes first cousins only;
- Definitions of "domestic partner," "integrity," "independence," and "impartiality," "impending," and "pending" have been added to correspond to the Terminology section of the code;

- "In-kind contribution" has been modified to conform to the statutory definition contained in R.C. 3517.01. See *Disciplinary Counsel v. Spicer* 106 Ohio St.3d 247, 2005-Ohio-4788;

- "Law firm" has been modified to conform to the definition found in Rule 1.0 of the Ohio Rules of Professional Conduct, with the addition of references to lawyers who practice together in a public office.

Comparison to ABA Model Code of Judicial Conduct

The Model Code contains no rule analogous to Rule 4.6. The definitions applicable to Model Canon 4 are contained in the Terminology section of the Model Code.

FORM OF CITATION, EFFECTIVE DATE, APPLICATION

(A) These rules shall be known as the Ohio Code of Judicial Conduct and cited as "Jud. Cond. Rule ___."

(B) The Ohio Code of Judicial Conduct shall take effect March 1, 2009, at which time the Code shall supersede and replace the Ohio Code of Judicial Conduct, in effect prior to March 1, 2009, to govern the conduct of judges occurring on or after that effective date. The former Ohio Code of Judicial Conduct shall continue to apply to govern conduct occurring prior to March 1, 2009 and shall apply to all disciplinary investigations and prosecutions relating to conduct that occurred prior to March 1, 2009.

(C) The amendments to the Jud. Cond. Rule 4.2(B) and (C) and Comment [2] and Jud. Cond. Rule 4.4(A) and Comment [1]) adopted by the Supreme Court of Ohio on August 10, 2010, shall take effect on August 12, 2010.

(D) The amendment to the Jud. Cond. Rule 4.4(F) adopted by the Supreme Court of Ohio on August 8, 2011, shall take effect on August 9, 2011.

(E) The amendment to the Jud. Cond. Rule 4.4(F) and Temporary Provision adopted by the Supreme Court of Ohio on October 4, 2011, shall take effect on October 5, 2011.

(F) The amendments to Jud.Cond. Rule 4.4(I) and (J) adopted by the Supreme Court of Ohio on December 5, 2012, shall take effect on January 1, 2013. The amended contribution limits shall apply to fundraising that occurs on behalf of judicial candidates who campaign for election to judicial offices that will appear on the ballot in the 2013 and subsequent years. The contribution limits that were in effect prior to January 1, 2013, shall apply to fundraising that has occurred or will occur on behalf of judicial candidates who campaigned for election to judicial offices that appeared on the ballot in calendar year 2012.

(G) The amendments to Jud.Cond. Rules 4.3(C) and (E), Rules 4.4(A)(3) and 4.6(D) and (N) adopted December 5, 2012, shall take effect on January 2, 2013.

(H) The amendment to the Terminology section adopted by the Supreme Court of Ohio on November 13, 2012, shall take effect on January 1, 2014.

(I) The amendments to Jud.Cond. Rule 4.3(A), adopted by the Supreme Court of Ohio on November 18, 2014, in response to *In re Judicial Campaign Complaint Against O'Toole,* Slip Opinion No. 2014-Ohio-4046, shall take effect immediately and apply retroactively to September 24, 2014.

(J) The amendments to Jud. Cond. Rule 3.15 and Comment [2], Jud. Cond. Rule 4.2(A)(4), and Jud. Cond. Rule 4.4(N), adopted August 11, 2015, shall take effect on August 11, 2015.

APPENDIX A

CORRELATION TABLE
2009 OHIO CODE OF JUDICIAL CONDUCT TO
FORMER OHIO CODE OF JUDICIAL CONDUCT

The following is a numerical listing of the 2009 Ohio Code of Judicial Conduct with cross-references to substantially similar provisions of the former Ohio Code of Judicial Conduct. Please consult the code comparisons that follow each rule for a more detailed treatment of corresponding provisions.

2009 OHIO CODE OF JUDICIAL CONDUCT	**FORMER OHIO CODE OF JUDICIAL CONDUCT**
Preamble and Scope	Preamble
Application	Compliance
Terminology	Terminology
CANON 1	
Rule 1.1 Compliance with the Law	Canon 2
Rule 1.2 Promoting Confidence in the Judiciary	Canons 1 and 2
Rule 1.3 Avoiding Abuse of the Prestige of Judicial Office	Canon 4(A)
CANON 2	
Rule 2.1 Giving Precedence to Duties of Judicial Office	Canon 3(A)
Rule 2.2 Impartiality and Fairness	Canons 3(B)(2) & (B)(5)
Rule 2.3 Bias, Prejudice, and Harassment	
Rule 2.3(A)	Canon 3(B)(5), 1st sentence
Rule 2.3(B)	Canon 3(B)(5), 2nd sentence
Rule 2.3(C)	Canon 3(B)(6)
Rule 2.3(D)	cf. Canon 3(B)(6)

Rule 2.4 External Influences on Judicial Conduct	
Rule 2.4(A)	Canon 3(B)(2)
Rule 2.4(B)	Canon 4(A)
Rule 2.4(C)	Canon 4(A)
Rule 2.5 Competence, Diligence, and Cooperation	
Rule 2.5(A)	Canon 3(B)(8)
Rule 2.5(B)	Canon 3(C)(1)
Rule 2.6 Ensuring the Right to be Heard	None
Rule 2.7 Responsibility to Decide	Canon 3(B)(1)
Rule 2.8 Decorum, Demeanor, and Communication with Jurors	
Rule 2.8(A)	Canon 3(B)(3)
Rule 2.8(B)	Canon 3(B)(4)
Rule 2.8(C)	Canon 3(B)(10)
Rule 2.9 *Ex Parte* Contacts and Communications with Others	
Rule 2.9(A)(1)	Canon 3(B)(7)(a)
Rule 2.9(A)(2)	Canon 3(B)(7)(b)
Rule 2.9(A)(3)	Canon 3(B)(7)(c)
Rule 2.9(A)(4)	None
Rule 2.9(A)(5)	Canon 3(B)(7)(d)
Rule 2.9(A)(6)	None
Rule 2.9(B)	None
Rule 2.9(C)	None
Rule 2.9(D)	None
Rule 2.10 Judicial Statements on Pending and Impending Cases	
Rule 2.10(A)	Canon 3(B)(9) and Canon 7(B)(2)(e)
Rule 2.10(B)	Canons 7(B)(2)(c) & (d)
Rule 2.10(C)	Canon 3(B)(9)
Rule 2.10(D)	Canon 3(B)(9)
Rule 2.10(E)	None

Rule 2.11 Disqualification

Rule 2.11(A)(1)	Canon 3(E)(1)(a)
Rule 2.11(A)(2)	Canon 3(E)(1)(d) [part]
Rule 2.11(A)(3)	Canon 3(E)(1)(c)
Rule 2.11(A)(5)	None
Rule 2.11(A)(6)	Canon 3(E)(1)(d)(iii)
Rule 2.11(A)(7)	Canon 3(E)(1)(b) [part]
Rule 2.11(B)	Canon 3(E)(2)
Rule 2.11(C)	Canon 3(F)

Rule 2.12 Supervisory Duties

Rule 2.12(A)	Canon 3(C)(2)
Rule 2.12(B)	Canon 3(C)(3)

Rule 2.13 Administrative Appointments

Rule 2.13(A)	Canon 3(C)(4), 1st three sentences
Rule 2.13(C)	Canon 3(C)(4), last sentence

Rule 2.14 Disability and Impairment

Rule 2.14(A)	None
Rule 2.14(B)	Canon 3(D)(4)

Rule 2.15 Responding to Judicial and Lawyer Misconduct

Rule 2.15(A)	Canon 3(D)(1)
Rule 2.15(B)	Canon 3(D)(2)

Rule 2.16 Cooperation with Disciplinary Authorities — cf. Canon 3(D)(3)

CANON 3

Rule 3.1 Extrajudicial Activities in General

Rule 3.1(A)	None
Rule 3.1(B)	Canon 2(A)
Rule 3.1(C)	Canon 2(A)
Rule 3.1(D)	None
Rule 3.1(E)	None

Rule 3.2 Appearances Before Governmental Bodies and Consultation with Government Officials	
Rule 3.2(A)	Canon 2(A)(2)
Rule 3.2(B)	None
Rule 3.2(C)	Canon 4(C)(1)
Rule 3.3 Testifying as a Character Witness	Canon 4(A), last sentence
Rule 3.4 Appointments to Governmental Positions	Canon 4(C)(2)
Rule 3.5 Use of Nonpublic Information	None
Rule 3.6 Affiliation with Discriminatory Organizations	
Rule 3.6(A)	Canon 4(B)
Rule 3.6(B)	None
Rule 3.7 Participation in Educational, Religious, Charitable, Fraternal, or Civic Organizations and Activities	
Rule 3.7(A)	Canon 2(B), 1st paragraph
Rule 3.7(A)(1)	Canon 2(B)(2)(a)
Rule 3.7(A)(2)	Canon 2(B)(2)(a)(i)
Rule 3.7(A)(3)	Canon 2(B)(2)(a)(ii)
Rule 3.7(A)(4)	Canon 2(B)(2)(c)
Rule 3.7(A)(5)	Canons 2(B)(2)(a) & (d)
Rule 3.7(A)(6)	Canon 2(B)(2)(b)
Rule 3.7(A)(7)	Canon 2(B)(1)
Rule 3.7(B)	None
Rule 3.8 Appointments to Fiduciary Positions	
Rule 3.8(A)	Canon 4(D)(1)
Rule 3.8(B)	Canon 4(D)(2)
Rule 3.8(C)	Canon 4(D)(3)
Rule 3.8(D)	None

Rule 3.9 Service as Arbitrator or Mediator	Canon 4(E)
Rule 3.10 Practice of Law	Canon 4(F)
Rule 3.11 Financial, Business, or Remunerative Activities	
Rule 3.11(A)	Canon 2(C)(2)
Rule 3.11(B)	Canon 2(C)(3)
Rule 3.11(C)	Canons 2(C)(1) & (4), first sentence
Rule 3.11(D)	Canon 2(C)(4), second sentence
Rule 3.12 Compensation for Extrajudicial Activities	Canon 2(D)
Rule 3.13 Acceptance and Reporting of Gifts, Loans, Bequests, Benefits, or Other Things of Value	
Rule 3.13(A)	Canon 2(C)(5)
Rule 3.13(A)(1)	None
Rule 3.13(A)(2)	Canon 2(C)(5)(e)
Rule 3.13(A)(3)	Canon 2(C)(5)(c)
Rule 3.13(A)(4)	Canon 2(C)(5)(f)
Rule 3.13(A)(5)	None
Rule 3.13(A)(6)	Canon 2(C)(5)(g)
Rule 3.13(A)(7)	Canon 2(C)(5)(a)
Rule 3.13(A)(8)	Canon 2(C)(5)(b)
Rule 3.13(A)(9)	Canon 2(C)(5)(d)
Rule 3.13(A)(10)	Canon 2(C)(5)(a)
Rule 3.13(A)(11)(a)	Canon 2(C)(5)(a)
Rule 3.13(A)(11)(b)	None
Rule 3.13(A)(12)	Canon 2(C)(5)(h); R.C. 102.03
Rule 3.13(C)	Canon 2(D)(3)
Rule 3.14 Reimbursement of Expenses and Waivers of Fees or Charges	
Rule 3.14(A)	Canons 2(D) & (D)(1)
Rule 3.14(B)	Canon 2(D)(2)
Rule 3.14 (C)	Canon 2(D)(3)
Rule 3.15 Reporting Requirements	Canon 2(D)(3); R.C. 102.02

CANON 4

Rule 4.1 Political and Campaign Activities of Judges and Judicial Candidates

Rule 4.1(A)(1)	Canon 7(B)(2)(a)
Rule 4.1(A)(2)	Canon 7(B)(2)(b)
Rule 4.1(A)(3)	Canon 7(B)(2)(b)
Rule 4.1(A)(4)	Canons 7(C)(7)(b) & (c)
Rule 4.1(A)(5)	Canon 7(B)(2)(e)
Rule 4.1(A)(6)	cf. Canons 3(B)(9) & Canon 7(B)(2)(e)
Rule 4.1(A)(7)	Canons 7(B)(2)(c) & (d)
Rule 4.1(B)(1)	Canons 7(B)(3)(a)(i) & (ii)
Rule 4.1(B)(2)	Canons 7(C)(7)(b) & (c)
Rule 4.1(B)(3)	Canons 7(C)(7)(b) & (c)

Rule 4.2 Political and Campaign Activities of Judicial Candidates

Rule 4.2(A)(1)	Canon 7(B)(1)
Rule 4.2(A)(2)	Canon 7(F)
Rule 4.2(A)(3)	Canon 7(F)
Rule 4.2(A)(4)	Canon 7(B)(5)
Rule 4.2(B)(1)	Canon 7(B)(2)(g)
Rule 4.2(B)(2)	Canon 7(B)(3)(g)
Rule 4.2(B)(3)	Canon 7(C)(7)(a)
Rule 4.2(C)(1)	Canon 7(B)(3)(g)
Rule 4.2(C)(2)	Canon 7(B)(3)(g)
Rule 4.2(C)(3)	Canon 7(B)(3)(g)
Rule 4.2(C)(4)	Canon 7(B)(3)(g)
Rule 4.2(C)(5)	None
Rule 4.2(C)(6)	Canons 7(B)(3)(a)(iii) & (iv) and 7(B)(3)(b)

Rule 4.3 Campaign Standards and Communications

Rule 4.3(A)	Canon 7(E)(1)
Rule 4.3(B)	Canon 7(E)(2)
Rule 4.3(C)	Canon 7(D)(1)
Rule 4.3(D)	Canon 7(D)(3)
Rule 4.3(E)	Canon 7(D)(4)
Rule 4.3(F)	Canon 7(B)(2)(f)
Rule 4.3(G)	Canon 7(D)(5)

Rule 4.3(H)	Canon 7(D)(6)
Rule 4.3(I)	Canon 7(D)(7)
Rule 4.3(J)	Canon 7(D)(8)
Rule 4.3(K)	Canon 7(D)(9)
Rule 4.3(L)	Canon 7(D)(10)
Rule 4.3(M)	Canon 7(D)(11)

Rule 4.4 Campaign Solicitations and Contributions

Rule 4.4(A)	Canon 7(C)(2)(a)
Rule 4.4(B)	Canon 7(C)(1)
Rule 4.4(C)	Canons 7(C)(2)(a) (i) to (iii)
Rule 4.4(D)	Canon 7(C)(2)(b)
Rule 4.4(E)	Canon 7(C)(3)
Rule 4.4(F)	Canon 7(C)(4)(a)
Rule 4.4(G)	Canon 7(C)(4)(b)
Rule 4.4(H)	Canon 7(C)(4)(c)
Rule 4.4(I)	Canon 7(C)(4)(d)
Rule 4.4(J)	Canon 7(C)(5)(a)
Rule 4.4(K)	Canon 7(C)(5)(b)
Rule 4.4(L)	Canon 7(C)(5)(c)
Rule 4.4(M)	Canon 7(C)(5)(d)
Rule 4.4(N)	Canon 7(C)(5)(e)
Rule 4.4(O)	Canon 7(C)(6)

Rule 4.5 Activities of a Judge Who Becomes a Candidate for Nonjudicial Office — Canon 7(B)(4)

Rule 4.6. Definitions

Rule 4.6(A)	None
Rule 4.6(B)	Canon 7(A)(3)
Rule 4.6(C)	Canon 7(A)(11)
Rule 4.6(D)	None
Rule 4.6(E)	Canon 7(A)(4)
Rule 4.6(F)	Canon 7(A)(1)
Rule 4.6(G)	None
Rule 4.6(H)	Canon 7(A)(9)
Rule 4.6(I)	Canon 7(A)(5)
Rule 4.6(J)	Canon 7(A)(7)
Rule 4.6(K)	Canon 7(A)(10)
Rule 4.6(L)	Canon 7(A)(8)
Rule 4.6(M)	Canon 7(A)(6)

APPENDIX B

CORRELATION TABLE
FORMER OHIO CODE OF JUDICIAL CONDUCT TO
2009 OHIO CODE OF JUDICIAL CONDUCT

The following is a numerical listing of the former Ohio Code of Judicial Conduct with cross-references to provisions of 2009 Ohio Code of Judicial Conduct that address substantially similar subject-matter. Please consult the code comparisons that follow each rule for a more detailed treatment of corresponding provisions.

FORMER OHIO CODE OF JUDICIAL CONDUCT	2009 OHIO CODE OF JUDICIAL CONDUCT
CANON 1 A Judge Shall Uphold the Integrity and Independence of the Judiciary	Rule 1.2
CANON 2 A Judge Shall Respect and Comply with the Law and Shall Act in a Manner that Promotes Public Confidence in the Integrity and Impartiality of the Judiciary	Rules 1.1 and 1.2
Canon 2(A)(1) and (2)	Rules 3.1(B) & (C) and 3.2(A)
Canon 2(B)(1)(a)	Rules 3.7(A) & (A)(7)
Canon 2(B)(1)(b)	
Canon 2(B)(2)(a)	Rules 3.7(A)(1), (2), (3), & (5)
Canon 2(B)(2)(b)	Rule 3.7(A)(6)
Canon 2(B)(2)(c)	Rule 3.7(A)(4)
Canon 2(B)(2)(d)	Rule 3.7(A)(5)
Canon 2(C)(1)	Rule 3.11(C)
Canon 2(C)(2)	Rule 3.11(A)
Canon 2(C)(3)	Rule 3.11(B)
Canon 2(C)(4)	Rules 3.11(C) & (D)
Canon 2(C)(5)	Rule 3.13(A)
Canon 2(C)(5)(a)	Rules 3.13(A)(7), (10) & (11)(a)
Canon 2(C)(5)(b)	Rule 3.13(A)(8)
Canon 2(C)(5)(c)	Rule 3.13(A)(3)
Canon 2(C)(5)(d)	Rule 3.13(A)(9)
Canon 2(C)(5)(e)	Rule 3.13(A)(2)
Canon 2(C)(5)(f)	Rule 3.13(A)(4)
Canon 2(C)(5)(g)	Rule 3.13(A)(6)
Canon 2(C)(5)(h)	Rule 3.13(A)(12)

Canon 2(D)	Rule 3.12
Canon 2(D)(1)	Rule 3.14(A)
Canon 2(D)(2)	Rule 3.14(B)
Canon 2(D)(3)	Rules 3.13(C), 3.14(C), and 3.15

CANON 3 A Judge Shall Perform the Duties of Judicial Office Impartially and Diligently

Canon 3(A)	Rule 2.1
Canon 3(B)(1)	Rule 2.7
Canon 3(B)(2)	Rules 2.2 and 2.4(A)
Canon 3(B)(3)	Rule 2.8(A)
Canon 3(B)(4)	Rule 2.8(B)
Canon 3(B)(5)	Rules 2.2 and 2.3(A) & (B)
Canon 3(B)(6)	Rule 2.3(C) & (D)
Canon 3(B)(7)(a)	Rule 2.9(A)(1)
Canon 3(B)(7)(b)	Rule 2.9(A)(2)
Canon 3(B)(7)(c)	Rule 2.9(A)(3)
Canon 3(B)(7)(d)	Rule 2.9(A)(5)
Canon 3(B)(8)	Rule 2.5(A)
Canon 3(B)(9)	Rules 2.10(A), (C), & (D) and 4.1(A)(6)
Canon 3(B)(10)	Rule 2.8(C)
Canon 3(B)(11)	Rule 3.5, Comments [1A], [3], & [4]
Canon 3(C)(1)	Rule 2.5(B)
Canon 3(C)(2)	Rule 2.12(A)
Canon 3(C)(3)	Rule 2.12(B)
Canon 3(C)(4)	Rules 2.13(A) & (C)
Canon 3(D)(1)	Rule 2.15(A)
Canon 3(D)(2)	Rule 2.15(B)
Canon 3(D)(3)	cf. Rule 2.16
Canon 3(D)(4)	Rule 2.14(B)
Canon 3(E)(1)(a)	Rule 2.11(A)(1)
Canon 3(E)(1)(b)	Rule 2.11(A)(7)(a)
Canon 3(E)(1)(c)	Rule 2.11(A)(3)
Canon 3(E)(1)(d)	Rules 2.11(A)(2) & (A)(6)
Canon 3(E)(2)	Rule 2.11(B)
Canon 3(F)	Rule 2.11(C)
Canon 3(G)	
Canon 3(H)	

