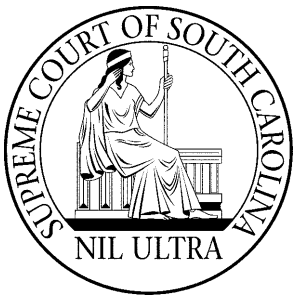

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 41

October 21, 2004

Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

The Supreme Court of South Carolina

REQUEST FOR WRITTEN COMMENTS AND NOTICE OF PUBLIC HEARING

The Supreme Court of South Carolina is considering numerous amendments to the current Rules of Professional Conduct contained in Rule 407 of the South Carolina Appellate Court Rules. A copy of the proposed amendments, along with commentary regarding the changes, is attached.[1]

Persons desiring to submit written comments regarding the proposed amendments may do so by filing an original and seven (7) copies of their written comments with the Supreme Court. The comments must be sent to the following address:

The Honorable Daniel E. Shearouse
Clerk of Court
Supreme Court of South Carolina
P. O. Box 11330
Columbia, South Carolina 29211

Any written comments must be actually received by the Supreme Court by Tuesday, December 21, 2004.

The Court will hold a public hearing regarding the proposed amendments on Wednesday, January 19, 2005, at 9:30 a.m. in the Supreme Court Courtroom in Columbia, South Carolina. Those desiring to be heard shall notify the Clerk of the Supreme Court no later than Friday, January 14, 2005.

Columbia, South Carolina
October 21, 2004

[1] An electronic version of the proposed amendments and commentary is also available on the Judicial Department Website, www.sccourts.org, under the link "Ethics 2000" on the left side of the page.

CHIEF JUSTICE'S COMMISSION ON THE ETHICS 2000 IMPLEMENTATION REPORT TO THE SUPREME COURT RECOMMENDING CHANGES TO THE SOUTH CAROLINA RULES OF PROFESSIONAL CONDUCT

Effective September 1, 1990, the South Carolina Supreme Court adopted the South Carolina Rules of Professional Conduct, which are based closely upon the Model Rules of Professional Conduct in effect at that time. The S.C. Rules of Professional Conduct, designated as Appellate Court Rule 407, replaced the prior Code of Professional Responsibility. From time to time in 1996, 1997, 1998, and 2002, the S.C. Rules of Professional Conduct have been amended by the Supreme Court.

In 1997, the American Bar Association began a comprehensive review of the Model Rules of Professional Conduct, charging the ABA Commission on Evaluation of Professional Standards (the "Ethics 2000 Commission") with the task of updating the Model Rules. In February 2002 the American Bar Association approved changes in the Model Rules of Professional Conduct, adopting many of the recommendations made to the ABA House of Delegates by the Ethics 2000 Commission. Additional changes were approved by the ABA House of Delegates in August 2002, based upon a report of the ABA Commission on Multijurisdictional Practice.

The Chief Justice appointed this Commission in Summer 2002 to evaluate the changes in the ABA Model Rules of Professional Conduct and to provide the Supreme Court with recommendations regarding the adoption of the revised Model Rules. The Commission has met on a number of occasions over the past year and has considered changes adopted by the ABA as well as recommendations for modification of the Rules that were forwarded to the Court by the South Carolina Bar. This Report sets forth a revised set of South Carolina Rules of Professional Conduct, the adoption of which the Commission recommends, along with an explanation by the Committee, following each rule, of differences between the recommended language and that of the 2002 ABA Model Rules. Where the Commission recommendation rejects language proposed by the South Carolina Bar, this Report also explains the basis for that decision.

The Report does not attempt to duplicate the Reporter's Explanation of Changes that was prepared by the Reporter to the ABA Ethics 2000 Commission to explain differences between the 2002 Model Rules and earlier Model Rules. Separate reference should be made to those Explanations as necessary.

The ~~deletions~~ and additions noted reflect differences between the proposed South Carolina Rules and the current South Carolina Rules.

PROPOSED REVISED APPELLATE COURT RULE 407

SOUTH CAROLINA RULES OF PROFESSIONAL CONDUCT

PREAMBLE: A LAWYER'S RESPONSIBILITIES

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

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

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

~~[3]~~ [4] In all professional functions a lawyer should be competent, prompt and diligent. A lawyer should maintain communication with a client concerning the representation. A lawyer should keep in confidence information relating to representation of a client except so far as disclosure is required or permitted by the Rules of Professional Conduct or other law.

~~[4]~~ [5] A lawyer's conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer's business and personal affairs. A lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others. A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials. While it is a lawyer's duty, when necessary, to challenge the rectitude of official action, it is also a lawyer's duty to uphold

legal process.

~~[5]~~ [6] As a public citizen, a lawyer should seek improvement of the law, access to the legal system, the administration of justice and the quality of service rendered by the legal profession. As a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients, employ that knowledge in reform of the law and work to strengthen legal education. In addition, a lawyer should further the public's understanding of and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority. A lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance~~, and~~. Therefore, all lawyers should ~~therefore~~ devote professional time and resources and use civic influence ~~in their behalf~~ 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.

~~[6]~~ [7] Many of a lawyer's professional responsibilities are prescribed in the Rules of Professional Conduct, as well as substantive and procedural law. However, a lawyer is also guided by personal conscience and the approbation of professional peers. A lawyer should strive to attain the highest level of skill, to improve the law and the legal profession and to exemplify the legal profession's ideals of public service.

~~[7]~~ [8] A lawyer's responsibilities as a representative of clients, an officer of the legal system and a public citizen are usually harmonious. Thus, when an opposing party is well represented, a lawyer can be a zealous advocate on behalf of a client and at the same time assume that justice is being done. So also, a lawyer can be sure that preserving client confidences ordinarily serves the public interest because people are more likely to seek legal advice, and thereby heed their legal obligations, when they know their communications will be private.

~~[8]~~ [9] In the nature of law practice, however, conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system and to the lawyer's own interest in remaining an ~~upright~~ ethical person while earning a satisfactory living. The Rules of Professional Conduct often prescribe terms for resolving such conflicts. Within the framework of these Rules, however, many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules. These principles include the lawyer's obligation zealously to protect and pursue a client's legitimate interests, within the bounds of the law, while maintaining a professional, courteous and civil attitude toward all persons involved in the legal system.

~~[9]~~ [10] The legal profession is largely self-governing. Although other professions also have been granted powers of self-government, the legal profession is unique in this respect because of the close relationship between the profession and the processes of government and law enforcement. This connection is manifested in the fact that ultimate authority over the legal profession is vested largely in the courts.

~~[10]~~ [11] To the extent that lawyers meet the obligations of their professional calling, the occasion for government regulation is obviated. Self-regulation also helps maintain the legal profession's independence from government domination. An independent legal profession is an important force in preserving government under law, for abuse of legal authority is more readily challenged by a profession whose members are not dependent on government for the right to practice.

~~[11]~~ [12] The legal profession's relative autonomy carries with it special responsibilities of self-government. The profession has a responsibility to assure that its regulations are conceived in the public interest and not in furtherance of parochial or self-interested concerns of the bar. Every lawyer is responsible for observance of the Rules of Professional Conduct. A lawyer should also aid in securing their observance by other lawyers. Neglect of these responsibilities compromises the independence of the profession and the public interest which it serves.

~~[12]~~ [13] Lawyers play a vital role in the preservation of society. The fulfillment of this role requires an understanding by lawyers of their relationship to our legal system. The Rules of Professional Conduct, when properly applied, serve to define that relationship.

Comparison with 2002 ABA Model Rule:

The proposed changes in the Preamble are identical to those made in the 2002 ABA Model Rules and would conform the South Carolina Preamble to that of the 2002 ABA Model Rules.

Other Commission Comments Regarding Proposed Changes from the Current S.C. Rules of Professional Conduct:

The reference to the lawyer as intermediary was deleted to conform to the Commissions' recommendation to delete Rule 2.2. The third paragraph addressing the third party neutral is now addressed in recommended Rules 1.12 and 2.4

Comparison with S.C. Bar Recommendation:

The S.C. Bar has recommended the 2002 ABA Model Rules language with one exception. The Bar Committee would not add "as a member of the legal profession" to Paragraph 1. The Commission, however, believes that the proposed language provides a useful and explicit reminder that obligations arise by virtue of a lawyer's professional status and it does not substantively affect the paragraph's characterization of a lawyer's role. The Commission, therefore, does not believe that the departure in language from the Model Rules as recommended by the Bar is warranted.

SCOPE

~~[13]~~ [14] The Rules of Professional Conduct are rules of reason. They should be interpreted with reference to the purposes of legal representation and of the law itself. Some of the Rules are imperatives, cast in the terms "shall" or "shall not." These define proper conduct for purposes of professional discipline. Others, generally cast in the term "may," are permissive and define areas under the Rules in which the lawyer has ~~professional~~ 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.

~~[14]~~ [15] The Rules presuppose a larger legal context shaping the lawyer's role. That context includes court rules and statutes relating to matters of licensure, laws defining specific obligations of lawyers and substantive and procedural law in general. The Comments are sometimes used to alert lawyers to their responsibilities under such other law.

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

~~[15]~~ [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 ~~may~~ 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.

~~[16]~~ [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. ~~They also may have authority to represent the "public interest" in circumstances where a private lawyer would not be authorized to do so.~~ These Rules do not abrogate any such authority.

~~[17]~~ [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.

~~[18]~~ [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. ~~Accordingly, nothing in the Rules should be deemed to augment any substantive legal duty of lawyers or the extra-disciplinary consequences of violating such a duty.~~ 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.

[19] Moreover, these Rules are not intended to govern or affect judicial application of either the attorney-client or work-product privilege. Those privileges were developed to promote compliance with law and fairness in litigation. In reliance on the attorney-client privilege, clients are entitled to expect that communications within the scope of the privilege will be protected against compelled disclosure. The attorney-client privilege is that of the client and not of the lawyer. The fact that in exceptional situations the lawyer under the rules has a limited discretion to disclose a client confidence does not vitiate the proposition that, as a general matter, the client has a reasonable expectation that information relating to the client will not be voluntarily disclosed and that disclosure of such information may be judicially compelled only in accordance with recognized exceptions to the attorney-client and work-product privileges.

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

[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.

Comparison with 2002 ABA Model Rule:

The proposed changes in the section on Scope are identical to those made in the 2002 ABA Model Rules and would conform the Scope of the South Carolina Rules to that of the 2002 ABA Model Rules. The only variation that previously existed between the Model Rules and South Carolina Rules was an additional sentence in paragraph 21 of the Model Rules referring to research notes. That sentence, which is deleted in the 2002 ABA Model Rules, is already omitted from the South Carolina Rules.

Other Commission Comments Regarding Proposed Changes from the Current S.C. Rules of Professional Conduct:

The revised language of paragraph 20 reflects current South Carolina case law. See Smith v. Haynesworth, Marion, McKay & Guerard, 322 S.C. 433, 472 S.E.2d 612 (1996)(holding that a violation of the Rules of Professional Conduct is not malpractice per se, but that an expert may reference the Rules in expressing an opinion as to whether a duty has been breached); McNair v. Rainsford, 330 S.C. 332, 499 S.E.2d 488 (Ct. App. 1998)(indicating that violation of a Rule of Professional Conduct is a circumstance that may be considered in determining whether a lawyer has exercised due care).

Comparison with S.C. Bar Recommendation:

In the next to last sentence of paragraph [20], the S.C. Bar recommends inserting the words "or does not have" prior to the word "standing." Otherwise, the proposed language is identical to the recommendation of the S.C. Bar.

RULE 1.0: TERMINOLOGY

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

(b) "Confirmed in writing," when used in reference to the informed consent of a person, denotes informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent. See paragraph (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) "Consult" or "consultation" denotes communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question.

(d) "Firm" or "law firm" denotes a lawyer or lawyers in a ~~private firm,~~ law partnership, professional corporation, sole proprietorship or other association, or in a legal services organization; lawyers employed in the legal department of a corporation, government, or other organization; and lawyers associated with an enterprise who represent clients within the scope of that association ~~lawyers employed in a legal services organization. See Comment, Rule 1.10~~.

(e) "Fraud" or "fraudulent" denotes conduct ~~having~~ that is fraudulent under the substantive or procedural law of the applicable jurisdiction or which has a purpose to deceive ~~and not merely negligent misrepresentation or failure to apprise another of relevant information~~.

(f) "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated reasonably 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 ~~and~~, 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 material matter of clear and weighty importance.

(n) "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.

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

Comparison with 2002 ABA Model Rule:

The proposed South Carolina Rule 1.0 varies in several respects from the 2002 ABA Model Rule 1.0:

Paragraph (c) is deleted from the 2002 ABA Model Rules. The rationale for its deletion is that the phrase "consent after consultation" has been removed in this revision of the Rules and replaced with the phrase "informed consent." However, the Commission notes that, while this is true, the terms "consult" and "consultation" remain in various Rules, and the Commission believes the continued inclusion of a definition of those terms is beneficial.

Proposed paragraph (d) includes within the definition of a law firm "lawyers associated with an enterprise who represent clients within the scope of that association," language not included in the 2002 ABA Model Rules. This change is substantive in that, in addition to lawyers practicing in traditional law firms, lawyers employed by multi-disciplinary enterprises, who represent clients as a part of their employment, are made subject by this language to all ethical rules applicable to law firms. The proposed Rule also includes government lawyers within the definition of a law firm. The Model Rule does not expressly do so. This clarification is recommended by the S.C. Bar and appears consistent with Comment [3] to Model Rule 1.0.

Proposed paragraph (e) substitutes the words "or which" for the word "and" prior to the words "has a purpose to deceive." This change is substantive and expands the types of conduct that are considered to be fraud or fraudulent under the South Carolina Rules. Under the Model Rule definition, conduct is fraudulent for purposes of the Rules only if it is both fraudulent under substantive or procedural law and has a purpose to deceive. The proposed South Carolina modification would clarify that any conduct with a purpose to deceive may be fraud or fraudulent for purposes of these Rules, regardless of whether that conduct is also fraudulent under substantive or procedural law.

Proposed paragraph (f) inserts the word "reasonably" prior to the word "adequate." The change clarifies that the adequacy of the information and explanation provided should be judged by an objective standard.

In proposed paragraph (n), there is one minor punctuation change from the Model Rules. A comma is added after the words

"arbitration proceeding." This punctuation addition is intended to be stylistic only.

Other Commission Comments Regarding Proposed Changes from the Current S.C. Rules of Professional Conduct:

The current Terminology section has been expanded and converted into a new Rule 1.0. There is no Rule 1.0 under the present South Carolina Rules.

Comparison with S.C. Bar Recommendation:

The S.C. Bar recommendation is identical as to paragraphs (a), (b), (g), (h), (i), (j), (k), (l), (m), and (o).

The S.C. Bar recommendation does not include recommended paragraph (c).

Proposed paragraph (d) differs stylistically from, but is substantively consistent with, the S.C. Bar recommendation.

Proposed paragraph (e) differs from the S.C. Bar proposal. The S.C. Bar proposal is similar to the Model Rule, with the additional proviso that fraudulent conduct does not include "merely negligent representation or failure to apprise another of relevant information" and with a reference to the Comments to Rule 4.1.

In proposed paragraph (f), the S.C. Bar proposal would add the words "expression of" before the word "agreement."

The Commission concluded that the changes proposed by the S.C. Bar in paragraphs (d) and (f) that are not incorporated in the Commission's recommendation did not justify deviating from the language of the Model Rules. The Commission prefers the policy reflected in its version of paragraph (e) as discussed above, as compared to that of the S.C. Bar proposal.

At the end of proposed paragraph (n), the S.C. Bar recommends the addition of the sentence "Tribunal includes ancillary proceedings conducted pursuant to the tribunal's adjudicative authority, such as a deposition." The Bar's intent appears to be to clarify that proceedings ancillary to litigation, such as the taking of depositions, are considered to be activities that occur before the tribunal and thus fall within the Rules addressing conduct before a tribunal, particularly Rule 3.3, even though the actual activity generally occurs outside of the physical courtroom. The extension of duties to the tribunal arising under Rule 3.3 to pretrial discovery is consistent with ABA Formal Op. # 93-376. However, the Commission believes that the Bar's effort to insert the language here as a part of the definition of a tribunal is awkward. A tribunal is an entity, not the activities associated with the entity. Language similar to that proposed by the S.C. Bar is more appropriately included in Comment [1] to Rule 3.3.

The S.C. Bar recommends the addition of three definitions as paragraphs (p), (q), and (r), which have particular implications for lawyers associated with multi-disciplinary enterprises. The terms and definitions proposed by the S.C. Bar are as follows:

> *"Client" includes any person to whom a lawyer provides legal advice or services as well as any person who gives anything of value to receive advice, services or products from an enterprise if the enterprise provides any of the advice or services through a lawyer whom the recipient contemporaneously knows to be a lawyer.*
>
> *"Fee" includes anything of value given by a client for representation by a lawyer.*
>
> *"Represent" and "representation". A lawyer represents a client in providing advice or services to that person.*

These definitions are apparently intended to clarify that a lawyer offering legal advice to third parties as a part of his or her employment in a multi-disciplinary enterprise is subject to the full range of ethical duties owed to a client. The objective may be desirable. However, the Commission is concerned that the S.C. Bar's language is overly broad. It would seem to impose duties, such as conflict of interest and confidentiality rules, upon persons in business who offer business advice to a third party for a fee, simply because the person offering the business advice happens to be a lawyer. The Commission does not recommend inclusion of the S.C. Bar proposals.

Comment

Confirmed in Writing

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

Firm

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

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

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

Fraud

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

Informed Consent

[6] Many of the Rules of Professional Conduct require the lawyer to obtain the informed consent of a client or other person (e.g., a former client or, under certain circumstances, a prospective client) before accepting or continuing representation or pursuing a course of conduct. See, e.g, Rules 1.2(c), 1.6(a), 1.7(b), and 1.18(d). 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), 1.9(a), and 1.18(d). For a definition of "writing" and "confirmed in writing," see paragraphs (o) and (b). Other Rules require that a client's consent be obtained in a writing signed by the client. See, e.g., Rules 1.8(a) and (g). For a definition of "signed," see paragraph (o).

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 1.8(l), 1.10(e), 1.11, 1.12 or 1.18.

[9] The purpose of screening is to assure the affected parties that confidential information known by the personally disqualified lawyer remains protected. The personally disqualified lawyer should acknowledge the obligation not to communicate with any of the other lawyers in the firm with respect to the matter. Similarly, other lawyers in the firm who are working on the matter should be informed that the screening is in place and that they may not communicate with the personally disqualified lawyer with respect to the matter. Additional

screening measures that are appropriate for the particular matter will depend on the circumstances. To implement, reinforce and remind all affected lawyers of the presence of the screening, it may be appropriate for the firm to undertake such procedures as a written undertaking by the screened lawyer to avoid any communication with other firm personnel and any contact with any firm files or other materials relating to the matter, written notice and instructions to all other firm personnel forbidding any communication with the screened lawyer relating to the matter, denial of access by the screened lawyer to firm files or other materials relating to the matter and periodic reminders of the screen to the screened lawyer and all other firm personnel.

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

Comparison of Proposed Comments with Model Comments under the 2002 ABA Model Rule:

Proposed Comments [1] - [4], [9], and [10] are identical to the Comments to Rule 1.0 in the 2002 ABA Model Rules.

Proposed Comment [5] substitutes the words "or conduct which" for the word "and" after the words "applicable jurisdiction" to reflect the change made in proposed Rule 1.0(e). The proposed South Carolina rule and comment expand the definition of fraudulent conduct to include any conduct with a purpose to deceive, regardless of whether it meets the legal definition of fraud.

Proposed Comments [6] and [7] add a reference to Rule 1.18(d) that is not included in the Model Comment. Given Comment [6]'s reference to prospective clients, the Commission felt it appropriate to cross-reference the new rule regarding duties arising out of contacts with prospective clients.

Proposed Comment [8] adds references to Rule 1.8(l) and 1.10(e) that do not appear in the Model Comment. Proposed South Carolina Rules 1.8(l) and 1.10(e) have no equivalent in the Model Rules. Rule 1.8(l) permits screening to avoid imputation of a conflict when public lawyers from the same office have conflicting duties in administrative proceedings. Rule 1.10(e) permits screening to avoid imputation of a conflict within a public defender or legal services office.

Other Commission Comments Regarding Proposed Changes in the Comments from the Current S.C. Comments:

Proposed Comments [2] and [3] have been moved verbatim from Comments that currently accompany Rule 1.10. Proposed Comment [4] is similar also to a current Comment to Rule 1.10. Under the current Rules, the term "firm" is not defined except by these Comments to Rule 1.10, which addressed imputation of disqualification. The Commission agrees that these Comments are more appropriately placed with the new definition of a "firm" in proposed Rule 1.0.

Comparison of Proposed Comments with S.C. Bar Recommendation:

The S.C. Bar would strike the phrase "or relied on the misrepresentation or failure to inform" at the end of Comment 5.

The S.C. Bar recommendation does not include the references to Rule 1.18(d) in Comments [6] and [7].

The S.C. Bar recommendation does not include the reference to Rule 1.8(l) or Rule 1.10(e) in Comment [8].

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.

Comparison with 2002 ABA Model Rule:

Proposed Rule 1.1 is identical to the 2002 ABA Model Rule.

Other Commission Comments Regarding Proposed Changes from the Current S.C. Rules of Professional Conduct:

There is no change from the current Rule 1.1.

Comparison with S.C. Bar Recommendation:

The proposed language is identical to the recommendation of the S.C. Bar.

Comment

Legal Knowledge and Skill

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

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

[3] In an emergency a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required where referral to or consultation or association with another lawyer would be impractical. Even in an emergency, however, assistance should be limited to that reasonably necessary in the circumstances, for ill-considered action under emergency conditions can jeopardize the client's interest.

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

Thoroughness and Preparation

[5] Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more ~~elaborate~~ extensive treatment than matters of lesser complexity and consequence. An agreement between the lawyer and the client regarding the scope of the representation may limit the matters for which the lawyer is responsible. See Rule 1.2(c).

Maintaining Competence

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

Comparison of Proposed Comments with Model Comments under the 2002 ABA Model Rule:

The proposed Comments are identical to the Comments to Rule 1.1 in the 2002 ABA Model Rules.

Other Commission Comments Regarding Proposed Changes in the Comments from the Current S.C. Comments:

The changes proposed are not intended to be substantive in nature.

Comparison of Proposed Comments with S.C. Bar Recommendation:

The proposed language is identical to the recommendation of the S.C. Bar.

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

(a) ~~A~~ Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation, ~~subject to paragraphs (c), (d) and (e),~~ and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to make or accept an offer of settlement of a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

(b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the

client's political, economic, social or moral views or activities.

(c) A lawyer may limit the ~~objectives~~ scope of the representation if the limitation is reasonable under the circumstances and the client ~~consents after consultation~~ gives informed consent.

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

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

Comparison with 2002 ABA Model Rule:

In the third sentence of the model version of Rule 1.2(a), the words "whether to settle" are used instead of the proposed "whether to make or accept an offer of settlement of."

Otherwise, the proposed changes in Rule 1.2 are identical to those made in the 2002 ABA Model Rules.

Other Commission Comments Regarding Proposed Changes from the Current S.C. Rules of Professional Conduct:

Proposed Rule 1.2(a) broadens the client's decision-making role with regards to settlement of a matter. Under the current Rule, the client has authority to decide whether to accept a settlement offer. The proposed Rule recognizes the authority of the client in deciding whether to make a settlement offer, as well.

Proposed Rule 1.2(c) restricts the ability of a lawyer to limit the scope of a representation by requiring that the limitation be reasonable. No such objective requirement exists under the current Rule.

Comparison with S.C. Bar Recommendation:

Proposed Rule 1.2 is identical to the S.C. Bar recommendation.

Comment

~~Scope of Representation~~ Allocation of Authority between Client and Lawyer

[1] ~~Both lawyer and client have authority and responsibility in the objectives and means of representation. The~~ Paragraph (a) recognizes that the client has 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. ~~Within those limits, a client also has a right to consult with the lawyer about the means to be used in pursuing those objectives. At the same time, a~~ A lawyer is not required to pursue objectives or employ means simply because a client may wish that the lawyer do so. ~~A clear distinction between objectives and means sometimes cannot be drawn, and in many cases the client-lawyer relationship partakes of a joint undertaking. In questions of means the lawyer should assume responsibility for technical and legal tactical issues, but should defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected. Law defining the lawyer's scope of authority in litigation varies among jurisdictions.~~ The decisions specified in paragraph (a), such as whether to make or accept an offer of settlement of 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.

~~[2]~~ [4] In a case in which the client appears to be suffering ~~mental disability~~ diminished capacity, the lawyer's duty to abide by the client's decisions is to be guided by reference to Rule 1.14.

Independence from Client's Views or Activities

~~[3]~~ [5] Legal representation should not be denied to people who are unable to afford legal services, or whose cause is controversial or the subject of popular disapproval. By the same token, representing a client does not constitute approval of the client's views or activities.

~~Services Limited in Objectives or Means~~ Agreements Limiting Scope of Representation

~~[4]~~ [6] The ~~objectives or~~ scope of services to be provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer's services are made available to the client. ~~For example, a retainer may be for a specifically defined purpose. Representation representation provided through a legal aid agency may be subject to limitations on the types of cases the agency handles.~~ When a lawyer has been retained by an insurer to represent an insured, for example, the representation may be limited to matters related to the insurance coverage. ~~The~~ A limited representation may be appropriate because the client has limited objectives for the representation. In addition, the terms upon which representation is undertaken may exclude specific ~~objectives or~~ means that might otherwise be used to accomplish the client's objectives. Such limitations may exclude ~~objectives or means~~ actions that the client thinks are too costly or that the lawyer regards as repugnant or imprudent.

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

~~[5]~~ [8] ~~An agreement~~ All agreements concerning ~~the scope of~~ a lawyer's representation of a client must accord with the Rules of Professional Conduct and other law. ~~Thus, the client may not be asked to agree to representation so limited in scope as to violate Rule 1.1, or to surrender the right to terminate the lawyer's services or the right to settle litigation that the lawyer might wish to continue.~~ See, e.g., Rules 1.1, 1.8 and 5.6.

Criminal, Fraudulent and Prohibited Transactions

~~[6]~~ [9] ~~A~~ Paragraph (d) prohibits a lawyer from knowingly counseling or assisting a client to commit a crime or fraud. This prohibition, however, does not preclude the lawyer ~~is required to give~~ from giving an honest opinion about the actual consequences that appear likely to result from a client's conduct. ~~The~~ Nor does the fact that a client uses advice in a course of action that is criminal or fraudulent ~~does not,~~ of itself, make a lawyer a party to the course of action. ~~However, a lawyer may not knowingly assist a client in criminal or fraudulent conduct.~~ There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity.

~~[7]~~ [10] When the client's course of action has already begun and is continuing, the lawyer's responsibility is especially delicate. ~~The lawyer is not permitted to reveal the client's wrongdoing, except where permitted by Rule 1.6. However, the~~ The lawyer is required to avoid ~~furthering the purpose~~ assisting the client, for example, by drafting or delivering documents that the lawyer knows are fraudulent or by suggesting how ~~it~~ the wrongdoing might be concealed. A lawyer may not continue assisting a client in conduct that the lawyer originally ~~supposes is~~ supposed was legally proper but then discovers is criminal or fraudulent. ~~Withdrawal~~ The lawyer must, therefore, withdraw from the representation, ~~therefore, may be required~~ of the client in the matter. See Rule 1.16(a). In some cases, withdrawal alone might be insufficient. It may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm any opinion, document, affirmation or the like. See Rule 4.1.

~~[8]~~ [11] Where the client is a fiduciary, the lawyer may ~~be charged with~~ have special obligations in dealings with a beneficiary. However, under S.C. Code Ann. § 62-1-109, the representation of a fiduciary does not necessarily create any duties or obligations to other interested persons.

~~[9]~~ [12] Paragraph (d) applies whether or not the defrauded party is a party to the transaction. Hence, a lawyer ~~should~~ must not participate in a sham transaction; such as, for example, a transaction to effectuate criminal or fraudulent ~~escape~~ avoidance of tax liability. Paragraph (d) does not preclude undertaking a criminal defense incident to a general retainer for legal services to a lawful enterprise. The last clause of paragraph (d) recognizes that determining the validity or interpretation of a statute or regulation may require a course of action involving disobedience of the statute or regulation or of the interpretation placed upon it by governmental authorities.

[13] If a lawyer comes to know or reasonably should know that a client expects assistance not permitted by the Rules of Professional Conduct or other law or if the lawyer intends to act contrary to the client's instructions, the lawyer must consult with the client regarding the limitations on the lawyer's conduct. See Rule 1.4(a)(5).

Comparison of Proposed Comments with Model Comments under the 2002 ABA Model Rule:

Proposed Comments [2]-[9], and [13] are identical to the Comments to Rule 1.2 in the 2002 ABA Model Rules.

The initial sentence of proposed Comment [1] differs slightly from the model version. The Model Comment [1] begins "Paragraph (a) confers upon the client..." The Model Rules, however, do not create a client's authority with regard to the representation. Authority stems from law of agency and other substantive law. Therefore, the Commission prefers the language proposed. The Model Comment would also delete the second sentence of proposed Comment [1]. The Commission, however, believes that this sentence is accurate and that its retention is instructive as to the nature of the attorney-client relationship. The third sentence of Comment [1] has been modified from "whether to settle" to "whether to accept an offer of settlement of." This change merely reflects the difference in language between Model Rule 1.2(a) and proposed Rule 1.2(a).

Model Comment [10] includes an additional sentence at the end, prior to the cross-reference to Rule 4.1, that is excluded from proposed Comment [10]. The sentence in the Model Comment reads "In extreme cases, substantive law may require a lawyer to disclose information relating to the representation to avoid being deemed to have assisted the client's crime or fraud." Identical language appears in the Comments to Rule 4.1. The Commission believes that the cross-reference to that Rule is adequate and that the same language need not be repeated here.

The first sentence of proposed Comment [11] differs slightly from the Model Comment. The proposed Comment substitutes the word "have" for the words "be charged with", which appear in the Model Comment prior to the words "special obligations." This change is intended to be stylistic only. The second sentence of proposed Comment [11] does not appear in the Model Comment. The Commission believes that, without this reference to the South Carolina Code, the prior sentence is potentially misleading.

Proposed Comment [12], the Model Comment differs by substituting the sentence "Hence, a lawyer must not participate in a transaction to effectuate criminal or fraudulent avoidance of tax liability" for the second sentence of the proposed Comment. The Commission believes, however, that, by its reference only to tax fraud, the Model Comment lacks the broader applicability of the proposed Comment. As proposed by the Commission, Comment [12] offers a broader prohibition on any sham transaction, using tax fraud as merely an example.

Other Commission Comments Regarding Proposed Changes in the Comments from the Current S.C. Comments:

The proposed comments do not differ substantively from current South Carolina standards. The changes are intended primarily to elaborate upon the distinction between matters that fall typically within the lawyer's discretion and those which require a decision by the client. The comments offer more specific guidance to the parties, particularly when a disagreement arises as to areas of responsibility, and they elaborate upon the circumstances under which a representation may be limited.

Comparison of Proposed Comments with S.C. Bar Recommendation:

The proposed language of Comments [1]-[5], [7]-[10], and [13] is identical to the recommendation of the S.C. Bar.

In Comment [6], the S.C. Bar recommends substituting the sentence "For example, representation provided through a legal aid agency may be subject to limitations on the types of cases the agency handles," in place of the second sentence of the proposed Comment. The Commission believes that the reference in the proposed Comment to insurance defense representation is more generally applicable and, therefore, useful as an example than the reference to legal aid agencies and that there is no substantial benefit to be gained by varying from the Model Comment in the manner recommended by the S.C. Bar.

The second sentence of proposed Comment [11] does not appear in the S.C. Bar recommendation. Their recommendation would include merely a cross-reference to the S.C. Code section.

In Comment [12], the S.C. Bar recommends the language of the Model Comment.

RULE 1.3: DILIGENCE

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

Comparison with 2002 ABA Model Rule:

Proposed Rule 1.3 is identical to the 2002 ABA Model Rule.

Other Commission Comments Regarding Proposed Changes from the Current S.C. Rules of Professional Conduct:

There is no change from the current Rule 1.3.

Comparison with S.C. Bar Recommendation:

The proposed language is identical to the recommendation of the S.C. Bar.

Comment

[1] A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and ~~may~~ take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer ~~should~~ must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf. ~~However, a~~ A lawyer is not bound, however, to press for every advantage that might be realized for a client. A For example, a lawyer ~~has~~ may have authority to exercise professional discretion in determining the means by which a matter should be pursued. See Rule 1.2. ~~A lawyer's work load should be controlled so that each matter can be handled adequately.~~ The lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect.

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

~~[2]~~ [3] Perhaps no professional shortcoming is more widely resented than procrastination. A client's interests often can be adversely affected by the passage of time or the change of conditions; in extreme instances, as when a lawyer overlooks a statute of limitations, the client's legal position may be destroyed. Even when the client's interests are not affected in substance, however, unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness. A lawyer's duty to act with reasonable promptness, however, does not preclude the lawyer from agreeing to a reasonable request for a postponement that will not prejudice the lawyer's client.

~~[3]~~ [4] Unless the relationship is terminated as provided in Rule 1.16, a lawyer should carry through to conclusion all matters undertaken for a client. If a lawyer's employment is limited to a specific matter, the relationship terminates when the matter has been resolved. If a lawyer has served a client over a substantial period in a variety of matters, the client sometimes may assume that the lawyer will continue to serve on a continuing basis unless the lawyer gives notice of withdrawal. Doubt about whether a client-lawyer relationship still exists should be clarified by the lawyer, preferably in writing, so that the client will not mistakenly suppose the lawyer is looking after the client's affairs when the lawyer has ceased to do so. For example, if a lawyer has handled a judicial or administrative proceeding that produced a result adverse to the client ~~but has not been specifically instructed concerning pursuit of an~~ and the lawyer and the client have not agreed that the lawyer will handle the matter on appeal, the lawyer should ~~advise~~ consult with the client ~~of~~ about the possibility of appeal before relinquishing responsibility for the matter. See Rule 1.4(a)(2). Whether the lawyer is obligated to prosecute the appeal for the client depends on the scope of the representation the lawyer has agreed to provide to the client. See Rule 1.2.

[5] To prevent neglect of client matters in the event of a practitioner's death or disability, it is the better practice, and the duty of diligence may require, that each lawyer or law firm 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 31 of the South Carolina Rules for Lawyer Disciplinary Enforcement (providing for court appointment of a lawyer to inventory files and take other protective action in absence of a plan providing for another lawyer to inventory files and take other protective action in absence of a plan providing for another lawyer to protect the interests of the clients of a deceased or disabled lawyer).

Comparison of Proposed Comments with Model Comments under the 2002 ABA Model Rule:

Proposed Comments [1]-[3] are identical to the Comments to Rule 1.3 in the 2002 ABA Model Rules.

In the fifth sentence of proposed Comment [4], the phrase "must consult" has been changed to "should consult."

In the first sentence of proposed Comment [5], the word "sole" was deleted prior to "practitioner's" and the words "lawyer or law firm" were substituted for "sole practitioner." The words "it is the better practice, and" also have been added to the first

sentence and do not appear in the Model Comment. While the Commission believes that the preparation of contingency plans should be encouraged, it does not believe that a lawyer should be subject to discipline merely because the lawyer has not yet prepared such a plan. Thus, the Commission believes it advisable to describe the preparation of a plan as a "better practice" and not as a per se duty. Proposed Comment [5] also has been modified to substitute a reference to the S.C. Rules for Disciplinary Enforcement in place of the reference to the ABA Model Rules that appears in the Model Comment.

Other Commission Comments Regarding Proposed Changes in the Comments from the Current S.C. Comments:

While many of the modifications to the Comments are stylistic, several are more substantive in nature. The use of the word "must"in place of "should" clarifies that the duties are mandatory. The limit on zealousness added to Comment [1] is an explicit statements of an accepted principle. The admonition regarding case law management in Comment [2] is moved from current Comment [1]. The sentence added to Comment [3] makes clear the propriety of conduct that is already common and encouraged. The substance of Comment [5] is not found currently in the South Carolina Rules and is added as an aspirational statement.

Comparison of Proposed Comments with S.C. Bar Recommendation:

Comment [1] of the S.C. Bar recommendation contained the references to "sole practitioner" that have been deleted or modified in the proposed Comment [1].

The proposed language of Comments [2]-[3] is identical to the recommendations of the S.C. Bar.

In Comment [4], the S.C. Bar would delete the language "that produced a result adverse to the client." The S.C. Bar also would substitute the words "represent the client on the appeal" for "prosecute the appeal for the client." The Commission believes the latter recommendation is purely stylistic and that variance from the Model Comment language is not warranted. There is merit to the Bar's recommendation that the duty to consult regarding an appeal not be limited to unsuccessful clients only. However, the risk of harm to the client that this Comment addresses is the risk that a withdrawing lawyer will not preserve an appeal in a timely manner. Because that situation affects only unsuccessful clients, the Commission has declined to follow the Bar recommendation.

The S.C. Bar recommendation rejects proposed Comment [5] in its entirety and would substitute a one-sentence aspirational statement that "A lawyer should consider how the interests of the lawyer's clients will be protected in the event of the lawyer's death or disability." The Commission concurs with the Bar that the statement should be aspirational, but believes that the modification the Commission proposes to the Model Comment achieves that intent and is more instructive for the lawyer.

RULE 1.4: COMMUNICATION

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

(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(f), is required by these Rules;

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

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

(4) promptly comply with reasonable requests for information; and

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

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

Comparison with 2002 ABA Model Rule:

Proposed Rule 1.4 is identical to the 2002 ABA Model Rule, with the exception in paragraph (a)(1) of the cross-reference to Rule 1.0, which is modified to reflect the proposed South Carolina version of Rule 1.0.

Other Commission Comments Regarding Proposed Changes from the Current S.C. Rules of Professional Conduct:

Proposed Rule 1.4 provides five specific areas in which there is a duty to communicate, in place of the more general language of the current rule. The proposed rule, however, appears consistent with current expectations.

Comparison with S.C. Bar Recommendation:

The proposed language is identical to the recommendation of the S.C. Bar (with the exception of the cross-reference change).

Comment

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

Communicating with Client

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

[3] Paragraph (a)(2) requires the lawyer to reasonably consult with the client about the means to be used to accomplish the client's objectives. In some situations–depending on both the importance of the action under consideration and the feasibility of consulting with the client–this duty will require consultation prior to taking action. In other circumstances, such as during a trial when an immediate decision must be made, the exigency of the situation may require the lawyer to act without prior consultation. In such cases the lawyer must nonetheless act reasonably to inform the client of actions the lawyer has taken on the client's behalf. Additionally, paragraph (a)(3) requires that the lawyer keep the client reasonably informed about the status of the matter, such as significant developments affecting the timing or the substance of the representation.