CANON 4 A Judge Shall Avoid Impropriety and the Appearance of Impropriety in All of the Judge's Activities

Canon 4(A)	Rules 1.3, 2.4 (B) & (C) and 3.3

Canon 4(B)	Rule 3.6(A)
Canon 4(C)(1)	Rule 3.2(C)
Canon 4(C)(2)	Rule 3.4
Canon 4(D)(1)	Rule 3.8(A)
Canon 4(D)(2)	Rule 3.8(B)
Canon 4(D)(3)	Rule 3.8(C)
Canon 4(E)	Rule 3.9
Canon 4(F)	Rule 3.10

CANON 7 Judges and Judicial Candidates Should Refrain from Political Activity Inappropriate to Judicial Office

Canon 7(A)	Rule 4.6
Canon 7(B)(1)	Rule 4.2(A)(1)
Canon 7(B)(2)(a)	Rule 4.1(A)(1)
Canon 7(B)(2)(b)	Rules 4.1(A)(2) & (3)
Canon 7(B)(2)(c) and (d)	Rules 2.10(B) and 4.1(A)(6) & (A)(7)
Canon 7(B)(2)(e)	Rule 4.1(A)(5)
Canon 7(B)(2)(f)	Rule 4.3(F)
Canon 7(B)(2)(g)	Rules 4.2(B)(1) & (2) and (C)(1) to (4)
Canon 7(B)(3)(a) and (b)	Rules 4.1(B)(1) and 4.2(C)(6)
Canon 7(B)(4)	Rule 4.5
Canon 7(B)(5)	Rule 4.2(A)(4)
Canon 7(C)(1)	Rule 4.4(B)
Canon 7(C)(2)	Rule 4.4(A)
Canon 7(C)(2)(a)(i) to (iii)	Rule 4.4(C)
Canon 7(C)(2)(b)	Rule 4.4(D)
Canon 7(C)(3)	Rule 4.4(E)
Canon 7(C)(4)(a) and (b)	Rules 4.4(F) & (G)
Canon 7(C)(4)(c)	Rule 4.4(H)
Canon 7(C)(4)(d)	Rule 4.4(I)
Canon 7(C)(5)(a)	Rule 4.4(J)
Canon 7(C)(5)(b)	Rule 4.4(K)
Canon 7(C)(5)(c)	Rule 4.4(L)
Canon 7(C)(5)(d)	Rule 4.4(M)
Canon 7(C)(5)(e)	Rule 4.4(N)
Canon 7(C)(6)	Rule 4.4(O)
Canon 7(C)(7)(a)	Rule 4.2(B)(3)
Canon 7(C)(7)(b) & (c)	Rules 4.1(A)(4), (B)(2), & (B)(3)
Canon 7(C)(8)	None
Canon 7(D)(1)	Rule 4.3(C)
Canon 7(D)(2)	Rule 4.3, Comment [2]
Canon 7(D)(3)	Rule 4.3(D)
Canon 7(D)(4)	Rule 4.3(E)
Canon 7(D)(5)	Rule 4.3(G)

Canon 7(D)(6)	Rule 4.3(H)
Canon 7(D)(7)	Rule 4.3(I)
Canon 7(D)(8)	Rule 4.3(J)
Canon 7(D)(9)	Rule 4.3(K)
Canon 7(D)(10)	Rule 4.3(L)
Canon 7(D)(11)	Rule 4.3(M)
Canon 7(E)(1)	Rule 4.3(A)
Canon 7(E)(2)	Rule 4.3(B)
Canon 7(F)	Rules 4.2(A)(2) & (3)

Ohio Code of Professional Responsibility

Superseded effective February 1, 2007

CODE OF PROFESSIONAL RESPONSIBILITY
(Superseded February 1, 2007)

View the Ohio Rules of Professional Conduct (effective February 1, 2007)

Preface
Canon 1 – A Lawyer Should Assist in Maintaining the Integrity and Competence of the Legal Profession
- DR 1-101. Maintaining Integrity and Competence of the Legal profession
- DR 1-102. Misconduct
- DR 1-103. Disclosure of Information to Authorities
- DR 1-104. Disclosure of Information to the Client

Canon 2 - A Lawyer Should Assist the Legal Profession in Fulfilling Its Duty to Legal Counsel Available
- DR 2-101. Publicity
- DR 2-102. Professional Notices, Letterheads, and Offices
- DR 2-103. Recommendation of Professional Employment
- DR 2-104. Suggestion of Need of Legal Services
- DR 2-105. Limitation of Practice
- DR 2-106. Fees for Legal Services
- DR 2-107. Division of Fees Among Lawyers
- DR 2-108. Agreement Restricting the Practice of a Lawyer
- DR 2-109. Acceptance of Employment
- DR 2-110. Withdrawal From Employment
- DR 2-111. Sale of Law Practice

Canon 3 – A Lawyer Should Assist in Preventing the Unauthorized Practice of Law
- DR 3-101. Aiding Unauthorized Practice of Law
- DR 3-102. Dividing Legal Fees With a Non-Lawyer
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Canon 4 – A Lawyer Should Preserve the Confidences and Secrets of a Client
- DR 4-101. Preservation of Confidences and Secrets of a Client

Canon 5 – A Lawyer Should Exercise Independent Professional Judgment on Behalf of a Client
- DR 5-101. Refusing Employment When the Interests of the Lawyer May Impair the Lawyer's Independent Professional Judgment
- DR 5-102. Withdrawal as Counsel When the Lawyer Becomes a Witness
- DR 5-103. Avoiding Acquisition of Interest in Litigation
- DR 5-104. Limiting Business Relations With a Client
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- DR 5-106. Settling Similar Claims of Clients
- DR 5-107. Avoiding Influence By Others Than the Client

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- DR 6-101. Failing to Act Competently
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Canon 7 – A Lawyer Should Represent a Client Zealously Within the Bounds of the Law
- DR 7-101. Representing a Client Zealously
- DR 7-102. Representing a Client Within the Bounds of the Law
- DR 7-103. Performing the Duty of Public Prosecutor or Other Government Lawyer
- DR 7-104. Communicating With One of Adverse Interest
- DR 7-105. Threatening Criminal Prosecution
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- DR 7-107. Trial Publicity
- DR 7-108. Communication With or Investigation of Jurors
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Canon 8 – A Lawyer Should Assist in Improving the Legal System
- DR 8-101. Action as a Public Official
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Canon 9 – A Lawyer Should Avoid Even the Appearance of Professional Impropriety
- DR 9-101. Avoiding Even the Appearance of Impropriety
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Definitions

PREFACE

The Canons of this Code are statements of axiomatic norms, expressing in general terms the standards of professional conduct expected of lawyers in their relationships with the public, with the legal system, and with the legal profession. They embody the general concepts from which the Ethical Considerations and the Disciplinary Rules are derived.

The Ethical Considerations are aspirational in character and represent the objectives toward which every member of the profession should strive. They constitute a body of principles upon which the lawyer can rely for guidance in many specific situations.

The Disciplinary Rules, unlike the Ethical Considerations, are mandatory in character. The Disciplinary Rules state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action.

[Effective: July 15, 1974.]

CANON 1

A Lawyer Should Assist in Maintaining the Integrity and Competence of the Legal Profession

ETHICAL CONSIDERATIONS

EC 1-1 A basic tenet of the professional responsibility of lawyers is that every person in our society should have ready access to the independent professional services of a lawyer of integrity and competence. Maintaining the integrity and improving the competence of the bar to meet the highest standards is the ethical responsibility of every lawyer.

EC 1-2 The public should be protected from those who are not qualified to be lawyers by reason of a deficiency in education or moral standards or of other relevant factors but who nevertheless seek to practice law. To assure the maintenance of high moral and educational standards of the legal profession, lawyers should affirmatively assist courts and other appropriate bodies in promulgating, enforcing, and improving requirements for admission to the bar. In like manner, the bar has a positive obligation to aid in the continued improvement of all phases of pre-admission and post-admission legal education.

EC 1-3 Before recommending an applicant for admission, a lawyer should satisfy himself that the applicant is of good moral character. Although a lawyer should not become a self-appointed investigator or judge of applicants for admission, he should report to proper officials all unfavorable information he possesses relating to the character or other qualifications of an applicant.

EC 1-4 The integrity of the profession can be maintained only if conduct of lawyers in violation of the Disciplinary Rules is brought to the attention of the proper officials. A lawyer should reveal voluntarily to those officials all unprivileged knowledge of conduct of lawyers which he believes clearly to be in violation of the Disciplinary Rules. If in the course of an investigation by a grievance or ethics committee of a bar association or by the office of disciplinary counsel it is found that persons involved in the investigation may have violated federal or state criminal statutes, it is the duty of the investigatory agency to notify the appropriate law enforcement or prosecutorial authority of such alleged criminal violation. A lawyer should, upon request, serve on and assist committees and boards having responsibility for the administration of the Disciplinary Rules.

EC 1-5 A lawyer should maintain high standards of professional conduct and should encourage fellow lawyers to do likewise. He should be temperate and dignified, and he should refrain from all illegal and morally reprehensible conduct. Because of his position in society, even minor violations of law by a lawyer may tend to lessen public confidence in the legal profession. Obedience to law exemplifies respect for law. To lawyers especially, respect for the law should be more than a platitude.

EC 1-6 An applicant for admission to the bar or a lawyer may be unqualified, temporarily or permanently, for other than moral and educational reasons, such as mental or emotional instability. Lawyers should be diligent in taking steps to see that during a period of disqualification such person is not granted a license or, if licensed, is not permitted to practice. In like manner, when the disqualification has terminated, members of the bar should assist such person in being licensed, or, if licensed, in being restored to his full right to practice.

[Effective: October 5, 1970; EC 1-4 amended effective June 11, 1979.]

DISCIPLINARY RULES

DR 1-101. MAINTAINING INTEGRITY AND COMPETENCE OF THE LEGAL PROFESSION.

(A) A lawyer is subject to discipline if he has made a materially false statement in, or if he has deliberately failed to disclose a material fact requested in connection with, his application for admission to the bar.

(B) A lawyer shall not further the application for admission to the bar of another person known by him to be unqualified in respect to character, education, or other relevant attribute.

[Effective: October 5, 1970.]

DR 1-102. MISCONDUCT.

(A) A lawyer shall not:

(1) Violate a Disciplinary Rule or, as a judicial candidate as defined in Canon 7 of the Code of Judicial Conduct, the provisions of the Code of Judicial Conduct applicable to judicial candidates.

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

(3) Engage in illegal conduct involving moral turpitude.

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

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

(6) Engage in any other conduct that adversely reflects on the lawyer's fitness to practice law.

(B) A lawyer shall not engage, in a professional capacity, in conduct involving discrimination prohibited by law because of race, color, religion, age, gender, sexual orientation, national origin, marital status, or disability. This prohibition does not apply to a lawyer's confidential communication to a client or preclude legitimate advocacy where race, color, religion, age, gender, sexual orientation, national origin, marital status, or disability is relevant to the proceeding where the advocacy is made.

[Effective: October 5, 1970; amended effective July 1, 1994; July 1, 1995.]

DR 1-103. DISCLOSURE OF INFORMATION TO AUTHORITIES.

(A) A lawyer possessing unprivileged knowledge of a violation of DR 1-102 shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation.

(B) A lawyer possessing unprivileged knowledge or evidence concerning another lawyer or a judge shall reveal fully such knowledge or evidence upon proper request of a tribunal or other authority empowered to investigate or act upon the conduct of lawyers or judges.

(C) Any knowledge obtained by a member of a committee or subcommittee of a bar association, or by a member, employee, or agent of a nonprofit corporation established by a bar association, designed to assist lawyers with substance abuse or mental health problems shall be privileged for all purposes under DR 1-103, provided the knowledge was obtained while the member, employee, or agent was performing duties as a member, employee, or agent of the committee, subcommittee, or nonprofit corporation.

[Effective: October 5, 1970; amended effective June 17, 1987; September 1, 1995; February 1, 2003.]

DR 1-104. DISCLOSURE OF INFORMATION TO THE CLIENT.

(A) A lawyer shall inform a client at the time of the client's engagement of the lawyer or at any time subsequent to the engagement if the lawyer does not maintain professional liability insurance in the amounts of at least one hundred thousand dollars per occurrence and three hundred thousand dollars in the aggregate or if the lawyer's professional liability insurance is terminated. The notice shall be provided to the client on a separate form set forth following this rule and shall be signed by the client.

(B) A lawyer shall maintain a copy of the notice signed by the client for five years after termination of representation of the client.

(C) The notice required by division (A) of this rule shall not apply to a lawyer who is engaged in either of the following:

(1) Rendering legal services to a governmental entity that employs the lawyer;

(2) Rendering legal services to an entity that employs the lawyer as in-house counsel.

NOTICE TO CLIENT

Required by DR 1-104
Ohio Code of Professional Responsibility

Pursuant to DR 1-104 of the Ohio Code of Professional Responsibility, I am required to notify you that I do not maintain professional liability (malpractice) insurance of at least $100,000 per occurrence and $300,000 in the aggregate.

_____
Attorney's Signature

CLIENT ACKNOWLEDGEMENT

I acknowledge receipt of the notice required by DR 1-104 of the Ohio Code of Professional Responsibility that [insert attorney's name] does not maintain professional liability (malpractice) insurance of at least $100,000 per occurrence and $300,000 in the aggregate.

_____
Client's Signature

_____
Date

[Effective: July 1, 2001]

CANON 2

A Lawyer Should Assist the Legal Profession in Fulfilling Its Duty to Make Legal Counsel Available

ETHICAL CONSIDERATIONS

EC 2-1 The need of members of the public for legal services is met only if they recognize their legal problems, appreciate the importance of seeking assistance, and are able to obtain the services of acceptable legal counsel. Hence, important functions of the legal profession are to educate laymen to recognize their legal problems, to facilitate the process of intelligent selection of lawyers, and to assist in making legal services fully available.

Recognition of Legal Problems

EC 2-2 The legal profession should assist laymen to recognize legal problems because such problems may not be self-revealing and often are not timely noticed. Therefore, lawyers acting under proper auspices should encourage and participate in educational and public relations programs concerning our legal system with particular reference to legal problems that frequently arise. Such educational programs should be motivated by a desire to benefit the public rather than to obtain publicity or employment for particular lawyers. Examples of permissible activities include preparation of institutional advertisements and professional articles for lay publications and participation in seminars, lectures, and civic programs. But a lawyer who participates in such activities should shun personal publicity.

EC 2-3 Whether a lawyer acts properly in volunteering advice to a layman to seek legal services depends upon the circumstances. The giving of advice that one should take legal action could well be in fulfillment of the duty of the legal profession to assist laymen in recognizing legal problems. The advice is proper only if motivated by a desire to protect one who does not recognize that he may have legal problems or who is ignorant of his legal rights or obligations. Hence, the advice is improper if motivated by a desire to obtain personal benefit, secure personal publicity, or cause litigation to be brought merely to harass or injure another.

EC 2-4 Since motivation is subjective and often difficult to judge, the motives of a lawyer who volunteers advice likely to produce legal controversy may well be suspect if he receives professional employment or other benefits as a result. A lawyer who volunteers advice that one should obtain the services of a lawyer generally should not himself accept employment, compensation, or other benefit in connection with that matter. However, it is not improper for a lawyer to volunteer such advice and render resulting legal services to close friends, relatives, former clients (in regard to matters germane to former employment), and regular clients.

EC 2-5 A lawyer who writes or speaks for the purpose of educating members of the public to recognize their legal problems should carefully refrain from giving or appearing to give a general solution applicable to all apparently similar individual problems, since slight changes in fact situations may require a material variance in the applicable advice; otherwise, the public may be misled and misadvised. Talks and writings by lawyers for laymen should caution them not to attempt to solve individual problems upon the basis of the information contained therein.

Selection of a Lawyer: Generally

EC 2-6 Formerly a potential client usually knew the reputations of local lawyers for competency and integrity and therefore could select a practitioner in whom he had confidence. This traditional selection process worked well because it was initiated by the client and the choice was an informed one.

EC 2-7 Changed conditions, however, have seriously restricted the effectiveness of the traditional selection process. Often the reputations of lawyers are not sufficiently known to enable laymen to make intelligent choices. The law has become increasingly complex and specialized. Few lawyers are willing and competent to deal with every kind of legal matter, and many laymen have difficulty in determining the competence of lawyers to render different types of legal services. The selection of legal counsel is particularly difficult for transients, persons moving into new areas, persons of limited education or means, and others who have little or no contact with lawyers.

EC 2-8 Selection of a lawyer by a layman often is the result of the advice and recommendation of third parties--relatives, friends, acquaintances, business associates, or other lawyers. A layman is best served if the recommendation is disinterested and informed. In order that the recommendation be disinterested, a lawyer should not seek to influence another to recommend his employment. A lawyer should not compensate another person for recommending him, for influencing a prospective client to employ him, or to encourage future recommendations.

Selection of a Lawyer: Professional Notices and Listings

EC 2-9 Methods of advertising that are false, misleading or deceptive should be and are prohibited. However, the Disciplinary Rules recognize the value of giving assistance in the selection process through forms of advertising.

EC 2-10 The name under which a lawyer conducts his practice may be a factor in the selection process. The use of a trade name or an assumed name could mislead laymen concerning the identity, responsibility, and status of those practicing thereunder. Accordingly, a lawyer in private practice should practice only under his own name, the name of a lawyer employing him, a partnership name composed of the name of one or more of the lawyers practicing in a partnership, or, if permitted by law, in the name of a professional legal corporation, which should be clearly designated as such. For many years some law firms have used a firm name retaining one or more names of deceased or retired partners and such practice is not improper if the firm is a bona fide successor of a firm in which the deceased or retired person was a member, if the use

of the name is authorized by law or by contract, and if the public is not misled thereby. However, the name of a partner who withdraws from a firm but continues to practice law should be omitted from the firm name in order to avoid misleading the public.

EC 2-11 A lawyer occupying a judicial, legislative, or public executive or administrative position who has the right to practice law concurrently may allow his name to remain in the name of the firm if he actively continues to practice law as a member thereof. Otherwise, his name should be removed from the firm name, and he should not be identified as a past or present member of the firm; and he should not hold himself out as being a practicing lawyer.

EC 2-12 In order to avoid the possibility of misleading persons with whom he deals, a lawyer should be scrupulous in the representation of his professional status. He should not hold himself out as being a partner or associate of a law firm if he is not one in fact, and thus should not hold himself out as a partner or associate if he only shares offices with another lawyer.

EC 2-13 In some instances, a lawyer confines his or her practice to a particular field of law. Except as provided in the Rules for the Government of the Bar of Ohio, a lawyer should not be permitted to hold himself or herself out as a specialist or as having special training or ability, other than in the historically excepted fields of admiralty, trademark, and patent law.

EC 2-14 The legal profession has developed lawyer referral systems designed to aid individuals who are able to pay fees but need assistance in locating lawyers competent to handle their particular problems. Use of a lawyer referral system enables a layman to avoid an uninformed selection of a lawyer because such a system makes possible the employment of competent lawyers who have indicated an interest in the subject matter involved. Lawyers should support the principle of lawyer referral systems and should encourage the evolution of other ethical plans which aid in the selection of qualified counsel.

Financial Ability to Employ Counsel: Generally

EC 2-15 The legal profession cannot remain a viable force in fulfilling its role in our society unless its members receive adequate compensation for services rendered, and reasonable fees should be charged in appropriate cases to clients able to pay them. Nevertheless, persons unable to pay all or a portion of a reasonable fee should be able to obtain necessary legal services, and lawyers should support and participate in ethical activities designed to achieve that objective.