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

Explaining Matters

~~[1]~~ [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. ~~For example, a lawyer negotiating on behalf of a client should provide the client with facts relevant to the matter, inform the client of communications from another party and take other reasonable steps that permit the client to make a decision regarding a serious offer from another party. A lawyer who receives from opposing counsel an offer of settlement in a civil controversy or a proffered plea bargain in a criminal case should promptly inform the client of its substance unless prior discussions with the client have left it clear that the proposal will be unacceptable. See Rule 1.2(a). Even when a client delegates authority to the lawyer, the client should be kept advised of the status of the matter.~~ [2] Adequacy of communication depends in part on the kind of advice or assistance that is involved. For example, ~~in negotiations where~~ 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 ~~might~~ are likely to result in significant expense or to injure or coerce others. On the other hand, a lawyer ordinarily ~~cannot~~ will not be expected to describe trial or negotiation strategy in detail. The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests, and the client's overall requirements as to the character of representation. In certain circumstances, such as when a lawyer asks a client to consent to a representation affected by a conflict of interest, the client must give informed consent, as defined in Rule 1.0(f).

~~[3]~~ [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 ~~mental disability~~ 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. ~~Practical exigency may also require a lawyer to act for a client without prior consultation.~~

Withholding Information

~~[4]~~ [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.

Comparison of Proposed Comments with Model Comments under the 2002 ABA Model Rule:

The proposed Comments are identical to the Comments to Rule 1.4 in the 2002 ABA Model Rules, with the exception of the cross-reference to Rule 1.0 in Comment [5], which has been changed to conform to proposed South Carolina Rule 1.0.

Other Commission Comments Regarding Proposed Changes in the Comments from the Current S.C. Comments:

The Comments to Rule 1.4 are substantially revised from the current language. Deleted language from current Comment [1], regarding the handling of settlement proposals, appears in an edited, but substantively similar, form in proposed Comment [2]. Other deleted language from current Comment [1], regarding communication during negotiations, is not replaced, but negotiations are specifically referenced in proposed Comment [5] (a revision of current Comment [2]) addressing the adequacy of communications in different settings. Under proposed Comment [5], the extent of communication required may depend upon the amount of time available in which to contact the client before a decision is required. Proposed Comment [2], however, makes clear that if the decision is one that must be made by the client, such as a decision regarding settlement, the lawyer generally must consult first with the client. Proposed Comment [1] sets forth the policy for Rule 1.4. Proposed Comment [3] makes clear that, even if a lawyer may have decision-making authority on the means used to accomplish a goal, there remains a duty to consult with the client. Proposed Comment [4] makes explicit the lawyer's duty to respond to client requests for information and client telephone calls. None of these comments appears to create new duties not already recognized in South Carolina. They merely set forth duties more explicitly.

Comparison of Proposed Comments with S.C. Bar Recommendation:

The proposed language is identical to the recommendation of the S.C. Bar.

RULE 1.5: FEES

(a) A ~~lawyer's fee~~ lawyer shall ~~be reasonable~~ not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee include the following:

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

(2) the likelihood that the acceptance of the particular employment will preclude other employment by the lawyer;

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

(4) the amount involved and the results obtained;

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

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

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

(8) whether the fee is fixed or contingent.

(b) ~~When the lawyer has not regularly represented the client,~~ The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall 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 paragraph (d) or other law. A contingent fee agreement shall be in a writing signed by the client and shall

state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal; litigation and other expenses to be deducted from the recovery; and whether such expenses are to be deducted before or after the contingent fee is calculated. The agreement must clearly notify the client of any expenses the client will be expected to pay. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

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

(1) any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony or support, or property settlement in lieu thereof, provided that a lawyer may charge a contingency fee in collection of past due alimony or child support; or

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

(e) A division of a fee between lawyers who are not in the same firm may be made only if:

(1) the division is in proportion to the services performed by each lawyer or~~, by written agreement with the client,~~ each lawyer assumes joint responsibility for the representation;

(2) the client ~~is advised of and does not object to the participation of all the lawyers involved~~ agrees to the arrangement, including the share each lawyer will receive, and the agreement is confirmed in writing; and

(3) the total fee is reasonable.

Comparison with 2002 ABA Model Rule:

Proposed Rule 1.5 differs from the 2002 ABA Model Rule in several instances.

In paragraph (a)(2), the Model Rule includes the words "if apparent to the client" after the word "likelihood." This language also appeared in the prior Model Rule 1.5 (as well as the earlier Code of Professional Responsibility), but was omitted when the current South Carolina version of the Rule was adopted. The Commission recommendation retains the current South Carolina approach. The Commission believes that retention of this modification is appropriate given that the purpose of paragraph (a) is to outline the factors relevant to an objective finding of reasonableness. The Model Rule language introduces a more subjective factor of whether a certain likelihood was actually apparent to the client.

In paragraph (b), the words "preferably in writing" are added at the end of the final sentence to emphasize that any changes in the fee agreement, as well as the original agreement, should be reduced to writing.

The third sentence of proposed paragraph (c) differs from the Model Rule. In the Model Rule, the sentence reads "The agreement must clearly notify the client of any expenses for which the client will be liable whether or not the client is the prevailing party." The variation proposed by the Commission is intended to be stylistic only.

Paragraph (d)(1) of the Model Rule does not include the language "provided that a lawyer may charge a contingency fee in collection of past due alimony or child support." This caveat appears in the current South Carolina rule and states expressly a distinction recognized under current South Carolina practice between actions to establish alimony or child support and actions to collect unpaid amounts of either. Under both the Model Rule and the proposed South Carolina rules, contingency fees are deemed inappropriate for the former category of actions. This furthers a policy of ensuring that the lawyer has no financial interest in the outcome of those proceedings. However, there are no similar policy concerns once the amount to be paid has been established, and the action is merely to enforce the earlier Order. The Commission recommends retaining the distinction that permits contingency fees to be charged in those matters.

Other Commission Comments Regarding Proposed Changes from the Current S.C. Rules of Professional Conduct:

Rule 1.5(a) differs in style from the current Rule, which requires that any fee be reasonable. The proposed Rule prohibits a lawyer from charging an unreasonable fee. This change, which hearkens back to DR 2-106 of the earlier Code of Professional Responsibility barring a lawyer from charging a "clearly excessive" fee, is likely to be stylistic only, with no practical consequence. Of more substantive note, proposed Rule 1.5(a) also expressly bars an unreasonable charge for expenses. Although this provision is consistent with current interpretation of ethical obligations under ABA Formal Op. 93-379, the express inclusion of a ban on unreasonable expenses is new.

Paragraph (b) clarifies that, in addition to fee arrangements, the lawyer must communicate to the client information regarding expenses and the scope of the representation. The original Ethics 2000 proposal, which was modified by the ABA

House of Delegates would have expanded significantly the number of situations in which the fee agreement must be written. Under both current rules and the proposed Rule 1.5, only contingency fee agreements (and some fee splitting agreements) must be in writing. Under the rejected Ethics 2000 recommendation, all fee agreements, except those with regularly represented clients, would have been required to be in writing. The proposed Rule says only that such a writing is "preferable" in non-contingency fee cases.

Paragraph (c) would require a writing signed by the client when a contingency fee agreement is used. Under current rule 1.5(c), the contingency fee agreement must be in writing, but there is no requirement that it be signed by the client.

Paragraph (e)(2) requires that any fee splitting agreement between law firms be in writing and that the client agree to the share that each lawyer will receive. Under current Rule 1.5(e), a written fee splitting agreement is not required if the fee is divided between firms in proportion to the services performed by each. Also under the current Rule, the client must be informed and not object to the participation of all of the lawyers involved, but there is no requirement that the client agree to, or even be informed of, the amount of each lawyer's share.

Comparison with S.C. Bar Recommendation:

The S.C. Bar recommends the deletion of the word "preferably" from paragraph (b), thus requiring that all fee agreements be reduced to writing. This approach is similar to the original recommendation of the Ethics 2000 panel, which was rejected by the ABA House of Delegates. While there is merit to the view that a writing requirement could have the beneficial effect of reducing the instances of miscommunication regarding fees, the Commission believes that some uniformity is desirable with regard to the technical requirements surrounding the entry into a fee agreement. Thus, the Commission does not recommend that South Carolina vary from the Model Rules approach.

Also in paragraph (b), in the first sentence, the S.C. Bar recommends substituting the words "previously or currently" for "regularly."

The S.C. Bar recommendation is identical in all other respects to proposed Rule 1.5.

Comment

Reasonableness of Fee and Expenses

[1] Paragraph (a) requires that lawyers charge fees that are reasonable under the circumstances. The factors specified in (1) through (8) are not exclusive. Nor will each factor be relevant in each instance. The South Carolina version of the rule differs from the Model Rule by making the test in paragraph (a)(2) objective rather than subjective. Paragraph (a) also requires that expenses for which the client will be charged must be reasonable. A lawyer may seek reimbursement for the cost of services performed in-house, such as copying, or for other expenses incurred in-house, such as telephone charges, either by charging a reasonable amount to which the client has agreed in advance or by charging an amount that reasonably reflects the cost incurred by the lawyer.

Basis or Rate of Fee

~~[1]~~ [2] When the lawyer has regularly represented a client, they ordinarily will have evolved an understanding concerning the basis or rate of the fee and the expenses for which the client will be responsible. In a new client-lawyer relationship, however, an understanding as to ~~the fee should~~ fees and expenses must be promptly established, preferably in writing. ~~It is not necessary to recite all the factors that underlie the basis of the fee, but only those that are directly involved in its computation. It is sufficient, for example, to state that the basic rate is an hourly charge or a fixed amount or an estimated amount, or to identify the factors that may be taken into account in finally fixing the fee.~~ [2] ~~The South Carolina version of the rule differs from the Model Rule by making the test in paragraph (a)(2) objective rather than subjective because clients may not fully understand why a lawyer who accepts one case may thereby be precluded from other employment. In paragraph (d)(1) the South Carolina rule makes clear that contingency fees are specifically approved in collection of arrearages in domestic relations matters.~~ [3] ~~When developments occur during the representation that render an earlier estimate substantially inaccurate, a revised estimate should be provided to the client.~~ Generally, it is desirable to furnish the client with at least a simple memorandum or copy of the lawyer's customary fee arrangements that states the general nature of the legal services to be provided, the basis, rate or total amount of the fee and whether and to what extent the client will be responsible for any costs, expenses or disbursements in the course of the representation. A written statement concerning the ~~fee~~ terms of the engagement reduces the possibility of misunderstanding. ~~Furnishing the client with a simple memorandum or a copy of the lawyer's customary fee schedule is sufficient if the basis or rate of the fee is set forth.~~

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

other than a contingent fee, for example, government regulations regarding fees in certain tax matters.

Terms of Payment

~~[2]~~ [4] A lawyer may require advance payment of a fee, but is obliged to return any unearned portion. Note further, however, that in certain circumstances in which a legitimate interest is served, the client and lawyer may ~~have~~ entered into an arrangement under which there is a nonrefundable retainer fee. This nonrefundable retainer fee may be retained if it is reasonable under the factors listed in Rule 1.5. The lawyer may deposit the nonrefundable fee immediately into the law firm's operating account. However, if, at the end of the representation, it would be unreasonable for the lawyer to retain the entire fee, the lawyer must then refund that portion of the fee that is unreasonable. See Rule 1.16 (d). A lawyer may accept property in payment for services, such as an ownership interest in an enterprise, providing this does not involve acquisition of a proprietary interest in the cause of action or subject matter of the litigation contrary to Rule 1.8~~(j)~~(i). However, a fee paid in property instead of money may be subject to ~~special scrutiny because it involves questions concerning both the value of the services and the lawyer's special knowledge of the value of the property~~ the requirements of Rule 1.8(a) because such fees often have the essential qualities of a business transaction with the client.

~~[3]~~ [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. ~~When there is doubt whether a contingent fee is consistent with the client's best interest, the lawyer should offer the client alternative bases for the fee and explain their implications. Applicable law may impose limitations on contingent fees, such as a ceiling on the percentage.~~

Prohibited Contingent Fees

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

Division of Fee

~~[4]~~ [7] A division of fee is a single billing to a client covering the fee of two or more lawyers who are not in the same firm. A division of fee facilitates association of more than one lawyer in a matter in which neither alone could serve the client as well, and most often is used when the fee is contingent and the division is between a referring lawyer and a trial specialist. Paragraph (e) permits the lawyers to divide a fee ~~on~~ either on the basis of the proportion of services they render or ~~by agreement between the participating lawyers~~ if ~~all assume~~ each lawyer assumes responsibility for the representation as a whole, ~~and~~ In addition, the client ~~is advised and does not object. It does not require disclosure to the client of~~ must agree to the arrangement, including the share that each lawyer is to receive, and the agreement must be confirmed in writing. Contingent fee agreements must be in a writing signed by the client and must otherwise comply with paragraph (c) of this Rule. Joint responsibility for the representation entails ~~the obligations stated in Rule 5.1 for purposes of the matter involved~~ financial and ethical responsibility for the representation as if the lawyers were associated in a partnership. A lawyer who assumes joint responsibility should be available to both the client and the other fee-sharing lawyer as needed throughout the representation and should remain knowledgeable about the progress of the legal matter. A lawyer should only refer a matter to a lawyer whom the referring lawyer reasonably believes is competent to handle the matter. See Rule 1.1.

[8] Paragraph (e) does not prohibit or regulate division of fees to be received in the future for work done when lawyers were previously associated in a law firm. Also, when a client has hired two or more lawyers in succession on a matter and later refuses to consent to a discharged lawyer receiving an earned share of the legal fee, paragraph (e) should not be applied to prevent a lawyer who has received a fee from sharing that fee with the discharged lawyer to the extent that the discharged lawyer has earned the fee for work performed on the matter and is entitled to payment.

Disputes over Fees

~~[5]~~ [9] If a procedure has been established for resolution of fee disputes, such as an arbitration or mediation procedure established by the bar, 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. See Rule 416, S.C. Appellate Court Rules. ~~Upon application by a client or fellow member of the South Carolina Bar, an attorney shall submit to the proceedings of the Resolution of Fee Disputes Board.~~ 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.

Comparison of Proposed Comments with Model Comments under the 2002 ABA Model Rule:

The fourth sentence of proposed Comment [1] adds a South Carolina specific statement not found in the Model Comment, reflecting the difference between proposed Rule 1.5 (a)(2) and its Model Rule equivalent. Similar language currently appears in Comment 2 to South Carolina Rule 1.5.

The second sentence of proposed Comment [2] ends with the words "preferably in writing," which are not found in the Model Comment. The Commission recommends this variation to emphasize the desirability of a writing, while making clear, in a manner consistent with the text of the proposed Rule, that a writing is not always required.

The second through fifth sentences of proposed Comment [4] do not appear in the Model Comment.

The next to last substantive sentence of proposed Comment [7] does not appear in the Model Comment. The language is taken from Ohio Ethics Advisory Opinion 2003-3.

Proposed Comment [8] adds a second sentence not found in the Model Comment. This sentence is intended to limit the applicability of Rule 1.5(e) to appropriate circumstances, which are primarily those in which one lawyer retains another to simultaneously assist in a client representation.

Proposed Comment [9] adds a South Carolina specific reference to Appellate Court Rule 416 governing the Resolution of Fee Disputes Board.

Proposed Comment [10] is new and is not found in the Model Comments.

Proposed Comments [3], [5], and [6] are identical to the Comments to Rule 1.5 in the 2002 ABA Model Rules.

Other Commission Comments Regarding Proposed Changes in the Comments from the Current S.C. Comments:

Language substantively similar to that deleted from current Comment [5] now appears in proposed Comment [3].

Language regarding non-refundable retainers has been expanded upon in proposed Comment [4] in an effort to provide greater guidance regarding these fees. Under current South Carolina Rules, non-refundable retainers are nominally permitted, but the court has indicated that a non-refundable retainer must be reasonable, See In re Miles, 516 S.E.2d 661 (1999).

Proposed Comment [6] effectively replaces South Carolina specific language currently found in Comment [2] regarding contingency fees in cases involving alimony and child abuse arrearages, without any change from current practice.

Comment [8] appears to overturn the conclusion of the S.C. Bar Ethics Advisory Committee in Opinion 98-32a that, while Rule 1.5(e) fits poorly in such circumstances, it should be adhered to in the absence of any express limitation to the contrary.

Comparison of Proposed Comments with S.C. Bar Recommendation:

The language added in proposed Comment [1] noting the South Carolina variation in paragraph (a)(2) appears instead in Comment [3] of the S.C. Bar recommendation along with a brief explanation of the policy. The Commission believes the more appropriate context is within Comment [1].

The S.C. Bar recommendation modifies Comment [2] to reflect the Bar's recommendation that all fee agreements be required to be in writing and adds a cross-reference to Rule 1.8(e)(1) prior to the final sentence.

The S.C. Bar recommendation would delete the third and fourth sentences of proposed Comment [3]. The S.C. Bar would address the substance of the third sentence by retaining, instead, the first deleted sentence at the end of proposed Comment [5]. The Commission finds no reason to vary from the Model Comment in this respect and recommends the inclusion of the material in Comment [3]. As for the fourth sentence of proposed Comment [3], the Commission believes that its retention is beneficial and desirable.

The S.C. Bar would add a sentence at the end of Comment [3] regarding contingency fees in the collection of arrearages in domestic relations cases. The proposed language appears in the current Comments. The Commission agrees with the need for a statement such as that proposed by the Bar, but believes it is adequately provided in proposed Comment [6].

The modification to the second sentence and the addition of the fourth and fifth sentences of proposed Comment [4] do not

appear in the S.C. Bar recommendation and were not considered by the S.C. Bar. The S.C. Bar would note in Comment [4] that non-refundable retainers are governed by case law and would cite In re Miles. The Bar also would substitute "obligated" for "obliged" for grammatical purposes. The Commission concludes that "obliged" can be used properly in this context and declines to recommend that change.

The next to last substantive sentence of proposed Comment [7] does not appear in the S.C. Bar recommendation.

The S.C. Bar recommendation does not include the second sentence of proposed Comment [8].

RULE 1.6: CONFIDENTIALITY OF INFORMATION

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

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

(1) to prevent the client from committing a criminal act; ~~or~~

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

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

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

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

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

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

Comparison with 2003 ABA Model Rule (The Model Rule adopted in 2002 was modified again by the ABA in 2003. The proposed Rule reflects both the 2002 and 2003 changes):

Paragraph (b)(1) does not appear in the 2003 ABA Model Rule. In all other respects, proposed Rule 1.6 is identical to the 2003 ABA Model Rule. The Commission believes that the current language of South Carolina Rule 1.6 allowing a lawyer to reveal confidences to the extent necessary to prevent the client from committing a crime is good policy and should be retained. Without paragraph (b)(1), a lawyer could act to prevent a client's criminal act only in situations covered by (b)(2) and (3). Property crimes, for example, in furtherance of which the lawyer's services had not been used, would not be covered by paragraph (b)(3). On the other hand, the inclusion of paragraph (b)(1) does not obviate the need for paragraphs (b)(2)or (3). Paragraph (b)(2) permits a lawyer to reveal a client's confidence to prevent potential deaths or substantial bodily harm even when the potential harm is not caused by a criminal act of the client.

Other Commission Comments Regarding Proposed Changes from the Current S.C. Rules of Professional Conduct:

Proposed Rule 1.6(b)(2) enlarges the exception of current Rule 1.6(b) by permitting a lawyer to disclose confidential information if necessary to prevent physical harm to a person without regard as to whether the harm would be the consequence of a criminal act of the client. The current Rule 1.6(b) allows disclosure only to prevent a criminal act of the client or to establish a claim or defense on behalf of the lawyer.

Proposed Rule 1.6(b)(3) may enlarge the exception of current Rule 1.6(b) by including some fraudulent acts, even if they do not rise to the level of a criminal act.

Proposed Rule 1.6(b)(4) enlarges the current rule by permitting disclosures to mitigate or rectify some past crimes, whereas the current rule allows disclosure only to prevent future or ongoing crimes.

Otherwise, the additional provisions of proposed Rule 1.6 (b), allowing a disclosure to obtain ethical advice or to comply with a court order, appear consistent with accepted practices under the current South Carolina Rule. The changes are desirable in that they make acceptance of these practices explicit.

Comparison with S.C. Bar Recommendation:

The S.C. Bar did not consider the 2003 Model Rule revisions and thus offered no recommendation with regard to proposed paragraphs (b)(3) and (4).

The S.C. Bar would substitute the word "crime" for "criminal act" in Rule 1.6 (b)(1).

Otherwise, proposed Rule 1.6 is identical to the S.C. Bar recommendation.

Comment

~~[1] The lawyer is part of a judicial system charged with upholding the law. One of the lawyer's functions is to advise clients so that they avoid any violation of the law in the proper exercise of their rights.~~

~~[2] The observance of the ethical obligation of a lawyer to hold inviolate confidential information of the client not only facilitates the full development of facts essential to proper representation of the client but also encourages people to seek early legal assistance.~~

~~[3] Almost without exception, clients come to lawyers in order to determine what their rights are and what is, in the maze of laws and regulations, deemed to be legal and correct. The common law recognizes that the client's confidences must be protected from disclosure. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld.~~

[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.

~~[4]~~ [2] A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer ~~maintain confidentiality of~~ must not reveal information relating to the representation. See Rule 1.0(f) for the definition of informed consent. Confidentiality 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.

~~[5]~~ [3] The principle of client-lawyer confidentiality is given effect ~~in two~~ by related bodies of law~~,~~: the attorney-client privilege, ~~(which includes~~ the work product doctrine~~) in the law of evidence~~ and the rule of confidentiality established in professional ethics. The attorney-client privilege ~~applies~~ 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 ~~merely~~ only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law. See also Scope.

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

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

Authorized Disclosure

~~[7]~~ [6] ~~A~~ 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~~, except to the extent that the client's instructions or special circumstances limit that authority~~. In ~~litigation~~ some situations, for example, a lawyer may ~~disclose information by~~

~~admitting~~ be impliedly authorized to admit a fact that cannot properly be disputed or~~, in negotiation by making~~ to make a disclosure that facilitates a satisfactory conclusion to a matter. ~~[8]~~ 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

~~[9]~~ [7] ~~The~~ 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. ~~In becoming privy to information about a client, a lawyer may foresee that the client intends serious harm to another person. However, to the extent a lawyer is required or permitted to disclose a client's purposes, the client will be inhibited from revealing facts which would enable the lawyer to counsel against a wrongful course of action. The public is better protected if full and open communication by the client is encouraged than if it is inhibited.[10] Several situations must be distinguished. [11] First, the lawyer may not counsel or assist a client in conduct that is criminal or fraudulent. See Rule 1.2(d). Similarly, a lawyer has a duty under Rule 3.3(a)(4) not to use false evidence. This duty is essentially a special instance of the duty prescribed in Rule 1.2(d) to avoid assisting a client in criminal or fraudulent conduct. [12] Second, the lawyer may have been innocently involved in past conduct by the client that was criminal or fraudulent. In such a situation the lawyer has not violated Rule 1.2(d), because to "counsel or assist" criminal or fraudulent conduct requires knowing that the conduct is of that character.[13] Third, the~~ The lawyer may learn that a client intends prospective conduct that is criminal. As stated in paragraph (b)(1), the lawyer has professional discretion to reveal information in order to prevent such consequences. ~~It is very difficult for a lawyer to "know" when such a heinous purpose will actually be carried out, for the client may have a change of mind. Paragraph (b)(1) was modified from the model rule version which has qualifying language to the effect that only those criminal acts which the lawyer believes are likely to result in imminent death or substantial bodily harm may be disclosed. This language was deleted in the South Carolina version to provide greater flexibility to the lawyer, similar to the flexibility present under DR 4-101 of the Code of Professional Responsibility. [14] The lawyer's exercise of discretion requires consideration of such factors as the nature of the lawyer's relationship with the client and with those who might be injured by the client, the lawyer's own involvement in the transaction and factors that may extenuate the conduct in question. Where practical, the lawyer should seek to persuade the client to take suitable action. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to the purpose. A lawyer's decision not to take preventive action permitted by paragraph (b)(1) does not violate this Rule.~~ Paragraph (b)(2) recognizes the overriding value of life and physical integrity and permits disclosure reasonably necessary to prevent reasonably certain death or substantial bodily harm. Such harm is reasonably certain to occur if it will be suffered imminently or if there is a present and substantial threat that a person will suffer such harm at a later date if the lawyer fails to take action necessary to eliminate the threat. Thus, a lawyer who knows that a client has accidentally discharged toxic waste into a town's water supply may reveal this information to the authorities if there is a present and substantial risk that a person who drinks the water will contract a life-threatening or debilitating disease and the lawyer's disclosure is necessary to eliminate the threat or reduce the number of victims.

[8] Paragraph (b)(3) does not limit the breadth of Paragraph (b)(1), but describes one specific example of a situation in which disclosure is permitted to prevent a criminal act by the client. Paragraph (b)(3) is a limited exception to the rule of confidentiality that permits the lawyer to reveal information to the extent necessary to enable affected persons or appropriate authorities to prevent the client from committing a crime or fraud, as defined in Rule 1.0(e), that is reasonably certain to result in substantial injury to the financial or property interests of another and in furtherance of which the client has used or is using the lawyer's services. Such a serious abuse of the client-lawyer relationship by the client forfeits the protection of this Rule. The client can, of course, prevent such disclosure by refraining from the wrongful conduct. Although paragraph (b)(3) does not require the lawyer to reveal the client's misconduct, the lawyer may not counsel or assist the client in conduct the lawyer knows is criminal or fraudulent. See Rule 1.2(d). See also Rule 1.16 with respect to the lawyer's obligation or right to withdraw from the representation of the client in such circumstances, and Rule 1.13(c), which permits the lawyer, where the client is an organization, to reveal information relating to the representation in limited circumstances.

[9] Paragraph (b)(4) addresses the situation in which the lawyer does not learn of the client's crime or fraud until after it has been consummated. Although the client no longer has the option of preventing disclosure by refraining from the wrongful conduct, there will be situations in which the loss suffered by the affected person can be prevented, rectified or mitigated. In such situations, the lawyer may disclose information relating to the representation to the extent necessary to enable the affected persons to prevent or mitigate reasonably certain losses or to attempt to recoup their losses. Paragraph (b)(4) does not apply when a person who has committed a crime or fraud thereafter employs a lawyer for representation concerning that offense.

[10] A lawyer's confidentiality obligations do not preclude a lawyer from securing confidential legal advice about the lawyer's personal responsibility to comply with these Rules. In most situations, disclosing information to secure such advice will be impliedly authorized for the lawyer to carry out the representation. Even when the disclosure is not impliedly authorized, paragraph (b)(5) permits such disclosure because of the importance of a lawyer's compliance with the Rules of Professional Conduct.

~~**Dispute Concerning a Lawyer's Conduct**~~

~~[18]~~ [11] Where a legal claim or disciplinary charge alleges complicity of the lawyer in a client's conduct or other misconduct of the lawyer involving representation of the client, the lawyer may respond to the extent the lawyer reasonably believes necessary to

establish a defense. The same is true with respect to a claim involving the conduct or representation of a former client. Such a charge can arise in a civil, criminal, disciplinary or other proceeding and can be based on a wrong allegedly committed by the lawyer against the client or on a wrong alleged by a third person, for example, a person claiming to have been defrauded by the lawyer and client acting together. The lawyer's right to respond arises when an assertion of such complicity has been made. Paragraph (b)~~(2)~~(6) 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, ~~applies~~ where a proceeding has been commenced. ~~Where practicable and not prejudicial to the lawyer's ability to establish the defense, the lawyer should advise the client of the third party's assertion and request that the client respond appropriately. In any event, disclosure should be no greater than the lawyer reasonably believes is necessary to vindicate innocence, the disclosure should be made in a manner which limits access to the information to the tribunal or other persons having a need to know it, and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.~~

~~[19]~~ [12] ~~If the lawyer is charged with wrongdoing in which the client's conduct is implicated, the rule of confidentiality should not prevent the lawyer from defending against the charge. Such a charge can arise in a civil, criminal or professional disciplinary proceeding, and can be based on a wrong allegedly committed by the lawyer against the client, or on a wrong alleged by a third person; for example, a person claiming to have been defrauded by the lawyer and client acting together.~~ A lawyer entitled to a fee is permitted by paragraph (b)~~(2)~~(6) to prove the services rendered in an action to collect it. This aspect of the rule expresses the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary. ~~As stated above, the lawyer must make every effort practicable to avoid unnecessary disclosure of information relating to a representation, to limit disclosure to those having the need to know it, and to obtain protective orders or make other arrangements minimizing the risk of disclosure.~~

[13] Other law may require that a lawyer disclose information about a client. Whether such a law supersedes Rule 1.6 is a question of law beyond the scope of these Rules. When disclosure of information relating to the representation appears to be required by other law, the lawyer must discuss the matter with the client to the extent required by Rule 1.4. If, however, the other law supersedes this Rule and requires disclosure, paragraph (b)(7) permits the lawyer to make such disclosures as are necessary to comply with the law.

[14] A lawyer may be ordered to reveal information relating to the representation of a client by a court or by another tribunal or governmental entity claiming authority pursuant to other law to compel the disclosure. Absent informed consent of the client to do otherwise, the lawyer should assert on behalf of the client all nonfrivolous claims that the order is not authorized by other law or that the information sought is protected against disclosure by the attorney-client privilege or other applicable law. In the event of an adverse ruling, the lawyer must consult with the client about the possibility of appeal to the extent required by Rule 1.4. Unless review is sought, however, paragraph (b)(5) permits the lawyer to comply with the court's order.

[15] Paragraph (b) permits disclosure only to the extent the lawyer reasonably believes the disclosure is necessary to accomplish one of the purposes specified. Where practicable, the lawyer should first seek to persuade the client to take suitable action to obviate the need for disclosure. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to accomplish the purpose. If the disclosure will be made in connection with a judicial proceeding, the disclosure should be made in a manner that limits access to the information to the tribunal or other persons having a need to know it and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.

[16] Paragraph (b) permits but does not require the disclosure of information relating to a client's representation to accomplish the purposes specified in paragraphs (b)(1) through (b)(7). In exercising the discretion conferred by this Rule, the lawyer may consider such factors as the nature of the lawyer's relationship with the client and with those who might be injured by the client, the lawyer's own involvement in the transaction and factors that may extenuate the conduct in question. A lawyer's decision not to disclose as permitted by paragraph (b) does not violate this Rule. Disclosure may be required, however, by other Rules. Some Rules require disclosure only if such disclosure would be permitted by paragraph (b). See Rules 1.2(d), 4.1(b), 8.1 and 8.3. Rule 3.3, on the other hand, requires disclosure in some circumstances regardless of whether such disclosure is permitted by this Rule. See Rule 3.3(c).

~~Withdrawal~~

~~[15] If the lawyer's services will be used by the client in materially furthering a course of criminal or fraudulent conduct, the lawyer must withdraw, as stated in Rule 1.16(a)(1). [16] After withdrawal the lawyer is required to refrain from making disclosure of the client's confidences, except as otherwise permitted in Rule 1.6. Neither this Rule nor Rule 1.8(b) nor Rule 1.16(d) prevents the lawyer from giving notice of the fact of withdrawal, and the lawyer may also withdraw or disaffirm any opinion, document, affirmation, or the like. [17] Where the client is an organization, the lawyer may be in doubt whether contemplated conduct will actually be carried out by the organization. Where necessary to guide conduct in connection with this Rule, the lawyer may make inquiry within the organization as indicated in Rule 1.13(b).~~

~~Disclosures Otherwise Required or Authorized~~

~~[20] The attorney-client privilege is differently defined in various jurisdictions. If a lawyer is called as a witness to give testimony~~

~~concerning a client, absent waiver by the client, paragraph (a) requires the lawyer to invoke the privilege when it is applicable. The lawyer must comply with the final orders of a court or other tribunal of competent jurisdiction requiring the lawyer to give information about the client.~~

~~[21] The Rules of Professional Conduct in various circumstances permit or require a lawyer to disclose information relating to the representation. See Rules 2.2, 2.3, 3.3 and 4.1. In addition to these provisions, a lawyer may be obligated or permitted by other provisions of law to give information about a client. Whether another provision of law supercedes Rule 1.6 is a matter of interpretation beyond the scope of these Rules, but a presumption should exist against such a supersession.~~

Acting Competently to Preserve Confidentiality

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

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

Former Client

~~[22]~~ [19] 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 of Proposed Comments with Model Comments under the 2003 ABA Model Rule:

Proposed Comments [1], [3], [5], [6], and [9]-[19] are identical to the Comments to Rule 1.6 in the 2003 ABA Model Rules, except for the cross-references to subsections of paragraph (b) in Comments [9]-[14] and [16], which have been modified to conform to the South Carolina version of paragraph (b).

Proposed Comment [2] omits the final sentence of the Model Comment, which reads "Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld." This language appears in Comment [3] of current Rule 1.6. However, the Commission finds that its continued inclusion offers no beneficial guidance and recommends its omission. The third sentence of the proposed Comment begins with the word "Confidentiality" instead of the word "This", which is used in the Model Comment. The change is stylistic only. Also, the cross-reference to Rule 1.0 in proposed Comment [2] is modified to reflect the proposed South Carolina version of that Rule.

Proposed Comment [4] is retained from the current Comments and does not appear in the Model Comments to Rule 1.6. Although perhaps unnecessary, its continued inclusion appears sufficiently beneficial to warrant its retention. The numbering of all subsequent proposed Comments is affected by this addition.

The second sentence of proposed Comment [7], referring to paragraph (b)(1), does not appear in the Model Comment. Its inclusion is appropriate in light of the addition to the proposed South Carolina Rule of paragraph (b)(1), which is not in the Model Rule. Also, the reference in proposed Comment [7] to paragraph (b)(2), rather than to paragraph (b)(1) as in the Model Comment, reflects the South Carolina version of Rule 1.6(b).

The first sentence of proposed Comment [8] does not appear in the Model Comments and is added to clarify the relationship between Paragraph (b)(1), which is not included in the Model Rule, and Paragraph (b)(3). The cross-references to subsections of paragraph (b) in Comment [8] have been modified to conform to the South Carolina version of paragraph (b).

Other Commission Comments Regarding Proposed Changes in the Comments from the Current S.C. Comments:

Proposed Comment [2] retains much of the substance of current Comments [1]-[3], which have been deleted.

Proposed Comment [7], along with proposed Comments [15] and [16], retain much of the substance of current Comment [14], which has been deleted.

Proposed Comments [8] and [9] do not appear in the current South Carolina Comments. Comment [9] reflects a significant

change in the Rule regarding disclosure of past criminal acts of the client.

A Comment originally proposed as Comment [15], which contained language currently in the South Carolina Comments, has been deleted for consistency with changes made to the Model Rule in 2003.

Comparison of Proposed Comments with S.C. Bar Recommendation:

In the second sentence of Comment [7], the S.C. Bar would substitute the words "harmful consequences of such conduct" for "such consequences."

The S.C. Bar did not consider proposed Comments [8] or [9]. The S.C. Bar recommendation included original proposed Comment [15], which is deleted in this version. These variations are attributable to the 2003 revisions in the Model Rule, which were not considered by the S.C. Bar.

Otherwise, the proposed language is identical to the recommendation of the S.C. Bar.

RULE 1.7: CONFLICT OF INTEREST: ~~GENERAL RULE~~ CURRENT CLIENTS

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

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

~~(2) each client consents after consultation.~~

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

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

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

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

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

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

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

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

(2) the representation is not prohibited by law;

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

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

Comparison with 2002 ABA Model Rule:

Proposed Rule 1.7 is identical to the 2002 ABA Model Rule.

Other Commission Comments Regarding Proposed Changes from the Current S.C. Rules of Professional Conduct:

Proposed Rule 1.7(a)(2) changes the definition of a conflict in situations in which the interests of the parties are not directly adverse. Under the proposed Rule, a conflict exists if "there is a significant risk that the representation" of a client "will be materially limited" by the interests of the lawyer or the lawyer's responsibilities to another person. Under the current Rule, a

conflict exists if the representation of a client "may be materially limited"by the interests of the lawyer or the lawyer's responsibilities to another person.

Proposed Rule 1.7 (b)(4) adds a requirement that a client's consent to a conflict of interest be confirmed in writing. The current rule does not require a writing. The proposed Rule and its Comments do not indicate whether the failure to create a writing should have any bearing on any subsequent civil action between lawyer and client.

The proposed Rule specifies in paragraph (b)(3) that a lawyer may not represent adverse parties in the same litigation or other proceeding before a tribunal. This provision reflects interpretations of current Rule 1.7.

Otherwise, the substance of current Rule 1.7 appears not to be altered by the revisions proposed.

Comparison with S.C. Bar Recommendation:

The S.C. Bar recommends adding an additional subsection (c) to incorporate material now incorporated in Rule 2.2, which is deleted in the Proposed Rules. The additional subsection proposed by the Bar would read as follows:

> *"(c) Notwithstanding the existence of a conflict of interest between multiple clients under paragraph (a), a lawyer may undertake the common representation of those multiple clients in the same transaction or other non-litigation matter if:*
>
> > *"(1) the requirements of paragraph (b) are satisfied, including each affected client giving informed consent to the common representation, confirmed in writing;*
> >
> > *"(2) the lawyer has informed each client concerning the implications of the common representation, including the advantages and risks involved, and the effect on the attorney-client privileges and the lawyer's duty of confidentiality;*
> >
> > *"(3) the lawyer reasonably believes that the matter can be resolved on terms compatible with the clients' best interests, each client will be able to make adequately informed decisions on the matter and the common representation poses little risk of material prejudice to the interests of any of the clients if the contemplated resolution is unsuccessful; and*
> >
> > *"(4) the lawyer reasonably believes that the common representation can be undertaken impartially and without effect on other responsibilities the lawyer has to any of the clients.*
>
> *"While engaged in such common representation, the lawyer shall consult with each client concerning the decisions to be made and the considerations relevant in making them, so that each client can make adequately informed decisions. A lawyer shall withdraw from the common representation if any of the clients so requests, or if any of the conditions of this paragraph is no longer satisfied. Upon withdrawal, the lawyer shall not continue to represent any of the clients in the matter that was the subject of the common representation unless each of the other clients gives informed consent, confirmed in writing."*

The Commission believes that the situation contemplated by the Bar's proposed paragraph (c) is adequately addressed under proposed paragraphs (a) and (b) and that inclusion of the Bar proposal is unnecessary.