Financial Ability to Employ Counsel: Persons Able to Pay Reasonable Fees

EC 2-16 The determination of a proper fee requires consideration of the interests of both client and lawyer. A lawyer should not charge more than a reasonable fee, for excessive cost of legal service would deter laymen from utilizing the legal system in protection of their rights. Furthermore, an excessive charge abuses the professional relationship between lawyer and client. On the other hand, adequate compensation is necessary in order to enable the lawyer to serve his client effectively and to preserve the integrity and independence of the profession.

EC 2-17 The determination of the reasonableness of a fee requires consideration of all relevant circumstances, including those stated in the Disciplinary Rules. The fees of a lawyer will vary according to many factors, including the time required, his experience, ability, and reputation, the nature of the employment, the responsibility involved, and the results obtained. Suggested fee schedules and economic reports of state and local bar associations provide some guidance on the subject of reasonable fees. It is a commendable and longstanding tradition of the bar that special consideration is given in the fixing of any fee for services rendered a brother lawyer or a member of his immediate family.

EC 2-18 As soon as feasible after a lawyer has been employed, it is desirable that he reach a clear agreement with his client as to the basis of the fee charges to be made. Such a course will not only prevent later misunderstanding but will also work for good relations between the lawyer and the client. It is usually beneficial to reduce to writing the understanding of the parties regarding the fee, particularly when it is contingent. A lawyer should be mindful that many persons who desire to employ him may have had little or no experience with fee charges of lawyers, and for this reason he should explain fully to such persons the reasons for the particular fee arrangement he proposes.

EC 2-19 Contingent fee arrangements in civil cases have long been commonly accepted in the United States in proceedings to enforce claims. The historical bases of their acceptance are that (1) they often, and in a variety of circumstances, provide the only practical means by which one having a claim against another can economically afford, finance, and obtain the services of a competent lawyer to prosecute his claim, and (2) a successful prosecution of the claim produces a res out of which the fee can be paid. Although a lawyer generally should decline to accept employment on a contingent fee basis by one who is able to pay a reasonable fixed fee, it is not necessarily improper for a lawyer, where justified by the particular circumstances of a case, to enter into a contingent fee contract in a civil case with any client who, after being fully informed of all relevant factors, desires that arrangement. Because of the human relationships involved and the unique character of the proceedings, contingent fee arrangements in domestic relations cases are rarely justified. In administrative agency proceedings contingent fee contracts should be governed by the same considerations as in other civil cases. Public policy properly condemns contingent fee arrangements in criminal cases, largely on the ground that legal services in criminal cases do not produce a res with which to pay the fee.

EC 2-20 A lawyer should not accept compensation or any thing of value incident to his employment or services from one other than his client without the knowledge and consent of his client after full disclosure.

EC 2-21 Without the prior consent of his or her client, a lawyer should not associate in a particular matter another lawyer outside his or her firm. A fee may properly be divided between lawyers properly associated if: (1) the division is in proportion to the services performed or, if agreed to in writing by the client, all of the lawyers assume responsibility for representing the client; (2) the terms of the fee division and the identity of all lawyers sharing in the fee are disclosed in writing to the client prior to obtaining the client's consent; and (3) the total fee is reasonable.

EC 2-22 A lawyer should be zealous in his efforts to avoid controversies over fees with clients and should attempt to resolve amicably any differences on the subject. He should not sue a client for a fee unless necessary to prevent fraud or gross imposition by the client.

Financial Ability to Employ Counsel: Persons Unable to Pay Reasonable Fees

EC 2-23 A layman whose financial ability is not sufficient to permit payment of any fee cannot obtain legal services, other than in cases where a contingent fee is appropriate, unless the services are provided for him. Even a person of moderate means may be unable to pay a reasonable fee which is large because of the complexity, novelty, or difficulty of the problem or similar factors.

EC 2-24 Historically, the need for legal services of those unable to pay reasonable fees has been met in part by lawyers who donated their services or accepted court appointments on behalf of such individuals. The basic responsibility for providing legal services for those unable to pay ultimately rests upon the individual lawyer, and personal involvement in the problems of the disadvantaged can be one of the most rewarding experiences in the life of a lawyer. Every lawyer, regardless of professional prominence or professional workload, should find time to participate in serving the disadvantaged. The rendition of free legal services to those unable to pay reasonable fees continues to be an obligation of each lawyer, but the efforts of individual lawyers are often not enough to meet the need. Thus it has been necessary for the profession to institute additional programs to provide legal services. Accordingly, legal aid offices, lawyer referral services, and other related programs have been developed, and others will be developed, by the profession. Every lawyer should support all proper efforts to meet this need for legal services.

Acceptance and Retention of Employment

EC 2-25 A lawyer is under no obligation to act as adviser or advocate for every person who may wish to become his client; but in furtherance of the objective of the bar to make legal services fully available, a lawyer should not lightly decline proffered employment. The fulfillment of this objective requires acceptance by a lawyer of his share of tendered employment which may be unattractive both to him and the bar generally.

EC 2-26 History is replete with instances of distinguished and sacrificial services by lawyers who have represented unpopular clients and causes. Regardless of his personal feelings, a lawyer should not decline representation because a client or a cause is unpopular or community reaction is adverse.

EC 2-27 The personal preference of a lawyer to avoid adversary alignment against judges, other lawyers, public officials, or influential members of the community does not justify his rejection of tendered employment.

EC 2-28 When a lawyer is appointed by a court or requested by a bar association to undertake representation of a person unable to obtain counsel, whether for financial or other reasons, he

should not seek to be excused from undertaking the representation except for compelling reasons. Compelling reasons do not include such factors as the repugnance of the subject matter of the proceeding, the identity or position of a person involved in the case, the belief of the lawyer that the defendant in a criminal proceeding is guilty, or the belief of the lawyer regarding the merits of the civil case.

EC 2-29 Employment should not be accepted by a lawyer when he is unable to render competent service or when he knows or it is obvious that the person seeking to employ him desires to institute or maintain an action merely for the purpose of harassing or maliciously injuring another. Likewise, a lawyer should decline employment if the intensity of his personal feeling, as distinguished from a community attitude, may impair his effective representation of a prospective client. If a lawyer knows a client has previously obtained counsel, he should not accept employment in the matter unless the other counsel approves or withdraws, or the client terminates the prior employment.

EC 2-30 Full availability of legal counsel requires both that persons be able to obtain counsel and that lawyers who undertake representation complete the work involved. Trial counsel for a convicted defendant should continue to represent his client by advising whether to take an appeal and, if the appeal is prosecuted, by representing him through the appeal unless new counsel is substituted or withdrawal is permitted by the appropriate court.

EC 2-31 A decision by a lawyer to withdraw should be made only on the basis of compelling circumstances, and in a matter pending before a tribunal he must comply with the rules of the tribunal regarding withdrawal. A lawyer should not withdraw without considering carefully and endeavoring to minimize the possible adverse effect on the rights of his client and the possibility of prejudice to his client as a result of his withdrawal. Even when he justifiably withdraws, a lawyer should protect the welfare of his client by giving due notice of his withdrawal, suggesting employment of other counsel, delivering to the client all papers and property to which the client is entitled, cooperating with counsel subsequently employed, and otherwise endeavoring to minimize the possibility of harm. Further, he should refund to the client any compensation not earned during the employment.

EC 2-32 As a party of the legal profession's commitment to the principle that high quality legal services should be available to all, attorneys are encouraged to cooperate with qualified legal assistance organizations providing prepaid legal services. Such participation should at all times be in accordance with the basic tenets of the profession: independence, integrity, competence and devotion to the interests of individual clients. An attorney so participating should make certain that his relationship with a qualified legal assistance organization in no way interferes with his independent, professional representation of the interests of the individual client. An attorney should avoid situations in which officials of the organization who are not lawyers attempt to direct attorneys concerning the manner in which legal services are performed for individual members, and should also avoid situations in which considerations of economy are given undue weight in determining the attorneys employed by an organization or the legal services to be performed for the member or beneficiary rather than competence and quality of service. An attorney interested in maintaining the historic traditions of the profession and

preserving the function of a lawyer as a trusted and independent advisor to individual members of society should carefully assess such factors when accepting employment by, or otherwise participating in, a particular qualified legal assistance organization, and while so participating should adhere to the highest professional standards of effort and competence.

[Effective: October 5, 1970; EC 2-33 adopted effective October 20, 1975; EC 2-3 and 2-9 amended effective March 1, 1986; EC 2-10 repealed and EC 2-11 to EC 2-33 renumbered effective March 1, 1986; EC 2-13 amended effective January 1, 1993.]

DR 2-101. PUBLICITY.

(A) A lawyer shall not, on his or her own behalf or that of a partner, associate, or other lawyer affiliated with the lawyer or the lawyer's firm, use, or participate in the use of, any form of public communication, including direct mail solicitation, that:

(1) Contains any false, fraudulent, misleading, deceptive, self-laudatory, or unfair statement;

(2) Seeks employment in connection with matters in which the lawyer or law firm does not intend to actively participate in the representation, but that the lawyer or law firm intends to refer to other counsel, except that this provision shall not apply to organizations defined in DR 2-103(D)(1);

(3) Contains any testimonial of past or present clients pertaining to the lawyer's capability;

(4) Contains any claim that is not verifiable;

(5) Contains characterizations of rates or fees chargeable by the lawyer or law firm, such as "cut-rate," “lowest," "giveaway," "below cost," "discount," and "special;" however, use of characterizations of rates or fees such as "reasonable" and "moderate" is acceptable.

(B) Subject to the limitations contained in these rules:

(1) A lawyer or law firm may advertise services or the sale of a law practice through newspapers, periodicals, trade journals, "shoppers," and similar print media, outdoor advertising, radio and television, and written communication.

(2) A lawyer or law firm may permit or purchase inclusion of information in a telephone or city directory, subject to the following standards:

(a) The lawyer's or the firm's name, address, and telephone number may be listed alphabetically in the residential, business, or classified sections.

(b) Listing or display advertising in the classified section shall be limited to one or more of the following:

(i) under the general heading "Lawyers" or "Attorneys;"

(ii) if a lawyer or a firm meets the requirements of DR 2-105(A)(1), under the classification or heading identifying the field or area of practice in which the lawyer or firm is so qualified;

(iii) under a classification or heading that identifies the lawyer or firm by geographic location, certification as a specialist pursuant to DR 2-105(A)(4) or (5), or field of law as provided by DR 2-105(A)(6).

(c) Nothing contained in this rule shall prohibit a lawyer or law firm from permitting inclusion in reputable law lists and law directories intended primarily for the use of the legal profession, of such information as has traditionally appeared in those publications.

(3) Brochures or pamphlets containing biographical and informational data that is acceptable under these rules may be disseminated directly to clients, members of the bar, or others.

(C) A communication is false or misleading if it satisfies any of the following:

(1) Contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading;

(2) Is likely to create an unjustified expectation about results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate the Code of Professional Responsibility or other law;

(3) Is subjectively self-laudatory, or compares a lawyer's services with other lawyers' services, unless the comparison can be factually substantiated.

(D) The following information with regard to lawyers, law firms, or members of firms will be presumed to be informational rather than solely promotional or self-laudatory, and acceptable for dissemination under these rules, if accurate and presented in a dignified manner:

(1) Name or names of lawyer, law firm, and professional associates, together with their addresses and telephone numbers, with designations such as "Lawyer," "Attorney," "Law Firm";

(2) Field or fields of practice, limitations of practice, or areas of concentration, but only to the extent permitted by DR 2-105;

(3) Date and place of birth;

(4) Dates and places of admission to the bar of the state and federal courts;

(5) Schools attended, with dates of graduation and degrees conferred;

(6) Legal teaching positions held at accredited law schools;

(7) Authored publications;

(8) Memberships in bar associations and other professional organizations;

(9) Technical and professional licenses;

(10) Military service;

(11) Foreign language abilities;

(12) Subject to DR 2-103, prepaid or group legal service programs in which the lawyer or firm participates;

(13) Whether credit cards or other credit arrangements are accepted;

(14) Office and telephone answering services hours.

(E)(1) Any of the following information with regard to fees and charges, if presented in a dignified manner, is acceptable for communication to the public in the manner stipulated by DR 2-101(B):

(a) Fee for an initial consultation;

(b) Availability upon request of either a written schedule of fees or of an estimate of the fee to be charged for specific services;

(c) Contingent fee rates, subject to DR 2-106(C), provided that the statement discloses whether percentages are computed before or after deduction of costs and expenses and advises the public that, in the event of an adverse verdict or decision, the contingent fee litigant could be liable for payment of court costs, expenses of investigation, expenses of medical examinations, and costs incurred in obtaining and presenting evidence;

(d) Fixed fee or range of fees for specific legal services or hourly fee rates, provided the statement discloses that;

(i) Stated fixed fees or range of fees will be available only to clients whose matters are included among the specified services;

(ii) If the client's matter is not included among the specified services or if no hourly fee rate is stated, the client will be entitled, without obligation, to a specific written estimate of the fee likely to be charged.

(2)(a) If a lawyer or a law firm quotes a fee for a service in an advertisement or direct mail solicitation, the service must be rendered for no more than the fee advertised or quoted.

(b) Unless otherwise specified in the advertisement, if a lawyer or a law firm includes any fee information in a publication that is published more frequently than one time per month,

the lawyer or law firm shall be bound by any representation made in the advertisement for a period of not less than thirty days after such publication. If a lawyer or law firm publishes any fee information in a publication that is published once a month or less frequently, the lawyer or law firm shall be bound by any representation made in the advertisement until the publication of the succeeding issue. If a lawyer or law firm advertises any fee information in a publication that has no fixed date for publication of a succeeding issue, the lawyer or law firm shall be bound by any representation made in the advertisement for a reasonable period of time after publication, but in no event less than one year.

(c) Unless otherwise specified, if a lawyer or law firm broadcasts any fee information by radio or television, the lawyer or law firm shall be bound by any representation made in the broadcast for a period of not less than thirty days after the date of the broadcast.

(F)(1) A lawyer shall not make any solicitation of legal business in person or by telephone, except as provided in DR 2-103 and DR 2-104.

(2) A lawyer or law firm may engage in written solicitation by direct mail addressed to persons or groups of persons who may be in need of specific legal service by reason of a circumstance, condition, or occurrence that is known or, upon reasonable inquiry, could be known to the soliciting lawyer or law firm, provided the letter of solicitation:

(a) Discloses accurately and fully the manner in which the lawyer or law firm became aware of and verified the identity and specific legal need of the addressee;

(b) Disclaims any prior acquaintance or contact with the addressee and avoids any personalization in approach unless the facts are otherwise;

(c) Disclaims or refrains from expressing any predetermined evaluation of the merits of the addressee's case;

(d) Conforms to standards required by these rules with respect to information acceptable for inclusion in media advertising by lawyers and law firms;

(e) Includes in its text and on the envelope in which mailed, in red ink and in type no smaller than 10 point, the recital –"ADVERTISEMENT ONLY."

(3) The provisions of division (F)(2) of this rule shall not apply to organizations defined in DR 2-103(D)(1).

(4) Prior to mailing a written solicitation of legal business pursuant to division (F)(2) of this rule to a party who has been named as a defendant in a civil action, a lawyer or law firm shall verify that the party has been served with notice of the action filed against that party. Service shall be verified by consulting the docket of the court in which the action was filed to determine whether mail, personal, or residence service has been perfected or whether service by

publication has been completed. Division (F)(4) of this rule shall not apply to the solicitation of a debtor regarding representation of the debtor in a potential or actual bankruptcy action.

(G) A lawyer shall not directly or indirectly compensate or give any thing of value to representatives of the press, radio, television, or other communication medium in anticipation of or in return for professional publicity in a news item.

(H)(1) If a communication is sent by a lawyer to a prospective client or a relative of a prospective client within thirty days of an accident or disaster that gives rise to a potential claim for personal injury or wrongful death, the following "Understanding Your Rights" must be enclosed with the communication.

UNDERSTANDING YOUR RIGHTS*

If you have been in an accident, or a family member has been injured or killed in a crash or some other incident, you have many important decisions to make. We believe it is important for you to consider the following:

1. **Make and keep records** - If your situation involves a motor vehicle crash, regardless of who may be at fault, it is helpful to obtain a copy of the police report, learn the identity of any witnesses, and obtain photographs of the scene, vehicles, and any visible injuries. Keep copies of receipts of all your expenses and medical care related to the incident.

2. **You do not have to sign anything** - You may not want to give an interview or recorded statement without first consulting with an attorney, because the statement can be used against you. If you may be at fault or have been charged with a traffic or other offense, it may be advisable to consult an attorney right away. However, if you have insurance, your insurance policy probably requires you to cooperate with your insurance company and to provide a statement to the company. If you fail to cooperate with your insurance company, it may void your coverage.

3. **Your interests versus interests of insurance company** - Your interests and those of the other person's insurance company are in conflict. Your interests may also be in conflict with your own insurance company. Even if you are not sure who is at fault, you should contact your own insurance company and advise the company of the incident to protect your insurance coverage.

4. **There is a time limit to file an insurance claim** - Legal rights, including filing a lawsuit, are subject to time limits. You should ask what time limits apply to your claim. You may need to act immediately to protect your rights.

5. **Get it in writing** - You may want to request that any offer of settlement from anyone be put in writing, including a written explanation of the type of damages which they are willing to cover.

6. **Legal assistance may be appropriate** - You may consult with an attorney before you sign any document or release of claims. A release may cut off all future rights against others, obligate you to repay past medical bills or disability benefits, or jeopardize future benefits. If your interests conflict with your own insurance company, you always have the right to discuss the matter with an attorney of your choice, which may be at your own expense.

7. **How to find an attorney** - If you need professional advice about a legal problem but do not know an attorney, you may wish to check with relatives, friends, neighbors, your employer or co-workers who may be able to recommend an attorney. Your local bar association may have a lawyer referral service that can be found in the Yellow Pages.

8. **Check a lawyer's qualifications** - Before hiring any lawyer, you have the right to know the lawyer's background, training, and experience in dealing with cases similar to yours.

9. **How much will it cost?** - In deciding whether to hire a particular lawyer, you should discuss, and the lawyer's written fee agreement should reflect:

a. How is the lawyer to be paid? If you already have a settlement offer, how will that affect a contingent fee arrangement?

b. How are the expenses involved in your case, such as telephone calls, deposition costs, and fees for expert witnesses, to be paid? Will these costs be advanced by the lawyer or charged to you as they are incurred? Since you are obligated to pay all expenses even if you lose your case, how will payment be arranged?

c. Who will handle your case? If the case goes to trial, who will be the trial attorney?

This information is not intended as a complete description of your legal rights, but as a checklist of some of the important issues you should consider.

***THE SUPREME COURT OF OHIO, WHICH GOVERNS THE CONDUCT OF LAWYERS IN THE STATE OF OHIO, NEITHER PROMOTES NOR PROHIBITS THE DIRECT SOLICITATION OF PERSONAL INJURY VICTIMS. THE COURT DOES REQUIRE THAT, IF SUCH A SOLICITATION IS MADE, IT MUST INCLUDE THE ABOVE DISCLOSURE.**

(2) The communication described in division (H)(1) of this rule must meet all of the other requirements of these rules.

(3) The communication described in division (H)(1) of this rule applies to any communication sent by a lawyer, on the lawyer's behalf, or by the lawyer's firm, partner, associate, or any other lawyer affiliated with the lawyer or the lawyer's firm.

[Effective: October 5, 1970; amended effective October 20, 1975; November 28, 1977; February 12, 1979; June 11, 1979; March 1, 1986; January 1, 1993; August 16, 1993; January 1, 2000; April 1, 2001; February 1, 2003.]

DR 2-102. PROFESSIONAL NOTICES, LETTERHEADS, AND OFFICES.

(A) A lawyer or law firm may use or participate in the use of professional cards, professional announcement cards, office signs, letterheads, or similar professional notices or devices, that are in dignified form and comply with the following:

(1) A professional card of a lawyer identifying the lawyer by name and as a lawyer and giving the lawyer's addresses, telephone numbers, law firm name, and any information permitted under DR 2-105. A professional card of a law firm may also give the names of members and associates and may be used for identification.

(2) A brief professional announcement card stating new or changed associations or addresses, change of firm name, sale of a law practice, or similar matters pertaining to the professional offices of a lawyer or law firm. It shall not state the nature of the practice except as permitted under DR 2-105.

(3) A sign on or near the door of the office and in the building directory identifying the law office. The sign shall not state the nature of the practice, except as permitted under DR 2-105.

(4) A letterhead of a lawyer identifying the lawyer by name and as a lawyer, and giving the lawyer's addresses, telephone numbers, law firm name, associates, and any information permitted under DR 2-105. A letterhead of a law firm may also give the names of members and associates, and names and dates relating to deceased and retired members. A lawyer may be designated “Of Counsel” on a letterhead if the lawyer has a continuing relationship with a lawyer or law firm, other than as a partner or associate. A lawyer or law firm may be designated as “General Counsel” or by similar professional reference on stationery of a client if the lawyer or the firm devotes a substantial amount of professional time in the representation of that client. The letterhead of a law firm may give the names and dates of predecessor firms in a continuing line of succession.

(B) A lawyer in private practice shall not practice under a trade name, a name that is misleading as to the identity of the lawyer or lawyers practicing under the name, or a firm name containing names other than those of one or more of the lawyers in the firm, except that the name of a professional corporation or association, legal clinic, limited liability company, or registered partnership shall contain symbols indicating the nature of the organization as required by Gov. Bar R. III. If otherwise lawful, a firm may use as, or continue to include in, its name the name or names of one or more deceased or retired members of the firm or of a predecessor firm in a continuing line of succession. A lawyer who assumes a judicial, legislative, public executive, or administrative post or office shall not permit his or her name to remain in the name of a law firm or to be used in professional notices of the firm during any significant period in which the lawyer is not actively and regularly practicing law as a member of the firm, and during this period other members of the firm shall not use the lawyer's name in the firm name or in professional notices of the firm.

(C) A lawyer shall not hold himself or herself out as having a partnership with one or more other lawyers or professional corporations unless they are in fact partners.

(D) A partnership shall not be formed or continued between or among lawyers licensed in different jurisdictions unless all enumerations of the members and associates of the firm on its letterhead and in other permissible listings make clear the jurisdictional limitations on those members and associates of the firm not licensed to practice in all listed jurisdictions; however, the same firm name may be used in each jurisdiction.

(E) A lawyer who is engaged both in the practice of law and another profession or business shall not so indicate on the lawyer's letterhead, office sign, or professional card, nor shall the lawyer identify himself or herself as a lawyer in any publication in connection with his or her other profession or business.

(F) Nothing contained in this rule shall prohibit a lawyer from using or permitting the use, in connection with the lawyer's name, of an earned degree or title derived from an earned degree indicating the lawyer's training in the law.

(G) A legal clinic operated by one or more lawyers may be organized by the lawyer or lawyers for the purpose of providing standardized and multiple legal services. The name of the law office shall consist only of the names of one or more of the active practitioners in the organization, and may include the phrase "legal clinic" or words of similar import. The use of a trade name or geographical or other type of identification or description is prohibited. The name of any active practitioner in the clinic may be retained in the name of the legal clinic after the lawyer's death, retirement or inactivity because of age or disability, and the name must otherwise conform to other provisions of the Code of Professional Responsibility and The Supreme Court Rules for the Government of the Bar of Ohio. The legal clinic cannot be owned by, and profits or losses cannot be shared with, nonlawyers or lawyers who are not actively engaged in the practice of law in the organization.

[Effective: October 5, 1970; amended effective November 28, 1977; March 13, 1978; June 11, 1979; January 4, 1982; March 1, 1986; December 1, 1995; February 1, 2003.]

DR 2-103. RECOMMENDATION OF PROFESSIONAL EMPLOYMENT.

(A) A lawyer shall not recommend employment, as a private practitioner, of himself or herself, his or her partner, or associate to a non-lawyer who has not sought the lawyer's advice regarding employment of a lawyer, except as provided in DR 2-101.

(B) A lawyer shall not compensate or give any thing of value to a person or organization to recommend or secure the lawyer's employment by a client, or as a reward for having made a recommendation resulting in the lawyer's employment by a client, except that the lawyer may pay the usual and reasonable fees or dues charged by any of the organizations listed in DR 2-103(D).

(C) A lawyer shall not request a person or organization to recommend or promote the use of the lawyer's services or those of the lawyer's partner or associate, or any other lawyer affiliated with the lawyer or the lawyer's firm, as a private practitioner, except that:

(1) The lawyer may request referrals from a lawyer referral service that refers the lawyer to prospective clients but only if the lawyer referral service conforms to all of the following:

(a) Operates in the public interest for the purpose of referring prospective clients to lawyers, pro bono and public service programs, and government, consumer, or other agencies who can provide the assistance the clients need in light of their financial circumstance, spoken language, any disability, geographical convenience, and the nature and complexity of their problem;

(b) Calls itself a lawyer referral service or a lawyer referral and information service;

(c) Is open to all lawyers who are licensed and admitted to the practice of law in Ohio who maintain an office in the geographical area to be served by the service and who meet reasonable, objectively determined experience requirements established by the service; pay the reasonable registration and membership fees established by the service; and maintain in force a policy of errors and omissions insurance in an amount established by the service;

(d) Establishes rules that prohibit lawyer members of the service from charging prospective clients to whom a client is referred, fees and or costs that exceed charges the client would have incurred had no lawyer referral service been involved;

(e) Establishes procedures to survey periodically clients referred to determine client satisfaction with its operations and to investigate and take appropriate action with respect to client complaints against lawyer members of the service, and the service and its employees;

(f) Establishes procedures for admitting, suspending, or removing lawyers from its roll of panelists and promulgates rules that prohibit the making of a fee generating referral to any lawyer who has an ownership interest in, or who operates or is employed by the lawyer referral

service, or who is associated with a law firm that has an ownership interest in, or operates or is employed by the lawyer referral service;

(g) Establishes subject-matter panels, eligibility for which shall be determined on the basis of experience and other substantial objectively determinable criteria;

(h) Does not, as a condition of participation in the referral service, limit the lawyer's selection of co-counsel to other lawyers listed with the referral service;

(i) Does not make a fee-generating referral to any lawyer who has an ownership interest in or who operates or is employed by the lawyer referral service or who is associated with a law firm that has an ownership interest in or operates or is employed by a lawyer referral service.

(j) Reports regularly to the Supreme Court Committee for Lawyer Referral and Information Services and complies with the record-keeping and requirements of and regulations adopted by the Committee.

(2) A lawyer participating in a lawyer referral service that meets the requirements of divisions (C)(1)(a) to (j) of this rule may:

(a) Be required, in addition to payment of a membership or registration fee as provided in divisions (C)(1)(c) of this rule, to pay a fee calculated as a percentage of legal fees earned by any lawyer panelist to whom the lawyer referral service has referred a matter. The income from the percentage fee shall be used only to pay the reasonable operating expenses of the service and to fund public service activities of the service or its sponsoring organization, including the delivery of pro bono public services;

(b) As a condition of participation in the service, be required to submit any fee disputes with a referred client to mandatory fee arbitration;

(c) Participate in moderate and no-fee panels and other special panels established by the service that respond to the referral needs of the consumer public, eligibility for which shall be determined on the basis of experience and other substantial objectively determinable criteria.

(3) The lawyer may cooperate with the legal service activities of any of the offices or organizations enumerated in divisions (D)(1) to (4) of this rule and may perform legal services for those to whom the lawyer was recommended by it to do such work if both of the following apply:

(a) The person to whom the recommendation is made is a member or beneficiary of such office or organization;

(b) The lawyer remains free to exercise independent professional judgment on behalf of the lawyer's client.

(D) A lawyer shall not knowingly assist a person or organization that furnishes or pays for legal services to others to promote the use of the lawyer's services or those of the lawyer's partner or associate or any other lawyer affiliated with the lawyer or the lawyer's firm except as permitted in DR 2-101(B). However, this does not prohibit a lawyer or the lawyer's partner or associate or any other lawyer affiliated with the lawyer or the lawyer's firm from being recommended, employed, or paid by, or cooperating with, assisting, and providing legal services for, one of the following offices or organizations that promote the use of the lawyer's services or those of the lawyer's partner or associate or any other lawyer affiliated with the lawyer or the lawyer's firm if there is no interference with the exercise of independent professional judgment on behalf of the lawyer's client:

(1) A legal aid office or public defender office:

(a) Operated or sponsored by a duly accredited law school.

(b) Operated or sponsored by a bona fide non-profit community organization.

(c) Operated or sponsored by a governmental agency.

(d) Operated, sponsored, or approved by a bar association.

(2) A military legal assistance office.

(3) A lawyer referral service that complies with division (C) of this rule.

(4) Any bona fide organization that recommends, furnishes, or pays for legal services to its members or beneficiaries provided all of the following conditions are satisfied:

(a) The organization, including any affiliate, is organized and operated so that no profit is derived by it from the rendition of legal services by lawyers, and that, if the organization is organized for profit, the legal services are not rendered by lawyers employed, directed, supervised, or selected by it except in connection with matters where the organization bears ultimate liability of its member or beneficiary.

(b) Neither the lawyer, the lawyer's partner, associate, or any other lawyer affiliated with the lawyer or the lawyer's firm, nor any non-lawyer, shall have initiated or promoted the organization for the primary purpose of providing financial or other benefit to the lawyer, partner, associate, or affiliated lawyer.

(c) The organization is not operated for the purpose of procuring legal work or financial benefit for any lawyer as a private practitioner outside of the legal services program of the organization.

(d) The member or beneficiary to whom the legal services are furnished, and not the organization, is recognized as the client of the lawyer in the matter.

(e) Any member or beneficiary who is entitled to have legal services furnished or paid for by the organization, if such member or beneficiary so desires, may select counsel other than that furnished, selected or approved by the organization; provided, however, that the organization shall be under no obligation to pay for the legal services furnished by the attorney selected by the beneficiary unless the terms of the legal services plan specifically provide for payment.

Every legal services plan shall provide that any member or beneficiary may assert a claim that representation by counsel furnished, selected, or approved by the organization would be unethical, improper, or inadequate under the circumstances of the matter involved. The plan shall provide for adjudication of a claim under division (D)(4)(e) of this rule and appropriate relief through substitution of counsel or providing that the beneficiary may select counsel and the organization shall pay for the legal services rendered by selected counsel to the extent that such services are covered under the plan and in an amount equal to the cost that would have been incurred by the plan if the plan had furnished designated counsel.

(f) The lawyer does not know or have cause to know that the organization is in violation of applicable laws, rules of court, and other legal requirements that govern its legal service operations.

(g) The organization has filed with the Supreme Court of Ohio, on or before the first day of January of each year, a report with respect to its legal service plan, if any, showing its terms, its schedule of benefits, its subscription charges, agreements with counsel, and financial results of its legal service activities or, if it has failed to do so, the lawyer does not know or have cause to know of the failure.

(E) Nothing in this rule prohibits a lawyer from accepting employment received in response to the lawyer's own advertising, provided the advertising is in compliance with DR 2-101.

[Effective: October 5, 1970; amended effective January 1, 1973; October 29, 1975; March 1, 1986, July 1, 1996; November 1, 1999.]

DR 2-104. SUGGESTION OF NEED OF LEGAL SERVICES.

(A) A lawyer who has given unsolicited advice to a nonlawyer that the nonlawyer should obtain counsel or take legal action shall not accept employment resulting from that advice, except that:

(1) A lawyer may accept employment by a close friend, relative, former client, if the advice is germane to the former employment, or one whom the lawyer reasonably believes to be a client.

(2) A lawyer may accept employment that results from the lawyer's participation in activities designed to educate nonlawyers to recognize legal problems, to make intelligent selection of counsel, or to utilize available legal services if the activities are conducted or sponsored by any of the offices or organizations enumerated in DR 2103(D)(1) through (4), to the extent and under the conditions prescribed in these rules.

(3) A lawyer who is recommended, furnished or paid by a qualified legal assistance organization enumerated in DR 2-103(D)(1) through (4) may represent a member or beneficiary of the organization, to the extent and under the conditions prescribed in these rules.

(4) Without affecting the lawyer's right to accept employment, a lawyer may speak publicly or write for publication on legal topics so long as the lawyer does not emphasize the lawyer's own professional experience or reputation and does not undertake to give individual advice.

(5) If success in asserting rights or defenses of the lawyer's client in litigation in the nature of a class action is dependent upon the joinder of others, a lawyer may accept, but shall not seek, employment from those contacted for the purpose of obtaining their joinder.

(B) Nothing in this rule prohibits a lawyer from accepting employment received in response to the lawyer's own advertising, provided the advertising is in compliance with DR 2-101.

[Effective: October 5, 1970; amended effective October 20, 1975; March 1, 1986; December 1, 1995.]

DR 2-105. LIMITATION OF PRACTICE.

(A) A lawyer shall not hold himself or herself out publicly as a specialist or as limiting his or her practice, except as follows:

(1) A lawyer admitted to practice before the United States Patent Office may use the designation "Patents," "Patent Attorney," or "Patent Lawyer," or any combination of those terms, on his letterhead and office sign. A lawyer engaged in the trademark practice may use the designation "Trademarks," "Trademark Attorney," or "Trademark Lawyer," or any combination of those terms, on his letterhead and office sign, and a lawyer engaged in the admiralty practice may use the designation "Admiralty," "Proctor in Admiralty," or "Admiralty Lawyer," or any combination of those terms, on his letterhead and office sign.

(2) A lawyer may permit his name to be listed in lawyer referral service offices according to the fields of law in which he will accept referrals.

(3) A lawyer available to act as a consultant to or as an associate of other lawyers in a particular branch of law or legal service may distribute to other lawyers and publish in legal journals a dignified announcement of such availability, but the announcement shall not contain a representation of special competence or experience.

(4) A lawyer who is certified as a specialist in a particular field of law pursuant to the Supreme Court Rules for the Government of the Bar of Ohio may hold himself or herself out as a specialist only in accordance with those rules.

(5) A lawyer who has received certification from a private organization of special training, competence, or experience in a particular field of law may communicate the fact of the certification only if the certifying organization is bona fide, certification is issued only to lawyers who meet objective and consistently applied standards relevant to practice in that field of law that are higher than those required for admission to the practice of law, and certification is available to all lawyers who meet the standards. Any communication regarding certification shall comply with DR 2-101 and, unless the certifying organization is so approved, shall contain a statement that the certifying organization is not approved by the Supreme Court Commission on Certification of Attorneys as Specialists.

(6) A lawyer may state that his or her practice consists in large part or is limited to a field or fields of law. Except as provided in DR 2-105(A)(1), (4), and (5), a lawyer may not claim or imply special competence or experience in a field of law through use of the term "specialize" or otherwise.

[Effective: October 5, 1970; amended effective March 1, 1986; January 1, 1993.]

DR 2-106. FEES FOR LEGAL SERVICES.

(A) A lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee.

(B) A fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee. Factors to be considered as guides in determining the reasonableness of a fee include the following:

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

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

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

(4) The amount involved and the results obtained.

(5) The time limitations imposed by the client or by the circumstances.

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

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

(8) Whether the fee is fixed or contingent.

(C) A lawyer shall not enter into an arrangement for, charge, or collect a contingent fee for representing a defendant in a criminal case.

[Effective: October 5, 1970.]

DR 2-107. DIVISION OF FEES AMONG LAWYERS.

(A) Division of fees by lawyers who are not in the same firm may be made only with the prior consent of the client and if all of the following apply:

(1) The division is in proportion to the services performed by each lawyer or, if by written agreement with the client, all lawyers assume responsibility for the representation;

(2) The terms of the division and the identity of all lawyers sharing in the fee are disclosed in writing to the client;

(3) The total fee is reasonable.

(B) In cases of dispute between lawyers arising under this rule, fees shall be divided in accordance with mediation or arbitration provided by a local bar association. Disputes that cannot be resolved by a local bar association shall be referred to the Ohio State Bar Association for mediation or arbitration.

(C) This rule does not prohibit payment to a former partner or associate pursuant to a separation or retirement agreement or payments made in conjunction with the sale of a law practice in accordance with DR 2-111.

[Effective: October 5, 1970; amended effective August 1, 1990; February 1, 2003.]

DR 2-108. AGREEMENTS RESTRICTING THE PRACTICE OF A LAWYER.

(A) A lawyer shall not be a party to or participate in a partnership or employment agreement with another lawyer that restricts the right of a lawyer to practice law after the termination of a relationship created by the agreement, except as a condition to payment of retirement benefits or the sale of a law practice in accordance with DR 2-111.

(B) In connection with the settlement of a controversy or suit, a lawyer shall not enter into an agreement that restricts his right to practice law.

[Effective: October 5, 1970; amended effective February 1, 2003.]

DR 2-109. ACCEPTANCE OF EMPLOYMENT.

(A) A lawyer shall not accept employment on behalf of a person if he knows or it is obvious that such person wishes to:

(1) Bring a legal action, conduct a defense, or assert a position in litigation, or otherwise have steps taken for him, merely for the purpose of harassing or maliciously injuring any person.

(2) Present a claim or defense in litigation that is not warranted under existing law, unless it can be supported by good faith argument for an extension, modification, or reversal of existing law.

[Effective: October 5, 1970.]

DR 2-110. WITHDRAWAL FROM EMPLOYMENT.

(A) In General.

(1) If permission for withdrawal from employment is required by the rules of a tribunal, a lawyer shall not withdraw from employment in a proceeding before that tribunal without its permission.

(2) In any event, a lawyer shall not withdraw from employment until the lawyer has taken reasonable steps to avoid foreseeable prejudice to the rights of his or her client, including giving due notice to his or her client, allowing time for employment of other counsel, delivering to the client all papers and property to which the client is entitled, and complying with applicable laws and rules.

(3) A lawyer who withdraws from employment shall refund promptly any part of a fee paid in advance that has not been earned, except when withdrawal is pursuant to DR 2-111.

(B) Mandatory Withdrawal. A lawyer representing a client before a tribunal, with its permission if required by its rules, shall withdraw from employment, and a lawyer representing a client in other matters shall withdraw from employment if the lawyer:

(1) Knows or it is obvious that the client is bringing the legal action, conducting the defense, or asserting a position in the litigation, or is otherwise having steps taken for the client, merely for the purpose of harassing or maliciously injuring any person.

(2) Knows or it is obvious that his or her continued employment will result in violation of a Disciplinary Rule.

(3) Has a mental or physical condition that renders it unreasonably difficult for the lawyer to carry out the employment effectively.

(4) Is discharged by the client.

(C) Permissive Withdrawal. If DR 2-110(B) is not applicable, a lawyer may not request permission to withdraw in matters pending before a tribunal, and may not withdraw in other matters, unless the request or withdrawal is because:

(1) The client:

(a) Insists upon presenting a claim or defense that is not warranted under existing law and cannot be supported by good faith argument for an extension, modification, or reversal of existing law.

(b) Personally seeks to pursue an illegal course of conduct.

(c) Insists that the lawyer pursue a course of conduct that is illegal or that is prohibited under the Disciplinary Rules.

(d) By other conduct renders it unreasonably difficult for the lawyer to carry out his or her employment effectively.

(e) Insists, in a matter not pending before a tribunal, that the lawyer engage in conduct that is contrary to the judgment and advice of the lawyer but not prohibited under the Disciplinary Rules.

(f) Deliberately disregards an agreement or obligation to the lawyer as to expenses or fees.

(2) The lawyer's continued employment is likely to result in a violation of a Disciplinary Rule.

(3) The lawyer's inability to work with co-counsel indicates that the best interests of the client likely will be served by withdrawal.