Comment

~~Loyalty to a Client~~ **General Principles**

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

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

[3] ~~An impermissible~~ A conflict of interest may exist before representation is undertaken, in which event the representation ~~should~~ must be declined, unless the lawyer obtains the informed consent of each client under the conditions of paragraph (b). ~~The~~ To determine whether a conflict of interest exists, a lawyer should adopt reasonable procedures, appropriate for the size and type of firm and practice, to determine in both litigation and non-litigation matters the ~~parties~~ persons and issues involved ~~and to determine whether there are actual or potential conflicts of interest~~. See also Comment to Rule 5.1. Ignorance caused by a failure to institute such procedures will not excuse a lawyer's violation of this Rule. As to whether a client-lawyer relationship exists or, having once been established, is continuing, see Comment to Rule 1.3 and Scope.

~~[2]~~ [4] If ~~such~~ a conflict arises after representation has been undertaken, the lawyer ~~should~~ ordinarily must withdraw from the representation, unless the lawyer has obtained the informed consent of the client under the conditions of paragraph (b). See Rule 1.16. Where more than one client is involved ~~and the lawyer withdraws because a conflict arises after representation~~, whether the lawyer may continue to represent any of the clients is determined both by the lawyer's ability to comply with duties owed to the former client and by the lawyer's ability to represent adequately the remaining client or clients, given the lawyer's duties to the former client. See Rule 1.9. See also ~~Rule 2.2(c)~~ Comments [5] and [27]. ~~As to whether a client-lawyer relationship exists or, having once been established, is continuing, see Comment to Rule 1.3 and Scope.~~

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

Identifying Conflicts of Interest: Directly Adverse

~~[3]~~ [6] ~~As a general proposition, loyalty~~ Loyalty to a current client prohibits undertaking representation directly adverse to that client without that client's informed consent. ~~Paragraph (a) expresses that general rule.~~ Thus, absent consent, a lawyer ~~ordinarily~~ may not act as an advocate in one matter against a person the lawyer represents in some other matter, even ~~if it is~~ when the matters are wholly unrelated. The client as to whom the representation is directly adverse is likely to feel betrayed, and the resulting damage to the client-lawyer relationship is likely to impair the lawyer's ability to represent the client effectively. In addition, the client on whose behalf the adverse representation is undertaken reasonably may fear that the lawyer will pursue that client's case less effectively out of deference to the other client, i.e., that the representation may be materially limited by the lawyer's interest in retaining the current client. Similarly, a directly adverse conflict may arise when a lawyer is required to cross-examine a client who appears as a witness in a lawsuit involving another client, as when the testimony will be damaging to the client who is represented in the lawsuit. On the other hand, simultaneous representation in unrelated matters of clients whose interests are only ~~generally~~ economically adverse, such as representation of competing economic enterprises in unrelated litigation, does not ordinarily constitute a conflict of interest and thus may not require consent of the respective clients. ~~Paragraph (a) applies only when the representation of one client would be directly adverse to the other.~~

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

Identifying Conflicts of Interest: Material Limitation

~~[4]~~ [8] ~~Loyalty to a client is also impaired when~~ Even where there is no direct adverseness, a conflict of interest exists if there is a significant risk that a ~~lawyer cannot~~ lawyer's ability to consider, recommend or carry out an appropriate course of action for the client ~~because~~ will be materially limited as a result of the lawyer's other responsibilities or interests. For example, a lawyer asked to represent several individuals seeking to form a joint venture is likely to be materially limited in the lawyer's ability to recommend or advocate all possible positions that each might take because of the lawyer's duty of loyalty to the others. The conflict in effect forecloses alternatives that would otherwise be available to the client. ~~Paragraph (b) addresses such situations. A possible conflict~~ The mere possibility of subsequent harm does not itself ~~preclude the representation~~ require disclosure and consent. The critical questions are the likelihood that a ~~conflict~~ difference in interests will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client. ~~Consideration should be given to whether the client wishes to accommodate the other interest involved.~~

Lawyer's ~~Interests~~ Responsibilities to Former Clients and Other Third Persons

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

Personal Interest Conflicts

~~[6]~~ [10] The lawyer's own interests should not be permitted to have an adverse effect on representation of a client. For example, ~~a lawyer's need for income should not lead the lawyer to undertake matters that cannot be handled competently and at a reasonable fee. See Rules 1.1 and 1.5. If~~ if the probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice. ~~A~~ Similarly, when a lawyer has discussions concerning possible employment with an opponent of the lawyer's client, or with a law firm representing the opponent, such discussions could materially limit the lawyer's representation of the client. In addition, a lawyer may not allow related business interests to affect representation, for example, by referring clients to an enterprise in which the lawyer has an undisclosed financial interest. See Rule 1.8 for specific Rules pertaining to a number of personal interest conflicts, including business transactions with clients. See also Rule 1.10 (personal interest conflicts under Rule 1.7 ordinarily are not imputed to other lawyers in a law firm).

Interest of Person Paying for a Lawyer's Service

~~[10]~~ [11] 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). ~~For example, when an insurer and its insured have conflicting interests in a matter arising from a liability insurance agreement, and the insurer is required to provide special counsel for the insured, the arrangement should assure the special counsel's professional independence. So also, when a corporation and its directors or employees are involved in a controversy in which they have conflicting interests, the corporation may provide funds for separate legal representation of the directors or employees, if the clients consent after consultation and the arrangement ensures the lawyer's professional independence.~~ If acceptance of the payment from any other source presents a significant risk that the lawyer's representation of the client will be materially limited by the lawyer's own interest in accommodating the person paying the lawyer's fee or by the lawyer's responsibilities to a payer who is also a co-client, then the lawyer must comply with the requirements of paragraph (b) before accepting the representation, including determining whether the conflict is consentable and, if so, that the client has adequate information about the material risks of the representation.

~~Consultation and Consent~~ Prohibited Representations

~~[5]~~ [12] ~~A client~~ Ordinarily, clients may consent to representation notwithstanding a conflict. However, as indicated in paragraph ~~(a)(1) with respect to representation directly adverse to a client, and paragraph~~ (b)~~(1) with respect to material limitations on representation of a client, when a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances~~, some conflicts are nonconsentable, meaning that the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent. When the lawyer is representing more than one client ~~is involved~~, the question of ~~conflict~~ consentability must be resolved as to each client. ~~Moreover, there may be circumstances where it is impossible to make the disclosure necessary to obtain consent. For example, when the lawyer represents different clients in related matters and one of the clients refuses to consent to the disclosure necessary to permit the other client to make an informed decision, the lawyer cannot properly ask the latter to consent.~~

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

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

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

Informed Consent

[16] Informed consent is defined in 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 should include the implications of the common representation, including possible effects on loyalty, confidentiality and the attorney-client privilege and the advantages and risks involved. See Comments [28] and [29] (effect of common representation on confidentiality).

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

Consent Confirmed in Writing

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

Revoking Consent

[19] 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.

Consent to Future Conflict

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

Conflicts in Litigation

~~[7]~~ [21] Paragraph ~~(a)~~ (b)(3) prohibits representation of opposing parties in the same litigation, regardless of the clients' consent. ~~Simultaneous~~ On the other hand, simultaneous representation of parties whose interests in litigation may conflict, such as coplaintiffs or codefendants, is governed by paragraph ~~(b)~~ (a)(2). ~~An impermissible~~ A conflict may exist by reason of substantial discrepancy in the parties' testimony, incompatibility in positions in relation to an opposing party or the fact that there are substantially different possibilities of settlement of the claims or liabilities in question. Such conflicts can arise in criminal cases as well as civil. The potential for conflict of interest in representing multiple defendants in a criminal case is so grave that ordinarily a lawyer should decline to represent more than one codefendant. On the other hand, common representation of persons having similar interests in civil litigation is proper if ~~the risk of adverse effect is minimal and~~ the requirements of paragraph (b) are met. ~~Compare Rule 2.2 involving intermediation between clients.~~

~~[8] Ordinarily, a lawyer may not act as advocate against a client the lawyer represents in some other matter, even if the other matter is wholly unrelated. However, there are circumstances in which a lawyer may act as advocate against a client. For example, a lawyer representing an enterprise with diverse operations may accept employment as an advocate against the enterprise in an unrelated matter if doing so will not adversely affect the lawyer's relationship with the enterprise or conduct of the suit and if both clients consent upon consultation. By the same token, government lawyers in some circumstances may represent government employees in proceedings in which a government agency is the opposing party. The propriety of concurrent representation can depend on the nature of the litigation. For example, a suit charging fraud entails conflict to a degree not involved in a suit for a declaratory judgment concerning statutory~~

~~interpretation.~~

~~[9] A lawyer may represent parties having antagonistic positions on a legal question that has arisen in different cases, unless representation of either client would be adversely affected. Thus, it is ordinarily not improper to assert such positions in cases pending in different trial courts, but it may be improper to do so in cases pending at the same time in an appellate court.~~

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

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

[23a] A lawyer serving as a part-time prosecutor is not necessarily disqualified from simultaneously representing other civil or criminal defense clients in private practice. If the prosecutions handled by the lawyer are limited in nature and scope, the lawyer may be able to represent other clients in criminal or civil matters that are not related to any of the cases that the lawyer has prosecuted.

~~Other Conflict Situations~~ Nonlitigation Conflicts

~~[11]~~ [24] Conflicts of interest under paragraphs (a)(1) and (a)(2) arise in contexts other than litigation ~~sometimes may be difficult to assess~~. For a discussion of directly adverse conflicts in transactional matters, see Comment [7]. Relevant factors in determining whether there is significant potential for ~~adverse effect~~ material limitation include the duration and intimacy of the lawyer's relationship with the client or clients involved, the functions being performed by the lawyer, the likelihood that ~~actual conflict~~ disagreements will arise and the likely prejudice to the client from the conflict ~~if it does arise~~. The question is often one of proximity and degree. See Comment [8].

~~[13]~~ [25] ~~Conflict~~ For example, conflict questions may ~~also~~ arise in estate planning and estate administration. A lawyer may be called upon to prepare wills for several family members, such as husband and wife, and, depending upon the circumstances, a conflict of interest may ~~arise~~ be present. In estate administration the identity of the client also may be unclear~~, under the law of a particular jurisdiction. Under one view, the client is the fiduciary; under another view the client is the estate or trust, including its beneficiaries.~~ The issue is addressed in S.C. Code 62-1-109. In order to comply with conflict of interest rules, the lawyer should make clear the lawyer's relationship to the parties involved.

~~[12]~~ [26] Whether a conflict is consentable depends on the circumstances. For example, a lawyer may not represent multiple parties to a negotiation whose interests are fundamentally antagonistic to each other, but common representation is permissible where the clients are generally aligned in interest even though there is some difference in interest among them. Thus, a lawyer may seek to establish or adjust a relationship between clients on an amicable and mutually advantageous basis; for example, in helping to organize a business in which two or more clients are entrepreneurs, working out the financial reorganization of an enterprise in which two or more clients have an interest or arranging a property distribution in settlement of an estate. The lawyer seeks to resolve potentially adverse interests by developing the parties' mutual interests. Otherwise, each party might have to obtain separate representation, with the possibility of incurring additional cost, complication or even litigation. Given these and other relevant factors, the clients may prefer that the lawyer act for all of them.

Special Considerations in Common Representation

[27] In considering whether to represent multiple clients in the same matter, a lawyer should be mindful that if the common representation fails because the potentially adverse interests cannot be reconciled, the result can be additional cost, embarrassment and recrimination. Ordinarily, the lawyer will be forced to withdraw from representing all of the clients if the common representation fails. In some situations, the risk of failure is so great that multiple representation is plainly impossible. For example, a lawyer cannot undertake common representation of clients where contentious litigation or negotiations between them are imminent or contemplated. Moreover, because the lawyer is required to be impartial between commonly represented clients, representation of multiple clients is improper when it is unlikely that impartiality can be maintained. Generally, if the relationship between the parties has already assumed antagonism, the

possibility that the clients' interests can be adequately served by common representation is not very good. Other relevant factors are whether the lawyer subsequently will represent both parties on a continuing basis and whether the situation involves creating or terminating a relationship between the parties.

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

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

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

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

Organizational Clients

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

~~[14]~~ [33] A lawyer for a corporation or other organization who is also a member of its board of directors should determine whether the responsibilities of the two roles may conflict. The lawyer may be called on to advise the corporation in matters involving actions of the directors. Consideration should be given to the frequency with which such situations may arise, the potential intensity of the conflict, the effect of the lawyer's resignation from the board and the possibility of the corporation's obtaining legal advice from another lawyer in such situations. If there is material risk that the dual role will compromise the lawyer's independence of professional judgment, the lawyer should not serve as a director or should cease to act as the corporation's lawyer when conflicts of interest arise. The lawyer should advise the other members of the board that in some circumstances matters discussed at board meetings while the lawyer is present in the capacity of director might not be protected by the attorney-client privilege and that conflict of interest considerations might require the lawyer's recusal as a director or might require the lawyer and the lawyer's firm to decline representation of the corporation in a matter.

~~**Conflict Charged by an Opposing Party**~~

~~[15] Resolving questions of conflict of interest is primarily the responsibility of the lawyer undertaking the representation. In litigation, a court may raise the question when there is reason to infer that the lawyer has neglected the responsibility. Where the conflict is such as clearly to call in question the fair or efficient administration of justice, opposing counsel may properly raise the question. Such an objection should be viewed with caution, however, for it can be misused as a technique of harassment. See Scope.~~

Comparison of Proposed Comments with Model Comments under the 2002 ABA Model Rule:

Proposed Comments [1]-[15], [17], [19]-[24], and [26]-[33] are identical to Model Comments [1]-[10], [13]-[17], [19], [21]-[26], and [28]-[35] to Rule 1.7 in the 2002 ABA Model Rules, with the exception of the cross-references to Rule 1.0 in proposed Comments [1], [15], and [18], which are modified to reflect the proposed South Carolina version of Rule 1.0, and

with the exception of internal cross-references to other proposed Comments within Comment [4], which are modified to reflect the omission of Model Comments [11] and [12].

Model Comment [11] is omitted here, but is included, instead, in the Comments to proposed Rule 1.8. This Comment reads as follows:

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

Unlike the Model Rules, which contain no Rule specifically addressing this issue, these proposed Rules do address the issue in Rule 1.8. Therefore, the Commission believes this Comment is better placed with proposed Rule 1.8.

Model Comment [12], addressing attorney-client sexual relationships is not included in the proposed Comments. The language of the omitted Model Comment reads as follows: "A lawyer is prohibited from engaging in sexual relationships with a client unless the sexual relationship predates the formation of the client-lawyer relationship. See Rule 1.8(j)." The omission is consistent with proposed Rule 1.8, which also omits Model Rule language prohibiting sexual relationships with clients. A further discussion of this issue may be found in the Commission comments regarding Rule 1.8.

Proposed Comment [16] differs in several respects from Model Comment [18]. The first sentence of the Model Comment is deleted. The deleted sentence reads, " Informed consent requires that each affected client be aware of the relevant circumstances and of the material and reasonably foreseeable ways that the conflict could have adverse effects on the interests of that client." The definition of "informed consent" is best left to Rule 1.0, which is cited in the Comment. In the third sentence, the verb "should" is substituted for "must." Also, internal cross-references within the Comment have been altered to conform to other changes.

The next-to-last sentence of proposed Comment [18] does not appear in the Model Comments. It is recommended by the Commission as a "better practice" in order to provide guidance as to the preferred content of the written confirmation, while making clear that a confirmation can be sufficient without all of these points expressly set forth. The Commission believes this addition is desirable, especially given the possibility that the client, rather than the lawyer, may draft the written confirmation.

Comment [23a] does not appear in the Model Comments.

In proposed Comment [25], the third and fourth sentences differ from the Model Comment. The material deleted appears in the Model Comment. The added reference to a South Carolina statute is not in the Model Comment.

Other Commission Comments Regarding Proposed Changes in the Comments from the Current S.C. Comments:

The Commission's reasoning with regard to a rule addressing sexual relations with clients is set forth in the discussion of proposed Rule 1.8. Even if such a rule is included in Rule 1.8, there seems no need to include a separate Comment in Rule 1.7.

Proposed Comment [5] provides guidance not found in current Comments when a conflict arises due to a unforeseen realignment of parties or a corporate reorganization beyond the control of the lawyer. It expressly provides for the possibility in that situation of withdrawing from one matter to resolve the conflict, while remaining as counsel in the other matter.

Proposed Comment [7] provides guidance not found in current Comments regarding conflicts that arise in a transactional practice.

Proposed Comment [10] includes language alerting a lawyer to the possibility of a conflict arising because of the lawyer seeking a prospective change of employment. The substance of the proposed Comment is consistent with ABA Formal Op. # 96-400.

Proposed Comment [15] addresses the possibility of a conflict in mediation representation.

Proposed Comment [19] provides guidance not found in current Comments regarding the effect of a revocation of consent.

Proposed Comment [20] provides guidance regarding the validity of prospective waivers not found in the current Comments. It appears to be substantively consistent with ABA Formal Op. 93-372.

Proposed Comment [22] amplifies upon the factors to be considered in determining whether an "issue conflict" exists. It is a more detailed guidance that substitutes for the guidance found in the current Comment.

Proposed Comment [23] offers much needed guidance with regard to the applicability of Rule 1.7 to members of a class in a class-action lawsuit.

Proposed Comment [23a] reflects the substance of a January 2004 Order of the South Carolina Supreme Court.

Proposed Comments [26]-[31] address concurrent representation in the organization of a business, incorporating the substance of Comments to current Rule 2.2. The proposed Rules eliminate current Rule 2.2.

Proposed Comment [32] clarifies that a lawyer for a corporate entity may not necessarily represent various subsidiary or parent entities in the corporate structure. This view is consistent with the guidance of ABA Formal Op. # 95-390.

Proposed Comment [33] elaborates upon the duty of a lawyer of a corporation to inform the Board of implications of the lawyer serving as a director of the entity.

Comparison of Proposed Comments with S.C. Bar Recommendation:

In Comment [4], the S.C. Bar recommends the deletion of the word "ordinarily" from the first sentence, suggesting that the modifier is inconsistent with mandatory language which follows regarding withdrawal. The Commission, however, concludes that the modifier is appropriate given the possibility, for example, that a court may not permit withdrawal.

In the last sentence of Comment [6], the S.C. Bar recommends retaining the word "generally" instead of the change to "economically." The Commission, however, believes that the Comment is enhanced by making clear that it is referring to clients with economically adverse interests. The term "generally adverse" is, by comparison, less certain and specific in its meaning.

In the fourth sentence of Comment [8], the S.C. Bar recommends substituting "In determining whether a material limitation exists, the possibility of subsequent harm does not itself require disclosure and consent." The Commission, however, prefers the language of the Model Comment as proposed.

The Commission's original proposed Comment [16] differed from that of the Bar in that it retained the word "must" in the third sentence. The Commission believed that the standard of conduct is created in the Rule's requirement that consent be informed and that the Comment merely elaborates upon the type of information that must be given in order to meet that requirement. The Bar's position, however, has now been incorporated into the Comment.

Neither the full Commission nor the S.C. Bar considered proposed Comment [23a].

The S.C. Bar recommendation combines the substance of the third and fourth sentences of proposed Comment [25] into a single sentence reading "In estate administration, the identity of the client is addressed in S.C. Code 62-1-109." The Commission believes the variation is merely a matter of style.

RULE 1.8: CONFLICT OF INTEREST: ~~PROHIBITED TRANSACTIONS~~ CURRENT CLIENTS: SPECIFIC RULES

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

(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing ~~to the client~~ in a manner ~~which~~ 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 ~~in~~ on the transaction; and

(3) the client ~~consents~~ gives informed consent, in a writing ~~thereto~~ signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

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

(c) A lawyer shall not solicit any substantial gift from a client, including a testamentary gift, or prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer ~~as parent, child, sibling, or spouse~~ any substantial gift ~~from a client, including a testamentary~~ unless the lawyer or other recipient of the gift, ~~except where the client~~ is related to the ~~donee~~ client. For purposes of this paragraph, related persons include a spouse, child, grandchild, parent, grandparent or other relative or individual with whom the lawyer or the client maintains a close, familial relationship.

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

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

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

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

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

(1) the client ~~consents after consultation~~ gives informed consent;

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

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

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

(h) A lawyer shall not:

(1) make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless ~~permitted by law and~~ the client is independently represented in making the agreement~~,~~; or

(2) settle a claim or potential claim for such liability with an unrepresented client or former client ~~without first advising~~ unless that person is advised in writing ~~that~~ of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent ~~representation is appropriate~~ legal counsel in connection therewith.

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

(1) acquire a lien ~~granted~~ authorized by law to secure the lawyer's fee or expenses; and

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

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

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

(l) In any adversarial proceeding, a lawyer shall not serve as both an advocate and an advisor to the hearing officer, trial judge or trier of fact. A lawyer serving as an advocate in a particular matter shall not directly or indirectly engage in an ex parte communication with the hearing officer, trial judge or trier of fact concerning the proceeding.

(m) A lawyer shall not have sexual relations with a client when the client is in a vulnerable condition or is otherwise subject to the control or undue influence of the lawyer, when such relations could have a harmful or prejudicial effect upon the interests of the client, or when sexual relations might adversely effect the lawyer's representation of the client.

Comparison with 2002 ABA Model Rule:

Paragraphs (a)-(j) are identical to paragraphs (a)-(i) and (k) of the 2002 ABA Model Rule. Rule.

Proposed Rule 1.8 substitutes proposed Rule 1.8(m) for Model Rule 1.8 (j), which addresses sexual relations between a lawyer and client. The Model Rule 1.8 (j) provides "A lawyer shall not have sexual relations with a client unless a consensual sexual relationship existed between them when the lawyer-client relationship commenced." South Carolina case law already has made clear that such relationships are inappropriate when they prejudice a client's legal interests, see In re McBratney, 465 S.E.2d 733 (S.C. 1996) and In re McDow, 354 S.E.2d 383 (S.C. 1987), or when they involve a vulnerable client, In re Bellino, 417 S.E.2d 535 (S.C. 1992). The Commission initially rejected any rule on this subject, believing that the effort to create a specific rule regarding sexual relationships between lawyer and client has yet defined adequately the parameters of an acceptable relationship. The timing of commencement of a sexual relationship, the sole factor upon which the Model Rule relies, is not necessarily determinative of whether the concerns articulated in prior case law exist. In response to the Bar's urging and other concerns on this issue, an effort has been made to provide guidance with the addition of Rule 1.8(m), that is intended to reflect existing South Carolina case law and incorporate some of the issues discussed Model Comment [17] to Rule 1.8.

The 2002 ABA Model Rule 1.8 does not include paragraphs (k) and (l) of the proposed Rule. The Model Comment to Rule 1.7 includes a Comment similar in substance to proposed Rule 1.8(k). The Commission, however, believes that this potential conflict is sufficiently common and different from other conflicts so as to justify a separate Rule provision, rather than merely a Comment. The language of proposed Rule 1.8(k) is similar to the current language of Rule 1.8(i), with a modification in style to conform to the revised Rules.

Paragraph (l) is identical to current Rule 1.8(k), which was added to the South Carolina Rules in 1996. This paragraph incorporates into the Rules a finding of the South Carolina Supreme Court in Ross v. Medical University of South Carolina, 453 S.E.2d 880 (S.C. 1994) that counsel for an agency who appeared on behalf of the agency in prosecuting a contested administrative matter could not also advise an agency officer serving in a judicial capacity in the same administrative process. There is no Model Rule equivalent.

Other Commission Comments Regarding Proposed Changes from the Current S.C. Rules of Professional Conduct:

The proposed revisions to paragraph (a), regarding a lawyer entering into a business transaction with a client, clarify that the client must be informed in writing of the opportunity to seek separate counsel and of whether the lawyer is serving as counsel for the client in a particular transaction. These revisions are consistent with prevailing law which has recognized the inherent risk of harm to the client and misunderstanding in these relationships.

Proposed paragraph (c) is broadened from the existing Rule to prohibit solicitation of a substantial gift as well as the preparation of a gift instrument benefitting the lawyer or the lawyer's family. It also broadens who may be included within the prohibited group of donees.

Proposed paragraph (j) enlarges the range of conflicts under Rule 1.8 that lead to an imputed disqualification of others in the law firm. Under current Rule 1.10, the only conflicts under Rule 1.8 giving rise to imputed disqualification are those arising under Rule 1.8(c).

Comparison with S.C. Bar Recommendation:

The S.C. Bar recommends inclusion of Model Rule 1.8(j) regarding sexual relationships with clients.

The S.C. Bar recommends inclusion of proposed Rule 1.8(k), but would use the current language of South Carolina Rule 1.8(i). The Commission's version differs in style only from the Bar recommendation and is more consistent in style with the remainder of the proposed Rules.

Comment

Business Transactions Between Client and Lawyer

[1] ~~As a general principle, all transactions between client and lawyer should be fair and reasonable to the client. In such transactions a review by independent counsel on behalf of the client is often advisable. Furthermore, a lawyer may not exploit information~~

~~relating to the representation to the client's disadvantage. For example, a lawyer who has learned that the client is investing in specific real estate may not, without the client's consent, seek to acquire nearby property where doing so would adversely affect the client's plan for investment. Paragraph (a)~~ A lawyer's legal skill and training, together with the relationship of trust and confidence between lawyer and client, create the possibility of overreaching when the lawyer participates in a business, property or financial transaction with a client, for example, a loan or sales transaction or a lawyer investment on behalf of a client. The requirements of paragraph (a) must be met even when the transaction is not closely related to the subject matter of the representation, as when a lawyer drafting a will for a client learns that the client needs money for unrelated expenses and offers to make a loan to the client. The Rule applies to lawyers engaged in the sale of goods or services related to the practice of law, for example, the sale of insurance or the provision of investment or fiduciary 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~~, however,~~ apply to standard commercial transactions between the lawyer and the client for products or services that the client generally markets to others, for example, banking or brokerage services, medical services, products manufactured or distributed by the client, and utilities' services. In such transactions, the lawyer has no advantage in dealing with the client, and the restrictions in paragraph (a) are unnecessary and impracticable.

[2] Paragraph (a)(1) requires that the transaction itself be fair to the client and that its essential terms be communicated to the client, in writing, in a manner that can be reasonably understood. Paragraph (a)(2) requires that the client also be advised, in writing, of the desirability of seeking the advice of independent legal counsel. It also requires that the client be given a reasonable opportunity to obtain such advice. Paragraph (a)(3) requires that the lawyer obtain the client's informed consent, in a writing signed by the client, both to the essential terms of the transaction and to the lawyer's role. When necessary, the lawyer should discuss both the material risks of the proposed transaction, including any risk presented by the lawyer's involvement, and the existence of reasonably available alternatives and should explain why the advice of independent legal counsel is desirable. See Rule 1.0(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 paragraph (a), but also with the requirements of Rule 1.7. Under that Rule, the lawyer must disclose the risks associated with the lawyer's dual role as both legal adviser and participant in the transaction, such as the risk that the lawyer will structure the transaction or give legal advice in a way that favors the lawyer's interests at the expense of the client. Moreover, the lawyer must obtain the client's informed consent. In some cases, the lawyer's interest may be such that Rule 1.7 will preclude the lawyer from seeking the client's consent to the transaction.

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

Use of Information Related to Representation

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

Gifts to Lawyers

~~[2]~~ [6] A lawyer may accept a gift from a client, if the transaction meets general standards of fairness. For example, a simple gift such as a present given at a holiday or as a token of appreciation is permitted. If a client offers the lawyer a more substantial gift, paragraph (c) does not prohibit the lawyer from accepting it, although such a gift may be voidable by the client under the doctrine of undue influence, which treats client gifts as presumptively fraudulent. In any event, due to concerns about overreaching and imposition on clients, a lawyer may not suggest that a substantial gift be made to the lawyer or for the lawyer's benefit, except where the lawyer is related to the client as set forth in paragraph (c).

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

[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 if the lawyer complies with Rule 1.8. 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

~~[3]~~ [9] An agreement by which a lawyer acquires literary or media rights concerning the conduct of the representation creates a conflict between the interests of the client and the personal interests of the lawyer. Measures suitable in the representation of the client may detract from the publication value of an account of the representation. Paragraph (d) does not prohibit a lawyer representing a client in a transaction concerning literary property from agreeing that the lawyer's fee shall consist of a share in ownership in the property, if the arrangement conforms to Rule 1.5 and ~~paragraph (j)~~ paragraphs (a) and (i).

Financial Assistance

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

Person Paying for a Lawyer's Services

~~[4] Paragraph (f) requires disclosure of the fact that the lawyer's services are being paid for by a third party. Such an arrangement must also conform to the requirements of Rule 1.6 concerning confidentiality and Rule 1.7 concerning conflict of interest. Where the client is a class, consent may be obtained on behalf of the class by court-supervised procedure.~~

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

[12] Sometimes, it will be sufficient for the lawyer to obtain the client's informed consent regarding the fact of the payment and the identity of the third-party payer. If, however, the fee arrangement creates a conflict of interest for the lawyer, then the lawyer must comply with Rule. 1.7. The lawyer must also conform to the requirements of Rule 1.6 concerning confidentiality. Under Rule 1.7(a), a conflict of interest exists if there is significant risk that the lawyer's representation of the client will be materially limited by the lawyer's own interest in the fee arrangement or by the lawyer's responsibilities to the third-party payer (for example, when the third-party payer is a co-client). Under Rule 1.7(b), the lawyer may accept or continue the representation with the informed consent of each affected client, unless the conflict is nonconsentable under that paragraph. Under Rule 1.7(b), the informed consent must be confirmed in writing.

Aggregate Settlements

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

members and other procedural requirements designed to ensure adequate protection of the entire class.

Limiting Liability and Settling Malpractice Claims

~~[5]~~ [14] Paragraph (h) is not intended to apply to customary qualifications and limitations in legal opinions and memoranda. Nevertheless, agreements prospectively limiting a lawyer's liability for malpractice are prohibited unless the client is independently represented in making the agreement because they are likely to undermine competent and diligent representation. Also, many clients are unable to evaluate the desirability of making such an agreement before a dispute has arisen, particularly if they are then represented by the lawyer seeking the agreement. This paragraph does not, however, prohibit a lawyer from entering into an agreement with the client to arbitrate legal malpractice claims, provided such agreements are enforceable and the client is fully informed of the scope and effect of the agreement. Nor does this paragraph limit the ability of lawyers to practice in the form of a limited-liability entity, where permitted by law, provided that each lawyer remains personally liable to the client for his or her own conduct and the firm complies with any conditions required by law, such as provisions requiring client notification or maintenance of adequate liability insurance. Nor does it prohibit an agreement in accordance with Rule 1.2 that defines the scope of the representation, although a definition of scope that makes the obligations of representation illusory will amount to an attempt to limit liability.

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

Family Relationships Between Lawyers

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

~~[6] Paragraph (i) applies to related lawyers who are in different firms. Related lawyers in the same firm are governed by Rules 1.7, 1.9, and 1.10. The disqualification stated in paragraph (i) is personal and is not imputed to members of firms with whom the lawyers are associated. The South Carolina version slightly modified the model version by inserting "personally".~~

~~**Acquisition of**~~ **Acquiring Proprietary Interest in Litigation**

~~[7]~~ [17] Paragraph ~~(j)~~ (i) states the traditional general rule that lawyers are prohibited from acquiring a proprietary interest in litigation. ~~This~~ Like paragraph (e), the general rule~~, which~~ 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~~, such as the exception for reasonable contingent fees set forth in Rule 1.5 and the exception for certain advances of the costs of litigation set forth in paragraph (e)~~. The exception for certain advances of the costs of litigation is set forth in paragraph (e). In addition, paragraph (i) sets forth exceptions for liens authorized by law to secure the lawyer's fees or expenses and contracts for reasonable contingent fees. The law of each jurisdiction determines which liens are authorized by law. These may include liens granted by statute, liens originating in common law and liens acquired by contract with the client. When a lawyer acquires by contract a security interest in property other than that recovered through the lawyer's efforts in the litigation, such an acquisition is a business or financial transaction with a client and is governed by the requirements of paragraph (a). Contracts for contingent fees in civil cases are governed by Rule 1.5.

Imputation of Prohibitions

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

Serving as an Advocate and Advisor in Adversarial Proceedings

[19] ~~This provision~~ Rule 1.8(l) addresses ~~those situations which arise~~ primarily ~~in~~ administrative proceedings in which a lawyer who serves as an advisor to ~~that~~ a public administrative body is permitted to prosecute matters which are adjudicated by that body. This rule prohibits a lawyer who has served or is serving as an advisor on a particular matter from also prosecuting or defending that particular matter. It does not prevent one lawyer from prosecuting an administrative matter in which another lawyer in the same office serves as an advisor to the hearing body, as long as the lawyers do not communicate with one another or share information about the particular case. Communications ~~by~~ between the prosecuting lawyer and the advising lawyer with respect to a particular matter would operate as an indirect ex parte communication with the hearing officer, trial judge, or trier of fact, because the information gained by the advising lawyer would be available to the hearing officer, trial judge, or trier of fact.

~~By way of~~ For example, ~~only: (A) A~~ a lawyer ~~assigned to serve as an advisor to~~ advising the Board of Dentistry may not prosecute a disciplinary action against Dentist Doe while at the same time ~~he advises~~ advising the Board on matters relative to the Doe matter. ~~He~~ The lawyer may advise the Board on the Doe matter while another lawyer employed by the same employer prosecutes the Doe matter, but the two lawyers may not share information with one another, except in the regular course of discovery, with notice to Doe. The lawyers must operate as if they are in separate firms, even though they are employed by a common employer. Similarly, ~~(B) G~~general counsel employed by a state-supported university may not defend the university in a dispute brought by an employee under the university's internal employee grievance system while at the same time serving as an advisor to the internal panel which is adjudicating the employee grievance matter. One lawyer in general counsel's office may advise the employee grievance body on the particular matter while another lawyer in the same office defends the university in the matter, as long as the two lawyers do not share information concerning the matter. The lawyers must operate as if they are in separate firms, even though they are employed by a common employer.

[20] ~~It is recognized that l~~Lawyers in private practice would be prohibited, under Rule 1.7, from representing an adjudicatory body in a particular matter while another lawyer in the same law firm prosecutes or defends the same matter before the adjudicatory body. Because of the nature of public employment of lawyers, however, some accommodation must be made to permit the sharing of responsibilities among lawyers of a common employer. The erection of a screen ~~"Chinese wall" regarding~~ preventing the sharing of information among lawyers employed by a common public employer permits the efficient carrying out of administrative functions, while at the same time protecting the rights of individuals whose rights are being adjudicated in the proceedings.

Sexual Relations with Clients

[21] The relationship between lawyer and client is a fiduciary one in which the lawyer occupies the highest position of trust and confidence. Except in a few, limited circumstances, such as when the lawyer and client are married to each other, a sexual relationship between lawyer and client presents a significant danger of harm to client interests and should be avoided. Sexual relationships between a lawyer and a client pose three types of potential problems. First, a question may arise as to the voluntariness of a client's consent to a sexual relationship. Lawyers are in a position of extraordinary trust and may not use that power and influence to entice a vulnerable client into an otherwise undesired sexual relationship. Second, sexual relationships are inappropriate when the existence of the relationship could prejudice a client's legal interests, especially when the client is involved in a domestic relations case. Third, a lawyer engaged in an intimate sexual relationship with a client may not be able to exercise the proper degree of professional judgment and independence required to fully represent the client. In any of these circumstances, a sexual relationship between lawyer and client is not appropriate, and the client's own emotional involvement renders it unlikely that a client can give adequate informed consent to the relationship.

Comparison of Proposed Comments with Model Comments under the 2002 ABA Model Rule:

Proposed Comments [2]-[7], [9]-[13], [15], and [17] are identical to Model Comments [2]-[13], [15], and [16] to Rule 1.8 in the 2002 ABA Model Rules, with the exception of the cross-reference to Rule 1.0 in proposed Comment [2], which has been changed to conform to the proposed version of South Carolina Rule 1.0 and the cross-references to paragraphs of Rule 1.8 in the final sentence of proposed Comment [18], which have been changed to conform to the proposed South Carolina version of Rule1.8.

The third sentence of proposed Comment [1], which reads in part "sale of insurance or the provision of investment or fiduciary services" differs slightly from the Model Comment. The Model Comment language is "sale of title insurance or investment services." The change was recommended by the S.C. Bar and the Commission concurs.

In proposed Comment [8], the words "if the lawyer complies with Rule 1.8" have been added to the end of the first sentence and do not appear in the Model Comment.

The first sentence of proposed Comment [14] does not appear in the Model Comment and has been added in the interest of greater clarity. The word "Nevertheless" has been added as a transition at the beginning of the second sentence.

Proposed Comment [16] appears in the 2002 ABA Model Rules as a Comment to Model Rule 1.7. It is moved here to accompany the addition of Proposed Rule 1.8(k), which does not appear in the Model Rules.

Proposed Comments [19], and [20] do not appear in the Model Comments and are retained from the current Comments to South Carolina Rule 1.8. These Comments accompany Rule 1.8(l), which is retained from the current South Carolina Rules, but which has no equivalent in the Model Rules.

Model Comments [17]-[19], which address sexual relationships with clients, are omitted from the proposed Comments because of the omission of Model Rule 1.8(j), which they accompany. Proposed Comment [21] is substituted.

Other Commission Comments Regarding Proposed Changes in the Comments from the Current S.C. Comments:

Proposed Comment [1] provides clearer emphasis than is currently provided of the range of business relationships that are governed by Rule 1.8(a).

Proposed Comment [4] clarifies the significance of a client having separate counsel regarding a business transaction. A similar discussion does not appear in the current Comments to Rule 1.8.

Proposed Comment [8] clarifies that appointment of a lawyer as a fiduciary is not the same as giving the lawyer a gift and is not barred under Rule 1.8. This is consistent with the guidance under current Rules provided in S.C. Bar Ethics Adv. Op. # 91-07.

Proposed Comment [10] elaborates helpfully upon the types of financial transactions that are barred. It also makes clear that Rule 1.8(e) prohibits a lawyer from guaranteeing a loan as well as making one.

Proposed Comment [14] explicitly allows an agreement to arbitrate malpractice claims. There is no South Carolina precedent on whether arbitration agreements can be entered into with regard to either fee disputes or malpractice claims. The allowance of arbitration agreements even with regard to malpractice claims appears to be consistent with the emerging, if not yet fully established, trend of decisions. See McGuire, Cornwell & Blakey v. Grider, 765 F. Supp. 1048 (D. Colo. 1991); ABA Formal Op. # 02-425; Ala. Ethics Op. # 202-04.

Proposed Comment [14] also expressly recognizes that lawyers may practice in a variety of forms of limited liability entities.

Comparison of Proposed Comments with S.C. Bar Recommendation:

In the second sentence of proposed Comment [8], the S.C. Bar recommends inserting the word "also" between "will" and "be subject." The Commission finds that change unnecessary.