(4) The lawyer's mental or physical condition renders it difficult for him to carry out the employment effectively.

(5) The client knowingly and freely assents to termination of the lawyer's employment.

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

(7) The lawyer sells the law practice in accordance with DR 2-111.

[Effective: October 5, 1970; amended effective February 1, 2003.]

DR 2-111. SALE OF LAW PRACTICE

(A)(1) Subject to the provisions of this rule, a lawyer or law firm may sell or purchase a law practice, including the good will of the practice. The law practice shall be sold in its entirety, except where a conflict of interest is present that prevents the transfer of representation of a client or class of clients. This rule shall not permit the sale or purchase of a law practice where the purchasing lawyer is buying the practice for the sole or primary purpose of reselling the practice to another lawyer or law firm.

(2) As used in this rule:

(a) "Purchasing lawyer" means either an individual lawyer or a law firm;

(b) "Selling lawyer" means an individual lawyer, a law firm, the estate of a deceased lawyer, or the representatives of a disabled or disappeared lawyer.

(B) The selling lawyer and the prospective purchasing lawyer may engage in general discussions regarding the possible sale of a law practice. Before the selling lawyer may provide the prospective purchasing lawyer with information relative to client representation or confidential material contained in client files, the selling lawyer shall require the prospective purchasing lawyer to execute a confidentiality agreement. The confidentiality agreement shall bind the prospective purchasing lawyer to preserve the confidences and secrets of the clients of the selling lawyer, consistent with DR 4-101, as if those clients were clients of the prospective purchasing lawyer.

(C) The selling lawyer and the purchasing lawyer may negotiate the terms of the sale of a law practice, subject to all of the following:

(1) The sale agreement shall include a statement by selling lawyer and purchasing lawyer that the purchasing lawyer is purchasing the law practice in good faith and with the intention of delivering legal services to clients of the selling lawyer and others in need of legal services.

(2) The sale agreement shall provide that the purchasing lawyer will honor any fee agreements between the selling lawyer and the clients of the selling lawyer relative to legal representation that is ongoing at the time of the sale. The purchasing lawyer may negotiate fees with clients of the selling lawyer for legal representation that is commenced after the date of the sale.

(3) The sale agreement may include terms that reasonably limit the ability of the selling lawyer to reenter the practice of law, including, but not limited to, the ability of the selling lawyer to reenter the practice of law for a specific period of time or to practice in a specific geographic area. The sale agreement shall not include terms limiting the ability of the selling lawyer to practice law or reenter the practice of law if the selling lawyer is selling his or her law

practice to enter academic, government, or public service or to serve as in-house counsel to a business.

(D)(1) Prior to completing the sale, the selling lawyer and purchasing lawyer shall provide written notice of the sale to the clients of the selling lawyer. For purposes of this rule, clients of the selling lawyer include all current clients of the selling lawyer and any closed files that the selling lawyer and purchasing lawyer agree to make subject of the sale. The written notice shall include all of the following:

(a) The anticipated effective date of the proposed sale;

(b) A statement that the purchasing lawyer will honor all existing fee agreements for legal representation that is ongoing at the time of sale and that fees for legal representation commenced after the date of sale will be negotiated by the purchasing lawyer and client;

(c) The client's right to retain other counsel or take possession of case files;

(d) The fact that the client's consent to the sale will be presumed if the client does not take action or otherwise object within ninety days of the receipt of the notice;

(e) Biographical information relative to the professional qualifications of the purchasing lawyer, including but not limited to applicable information set forth in DR 2-101(D)(1) to (11), information regarding any disciplinary action taken against the purchasing lawyer, and information regarding the existence, nature, and status of any pending disciplinary complaint certified by a probable cause panel pursuant to Gov. Bar R. V, Section 6(D)(1).

(2) If the seller is the estate of a deceased lawyer or the representative of a disabled or disappeared lawyer, the purchasing lawyer shall provide written notice to the clients, and the purchasing lawyer shall obtain written consent from each client to act on the client's behalf. The client's consent shall be presumed if no response is received from the client within ninety days of the date the notice was sent to the client at the client's last known address as shown on the records of the seller or the client's rights would be prejudiced by a failure to act during the ninety day period.

(3) If a client cannot be given notice, the representation of that client may be transferred to the purchaser only upon entry of an order authorizing the transfer by a court having jurisdiction. The seller may disclose to the court, *in camera*, information relating to the representation only to the extent necessary to obtain an order authorizing the transfer of the representation.

(4) The written notice to clients required by division (D)(1) and (2) of this rule shall be provided by certified mail, return receipt requested. In lieu of providing notice by certified mail, either the selling lawyer or purchasing lawyer, or both, may personally deliver the notice to a client. In the case of personal delivery, the lawyer providing the notice shall obtain written acknowledgement of the delivery from the client.

(E) Neither the selling lawyer nor the purchasing lawyer shall attempt to exonerate the lawyer or law firm from or limit liability to the former or prospective client for any malpractice or other professional negligence. DR 6-102 shall be incorporated in all agreements for the sale or purchase of a law practice. The selling lawyer or the purchasing lawyer, or both, may agree to provide for the indemnification or other contribution arising from any claim or action in malpractice or other professional negligence.

(F) The selling lawyer and the purchasing lawyer shall comply with the limitations, restrictions, or prohibitions contained in the Attorney's Oath of Office, the Supreme Court Rules for the Government of the Bar of Ohio, and the Code of Professional Responsibility, including but not limited to, DR 2-103, 3-102, 4-101, and 5-105.

[Effective: February 1, 2003.]

CANON 3

A Lawyer Should Assist in Preventing the Unauthorized Practice of Law

ETHICAL CONSIDERATIONS

EC 3-1 The prohibition against the practice of law by a layman is grounded in the need of the public for integrity and competence of those who undertake to render legal services. Because of the fiduciary and personal character of the lawyer-client relationship and the inherently complex nature of our legal system, the public can better be assured of the requisite responsibility and competence if the practice of law is confined to those who are subject to the requirements and regulations imposed upon members of the legal profession.

EC 3-2 The sensitive variations in the considerations that bear on legal determinations often make it difficult even for a lawyer to exercise appropriate professional judgment, and it is therefore essential that the personal nature of the relationship of client and lawyer be preserved. Competent professional judgment is the product of a trained familiarity with law and legal processes, a disciplined, analytical approach to legal problems, and a firm ethical commitment.

EC 3-3 A non-lawyer who undertakes to handle legal matters is not governed as to integrity or legal competence by the same rules that govern the conduct of a lawyer. A lawyer is not only subject to that regulation but also is committed to high standards of ethical conduct. The public interest is best served in legal matters by a regulated professional committed to such standards. The Disciplinary Rules protect the public in that they prohibit a lawyer from seeking employment by improper overtures, from acting in cases of divided loyalties, and from submitting to the control of others in the exercise of his judgment. Moreover, a person who entrusts legal matters to a lawyer is protected by the attorney-client privilege and by the duty of the lawyer to hold inviolate the confidences and secrets of his client.

EC 3-4 A layman who seeks legal services often is not in a position to judge whether he will receive proper professional attention. The entrustment of a legal matter may well involve the confidences, the reputation, the property, the freedom, or even the life of the client. Proper protection of members of the public demands that no person be permitted to act in the confidential and demanding capacity of a lawyer unless he is subject to the regulations of the legal profession.

EC 3-5 It is neither necessary nor desirable to attempt the formulation of a single, specific definition of what constitutes the practice of law. Functionally, the practice of law relates to the rendition of services for others that call for the professional judgment of a lawyer. The essence of the professional judgment of the lawyer is his educated ability to relate the general body and philosophy of law to a specific legal problem of a client; and thus, the public interest will be

better served if only lawyers are permitted to act in matters involving professional judgment. Where this professional judgment is not involved, non-lawyers, such as court clerks, police officers, abstracters, and many governmental employees, may engage in occupations that require a special knowledge of law in certain areas. But the services of a lawyer are essential in the public interest whenever the exercise of professional legal judgment is required.

EC 3-6 A lawyer often delegates tasks to clerks, secretaries, and other lay persons. Such delegation is proper if the lawyer maintains a direct relationship with his client, supervises the delegated work, and has complete professional responsibility for the work product. This delegation enables a lawyer to render legal service more economically and efficiently.

EC 3-7 The prohibition against a non-lawyer practicing law does not prevent a layman from representing himself, for then he is ordinarily exposing only himself to possible injury. The purpose of the legal profession is to make educated legal representation available to the public; but anyone who does not wish to avail himself of such representation is not required to do so. Even so, the legal profession should help members of the public to recognize legal problems and to understand why it may be unwise for them to act for themselves in matters having legal consequences.

EC 3-8 Because a lawyer should not aid or encourage a nonlawyer to practice law, a lawyer should not practice law in association with a nonlawyer or otherwise share legal fees with a nonlawyer. This does not mean, however, that the pecuniary value of the interest of a deceased lawyer in his or her firm or practice may not be paid to his estate or specified persons such as a surviving spouse or heirs through the sale of a law practice or otherwise. In like manner, profit-sharing retirement plans of a lawyer or law firm that include nonlawyer office employees are not improper. These limited exceptions to the rule against sharing legal fees with nonlawyers are permissible since they do not aid or encourage nonlawyers to practice law.

EC 3-9 Regulation of the practice of law is accomplished principally by the respective states. Authority to engage in the practice of law conferred in any jurisdiction is not per se a grant of the right to practice elsewhere, and it is improper for a lawyer to engage in practice where he is not permitted by law or by court order to do so. However, the demands of business and the mobility of our society pose distinct problems in the regulation of the practice of law by the states. In furtherance of the public interest, the legal profession should discourage regulation that unreasonably imposes territorial limitations upon the right of a lawyer to handle the legal affairs of his client or upon the opportunity of a client to obtain the services of a lawyer of his choice in all matters including the presentation of a contested matter in a tribunal before which the lawyer is not permanently admitted to practice.

[Effective: October 5, 1970; amended effective February 1, 2003.]

DISCIPLINARY RULES

DR 3-101. AIDING UNAUTHORIZED PRACTICE OF LAW.

(A) A lawyer shall not aid a non-lawyer in the unauthorized practice of law.

(B) A lawyer shall not practice law in a jurisdiction where to do so would be in violation of regulations of the profession in that jurisdiction.

[Effective: October 5, 1970.]

DR 3-102. DIVIDING LEGAL FEES WITH A NON-LAWYER.

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

(1) An agreement by a lawyer with his or her 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) An agreement to purchase the practice of a deceased, disabled, or disappeared lawyer in accordance with DR 2-111 may provide for the payment of money, over a reasonable period of time, to a nonlawyer.

(3) A lawyer who undertakes to complete unfinished legal business of a deceased lawyer may pay to the estate of the deceased lawyer a proportion of the total compensation that fairly represents the services rendered by the deceased lawyer.

(4) A lawyer or law firm may include nonlawyer employees in a retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement.

(5) A lawyer participating in a lawyer referral service that satisfies the requirements of DR 2-103(C) may pay to the service a fee calculated as a percentage of legal fees earned by the lawyer in his or her capacity as a lawyer to whom the service has referred a matter. This percentage fee is in addition to any reasonable membership or registration fee established by the service.

[Effective: October 5, 1970; amended effective: July 1, 1996; February 1, 2003.]

DR 3-103. FORMING A PARTNERSHIP WITH A NON-LAWYER.

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

[Effective: October 5, 1970.]

CANON 4

A Lawyer Should Preserve the Confidences and Secrets of a Client

ETHICAL CONSIDERATIONS

EC 4-1 Both the fiduciary relationship existing between lawyer and client and the proper functioning of the legal system require the preservation by the lawyer of confidences and secrets of one who has employed or sought to employ him. A client must feel free to discuss whatever he wishes with his lawyer and a lawyer must be equally free to obtain information beyond that volunteered by his client. A lawyer should be fully informed of all the facts of the matter he is handling in order for his client to obtain the full advantage of our legal system. It is for the lawyer in the exercise of his independent professional judgment to separate the relevant and important from the irrelevant and unimportant. The observance of the ethical obligation of a lawyer to hold inviolate the confidences and secrets of his client not only facilitates the full development of facts essential to proper representation of the client but also encourages laymen to seek early legal assistance.

EC 4-2 The obligation to protect confidences and secrets obviously does not preclude a lawyer from revealing information when his client consents after full disclosure, when necessary to perform his professional employment, when permitted by a Disciplinary Rule, or when required by law. Unless the client otherwise directs, a lawyer may disclose the affairs of his client to partners or associates of his firm. It is a matter of common knowledge that the normal operation of a law office exposes confidential professional information to nonlawyer employees of the office, particularly secretaries and those having access to the files; and this obligates a lawyer to exercise care in selecting and training his employees so that the sanctity of all confidences and secrets of his clients may be presented. If the obligation extends to two or more clients as to the same information, a lawyer should obtain the permission of all before revealing the information. A lawyer must always be sensitive to the rights and wishes of his client and act scrupulously in the making of decisions which may involve the disclosure of information obtained in his professional relationship. Thus, in the absence of consent of his client after full disclosure, a lawyer should not associate another lawyer in the handling of a matter; nor should he, in the absence of consent, seek counsel from another lawyer if there is a reasonable possibility that the identity of the client or his confidences or secrets would be revealed to such lawyer. Both social amenities and professional duty should cause a lawyer to shun indiscreet conversations concerning his clients.

EC 4-3 Unless the client otherwise directs, it is not improper for a lawyer to give limited information from his files to an outside agency necessary for statistical, bookkeeping, accounting, data processing, banking, printing, or other legitimate purposes, provided he exercises due care in the selection of the agency and warns the agency that the information must be kept confidential.

EC 4-4 The attorney-client privilege is more limited than the ethical obligation of a lawyer to guard the confidences and secrets of his client. This ethical precept, unlike the evidentiary privilege, exists without regard to the nature or source of information or the fact that others share the knowledge. A lawyer should endeavor to act in a manner which preserves the evidentiary privilege; for example, he should avoid professional discussions in the presence of persons to whom the privilege does not extend. A lawyer owes an obligation to advise the client of the attorney-client privilege and timely to assert the privilege unless it is waived by the client.

EC 4-5 A lawyer should not use information acquired in the course of the representation of a client to the disadvantage of the client and a lawyer should not use, except with the consent of his client after full disclosure, such information for his own purposes. Likewise, a lawyer should be diligent in his efforts to prevent the misuse of such information by his employees and associates. Care should be exercised by a lawyer to prevent the disclosure of the confidences and secrets of one client to another, and no employment should be accepted that might require such disclosure.

EC 4-6 The obligation of a lawyer to preserve the confidences and secrets of clients continues after the termination of employment. A lawyer should also provide for the protection of the confidences and secrets of clients following the termination of the practice of the lawyer, whether termination is due to death, disability, or retirement. For example, a lawyer might provide for the personal papers of the client to be returned to the client and for the papers of the lawyer to be delivered to another lawyer or to be destroyed. In determining the method of disposition, the instructions and wishes of the client should be a dominant consideration.

[Effective: October 5, 1970; amended effective February 1, 2003.]

DISCIPLINARY RULES

DR 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 when permitted under DR 4-101(C), 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 of 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 permitted under Disciplinary Rules or required by law or court order.

(3) The intention of his client to commit a crime and the information necessary to prevent the crime.

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

(D) 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.

[Effective: October 5, 1970.]

CANON 5

A Lawyer Should Exercise Independent Professional Judgment on Behalf of a Client

ETHICAL CONSIDERATIONS

EC 5-1 The professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of his client and free of compromising influences and loyalties. Neither his personal interests, the interests of other clients, nor the desires of third persons should be permitted to dilute his loyalty to his client.

Interests of a Lawyer That May Affect His Judgment

EC 5-2 A lawyer should not accept proffered employment if his personal interests or desires will, or there is a reasonable probability that they will, affect adversely the advice to be given or services to be rendered the prospective client. After accepting employment, a lawyer carefully should refrain from acquiring a property right or assuming a position that would tend to make his judgment less protective of the interests of his client.

EC 5-3 The self-interest of a lawyer resulting from his ownership of property in which his client also has an interest or which may affect property of his client may interfere with the exercise of free judgment on behalf of his client. If such interference would occur with respect to a prospective client, a lawyer should decline employment proffered by him. After accepting employment, a lawyer should not acquire property rights that would adversely affect his professional judgment in the representation of his client. Even if the property interests of a lawyer do not presently interfere with the exercise of his independent judgment, but the likelihood of interference can reasonably be foreseen by him, a lawyer should explain the situation to his client and should decline employment or withdraw unless the client consents to the continuance of the relationship after full disclosure. A lawyer should not seek to persuade his client to permit him to invest in an undertaking of his client nor make improper use of his professional relationship to influence his client to invest in an enterprise in which the lawyer is interested.

EC 5-4 If, in the course of his representation of a client, a lawyer is permitted to receive from his client a beneficial ownership in publication rights relating to the subject matter of the employment, he may be tempted to subordinate the interests of his client to his own anticipated pecuniary gain. For example, a lawyer in a criminal case who obtains from his client television, radio, motion picture, newspaper, magazine, book, or other publication rights with respect to the case may be influenced, consciously or unconsciously, to a course of conduct that will enhance the value of his publication rights to the prejudice of his client. To prevent these potentially differing interests, such arrangements should be scrupulously avoided prior to the termination of

all aspects of the matter giving rise to the employment, even though his employment has previously ended.

EC 5-5 A lawyer should not suggest to the lawyer's client that a gift be made to the lawyer or for the lawyer's benefit. If a lawyer accepts a gift from the lawyer's client, the lawyer is peculiarly susceptible to the charge that the lawyer unduly influenced or overreached the client. If a client voluntarily offers to make a gift to the client's lawyer, the lawyer may accept the gift, but before doing so, the lawyer should urge that the client secure disinterested advice from an independent, competent person who is cognizant of all the circumstances. Unless the client is related by blood or marriage, a lawyer should insist that an instrument in which the lawyer's client desires to name the lawyer beneficially be prepared by another lawyer selected by the client.

EC 5-6 A lawyer should not consciously influence a client to name him as executor, trustee, or lawyer in an instrument. In those cases where a client wishes to name his lawyer as such, care should be taken by the lawyer to avoid even the appearance of impropriety.

EC 5-7 The possibility of an adverse effect upon the exercise of free judgment by a lawyer on behalf of his client during litigation generally makes it undesirable for the lawyer to acquire a proprietary interest in the cause of his client or otherwise to become financially interested in the outcome of the litigation. However, it is not improper for a lawyer to protect his right to collect a fee for his services by the assertion of legally permissible liens, even though by doing so he may acquire an interest in the outcome of litigation. Although a contingent fee arrangement gives a lawyer a financial interest in the outcome of litigation, a reasonable contingent fee is permissible in civil cases because it may be the only means by which a layman can obtain the services of a lawyer of his choice. But a lawyer, because he is in a better position to evaluate a cause of action, should enter into a contingent fee arrangement only in those instances where the arrangement will be beneficial to the client.

EC 5-8 A financial interest in the outcome of litigation also results if monetary advances are made by the lawyer to his client. Although this assistance generally is not encouraged, there are instances when it is not improper to make loans to a client. For example, the advancing or guaranteeing of payment of the costs and expenses of litigation by a lawyer may be the only way a client can enforce his cause of action, but the ultimate liability for such costs and expenses must be that of the client.

EC 5-9 Occasionally a lawyer is called upon to decide in a particular case whether he will be a witness or an advocate. If a lawyer is both counsel and witness, he becomes more easily impeachable for interest and thus may be a less effective witness. Conversely, the opposing counsel may be handicapped in challenging the credibility of the lawyer when the lawyer also appears as an advocate in the case. An advocate who becomes a witness is in the unseemly and ineffective position of arguing his own credibility. The roles of an advocate and of a witness are inconsistent; the function of an advocate is to advance or argue the cause of another, while that of a witness is to state facts objectively.

EC 5-10 Problems incident to the lawyer-witness relationship arise at different stages; they relate either to whether a lawyer should accept employment or should withdraw from employment. Regardless of when the problem arises, his decision is to be governed by the same basic considerations. It is not objectionable for a lawyer who is a potential witness to be an advocate if it is unlikely that he will be called as a witness because his testimony would be merely cumulative or if his testimony will relate only to an uncontested issue. In the exceptional situation where it will be manifestly unfair to the client for the lawyer to refuse employment or to withdraw when he will likely be a witness on a contested issue, he may serve as advocate even though he may be a witness. In making such decision, he should determine the personal or financial sacrifice of the client that may result from his refusal of employment or withdrawal therefrom, the materiality of his testimony, and the effectiveness of his representation in view of his personal involvement. In weighing these factors, it should be clear that refusal or withdrawal will impose an unreasonable hardship upon the client before the lawyer accepts or continues the employment. Where the question arises, doubts should be resolved in favor of the lawyer testifying and against his becoming or continuing as an advocate.

EC 5-11 A lawyer should not permit his personal interests to influence his advice relative to a suggestion by his client that additional counsel be employed. In like manner, his personal interests should not deter him from suggesting that additional counsel be employed; on the contrary, he should be alert to the desirability of recommending additional counsel when, in his judgment, the proper representation of his client requires it. However, a lawyer should advise his client not to employ additional counsel suggested by the client if the lawyer believes that such employment would be a disservice to the client, and he should disclose the reasons for his belief.

EC 5-12 Inability of co-counsel to agree on a matter vital to the representation of their client requires that their disagreement be submitted by them jointly to their client for his resolution, and the decision of the client shall control the action to be taken.

EC 5-13 A lawyer should not maintain membership in or be influenced by any organization of employees that undertakes to prescribe, direct, or suggest when or how he should fulfill his professional obligations to a person or organization that employs him as a lawyer. Although it is not necessarily improper for a lawyer employed by a corporation or similar entity to be a member of an organization of employees, he should be vigilant to safeguard his fidelity as a lawyer to his employer free from outside influences.

Interests of Multiple Clients

EC 5-14 Maintaining the independence of professional judgment required of a lawyer precludes his acceptance or continuation of employment that will adversely affect his judgment on behalf of or dilute his loyalty to a client. This problem arises whenever a lawyer is asked to represent two or more clients who may have differing interests, whether such interests be conflicting, inconsistent, diverse, or otherwise discordant.

EC 5-15 If a lawyer is requested to undertake or to continue representation of multiple clients having potentially differing interests, he must weigh carefully the possibility that his judgment

may be impaired or his loyalty divided if he accepts or continues the employment. He should resolve all doubts against the propriety of the representation. A lawyer should never represent in litigation multiple clients with differing interests; and there are few situations in which he would be justified in representing in litigation multiple clients with potentially differing interests. If a lawyer accepted such employment and the interests did become actually differing, he would have to withdraw from employment with likelihood of resulting hardship on the clients; and for this reason it is preferable that he refuse the employment initially. On the other hand, there are many instances in which a lawyer may properly serve multiple clients having potentially differing interests in matters not involving litigation. If the interests vary only slightly, it is generally likely that the lawyer will not be subjected to an adverse influence and that he can retain his independent judgment on behalf of each client; and if the interests become differing, withdrawal is less likely to have a disruptive effect upon the causes of his clients.

EC 5-16 A lawyer representing a fiduciary that owes fiduciary duties to third parties does not solely by representation of the fiduciary engage in multiple representation even if the third parties' interests conflict with the interests of the fiduciary or other third parties. As used in this Ethical Consideration, "fiduciary" includes only a trustee under an express trust or an executor, administrator, or personal representative.

EC 5-17 In those instances in which a lawyer is justified in representing two or more clients having differing interests, it is nevertheless essential that each client be given the opportunity to evaluate his need for representation free of any potential conflict and to obtain other counsel if he so desires. Thus before a lawyer may represent multiple clients, he should explain fully to each client the implications of the common representation and should accept or continue employment only if the clients consent. If there are present other circumstances that might cause any of the multiple clients to question the undivided loyalty of the lawyer, he should also advise all of the clients of those circumstances.

EC 5-18 Typically recurring situations involving potentially differing interests are those in which a lawyer is asked to represent co-defendants in a criminal case, co-plaintiffs in a personal injury case, an insured and his insurer, and beneficiaries of the estate of a decedent. Whether a lawyer can fairly and adequately protect the interests of multiple clients in these and similar situations depends upon an analysis of each case. In certain circumstances, there may exist little chance of the judgment of the lawyer being adversely affected by the slight possibility that the interests will become actually differing; in other circumstances, the chance of adverse effect upon his judgment is not unlikely.

EC 5-19 A lawyer employed or retained by a corporation or similar entity owes his allegiance to the entity and not to a stockholder, director, officer, employee, representative, or other person connected with the entity. In advising the entity, a lawyer should keep paramount its interests and his professional judgment should not be influenced by the personal desires of any person or organization. Occasionally, a lawyer for an entity is requested by a stockholder, director, officer, employee, representative, or other person connected with the entity to represent him in an individual capacity; in such case the lawyer may serve the individual only if the lawyer is convinced that differing interests are not present.

EC 5-20 A lawyer may represent several clients whose interests are not actually or potentially differing. Nevertheless, he should explain any circumstances that might cause a client to question his undivided loyalty. Regardless of the belief of a lawyer that he may properly represent multiple clients, he must defer to a client who holds the contrary belief and withdraw from representation of that client.

EC 5-21 A lawyer is often asked to serve as an impartial arbitrator or mediator in matters which involve present or former clients. He may serve in either capacity if he first discloses such present or former relationships. After a lawyer has undertaken to act as an impartial arbitrator or mediator, he should not thereafter represent in the dispute any of the parties involved.

Desires of Third Persons

EC 5-22 The obligation of a lawyer to exercise professional judgment solely on behalf of his client requires that he disregard the desires of others that might impair his free judgment. The desires of a third person will seldom adversely affect a lawyer unless that person is in a position to exert strong economic, political, or social pressures upon the lawyer. These influences are often subtle, and a lawyer must be alert to their existence. A lawyer subjected to outside pressures should make full disclosure of them to his client; and if he or his client believes that the effectiveness of his representation has been or will be impaired thereby, the lawyer should take proper steps to withdraw from representation of his client.

EC 5-23 Economic, political, or social pressures by third persons are less likely to impinge upon the independent judgment of a lawyer in a matter in which he is compensated directly by his client and his professional work is exclusively with his client. On the other hand, if a lawyer is compensated from a source other than his client, he may feel a sense of responsibility to someone other than his client.

EC 5-24 A person or organization that pays or furnishes lawyers to represent others possesses a potential power to exert strong pressures against the independent judgment of those lawyers. Some employers may be interested in furthering their own economic, political, or social goals without regard to the professional responsibility of the lawyer to his individual client. Others may be far more concerned with establishment or extension of legal principles than in the immediate protection of the rights of the lawyer's individual client. On some occasions, decisions on priority of work may be made by the employer rather than the lawyer with the result that prosecution of work already undertaken for clients is postponed to their detriment. Similarly, an employer may seek, consciously or unconsciously, to further its own economic interests through the actions of the lawyers employed by it. Since a lawyer must always be free to exercise his professional judgment without regard to the interests or motives of a third person, the lawyer who is employed by one to represent another must constantly guard against erosion of his professional freedom.

EC 5-25 To assist a lawyer in preserving his professional independence, a number of courses are available to him. For example, a lawyer should not practice with or in the form of a professional

legal corporation, even though the corporate form is permitted by law, if any director, officer, or stockholder of it is a non-lawyer. Although a lawyer may be employed by a business corporation with non-lawyers serving as directors or officers, and they necessarily have the right to make decisions of business policy, a lawyer must decline to accept direction of his professional judgment from any layman. Various types of legal aid offices are administered by boards of directors composed of lawyers and laymen. A lawyer should not accept employment from such an organization unless the board sets only broad policies and there is no interference in the relationship of the lawyer and the individual client he serves. Where a lawyer is employed by an organization, a written agreement that defines the relationship between him and the organization and provides for his independence is desirable since it may serve to prevent misunderstanding as to their respective roles. Although other innovations in the means of supplying legal counsel may develop, the responsibility of the lawyer to maintain his professional independence remains constant, and the legal profession must insure that changing circumstances do not result in loss of the professional independence of the lawyer.

[Effective: October 5, 1970; amended May 1, 1996; November 1, 1999.]

DISCIPLINARY RULES

DR 5-101. REFUSING EMPLOYMENT WHEN THE INTERESTS OF THE LAWYER MAY IMPAIR THE LAWYER'S INDEPENDENT PROFESSIONAL JUDGMENT.

(A)(1) Except with the consent of the client after full disclosure, a lawyer shall not accept employment if the exercise of professional judgment on behalf of the client will be or reasonably may be affected by the lawyer's financial, business, property, or personal interests.

(2) Notwithstanding the consent of the client, a lawyer shall not knowingly prepare, draft, or supervise the preparation or execution of a will, codicil, or *inter vivos* trust for a client in which any of the following are named as beneficiary:

(a) the lawyer;

(b) the lawyer's law partner or a shareholder of the lawyer's firm;

(c) an associate, paralegal, law clerk, or other employee in the lawyer's firm or office;

(d) a lawyer acting "of counsel" in the lawyer's firm;

(e) the spouses, siblings, natural or adoptive children, or natural or adoptive parents of any of those described in divisions (A)(2)(a) through (d) of this rule.

(3) Division (A)(2) of this rule shall not apply if the client is related by blood or marriage to the beneficiary within the third degree of relationship as defined by the law of Ohio.

(B) A lawyer shall not accept employment in contemplated or pending litigation if the lawyer knows or it is obvious that the lawyer or a lawyer in the firm ought to be called as a witness, except that the lawyer may undertake the employment and the lawyer or a lawyer in the firm may testify:

(1) If the testimony will relate solely to an uncontested matter.

(2) If the testimony will relate solely to a matter of formality and there is no reason to believe that substantial evidence will be offered in opposition to the testimony.

(3) If the testimony will relate solely to the nature and value of legal services rendered in the case by the lawyer or the firm to the client.

(4) As to any matter, if refusal would work a substantial hardship on the client because of the distinctive value of the lawyer or the firm as counsel in the particular case.

[Effective: October 5, 1970; amended May 1, 1996.]

DR 5-102. WITHDRAWAL AS COUNSEL WHEN THE LAWYER BECOMES A WITNESS.

(A) If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that he or a lawyer in his firm ought to be called as a witness on behalf of his client, he shall withdraw from the conduct of the trial and his firm, if any, shall not continue representation in the trial, except that he may continue the representation and he or a lawyer in his firm may testify in the circumstances enumerated in DR 5-101(B)(1) through (4).

(B) If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that he or a lawyer in his firm may be called as a witness other than on behalf of his client, he may continue the representation until it is apparent that his testimony is or may be prejudicial to his client.

[Effective: October 5, 1970.]

DR 5-103. AVOIDING ACQUISITION OF INTEREST IN LITIGATION.

(A) 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 a lawyer may:

(1) Acquire a lien granted by law to secure the lawyer's fee or expenses.

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

(B) While representing a client in connection with contemplated or pending litigation, a lawyer shall not advance or guarantee financial assistance to the client, except that a lawyer may advance or guarantee the expenses of litigation, including court costs, expenses of investigation, expenses of medical examination, and costs of obtaining and presenting evidence, the repayment of which may be contingent on the outcome of the matter.

[Effective: October 5, 1970; amended effective June 14, 1999.]

DR 5-104. LIMITING BUSINESS RELATIONS WITH A CLIENT.

(A) A lawyer shall not enter into a business transaction with a client if they have differing interests therein and if the client expects the lawyer to exercise his professional judgment therein for the protection of the client, unless the client has consented after full disclosure.

(B) Prior to conclusion of all aspects of the matter giving rise to his employment, a lawyer shall not enter into any arrangement or understanding with a client or a prospective client by which he acquires an interest in publication rights with respect to the subject matter of his employment or proposed employment.

[Effective: October 5, 1970.]

DR 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) 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.

[Effective: October 5, 1970.]

DR 5-106. SETTLING SIMILAR CLAIMS OF CLIENTS.

(A) A lawyer who represents two or more clients shall not make or participate in the making of an aggregate settlement of the claims of or against his clients, unless each client has consented to the settlement after being advised of the existence and nature of all the claims involved in the proposed settlement, of the total amount of the settlement, and of the participation of each person in the settlement.

[Effective: October 5, 1970.]

DR 5-107. AVOIDING INFLUENCE BY OTHERS THAN THE CLIENT.

(A) Except with the consent of his client after full disclosure, a lawyer shall not:

(1) Accept compensation for his legal services from one other than his client.

(2) Accept from one other than his client any thing of value related to his representation of or his employment by his client.

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

(C) 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 non-lawyer 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 non-lawyer is a corporate director or officer thereof; or

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

[Effective: October 5, 1970.]

CANON 6

A Lawyer Should Represent a Client Competently

ETHICAL CONSIDERATIONS

EC 6-1 Because of his vital role in the legal process, a lawyer should act with competence and proper care in representing clients. He should strive to become and remain proficient in his practice and should accept employment only in matters which he is or intends to become competent to handle.

EC 6-2 A lawyer is aided in attaining and maintaining his competence by keeping abreast of current legal literature and developments, participating in continuing legal education programs, concentrating in particular areas of the law, and by utilizing other available means. He has the additional ethical obligation to assist in improving the legal profession, and he may do so by participating in bar activities intended to advance the quality and standards of members of the profession. Of particular importance is the careful training of his younger associates and the giving of sound guidance to all lawyers who consult him. In short, a lawyer should strive at all levels to aid the legal profession in advancing the highest possible standards of integrity and competence and to meet those standards himself.

EC 6-3 While the licensing of a lawyer is evidence that he has met the standards then prevailing for admission to the bar, a lawyer generally should not accept employment in any area of the law in which he is not qualified. However, he may accept such employment if in good faith he expects to become qualified through study and investigation, as long as such preparation would not result in unreasonable delay or expense to his client. Proper preparation and representation may require the association by the lawyer of professionals in other disciplines. A lawyer offered employment in a matter in which he is not and does not expect to become so qualified should either decline the employment or, with the consent of his client, accept the employment and associate a lawyer who is competent in the matter.

EC 6-4 Having undertaken representation, a lawyer should use proper care to safeguard the interests of his client. If a lawyer has accepted employment in a matter beyond his competence but in which he expected to become competent, he should diligently undertake the work and study necessary to qualify himself. In addition to being qualified to handle a particular matter, his obligation to his client requires him to prepare adequately for and give appropriate attention to his legal work.

EC 6-5 A lawyer should have pride in his professional endeavors. His obligation to act competently calls for higher motivation than that arising from fear of civil liability or disciplinary penalty.

EC 6-6 A lawyer should not seek, by contract or other means, to limit his or her individual liability to clients for malpractice. A lawyer who properly handles client affairs has no need to attempt to limit liability for professional activities, and a lawyer who does not properly handle client affairs should not be permitted to do so. A lawyer who is a stockholder in or is associated with a professional legal corporation may, however, limit his or her liability for malpractice of associates in the corporation, but only to the extent permitted by law. A lawyer who sells or purchases a law practice may enter into an agreement for contribution or indemnification with the other lawyer in accordance with DR 2-111.

[Effective: October 5, 1970; amended effective February 1, 2003.]

DISCIPLINARY RULES

DR 6-101. FAILING TO ACT COMPETENTLY.

(A) A lawyer shall not:

(1) Handle a legal matter which he knows or should know that he is not competent to handle, without associating with him a lawyer who is competent to handle it.

(2) Handle a legal matter without preparation adequate in the circumstances.

(3) Neglect a legal matter entrusted to him.

[Effective: October 5, 1970.]

DR 6-102. LIMITING LIABILITY TO CLIENT.

Except as permitted in DR 2-111(C), a lawyer shall not attempt to exonerate himself or herself from or limit his or her liability to a client for personal malpractice.

[Effective: October 5, 1970; amended effective February 1, 2003.]

CANON 7

A Lawyer Should Represent a Client Zealously Within the Bounds of the Law

ETHICAL CONSIDERATIONS

EC 7-1 The duty of a lawyer, both to his client and to the legal system, is to represent his client zealously within the bounds of the law, which includes Disciplinary Rules and enforceable professional regulations. The professional responsibility of a lawyer derives from his membership in a profession which has the duty of assisting members of the public to secure and protect available legal rights and benefits. In our government of laws and not of men, each member of our society is entitled to have his conduct judged and regulated in accordance with the law; to seek any lawful objective through legally permissible means; and to present for adjudication any lawful claim, issue, or defense.

EC 7-2 The bounds of the law in a given case are often difficult to ascertain. The language of legislative enactments and judicial opinions may be uncertain as applied to varying factual situations. The limits and specific meaning of apparently relevant law may be made doubtful by changing or developing constitutional interpretations, inadequately expressed statutes or judicial opinions, and changing public and judicial attitudes. Certainty of law ranges from well-settled rules through areas of conflicting authority to areas without precedent.

EC 7-3 Where the bounds of law are uncertain, the action of a lawyer may depend on whether he is serving as advocate or adviser. A lawyer may serve simultaneously as both advocate and adviser, but the two roles are essentially different. In asserting a position on behalf of his client, an advocate for the most part deals with past conduct and must take the facts as he finds them. By contrast, a lawyer serving as adviser primarily assists his client in determining the course of future conduct and relationships. While serving as advocate, a lawyer should resolve in favor of his client doubts as to the bounds of the law. In serving a client as adviser, a lawyer in appropriate circumstances should give his professional opinion as to what the ultimate decisions of the courts would likely be as to the applicable law.

Duty of the Lawyer to a Client

EC 7-4 The advocate may urge any permissible construction of the law favorable to his client, without regard to his professional opinion as to the likelihood that the construction will ultimately prevail. His conduct is within the bounds of the law, and therefore permissible, if the position taken is supported by the law or is supportable by a good faith argument for an extension, modification, or reversal of the law. However, a lawyer is not justified in asserting a position in litigation that is frivolous.

EC 7-5 A lawyer as adviser furthers the interest of his client by giving his professional opinion as to what he believes would likely be the ultimate decision of the courts on the matter at hand and by informing his client of the practical effect of such decision. He may continue in the representation of his client even though his client has elected to pursue a course of conduct contrary to the advice of the lawyer so long as he does not thereby knowingly assist the client to engage in illegal conduct or to take a frivolous legal position. A lawyer should never encourage or aid his client to commit criminal acts or counsel his client on how to violate the law and avoid punishment therefor.

EC 7-6 Whether the proposed action of a lawyer is within the bounds of the law may be a perplexing question when his client is contemplating a course of conduct having legal consequences that vary according to the client's intent, motive, or desires at the time of the action. Often a lawyer is asked to assist his client in developing evidence relevant to the state of mind of the client at a particular time. He may properly assist his client in the development and preservation of evidence of existing motive, intent, or desire; obviously, he may not do anything furthering the creation or preservation of false evidence. In many cases a lawyer may not be certain as to the state of mind of his client, and in those situations he should resolve reasonable doubts in favor of his client.

EC 7-7 In certain areas of legal representation not affecting the merits of the cause or substantially prejudicing the rights of a client, a lawyer is entitled to make decisions on his own. But otherwise the authority to make decisions is exclusively that of the client and, if made within the framework of the law, such decisions are binding on his lawyer. As typical examples in civil cases, it is for the client to decide whether he will accept a settlement offer or whether he will waive his right to plead an affirmative defense. A defense lawyer in a criminal case has the duty to advise his client fully on whether a particular plea to a charge appears to be desirable and as to the prospects of success on appeal, but it is for the client to decide what plea should be entered and whether an appeal should be taken.