The S.C. Bar would delete the fourth sentence of proposed Comment [14], which authorizes an agreement between a lawyer and client to arbitrate malpractice claims. The Commission believes that arbitration agreements should be permitted and has, therefore, retained the sentence.

The S.C. Bar would add two sentences at the beginning of proposed Comment [16]. The language is taken from the first two sentences of current Comment [6], which is deleted in the proposed and Model Comments.

The S.C. Bar would include Model Comments [17] and [18] regarding sexual relationships with clients, but would not include Model Comment [19]. All three Model Comments are excluded from the proposed Comments because of the exclusion of Model Rule 1.8(j) from the proposed Rule. The S.C. Bar did not consider Proposed Comment [21].

The S.C. Bar would include proposed Comments [19] and [20] without the editorial changes proposed by the Commission.

RULE 1.9: ~~CONFLICT OF INTEREST:~~ DUTIES TO FORMER ~~CLIENT~~ CLIENTS

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client ~~consents after consultation~~ gives informed consent, confirmed in writing.

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client

(1) whose interests are materially adverse to that person; and

(2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to

the matter;

unless the former client ~~consents after consultation~~ gives informed consent, confirmed in writing.

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former client except as ~~Rule 1.6 or Rule 3.3~~ these Rules would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as ~~Rule 1.6 or Rule 3.3~~ these Rules would permit or require with respect to a client.

Comparison with 2002 ABA Model Rule:

Proposed Rule 1.9 is identical to the 2002 ABA Model Rule.

Other Commission Comments Regarding Proposed Changes from the Current S.C. Rules of Professional Conduct:

Paragraph (c) replaces references to Rules 1.6 and 3.3 with a reference to all of the Rules. Circumstances may also require disclosure, for example, under Rules 1.2(d), 4.1(b), 8.1, and 8.3.

Comparison with S.C. Bar Recommendation:

Proposed Rule 1.9 is identical to the S.C. Bar recommendation.

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. ~~The principles in Rule 1.7 determine whether the interests of the present and former client are adverse. Thus~~ Under this Rule, for example, a lawyer could not properly seek to rescind on behalf of a new client a contract drafted on behalf of the former client. So also a lawyer who has prosecuted an accused person could not properly represent the accused in a subsequent civil action against the government concerning the same transaction. Nor could a lawyer who has represented multiple clients in a matter represent one of the clients against the others in the same or a substantially related matter after a dispute arose among the clients in that matter, unless all affected clients give informed consent. See Comment [9]. Current and former government lawyers must comply with this Rule to the extent required by Rule 1.11.

[2] The scope of a "matter" for purposes of this Rule may depend on the facts of a particular situation or transaction. The lawyer's involvement in a matter can also be a question of degree. When a lawyer has been directly involved in a specific transaction, subsequent representation of other clients with materially adverse interests in that transaction clearly is prohibited. On the other hand, a lawyer who recurrently handled a type of problem for a former client is not precluded from later representing another client in a factually distinct problem of that type even though the subsequent representation involves a position adverse to the prior client. Similar considerations can apply to the reassignment of military lawyers between defense and prosecution functions within the same military jurisdictions. The underlying question is whether the lawyer was so involved in the matter that the subsequent representation can be justly regarded as a changing of sides in the matter in question.

[3] Matters are "substantially related" for purposes of this Rule if they involve the same transaction or legal dispute or if there otherwise is a substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter. For example, a lawyer who has represented a businessperson and learned extensive private financial information about that person may not then represent that person's spouse in seeking a divorce. Similarly, a lawyer who has previously represented a client in securing environmental permits to build a shopping center would be precluded from representing neighbors seeking to oppose rezoning of the property on the basis of environmental considerations, but 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 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

~~[3]~~ [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.

~~[4 Reconciliation of these competing principles in the past has been attempted under two rubrics. One approach has been to seek per se rules of disqualification. For example, it has been held that a partner in a law firm is conclusively presumed to have access to all confidences concerning all clients of the firm. Under this analysis, if a lawyer has been a partner in one law firm and then becomes a partner in another law firm, there may be a presumption that all confidences known by the partner in the first firm are known to all partners in the second firm. This presumption might properly be applied in some circumstances, especially where the client has been extensively represented, but may be unrealistic where the client was represented only for limited purposes. Furthermore, such a rigid rule exaggerates the difference between a partner and an associate in modern law firms.~~

~~[5 The other rubric formerly used for dealing with disqualification is the appearance of impropriety proscribed in Canon 9 of the ABA Model Code of Professional Responsibility. This rubric has a two-fold problem. First, the appearance of impropriety can be taken to include any new client-lawyer relationship that might make a former client feel anxious. If that meaning were adopted, disqualification would become little more than a question of subjective judgment by the former client. Second, since "impropriety" is undefined, the term "appearance of impropriety" is question-begging. It therefore has to be recognized that the problem of disqualification cannot be properly resolved either by simple analogy to a lawyer practicing alone or by the very general concept of appearance of impropriety.~~

~~**Confidentiality**~~

~~[8]~~ [5] Paragraph (b) operates to disqualify the lawyer only when the lawyer involved has actual knowledge of information protected by Rules 1.6 and 1.9~~(b)~~(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] ~~Preserving confidentiality is a question of access to information. Access to information, in turn, is essentially a question of fact in~~ Application of paragraph (b) depends on a situation's particular ~~circumstances~~ facts, aided by inferences, deductions or working presumptions that reasonably may be made about the way in which lawyers work together. A lawyer may have general access to files of all clients of a law firm and may regularly participate in discussions of their affairs; it should be inferred that such a lawyer in fact is privy to all information about all the firm's clients. In contrast, another lawyer may have access to the files of only a limited number of clients and participate in discussions of the affairs of no other clients; in the absence of information to the contrary, it should be inferred that such a lawyer in fact is privy to information about the clients actually served but not those of other clients. In such an inquiry, the burden of proof should rest upon the firm whose disqualification is sought.

~~[7 Application of paragraph (b) depends on a situation's particular facts. In such an inquiry, the burden of proof should rest upon the firm whose disqualification is sought.~~

~~[9]~~ [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).

~~**Adverse Positions**~~

~~[10 The second aspect of loyalty to a client is the lawyer's obligation to decline subsequent representations involving positions adverse to a former client arising in substantially related matters. This obligation requires abstention from adverse representation by the individual lawyer involved, but does not properly entail abstention of other lawyers through imputed disqualification. Hence, this aspect of the problem is governed by Rule 1.9(a). Thus, if a lawyer left one firm for another, the new affiliation would not preclude the firms involved from continuing to represent clients with adverse interests in the same or related matters, so long as the~~

~~conditions of paragraphs (b) and (c) concerning confidentiality have been met.~~

~~[11]~~ [8] ~~Information~~ Paragraph (c) provides that information acquired by the lawyer in the course of representing a client may not subsequently be used or revealed by the lawyer to the disadvantage of the client. However, the fact that a lawyer has once served a client does not preclude the lawyer from using generally known information about that client when later representing another client.

~~[12]~~ [9] ~~Disqualification from subsequent representation is~~ The provisions of this Rule are for the protection of former clients and can be waived ~~by them. A waiver is effective only if there is disclosure of the circumstances, including the lawyer's intended role in behalf of the new client~~ if the client gives informed consent, which consent must be confirmed in writing under paragraphs (a) and (b). See Rule 1.0(f). ~~[13]~~ With regard to ~~an opposing party's raising a question of conflict of interest~~ the effectiveness of an advance waiver, see Comment [20] 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 of Proposed Comments with Model Comments under the 2002 ABA Model Rule:

The proposed Comments are identical to the Model Comments to Rule 1.9 in the 2002 ABA Model Rules.

Other Commission Comments Regarding Proposed Changes in the Comments from the Current S.C. Comments:

Proposed Comment [3] adds an important discussion of the meaning of the term "substantially related" matter. Previously this term has not been defined in the Rules or Comments. The proposed definition includes both matters in which loyalty interests would be implicated by the lawyer switching sides and matters in which confidentiality interests would be implicated. The proposed definition appears consistent with prevailing discussions of the term in case law. Under current South Carolina law, the court has said that, in considering whether matters are substantially related, "one should consider, among other things, whether the affected lawyer 'would have or reasonably could have learned confidential information in the first representation that would be of significance in the second.'" Townsend v. Townsend, 474 S.E.2d 424, 429 (S.C. 1996). The S.C. Court of Appeals has said more broadly that "[t]he test of whether the attorney's employment is inconsistent with his duty to a former client is whether acceptance of the new retainer will require him, in forwarding the interest of the new client, to do anything that will injuriously affect a former client in any matter in which he formerly represented him, and also whether the attorney will be called on, in his new relation, to use against a former client any knowledge or information acquired in the former relationship." Madison v. Graffix Fabrix, Inc., 404 S.E.2d 37, 40 (S.C. Ct. App. 1991).

Other changes reflected in the proposed Comments have little substantive impact.

Comparison of Proposed Comments with S.C. Bar Recommendation:

The S.C. Bar recommends deleting the words "or to other parties adverse to the former client" from the fourth sentence of Comment 3. Although Rule 1.9(c)(1) allows a lawyer to use information relating to a prior representation in a manner adverse to a former client only if the information has become "generally known," the language of the Comment allowing the use of information that has become known to the adverse parties appears to be consistent with the policy of the Rule. Where the information is already known to the adverse parties, the former client would not seem to suffer any prejudice from its use by the lawyer. Thus, the Commission declines to recommend this modification.

RULE 1.10: ~~IMPUTED DISQUALIFICATION~~ IMPUTATION OF CONFLICTS OF INTEREST: GENERAL RULE

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7, 1.8(c), or 1.9 ~~or 2.2~~, unless the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.

(b) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm, unless:

(1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and

(2) any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9(c) that is material to the matter.

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

(d) The disqualification of lawyers associated in a firm with former or current government lawyers is governed by Rule 1.11.

(e) A lawyer representing a client of a public defender office, legal services association, or similar program serving indigent clients shall not be disqualified under this Rule because of the program's representation of another client in the same or a substantially related matter if:

(1) the lawyer is screened in a timely manner from access to confidential information relating to and from any participation in the representation of the other client; and

(2) the lawyer retains authority over the objectives of the representation pursuant to Rule 5.4(c).

Comparison with 2002 ABA Model Rule:

Proposed Rule 1.10(a) retains a reference to Rule 1.8(c), which the 2002 ABA Model Rule deletes. Thus a conflict associated with the preparation of an instrument making a gift to a lawyer would continue to be imputed to other lawyers in the firm.

Proposed Rule 1.10(e) is not included in the 2002 ABA Model Rule.

Otherwise, proposed Rule 1.10 is identical to the 2002 ABA Model Rule.

Other Commission Comments Regarding Proposed Changes from the Current S.C. Rules of Professional Conduct:

The ABA House of Delegates rejected a proposal by the Ethics 2000 Commission to allow a law firm to avoid imputation of the conflicts of laterally hired lawyers by screening the newly hired lawyer from the conflicting matter. The Commission concurs in the rejection of screening when a lawyer has moved between private law firms.

The deletion of a reference in Rule 1.10(a) to Rule 2.2 reflects the deletion of the current Rule 2.2 from the proposed Rules.

The retention of the reference to Rule 1.8(c) is not intended to be a substantive change from the Model Rules. Under the Model Rules, although the reference to Rule 1.8 is deleted from Model Rule 1.10, the conflict continues to be imputed to others in the firm under new Model Rule 1.8(k) [proposed South Carolina Rule 1.8(j)]. The Commission recognizes that continued inclusion in proposed Rule 1.10 may, therefore, be somewhat duplicative. However, given the express reference to Rule 1.8(c) in current Rule 1.10, the Commission is concerned that its deletion from the proposed Rule might be wrongly interpreted by lawyers who are not also intimately familiar with the changes to Rule 1.8. The Commission recommends retaining the reference in Rule 1.10 in the interest of clarity.

The language added at the end of proposed Rule 1.10(a) is a substantive change from the current rule, creating a limited exception to the normal rules of imputed disqualification. In certain situations in which a lawyer would be prohibited from undertaking a representation because of a conflict with the lawyer's personal interests, other lawyers in the firm might remain able to handle the matter, if there is no significant risk that the personal conflict of the disqualified lawyer will influence their work on the matter.

Paragraph (d) simply clarifies that Rule 1.11, rather than Rule 1.10, is intended to be the exclusive rule governing the imputation of conflicts when lawyers move between government practice and private practice.

Paragraph (e) would reverse the conclusion of several advisory opinions indicating that public defender and legal services offices are treated in the same manner as a law firm for purposes of the imputation of conflicts of interest. This paragraph would permit screening to avoid imputed disqualification when a program represents multiple clients with conflicting interests in the same or a related matter. The rule does not provide for similar screening within a private law firm.

Comparison with S.C. Bar Recommendation:

Except for paragraph (e), Proposed Rule 1.10 is identical to the S.C. Bar recommendation.

Comment

Definition of "Firm"

[1] For purposes of the Rules of Professional Conduct, the term "firm" ~~includes~~ denotes lawyers in a ~~private firm, and~~ 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~~, or in a legal services organization~~. See Rule 1.0(d). Whether two or more lawyers constitute a firm within this definition can depend on the specific facts. ~~For example, two practitioners who share office space and occasionally consult or assist each other ordinarily would not be regarded as constituting a firm. However, if they present themselves to the public in a way suggesting that they are a firm or conduct themselves as a firm, they should be regarded as a firm for purposes of the Rules. The terms of any formal agreement between associated lawyers are relevant in determining whether they are a firm, as is the fact that they have mutual access to information concerning the clients they serve. Furthermore, it is relevant in doubtful cases to consider the underlying purpose of the Rule that is involved. A group of lawyers could be regarded as a firm for purposes of the rule that the same lawyer should not represent opposing parties in litigation, while it might not be so regarded for purposes of the rule that information acquired by one lawyer is attributed to another.~~ See Rule 1.0, Comments [2] - [4]. For purposes of imputing disqualification under this Rule, however, paragraph (e) treats legal services organizations differently from other law firms by permitting screening.

~~[2] With respect to the law department of an organization, there is ordinarily no question that the members of the department constitute a firm within the meaning of the Rules of Professional Conduct. However, there can be uncertainty as to the identity of the client. For example, it may not be clear whether the law department of a corporation represents a subsidiary or an affiliated corporation, as well as the corporation by which the members of the department are directly employed. A similar question can arise concerning an unincorporated association and its local affiliates.~~

~~[3] Similar questions can also arise with respect to lawyers in legal aid. Lawyers employed in the same unit of a legal service organization constitute a firm, but not necessarily those employed in separate units. As in the case of independent practitioners, whether the lawyers should be treated as associated with each other can depend on the particular rule that is involved, and on the specific facts of the situation.~~

~~[5] Different provisions are thus made for movement of a lawyer from one private firm to another and for movement of a lawyer between a private firm and the government. The government is entitled to protection of its client confidences and, therefore, to the protections provided in Rules 1.6, 1.9 and 1.11. However, if the more extensive disqualification in Rule 1.10 were applied to former government lawyers, the potential effect on the government would be unduly burdensome. The government deals with all private citizens and organizations and, thus, has a much wider circle of adverse legal interests than does any private law firm. In these circumstances, the government's recruitment of lawyers would be seriously impaired if Rule 1.10 were applied to the government. On balance, therefore, the government is better served in the long run by the protections stated in Rule 1.11.~~

Principles of Imputed Disqualification

~~[6]~~ [2] The rule of imputed disqualification stated in paragraph (a) gives effect to the principle of loyalty to the client as it applies to lawyers who practice in a law firm. Such situations can be considered from the premise that a firm of lawyers is essentially one lawyer for purposes of the rules governing loyalty to the client, or from the premise that each lawyer is vicariously bound by the obligation of loyalty owed by each lawyer with whom the lawyer is associated. Paragraph (a) operates only among the lawyers currently associated in a firm. When a lawyer moves from one firm to another, the situation is governed by Rules 1.9(b) and 1.10(b).

[3] The rule in paragraph (a) does not prohibit representation where neither questions of client loyalty nor protection of confidential information are presented. Where one lawyer in a firm could not effectively represent a given client because of strong political beliefs, for example, but that lawyer will do no work on the case and the personal beliefs of the lawyer will not materially limit the representation by others in the firm, the firm should not be disqualified. On the other hand, if an opposing party in a case were owned by a lawyer in the law firm, and others in the firm would be materially limited in pursuing the matter because of loyalty to that lawyer, the personal disqualification of the lawyer would be imputed to all others in the firm.

[4] The rule in paragraph (a) also does not prohibit representation by others in the law firm where the person prohibited from involvement in a matter is a nonlawyer, such as a paralegal or legal secretary. Nor does paragraph (a) prohibit representation if the lawyer is prohibited from acting because of events before the person became a lawyer, for example, work that the person did while a law student. Such persons, however, ordinarily must be screened from any personal participation in the matter to avoid communication to others in the firm of confidential information that both the nonlawyers and the firm have a legal duty to protect. See Rules 1.0(l) and 5.3.

~~[7]~~ [5] Rule 1.10(b) operates to permit a law firm, under certain circumstances, to represent a person with interests directly adverse to those of a client represented by a lawyer who formerly was associated with the firm. The Rule applies regardless of when the formerly associated lawyer represented the client. However, the law firm may not represent a person with interests adverse to those of a present client of the firm, which would violate Rule 1.7. Moreover, the firm may not represent the person where the matter is the same or

substantially related to that in which the formerly associated lawyer represented the client and any other lawyer currently in the firm has material information protected by Rules 1.6 and 1.9(c).

[6] Rule 1.10(c) removes imputation with the informed consent of the affected client or former client under the conditions stated in Rule 1.7. The conditions stated in Rule 1.7 require the lawyer to determine that the representation is not prohibited by Rule 1.7(b) and that each affected client or former client has given informed consent to the representation, confirmed in writing. In some cases, 7the 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 [20]. For a definition of informed consent, see Rule 1.0(f).

~~[4]~~ [7] Where a lawyer has joined a private firm after having represented the government, ~~the situation~~ imputation is governed by Rule 1.11~~(a) and~~ (b) and (c)~~;~~, not this Rule. Under Rule 1.11(d), where a lawyer represents the government after having served ~~private~~ clients~~, the situation is governed by Rule 1.11(c)(1). The individual lawyer involved is bound by the Rules generally, including Rules 1.6, 1.7 and 1.9~~ 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. Judical law clerks are governed by Rule 1.12.

[8] A conflict arising under Rule 1.8(c) is specifically imputed to other lawyers within the firm under this Rule. Otherwise, where a lawyer is prohibited from engaging in certain transactions under Rule 1.8, paragraph (j) 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.

[9] Rule 1.10(e) allows programs providing legal services to indigents to avoid imputed disqualification by screening lawyers from conflicting matters within the office. See Rule 1.0(l) for screening procedures. The authorization of screening is intended to increase the number of persons to whom each program can provide legal services, while at the same time protecting the clients from prejudice. Paragraph (e) applies only to programs of the type delineated and does not authorize screening by private law firms to avoid imputed disqualification.

Comparison of Proposed Comments with Model Comments under the 2002 ABA Model Rule:

The cross references in proposed Comments [1], [4], and [6] to Rule 1.0 have been changed to conform to the South Carolina version of Rule 1.0. The cross reference to the Comments to Rule 1.7 in proposed Comment [6] has been changed to conform to the South Carolina version of those Comments. Otherwise, proposed Comments [1]-[6] are identical to the Comments to Rule 1.10 in the 2002 ABA Model Rules.

Proposed Comment [7] adds a final sentence not found in the Comments to Rule 1.10 in the 2002 ABA Model Rules. This change is added for clarification only and is not intended to be a substantive change.

Proposed Comment [8] includes an initial sentence and the word "Otherwise" at the beginning of the second sentence, not found in the Model Comments. These changes reflect the continued inclusion of a reference to Rule 1.8(c) in the proposed Rule.

Other Commission Comments Regarding Proposed Changes in the Comments from the Current S.C. Comments:

Proposed Comment [3] is entirely new and pertains to the exception to imputation added by proposed Rule 1.10(a). No similar exception exists under the current Rule 1.10.

Proposed Comment [4] provides needed clarification when conflicts arise involving non-lawyer employees of the law firm. The guidance provided by the proposed Comment appears consistent with opinions by the S.C. Bar Ethics Advisory Committee interpreting current rules. S.C. Bar Ethics Adv. Op. # 91-12 (opining that screening may prevent disqualification of a law firm when it has hired a paralegal from a firm representing an adverse party); S.C. Bar Ethics Adv. Op. # 93-29 (opining that screening avoids imputed conflict when secretary changes firms).

Comparison of Proposed Comments with S.C. Bar Recommendation:

The S.C. Bar would delete proposed Comment [1] and leave the definition of a law firm entirely to Rule 1.0 and the Comments to that Rule. In the interest of maximizing conformity of the proposed Comments with the Model Comments, the Commission has retained Comment [1].

The S.C. Bar proposal does not include the changes from the Model Comments that are proposed by the Commission for Comments [7] and [8].

RULE 1.11: ~~SUCCESSIVE~~ SPECIAL CONFLICTS OF INTEREST FOR FORMER AND CURRENT GOVERNMENT OFFICERS AND ~~PRIVATE EMPLOYMENT~~ EMPLOYEES

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

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

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

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

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

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

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

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

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

(2) shall not:

~~(1)~~ (i) participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless ~~under applicable law no one is, or by lawful delegation may be, authorized to act in the lawyer's stead in the matter~~ the appropriate government agency gives its informed consent, confirmed in writing; or

~~(2)~~ (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).

~~(d)~~ (e) As used in this Rule, the term "matter" includes:

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

(2) any other matter covered by the conflict of interest rules of the appropriate government agency.

~~(e) As used in this Rule, the term "confidential government information" means information which has been obtained under governmental authority and which, at the time this rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose, and which is not otherwise available to the public.~~

Comparison with 2002 ABA Model Rule:

Proposed Rule 1.11 is identical to the 2002 ABA Model Rule.

Other Commission Comments Regarding Proposed Changes from the Current S.C. Rules of Professional Conduct:

The caption of proposed Rule 1.11 is changed to reflect that it applies to lawyers moving between government agencies as well as those moving between government service and private practice.

The addition of subsections (a)(1) and (2) clarifies that lawyers subject to Rule 1.11 are also subject to Rule 1.9.

Proposed Rule 1.11(d) clarifies that a lawyer in government practice is subject also to Rules 1.7 and 1.9.

Under the proposed Rule, consents obtained under sections (a) or (d) must be confirmed in writing.

The language of current Rule 1.11(e) is not deleted, but merely moved to subsection (c) of the proposed Rule 1.11..

Comparison with S.C. Bar Recommendation:

Proposed Rule 1.11 is identical to the S.C. Bar recommendation.

Comment

~~[1] This Rule prevents a lawyer from exploiting public office for the advantage of a private client. It is a counterpart of Rule 1.10(b), which applies to lawyers moving from one firm to another.~~

~~[2]~~ [1] A lawyer ~~representing a government agency, whether employed or specially retained by the government,~~ who has served or is currently serving as a public officer or employee is personally subject to the Rules of Professional Conduct, including the prohibition against ~~representing adverse interests~~ concurrent conflicts of interest stated in Rule 1.7 ~~and the protections afforded former clients in Rule 1.9~~. In addition, such a lawyer ~~is~~ may be subject to ~~Rule 1.11 and to~~ statutes and government regulations regarding conflict of interest. Such statutes and regulations may circumscribe the extent to which the government agency may give consent under this Rule. See Rule 1.0(f) for the definition of informed consent.

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

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

~~[3]~~ [4] ~~Where~~ This Rule represents a balancing of interests. On the one hand, where the successive clients are a ~~public~~ government agency and ~~a private~~ another client, public or private, the risk exists that power or discretion vested in that agency ~~public authority~~ might be used for the special benefit of ~~a private~~ the other client. A lawyer should not be in a position where benefit to ~~a private~~ the other client might affect performance of the lawyer's professional functions on behalf of the government ~~public authority~~. Also, unfair advantage could accrue to the ~~private~~ other client by reason of access to confidential government information about the client's adversary obtainable only through the lawyer's government service. ~~However~~ On the other hand, the rules governing lawyers presently or formerly employed by a government agency should not be so restrictive as to inhibit transfer of employment to and from the government. The government has a legitimate need to attract qualified lawyers as well as to maintain high ethical standards. Thus a former government lawyer is disqualified only from particular matters in which the lawyer participated personally and substantially. The provisions for screening and waiver in paragraph (b) are necessary to prevent the disqualification rule from imposing too severe a deterrent against entering public service. The limitation of disqualification in paragraphs (a)(2) and (d)(2) to matters involving a specific party or parties, rather than extending disqualification to all substantive issues on which the lawyer worked, serves a similar function.

~~[4]~~ [5] When ~~the client is an agency of~~ 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 ~~should be treated~~ as ~~a private~~ another client for purposes of this Rule ~~if the lawyer thereafter represents an agency of another government~~, as when a lawyer ~~represents~~ is employed by a city and subsequently is

employed by a federal agency. However, because the conflict of interest is governed by paragraph (d), the latter agency is not required to screen the lawyer as paragraph (b) requires a law firm to do. The question of whether two government agencies should be regarded as the same or different clients for conflict of interest purposes is beyond the scope of these Rules. See Rule 1.13 Comment [6].

~~[5]~~ [6] Paragraphs ~~(a)(1) and~~ (b) and (c) contemplate a screening arrangement. See Rule 1.0(l) (requirements for screening procedures). These paragraphs do not prohibit a lawyer from receiving a salary or partnership share established by prior independent agreement~~. They prohibit~~, but that lawyer may not receive compensation directly relating the lawyer's compensation to the fee in the matter in which the lawyer is disqualified.

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

~~[6] Paragraph (a)(2) does not require that a lawyer give notice to the government agency at a time when premature disclosure would injure the client; a requirement for premature disclosure might preclude engagement of the lawyer. Such notice is, however, required to be given as soon as practicable in order that the government agency will have a reasonable opportunity to ascertain that the lawyer is complying with Rule 1.11 and to take appropriate action if it believes the lawyer is not complying.~~

~~[7]~~ [8] Paragraph ~~(b)~~ (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.

~~[8]~~ [9] Paragraphs (a) and ~~(c)~~ (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.

~~[9] Paragraph (c) does not disqualify other lawyers in the agency with which the lawyer in question has become associated.~~

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

Comparison of Proposed Comments with Model Comments under the 2002 ABA Model Rule:

The cross references in proposed Comments [1] and [6] to Rule 1.0 have been changed to conform to the South Carolina version of Rule 1.0. Otherwise, the proposed Comments are identical to the Comments to Rule 1.11 in the 2002 ABA Model Rules.

Other Commission Comments Regarding Proposed Changes in the Comments from the Current S.C. Comments:

The differences between the proposed Comments and the current Comments stem primarily from changes made in the text of proposed Rule 1.11.

Comparison of Proposed Comments with S.C. Bar Recommendation:

The proposed Comments are identical to the S.C. Bar proposal.

RULE 1.12: FORMER JUDGE ~~OR,~~ ARBITRATOR, MEDIATOR OR OTHER THIRD-PARTY NEUTRAL

(a) Except as stated in paragraph (d), a lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as a judge or other adjudicative officer~~, arbitrator~~ 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 ~~after consultation~~, 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 ~~or arbitrator~~ 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 ~~or arbitrator~~.

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

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

therefrom; and

(2) written notice is promptly given to the parties and any appropriate tribunal to enable ~~it~~ 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.

Comparison with 2002 ABA Model Rule:

Proposed Rule 1.12 is identical to the 2002 ABA Model Rule.

Other Commission Comments Regarding Proposed Changes from the Current S.C. Rules of Professional Conduct:

Proposed Rule 1.12 includes mediators and other third-party neutrals within its coverage, in addition to arbitrators, who are covered by the current Rule. One significant result of this change is to permit the screening within a firm of any mediator or third-party neutral, so as to avoid an imputed conflict of interest arising out of the screened person's involvement in dispute resolution efforts.

Otherwise, the changes are essentially stylistic, to conform with terminology adopted throughout the proposed Rules.

Comparison with S.C. Bar Recommendation:

Proposed Rule 1.12 is identical to the S.C. Bar recommendation.

Comment

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

[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. See Rule 2.4.

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

[4] Requirements for screening procedures are stated in Rule 1.0(l). Paragraph (c)(1) does not prohibit the screened lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly related to the matter in which the lawyer is disqualified.

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

Comparison of Proposed Comments with Model Comments under the 2002 ABA Model Rule:

Cross references in proposed Comments [2] and [4] to Rule 1.0 have been changed to conform to the South Carolina version of Rule 1.0. Otherwise, the proposed Comments are identical to the Comments to Rule 1.12 in the 2002 ABA Model Rules.

Other Commission Comments Regarding Proposed Changes in the Comments from the Current S.C. Comments:

Proposed Comment [2] elaborates upon the inclusion of mediators and other third-party neutrals within the scope of the proposed Rule.

Proposed Comment [3] explains the justification for imputing disqualification to the entire firm in the absence of proper screening.

Proposed Comment [4] elaborates upon the impact of screening on a lawyer's compensation.

Proposed Comment [5] simply elaborates upon when notice of screening should be given.

Comparison of Proposed Comments with S.C. Bar Recommendation:

The proposed Comments are identical to the S.C. Bar proposal.

RULE 1.13: ORGANIZATION AS CLIENT

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

(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law which reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. ~~In determining how to proceed, the lawyer shall give due consideration to the seriousness of the violation and its consequences, the scope and nature of the lawyer's representation, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters and any other relevant considerations. Any measures taken shall be designed to minimize disruption of the organization and the risk of revealing information relating to the representation to persons outside the organization. Such measures may include among others:~~

~~(1) asking for reconsideration of the matter;~~

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

~~(3) referring~~

Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances, ~~seriousness of the matter, referral~~ to the highest authority that can act ~~in~~ on behalf of the organization as determined by applicable law.

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

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

(2) the lawyer reasonably believes that the violation is reasonably certain ~~is likely~~ to result in substantial injury to the organization, then the lawyer may ~~resign in accordance with Rule 1.16~~ reveal information relating to the representation whether or not Rule 1.6 permits such disclosure, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.

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

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

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

adverse to those of the constituents with whom the lawyer is dealing.

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

Comparison with 2003 ABA Model Rule (The Model Rule adopted in 2002 was modified again by the ABA in 2003. The proposed Rule reflects both the 2002 and 2003 changes):

Proposed Rule 1.13 is identical to the 2003 ABA Model Rule.

Other Commission Comments Regarding Proposed Changes from the Current S.C. Rules of Professional Conduct:

The 2003 revisions substantially modify Rule 1.13. Under paragraph (b), the option of reporting a violation to persons up the corporate ladder would become a duty in many situations. Under paragraph (c), the lawyer for an entity would be permitted, but not required, to disclose confidential information if necessary to prevent injury to the organization. The current rule has no similar exception to the duty of confidentiality. Paragraph (e) would require a lawyer for the entity who is discharged because of an effort to comply with Rule 1.13 to make the discharge known to the highest authority of the entity. No similar provision now exists.

Proposed Rule 1.13(f) clarifies the scienter requirement.

Comparison with S.C. Bar Recommendation:

The S.C. Bar did not consider the 2003 amendments to Rule 1.13.

Comment

The Entity as the Client

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

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

[3] When constituents of the organization make decisions for it, the decisions ordinarily must be accepted by the lawyer even if their utility or prudence is doubtful. Decisions concerning policy and operations, including ones entailing serious risk, are not as such in the lawyer's province. ~~However, different considerations arise~~ Paragraph (b) makes clear, however, that when the lawyer knows that the organization ~~may~~ is likely to be substantially injured by action of an officer or other constituent that violates a legal obligation to the organization or is in violation of law that might be imputed to the organization, the lawyer must proceed as is reasonably necessary in the best interest of the organization. As defined in Rule 1.0(g), knowledge can be inferred from circumstances, and a lawyer cannot ignore the obvious. ~~. In such a circumstance, it may be reasonably necessary for the lawyer to ask the constituent to reconsider the matter. If that fails, or if the matter is of sufficient seriousness and importance to the organization, it may be reasonably necessary for the lawyer to take steps to have the matter reviewed by a higher authority in the organization. Clear justification should exist for seeking review over the head of the constituent normally responsible for it. The stated policy of the organization may define circumstances and prescribe channels for such review, and a lawyer should encourage the formulation of such a policy. Even in the absence of organization policy, however, the lawyer may have an obligation to refer a matter to higher authority, depending on the seriousness of the matter and whether the constituent in question has apparent motives to act at variance with the organization's interest. Review by the chief executive officer or by the board of directors may be required when the matter is of importance commensurate with their authority. At some point it may be useful or essential to obtain an independent legal opinion.~~

[4] In determining how to proceed under paragraph (b), the lawyer should give due consideration to the seriousness of the violation and its consequences, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters, and any other relevant considerations. Ordinarily, referral to a higher authority would be

necessary. In some circumstances, however, it may be appropriate for the lawyer to ask the constituent to reconsider the matter; for example, if the circumstances involve a constituent's innocent misunderstanding of law and subsequent acceptance of the lawyer's advice, the lawyer may reasonably conclude that the best interest of the organization does not require that the matter be referred to higher authority. If a constituent persists in conduct contrary to the lawyer's advice, it will be necessary for the lawyer to take steps to have the matter reviewed by a higher authority in the organization. If the matter is of sufficient seriousness and importance or urgency to the organization, referral to higher authority in the organization may be necessary even if the lawyer has not communicated with the constituent. Any measures taken should, to the extent practicable, minimize the risk of revealing information relating to the representation to persons outside the organization. Even in circumstances where a lawyer is not obligated by Rule 1.13 to proceed, a lawyer may bring to the attention of an organizational client, including its highest authority, matters that the lawyer reasonably believes to be of sufficient importance to warrant doing so in the best interest of the organization.

~~[4]~~ [5] ~~In an extreme case, it may be reasonably necessary for the lawyer to refer the matter to the~~ Paragraph (b) also makes clear that, when it is reasonably necessary to enable the organization to address the matter in a timely and appropriate manner, the lawyer must refer the matter to higher authority, including, if warranted by the circumstances, the highest authority that can act on behalf of the organization under applicable law. The organization's highest authority~~. Ordinarily, that is~~ 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

~~[5]~~ [6] The authority and responsibility provided in ~~paragraph (b)~~ this Rule are concurrent with the authority and responsibility provided in other Rules. In particular, this Rule does not limit or expand the lawyer's responsibility under Rules 1.6, 1.8, 1.16, 3.3 or 4.1. Paragraph (c) of this Rule supplements Rule 1.6(b) by providing an additional basis upon which the lawyer may reveal information relating to the representation, but does not modify, restrict, or limit the provisions of Rule 1.6(b)(1)-(6). Under paragraph (c) the lawyer may reveal such information only when the organization's highest authority insists upon or fails to address threatened or ongoing action that is clearly a violation of law, and then only to the extent the lawyer reasonably believes necessary to prevent reasonably certain substantial injury to the organization. It is not necessary that the lawyer's services be used in furtherance of the violation, but it is required that the matter be related to the lawyer's representation of the organization. If the lawyer's services are being used by an organization to further a crime or fraud by the organization, Rules 1.6(b)(2) and 1.6(b)(3) may permit the lawyer to disclose confidential information. In such circumstances Rule 1.2(d) ~~can~~ may also be applicable, in which event, withdrawal from the representation under Rule 1.16(a)(1) may be required.

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

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

Government Agency

~~[6]~~ [9] The duty defined in this Rule applies to governmental organizations. ~~However, when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful official act is prevented or rectified, for public business is involved. In addition, duties of lawyers employed by the government or lawyers in military service may be defined by statutes and regulation. Therefore, defining~~ Defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context and is a matter beyond the scope of these Rules. See Scope [18]. Although in some circumstances the client may be a specific agency, it ~~is generally~~ may also be a branch of government, such as the executive branch, or the government as a whole. For example, if the action or failure to act involves the head of a bureau, either the department of which the bureau is a part or the relevant branch of government ~~as a whole~~ may be the client for ~~purpose~~ purposes of this Rule. Moreover, in a matter involving the conduct of government officials, a government lawyer may have authority under applicable law to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances. Thus, when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful act is prevented or rectified, for public business is involved. In addition, duties of lawyers employed by the government or lawyers in military service may be defined by statutes and regulation. This Rule does not limit that authority. See ~~note on~~ Scope.

Clarifying the Lawyer's Role

~~[7]~~ [10] There are times when the organization's interest may be or become adverse to those of one or more of its constituents. In such circumstances the lawyer should advise any constituent, whose interest the lawyer finds adverse to that of the organization of the conflict or potential conflict of interest, that the lawyer cannot represent such constituent, and that such person may wish to obtain independent representation. Care must be taken to assure that the individual understands that, when there is such adversity of interest, the lawyer for the organization cannot provide legal representation for that constituent individual, and that discussions between the lawyer for the organization and the individual may not be privileged.

~~[8]~~ [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

~~[9]~~ [12] Paragraph (g) ~~(e)~~ recognizes that a lawyer for an organization may also represent a principal officer or major shareholder.

Derivative Actions

~~[10]~~ [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.

~~[11]~~ [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 of Proposed Comments with Model Comments under the 2003 ABA Model Rule:

The proposed Comments are identical to the Comments to Rule 1.13 in the 20032 ABA Model Rules, with the exception of a cross-reference in proposed Comment [3] that has been modified to conform to proposed Rule 1.0..

Other Commission Comments Regarding Proposed Changes in the Comments from the Current S.C. Comments:

Proposed Comments [3] -[8] are new or substantially modified to reflect the 2003 changes in the Rule.

Proposed Comment [9] elaborates slightly upon the possible identity of a governmental client, recognizing that the client may be a branch of government, as well as an agency or the entire government. Other changes are largely stylistic.

Comparison of Proposed Comments with S.C. Bar Recommendation:

Comments [1] and [2] and [9]-[14] are identical to the S.C. Bar proposal. The S.C. Bar did not consider the 2003 modifications.

RULE 1.14: CLIENT ~~UNDER A DISABILITY~~ WITH DIMINISHED CAPACITY

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

(b) ~~A lawyer may seek the appointment of a guardian or take other protective action with respect to a client only when~~ When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.

(c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but

only to the extent reasonably necessary to protect the client's interests.

Comparison with 2002 ABA Model Rule:

Proposed Rule 1.14 is identical to the 2002 ABA Model Rule.

Other Commission Comments Regarding Proposed Changes from the Current S.C. Rules of Professional Conduct:

Proposed Rule 1.14 adopts terminology throughout focusing on diminished capacity rather than disability.

Proposed Rule 1.14(b) does not appear to permit any protective measures not currently allowed, but does offer specific guidance that it is permissible to consult with others about protecting the client.

Proposed Rule 1.14(c) defines the scope of the lawyer's implied authorization to reveal confidences without violating Rule 1.6. The relationship between Rules 1.6 and 1.14 is not explicitly addressed in the current Rules.

Comparison with S.C. Bar Recommendation:

Proposed Rule 1.14 is identical to the S.C. Bar recommendation.

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 ~~disorder or disability~~, however, maintaining the ordinary client-lawyer relationship may not be possible in all respects. In particular, ~~an~~ a severely incapacitated person may have no power to make legally binding decisions. Nevertheless, a client ~~lacking legal competence~~ with diminished capacity often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being. ~~Furthermore, to an increasing extent the law recognizes intermediate degrees of competence.~~ For example, children as young as five or six years of age, and certainly those of ten or twelve, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody. So also, it is recognized that some persons of advanced age can be quite capable of handling routine financial matters while needing special legal protection concerning major transactions.

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

[3] The client may wish to have family members or other persons participate in discussions with the lawyer. When necessary to assist in the representation, the presence of such persons generally does not affect the applicability of the attorney-client evidentiary privilege. Nevertheless, the lawyer must keep the client's interests foremost and, except for protective action authorized under paragraph (b), must to look to the client, and not family members, to make decisions on the client's behalf.

~~[3]~~ [4] If a legal representative has already been appointed for or by the client, the lawyer should ordinarily look to the representative for decisions on behalf of the client. ~~If a legal representative has not been appointed, the lawyer should see to such an appointment where it would serve the client's best interests. Thus, if a disabled client has substantial property that should be sold for the client's benefit, effective completion of the transaction ordinarily requires appointment of a legal representative. In many circumstances, however, appointment of a legal representative may be expensive or traumatic for the client. Evaluation of these considerations is a matter of professional judgment on the lawyer's part.~~ 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. ~~[4]~~ If the lawyer represents the guardian as distinct from the ward, and is aware that the guardian is acting adversely to the ward's interest, the lawyer may have an obligation to prevent or rectify the guardian's misconduct. See Rule 1.2(d).

Taking Protective Action

[5] If a lawyer reasonably believes that a client is at risk of substantial physical, financial or other harm unless action is taken, and that a normal client-lawyer relationship cannot be maintained as provided in paragraph (a) because the client lacks sufficient capacity to communicate or to make adequately considered decisions in connection with the representation, then paragraph (b) permits the lawyer to take protective measures deemed necessary. Such measures could include: consulting with family members, using a reconsideration period to permit clarification or improvement of circumstances, using voluntary surrogate decisionmaking 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 decisionmaking 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

~~[5]~~ [8] ~~Rules of procedure in litigation generally provide that minors or persons suffering mental disability shall be represented by a guardian or next friend if they do not have a general guardian. However, disclosure~~ Disclosure of the client's ~~disability can~~ diminished capacity could adversely affect the client's interests. For example, raising the question of ~~disability~~ diminished capacity could, in some circumstances, lead to proceedings for involuntary commitment. Information relating to the representation is protected by Rule 1.6. Therefore, unless authorized to do so, the lawyer may not disclose such information. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized to make the necessary disclosures, even when the client directs the lawyer to the contrary. Nevertheless, given the risks of disclosure, paragraph (c) limits what the lawyer may disclose in consulting with other individuals or entities or seeking the appointment of a legal representative. At the very least, the lawyer should determine whether it is likely that the person or entity consulted with will act adversely to the client's interests before discussing matters related to the client. The lawyer's position in such cases is an unavoidably difficult one. ~~The lawyer may seek guidance from an appropriate diagnostician.~~

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.

~~[7]~~ [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 of Proposed Comments with Model Comments under the 2002 ABA Model Rule:

The proposed Comments are identical to the Comments to Rule 1.14 in the 2002 ABA Model Rules.

Other Commission Comments Regarding Proposed Changes in the Comments from the Current S.C. Comments:

Proposed Comment [2] deletes the reference in the current Comment to the lawyer acting as a "de facto guardian" for the client.

Proposed Comments [3] and [4] address the lawyer's relationship with family of the client who has diminished capacity.

Proposed Comments [5]-[7] amplify the guidance given to a lawyer regarding the range of appropriate protective actions for an incapacitated client and the steps to be taken in determining the appropriate action.

Proposed Comments [9] and [10] are slightly edited versions of Comments previously approved by the ABA in 1997, but not

adopted in South Carolina. They allow a lawyer in an emergency to act on behalf of a person with diminished capacity even though the person does not have the capacity to create a formal attorney-client relationship. The Commission recommends their inclusion.

Other changes are largely stylistic.

Comparison of Proposed Comments with S.C. Bar Recommendation:

The proposed Comments are identical to the S.C. Bar proposal.

RULE 1.15: SAFEKEEPING 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 account maintained in the state where the lawyer's office is situated, or elsewhere with the consent of the client or third person. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of six years after termination of the representation.

(b) A lawyer may deposit the lawyer's own funds in a client trust account for the sole purpose of paying service charges on that account, but only in an amount necessary for that purpose.

(c) A lawyer shall deposit into a client trust account unearned legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses incurred.

~~(b)~~ (d) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.

~~(c)~~ (e) When in the course of representation a lawyer is in possession of property in which ~~both~~ two or more persons (one of whom may be the lawyer ~~and another person~~) claim interests, the property shall be kept separate by the lawyer until ~~there is an accounting and severance of their interests. If a dispute arises concerning their respective interests, the portion in dispute shall be kept separate by the lawyer until~~ the dispute is resolved. The lawyer shall promptly distribute all portions of the property as to which the interests are not in dispute.

(f) A lawyer shall not disburse funds from an account containing the funds of more than one client or third person unless the funds are collected funds; provided, however, a lawyer may treat as equivalent to collected funds cash, verified and documented electronic fund transfers, or other deposits treated by the depository bank as equivalent to cash; properly endorsed government checks, certified checks, cashiers checks or other checks drawn by a bank; and any other instrument payable at or through a bank, if the amount of such instrument does not exceed $5,000 and the lawyer has reasonable and prudent belief that the deposit of the instrument will be collected promptly. If the actual collection of deposits treated as the equivalent of collected funds does not occur, the lawyer shall, as soon as practical but in no event more than five working days after notice of noncollection, deposit replacement funds in the account.

(g) A lawyer shall not use or pledge any entrusted property to obtain credit or other personal benefit for the lawyer or any person other than the legal or beneficial owner of that property.

(h) Every lawyer maintaining a law office trust account shall file with the financial institution a written directive requiring the institution to report to the Commission on Lawyer Conduct when any properly payable instrument drawn on the account is presented for payment against insufficient funds. No law office trust account shall be maintained in a financial institution that does not agree to make such reports. The inadvertent failure of the institution to provide the report required by this rule shall not be construed to establish a breach of duty of care, or contract with, the Court or any third party who may sustain a loss as a result of an overdraft of a lawyer trust account.

Comparison with 2002 ABA Model Rule:

Proposed Rule 1.15(a) retains the current six-year period for preserving property and account records. A period of five years is recommended under the 2002 ABA Model Rule. The six-year period maintains consistency with S.C. Appellate Ct. Rule 417.

Proposed Rule 1.15(b) deletes the word "bank" prior to the words "service charges." The S.C. Bar recommended this deletion on the grounds that the account may be held in an institution other than a bank.

In Proposed Rule 1.15(c) the word "unearned" does not appear in the 2002 ABA Model Rule.

Proposed Rules 1.15(f), (g), and (h) are not included in the 2002 ABA Model Rule. This paragraphs are derived from language proposed to the Court by the S.C. Bar in a petition separate from the Bar's consideration of Ethics 2000.

Other Commission Comments Regarding Proposed Changes from the Current S.C. Rules of Professional Conduct:

Proposed Rule 1.15(b) appears consistent with current practice as approved in S.C. Bar Ethics Adv. Op. 93-11.

Proposed Rule 1.15(c) is consistent with current S.C. law as set forth in In re Burr, 228 S.E.2d 678 (S.C. 1976). The inclusion of the word "unearned" clarifies that fees which already have been earned, including general retainers, are not deposited in the trust account.

Proposed Rule 1.15(e) broadens the circumstances in which the lawyer holds disputed funds to include situations in which the lawyer is not a claimant. This change appears to reflect already existing practice in the state. The final sentence of section (e) states expressly the lawyer's existing obligation.

Proposed Rule 1.15(f) attempts to codify a principle set forth in several older S.C. Bar Ethics Advisory Opinions. S.C. Bar Ethics Adv. Ops. ## 78-20, 83-24, 84-23. Those opinions suggested that a lawyer could not disburse trust account funds until they are "available" for disbursement.

Comparison with S.C. Bar Recommendation:

The S.C. Bar recommends the insertion in Rule 1.15(e) of the words "the lawyer knows" before "two or more persons."

Although the S.C. Bar separately has recommended a version of Proposed Rule 1.15(f), it was not included as a part of their recommendation on Ethics 2000. The S.C. Bar proposal does not include the terms "verified and documented" or "properly endorsed" in Rule 1.15(f). The Commission proposes these additions for clarity and certainty. The S.C. Bar would include "and insurance company checks" at the end of the section. The Commission did not include insurance company checks because of concern that such checks may be dishonored.

Proposed Rules 1.15 (g) and (h) were recommended by the S.C. Bar in a separate petition to the S.C. Supreme Court and were not included as part of their Ethics 2000 recommendation.

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 ~~should~~, including prospective clients, must be kept separate from the lawyer's business and personal property and, if monies, in one or more trust accounts. Separate trust accounts may be warranted when administering estate monies or acting in similar fiduciary capacities. A lawyer should maintain on a current basis books and records in accordance with prudent accounting practice and must comply with any recordkeeping rules established by law or court order. See, e.g., S.C. App. Ct. R Rule 417, Financial Recordkeeping.

[2] While normally it is impermissible to commingle the lawyer's own funds with client funds, paragraph (b) provides that it is permissible when necessary to pay service charges on that account. Accurate records must be kept regarding which part of the funds are the lawyer's.

~~[2]~~ [3] Lawyers often receive funds from ~~third parties from~~ which the lawyer's fee will be paid. ~~If there is risk that the client may divert the funds without paying the fee, the~~ The lawyer is not required to remit ~~the portion from which the fee is to be paid~~ 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 ~~should~~ 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.

~~[3]~~ [4] ~~Third~~ Paragraph (e) also recognizes that third parties~~, such as a client's creditors,~~ may have ~~just~~ lawful claims against specific funds or other property in a lawyer's custody, such as a client's creditor who has a lien on funds recovered in a personal injury action. A lawyer may have a duty under applicable law to protect such third-party claims against wrongful interference by the client~~, and accordingly may~~. In such cases, when the third-party claim is not frivolous under applicable law, the lawyer must refuse to surrender the property to the client until the claims are resolved. ~~However, a~~ A lawyer should not unilaterally assume to arbitrate a dispute between the client and the third party, but, when there are substantial grounds for dispute as to the person entitled to the funds, the lawyer may file an action to have a court resolve the dispute.

~~[4]~~ [5] The obligations of a lawyer under this Rule are independent of those arising from activity other than rendering legal services. For example, a lawyer who serves only as an escrow agent is governed by the applicable law relating to fiduciaries even though the lawyer does not render legal services in the transaction and is not governed by this Rule.

~~[5]~~ [6] ~~A "clients' security~~ The Lawyers' Fund~~"~~ for Client Protection provides a means through the collective efforts of the bar to reimburse persons who have lost money or property as a result of dishonest conduct of a lawyer. Under S.C. App. Ct. R. 411, each active or senior member of the Bar is required to make an annual contribution to this fund.

Comparison of Proposed Comments with Model Comments under the 2002 ABA Model Rule:

Proposed Comment [1] substitutes a specific South Carolina reference to Rule 417 in place of the general reference in the Model Comment to the ABA Model Financial Recordkeeping Rule. Also, in the final substantive sentence of Comment [1], the Commission's proposal substitutes the word "prudent" in place of "generally accepted," prior to "accounting practices." The Commission recognizes that "generally accepted accounting practice" is a term of art and believes that its use in this context could create unintended confusion as to what is required.

Proposed Comment [6] has been modified from the Model Comment so as to be state specific. The Model Comment reads: "A lawyers' fund for client protection provides a means through the collective efforts of the bar to reimburse persons who have lost money or property as a result of dishonest conduct of a lawyer. Where such a fund has been established, a lawyer must participate where it is mandatory, and, even when it is voluntary, the lawyer should participate.

Other Commission Comments Regarding Proposed Changes in the Comments from the Current S.C. Comments:

Proposed Comments [1] and [2] express more clearly than do the prior Comments the accepted rule that trust property and personal property cannot be commingled. Proposed Comment [1] also provides a reference to Rule 417 not currently found in the Comments.

Proposed Comment [6] conforms to current South Carolina law. It seems unnecessary to add that a lawyer must comply with a financial obligation imposed by court rule, as the Model Comment does. South Carolina currently omits language that was in the previous version of the Model Comments stating that a lawyer "should participate" in such a fund.

Other changes in the Comments are intended primarily to conform the Comments to the revised language of Rule 1.15.

Comparison of Proposed Comments with S.C. Bar Recommendation:

In the final substantive sentence of Comment [1], the S.C. Bar recommends the addition of the word "must" prior to "comply."

In Comment [2] the S.C. Bar recommends deletion of the word "bank" from the first sentence.

The S.C. Bar recommends the language of Model Comment [6].

RULE 1.16: DECLINING OR TERMINATING REPRESENTATION

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

(1) the representation will result in violation of the rules of professional conduct or other law;

(2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or

(3) the lawyer is discharged.

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:

(1) withdrawal can be accomplished without material adverse effect on the interests of the client~~, or if:~~;

~~(1)~~ (2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;

~~(2)~~ (3) the client has used the lawyer's services to perpetrate a crime or fraud;

~~(3)~~ (4) ~~a~~ the client insists upon ~~pursuing an objective~~ taking action that the lawyer considers repugnant or ~~imprudent~~ with which the lawyer has a fundamental disagreement;

~~(4)~~ (5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services or payment therefor and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;

~~(5)~~ (6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or

~~(6)~~ (7) other good cause for withdrawal exists.

(c) A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

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

Comparison with 2002 ABA Model Rule:

Proposed Rule 1.16(b)(5) retains the words "or payment therefor" not found in the 2002 ABA Model Rule.

The final sentence of proposed Rule 1.16(d) is not found in the Model Rule.

Other Commission Comments Regarding Proposed Changes from the Current S.C. Rules of Professional Conduct:

Proposed Rule 1.16(b)(4) narrows somewhat the grounds upon which a lawyer may withdraw. It no longer would be enough that the lawyer found the client's actions to be imprudent.

The change in Proposed Rule 1.16(b)(5) from the model language retains language currently in the South Carolina Rule, making clear that a client's failure to honor a fee agreement can be grounds for permissive withdrawal by the lawyer.

Rule 1.16(c) provides a clear reminder to lawyers that court approval may be required in order for the lawyer to withdraw. This is consistent with S.C. R. Civ. Proc. 11(b) and S.C. App. Ct. R. 235, as well as cases such as Ex Parte Strom, 539 S.E.2d 699 (S.C. 2000).

Comparison with S.C. Bar Recommendation:

Proposed Rule 1.16 is identical to the recommendation of the S.C. Bar.

Comment

[1] A lawyer should not accept representation in a matter unless it can be performed competently, promptly, without improper conflict of interest and to completion. Ordinarily, a representation in a matter is completed when the agreed-upon assistance has been concluded. See Rules 1.2(c) and 6.5. See also Rule 1.3, Comment [4].

Mandatory Withdrawal

[2] A lawyer ordinarily must decline or withdraw from representation if the client demands that the lawyer engage in conduct that is illegal or violates the Rules of Professional Conduct or other law. The lawyer is not obliged to decline or withdraw simply because the client suggests such a course of conduct; a client may make such a suggestion in the hope that a lawyer will not be constrained by a professional obligation.

[3] When a lawyer has been appointed to represent a client, withdrawal ordinarily requires approval of the appointing authority. See also Rule 6.2. Similarly, court approval or notice to the court is often required by applicable law before a lawyer withdraws from pending litigation. Difficulty may be encountered if withdrawal is based on the client's demand that the lawyer engage in unprofessional conduct. The court may ~~wish~~ request an explanation for the withdrawal, while the lawyer may be bound to keep confidential the facts that would constitute such an explanation. The lawyer's statement that professional considerations require termination of the representation ordinarily should be accepted as sufficient. Lawyers should be mindful of their obligations to both clients and the court under Rules 1.6

and 3.3.

Discharge

[4] A client has a right to discharge a lawyer at any time, with or without cause, subject to liability for payment for the lawyer's services. Where future dispute about the withdrawal may be anticipated, it may be advisable to prepare a written statement reciting the circumstances.

[5] Whether a client can discharge appointed counsel may depend on applicable law. A client seeking to do so should be given a full explanation of the consequences. These consequences may include a decision by the appointing authority that appointment of successor counsel is unjustified, thus requiring self-representation by the client.

[6] If the client ~~is mentally incompetent~~ 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~~, in an extreme case,~~ may ~~initiate proceedings for a conservatorship or similar protection of the client. See~~ take reasonably necessary protective action as provided in Rule 1.14.

Optional Withdrawal

[7] A lawyer may withdraw from representation in some circumstances. The lawyer has the option to withdraw if it can be accomplished without material adverse effect on the client's interests. Withdrawal is also justified if the client persists in a course of action that the lawyer reasonably believes is criminal or fraudulent, for a lawyer is not required to be associated with such conduct even if the lawyer does not further it. Withdrawal is also permitted if the lawyer's services were misused in the past even if that would materially prejudice the client. The lawyer may also withdraw where the client insists on ~~a~~ taking action that the lawyer considers repugnant or ~~imprudent objective~~ 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. The South Carolina version of paragraph (b)(5) specifically recognizes that nonpayment for services may be a basis for withdrawal.

Assisting the Client upon Withdrawal

[9] Even if the lawyer has been unfairly discharged by the client, a lawyer must take all reasonable steps to mitigate the consequences to the client. The lawyer may retain papers as security for a fee only to the extent permitted by law. ~~A lawyer may retain an otherwise proper nonrefundable retainer. See Comment to Rule 1.5. Whether or not a lawyer for an organization may under certain unusual circumstances have a legal obligation to the organization after withdrawing or being discharged by the organization's highest authority is beyond the scope of these Rules.~~ See Rule 1.15. Whether a client and lawyer may enter into an arrangement under which there is a nonrefundable retainer fee is governed by case law. Even when permitted, a nonrefundable retainer still must comply with Rule 1.5 and not be unreasonable. See Rule 1.5, Comment [4].

Comparison of Proposed Comments with Model Comments under the 2002 ABA Model Rule:

The final sentence of proposed Comment [8] and the final three sentences of proposed Comment [9] do not appear in the Model Comments.

Other Commission Comments Regarding Proposed Changes in the Comments from the Current S.C. Comments:

Changes in the Comments merely conform them to changes in proposed Rule 1.16.

The final sentences of proposed Comment [9] are placed here upon the recommendation of the S.C. Bar. Similar language also appears in Comments [4] to Rule 1.5 and that Comment is cross-referenced.

Comparison of Proposed Comments with S.C. Bar Recommendation:

The proposed Comments are identical to the recommendation of the S.C. Bar, except that the S.C. Bar would add a citation to In re Miles at the end of Comment [9]. The Commission does not believe that the specific case citation is necessary and that it could cause the Comments to become outdated as later decisions are rendered. The S.C. Bar has not considered the final two sentences of proposed Comment [9].

RULE 1.17: SALE OF LAW PRACTICE

~~(a)~~ A lawyer or a law firm may sell or purchase a law practice, including good will, if the following conditions are satisfied:

~~(1)~~(a) The seller ceases to engage in the private practice of law in the geographical area in which the ~~seller's~~ practice has been conducted;

~~(2)~~(b) The entire practice is sold ~~as an entirety~~ to ~~another lawyer~~ one or more lawyers or law ~~firm~~ firms;

~~(3)~~(c) The seller gives ~~W~~written notice ~~is given~~ to each of the seller's active clients regarding:

~~(i)~~(1) the proposed sale;

~~(ii) the terms of any proposed change in the fee arrangement authorized by paragraph (d);~~

(2)~~(iii)~~ the client's right to retain other counsel or to take possession of the ~~client's~~ file; and

(3)~~(iv)~~ the fact that the client's consent to the ~~sale~~ transfer of the client's files will be presumed if the client does not take any action or does not otherwise object within ~~forty-five (45)~~ ninety (90) days of ~~the mailing~~ receipt of the notice; ~~and~~

~~(4)~~(d) A notice is published in a newspaper of general circulation in the geographical area in which the practice has been conducted regarding:

(1) the proposed sale;

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

(3) the fact that active clients will be or have been given written notice regarding the proposed sale and that their consent to the sale will be presumed if they do not take any action or object within ~~forty-five (45)~~ ninety (90) days of the date of the mailing of the written notice;

(4) the fact that the selling lawyer will retain the files of inactive clients unless those clients give permission for the transfer of their files or, if the parties to the sale elect to give written notice to an inactive client in the same manner provided by paragraph ~~(a)(3)~~ (c) above, the inactive client's consent to the sale will be presumed if the client does not take any action or does not otherwise object within ~~forty-five (45)~~ ninety (90) days of the date of the mailing of the notice; and

~~(b)~~ (e) The fees charged clients shall not be increased by reason of the sale. ~~The purchaser may, however, refuse to undertake the representation unless the client consents to pay the purchaser fees at a rate not exceeding the fees charged by the purchaser for rendering substantially similar services prior to initiation of the purchase negotiations.~~

~~(c)~~ The agreement for the sale of a law practice may include reasonable restrictions on the seller's right to practice without violating Rule 5.6.

Comparison with 2002 ABA Model Rule:

References to sale of "an area of practice," which appear in 2002 ABA Model Rule 1.17 have been omitted throughout the proposed Rule.

In paragraph (a), the Model Rule offers a choice of limiting practice to a "geographic area" or to the "jurisdiction." The proposed Rule selects the former, which is consistent with the current South Carolina Rule.

In the first clause of paragraph (c), the word "active" has been retained from the current South Carolina Rule and does not appear in the Model Rule.

Proposed paragraph (d) is retained from the current South Carolina rule (with time periods enlarged from 45 days to 90 days) and does not appear in the Model Rule.

The following provision found in the Model Rule is omitted from the proposed Rule 1.17:

"If a client cannot be given notice, the representation of that client may be transferred to the purchaser only upon entry of an order so authorizing by a court having jurisdiction. The seller may disclose the court in camera information relating to the representation only to the extent necessary to obtain an order authorizing transfer of a file."

The Model Rule provision omits the final sentence, which is retained from the current South Carolina rule.

Other Commission Comments Regarding Proposed Changes from the Current S.C. Rules of Professional Conduct:

The proposed Rule allows the sale of a practice to more than one lawyer.

The proposed Rule retains much of the notification process in the current South Carolina Rule. The time period in which a client may object to transfer of the file is increased from the current 45 days to 90 days as in the Model Rule.

The proposed Rule adopts the Model Rule revision that removes language permitting the purchaser to increase fees charged clients on transferred matters.

Comparison with S.C. Bar Recommendation:

The S.C. Bar recommendation retains the current lettering and numbering of paragraphs.

The S.C. Bar recommends retaining the current language beginning paragraph (c) of the proposed Rule, substituting "Written notice is given..." for "The seller gives written notice..." The Commission prefers the Model Rule version imposing the notification duty upon the seller.

The S.C. Bar recommends retaining language deleted from proposed Rule 1.17(d) that would permit a fee increase. The S.C. Bar recommendation, therefore, would also retain a notice requirement of "the terms of any proposed change in the fee arrangement authorized by paragraph (d)."

The S.C. Bar recommends retaining the 45-day objection period, rather than the 90-day period proposed in section (c)(3).

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 ~~another lawyer~~ other lawyers or ~~firm takes~~ firms take over the representation, the selling lawyer or firm may obtain compensation for the reasonable value of the practice as may withdrawing partners of law firms. See Rules 5.4 and 5.6.

Termination of Practice by the Seller

[2] The requirement that all of the private practice be sold is satisfied if the seller in good faith makes the entire practice available for sale to the purchasers. The fact that a number of the seller's clients decide not to be represented by the purchasers but take their matters elsewhere, therefore, does not result in a violation. ~~Neither does a return~~ Return to private practice as a result of an unanticipated change in circumstances does not necessarily result in a violation. For example, a lawyer who has sold the practice to accept an appointment to judicial office does not violate the requirement that the sale be attendant to cessation of practice if the lawyer later resumes private practice ~~in the same geographic area after ceasing to hold judicial office due to retirement, resignation or failure to be reelected or reappointed~~ upon being defeated in a contested or a retention election for the office or resigns from a judiciary position.

[3] The requirement that the seller cease to engage in the private practice of law in the geographic area does not prohibit employment as a lawyer on the staff of a public agency or a legal services entity ~~which~~ that provides legal services to the poor, or as in-house counsel to a business ~~even in the geographic area in which the private practice was located~~.

[4] The Rule permits a sale of an entire practice attendant upon retirement from the private practice of law within the jurisdiction. ~~Further, its~~ Its provisions, therefore, accommodate the lawyer who sells the practice upon the occasion of moving to another state or geographic area within this state.

~~Single Purchaser~~ Sale of Entire Practice

[5] The Rule requires ~~a single purchaser~~ that the seller's entire practice be sold. The prohibition against ~~piecemeal~~ sale of less than an entire a practice 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 ~~purchaser is~~ purchasers are required to undertake all client matters in the practice, subject to client consent. ~~If, however, the purchaser is unable to undertake all client matters because of a conflict of interest in a specific matter respecting which the purchaser is not permitted by Rule 1.7 or another rule to represent the client, the requirement that there be a single purchaser is nevertheless satisfied.~~ This requirement is satisfied, however, even if a purchaser is unable to undertake a particular client matter because of a conflict of interest.

Client Confidences, Consent and Notice

[6] Negotiations between seller and prospective purchaser prior to disclosure of information relating to a specific representation of an identifiable client no more violate the confidentiality provisions of Rule 1.6 than do preliminary discussions concerning the possible association of another lawyer or mergers between firms, with respect to which client consent is not required. Providing the purchaser access to client-specific information relating to the representation and to the file, however, requires client consent. The Rule provides that before such information can be disclosed by the seller to the purchaser regarding an active client, the client must be given actual written notice of the contemplated sale, including the identity of the purchaser ~~and any proposed change in the terms of future representation~~, and must be told that the decision to consent or make other arrangements must be made within ~~45~~ 90 days. If nothing is heard from the active client within that time, consent to the sale is presumed. ~~The Rule also requires that notice be given to both active and inactive clients in a newspaper of general circulation in the geographical area where the seller's practice has been conducted.~~

[7] It is not envisioned that files of inactive clients will be transferred to the purchaser as part of the sale of the practice, because of the continuing duties to ~~an~~ inactive client~~s~~ ~~that remain vested in the seller~~. Should the parties choose to transfer files of inactive clients of the seller as part of the sale of the law practice, notice must be given to each inactive client in the same manner as set forth in paragraph ~~(a)(3)~~(c) or (d). For purposes of this Rule, an inactive client refers to a client whose file has been closed due to the completion or termination of the representation.

[8] All the elements of client autonomy, including the client's absolute right to discharge a lawyer and transfer the representation to another, survive the sale of the practice.

Fee Arrangements Between Client and Purchaser

[9] The sale may not be financed by increases in fees charged the clients of the practice. Existing agreements between the seller and the client as to fees and the scope of the work must be honored by the purchaser~~, unless the client consents after consultation. The purchaser may, however, advise the client that the purchaser will not undertake the representation unless the client consents to pay the higher fees the purchaser usually charges. To prevent client financing of the sale, the higher fee the purchaser may charge must not exceed the fees charged by the purchaser for substantially similar service rendered prior to the initiation of the purchase negotiations~~.

~~[10] The purchaser may not intentionally fragment the practice which is the subject of the sale by charging significantly different fees in substantially similar matters. Doing so would make it possible for the purchaser to avoid the obligation to take over the entire practice by charging arbitrarily higher fees for less lucrative matters, thereby increasing the likelihood that those clients would not consent to the new representation.~~

Other Applicable Ethical Standards

~~[11]~~ [10] 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 ~~client~~ the client's informed consent ~~after consultation~~ 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); and the obligation to protect information relating to the representation (see Rules 1.6 and 1.9).

~~[12]~~ [11] 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]~~ [12] This Rule applies to the sale of a law practice by representatives of a deceased, disabled or disappeared lawyer. Thus, the seller may be represented by a non-lawyer ~~nonlawyer~~ representative not subject to these Rules. Since, however, no lawyer may participate in a sale of a law practice which does not conform to the requirements of this Rule, the representatives of the seller as well as the purchasing lawyer can be expected to see to it that they are met.

~~[14]~~ [13] 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. Nor does this Rule govern the transfer of ownership interests or clients between members of a law firm.

~~[15]~~ [14] This Rule does not apply to the transfers of legal representation between lawyers when such transfers are unrelated to the sale of a practice.

Comparison of Proposed Comments with Model Comments under the 2002 ABA Model Rule:

References to sale of "an area of practice," which appear in the Model versions of proposed Comments [1], [2], [5], [8], [10], and [14] have been omitted from those proposed Comments.

In Model Comment [3] the phrase "in the geographic area" does not appear in the Model Comment.

In Model Comment [4] the phrase "or geographic area within this state" does not appear in the Model Comment.

Model Comment [5], which addresses sale of a practice area only is deleted. The Model Comment reads as follows:

> *"[5] This Rule also permits a lawyer or law firm to sell an area of practice. If an area of practice is sold and the lawyer remains in the active practice of law, the lawyer must cease accepting any matters in the area of practice that has been sold, either as counsel or co-counsel or by assuming joint responsibility for a matter in connection with the division of a fee with another lawyer as would otherwise be permitted by Rule 1.5(e). For example, a lawyer with a substantial number of estate planning matters and a substantial number of probate administration cases may sell the estate planning portion of the practice but remain in the practice of law by concentrating on probate administration; however, that practitioner may not thereafter accept any estate planning matters. Although a lawyer who leaves a jurisdiction or geographical area typically would sell the entire practice, this Rule permits the lawyer to limit the sale to one or more areas of the practice, thereby preserving the lawyer's right to continue practice in the areas of the practice that were not sold."*

Proposed Comment [7] is retained from the current South Carolina Comments and does not appear in the Model Comments.

Because of the deletion of related language from the Rule itself, Model Comment [8] is deleted and does not appear in the proposed Comments. It reads as follows:

> *"[8] A lawyer or firm ceasing to practice cannot be required to remain in practice because some clients cannot be given actual notice of the proposed purchase. Since these clients cannot themselves consent to the purchase or direct any other disposition of their files, the Rule requires an order from a court having jurisdiction authorizing their transfer or other disposition. The Court can be expected to determine whether reasonable efforts to locate the client have been exhausted, and whether the absent client's legitimate interests will be served by authorizing the transfer of the file so that the purchaser may continue the representation. Preservation of client confidences requires that the petition for a court order be considered in camera."*

In proposed Comment [10], the cross-reference to Rule 1.0 has been changed to conform to the proposed South Carolina version of that Rule.

Otherwise, the proposed Comments are identical to the Model Comments.

Other Commission Comments Regarding Proposed Changes in the Comments from the Current S.C. Comments:

The proposed changes in the Comments reflect the substantive changes proposed for Rule 1.17.

Comparison of Proposed Comments with S.C. Bar Recommendation:

Proposed Comment [1] is identical to the S.C. Bar recommendation.

With one exception, the S.C. Bar recommends retaining the current language of Comment [2] instead of the changes proposed. The S.C. Bar does recommend inclusion of the words "an appointment to" as proposed.

In Comment [3], the S.C. Bar recommends retaining at the end the words "even in the geographic area in which the private practice was located."

In Comment [4], the S.C. Bar does not recommend the stylistic changes proposed in the second sentence.

In the second sentence of proposed Comment [5], the S.C. Bar recommends the word "area" be included after the word "practice." The Commission's proposal deleted that word from the Model version in light of the proposal's requirement that an entire practice, not merely a practice area, be sold.

In proposed Comment [6], the S.C. Bar recommends that the proposed changes not be made.

Proposed Comment [7] is identical to the S.C. Bar recommendation, with the exception of the cross-reference to the Rule,

which reflects the different lettering system proposed by the Bar.

The S.C. Bar recommends retaining the deleted material in proposed Comment [9] and retaining deleted current Comment [10].

RULE 1.18: DUTIES TO PROSPECTIVE CLIENT

(a) A person with whom a lawyer discusses the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client only when there is a reasonable expectation that the lawyer is likely to form the relationship.

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

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

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

(1) both the affected client and the prospective client have given informed consent, confirmed in writing, or

(2) the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; and

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

(ii) written notice is promptly given to the prospective client.

Comparison with 2002 ABA Model Rule:

Proposed Rule 1.18 (a) differs from the Model Rule. The model language reads as follows: "A person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client." The language proposed is that recommended by the S.C. Bar.

Proposed Rule 1.18(b)-(d) is identical to the 2002 ABA Model Rule.

Other Commission Comments Regarding Proposed Changes from the Current S.C. Rules of Professional Conduct:

South Carolina does not currently have a similar rule. Although an initial consultation may not necessarily create an attorney-client relationship, see S.C. Bar Ethics Adv. Op. # 91-03, proposed Rule 1.18 appears consistent with existing views that, even in the absence of a formal attorney-client relationship, duties, especially a duty to preserve confidences, can arise with regard to a prospective client. ABA Formal Op. # 90-358.

No South Carolina precedent has suggested that screening could be used by a law firm to avoid an imputed conflict when one lawyer has had significant contact with an adverse party who was seeking the firm's services. However, the use of screening appears reasonable in this situation and is recommended by the Commission.

Comparison with S.C. Bar Recommendation:

In the first sentence of subparagraph (c), the S.C. Bar recommends inserting the words "is likely to" for the word "could."

The S.C. Bar recommendation rejects screening under Rule 1.18(d), allowing an otherwise prohibited representation to proceed only upon the consent of both parties.

Comment

[1] Prospective clients, like clients, may disclose information to a lawyer, place documents or other property in the lawyer's custody, or rely on the lawyer's advice. A lawyer's discussions with a prospective client usually are limited in time and depth and leave both the prospective client and the lawyer free (and sometimes required) to proceed no further. Hence, prospective clients should receive

some but not all of the protection afforded clients.

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

[3] It is often necessary for a prospective client to reveal information to the lawyer during an initial consultation prior to the decision about formation of a client-lawyer relationship. The lawyer often must learn such information to determine whether there is a conflict of interest with an existing client and whether the matter is one that the lawyer is willing to undertake. Paragraph (b) prohibits the lawyer from using or revealing that information, except as permitted by Rule 1.9, even if the client or lawyer decides not to proceed with the representation. The duty exists regardless of how brief the initial conference may be.

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

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

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

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

[8] Notice, including a description of the screened lawyer's prior representation and of the screening procedures employed, generally should be given as soon as practicable after the need for screening becomes apparent. When disclosure is likely to significantly injure the client, a reasonable delay may be justified.

[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 a lawyer's care, see Rule 1.15.

Comparison of Proposed Comments with Model Comments under the 2002 ABA Model Rule:

The proposed Comments are identical to the Model Comments under the 2002 ABA Model Rule with the exception of changes in the cross-references to Rule 1.0 in proposed Comments [5] and [7] to conform to the proposed South Carolina version of that Rule.

Other Commission Comments Regarding Proposed Changes in the Comments from the Current S.C. Comments:

There are no equivalent Comments in the current South Carolina Rules.

Comparison of Proposed Comments with S.C. Bar Recommendation:

The S.C. Bar recommends the deletion from Comment [2] of the phrase "without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship."

In Comment [6], the S.C. Bar would substitute the words "is likely to" for "could".

The S.C. Bar would include only the first sentence of Comment [7] and none of Comment [8].

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.

Comparison with 2002 ABA Model Rule:

Proposed Rule 2.1 is identical to the 2002 ABA Model Rule.

Other Commission Comments Regarding Proposed Changes from the Current S.C. Rules of Professional Conduct:

No changes are proposed in Rule 2.1.

Comparison with S.C. Bar Recommendation:

Proposed Rule 2.1 is identical to the S.C. Bar recommendation.

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 ~~act~~ 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 of Proposed Comments with Model Comments under the 2002 ABA Model Rule:

The proposed Comments are identical to the Model Comments under the 2002 ABA Model Rule.

Other Commission Comments Regarding Proposed Changes in the Comments from the Current S.C. Comments:

Proposed Comment [5] adds a potential duty under Rule 1.4 to inform a litigation client of alternative forms of dispute resolution.

Comparison of Proposed Comments with S.C. Bar Recommendation:

The proposed Comments are identical to the S.C. Bar recommendation.