EC 7-8 A lawyer should exert his best efforts to insure that decisions of his client are made only after the client has been informed of relevant considerations. A lawyer ought to initiate this decision-making process if the client does not do so. Advice of a lawyer to his client need not be confined to purely legal considerations. A lawyer should advise his client of the possible effect of each legal alternative. A lawyer should bring to bear upon this decision-making process the fullness of his experience as well as his objective viewpoint. In assisting his client to reach a proper decision, it is often desirable for a lawyer to point out those factors which may lead to a decision that is morally just as well as legally permissible. He may emphasize the possibility of harsh consequences that might result from assertion of legally permissible positions. In the final analysis, however, the lawyer should always remember that the decision whether to forego legally available objectives or methods because of non-legal factors is ultimately for the client and not for himself. In the event that the client in a non-adjudicatory matter insists upon a course of conduct that is contrary to the judgment and advice of the lawyer but not prohibited by Disciplinary Rules, the lawyer may withdraw from the employment.

EC 7-9 In the exercise of his professional judgment on those decisions which are for his determination in the handling of a legal matter, a lawyer should always act in a manner consistent with the best interests of his client. However, when an action in the best interest of his client seems to him to be unjust, he may ask his client for permission to forego such action.

EC 7-10 The duty of a lawyer to represent his client with zeal does not militate against his concurrent obligation to treat with consideration all persons involved in the legal process and to avoid the infliction of needless harm.

EC 7-11 The responsibilities of a lawyer may vary according to the intelligence, experience, mental condition or age of a client, the obligation of a public officer, or the nature of a particular proceeding. Examples include the representation of an illiterate or an incompetent, service as a public prosecutor or other government lawyer, and appearances before administrative and legislative bodies.

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

EC 7-13 The responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict. This special duty exists because: (1) the prosecutor represents the sovereign and therefore should use restraint in the discretionary exercise of governmental powers, such as in the selection of cases to prosecute; (2) during trial the prosecutor is not only an advocate but he also may make decisions normally made by an individual client, and those affecting the public interest should be fair to all; and (3) in our system of criminal justice the accused is to be given the benefit of all reasonable doubts. With respect to evidence and witnesses, the prosecutor has responsibilities different from those of a lawyer in private practice: the prosecutor should make timely disclosure to the defense of available evidence, known to him, that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment. Further a prosecutor should not intentionally avoid pursuit of evidence merely because he believes it will damage the prosecution's case or aid the accused.

EC 7-14 A government lawyer who has discretionary power relative to litigation should refrain from instituting or continuing litigation that is obviously unfair. A government lawyer not having such discretionary power who believes there is lack of merit in a controversy submitted to him should so advise his superiors and recommend the avoidance of unfair litigation. A government lawyer in a civil action or administrative proceeding has the responsibility to seek justice and to develop a full and fair record, and he should not use his position or the economic power of the government to harass parties or to bring about unjust settlements or results.

EC 7-15 The nature and purpose of proceedings before administrative agencies vary widely. The proceedings may be legislative or quasi-judicial, or a combination of both. They may be ex parte in character, in which event they may originate either at the instance of the agency or upon motion of an interested party. The scope of an inquiry may be purely investigative or it may be truly adversary looking toward the adjudication of specific rights of a party or of classes of parties. The foregoing are but examples of some of the types of proceedings conducted by administrative agencies. A lawyer appearing before an administrative agency, regardless of the nature of the proceeding it is conducting, has the continuing duty to advance the cause of his client within the bounds of the law. Where the applicable rules of the agency impose specific obligations upon a lawyer, it is his duty to comply therewith, unless the lawyer has a legitimate basis for challenging the validity thereof. In all appearances before administrative agencies, a lawyer should identify himself, his client if identity of his client is not privileged, and the representative nature of his appearance. It is not improper, however, for a lawyer to seek from an agency information available to the public without identifying his client.

EC 7-16 The primary business of a legislative body is to enact laws rather than to adjudicate controversies, although on occasion the activities of a legislative body may take on the characteristics of an adversary proceeding, particularly in investigative and impeachment matters. The role of a lawyer supporting or opposing proposed legislation normally is quite different from his role in representing a person under investigation or on trial by a legislative body. When a lawyer appears in connection with proposed legislation, he seeks to affect the lawmaking process, but when he appears on behalf of a client in investigatory or impeachment proceedings, he is concerned with the protection of the rights of his client. In either event, he should identify himself and his client, if identity of his client is not privileged, and should comply with applicable laws and legislative rules.

EC 7-17 The obligation of loyalty to his client applies only to a lawyer in the discharge of his professional duties and implies no obligation to adopt a personal viewpoint favorable to the interests or desires of his client. While a lawyer must act always with circumspection in order that his conduct will not adversely affect the rights of a client in a matter he is then handling, he may take positions on public issues and espouse legal reforms he favors without regard to the individual views of any client.

EC 7-18 The legal system in its broadest sense functions best when persons in need of legal advice or assistance are represented by their own counsel. For this reason a lawyer should not communicate on the subject matter of the representation of his client with a person he knows to be represented in the matter by a lawyer, unless pursuant to law or rule of court or unless he has

the consent of the lawyer for that person. If one is not represented by counsel, a lawyer representing another may have to deal directly with the unrepresented person; in such an instance, a lawyer should not undertake to give advice to the person who is attempting to represent himself, except that he may advise him to obtain a lawyer.

Duty of the Lawyer to the Adversary System of Justice

EC 7-19 Our legal system provides for the adjudication of disputes governed by the rules of substantive, evidentiary, and procedural law. An adversary presentation counters the natural human tendency to judge too swiftly in terms of the familiar that which is not yet fully known; the advocate, by his zealous preparation and presentation of facts and law, enables the tribunal to come to the hearing with an open and neutral mind and to render impartial judgments. The duty of a lawyer to his client and his duty to the legal system are the same: to represent his client zealously within the bounds of the law.

EC 7-20 In order to function properly, our adjudicative process requires an informed, impartial tribunal capable of administering justice promptly and efficiently according to procedures that command public confidence and respect. Not only must there be competent, adverse presentation of evidence and issues, but a tribunal must be aided by rules appropriate to an effective and dignified process. The procedures under which tribunals operate in our adversary system have been prescribed largely by legislative enactments, court rules and decisions, and administrative rules. Through the years certain concepts of proper professional conduct have become rules of law applicable to the adversary adjudicative process. Many of these concepts are the bases for standards of professional conduct set forth in the Disciplinary Rules.

EC 7-21 The civil adjudicative process is primarily designed for the settlement of disputes between parties, while the criminal process is designed for the protection of society as a whole. Threatening to use, or using, the criminal process to coerce adjustment of private civil claims or controversies is a subversion of that process; further, the person against whom the criminal process is so misused may be deterred from asserting his legal rights and thus the usefulness of the civil process in settling private disputes is impaired. As in all cases of abuse of judicial process, the improper use of criminal process tends to diminish public confidence in our legal system.

EC 7-22 Respect for judicial rulings is essential to the proper administration of justice; however, a litigant or his lawyer may, in good faith and within the framework of the law, take steps to test the correctness of a ruling of a tribunal.

EC 7-23 The complexity of law often makes it difficult for a tribunal to be fully informed unless the pertinent law is presented by the lawyers in the cause. A tribunal that is fully informed on the applicable law is better able to make a fair and accurate determination of the matter before it. The adversary system contemplates that each lawyer will present and argue the existing law in the light most favorable to his client. Where a lawyer knows of legal authority in the controlling jurisdiction directly adverse to the position of his client, he should inform the tribunal of its

existence unless his adversary has done so; but, having made such disclosure, he may challenge its soundness in whole or in part.

EC 7-24 In order to bring about just and informed decisions, evidentiary and procedural rules have been established by tribunals to permit the inclusion of relevant evidence and argument and the exclusion of all other considerations. The expression by a lawyer of his personal opinion as to the justness of a cause, as to the credibility of a witness, as to the culpability of a civil litigant, or as to the guilt or innocence of an accused is not a proper subject for argument to the trier of fact. It is improper as to factual matters because admissible evidence possessed by a lawyer should be presented only as sworn testimony. It is improper as to all other matters because, were the rule otherwise, the silence of a lawyer on a given occasion could be construed unfavorably to his client. However a lawyer may argue, on his analysis of the evidence, for any position or conclusion with respect to any of the foregoing matters.

EC 7-25 Rules of evidence and procedure are designed to lead to just decisions and are part of the framework of the law. Thus while a lawyer may take steps in good faith and within the framework of the law to test the validity of rules, he is not justified in consciously violating such rules and he should be diligent in his efforts to guard against his unintentional violation of them. As examples, a lawyer should subscribe to or verify only those pleadings that he believes are in compliance with applicable law and rules; a lawyer should not make any prefatory statement before a tribunal in regard to the purported facts of the case on trial unless he believes that his statement will be supported by admissible evidence; a lawyer should not ask a witness a question solely for the purpose of harassing or embarrassing him; and a lawyer should not by subterfuge put before a jury matters which it cannot properly consider.

EC 7-26 The law and Disciplinary Rules prohibit the use of fraudulent, false, or perjured testimony or evidence. A lawyer who knowingly participates in introduction of such testimony or evidence is subject to discipline. A lawyer should, however, present any admissible evidence his client desires to have presented unless he knows, or from facts within his knowledge should know, that such testimony or evidence is false, fraudulent, or perjured.

EC 7-27 Because it interferes with the proper administration of justice, a lawyer should not suppress evidence that he or his client has a legal obligation to reveal or produce. In like manner, a lawyer should not advise or cause a person to secrete himself or to leave the jurisdiction of a tribunal for the purpose of making him unavailable as a witness therein.

EC 7-28 Witnesses should always testify truthfully and should be free from any financial inducements that might tempt them to do otherwise. A lawyer should not pay or agree to pay a non-expert witness an amount in excess of reimbursement for expenses and financial loss incident to his being a witness; however, a lawyer may pay or agree to pay an expert witness a reasonable fee for his services as an expert. But in no event should a lawyer pay or agree to pay a contingent fee to any witness. A lawyer should exercise reasonable diligence to see that his client and lay associates conform to these standards.

EC 7-29 To safeguard the impartiality that is essential to the judicial process, veniremen and jurors should be protected against extraneous influences. When impartiality is present, public confidence in the judicial system is enhanced. There should be no extrajudicial communication with veniremen prior to trial or with jurors during trial by or on behalf of a lawyer connected with the case. Furthermore, a lawyer who is not connected with the case should not communicate with or cause another to communicate with a venireman or a juror about the case. After the trial, communication by a lawyer with jurors is permitted so long as he refrains from asking questions or making comments that tend to harass or embarrass the juror or to influence actions of the juror in future cases. Were a lawyer to be prohibited from communicating after trial with a juror, he could not ascertain if the verdict might be subject to legal challenge, in which event the invalidity of a verdict might go undetected. When an extrajudicial communication by a lawyer with a juror is permitted by law, it should be made considerately and with deference to the personal feelings of the juror.

EC 7-30 Vexatious or harassing investigations of veniremen or jurors seriously impair the effectiveness of our jury system. For this reason, a lawyer or anyone on his behalf who conducts an investigation of veniremen or jurors should act with circumspection and restraint.

EC 7-31 Communications with or investigations of members of families of veniremen or jurors by a lawyer or by anyone on his behalf are subject to the restrictions imposed upon the lawyer with respect to his communications with or investigations of veniremen and jurors.

EC 7-32 Because of his duty to aid in preserving the integrity of the jury system, a lawyer who learns of improper conduct by or towards a venireman, a juror, or a member of the family of either should make a prompt report to the court regarding such conduct.

EC 7-33 A goal of our legal system is that each party shall have his case, criminal or civil, adjudicated by an impartial tribunal. The attainment of this goal may be defeated by dissemination of news or comments which tend to influence judge or jury. Such news or comments may prevent prospective jurors from being impartial at the outset of the trial and may also interfere with the obligation of jurors to base their verdict solely upon the evidence admitted in the trial. The release by a lawyer of out-of-court statements regarding an anticipated or pending trial may improperly affect the impartiality of the tribunal. For these reasons, standards for permissible and prohibited conduct of a lawyer with respect to trial publicity have been established.

EC 7-34 The impartiality of a public servant in our legal system may be impaired by the receipt of gifts or loans. A lawyer, therefore, is never justified in making a gift or a loan to a judge, a hearing officer, or an official or employee of a tribunal.

EC 7-35 All litigants and lawyers should have access to tribunals on an equal basis. Generally, in adversary proceedings a lawyer should not communicate with a judge relative to a matter pending before, or which is to be brought before, a tribunal over which he presides in circumstances which might have the effect or give the appearance of granting undue advantage to one party. For example, a lawyer should not communicate with a tribunal by a writing unless a copy thereof

is promptly delivered to opposing counsel or to the adverse party if he is not represented by a lawyer. Ordinarily an oral communication by a lawyer with a judge or hearing officer should be made only upon adequate notice to opposing counsel, or, if there is none, to the opposing party. A lawyer should not condone or lend himself to private importunities by another with a judge or hearing officer on behalf of himself or his client.

EC 7-36 Judicial hearings ought to be conducted through dignified and orderly procedures designed to protect the rights of all parties. Although a lawyer has the duty to represent his client zealously, he should not engage in any conduct that offends the dignity and decorum of proceedings. While maintaining his independence, a lawyer should be respectful, courteous, and above-board in his relations with a judge or hearing officer before whom he appears. He should avoid undue solicitude for the comfort or convenience of judge or jury and should avoid any other conduct calculated to gain special consideration.

EC 7-37 In adversary proceedings, clients are litigants and though ill feeling may exist between clients, such ill feeling should not influence a lawyer in his conduct, attitude, and demeanor towards opposing lawyers. A lawyer should not make unfair or derogatory personal reference to opposing counsel. Haranguing and offensive tactics by lawyers interfere with the orderly administration of justice and have no proper place in our legal system.

EC 7-38 A lawyer should be courteous to opposing counsel and should accede to reasonable requests regarding court proceedings, settings, continuances, waiver of procedural formalities, and similar matters which do not prejudice the rights of his client. He should follow local customs of courtesy or practice, unless he gives timely notice to opposing counsel of his intention not to do so. A lawyer should be punctual in fulfilling all professional commitments.

EC 7-39 In the final analysis, proper functioning of the adversary system depends upon cooperation between lawyers and tribunals in utilizing procedures which will preserve the impartiality of tribunals and make their decisional processes prompt and just, without impinging upon the obligation of the lawyer to represent their clients zealously within the framework of the law.

[Effective: October 5, 1970.]

DISCIPLINARY RULES

DR 7-101. REPRESENTING A CLIENT ZEALOUSLY.

(A) A lawyer shall not intentionally:

(1) Fail to seek the lawful objectives of his client through reasonably available means permitted by law and the Disciplinary Rules, except as provided by DR 7-101(B). A lawyer does not violate this Disciplinary Rule, however, by acceding to reasonable requests of opposing counsel which do not prejudice the rights of his client, by being punctual in fulfilling all professional commitments, by avoiding offensive tactics, or by treating with courtesy and consideration all persons involved in the legal process.

(2) Fail to carry out a contract of employment entered into with a client for professional services, but he may withdraw as permitted under DR 2-110, DR 5102, and DR 5-105.

(3) Prejudice or damage his client during the course of the professional relationship, except as required under DR 7-102(B).

(B) In his representation of a client, a lawyer may:

(1) Where permissible, exercise his professional judgment to waive or fail to assert a right or position of his client.

(2) Refuse to aid or participate in conduct that he believes to be unlawful, even though there is some support for an argument that the conduct is legal.

[Effective: October 5, 1970.]

DR 7-102. REPRESENTING A CLIENT WITHIN THE BOUNDS OF THE LAW.

(A) In his representation of a client, a lawyer shall not:

(1) File a suit, assert a position, conduct a defense, delay a trial, or take other action on behalf of his client when he knows or when it is obvious that such action would serve merely to harass or maliciously injure another.

(2) Knowingly advance a claim or defense that is unwarranted under existing law, except that he may advance such claim or defense if it can be supported by good faith argument for an extension, modification, or reversal of existing law.

(3) Conceal or knowingly fail to disclose that which he is required by law to reveal.

(4) Knowingly use perjured testimony or false evidence.

(5) Knowingly make a false statement of law or fact.

(6) Participate in the creation or preservation of evidence when he knows or it is obvious that the evidence is false.

(7) Counsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent.

(8) Knowingly engage in other illegal conduct or conduct contrary to a Disciplinary Rule.

(B) A lawyer who receives information clearly establishing that:

(1) His client has, in the course of the representation, perpetrated a fraud upon a person or tribunal, shall promptly call upon his client to rectify the same, and if his client refuses or is unable to do so, he shall reveal the fraud to the affected person or tribunal.

(2) A person other than his client has perpetrated a fraud upon a tribunal shall promptly reveal the fraud to the tribunal.

[Effective: October 5, 1970.]

DR 7-103. PERFORMING THE DUTY OF PUBLIC PROSECUTOR OR OTHER GOVERNMENT LAWYER.

(A) A public prosecutor or other government lawyer shall not institute or cause to be instituted criminal charges when he knows or it is obvious that the charges are not supported by probable cause.

(B) A public prosecutor or other government lawyer in criminal litigation shall make timely disclosure to counsel for the defendant, or to the defendant if he has no counsel, of the existence of evidence, known to the prosecutor or other government lawyer, that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment.

[Effective: October 5, 1970.]

DR 7-104. COMMUNICATING WITH ONE OF ADVERSE INTEREST.

(A) During the course of his representation of a client a lawyer shall not:

(1) Communicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so.

(2) Give advice to a person who is not represented by a lawyer, other than the advice to secure counsel, if the interests of such person are or have a reasonable possibility of being in conflict with the interests of his client.

[Effective: October 5, 1970.]

DR 7-105. THREATENING CRIMINAL PROSECUTION.

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

[Effective: October 5, 1970.]

DR 7-106. TRIAL CONDUCT.

(A) A lawyer shall not disregard or advise his client to disregard a standing rule of a tribunal or a ruling of a tribunal made in the course of a proceeding, but he may take appropriate steps in good faith to test the validity of such rule or ruling.

(B) In presenting a matter to a tribunal, a lawyer shall disclose:

(1) Legal authority in the controlling jurisdiction known to him to be directly adverse to the position of his client and which is not disclosed by opposing counsel.

(2) Unless privileged or irrelevant, the identities of the clients he represents and of the persons who employed him.

(C) In appearing in his professional capacity before a tribunal, a lawyer shall not:

(1) State or allude to any matter that he has no reasonable basis to believe is relevant to the case or that will not be supported by admissible evidence.

(2) Ask any question that he has no reasonable basis to believe is relevant to the case and that is intended to degrade a witness or other person.

(3) Assert his personal knowledge of the facts in issue, except when testifying as a witness.

(4) Assert his personal opinion as to the justness of a cause, as to the credibility of a witness, as to the culpability of a civil litigant, or as to the guilt or innocence of an accused; but he may argue, on his analysis of the evidence, for any position or conclusion with respect to the matters stated herein.

(5) Fail to comply with known local customs of courtesy or practice of the bar or a particular tribunal without giving to opposing counsel timely notice of his intent not to comply.

(6) Engage in undignified or discourteous conduct which is degrading to a tribunal.

(7) Intentionally or habitually violate any established rule of procedure or of evidence.

[Effective: October 5, 1970.]

DR 7-107. TRIAL PUBLICITY.

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

(B) Notwithstanding division (A) of this rule, a lawyer may state any of the following:

(1) The claim, offense, or defense involved and, except when prohibited by law, the identity of the persons involved;

(2) Information contained in a public record;

(3) That an investigation of a matter is in progress;

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

(5) A request for assistance in obtaining evidence and information necessary to obtain evidence;

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

(7) In a criminal case, in addition to divisions (B)(1) to (6) of this rule, any of the following:

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

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

(c) The fact, time, and place of arrest;

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

(C) Notwithstanding division (A) of this rule, a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this division shall be limited to the information necessary to mitigate the recent adverse publicity.

(D) No lawyer associated in a firm or government agency with a lawyer subject to division (A) of this rule shall make a statement prohibited by division (A) of this rule.

[Effective: October 5, 1970; amended effective January 1, 1996.]