~~RULE 2.2: INTERMEDIARY~~

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

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

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

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

~~(b) While acting as intermediary, the lawyer shall consult with each client concerning the decisions to be made and the considerations relevant in making them, so that each client can make adequately informed decisions.~~

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

~~Comment~~

~~[1] A lawyer acts as intermediary under this Rule when the lawyer represents two or more parties with potentially conflicting interests. A key factor in defining the relationship is whether the parties share responsibility for the lawyer's fee, but the common representation may be inferred from other circumstances. Because confusion can arise as the lawyer's role where each party is not separately represented, it is important that the lawyer make clear the relationship.~~

~~[2] The Rule does not apply to a lawyer acting as arbitrator or mediator between or among parties who are not clients of the lawyer, even where the lawyer has been appointed with the concurrence of the parties. In performing such a role the lawyer may be subject to applicable codes of ethics, such as the Code of Ethics for Arbitration in Commercial Disputes prepared by a joint Committee of the American Bar Association and the American Bar Association.~~

~~[3] A lawyer acts as intermediary in seeking to establish or adjust a relationship between clients on an amicable and mutually advantageous basis; for example, in helping to organize a business in which tow or more clients are entrepreneurs, working out the financial reorganization of an enterprise in which two or more clients have an interest, arranging a property distribution in settlement of an estate or mediating a dispute between clients. The lawyer seeks to resolve potentially conflicting interests by developing the parties' mutual interests. The alternative can be that each party may have to obtain separate representation, with the possibility in some situations of incurring additional cost, complication or even litigation. Given these and other relevant factors, all the clients may prefer that the lawyer act as intermediary.~~

~~[4] In considering whether to act as intermediary between clients, a lawyer should be mindful that if the intermediation fails the result can be additional cost, embarrassment and recrimination. In some situations the risk of failure is so great that intermediation is plainly impossible. For example, a lawyer cannot undertake common representation of clients between whom contentious litigation is imminent or who contemplate contentious negotiations. More generally, if the relation ship between the parties has already assumed definite antagonism, the possibility that the clients' interests can be adjusted by intermediation ordinarily is not very good.~~

~~[5] The appropriateness of intermediation can depend on its form. Forms of intermediation range from informal arbitration, where each client's case is presented by the respective client and the lawyer decides the outcome, to mediation, to common representation where the clients' interests are substantially though not entirely compatible. One form may be appropriate in circumstance where another would not. Other relevant actors are whether the lawyer subsequently will represent both parties on a continuing basis and whether the situation involves creating a relationship between the parties or termination one.~~

~~**Confidentiality and Privilege**~~

~~[6] A particularly important factor in determining the appropriateness of intermediation is the effect on client lawyer confidentiality and the attorney client privilege. In a common representation, the lawyer is still required to keep each client adequately informed and to maintain confidentiality of information relating to the representation. See Rules 1.4 and 1.6. Complying with both requirements while acting as intermediary requires a delicate balance. If the balance cannot be maintained, the common representation is improper. With regard to the attorney-client privilege, the prevailing rule is that as between commonly represented clients the privilege does not attach. Hence, it must be assumed that if litigation eventuates between the clients, the privilege will not protect any such communications, and the clients should be so advised.~~

~~[7] Since the lawyer is required to be impartial between commonly represented clients, intermediation is improper when that impartiality cannot be maintained. For example, a lawyer who has represented one of the clients for a long period and in a variety of matters might have difficulty being impartial between that client and one to whom the lawyer has only recently been introduced.~~

~~**Consultation**~~

~~[8] In acting as intermediary between clients, the lawyer is required to consult with the clients on the implications of doing so, and proceed only upon consent based on such a consultation. The consultation should make clear that the lawyer's role is not that of partisanship normally expected in other circumstances.~~

~~[9] Paragraph (b) is an application of the principle expressed in Rule 1.4. Where the lawyer is intermediary, the clients ordinarily must assume greater responsibility for decisions than when each client is independently represented.~~

~~**Withdrawal**~~

~~[10] Common representation does not diminish the rights of each client in the client-lawyer relationship. Each has the right to loyal and diligent representation, the right to discharge the lawyer as stated in Rule 1.16, and the protection of Rule 1.9 concerning obligations to a former client.~~

The Commission recommends the deletion in its entirety of current Rule 2.2 and the accompanying Comments. The Rule and Comments are deleted in the 2002 ABA Model Rules and their deletion is recommended by the S.C. Bar. Conflicts currently addressed in Rule 2.2 are covered adequately under proposed Rule 1.7.

RULE 2.2: [RESERVED]

It would appear reasonable to simply number the next substantive rule as Rule 2.2. However, because the 2002 ABA Model Rules did not renumber subsequent model rules upon the deletion of Rule 2.2, the Commission recommends, in the interest of conformity, that Rule 2.2 be reserved and that the next substantive rule be numbered Rule 2.3.

RULE 2.3: EVALUATION FOR USE BY THIRD PERSONS

(a) A lawyer may ~~undertake~~ provide an evaluation of a matter affecting a client for the use of someone other than the client if: ~~(1)~~ the lawyer reasonably believes that making the evaluation is compatible with other aspects of the lawyer's relationship with the client,; ~~and~~

~~(2)~~(b) When the lawyer knows or reasonable 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 ~~consents after consultation~~ gives informed consent.

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

Comparison with 2002 ABA Model Rule:

Proposed Rule 2.3 is identical to the 2002 ABA Model Rule.

Other Commission Comments Regarding Proposed Changes from the Current S.C. Rules of Professional Conduct:

The changes proposed in Rule 2.3 require client consent only when the evaluation is likely to affect the client adversely. Under the current rule, express consent appears to be required before any evaluation can be provided.

Comparison with S.C. Bar Recommendation:

Proposed Rule 2.3 is identical to the S.C. Bar recommendation.

Comment

Definition

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

~~[3]~~[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.

~~Duty~~ Duties Owed to Third Person and Client

~~[4]~~[3] When the evaluation is intended for the information or use of a third person, a legal duty to that person may or may not arise. That legal question is beyond the scope of this Rule. However, since such an evaluation involves a departure from the normal client-lawyer relationship, careful analysis of the situation is required. The lawyer must be satisfied as a matter of professional judgement that making the evaluation is compatible with other functions undertaken in behalf of the client. For example, if the lawyer is acting as advocate in defending the client against charges of fraud, it would normally be incompatible with that responsibility for the lawyer to perform an evaluation for others concerning the same or a related transaction. Assuming no such impediment is apparent, however, the lawyer should advise the client of the implications of the evaluation, particularly the lawyer's responsibilities to third persons and the duty to disseminate the findings.

Access to and Disclosure of Information

~~[5]~~[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 non cooperation 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 and 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 informed consent.

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 of Proposed Comments with Model Comments under the 2002 ABA Model Rule:

> ***Proposed Comment [5] inserts the word "informed" prior to the word "consent" in the final sentence. The proposed Comment then deletes the language which follows the word "consent" in the Model Comment. Model Comment [5] ends with "after the client has been adequately informed concerning the important possible effects on the client's interests. See Rules 1.6(a) and 1.0(e)." The Commission believes that informed consent is adequately defined without inclusion of the deleted language.***

Other Commission Comments Regarding Proposed Changes in the Comments from the Current S.C. Comments:

> ***The final sentence added to proposed Comment [4] refers to an existing duty under Rule 4.1. The Commission does not concur with the S.C. Bar view that this language would create a duty not already imposed by Rule.***

Comparison of Proposed Comments with S.C. Bar Recommendation:

> ***The S.C. Bar recommends the deletion of the final sentence of proposed Comment [4], believing that it inappropriately creates a duty not included in the Rule. The Commission believes the Comment merely reflects a duty already imposed by Rule, and that it should be retained.***

RULE 2.4: LAWYER SERVING AS THIRD PARTY NEUTRAL

(a) A lawyer serves as a third party neutral when the lawyer assists two or more persons who are not clients of the lawyer to reach a resolution of a dispute or other matter that has arisen between them. Service as a third-party neutral may include service as an arbitrator, a mediator or in such other capacity as will enable the lawyer to assist the parties to resolve the matter.

(b) A lawyer serving as a third-party neutral shall inform unrepresented parties that the lawyer is not representing them. When the lawyer knows or reasonably should know that a party does not understand the lawyer's role in the matter, the lawyer shall explain the difference between the lawyer's role as a third-party neutral and a lawyer's role as one who represents a client.

(c) When one or more of the parties in a mediation is a current or former client of the neutral lawyer or the neutral's law firm, a lawyer may serve as a neutral only if the matter in which the lawyer serves as a neutral is not the same matter in which the lawyer or law firm represents or represented the party and all parties give informed consent confirmed in writing.

Comparison with 2002 ABA Model Rule:

> ***The Model Rule does not include paragraph (c). The Commission recommends the addition of this paragraph to recognize the increased use of neutrals in less heavily populated areas in which a limited number of potential qualified neutrals may be available.***

Other Commission Comments Regarding Proposed Changes from the Current S.C. Rules of Professional Conduct:

> ***No equivalent rule currently exists.***

Comparison with S.C. Bar Recommendation:

> ***The S.C. Bar recommends the adoption of a rule identical to Model Rule 2.4 and has not considered the implications of additional paragraph (c).***

Comment

[1] Alternative dispute resolution has become a substantial part of the civil justice system. Aside from representing clients in dispute-resolution processes, lawyers often serve as third-party neutrals. A third-party neutral is a person, such as a mediator, arbitrator, conciliator or evaluator, who assists the parties, represented or unrepresented, in the resolution of a dispute or in the arrangement of a transaction. Whether a third-party neutral serves primarily as a facilitator, evaluator or decision maker depends on the particular process that is either selected by the parties or mandated by a court.

[2] The role of a third-party neutral is not unique to lawyers, although, in some court-connected contexts, only lawyers are allowed to serve in this role or to handle certain types of cases. In performing this role, the lawyer may be subject to court rules or other law that apply either to third-party neutrals generally or to lawyers serving as third-party neutrals. Lawyer-neutrals may also be subject to

various codes of ethics, such as the Code of Ethics for Arbitration in Commercial Disputes prepared by a joint committee of the American Bar Association and the American Arbitration Association or the Model Standards of Conduct for Mediators jointly prepared by the American Bar Association, the American Arbitration Association and the Society of Professionals in Dispute Resolution.

[3] Unlike non lawyers who serve as third-party neutrals, lawyers serving in this role may experience unique problems as a result of differences between the role of a third-party neutral and a lawyer's service as a client representative. The potential for confusion is significant when the parties are unrepresented in the process. Thus paragraph (b) requires a lawyer-neutral to inform unrepresented parties that the lawyer is not representing them. For some parties, particularly parties who frequently use dispute-resolution processes, this information will be sufficient. For others, particularly those who are using the process for the first time, more information will be required. Where appropriate, the lawyer should inform unrepresented parties of the important differences between the lawyer's role as third-party neutral and a lawyer's role as a client representative, including the inapplicability of the attorney-client evidentiary privilege. The extent of disclosure required under this paragraph will depend on the particular parties involved and the subject matter of the proceeding, as well as the particular features of the dispute-resolution process selected.

[4] A lawyer who serves 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(n)), 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 of Proposed Comments with Model Comments under the 2002 ABA Model Rule:

The Proposed Comments are identical to the Model Comments, with the exception of the cross-reference to proposed Rule 1.0 in proposed Comment [5], which has been changed to reflect the proposed South Carolina version of that Rule.

Other Commission Comments Regarding Proposed Changes in the Comments from the Current S.C. Comments:

No equivalent Rule or Comments currently exist.

Comparison of Proposed Comments with S.C. Bar Recommendation:

The Proposed Comments are identical to the S.C. Bar recommendation, with the exception of the cross-reference to proposed Rule 1.0 in proposed Comment [5], which has been changed to reflect the proposed South Carolina version of that Rule.

RULE 3.1: MERITORIOUS CLAIMS AND CONTENTIONS

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

Comparison with 2002 ABA Model Rule:

Proposed Rule 3.1 is identical to 2002 ABA Model Rule 3.1.

Other Commission Comments Regarding Proposed Changes from the Current S.C. Rules of Professional Conduct:

The only change is to insert an explicit requirement that the claim have a non-frivolous basis in both law and fact.

Comparison with S.C. Bar Recommendation:

The S.C. Bar recommends inserting the words "the lawyer reasonably believes" after the word "unless" in the first sentence. The Commission prefers the Rule as written, accompanied by the guidance in proposed Comment [2], and declines to recommend this change.

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 ~~client desires to have the action taken primarily for the purpose of harassing or maliciously injuring a person or 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 good faith argument for an extension, modification or reversal of existing laws.

[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 of Proposed Comments with Model Comments under the 2002 ABA Model Rule:

The proposed Comments are identical to the Model Comments.

Other Commission Comments Regarding Proposed Changes in the Comments from the Current S.C. Comments:

The proposed changes are matters of clarification and do not appear to change current law substantively.

Comparison of Proposed Comments with S.C. Bar Recommendation:

The proposed Comments are identical to the recommendation of the S.C. Bar.

RULE: 3.2: EXPEDITING LITIGATION

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

Comparison with 2002 ABA Model Rule:

Proposed Rule 3.2 is identical to 2002 ABA Model Rule 3.2.

Other Commission Comments Regarding Proposed Changes from the Current S.C. Rules of Professional Conduct:

No changes are proposed.

Comparison with S.C. Bar Recommendation:

Proposed Rule 3.2 is identical to the S.C. Bar recommendation.

Comment

[1] Dilatory practices bring the administration of justice into disrepute. ~~Delay should not be indulged merely for the convenience of the advocates, or~~ Although there will be occasions when a lawyer may properly seek a postponement for personal reasons, it is not proper for a lawyer to routinely fail to expedite litigation solely for the convenience of the lawyer. Nor will a failure to expedite be reasonable if done for the purpose of frustrating an opposing party's attempt to of obtain rightful redress or repose. It is not a justification that similar conduct is often tolerated by the bench and bar. The question is whether a competent lawyer acting in good faith would regard the course of action as having some substantial purpose other than delay. Realizing financial or other benefit from otherwise improper delay in litigation is not a legitimate interest of the client.

Comparison of Proposed Comment with Model Comment under the 2002 ABA Model Rule:

The proposed Comment is identical to the Model Comment.

Other Commission Comments Regarding Proposed Change in the Comment from the Current S.C. Comment:

The proposed change recognizes that the current Comment may be overly restrictive and that circumstances may exist in which a lawyer can properly seek a postponement for personal reasons.

Comparison of Proposed Comment with S.C. Bar Recommendation:

The proposed Comment is identical to the S.C. Bar recommendation.

RULE 3.3: CANDOR TOWARD THE TRIBUNAL

(a) A lawyer shall not knowingly:

(1) make a false statement of ~~material~~ fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

~~(2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client;~~

~~(3)~~(2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(4)(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

~~(b)~~(c) The duties stated in paragraphs (a) and (b) apply when the lawyer is representing a client before a tribunal as well as in an ancillary proceeding conducted pursuant to the tribunal's adjudicative authority, such as a deposition. These duties continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

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

(d) In an ex parte proceeding, 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.

Comparison with 2002 ABA Model Rule:

Proposed Rule 3.3 is identical to the Model Rule.

Other Commission Comments Regarding Proposed Changes from the Current S.C. Rules of Professional Conduct:

Proposed Rule 3.3(a)(1) broadens the requirement imposed upon a lawyer to correct false statements beyond situations covered by Rule 3.3(a)(3).

The deletion of a materiality standard in the first clause of Rule 3.3(a)(1) combined with the addition of a materiality standard results in a slightly different analysis depending upon whether the lawyer is making a false statement or correcting a previous statement found later to have been false. A lawyer cannot knowingly make any false statement, but is required to correct only material false statements.

Material deleted from current sections (a)(2) and (c) is moved in substance to proposed sections (a)(3) and (b) and results in no change in the law.

Comparison with S.C. Bar Recommendation:

The proposed Rule is identical to the recommendation of the S.C. Bar.

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(n) for the definition of "tribunal." It also applies when the lawyer is representing a client in an ancillary proceeding conducted pursuant to the tribunal's adjudicative authority, such as a deposition. Thus, for example, paragraph (a)(3) requires a lawyer to take

reasonable remedial measures if the lawyer comes to know that a client who is testifying in a deposition has offered evidence that is false.

[1][2] ~~The advocate's task is~~ 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 adjucative 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. ~~However~~ Consequently,~~an advocate does~~ 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 ~~is responsible for assessing its probative value~~ to be misled by false statements of law or fact or evidence that the lawyer knows to be false.

Representations by a Lawyer

[2][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).

~~Misleading~~ Legal Argument

[3][4] Legal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal. A lawyer is not required to make a disinterested exposition of the law, but must recognize the existence of pertinent legal authorities. Furthermore, as stated in paragraph (a)~~(3)~~(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.

~~False~~ Offering Evidence

~~[4] When evidence that a lawyer knows to be false is provided by a person who is not the client, the lawyer must refuse to offer it regardless of the client's wishes.~~

~~[5] When false evidence is offered by the client, however, a conflict may arise between the lawyer's duty to keep the client's revelations confidential and the duty of candor to the court. Upon ascertaining that material evidence is false, the lawyer should seek to persuade the client that the evidence should not be offered or, if it has been offered, that its false character should immediately be disclosed. If the persuasion is ineffective, the lawyer must take reasonable remedial measure.~~

[5] Paragraph (a)(3) requires, that the lawyer refuse to offer evidence that the lawyer knows to be false, regardless of the client's wishes. This duty is premised on the lawyer's obligation as an officer of the court to prevent the trier of fact from being misled by false evidence. A lawyer does not violate this Rule if the lawyer offers the evidence for the purpose of establishing its falsity.

[6] If a lawyer knows that the client intends to testify falsely or wants the lawyer to introduce false evidence, the lawyer should seek to persuade the client that the evidence should not be offered. If the persuasion is ineffective and the lawyer continues to represent the client, the lawyer must refuse to offer the false evidence. If only a portion of a witness's testimony will be false the lawyer may call the witness to testify but may not elicit or otherwise permit the witness to present the testimony that the lawyer knows is false.

[7] The duties stated in paragraphs (a) and (b) apply to all lawyers, including defense counsel in criminal cases. Counsel, however, may allow the accused to give a narrative statement if the accused so desires, even if counsel knows that the testimony or statement will be false. See also Comment [9] . When a narrative statement is offered under these circumstances, the lawyer may not examine the witness or use the false testimony in the closing argument.

[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.

~~Refusing to Offer Proof Believed to Be False~~

~~[14]~~[9] ~~Generally speaking~~, Although (a)(3) only prohibits a lawyer ~~has authority~~ from offering evidence the lawyer knows to be false, it permits the lawyer to refuse to offer testimony or other proof that the lawyer reasonably believes is ~~untrustworthy~~ false. Offering such proof may reflect adversely on the lawyer's ability to discriminate in the quality of evidence and thus impair the lawyer's effectiveness as an advocate. ~~In criminal cases, however, a lawyer may, in some jurisdictions, be denied this authority by constitutional requirements governing the right to counsel.~~ Because of the special protections historically provided criminal defendants, however, this Rule does not permit a lawyer to refuse to offer the testimony of such a client where the lawyer reasonably believes but does not know that the testimony will be false. Unless the lawyer knows the testimony will be false, the lawyer must honor the client's decision to testify. See also Comment [7].

~~Perjury by a Criminal Defendant~~

~~[7] Whether an advocate for a criminally accused has the same duty of disclosure has been intensely debated. While it is agreed that the lawyer should seek to persuade the client to refrain from perjurious testimony, there has been dispute concerning the lawyer's duty when that persuasion fails. If the confrontation with the client occurs before trial, the lawyer ordinarily can withdraw. Withdrawal before trial may not be possible, however, either because trial is imminent, or because the confrontation with the client does not take place until the trial itself, or because no other counsel is available.~~

~~[8[The most difficult situation, therefore, arises in a criminal case where the accused insists on testifying when the lawyer knows that the testimony is perjurious. The lawyer's effort to rectify the situation can increase the likelihood of the client's being convicted as well as opening the possibility of a prosecution for perjury. On the other hand, if the lawyer does not exercise control over the proof, the lawyer participates, although in a merely passive way, in deception of the court.~~

~~[9] Three resolutions of this dilemma have been proposed. One is to permit the accused to testify by a narrative without guidance through the lawyer's questioning. This compromises both contending principles; it exempts the lawyer from the duty to disclose false evidence but subjects the client to an implicit disclosure of information imparted to counsel. Another suggested resolution, of relatively recent origin, is that the advocate be entirely excused from the duty to reveal perjury if the perjury is that of the client. This is a coherent solution but makes the advocate a knowing instrument of perjury.~~

~~[10] The other resolution of the dilemma is that the lawyer must reveal the client's perjury if necessary to rectify the situation. A criminal accused has a right to the assistance of an advocate, a right to testify and a right of confidential communication with counsel. However, an accused should no have a right to assistance of counsel in committing perjury. Furthermore, an advocate has an obligation, not only in professional ethics but under the law as well, to avoid implication in the commission of perjury or other falsification of evidence. See Rule 1.2(d).~~

Remedial Measures

~~[11]~~[10] ~~If perjured testimony or false~~ Having offered material evidence ~~has been offered~~ 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 ~~ordinarily~~ 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 ~~should seek to withdraw if that will remedy the situation~~ must take further remedial action. If withdrawal from the representation is not permitted or will not ~~remedy the situation or is impossible~~ undo the effect of the false evidence, the advocate ~~should~~ must make disclosure to the tribunal. It is for the ~~court~~ tribunal then to determine what should be done - making a statement about the matter to the trier of fact, ordering a mistrial or perhaps nothing. ~~If the false testimony was that of the client, the client may controvert the lawyer's version of their communication when the lawyer discloses the situation to the court. If there is an issue whether the client has committed perjury, the lawyer cannot represent the client in resolution of the issue, and a mistrial may be unavoidable. An unscrupulous client might in this way attempt to produce a series of mistrials and thus escape prosecution. However, a second such encounter could be construed as a deliberate abuse of the right to counsel and as such a waiver of the right to further representation.~~

~~[6]~~[11] ~~Except in the defense of a criminal accused, the rule generally recognized is that, if necessary to rectify the situation, an advocate must disclose the existence of the client's deception to the court or to the other party. Such a~~ 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 The Adjudicative Process

[12] Lawyers have a special obligation to protect a tribunal against criminal or fraudulent conduct that undermines the integrity of the adjudicative process, such as bribing, intimidating or otherwise unlawfully communicating with a witness, juror, court official or other participant in the proceeding, unlawfully destroying or concealing documents or other evidence or failing to disclose information to the tribunal when required by law to do so. Thus, paragraph (b) requires a lawyer to take reasonable remedial measures, including disclosure if necessary, whenever the lawyer knows that a person, including the lawyer's client, intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding.

~~**Constitutional Requirements**~~

~~[12] The general rule that an advocate must reveal the existence of perjury with respect to a material fact, even that of a client applies to defense counsel in criminal cases, as well as in other instances. However, the definition of the lawyer's ethical duty in such a situation may be qualified by constitutional provisions for due process and the right to counsel in criminal cases. In some jurisdictions these provisions have been construed to require that counsel present an accused as a witness if the accused wished to testify, even if counsel knows the testimony will be false. The obligation of the advocate under these Rules is subordinate to such a constitutional requirement.~~

Duration of Obligation

[13] A practical time limit on the obligation to rectify ~~the presentation of~~ false evidence or false statements of law and fact has to be established. The conclusion of the proceeding is a reasonably definite point for the termination of the obligation. A proceeding has concluded within the meaning of this Rule when a final judgement in the proceeding has been affirmed on appeal or the time for review has passed.

Ex Parte Proceedings

~~[15]~~[14] Ordinarily an advocate has the limited responsibility of presenting one side of the matters that a tribunal should consider in reaching a decision; the conflicting position is expected to be presented by the opposing party. However, in any ex parte proceeding, such as an application for a temporary restraining order, there is no balance of presentation by opposing advocates. The object of an ex parte proceeding is nevertheless to yield a substantially just result. The judge has an affirmative responsibility to accord the absent party just consideration. The lawyer for the represented party has the correlative duty to make disclosures of material facts known to the lawyer and that the lawyer reasonably believes are necessary to an informed decision.

Withdrawal

[15] Normally, a lawyer's compliance with the duty of candor imposed by this Rule does not require that the lawyer withdraw from the representation of a client whose interests will be or have been adversely affected by the lawyer's disclosure. The lawyer may, however, be required by Rule 1.16(a) to seek permission of the tribunal to withdraw if the lawyer's compliance with this Rule's duty of candor results in such an extreme deterioration of the client-lawyer relationship that the lawyer can no longer competently represent the client. Also see Rule 1.16(b) for the circumstances in which a lawyer will be permitted to seek a tribunal's permission to withdraw. In connection with a request for permission to withdraw that is premised on a client's misconduct, a lawyer may reveal information relating to the representation only to the extent reasonably necessary to comply with this Rule or as otherwise permitted by Rule 1.6.

Comparison of Proposed Comments with Model Comments under the 2002 ABA Model Rule:

> ***Except for Comment [7], and with the exception of cross-references to Rule 1.0 in proposed Comments [1] and [8], which have been changed to reflect the proposed South Carolina version of that Rule, the proposed Comments are identical to the Model Comments.,***
>
> ***The second sentence of Proposed Comment [7] has been modified to reflect specifically the South Carolina practice as detailed in In re Goodwin, 305 S.E.2d 578 (S.C. 1983). The final two sentences of Model Comment [7], for which the proposed language is substituted, read as follows:***
>
> > ***In some jurisdictions, however, courts have required counsel to present the accused as a witness or to give a narrative statement if the accused so desires, even if counsel knows that the testimony or statement will be false. The obligation of the advocate under the Rules of Professional Conduct is subordinate to such requirements.***

Other Commission Comments Regarding Proposed Changes in the Comments from the Current S.C. Comments:

Prior to adoption of the current South Carolina Rules, the South Carolina Supreme Court had indicated that, when representing a client in a criminal defense matter who wished to testify falsely, the lawyer should allow the client to make a narrative statement, without assistance from the lawyer. See In re Goodwin, 305 S.E.2d 578 (S.C. 1983). ABA Formal Opinion # 87-353 characterized the narrative approach as inconsistent with current Rule 3.3. Model Comment [7], however, specifically subordinates the ethical obligation under Rule 3.3 to state law in states where a narrative statement is required. The proposed Comment [7] specifically restores the narrative approach outlined in In re Goodwin.

The final sentence of proposed Comment [13] adds clarification as to when a proceeding is considered to have been concluded within the meaning of Rule 3.3. The proposed sentence is consistent with guidance offered under the current Rule in S.C. Bar Ethics Advisory Op. # 97-14.

Comparison of Proposed Comments with S.C. Bar Recommendation:

The proposed Comments are identical to the recommendation of the S.C. Bar, with the exception of the second sentence of proposed Comment [7] and the cross-references to Rule 1.0.

RULE 3.4: FAIRNESS TO OPPOSING PARTY AND COUNSEL

A lawyer shall not:

(a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;

(b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;

(c) knowingly disobey an obligation under the rules of a tribunal, except for an open refusal based on an assertion that no valid obligation exists;

(d) in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party;

(e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused; or

(f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

(1) the person is a relative or an employee or other agent of a client; and

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

Comparison with 2002 ABA Model Rule:

Proposed Rule 3.4 is identical to 2002 ABA Model Rule 3.4.

Other Commission Comments Regarding Proposed Changes from the Current S.C. Rules of Professional Conduct:

No changes are proposed.

Comparison with S.C. Bar Recommendation:

Proposed Rule 3.4 is identical to the S.C. Bar recommendation.

Comment

[1] The procedure of the adversary system contemplates that the evidence in a case is to be marshalled competitively by the contending parties. Fair competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery procedure, and the like.

[2] Documents and other items of evidence are often essential to establish a claim or defense. Subject to evidentiary privileges, the right of an opposing party, including the government, to obtain evidence through discovery or subpoena is an important procedural right. The exercise of that right can be frustrated if relevant material is altered, concealed or destroyed. Applicable law in many jurisdictions makes it an offense to destroy material for purpose of impairing its availability in a pending proceeding or one whose commencement can be foreseen. Falsifying evidence is also generally a criminal offense. Paragraph (a) applies to evidentiary material generally, including computerized information. A lawyer may take temporary possession of physical evidence of client crimes for the purpose of conducting a limited examination that will not alter or destroy material characteristics of the evidence. In such a case, applicable law may require the lawyer to turn the evidence over to the police or other prosecuting authority, depending on the circumstances.

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

[4] Paragraph (f) permits a lawyer to advise employees of a client to refrain from giving information to another party, for the employees may identify their interests with those of the client. See also Rule 4.2.

Comparison of Proposed Comments with Model Comments under the 2002 ABA Model Rule:

The proposed Comments are identical to the Model Comments, except for the beginning of the final sentence of proposed Comment [2]. The model language reads "Applicable law may permit a lawyer to take...."

Other Commission Comments Regarding Proposed Changes in the Comments from the Current S.C. Comments:

There is no prior direct South Carolina law regarding the subject of the sentence added at the end of proposed Comment [2]. Other states have applied a variety of standards in considering the responsibility of lawyers who take possession of physical evidence of a crime. The guidance offered by this sentence reflects what may be described as the emerging majority view on the subject and is consistent with Restatement (Third) of the Law Governing Lawyers § 119 (2000).

Comparison of Proposed Comments with S.C. Bar Recommendation:

The S.C. Bar recommendation is identical to the Model Comments.

RULE 3.5: IMPARTIALITY AND DECORUM OF THE TRIBUNAL

A lawyer shall not:

(a) seek to influence a judge, juror, member of the jury venire or other official by means prohibited by law;

(b) communicate ex parte with such a person ~~except as permitted~~ during the proceeding unless authorized to do so by law or court order;

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

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

(2) the juror has made known to the lawyer a desire not to communicate; or

(3) the communication involves misrepresentation, coercion, duress or harassment; ~~or~~

~~(e)~~ (d) engage in conduct intended to disrupt a tribunal; or

~~(d)~~(e) participate in any judicial portrait fund or memorial except upon the following conditions:

(1) the soliciting entity shall be a law school or an established state, county or local bar organization or association which was not formed for the primary purpose of soliciting judicial portrait funds or memorials;

(2) except for an officer of the soliciting entity, no lawyer or judge other than the intended honoree shall be identified in any communication preparatory to the creation of, or during the solicitation for, the fund or memorial; and

(3) anonymity of donors shall be guaranteed, and any solicitation shall so state.

Comparison with 2002 ABA Model Rule:

In both sections (a) and (c) of proposed Rule 3.5, the words "member of the jury venire" are substituted for the term "prospective juror," which appears in the Model Rule. As stated in both the current and proposed Comment [1], this change is intended to avoid the possible interpretation that every adult technically could be classified a prospective juror.

Proposed section(e) does not appear in Model Rule 3.5. It is retained from current South Carolina Rule 3.5(d).

Other Commission Comments Regarding Proposed Changes from the Current S.C. Rules of Professional Conduct:

The revisions to sections (b) and (c) clarify that a lawyer's access to members of the jury venire is restricted not only before trial, but also during and after trial. Section (c) appears consistent with the S.C. Supreme Court's interpretation of current Rule 3.5 in cases involving lawyers who contacted witnesses after trial. See In re Smith, 527 S.E.2d 758 (S.C. 2000); In re Delgado, 306 S.E.2d 591 (S.C. 1989).

Comparison with S.C. Bar Recommendation:

The S.C. Bar recommendation uses the Model Rule term "prospective juror" instead of "member of the jury venire" in Rule 3.5(c).

Comment

[1] Many forms of improper influence upon a tribunal are proscribed by criminal law. Others are specified in the ABA Model Code of Judicial Conduct, with which an advocate should be familiar. A lawyer is required to avoid contributing to a violation of such provisions. The South Carolina version of paragraph (a) ~~refers to~~ differs from the Model Rule in its reference to a "member of the jury venire" rather than "prospective juror" ~~(as is found in the model rule)~~ since any person technically could be the latter.

[2] During a proceeding a lawyer may not communicate ex parte with persons serving in an official capacity in the proceedings such as judges, masters or jurors, unless authorized to do so by law or court order.

[3] A lawyer may on occasion want to communicate with a juror or member of the jury venire 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.

~~[2]~~ [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 rim against abuse by a judge but should avoid reciprocation; the judge's default is no justification for similar dereliction by an advocate. An advocate can present the cause, protect the record for subsequent review and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics.

[5] The duty to refrain from disruptive conduct applies to any proceeding of a tribunal, including a deposition. See Rule 1.0(n) and Rule 3.3, Comment [1].

Comparison of Proposed Comments with Model Comments under the 2002 ABA Model Rule:

The final sentence of proposed Comment [1] is not found in the Model Comment.

In proposed Comment [5], the cross-reference to Rule 1.0 has been changed to correspond with the proposed South Carolina version of that Rule. Also, the reference to Rule 3.3, Comment [1] does not appear in the Model Comment. The additional reference is appropriate given the discussion in that Comment of depositions as proceedings ancillary to a tribunal.

Other Commission Comments Regarding Proposed Changes in the Comments from the Current S.C. Comments:

The changes to the Comments provide further guidance, but do not differ substantively from existing law and practice.

Comparison of Proposed Comments with S.C. Bar Recommendation:

The S.C. Bar recommends a stylistic variation to the final sentence of proposed Comment [1].

The S.C. Bar recommendation omits the cross-reference in Comment [5] to Rule 3.3, Comment [1].

Otherwise, the proposed Comments are identical to the S.C. Bar recommendation.

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 ~~a reasonable person would expect to~~ the lawyer knows or reasonably should know will be disseminated by means of public communication ~~if the lawyer knows or reasonably should know that it~~ and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

(b) Notwithstanding paragraph (a), a lawyer may state:

(1) the claim, offense or defense involved and, except when prohibited by law, the identity of the persons involved;

(2) information contained in a public record;

(3) that an investigation of a matter is in progress;

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

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

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

(7) in a criminal case, in addition to subparagraphs (1) through (6):

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

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

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

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

(c) Notwithstanding paragraph (a), a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.

(d) No lawyer associated in a firm or government agency with a lawyer subject to paragraph (a) shall make a statement prohibited by paragraph (a).

Comparison with 2002 ABA Model Rule:

Proposed Rule 3.6 is identical to 2002 ABA Model Rule 3.6.

Other Commission Comments Regarding Proposed Changes from the Current S.C. Rules of Professional Conduct:

The changes are intended to be grammatical and stylistic only.

Comparison with S.C. Bar Recommendation:

Proposed Rule 3.6 is identical to the S.C. Bar recommendation.

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 m debate and deliberation over questions of public policy

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

[3] The Rule sets forth a basic general prohibition against a lawyer's making statements that the lawyer knows or should know will have a substantial likelihood of materially prejudicing an adjudicative proceeding. Recognizing that the public value of informed commentary is great and the likelihood of prejudice to a proceeding by the commentary of a lawyer who is not involved in the proceeding is small, the rule applies only to lawyers who are, or who have been involved in the investigation or litigation of a case, and their associates.

[4] Paragraph (b) identifies specific matters about which a lawyer's statements would not ordinarily be considered to present a substantial likelihood of material prejudice, and should not in any event be considered prohibited by the general prohibition of paragraph (a). Paragraph (b) is not intended to be an exhaustive listing of the subjects upon which a lawyer may make a statement, but statements on other matters may be subject to paragraph (a).

[5] There are, on the other hand, certain subjects 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; or

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

[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. Non jury hearings and arbitration proceedings may be even less affected. The Rule will still place limitations on prejudicial comments in these cases, but the likelihood of prejudice may be different depending on the type of proceeding.

[7] Finally, extrajudicial statements that might otherwise raise a question under this Rule may be permissible when they are made in response to statements made publicly by another party, another party's lawyer, or third persons, where a reasonable lawyer would believe a public response is required in order to avoid prejudice to the lawyer's client. When prejudicial statements have been publicly made by others, responsive statements may have the salutary effect of lessening any resulting adverse impact on the adjudicative proceeding. Such responsive statements should be limited to contain only such information as is necessary to mitigate undue prejudice created by the statements made by others.

[8] See Rule 3.8(f) for additional duties of prosecutors in connection with extrajudicial statements about criminal proceedings.

Comparison of Proposed Comments with Model Comments under the 2002 ABA Model Rule:

The proposed Comments are identical to the Model Comments.

Other Commission Comments Regarding Proposed Changes in the Comments from the Current S.C. Comments:

The only change is the addition of a reference to Rule 3.8 in new Comment [8].

Comparison of Proposed Comments with S.C. Bar Recommendation:

The proposed Comments are identical to the S.C. Bar recommendation.

RULE 3.7: LAWYER AS WITNESS

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

(1) the testimony relates to an uncontested issue;

(2) the testimony relates to the nature and value of legal services rendered in the case; or

(3) disqualification of the lawyer would work substantial hardship on the client.

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

Comparison with 2002 ABA Model Rule:

Proposed Rule 3.7 is identical to 2002 ABA Model Rule 3.7.

Other Commission Comments Regarding Proposed Changes from the Current S.C. Rules of Professional Conduct:

The only change is intended to be stylistic only.

Comparison with S.C. Bar Recommendation:

Proposed Rule 3.6 is identical to the S.C. Bar recommendation.

Comment

[1] Combining the roles of advocate and witness can prejudice the tribunal and the opposing party and can also involve a conflict of interest between the lawyer and client.

Advocate Witness Rule

[2] The tribunal has proper objection when the trier of fact may be confused or misled by a lawyer serving as both advocate and witness. The opposing party has proper objection where the combination of roles may prejudice that party's rights in the litigation. A witness is required to testify on the basis of personal knowledge, while an advocate is expected to explain and comment on evidence given by others. It may not be clear whether a statement by an advocate-witness should be taken as proof or as an analysis of the proof.

[3] To protect the tribunal, paragraph (a) prohibits a lawyer from simultaneously serving as advocate and necessary witness except in those circumstances specified in paragraphs (a)(1) through (a)(3). Paragraph (a)(1) recognizes that if the testimony will be uncontested, the ambiguities in the dual role are purely theoretical. Paragraph (a)(2) recognizes that where the testimony concerns the extent and value of legal services rendered in the action in which the testimony is offered, permitting the lawyers to testify avoids the need for a second trial with new counsel to resolve that issue. Moreover, in such a situation the judge has firsthand knowledge of the matter in issue; hence, there is less dependence on the adversary process to test the credibility of the testimony.

[4] Apart from these two exceptions, paragraph (a)(3) recognizes that a balancing is required between the interests of the client and those of the tribunal and the opposing party. Whether the tribunal is likely to be misled or the opposing party is likely to suffer prejudice depends on the nature of the case, the importance and probable tenor of the lawyer's testimony, and the probability that the lawyer's testimony will conflict with that of other witnesses. Even if there is risk of such prejudice, in determining whether the lawyer should be disqualified, due regard must be given to the effect of disqualification on the lawyer's client. It is relevant that one or both parties could reasonably foresee that the lawyer would probably be a witness. The ~~principle of imputed disqualification~~ conflict of interest

principles stated in ~~Rule~~ Rules 1.7, 1.9. and 1.10 ~~has~~ have no application to this aspect of the problem.

[5] Because the tribunal is not likely to be misled when a lawyer acts as advocate in a trial in which another lawyer in the lawyer's firm will testify as a necessary witness, paragraph (b) permits the lawyer to do so except in situations involving a conflict of interest.

Conflict of Interest

~~[5]~~ [6] ~~Whether the combination of roles involves an improper~~ In determining if it is permissible to act as advocate in a trial in which the lawyer will be a necessary witness, the lawyer must also consider that the dual role may give rise to a conflict of interest ~~with respect to the client is determined by Rule~~ that will require compliance with Rules 1.7 or 1.9. For example, if there is likely to be substantial conflict between the testimony of the client and that of the lawyer ~~or member of the lawyer's firm~~, the representation ~~is improper~~ involves a conflict of interest that requires compliance with Rule 1.7. This would be true even though the lawyer might not be prohibited by paragraph (a) from simultaneously serving as advocate and witness because the lawyer's disqualification would work a substantial hardship on the client. Similarly, a lawyer who might be permitted to simultaneously serve as an advocate and a witness by paragraph (a)(3) might be precluded from doing so by Rule 1.9. The problem can arise whether the lawyer is called as a witness on behalf of the client or is called by the opposing party. Determining whether or not such a conflict exists is primarily the responsibility of the lawyer involved. If there is a conflict of interest, the lawyer must secure the client's informed consent, confirmed in writing. In some cases the lawyer will be precluded from seeking the client's consent. See ~~Comment to~~ Rule 1.7. ~~If a lawyer who is a member of a firm may not act as both advocate and witness by reason of conflict of interest, Rule 1.10 disqualifies the firm also.~~ See Rule 1.0(b) for the definition of "confirmed in writing" and Rule 1.0(f) for the definition of "informed consent."