DR 7-108. COMMUNICATION WITH OR INVESTIGATION OF JURORS.

(A) Before the trial of a case a lawyer connected therewith shall not communicate with or cause another to communicate with anyone be knows to be a member of the venire from which the jury will be selected for the trial of the case.

(B) During the trial of a case:

(1) A lawyer connected therewith shall not communicate with or cause another to communicate with any member of the jury.

(2) A lawyer who is not connected therewith shall not communicate with or cause another to communicate with a juror concerning the case.

(C) DR 7-108(A) and (B) do not prohibit a lawyer from communicating with veniremen or jurors in the course of official proceedings.

(D) After discharge of the jury from further consideration of a case with which the lawyer was connected, the lawyer shall not ask questions of or make comments to a member of that jury that are calculated merely to harass or embarrass the juror or to influence his actions in future jury service.

(E) A lawyer shall not conduct or cause, by financial support or otherwise, another to conduct a vexatious or harassing investigation of either a venireman or a juror.

(F) All restrictions imposed by DR 7-108 upon a lawyer also apply to communications with or investigations of members of a family of a venireman or a juror.

(G) A lawyer shall reveal promptly to the court improper conduct by a venireman or a juror, or by another toward a venireman or a juror or a member of his family, of which the lawyer has knowledge.

[Effective: October 5, 1970.]

DR 7-109. CONTACT WITH WITNESSES.

(A) A lawyer shall not suppress any evidence that he or his client has a legal obligation to reveal or produce.

(B) A lawyer shall not advise or cause a person to secrete himself or to leave the jurisdiction of a tribunal for the purpose of making him unavailable as a witness therein.

(C) A lawyer shall not pay, offer to pay, or acquiesce in the payment of compensation to a witness contingent upon the content of his testimony or the outcome of the case. But a lawyer may advance, guarantee, or acquiesce in the payment of:

(1) Expenses reasonably incurred by a witness in attending or testifying.

(2) Reasonable compensation to a witness for his loss of time in attending or testifying.

(3) A reasonable fee for the professional services of an expert witness.

[Effective: October 5, 1970.]

DR 7-110. CONTACT WITH OFFICIALS.

(A) A lawyer shall not give or lend any thing of value to a judge, official, or employee of a tribunal.

(B) In an adversary proceeding, a lawyer shall not communicate, or cause another to communicate, as to the merits of the cause with a judge or an official before whom the proceeding is pending, except:

(1) In the course of official proceedings in the cause.

(2) In writing if he promptly delivers a copy of the writing to opposing counsel or to the adverse party if he is not represented by a lawyer.

(3) Orally upon adequate notice to opposing counsel or to the adverse party if he is not represented by a lawyer.

(4) As otherwise authorized by law.

[Effective: October 5, 1970.]

DR 7-111. CONFIDENTIAL INFORMATION

(A)(1) A lawyer shall not disclose or cause to be disclosed, without appropriate authorization, information regarding the probable or actual decision in a case or legal proceeding pending before a court, including the vote of a justice, judge, or court in a case pending before the Supreme Court, a court of appeals, or a panel of judges of a trial court, prior to the announcement of the decision by the court or journalization of an opinion, entry, or other document reflecting that decision under either of the following circumstances:

(a) The probable or actual decision is confidential because of statutory or rule provisions;

(b) The probable or actual decision clearly has been designated to the justice or judge as confidential when confidentiality is warranted because of the status of the proceedings or the circumstances under which the information was received and preserving confidentiality is necessary to the proper conduct of court business.

(2) Nothing in division (A)(1) of this rule shall prohibit the disclosure of any of the following:

(a) A decision that has been announced on the record or in open court, but that has not been journalized in a written opinion, entry, or other document;

(b) Information regarding the probable or actual decision in a pending case or legal proceeding to a justice, judge, or employee of the court;

(c) Other information that is a matter of public record or that may be disclosed pursuant to law.

(B)(1) No lawyer shall obtain or attempt to obtain information, without appropriate authorization, from a justice, judge, or court employee regarding the probable or actual decision in a case or legal proceeding pending before a court, including the vote of a justice or judge in a case pending before the Supreme Court or a court of appeals, prior to announcement of the decision by the court or journalization of an opinion, entry, or other document reflecting that decision under either of the following circumstances:

(a) The probable or actual decision is confidential because of statutory or rule provisions;

(b) The probable or actual decision clearly has been designated to the justice or judge as confidential when confidentiality is warranted because of the status of the proceedings or the circumstances under which the information was received and preserving confidentiality is necessary to the proper conduct of court business.

(2) Nothing in division (B)(1) of this rule shall prohibit a lawyer from obtaining or attempting to obtain either of the following:

(a) A decision that has been announced on the record or in open court, but that has not been journalized in a written opinion, entry, or other document;

(b) Information regarding the probable or actual decision in a pending case or legal proceeding from a justice, judge, or other employee of the court in which the lawyer is employed;

(c) Other information that is a matter of public record or that may be disclosed pursuant to law.

(C) The imposition of discipline upon a lawyer for violation of division (A) or (B) of this rule shall not preclude prosecution for a violation of any applicable provision of the Revised Code, including, but not limited to, division (B) of section 102.03 of the Revised Code.

[Effective: October 24, 1994.]

CANON 8

A Lawyer Should Assist in Improving the Legal System

ETHICAL CONSIDERATIONS

EC 8-1 Changes in human affairs and imperfections in human institutions make necessary constant efforts to maintain and improve our legal system. This system should function in a manner that commands public respect and fosters the use of legal remedies to achieve redress of grievances. By reason of education and experience, lawyers are especially qualified to recognize deficiencies in the legal system and to initiate corrective measures therein. Thus they should participate in proposing and supporting legislation and programs to improve the system, without regard to the general interests or desires of clients or former clients.

EC 8-2 Rules of law are deficient if they are not just, understandable, and responsive to the needs of society. If a lawyer believes that the existence or absence of a rule of law, substantive or procedural, causes or contributes to an unjust result, he should endeavor by lawful means to obtain appropriate changes in the law. He should encourage the simplification of laws and the repeal or amendment of laws that are outmoded. Likewise, legal procedures should be improved whenever experience indicates a change is needed.

EC 8-3 The fair administration of justice requires the availability of competent lawyers. Members of the public should be educated to recognize the existence of legal problems and the resultant need for legal services, and should be provided methods for intelligent selection of counsel. Those persons unable to pay for legal services should be provided needed services. Clients and lawyers should not be penalized by undue geographical restraints upon representation in legal matters, and the bar should address itself to improvements in licensing, reciprocity, and admission procedures consistent with the needs of modern commerce.

EC 8-4 Whenever a lawyer seeks legislative or administrative changes, he should identify the capacity in which he appears, whether on behalf of himself, a client, or the public. A lawyer may advocate such changes on behalf of a client even though he does not agree with them. But when a lawyer purports to act on behalf of the public, he should espouse only those changes which he conscientiously believes to be in the public interest.

EC 8-5 Fraudulent, deceptive, or otherwise illegal conduct by a participant in a proceeding before a tribunal or legislative body is inconsistent with fair administration of justice, and it should never be participated in or condoned by lawyers. Unless constrained by his obligation to preserve the confidences and secrets of his client, a lawyer should reveal to appropriate authorities any knowledge he may have of such improper conduct.

EC 8-6 Judges and administrative officials having adjudicatory powers ought to be persons of integrity, competence, and suitable temperament. Generally, lawyers are qualified, by personal observation or investigation, to evaluate the qualifications of persons seeking or being considered for such public offices, and for this reason they have a special responsibility to aid in the selection of only those who are qualified. It is the duty of lawyers to endeavor to prevent political considerations from outweighing judicial fitness in the selection of judges. Lawyers should protest earnestly against the appointment or election of those who are unsuited for the bench and should strive to have elected or appointed thereto only those who are willing to forego pursuits, whether of a business, political, or other nature, that may interfere with the free and fair consideration of questions presented for adjudication. Adjudicatory officials, not being wholly free to defend themselves, are entitled to receive the support of the bar against unjust criticism. While a lawyer as a citizen has a right to criticize such officials publicly, he should be certain of the merit of his complaint, use appropriate language, and avoid petty criticisms, for unrestrained and intemperate statements tend to lessen public confidence in our legal system. Criticisms motivated by reasons other than a desire to improve the legal system are not justified.

EC 8-7 Since lawyers are a vital part of the legal system, they should be persons of integrity, of professional skill, and of dedication to the improvement of the system. Thus a lawyer should aid in establishing, as well as enforcing, standards of conduct adequate to protect the public by insuring that those who practice law are qualified to so.

EC 8-8 Lawyers often serve as legislators or as holders of other public offices. This is highly desirable, as lawyers are uniquely qualified to make significant contributions to the improvement of the legal system. A lawyer who is a public officer, whether full or part-time, should not engage in activities in which his personal or professional interests are or foreseeably may be in conflict with his official duties.

EC 8-9 The advancement of our legal system is of vital importance in maintaining the rule of law and in facilitating orderly changes; therefore, lawyers should encourage, and should aid in making, needed changes and improvements.

[Effective: October 5, 1970.]

DISCIPLINARY RULES

DR 8-101. ACTION AS A PUBLIC OFFICIAL.

(A) A lawyer who holds public office shall not:

(1) Use his public position to obtain, or attempt to obtain, a special advantage in legislative matters for himself or for a client under circumstances where he knows or it is obvious that such action is not in the public interest.

(2) Use his public position to influence, or attempt to influence, a tribunal to act in favor of himself or of a client.

(3) Accept any thing of value from any person when the lawyer knows or it is obvious that the offer is for the purpose of influencing his action as a public official.

[Effective: October 5, 1970.]

DR 8-102. STATEMENTS CONCERNING JUDGES AND OTHER ADJUDICATORY OFFICERS.

(A) A lawyer shall not knowingly make false statements of fact concerning the qualifications of a candidate for election or appointment to a judicial office.

(B) A lawyer shall not knowingly make false accusations against a judge or other adjudicatory officer.

[Effective: October 5, 1970.]

CANON 9

A Lawyer Should Avoid Even the Appearance of Professional Impropriety

ETHICAL CONSIDERATIONS

EC 9-1 Continuation of the American concept that we are to be governed by rules of law requires that the people have faith that justice can be obtained through our legal system. A lawyer should promote public confidence in our system and in the legal profession.

EC 9-2 Public confidence in law and lawyers may be eroded by irresponsible or improper conduct of a lawyer. On occasion, ethical conduct of a lawyer may appear to laymen to be unethical. In order to avoid misunderstandings and hence to maintain confidence, a lawyer should fully and promptly inform his client of material developments in the matters being handled for the client. While a lawyer should guard against otherwise proper conduct that has a tendency to diminish public confidence in the legal system or in the legal profession his duty to clients or to the public should never be subordinate merely because the full discharge of his obligation may be misunderstood or may tend to subject him or the legal profession to criticism. When explicit ethical guidance does not exist, a lawyer should determine his conduct by acting in a manner that promotes public confidence in the integrity and efficiency of the legal system and the legal profession.

EC 9-3 After a lawyer leaves judicial office or other public employment, he should not accept employment in connection with any matter in which he had substantial responsibility prior to his leaving, since to accept employment would give the appearance of impropriety even if none exists.

EC 9-4 Because the very essence of the legal system is to provide procedures by which matters can be presented in an impartial manner so that they may be decided solely upon the merits, any statement or suggestion by a lawyer that he can or would attempt to circumvent those procedures is detrimental to the legal system and tends to undermine public confidence in it.

EC 9-5 Separation of the funds of a client from those of his lawyer not only serves to protect the client but also avoids even the appearance of impropriety, and therefore commingling of such funds should be avoided.

EC 9-6 Every lawyer owes a solemn duty to uphold the integrity and honor of his profession; to encourage respect for the law and for the courts and the judges thereof; to observe the Code of Professional Responsibility; to act as a member of a learned profession, one dedicated to public service; to cooperate with his brother lawyers in supporting the organized bar through the devoting of his time, efforts, and financial support as his professional standing and ability

reasonably permit; to conduct himself so as to reflect credit on the legal profession and to inspire the confidence, respect, and trust of his clients and of the public; and to strive to avoid not only professional impropriety but also the appearance of impropriety.

[Effective: October 5, 1970.]

DISCIPLINARY RULES

DR 9-101. AVOIDING EVEN THE APPEARANCE OF IMPROPRIETY.

(A) A lawyer shall not accept private employment in a matter upon the merits of which he has acted in a judicial capacity.

(B) A lawyer shall not accept private employment in a matter in which he had substantial responsibility while he was a public employee.

(C) A lawyer shall not state or imply that he is able to influence improperly or upon irrelevant grounds any tribunal, legislative body, or public official.

[Effective: October 5, 1970.]

DR 9-102. PRESERVING IDENTITY OF FUNDS AND PROPERTY OF A CLIENT.

(A) All funds of clients paid to a lawyer or law firm, other than advances for costs and expenses, shall be deposited in one or more identifiable bank accounts maintained in the state in which the law office is situated and no funds belonging to the lawyer or law firm shall be deposited therein except as follows:

(1) Funds reasonably sufficient to pay bank charges may be deposited therein.

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

(B) A lawyer shall:

(1) Promptly notify a client of the receipt of his funds, securities, or other properties.

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

(3) Maintain complete records of all funds, securities, and other properties of a client coming into the possession of the lawyer and render appropriate accounts to his client regarding them.

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

(C) A lawyer, law firm, or estate of a deceased lawyer who sells a law practice shall transfer all funds held pursuant to DR 9-102(A) to the lawyer or law firm purchasing the law practice at the time client files are transferred.

(D) Nothing in the Code of Professional Responsibility shall be interpreted to prohibit compliance by a lawyer, a law firm, or an ancillary business related to the practice of law in which the lawyer is a principal with the provisions of sections 3953.231, 4705.09, and 4705.10 of the Revised Code and any rules adopted by the Ohio Legal Assistance Foundation pursuant to section 120.52 of the Revised Code.

(E) No lawyer, law firm, or ancillary business related to the practice of law shall fail to do any of the following:

(1) Maintain funds of clients or third persons in an interest-bearing trust account that is established in an eligible depository institution as required by sections 3953.231, 4705.09, and

4705.10 of the Revised Code or any rules adopted by the Ohio Legal Assistance Foundation pursuant to section 120.52 of the Revised Code;

(2) Notify the Ohio Legal Assistance Foundation, in a manner required by rules adopted by the Ohio Legal Assistance Foundation pursuant to section 120.52 of the Revised Code, of the existence of an interest-bearing trust account;

(3) Comply with the reporting requirement contained in Gov. Bar R. VI, Section 1(F).

[Effective: October 5, 1970; amended effective June 19, 1985; November 1, 2002; February 1, 2003.]

DEFINITIONS*

As used in the Disciplinary Rules of the Code of Professional Responsibility:

(1) "Differing interests" include every interest that will adversely affect either the judgment or the loyalty of a lawyer to a client, whether it be a conflicting, inconsistent, diverse, or other interest.

(2) "Law firm" includes a legal professional association, corporation, legal clinic, limited liability company, registered partnership, or any other organization under which a lawyer may engage in the practice of law pursuant to the Supreme Court Rules for the Government of the Bar of Ohio.

(3) "Person" includes a corporation, an association, a trust, a partnership, and any other organization or legal entity.

(4) "Professional legal corporation" means a corporation, or an association treated as a corporation, authorized by law to practice law for profit.

(5) "State" includes the District of Columbia, Puerto Rico, and other federal territories and possessions.

(6) "Tribunal" includes all courts and all other adjudicatory bodies.

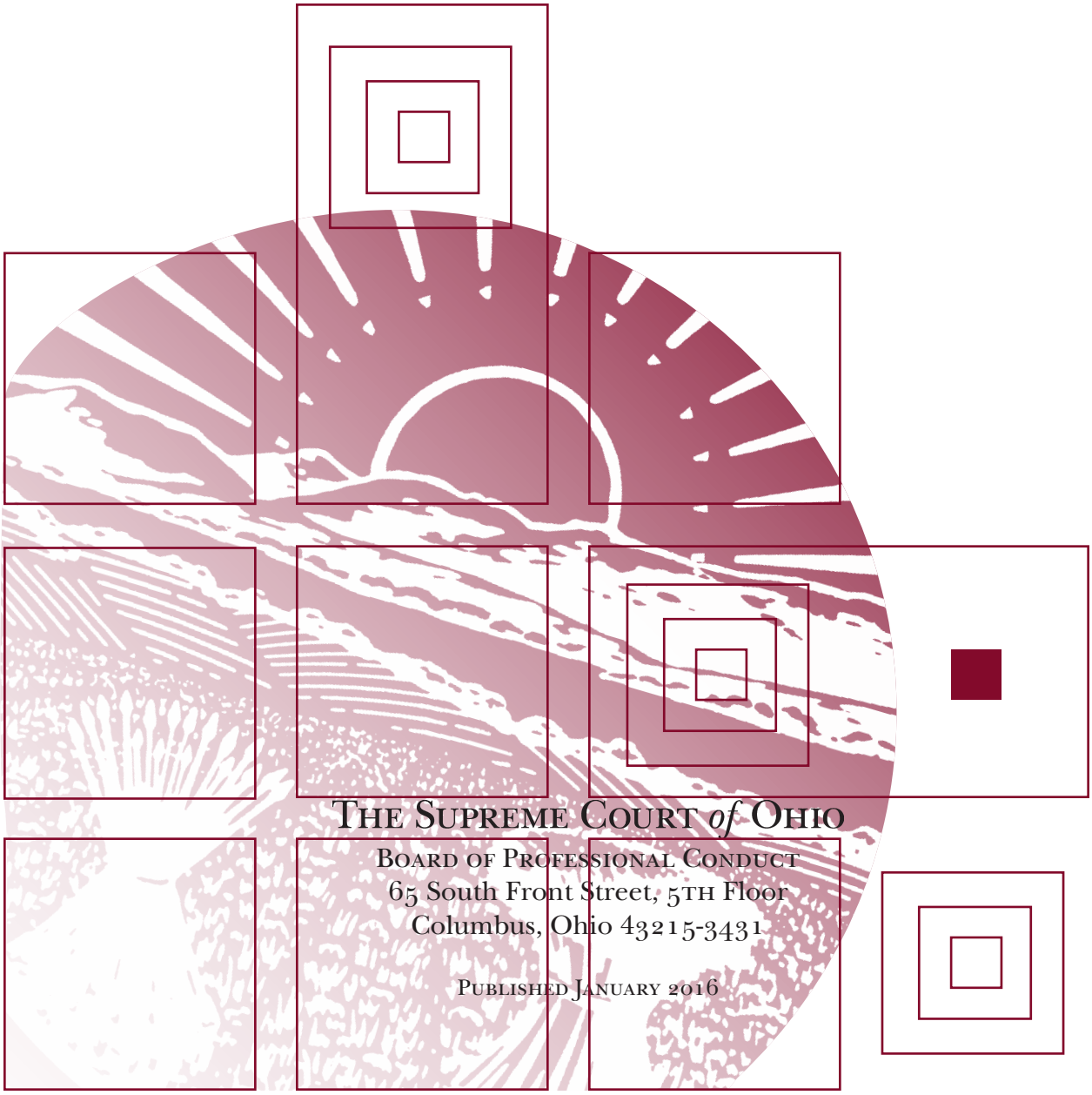
(7) "A Bar association" includes a bar association of specialists as referred to in DR 2-105(A)(1) or (4).

(8) "Qualified legal assistance organization" means an office or organization of one of the four types listed in DR 2-103(D)(1)-(4), inclusive that meets all the requirements thereof.

(9) "Ancillary business related to the practice of law" includes, but is not limited to, a title insurance company that is owned, operated, or owned and operated by a lawyer or law firm and that is subject to section 3953.231 of the Revised Code.

* "Confidence" and "secret" are defined in DR 4-101(A).

[Effective: October 5, 1970; amended effective October 20, 1975; June 11, 1979; November 1, 2002.]



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