[7] Paragraph (b) provides that a lawyer is not disqualified from serving as an advocate because a lawyer with whom the lawyer is associated in a firm is precluded from doing so by paragraph (a). If, however, the testifying lawyer would also be disqualified by Rule 1.7 or Rule 1.9 from representing the client in the matter, other lawyers in the firm will be precluded from representing the client by Rule 1.10 unless the client gives informed consent under the conditions stated in Rule 1.7.

Comparison of Proposed Comments with Model Comments under the 2002 ABA Model Rule:

The proposed Comments are identical to the Model Comments, with the exception of a cross-reference in proposed Comment [6] to Rule 1.0, which has been changed to conform to the proposed South Carolina version of that Rule.

Other Commission Comments Regarding Proposed Changes in the Comments from the Current S.C. Comments:

Proposed Comment [5] offers an explanation of the policy underlying Rule 3.7. Coupled with the revisions in proposed Comment [6], these Comments provide a clearer discussion of the additional concerns that arise when the testimony of the lawyer would conflict with the interests of a client or former client.

Proposed Comment [7] makes clear that, although a disqualification under Rule 3.7 (a) is not generally imputed to others in the law firm, the other members of the law firm of the witness may be imputedly disqualified when a conflict also exists. This Comment is intended to clarify, not change, existing law.

Comparison of Proposed Comments with S.C. Bar Recommendation:

The proposed Comments are identical to the S.C. Bar recommendations, with the exception of the cross-reference to Rule 1.0 in Comment [6].

RULE 3.8: SPECIAL RESPONSIBILITIES OF A PROSECUTOR

The prosecutor in a criminal case shall:

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

(b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;

(c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;

(d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged

mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility be a protective order of the tribunal; ~~and~~

~~(e) exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6.~~

~~(f)~~(e) not 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:

(1) the information sought is not protected from disclosure by any applicable privilege;

(2) the evidence sought is ~~relevant~~ essential to the successful completion of an ongoing investigation or prosecution; and

(3) there is no other ~~reasonable~~ feasible alternative to obtain the information~~.~~;

(f) except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule.

Comparison with 2002 ABA Model Rule:

Proposed Rule 3.8 is identical to 2002 ABA Model Rule 3.8.

Other Commission Comments Regarding Proposed Changes from the Current S.C. Rules of Professional Conduct:

The changes in proposed section (e) [current section (f)], were previously made by the ABA, but not adopted in South Carolina. The proposed language would appear to limit more the circumstances in which a lawyer could be subpoenaed to testify about a past or present client.

Language that currently appears in section (e) is moved to the final clause of proposed section (f). The first clause of section (f) previously was adopted by the ABA, but was not been adopted in South Carolina.

Comparison with S.C. Bar Recommendation:

Proposed Rule 3.8 is identical to the S.C. Bar recommendation.

Comment

[1] A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence. Precisely how far the prosecutor is required to go in this direction is a matter of debate and varies in different jurisdictions. Many jurisdictions have adopted the ABA Standards of Criminal Justice Relating to the Prosecution Function, which in turn are the product of prolonged and careful deliberation by lawyers experienced in both criminal prosecution and defense. ~~See also Rule 3.3(d), governing *ex parte* proceedings, among which grand jury proceedings are included.~~ Applicable law may require other measures by the prosecutor and knowing disregard of those obligations or a systematic abuse of prosecutorial discretion could constitute a violation of Rule 8.4.

[2] In some jurisdictions, a defendant may waive a preliminary hearing and thereby lose a valuable opportunity to challenge probable cause. Accordingly, prosecutors should not seek to obtain waivers of preliminary hearings or other important pretrial rights from unrepresented accused persons. Paragraph (c) does not apply, however, to an accused appearing *pro se* with the approval of the tribunal. Nor does it forbid the lawful questioning of a an uncharged suspect who has knowingly waived the rights to counsel and silence.

[3] The exception in paragraph (d) recognizes that a prosecutor may seek an appropriate protective order from the tribunal if disclosure of information to the defense could result insubstantial harm to an individual or to the public interest.

[4] Paragraph ~~(f)~~(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. The prosecutor is required to obtain court approval for the issuance of the subpoena after an opportunity for an adversarial hearing is afforded in order to assure an independent

determination that the applicable standards are met.

[5] Paragraph (f) supplements Rule 3.6, which prohibits extrajudicial statements that have a substantial likelihood of prejudicing an adjudicatory proceeding. In the context of a criminal prosecution, a prosecutor's extrajudicial statement can create the additional problem of increasing public condemnation of the accused. Although the announcement of an indictment, for example, will necessarily have severe consequences for the accused, a prosecutor can, and should, avoid comments which have no legitimate law enforcement purpose and have a substantial likelihood of increasing public opprobrium of the accused. Nothing in this Comment is intended to restrict the statements which a prosecutor may make which comply with Rule 3.6(b) or 3.6(c).

[6] Like other lawyers, prosecutors are subject to Rules 5.1 and 5.3, which relate to responsibilities regarding lawyers and nonlawyers who work for or are associated with the lawyer's office. Paragraph (f) reminds the prosecutor of the importance of these obligations in connection with the unique dangers of improper extrajudicial statements in a criminal case. In addition, paragraph (f) requires a prosecutor to exercise reasonable care to prevent persons assisting or associated with the prosecutor from making improper extrajudicial statements, even when such persons are not under the direct supervision of the prosecutor. Ordinarily, the reasonable care standard will be satisfied if the prosecutor issues the appropriate cautions to law-enforcement personnel and other relevant individuals.

Comparison of Proposed Comments with Model Comments under the 2002 ABA Model Rule:

The final sentence of proposed Comment [4] does not appear in the Model Comments and is retained from Comment [4] of current South Carolina Rule 3.8.

Other Commission Comments Regarding Proposed Changes in the Comments from the Current S.C. Comments:

The changes in the proposed Comments reflect changes in the proposed Rule discussed above.

The first sentence of proposed Comment [6] is consistent with the interpretation of current rules by the S.C. Supreme Court in In re Myers, 584 S.E.2d 357(S.C. 2003).

Comparison of Proposed Comments with S.C. Bar Recommendation:

The S.C. Bar recommendation does not include the final sentence of proposed Comment [4].

RULE 3.9: ADVOCATE IN NONADJUDICATIVE PROCEEDINGS

A lawyer representing a client before a legislative body or administrative ~~tribunal~~ agency in a nonadjudicative proceeding shall disclose that the appearance is in a representative capacity and shall conform to the provisions of Rules 3.3(a) through (c), 3.4(a) through (c), and 3.5.

Comparison with 2002 ABA Model Rule:

Proposed Rule 3.9 is identical to 2002 ABA Model Rule 3.9.

Other Commission Comments Regarding Proposed Changes from the Current S.C. Rules of Professional Conduct:

The changes are intended to be stylistic only.

Comparison with S.C. Bar Recommendation:

Proposed Rule 3.9 is identical to the S.C. Bar recommendation.

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 to the matters under consideration. The decision-making body, like a court, should be able to rely on the integrity of the submissions made to it. A lawyer appearing before such a body ~~should~~ must deal with ~~the tribunal~~ it honestly and in conformity with applicable rules of procedure. See Rules 3.3(a) through (c), 3.4 (a) through (c) and 3.5.

[2] Lawyers have no exclusive right to appear before nonadjudicative bodies, as they do before a court. The requirements of this Rule therefore may subject lawyers to regulations inapplicable to advocates who are not lawyers. However, legislatures and

administrative agencies have a right to expect lawyers to deal with them as they deal with courts.

[3] This Rule only applies when a lawyer represents a client in connection with an official hearing or meeting of a governmental agency or a legislative body to which the lawyer or the lawyer's client is presenting evidence or argument. It does not apply to representation of a client in a negotiation or other bilateral transaction with a governmental agency~~; representation~~ 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 ~~a transaction~~ matters is governed by Rules 4.1 through 4.4.

Comparison of Proposed Comments with Model Comments under the 2002 ABA Model Rule:

The proposed Comments are identical to the Model Comments.

Other Commission Comments Regarding Proposed Changes in the Comments from the Current S.C. Comments:

The changes in proposed Comment [3] are intended to clarify situations in which this Rule applies and is not intended to reflect any substantive change.

Comparison of Proposed Comments with S.C. Bar Recommendation:

The proposed Comments are identical to the S.C. Bar recommendation.

RULE 4.1: TRUTHFULNESS 1N STATEMENTS TO OTHERS

In the course of representing a client a lawyer shall not knowingly:

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

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

Comparison with 2002 ABA Model Rule:

Proposed Rule 4.1 is identical to 2002 ABA Model Rule 4.1.

Other Commission Comments Regarding Proposed Changes from the Current S.C. Rules of Professional Conduct:

No changes are proposed.

Comparison with S.C. Bar Recommendation:

Proposed Rule 4.1 is identical to the S.C. Bar recommendation.

Comment

Misrepresentation

[1] A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts. A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false. Misrepresentations can also occur by ~~failure to act~~ 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.

[2] A government lawyer involved with or supervising a law enforcement investigation or operation does not violate this rule as a result of the use, by law enforcement personnel or others, of false identifications, backgrounds and other information for purposes of the investigation or operation.

Statements of Fact

~~[2]~~ [3] This Rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the

circumstances. Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are ordinarily in this category, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud. Lawyers should be mindful of their obligations under applicable law to avoid criminal and tortious misrepresentation.

Crime or Fraud by Client

~~[3]~~ [4] Under Rule 1.2(d), a lawyer is prohibited from counseling or assisting a client in conduct that the lawyer knows is criminal or fraudulent. Paragraph (b) ~~recognizes that~~ states a specific application of the principle set forth in Rule 1.2(d) and addresses the situation where a client's crime or fraud takes the form of a lie or misrepresentation. Ordinarily, a lawyer can avoid assisting a client's crime or fraud by withdrawing from the representation. Sometimes it may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm an opinion, document, affirmation or the like. In extreme cases, substantive law may require a lawyer to disclose ~~certain~~ information relating to the representation to avoid being deemed to have assisted the client's crime or fraud. ~~The requirement of~~ If the lawyer can avoid assisting a client's crime or fraud only by disclosing this information, then under paragraph (b) the lawyer is required to do so, unless the disclosure ~~created in this paragraph is, however, subject to the obligations created~~ is prohibited by Rule 1.6.

Comparison of Proposed Comments with Model Comments under the 2002 ABA Model Rule:

Proposed Comments [1], [3], and [4] are identical to the Model Comments.

Proposed Comment [2] does not appear in the Model Comments, but was recommended by the S.C. Bar.

Other Commission Comments Regarding Proposed Changes in the Comments from the Current S.C. Comments:

Proposed Comment [4] specifically approves the "noisy withdrawal" in which a lawyer, for example, publicly disavows an earlier opinion letter, thus alerting others indirectly to the possibility that the client has committed a fraud or crime.

Proposed Comment [4] amplifies upon current advice in making clear that a lawyer may have to reveal information relating to the representation in order to avoid having assisted in a crime or fraud by the client, but only in extreme cases and only if disclosure is allowed under Rule 1.6.

Comparison of Proposed Comments with S.C. Bar Recommendation:

The Proposed Comments are identical to the recommendation of the S.C. Bar.

RULE 4.2: COMMUNICATION WITH PERSON REPRESENTED BY COUNSEL

In representing a client, a lawyer shall not communicate about the subject of the representation with a ~~party~~ 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 ~~to do so~~ or a court order.

Comparison with 2002 ABA Model Rule:

Proposed Rule 4.2 is identical to 2002 ABA Model Rule 4.2.

Other Commission Comments Regarding Proposed Changes from the Current S.C. Rules of Professional Conduct:

Current South Carolina Rule 4.2 does not reflect the change made earlier by the ABA from "party" to "person." The Commission recommends that this change now be made, applying Rule 4.2 to contact with anyone represented by a lawyer, including, for example, witnesses, and not merely to contact with the parties in a pending action. The Comments to current South Carolina Rule 4.2 indicate that the current Rule, despite its more limited language, already is to be applied in this broader manner.

The second proposed change is stylistic and the final change clarifies that a lawyer may contact a represented party when authorized to do so by a court order.

Comparison with S.C. Bar Recommendation:

Proposed Rule 4.2 is identical to the S.C. Bar recommendation.

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.

~~[3]~~ [2] This Rule ~~also covers~~ applies to communications with any person~~, whether or not a party to a formal proceeding,~~ who is represented by counsel concerning the matter ~~in question~~ to which the communication relates.

[3] The Rule applies even though to 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.

~~[1]~~[4] This Rule does not prohibit communication with a ~~party~~ represented person, or an employee or agent of ~~a party~~ 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. ~~Also, parties~~ 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 without consent from or notice to the original lawyer. 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 including giving a second professional opinion without consent from or notice to the original lawyer. ~~Communications authorized by law include, for example, the right of a party to a controversy with a government agency to speak with government officials about the matter~~.

[5] Communications authorized by law may include communications by a lawyer on behalf of a client who is exercising in constitutional or other legal right to communicate to 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.

~~[2]~~[7] In the case of ~~an~~ a represented organization, this Rule prohibits communications ~~by a lawyer for one party concerning the matter in representation~~ with ~~persons having a managerial responsibility on behalf~~ a constituent of the organization ~~and with any other person~~ 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 ~~that~~ the matter may be imputed to the organization for purposes of civil or criminal ~~liability or whose statement may constitute an admission on the part of the organization.~~ Consent of the organization's lawyer is not required, for communication with a former constituent. If ~~an agent or employee~~ a constituent of the organization is represented in the matter by his or her own counsel, the consent by that counsel to a communication will be sufficient for purposes of this Rule. Compare Rule 3.4(f). In communicating with a current or former constituent of an organization, a lawyer must not use methods of obtaining evidence that violate the legal rights of the organization See Rule 4.4, Comment [2].

[8] The prohibition on communications with a represented person only applies in circumstances where the lawyer knows that the person is in fact represented in the matter to be discussed. This means that the lawyer has actual knowledge of the fact of the representation; but such actual knowledge may be inferred from the circumstances. See Rule 1.0(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 of Proposed Comments with Model Comments under the 2002 ABA Model Rule:

Except for proposed Comment [4], the proposed Comments are identical to the Model Comments. In third sentence of proposed Comment [4], the language "without consent from or notice to the original lawyer" does not appear in the Model Comment. Also, the final phrase of Comment [4] does not appear in the Model Comment.

Other Commission Comments Regarding Proposed Changes in the Comments from the Current S.C. Comments:

Portions of proposed Comments [5] and [8] and all of proposed Comment [9] were previously approved by the ABA, but not adopted in South Carolina.

Proposed comments [1], [3], and [6] are new Model Comments.

Proposed Comments [2], [4], and [7] are revised versions of current South Carolina comments. These proposed Comments include revisions made in 2002 by the ABA, as well as revisions previously made by the ABA, but not adopted in South Carolina.

Proposed Comment [3] makes clear the current interpretation that Rule 4.2 applies to contacts, regardless of which person initiates the communication.

The new third sentence of proposed Comment [4] exempts from the Rule any communication by a represented person with a lawyer not otherwise representing a client in the matter. This interpretation is new, but appears consistent with the current Rule. The reference in Comment [4] to second opinions is consistent with S.C. Ethics Adv. Op. # 97-07.

Proposed Comment [5] applies the Rule to government lawyers contacting an accused person.

Proposed Comment [7] broadens the group of current employees of a corporation who may be contacted without violating Rule 4.2 and clarifies that contact with former employees is permitted without consent of the entity's lawyer. Both areas have been the subject of intense debate in recent years.
Proposed Comments [8] and [9] address the duty of a lawyer who does not know whether a person is represented. South Carolina has not adopted earlier versions of these Comments.

Comparison of Proposed Comments with S.C. Bar Recommendation:

The S.C. Bar recommends adding the explanatory parenthetical "(officer, director, employee or agent)" after the word "constituent" in the first sentence of Comment [7].

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.

Comparison with 2002 ABA Model Rule:

Proposed Rule 4.3 is identical to 2002 ABA Model Rule 4.3.

Other Commission Comments Regarding Proposed Changes from the Current S.C. Rules of Professional Conduct:

The Comment to current South Carolina Rule 4.3 appears to establish a broad ethical bar against advising an unrepresented person, prohibiting in all situations any advice other than the advice to obtain counsel. The new final sentence of proposed Rule 4.3 creates an exception to the ethical prohibition, barring advice only if a conflict of interest may exist. When there is no conflict, the proposed Rule leaves room for the lawyer ethically to give legal advice to the unrepresented person. The proposed Rule, however, does not address whether, by giving advice in situations when there is no conflict, the lawyer may be creating an attorney-client relationship with the previously unrepresented person.

Comparison with S.C. Bar Recommendation:

Proposed Rule 4.3 is identical to the S.C. Bar recommendation.

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. ~~During the course of a lawyer's representation of a client, the lawyer should not give advice to an unrepresented person other than the advice to obtain counsel.~~ 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 to which the persons 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 of Proposed Comments with Model Comments under the 2002 ABA Model Rule:

The proposed Comments are identical to the Model Comments.

Other Commission Comments Regarding Proposed Changes in the Comments from the Current S.C. Comments:

The deletion in proposed Comment [1] and the new language of both proposed Comments implements the change in the Rule discussed above.

Comparison of Proposed Comments with S.C. Bar Recommendation:

The proposed Comments are identical to the S.C. Bar recommendation.

RULE 4.4: RESPECT FOR RIGHTS OF THIRD PERSONS

(a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

(b) A lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender.

Comparison with 2002 ABA Model Rule:

The proposed Rule 4.4 is identical to the Model Rule.

Other Commission Comments Regarding Proposed Changes from the Current S.C. Rules of Professional Conduct:

South Carolina has previously declined to follow the Model Rule in its inclusion of the word "substantial" in Rule 4.4(a). The South Carolina Comment to Rule 4.4 explains that a lawyer is undesirably "chilled" by having to show that a tactic has a "substantial" purpose.

The Commission debated whether to add the language "and handle the document in accordance with the sender's instructions, unless otherwise instructed by court order" at the end of Rule 4.4(b). The language has not been included, opting instead for the Model Rule version. The Model Rule, which does not include the additional language of proposed Rule 4.4(b), does not specify how the document should be handled and appears to allow the recipient to read and retain the document, essentially placing the burden on the sender to obtain a court order if the sender wishes to limit the recipient's use of the document.

Comparison with S.C. Bar Recommendation:

The proposed Rule is identical to the S.C. Bar recommendation.

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] The South Carolina version deletes "substantial" which is the qualifier before "purpose" in the model rule. The chilling effect of having to demonstrate a substantial purpose outweighs the protections to be afforded to third persons. A lawyer should not have to determine the relative merits of trial tactics against embarrassment to a third person. As to cross examining an adverse witness, the lawyer's conduct is limited by the rules of evidence and the control which the trial judge exercises over the conduct of the trial. In problems of delaying or burdening witnesses, the trial judge can also exercise control and the witness in certain circumstances can obtain a protective order.~~

[2] Paragraph (b) recognizes that lawyers sometimes receive documents that were mistakenly sent or produced by opposing parties or their lawyers. If a lawyer knows or reasonably should know that a such a document was sent inadvertently, then this Rule requires the lawyer to promptly notify the sender in order to permit that person to take protective measures. Whether the lawyer is required to take additional steps, such as returning the original document, is a matter of law beyond the scope of these Rules, as is the question of whether the privileged status of a document has been waived. Similarly, this Rule does not address the legal duties of a lawyer who receives a document that the lawyer knows or reasonably should know may have been wrongfully obtained by the sending person. For purposes of this Rule, "document" includes e-mail or other electronic modes of transmission subject to being read or put into readable form.

[3] Some lawyers may choose to return a document unread, for example, when the lawyer learns before receiving the document that it was inadvertently sent to the wrong address. Where a lawyer is not required by applicable law to do so, the decision to voluntarily return such a document is a matter of professional judgment ordinarily reserved to the lawyer. See Rules 1.2 and 1.4.

Comparison of Proposed Comments with Model Comments under the 2002 ABA Model Rule:

The proposed Comments are identical to Model Comments.

Other Commission Comments Regarding Proposed Changes in the Comments from the Current S.C. Comments:

The comments do not appear to make changes beyond those discussed in connection with the Rule itself.

Comparison of Proposed Comments with S.C. Bar Recommendation:

The proposed Comments are identical to S.C. Bar recommendation.

RULE 4.5: THREATENING CRIMINAL PROSECUTION

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

Comparison with 2002 ABA Model Rule:

There is no equivalent rule in the 2002 ABA Model Rules.

Other Commission Comments Regarding Proposed Changes from the Current S.C. Rules of Professional Conduct:

The words "or professional disciplinary" are added to the language of current South Carolina Rule 4.5. The Commission favors retaining Rule 4.5 in order to avoid misuse of the criminal process solely for advantage in a civil matter. Such misuse could result in lessened confidence in the criminal justice system. The Commission believes that similar policy justifications exist for preventing misuse of any professional disciplinary process.

Comparison with S.C. Bar Recommendation:

The S.C. Bar recommendation does not include the words "or professional disciplinary."

Comment

This Rule is not included in the Model Rules of Professional Conduct. The language of this Rule is ~~taken from~~ based upon DR 7-105 of the Code of Professional Responsibility.

Comparison of Proposed Comment with Model Comment under the 2002 ABA Model Rule:

There is no equivalent Model Rule or Comment.

Other Commission Comments Regarding Proposed Changes in the Comments from the Current S.C. Comments:

The first change proposed reflects that the proposed Rule, as modified, is similar to, but no longer identical to DR 7-105. The addition of a specific reference to the Code of Professional Responsibility is added because many modern users of the Rules may no longer be familiar with the source of old Disciplinary Rules.

Comparison of Proposed Comment with S.C. Bar Recommendation:

The S.C. Bar recommendation retains the original language, without the modifications proposed by the Commission.

LAW FIRMS AND ASSOCIATIONS

RULE 5.1: RESPONSIBILITIES OF ~~A PARTNER OR~~ PARTNERS, MANAGERS, AND SUPERVISORY ~~LAWYER~~ LAWYERS

(a) A partner in a law firm, and a lawyer who individually or together with other lawyers possess comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm confirm to the Rules of Professional Conduct.

(b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer confirms to the Rules of Professional Conduct.

(c) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:

(1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Comparison with 2002 ABA Model Rule:

Proposed Rule 5.1 is identical to 2002 ABA Model Rule 5.1.

Other Commission Comments Regarding Proposed Changes from the Current S.C. Rules of Professional Conduct:

The changes proposed in Rule 5.1 address the likelihood that a law firm may operate in a legal form other than a partnership, applying the duties of Rule 5.1 to any lawyer who has responsibilities within the firm comparable to those of a partner.

The South Carolina Supreme Court's application of Rule 5.1 to the conduct of lawyers in government agencies, as well as those in private firms, see In re Myers, 584 S.E.2d 357(S.C. 2003), is preserved, given the definition of a law firm under proposed Rule 1.0 as including government lawyers.

Comparison with S.C. Bar Recommendation:

Proposed Rule 5.1 is identical to the S.C. Bar recommendation.

Comment

[1] ~~Paragraphs~~ Paragraph (a) ~~and (b) refer~~ applies to lawyers who have ~~supervisory~~ managerial authority over the professional work of a firm ~~or legal department of a government agency~~. See Rule 1.0(d). This includes members of a partnership ~~and~~, the shareholders in a law firm organized as a professional corporation, and members of other associations authorized to practice law; lawyers have ~~supervisory~~ comparable managerial authority in ~~the~~ a legal services organization or a law department of an enterprise or government agency; and lawyers who have intermediate managerial responsibilities in a firm. Paragraph (b) applies to lawyers who have supervisory authority over the work of other lawyers in a firm.

[2] Paragraph (a) requires lawyers with managerial authority within a firm to make reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance that all lawyers in the firm will confirm to the Rules of

Professional Conduct. Such policies and procedures include those designed to detect and resolve conflicts of interest, identify dates by which actions must be taken in pending matters, account for client funds and property and ensure that inexperienced lawyers are properly supervised.

~~[2]~~ [3] ~~The~~ Other measures that may be required to fulfill the responsibility prescribed in ~~paragraphs~~ paragraph (a) ~~and (b)~~ can depend on the firm's structure and the nature of its practice. In a small firm of experienced lawyers, informal supervision and ~~occasional admonition~~ periodic review of compliance with the required systems ordinarily ~~might be sufficient~~ will suffice. In a large firm, or in practice situations in which ~~intensely~~ difficult ethical problems frequently arise, more elaborate ~~procedures~~ measures may be necessary. Some firms, for example, have a procedure whereby junior lawyers can make confidential referral of ethical problems directly to a designated senior partner or special committee. See Rule 5.2. Firms, whether large or small, may also rely on continuing legal education in professional ethics. In any event, the ethical atmosphere of a firm can influence the conduct of all its members and ~~a lawyer having authority over the work of another~~ the partners may not assume that ~~the subordinate lawyer~~ all lawyers associated with the firm will inevitably conform to the Rules.

~~[3]~~ [4] Paragraph (c)(~~1~~) expresses a general principle of personal responsibility for acts of another. See also Rule 8.4(a).

~~[4]~~ [5] Paragraph (c)(2) defines the duty of a partner or other lawyer having comparable managerial authority in a law firm, as well as a lawyer who has direct supervisory authority over performance of specific legal work by another lawyer. Whether a lawyer has supervisory authority in particular circumstances is a question of fact. Partners ~~of a private firm~~ and lawyers with comparable authority have at least indirect responsibility for all work being done by the firm, while a partner or manager in charge of a particular matter ordinarily also has ~~direct authority over~~ supervisory responsibility for the work of other firm lawyers engaged in the matter. Appropriate remedial action by a partner or managing lawyer would depend on the immediacy of ~~the partner's~~ that lawyer's involvement and the seriousness of the misconduct. ~~The~~ 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.

~~[5]~~ [6] Professional misconduct by a lawyer under supervision could reveal a violation of paragraph (b) on the part of the supervisory lawyer even though it does not entail a violation of paragraph (c) because there was no direction, ratification or knowledge of the violation.

~~[6]~~ [7] Apart from this Rule and Rule 8.4(a), a lawyer does not have disciplinary liability for the conduct of a partner, associate or subordinate. Whether a lawyer may be liable civilly or criminally for another lawyer's conduct is a question of law beyond the scope of these Rules.

[8] The duties imposed by this Rule on managing and supervising lawyers do not alter the personal duty of each lawyer in a firm to abide by the Rules of Professional Conduct. See Rule 5.2.(a).

Comparison of Proposed Comments with Model Comments under the 2002 ABA Model Rule:

The proposed Comments are identical to the Model Comments, with the exception of the cross-reference in Comment [1] to Rule 1.0, which has been modified to conform to the proposed South Carolina version of that Rule.

Other Commission Comments Regarding Proposed Changes in the Comments from the Current S.C. Comments:

The proposed Comments amplify and clarify the advice contained in current Comments.

Comparison of Proposed Comments with S.C. Bar Recommendation:

The proposed Comments are identical to the S.C. Bar recommendation.

RULE 5.2 RESPONSIBILITIES OF A SUBORDINATE LAWYER

(a) A lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person.

(b) A subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty.

Comparison with 2002 ABA Model Rule:

Proposed Rule 5.2 is identical to 2002 ABA Model Rule 5.2.

Other Commission Comments Regarding Proposed Changes from the Current S.C. Rules of Professional Conduct:

No changes are proposed.

Comparison with S.C. Bar Recommendation:

Proposed Rule 5.2 is identical to the S.C. Bar recommendation.

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 judgement. Otherwise a consistent course of action or position could not be taken. If the question can reasonably be answered only one way, the duty of both lawyers is clear and they are equally responsible for fulfilling it. However, if the question is reasonably arguable, someone has to decide upon the course of action. That authority ordinarily reposes in the supervisor, and a subordinate may be guided accordingly. For example, if a question arises whether the interests of two clients conflicts under Rule 1.7, the supervisor's reasonable resolution of the question should protect the subordinate professionally if the resolution is subsequently challenged.

Comparison of Proposed Comments with Model Comments under the 2002 ABA Model Rule:

The proposed Comments are identical to the Model Comments.

Other Commission Comments Regarding Proposed Changes in the Comments from the Current S.C. Comment:

No changes are proposed.

Comparison of Proposed Comments with S.C. Bar Recommendation:

The proposed Comments are identical to the S.C. Bar recommendation, except that the S.C. Bar would insert the word "the" before the word "conduct" in the first sentence of Comment [1].

RULE 5.3: RESPONSIBILITIES REGARDING NONLAWYER ASSISTANTS

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

(a) a partner, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;

(b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and

(c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Comparison with 2002 ABA Model Rule:

Proposed Rule 5.3 is identical to 2002 ABA Model Rule 5.3.

Other Commission Comments Regarding Proposed Changes from the Current S.C. Rules of Professional Conduct:

The changes proposed in Rule 5.3, mirror those proposed in Rule 5.1 and address the likelihood that a law firm may operate in a legal form other than a partnership, applying the duties of Rule 5.1 to any lawyer who has responsibilities within the firm comparable to those of a partner.

Comparison with S.C. Bar Recommendation:

Proposed Rule 5.3 is identical to the S.C. Bar recommendation.

Comment

[1] Lawyers generally employ assistants in their practice, including secretaries, investigators, law student interns, and paraprofessionals. Such assistants, whether employees or independent contractors, act for the lawyer in rendition of the lawyer's professional services. A lawyer ~~should~~ must give such assistants appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to representation of the client, and should be responsible for their work product. The measures employed in supervising nonlawyers should take account of the fact that they do not have legal training and are not subject to professional discipline.

[2] Paragraph (a) requires lawyers with managerial authority within a law firm to make reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance that nonlawyers in the firm will act in a way compatible with the Rules of Professional Conduct. See Comment [1] to Rule 5.1. Paragraph (b) applies to lawyers who have supervisory authority over the work of a nonlawyer. Paragraph (c) specifies the circumstances in which a lawyer is responsible for conduct of a nonlawyer that would be a violation of the Rules of Professional conduct if engaged in by a lawyer.

Comparison of Proposed Comments with Model Comments under the 2002 ABA Model Rule:

The proposed Comments are identical to the Model Comments.

Other Commission Comments Regarding Proposed Changes in the Comments from the Current S.C. Comments:

The proposed Comments appear consistent with current expectations.

Comparison of Proposed Comments with S.C. Bar Recommendation:

The proposed Comments are identical to the S.C. Bar recommendation.

RULE 5.4 PROFESSIONAL INDEPENDENCE OF A LAWYER

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

(1) an agreement by a lawyer with the lawyer's firm, partner, or associate may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;

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

(3) a lawyer who purchases the practice of a deceased, disabled, or disappeared lawyer may, pursuant to the provision of Rule 1.17, pay to the estate or other representative of that lawyer the agreed-upon purchase price;

~~(3)~~(4) a lawyer or a law firm may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement;

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

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

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

profit, if:

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

(2) a nonlawyer is a corporate director or officer thereof or occupies a position of similar responsibility in any form of association other than a corporation; or

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

Comparison with 2002 ABA Model Rule:

Subsection (a)(2) of proposed Rule 5.4 is retained from the current South Carolina Rule and does not appear in 2002 ABA Model Rule 5.4. Proposed subsections (a)(3) and (a)(4) appear as subsections (a)(2) and (a)(3) in Model Rule 5.4. Subsection (a)(4) of the 2002 ABA Model Rule is not included in the proposed Rule. The omitted portion of the Model Rule reads as follows: "(a)(4) a lawyer may share court-awarded legal fees with a non-profit organization that employed, retained or recommended employment of the lawyer in the matter."

Other Commission Comments Regarding Proposed Changes from the Current S.C. Rules of Professional Conduct:

Proposed subsection (a)(3) was approved by the ABA in 1990, but has not been previously adopted in South Carolina.

From time to time, a lawyer may undertake a pro bono representation of a client at the request of a non-profit group. If that representation results in court-awarded legal fees, Model Rule 5.4(a)(4), which is omitted from the proposed Rule, would provide clear ethical permission for the lawyer to share the fee award with the non-profit group. See ABA Op. # 93-374 (approving such a sharing arrangement). There is not yet any South Carolina authority on the subject. The Commission declines to recommend the addition of the Model Rule language.

The change in subsection (d)(2) simply reflects the possibility of a managerial position in a law firm that is not a corporation.

Comparison with S.C. Bar Recommendation:

The S.C. Bar recommends including the language of Model Rule 5.4(a)(4) as section (a)(5) of the South Carolina Rule.

The S.C. Bar recommends substituting the words "a deceased" for the words "the estate of" in section (d)(1).

Comment

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

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

Comparison of Proposed Comments with Model Comments under the 2002 ABA Model Rule:

The proposed Comments are identical to the Model Comments.

Other Commission Comments Regarding Proposed Changes in the Comments from the Current S.C. Comments:

The proposed Comments are consistent with current standards.

Comparison of Proposed Comments with S.C. Bar Recommendation:

The proposed Comments are identical to the S.C. Bar recommendation.

RULE 5.5: UNAUTHORIZED PRACTICE OF LAW; MULTIJURISDICTIONAL PRACTICE OF LAW

(a) A lawyer shall not: ~~(a)~~ practice law in a jurisdiction in violation of ~~where doing so violates~~ the regulation of the legal profession in that jurisdiction; or ~~(b)~~ assist ~~a person who is not a member of the bar~~ another in ~~the performance of activity that constitutes the unauthorized practice of law~~ doing so.

(b) A lawyer who is not admitted to practice in this jurisdiction shall not:

(1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or

(2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

(c) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that:

(1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;

(2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized;

(3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's representation of an existing client in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission; or

(4) are not within paragraph (c)(2) or (c)(3) and arise out of or are reasonably related to the lawyer's representation of an existing client in a jurisdiction in which the lawyer is admitted to practice.

(d) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services in this jurisdiction that:

(1) are provided to the lawyer's employer or its organizational affiliates and are not services for which the forum requires pro hac vice admission; or

(2) are services that the lawyer is authorized to provide by federal law or other law of this jurisdiction.

Comparison with 2002 ABA Model Rule:

Paragraphs (a), (b), and (d) of proposed Rule 5.5 is identical to the corresponding paragraphs of 2002 ABA Model Rule 5.5. Paragraphs (c)(3) and (c)(4) of the proposed rule have been modified by substituting in each the words "representation of an existing client" in place of the word "practice," which appears in the Model Rule. This change would permit a lawyer to appear temporarily in the state in connection with a transaction or business matter of an existing client. It is intended, however, to prevent an out-of-state lawyer from seeking new clients for representation in the state without becoming admitted in the state or complying with one of the other provisions of Rule 5.5(c).

Other Commission Comments Regarding Proposed Changes from the Current S.C. Rules of Professional Conduct:

Proposed Rule 5.5 substantially revises current Rule 5.5 with the addition of extensive regulations regarding multi-jurisdictional practice of law. The proposed Rule effectively prohibits a lawyer from establishing a continuous presence within the state unless the lawyer is admitted to the South Carolina Bar, except in the limited exceptions of paragraph (d), but does not require admission of a lawyer in many situations where the lawyer's presence in the state is truly temporary. This proposed Rule appears to be consistent with current practice and provides needed formal guidance on the subject. It also retains the requirement that a lawyer obtain pro hac vice admission in appropriate litigation situations and is intended to be consistent with S.C. App. Ct. R. 418 (Advertising and Solicitation by Unlicensed Lawyers) and S.C. App. Ct. R. 405 (Limited Certificate of Admission).

Comparison with S.C. Bar Recommendation:

The S.C. Bar recommended the model version of Rule 5.5.

Comment

[1] A lawyer may practice law only in a jurisdiction in which the lawyer is authorized to practice. A lawyer may be admitted to practice law in a jurisdiction on a regular basis or may be authorized by court rule or order or by law to practice for a limited purpose or on a restricted basis. Paragraph (a) applies to unauthorized practice of law by a lawyer, whether through the lawyer's direct action or by the lawyer assisting another person.

[~~1~~] [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. ~~Paragraph (b)~~ 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] ~~Likewise, it does not prohibit lawyers from providing~~ A lawyer may provide professional advice and instruction to nonlawyers whose employment requires knowledge of the law; for example, claims adjusters, employees of financial or commercial institutions, social workers, accountants and persons employed in government agencies. Lawyers also may assist independent nonlawyers, such as paraprofessionals, who are authorized by the law of a jurisdiction to provide particular law-related services. In addition, a lawyer may counsel nonlawyers who wish to proceed pro se.

[4] Other than as authorized by law or this Rule, a lawyer who is not admitted to practice generally in this jurisdiction violates paragraph (b) if the lawyer establishes an office or other systematic and continuous presence in this jurisdiction for the practice of law. Presence may be systematic and continuous even if the lawyer is not physically present here. Such a lawyer must not hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction. See also Rules 7.1(a) and 7.5(b).

[5] There are occasions in which a lawyer admitted to practice in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction under circumstances that do not create an unreasonable risk to the interests of their clients, the public or the courts. Paragraph (c) identifies four such circumstances. The fact that conduct is not so identified does not imply that the conduct is or is not authorized. With the exception of paragraphs (d)(1) and (d)(2), the Rule does not authorize a lawyer to establish an office or other systematic and continuous presence in this jurisdiction without being admitted to practice generally here.

[6] There is no single test to determine whether a lawyer's services are provided on a "temporary basis" in this jurisdiction, and may therefore be permissible under paragraph (c). Services may be "temporary" even though the lawyer provides services in this jurisdiction on a recurring basis, or for an extended period of time, as when the lawyer is representing a client in a single lengthy negotiation or litigation.

[7] Paragraphs (c) and (d) apply to lawyers who are admitted to practice law in any United States jurisdiction, which includes the District of Columbia and any state, territory or commonwealth of the United States. The word "admitted" in paragraph (c) contemplates that the lawyer is authorized to practice in the jurisdiction in which the lawyer is admitted and excludes a lawyer who while technically admitted is not authorized to practice, because, for example, the lawyer is on inactive status.

[8] Paragraph (c)(1) recognized that the interests of clients and the public are protected if a lawyer admitted only in another jurisdiction associates with a lawyer licensed to practice in this jurisdiction. For this paragraph to apply, however, the lawyer admitted to practice in this jurisdiction must actively participate in and share responsibility for the representation of the client.

[9] Lawyers not admitted to practice generally in a jurisdiction may be authorized by law or order of a tribunal or an administrative agency to appear before the tribunal or agency. This authority may be granted pursuant to formal rules governing admission pro hac vice or pursuant to informal practice of the tribunal or agency Under paragraph (c)(2), a lawyer does not violate this Rule when the lawyer appears before a tribunal or agency pursuant to such authority. To the extent that a court rule or other law of this jurisdiction requires a lawyer who is not admitted to practice in this jurisdiction to obtain admission pro hac vice before appearing before a tribunal or administrative agency, this Rule requires the lawyer to obtain that authority.

[10] Paragraph (c)(2) also provides that a lawyer rendering services in this jurisdiction on a temporary basis does not violate this Rule when the lawyer engages in conduct in anticipation of a proceeding or hearing in a jurisdiction in which the lawyer is authorized to practice law or in which the lawyer reasonably expects to be admitted pro hac vice. Examples of such conduct include meetings with the client, interviews of potential witnesses, and the review of documents. Similarly, a lawyer admitted only in another jurisdiction may engage in conduct temporarily in this jurisdiction in connection with pending litigation in another jurisdiction in which the lawyer is or reasonably expects to be authorized to appear, including taking depositions in this jurisdiction.

[11] When a lawyer has been or reasonably expects to be admitted to appear before a court or administrative agency, paragraph

(c)(2) also permits conduct by lawyers who are associated with that lawyer in the matter, but who do not expect to appear before the court or administrative agency. For example, subordinate lawyers may conduct research, review documents, and attend meetings with witnesses in support of the lawyer responsible for the litigation.

[12] Paragraph (c)(3) permits a lawyer admitted to practice law in another jurisdiction to perform services on a temporary basis in this jurisdiction if those services are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's pre-existing representation of a client in a jurisdiction in which the lawyer is admitted to practice. The lawyer, however, must obtain admission pro hac vice in the case of a court-annexed arbitration or mediation or otherwise if court rules or law so require.

[13] Paragraph (c)(4) permits a lawyer admitted in another jurisdiction to provide certain legal services on a temporary basis in this jurisdiction that arise out of or are reasonably related to the lawyer's pre-existing representation of a client in a jurisdiction in which the lawyer is admitted but are not within paragraphs (c)(2) or (c)(3). These services include both legal services and services that nonlawyers may perform but that are considered the practice of law when performed by lawyers.

[14] Paragraph (c)(3) requires that the services arise out of or be reasonably related to the lawyer's pre-existing representation of a client 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 for the client 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 issue 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.

[15] Paragraph (d) identifies two circumstances in which a lawyer who is admitted to practice in another United States jurisdiction, and is not disbarred or suspended from practice in any jurisdiction, may establish an office or other systematic and continuous presence in this jurisdiction for the practice of law as well as provide legal services on a temporary basis. Except as provided in paragraphs (d)(1) and (d)(2), a lawyer who is admitted to practice law in another jurisdiction and who establishes an office or other systematic or continuous presence in this jurisdiction must become admitted to practice law generally in this jurisdiction.

[16] Paragraphs (d)(1) applies to a lawyer who is employed by a client to provide legal services to the client or its organizational affiliates, i.e., entities that control, are controlled by, or are under common control with the employer. This paragraph does not authorize the provision of personal legal services to the employer's officers or employees. The paragraph applies to in-house corporate lawyers, government lawyers and others who are employed to render legal services to the employer. The lawyer's ability to represent the employer outside the jurisdiction in which the lawyer is licensed generally serves the interests of the employer and does not create an unreasonable risk to the client and others because the employer is well situated to assess the lawyer's qualifications and the quality of the lawyer's work.

[17] If an employed lawyer establishes an office or other systematic presence in this jurisdiction for the purpose of rendering legal services to the employer, the lawyer may be subject to registration or other requirements, including assessments for client protection funds and mandatory continuing legal education.

[18] Paragraphs (d)(2) recognizes that a lawyer may provide legal services in a jurisdiction in which the lawyer is not licensed when authorized to do so by federal or other law, which includes statute, court rule, executive regulation or judicial precedent.

[19] A lawyer who practices law in this jurisdiction pursuant to paragraphs (c) or (d) or otherwise is subject to the disciplinary authority of this jurisdiction. See Rule 8.5(a).

[20] In some circumstances, a lawyer who practices law in this jurisdiction pursuant to paragraphs (c) or (d) may have to inform the client that the lawyer is not licensed to practice law in this jurisdiction. For example, that may be required when the representation occurs primarily in this jurisdiction and requires knowledge of the law of this jurisdiction. See Rule 1.4(b).

[21] Paragraphs (c) and (d) do not authorize communications advertising legal services to prospective clients in this jurisdiction by lawyers who are admitted to practice in other jurisdictions. Whether and how lawyers may communicate the availability of their services to prospective clients in this jurisdiction is governed by Rules 7.1 to 7.5.

Comparison of Proposed Comments with Model Comments under the 2002 ABA Model Rule:

Proposed Comments [1]-[11] and [15]-[21]are identical to Model Comments [1-11] and [15]-[21].

Proposed Comment [12] is identical to Model Comment [12] except for the substitution of the words "pre-existing representation of a client" for the word "practice."

Proposed Comment [13] is identical to Model Comment [13] except for the substitution of the words "pre-existing representation of a client" for the word "practice."

Model Comment [14] appears as proposed Comment [14], except for the substitution of the words "pre-existing representation of a client" for the word "practice" in the first sentence, the addition of the words "for the client" in the fifth sentence, and the omission of the final sentence of the Model Comment from the Proposed Comment. The omitted sentence reads as follows: "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."

Other Commission Comments Regarding Proposed Changes in the Comments from the Current S.C. Comments:

Proposed Comment [19] makes clear that, although a lawyer may practice temporarily in the state without being admitted to the S.C. Bar, that lawyer does become subject to South Carolina disciplinary authority. A conforming change should also be made in the definition of a "lawyer" under Rule 2 of S.C. App. Ct. R. 413 (Rules for Lawyer Disciplinary Enforcement) and possibly S.C. App. Ct. R. 418 (Advertising and Solicitation by Unlicensed Lawyers).

The proposed Comments provide a number of specific examples in explanation of Rule 5.5.

Comparison of Proposed Comments with S.C. Bar Recommendation:

The S.C. Bar recommends the adoption of the Model Comments.

RULE 5.6: RESTRICTIONS ON RIGHT TO PRACTICE

A lawyer shall not participate in offering or making:

(a) a partnership ~~or,~~ shareholders, operating, employment, or other similar type of agreement that restricts the right of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement; or

(b) an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a client controversy ~~between private parties~~.

Comparison with 2002 ABA Model Rule:

Proposed Rule 5.6 is identical to 2002 ABA Model Rule 5.6.

Other Commission Comments Regarding Proposed Changes from the Current S.C. Rules of Professional Conduct:

The changes proposed in Rule 5.6(a) address the likelihood that a law firm may operate in a legal form other than a partnership and apply the Rule to any type of business agreement between lawyers.

Comparison with S.C. Bar Recommendation:

The S.C. Bar recommends ending Rule 5.6(b) with the words "is part of a settlement," deleting the words "of a client controversy."

Comment

[1] An agreement restricting the right of ~~partners or associates~~ lawyers to practice after leaving a firm not only limits their professional autonomy but also limits the freedom of clients to choose a lawyer. Paragraph (a) prohibits such agreements except for restrictions incident to provisions concerning retirement benefits for service with the firm.

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

[3] This Rule does not apply to prohibit restrictions that may be included in the terms of the sale of a law practice pursuant to Rule 1.17.

Comparison of Proposed Comments with Model Comments under the 2002 ABA Model Rule:

The proposed Comments are identical to the Model Comments.

Other Commission Comments Regarding Proposed Changes in the Comments from the Current S.C. Comments:

Proposed Comment [3] has previously accompanied the Model Rule, but has not yet been adopted in South Carolina. Its adoption appears consistent with language in Rule 1.17 to the same effect.

Comparison of Proposed Comments with S.C. Bar Recommendation:

The proposed Comments are identical to the S.C. Bar recommendation.

RULE 5.7: RESPONSIBILITIES REGARDING LAW-RELATED SERVICES

(a) A lawyer shall be subject to the Rules of Professional Conduct with respect to the provision of law-related services, as defined in paragraph (b), if the law-related services are provided:

(1) by the lawyer in circumstances that are not distinct from the lawyer's provision of legal services to clients; or

(2) in other circumstances by an entity controlled by the lawyer individually or with others if the lawyer fails to take reasonable measures to assure that a person obtaining the law-related services knows that the services are not legal services and that the protections of the client-lawyer relationship do not exist.

(b) The term "law related services" denotes services that might reasonably be performed in conjunction with and in substance are related to the provision of legal services, and that are not prohibited as unauthorized practice of law when provided by a nonlawyer.

Comparison with 2002 ABA Model Rule:

Proposed Rule 5.7 is identical to 2002 ABA Model Rule 5.7.

Other Commission Comments Regarding Proposed Changes from the Current S.C. Rules of Professional Conduct:

South Carolina currently has no equivalent of proposed Rule 5.7, although an earlier version of the Rule was originally approved by the ABA in 1991. In light of modern practice development, the Commission recommends its adoption at this time. Multi-state firms in South Carolina may already provide law related services in connection with their ongoing activities (i.e. lobbying, litigation management, consulting services, etc). The Commission feels a rule addressing these business formations is necessary.

Comparison with S.C. Bar Recommendation:

Proposed Rule 5.7 is identical to the S.C. Bar recommendation.

Comment

[1] When a lawyer performs law-related services or controls an organization that does so, there exists the potential for ethical problems. Principal among these is the possibility that the person for whom the law-related services are performed fails to understand that the services may not carry with them the protections normally afforded as part of the client-lawyer relationship. The recipient of the law-related services may expect, for example, that the protection of client confidences, prohibitions against representation of persons with conflicting interests, and obligations of a lawyer to maintain professional independence apply to the provision of law-related services when that may not be the case.

[2] Rule 5.7 applies to the provision of law-related services by a lawyer even when the lawyer does not provide any legal services to the person for whom the law-related services are performed and whether the law-related services are performed through a law firm or a separate entity. The Rule identifies the circumstances in which all of the Rules of Professional Conduct apply to the provision of law-related services. Even when those circumstances do not exist, however, the conduct of a lawyer involved in the provision of law-related services is subject to those Rules that apply generally to lawyer conduct, regardless of whether the conduct involves the provision of legal services. See, e. g., Rule 8.4.

[3] When law-related services are provided by a lawyer under circumstances that are not distinct from the lawyer's provision of legal services to clients, the lawyer in providing the law-related services must adhere to the requirements of the Rules of Professional Conduct as provided in paragraph (a)(1). Even when the law-related and legal services are provided in circumstances that are distinct from

each other, for example through separate entities or different support staff within the law firm, the Rules of Professional Conduct apply to the lawyer as provided in paragraph (a)(2) unless the lawyer takes reasonable measures to assure that the recipient of the law-related services knows that the services are not legal services and that the protections of the client-lawyer relationship do not apply.

[4] Law-related services also may be provided through an entity that is distinct from that through which the lawyer provides legal services. If the lawyer individually or with others has control of such an entity's operations, the Rule requires the lawyer to take reasonable measures to assure that each person using the services of the entity knows that the services provided by the entity are not legal services and that the Rules of Professional Conduct that relate to the client-lawyer relationship do not apply. A lawyer's control of an entity extends to the ability to direct its operation. Whether a lawyer has such control will depend upon the circumstances of the particular case.

[5] When a client-lawyer relationship exists with a person who is referred by a lawyer to a separate law-related service entity controlled by the lawyer, individually or with others, the lawyer must comply with Rule 1.8(a).

[6] In taking the reasonable measures referred to in paragraph (a)(2) to assure that a person using law-related services understands the practical effect or significance of the inapplicability of the Rules of Professional Conduct, the lawyer should communicate to the person receiving the law-related services, in a manner sufficient to assure that the person understands the significance of the fact, that the relationship of the, person to the business entity will not be a client-lawyer relationship. The communication should be made before entering into an agreement for provision of or providing law-related services, and preferably should be in writing.

[7] The burden is upon the lawyer to show that the lawyer has taken reasonable measures under the circumstances to communicate the desired understanding. For instance, a sophisticated user of law-related services, such as a publicly held corporation, may require a lesser explanation than someone unaccustomed to making distinctions between legal services and law-related services, such as an individual seeking tax advice from a lawyer-accountant or investigative services in connection with a lawsuit.

[8] Regardless of the sophistication of potential recipients of law-related services, a lawyer should take special care to keep separate the provision of law-related and legal services in order to minimize the risk that the recipient will assume that the law-related services are legal services. The risk of such confusion is especially acute when the lawyer renders both types of services with respect to the same matter. Under some circumstances the legal and law-related services may be so closely entwined that they cannot be distinguished from each other, and the requirement of disclosure and consultation imposed by paragraph (a)(2) of the Rule cannot be met. In such a case a lawyer will be responsible for assuring that both the lawyer's conduct and, to the extent required by Rule 5.3. that of nonlawyer employees in the distinct entity that the lawyer controls complies in all respects with the Rules of Professional Conduct.

[9] A broad range of economic and other interests of clients may be served by lawyers' engaging in the delivery of law-related services. Examples of law-related services include providing title insurance, financial planning, accounting, trust services, real estate counseling, legislative lobbying, economic analysis, social work, psychological counseling, tax preparation, and patent, medical or environmental consulting.

[10] When a lawyer is obliged to accord the recipients of such services the protections of those Rules that apply to the client-lawyer relationship, the lawyer must take special care to heed the proscriptions of the Rules addressing conflict of interest (Rules 1.7 through 1.11, especially Rules 1.7(a)(2) and 1.8 (a), (b) and (f)), and to scrupulously adhere to the requirements of Rule 1.6 relating to disclosure of confidential information. The promotion of the law-related services must also to all respects comply with Rules 7.1 through 7.3, dealing with advertising and solicitation. In that regard, lawyers should take special care to identify the obligations that may be imposed as a result of a jurisdiction's decisional law.

[11] When the full protections of all of the Rules of Professional Conduct do not apply to the provision of law-related services, principles of law external to the Rules, for example, the law of principal and agent govern the legal duties owed to those receiving the services. Those other legal principles may establish a different degree of protection for the recipient with respect to confidentiality of information, conflicts of interest and permissible business relationships with clients. See also Rule 8 4 (Misconduct).

Comparison of Proposed Comments with Model Comments under the 2002 ABA Model Rule:

The proposed Comments are identical to the Model Comments.

Other Commission Comments Regarding Proposed Changes in the Comments from the Current S.C. Comments:

South Carolina currently has no equivalent Rule or Comments.

Comparison of Proposed Comments with S.C. Bar Recommendation:

The S.C. Bar recommends an additional sentence in Comment [4], which was not included in the proposed comment. The additional final sentence would read as follows: "If a lawyer has taken reasonable measures to keep potential customers of an entity

controlled by the lawyer from knowing of the lawyer's involvement with that entity, this may itself be a reasonable measure to assure that the customers do not believe that the services are legal services subject to the protections of the client-lawyer relationship."

The S.C. Bar recommends deleting the first sentence of proposed Comment [9].

PUBLIC SERVICE

RULE 6.1: VOLUNTARY PRO BONO PUBLICO SERVICE

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

Comparison with 2002 ABA Model Rule:

Proposed Rule 6.1 differs substantially from 2002 ABA Model Rule 6.1, which reads as follows:

"RULE 6.1: PRO BONO PUBLICO SERVICE

Every lawyer has a professional responsibility to provide legal services to those unable to pay. A lawyer should aspire to render at least (50) hours of pro bono publico legal services per year. In fulfilling this responsibility, the lawyer should:

(a) provide a substantial majority of the (50) hours of legal services without fee or expectation of fee to:

(1) persons of limited means or

(2) charitable, religious, civic, community, governmental and educational organizations in matters that are designed primarily to address the needs of persons of limited means; and

(b) provide any additional services through:

(1) delivery of legal services at no fee or substantially reduced fee to individuals, groups or organizations seeking to secure or protect civil rights, civil liberties or public rights, or charitable, religious, civic, community, governmental and educational organizations in matters in furtherance of their organizational purposes, where the payment of standard legal fees would significantly deplete the organization's economic resources or would be otherwise inappropriate;

(2) delivery of legal services at a substantially reduced fee to persons of limited means; or

(3) participation in activities for improving the law, the legal system or the legal profession.

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

Other Commission Comments Regarding Proposed Changes from the Current S.C. Rules of Professional Conduct:

The Commission recommends retaining the current South Carolina version of Rule 6.1. The Commission believes the current Rule works well and is in keeping with the basic approach of Rules, which is to remove purely aspirational goals and focus the Rules on conduct and discipline. The Commission believes the Model approach could be included more appropriately in professionalism guidelines promulgated by the Commission on the Profession.

Comparison with S.C. Bar Recommendation:

The S.C. Bar recommends adopting 2002 ABA Model Rule 6.1.

Comment

[1] The ABA House of Delegates has formally acknowledged "the basic responsibility of each lawyer engaged in the practice of law to provide public interest legal services" without fee, or at a substantially reduced fee, in one or more of the following areas: poverty law, civil rights law, public rights law, charitable organization representation and the administration of justice. This Rule expresses that policy but is not intended to be enforced through disciplinary process.

[2] The rights and responsibilities of individuals and organizations in the United States are increasingly defined in legal terms. As a consequence, legal assistance in coping with the web of statutes, rules and regulations is imperative for persons of modest and limited means, as well as for the relatively well to do.

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

Comparison of Proposed Comments with Model Comments under the 2002 ABA Model Rule:

The proposed Comments differ in their entirety from the Model Comments, which are set forth below:

"[1] Every lawyer, regardless of professional prominence or professional work load, has a responsibility to provide legal services to those unable to pay and personal involvement in the problems of the disadvantaged can be one of the most rewarding experiences in the life of a lawyer. The American Bar Association urges all lawyers to provide a minimum of 50 hours of pro bono services annually. States, however, may decide to choose a higher or lower number of hours of annual service (which may be expressed as a percentage of a lawyer's professional time) depending upon local needs and local conditions. It is recognized that in some years a lawyer may render greater or fewer hours than the annual standard specified, but during the course of his or her legal career, each lawyer should render on average per year, the number of hours set forth in this Rule. Services can be performed in civil matters or in criminal or quasi-criminal matters for which there is no government obligation to provide funds for legal representation, such as post-conviction death penalty appeal cases.

"[2] Paragraphs (a)(1) and (2) recognize the critical need for legal services that exists among persons of limited means by providing that a that a substantial majority of the legal services rendered annually to the disadvantaged be furnished without fee or expectation of fee. Legal services under these paragraphs consist of a full range of activities, including individual and class representation, the provision of legal advice, legislative lobbying, administrative rule making and the provision of free training or mentoring to those who represent persons of limited means. The variety of these activities should facilitate participation by government lawyers, even when restrictions exist on their engaging in the outside practice of law.

"[3] Persons eligible for legal services under paragraphs (a)(1) and (2) are those who qualify for participation in programs funded by the Legal Services Corporation and those whose incomes and financial resources are slightly above the guidelines utilized by such programs but nevertheless cannot afford counsel. Legal services can be rendered to individuals or to organizations such as homeless shelters battered women's centers and food pantries that serve those of limited means. The term "governmental organizations" includes, but is not limited to, public protection programs and sections of governmental or public sector agencies.

"[4] Because service must be provided without fee or expectation of fee, the intent of the lawyer to render free legal services is essential for the work performed to fall within the meaning of paragraphs (a)(1) and (2). Accordingly, services rendered cannot be considered pro bono if an anticipated fee is uncollected but the award of statutory attorneys' fees in a case originally accepted as pro bono would not disqualify such services from inclusion under this section. Lawyers who do receive fees in such cases are encouraged to contribute an appropriate portion of such fees to organizations or projects that benefit persons of limited means.

"[5] While it is possible for a lawyer to fulfill the annual responsibility to perform pro bono services exclusively through activities described in paragraphs (a)(1) and (2), to the extent that any hours of service remained unfulfilled the remaining commitment can be met in a variety of ways as set forth in paragraph (b). Constitutional, statutory or regulatory restrictions may prohibit or impede government and public sector lawyers and judges from performing the pro bono services outlined in paragraphs (a)(1) and (2). Accordingly, where those restrictions apply, government and public sector lawyers and judges may fulfill their pro bono responsibility by performing services outlined in paragraph (b).

"[6] Paragraph (b)(1) includes the provision of certain types of legal services to those whose incomes and financial resources place them above limited means. It also permits the pro bono lawyer to accept a substantially reduced fee for services. Examples of the types of issues that may be addressed under this paragraph include First Amendment claims, Title VII claims and environmental protection claims. Additionally, a wide range of organizations may be represented,. including social service, medical research, cultural and religious groups.

"[7] Paragraph (b)(2) covers instances in which lawyers agree to and receive a modest fee for

furnishing legal services to persons of limited means. Participation in judicare programs and acceptance of court appointments in which the fee is substantially below a lawyer's usual rate are encouraged under this section.

"[8] Paragraph (b)(3) recognizes the value of lawyers engaging in activities that improve the law, the legal system or the legal profession. Serving on bar association committees, serving on boards of pro bono or legal services programs, taking part in Law Day activities, acting as a continuing legal education instructor, a mediator or an arbitrator and engaging in legislative lobbying to improve the law, the legal system or the profession are a few examples of the many activities that fall within this paragraph.

"[9] Because the provision of pro bono services is a professional responsibility, it is the individual ethical commitment of each lawyer. Nevertheless, there may be times when it is not feasible for a lawyer to engage in pro bono services. At such times a lawyer may discharge the pro bong responsibility by providing financial support to organizations providing free legal services to persons of limited means. Such financial support should be reasonably equivalent to the value of the hours of service that would have otherwise been provided. In addition, at times it may be more feasible to satisfy the pro bono responsibility collectively, as by a firm's aggregate pro bono activities.

"[10] Because the efforts of individual lawyers are not enough to meet the need for free legal services that exists among persons of limited means, the government and the profession have instituted additional programs to provide those services. Every lawyer should financially support such programs, in addition to either providing direct pro bono services or making financial contributions when pro bono service is not feasible.

"[11] Law firms should act reasonably to enable and encourage all lawyers to the firm to provide the pro bone legal services called for by this Rule.

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

Other Commission Comments Regarding Proposed Changes in the Comments from the Current S.C. Comments:

The proposed Comments are the current South Carolina Comments to Rule 6.1.

Comparison of Proposed Comments with S.C. Bar Recommendation:

The S.C. Bar recommends adoption of the ABA Model Comments to Rule 6.1.

RULE 6.2: ACCEPTING APPOINTMENTS

A lawyer shall not seek to avoid appointment by a tribunal to represent a person except for good cause, such as:

(a) representing the client is likely to result in violation of the Rules of Professional Conduct or other law;

(b) representing the client is likely to result in an unreasonable financial burden on the lawyer; or

(c) the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client.

Comparison with 2002 ABA Model Rule:

Proposed Rule 6.2 is identical to 2002 ABA Model Rule 6.2.

Other Commission Comments Regarding Proposed Changes from the Current S.C. Rules of Professional Conduct:

No change is proposed.

Comparison with S.C. Bar Recommendation:

The proposed Rule is identical to the recommendation of the S.C. Bar.

Comment

[1] A lawyer ordinarily is not obliged to accept a client whose character or cause the lawyer regards as repugnant. The lawyer's freedom to select clients is, however, qualified. All lawyers have a responsibility to assist in providing pro bono publico service. See Rule 6.1. An individual lawyer fulfills this responsibility by accepting a fair share of unpopular matters or indigent or unpopular clients. A lawyer may also be subject to appointment by a court to serve unpopular clients or persons unable to afford legal services.

Appointed Counsel

[2] For good cause a lawyer may seek to decline an appointment to represent a person who cannot afford to retain counsel or whose cause is unpopular. Good cause exists if the lawyer could not handle the matter competently, see Rule 1.1, or if undertaking the representation would result in an improper conflict of interest, for example, when the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client. A lawyer may also seek to decline an appointment if acceptance would be unreasonably burdensome, for example, when it would impose a financial sacrifice so great as to be unjust.

[3] An appointed lawyer has the same obligations to the client as retained counsel, including the obligations of loyalty and confidentiality, and is subject to the same limitations on the client-lawyer relationship, such as the obligation to refrain from assisting the client in violation of the Rules.

Comparison of Proposed Comments with Model Comments under the 2002 ABA Model Rule:

The proposed Comments are identical to the Model Comments.

Other Commission Comments Regarding Proposed Changes in the Comments from the Current S.C. Comments:

No change is proposed.

Comparison of Proposed Comments with S.C. Bar Recommendation:

The proposed Comments are identical to the recommendation of the S.C. Bar.

RULE 6.3: MEMBERSHIP IN LEGAL SERVICES ORGANIZATION

A lawyer may serve as a director, officer or member of a legal services organization, apart from the law firm in which the lawyer practices, notwithstanding that the organization serves persons having interests adverse to a client of the lawyer. The lawyer shall not knowingly participate in a decision or action of the organization:

(a) if participating in the decision or action would be incompatible with the lawyer's obligations to a client under Rule 1.7; or

(b) where the decision or action could have a material adverse effect on the representation of a client of the organization whose interests are adverse to a client of the lawyer.

Comparison with 2002 ABA Model Rule:

Proposed Rule 6.3 is identical to 2002 ABA Model Rule 6.3.

Other Commission Comments Regarding Proposed Changes from the Current S.C. Rules of Professional Conduct:

No change is proposed.

Comparison with S.C. Bar Recommendation:

The proposed Rule is identical to the recommendation of the S.C. Bar.

Comment

[1] Lawyers should be encouraged to support and participate in legal service organizations. A lawyer who is an officer or a member of such an organization does not thereby have a client-lawyer relationship with persons served by the organization. However, there is potential conflict between the interests of such persons and the interests of the lawyer's clients. If the possibility of such conflict disqualified a lawyer from serving on the board of a legal services organization, the profession's involvement in such organizations would

be severely curtailed.

[2] It may be necessary in appropriate cases to reassure a client of the organization that the representation will not be affected by conflicting loyalties of a member of the board. Established, written policies in this respect can enhance the credibility of such assurances.

Comparison of Proposed Comments with Model Comments under the 2002 ABA Model Rule:

The proposed Comments are identical to the Model Comments.

Other Commission Comments Regarding Proposed Changes in the Comments from the Current S.C. Comments:

No change is proposed.

Comparison of Proposed Comments with S.C. Bar Recommendation:

The proposed Comments are identical to the recommendation of the S.C. Bar.

RULE 6.4: LAW REFORM ACTIVITIES AFFECTING CLIENT INTERESTS

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

Comparison with 2002 ABA Model Rule:

Proposed Rule 6.4 is identical to 2002 ABA Model Rule 6.4.

Other Commission Comments Regarding Proposed Changes from the Current S.C. Rules of Professional Conduct:

No change is proposed.

Comparison with S.C. Bar Recommendation:

The proposed Rule is identical to the recommendation of the S.C. Bar.

Comment

[1] Lawyers involved in organizations welting law reform generally do not have a client-lawyer relationship with the organization. Otherwise, it might follow that a lawyer could not be involved in a bar association law reform program that might indirectly affect a client. See also Rule 1.2(b). For example, a lawyer specializing in antitrust litigation might be regarded as disqualified from participating in drafting revisions of rules governing that subject. In determining the nature and scope of participation in such activities, a lawyer should be mindful of obligations to clients under other Rules, particularly Rule 1.7. A lawyer is professionally obligated to protect the integrity of the program by making an appropriate disclosure within the organization when the lawyer knows a private client might be materially benefitted.

Comparison of Proposed Comment with Model Comment under the 2002 ABA Model Rule:

The proposed Comment is identical to the Model Comment.

Other Commission Comments Regarding Proposed Changes in the Comment from the Current S.C. Comment:

No change is proposed.

Comparison of Proposed Comment with S.C. Bar Recommendation:

The proposed Comment is identical to the recommendation of the S.C. Bar.

RULE 6.5: NONPROFIT AND COURT-ANNEXED LIMITED LEGAL SERVICES PROGRAMS

(a) A lawyer who, under the auspices of a program sponsored by a nonprofit organization or court, provides short-term limited legal services to a client without expectation by either the lawyer or the client that the lawyer will provide continuing representation in the matter:

(1) is subject to Rules 1.7 and 1.9(a) only if the lawyer knows that the representation of the client involves a conflict of interest; and

(2) is subject to Rule 1.10 only if the lawyer knows that another lawyer associated with the lawyer in a law firm is disqualified by Rule 1.7 or 1.9(a) with respect to the matter.

(b) Except as provided in paragraph (a)(2), Rule 1.10 is inapplicable to a representation governed by this Rule.

Comparison with 2002 ABA Model Rule:

Proposed Rule 6.5 is identical to 2002 ABA Model Rule 6.5.

Other Commission Comments Regarding Proposed Changes from the Current S.C. Rules of Professional Conduct:

South Carolina currently has no equivalent of proposed Rule 6.5.

Comparison with S.C. Bar Recommendation:

Proposed Rule 6.5 is identical to the S.C. Bar recommendation.

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-once clinics or pro se counseling programs, a client-lawyer relationship is established, but there is no expectation that the lawyer's representation of the client will continue beyond the limited consultation. Such programs are normally operated under circumstances in which it is not feasible for a lawyer to systematically screen for conflicts of interest as is generally required before undertaking a representation. See, e.g., Rules 1.7, 1.9 and 1.10.

[2] A lawyer who provides short-term limited legal services pursuant to this Rule must secure the client's informed consent to the limited scope of the representation. See Rule 1.2(c). If a short-term limited representation would not be reasonable under the circumstances, the lawyer may offer advice to the client but must also advise the client of the need for further assistance of counsel. Except as provided in this Rule, the Rules of Professional Conduct, including Rules 1.6 and 1.9(c), are applicable to the limited representation.

[3] Because a lawyer who is representing a client to the circumstances addressed by this Rule ordinarily is not able to check systematically for conflicts of interest paragraph (a) requires compliance with Rules 1.7 or 1.9(a) only if the lawyer knows that the representation presents a conflict of interest for the lawyer and with Rule 1.10 only if the lawyer knows that another lawyer in the lawyer's firm is disqualified by Rules 1.7 or 1.9(a) in the matter.

[4] Because the limited nature of the services significantly reduces the risk of conflicts of interest with other matters being handled by the lawyer's Finn paragraph (b) provides that Rule 1.10 is inapplicable to a representation governed by this Rule except as provided by paragraph (a)(2). Paragraph (a)(2) requires the participating lawyer to comply with Rule 1.10 when the lawyer knows that the lawyer's firm is disqualified by Rules 1.7 or 1.9(a). By virtue of paragraph (b), however, a lawyer's participation in a short-term limited legal services program will not preclude the lawyer's firm from undertaking or continuing, the representation of a client with interests adverse to a client being represented under the program's auspices. Nor will the personal disqualification of a lawyer participating in the program be imputed to other lawyers participating in the program.

[5] If, after commencing a short-term limited representation in accordance with this Rule, a lawyer undertakes to represent the client in the matter on an ongoing basis, Rules 1.7, 1.9(a) and 1.10 become applicable.

Comparison of Proposed Comments with Model Comments under the 2002 ABA Model Rule:

The proposed Comments are identical to the Model Comments.

Other Commission Comments Regarding Proposed Changes in the Comments from the Current S.C. Comments:

South Carolina currently has no equivalent Rule or Comments.

Comparison of Proposed Comments with S.C. Bar Recommendation:

The proposed Comments are identical to the S.C. Bar recommendation.

~~LAWYER ADVERTISING~~ INFORMATION ABOUT LEGAL SERVICES

RULE 7.1: COMMUNICATIONS CONCERNING A LAWYER'S SERVICES

A lawyer shall not make false, misleading, deceptive, or unfair communications about the lawyer or the lawyer's services. A communication violates this rule if it:

(a) contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading;

(b) is likely to create an unjustified expectation about results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate the Rules of Professional Conduct or other law; or

(c) compares the lawyers services with other lawyers' services, unless the comparison can be factually substantiated; ~~or~~

(d) contains a testimonial ~~which concerns the quality of the services received or results obtained.~~ ; or

(e) contains a nickname, moniker, or trade name that implies an ability to obtain results in a matter.

Comparison with 2002 ABA Model Rule:

2002 ABA Model Rule 7.1 omits the words "deceptive" and "unfair" in the first sentence.

The second sentence of Model Rule 7.1 contains the substance of proposed subsection (a) and reads as follows: "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."

Proposed subsections (b) - (e) are not included in the Model Rule.

Other Commission Comments Regarding Proposed Changes from the Current S.C. Rules of Professional Conduct:

The deletion at the end of subsection (d) would change the rule to preclude all forms of testimonial in advertising. The addition of subsection (e) does not necessarily change existing law, but may be interpreted as the specific identification of an advertising technique already barred under the prohibition against deceptive or misleading speech. The South Carolina Supreme Court and the Bar have studied the issue of lawyer advertising and communications thoroughly in recent years. Therefore, the Commission has not proposed other, more extensive revisions to the current South Carolina Rule 7.1.

Comparison with S.C. Bar Recommendation:

The S.C. Bar recommends the Model Rule language deleting the terms "deceptive" and "unfair" in the first sentence.

The S.C. Bar would delete paragraph (c). The Commission is advised, however, that this provision remains an effective and useful tool in advertising regulation.

The S.C. Bar has not considered the change in subsection (d) or the addition of subsection (e).

Otherwise, the proposed Rule is identical to the S.C. Bar recommendation.

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

[2] Truthful statements that are misleading are also prohibited by this Rule. A truthful statement is misleading if it omits a fact necessary to make the lawyer's communication considered as a whole not materially misleading. A truthful statement is also misleading if there is a substantial likelihood that it will lead a reasonable person to formulate a specific conclusion about the lawyer or the lawyer's services for which there is no reasonable factual foundation.

[3] An advertisement that truthfully reports a lawyer's achievements on behalf of clients or former clients may be misleading if presented so as to lead a reasonable person to form an unjustified expectation that the same results could be obtained for other clients in similar matters without reference to the specific factual and legal circumstances of each client's case. Similarly, an unsubstantiated comparison of the lawyer's services or fees with the services or fees of other lawyers may be misleading if presented with such specificity as would lead a reasonable person to conclude that the comparison can be substantiated. The inclusion of an appropriate disclaimer or qualifying language may preclude a finding that a statement is likely to create unjustified expectations or otherwise mislead a prospective client.

[4] Paragraph (e) precludes the use of nicknames, such as the "Heavy Hitter" or "The Strong Arm," that suggest the lawyer or law firm has an ability to obtain favorable results for a client in any matter. A significant possibility exists that such nicknames will be used to mislead the public as to the results that can be obtained or create an unsubstantiated comparison with the services provided by other lawyers. See also Rule 8.4(e) for the prohibition against stating or implying an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law.

Comparison of Proposed Comments with Model Comments under the 2002 ABA Model Rule:

The final two sentences of proposed Comment [1] are retained from the current South Carolina Comment and do not appear in the Model Comments. The first two sentences of proposed Comment [4] do not appear in the Model Comments.

Other Commission Comments Regarding Proposed Changes in the Comments from the Current S.C. Comments:

Proposed Comment [1] is retained in its current form, with the single change to mandatory language regarding the duty to be truthful. Proposed Comments [2]-[4] are included because they appear consistent with both the proposed Rule and current interpretation of the existing Rule. The first two sentences of proposed Comment [4] are added to explain new section (e) of the proposed Rule.

Comparison of Proposed Comments with S.C. Bar Recommendation:

The S.C. Bar did not consider the first two sentences of proposed Comment [4]. Otherwise, the proposed Comments are identical to the S.C. Bar recommendation.

RULE 7.2: ADVERTISING

(a) Subject to the requirements of this Rule and Rules 7.1 and 7.3, a lawyer may advertise services through ~~the public media, such as a telephone directory, legal directory, newspaper or other periodical, outdoor advertising, radio or television, or through~~ written ~~or~~, recorded or electronic communication, including public media.

(b) A lawyer is responsible for the content of any advertisement or solicitation placed or disseminated by the lawyer and has a duty to review the advertisement or solicitation prior to its dissemination to reasonably ensure its compliance with the Rules of Professional Conduct. A copy of every advertisement or communication subject to this Rule, except for those which contain only directory information and are not disseminated through the public media, shall be filed with the Commission on Lawyer Conduct within ten (10) days after the advertisement or communication is first published, broadcast, transmitted, or otherwise disseminated to the public, together with a fee of $50.00. A copy or recording of ~~an~~ every advertisement or communication shall be kept for two (2) years after its last dissemination along with a record of when and where it was disseminated.

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

(1) pay the reasonable costs of advertisements or communications permitted by this Rule ~~and may~~;

(2) pay the usual charges of a legal service plan or a not-for-profit lawyer referral service ~~or other legal service organization~~; and

(3) pay for a law practice in accordance with Rule 1.17.

(d) Any ~~advertisement~~ communication made pursuant to this Rule shall include the name and office address of at least one lawyer responsible for its content.

(e) No lawyer shall, directly or indirectly, pay all or a part of the cost of an advertisement by a lawyer not in the same firm unless the advertisement discloses the name and address of the nonadvertising lawyer, the relationship between the advertising lawyer and the nonadvertising lawyer, and whether the advertising lawyer may refer any case received through the advertisement to the nonadvertising lawyer.

(f) A lawyer shall not make statements in advertisements or written communications which are merely self laudatory or which describe or characterize the quality of the lawyer's services; provided that this provision shall not apply to information furnished to a prospective client at that person's request or to information supplied to existing clients.

(g) Every advertisement that contains information about the lawyer's fee shall disclose whether the client will be liable for any expenses in addition to the fee and, if the fee will be a percentage of the recovery, whether the percentage will be computed before deducting the expenses.

(h) A lawyer who advertises a specific fee or range of fees for a particular service shall honor the advertised fee or fee range for at least ninety (90) days following dissemination of the advertisement, unless the advertisement specifies a shorter period; provided that a fee advertised in a publication which is issued not more than annually, shall be honored for one (1) year following publication.

(i) All advertisements shall disclose the geographic location, by city or town, of the office in which the lawyer or lawyers who will actually perform the services advertised principally practice law. If the office location is outside a city or town, the county in which the office is located must be disclosed. A lawyer referral service shall disclose the geographic area in which the lawyer practices when a referral is made.

Comparison with 2002 ABA Model Rule:

Proposed Rule 7.2(a) is identical to 2002 ABA Model Rule 7.2(a).

Proposed Rule 7.2(b) does not appear in 2002 ABA Model Rule 7.2.

Proposed Rule 7.2(c) is similar to 2002 ABA Model Rule 7.2(b), with the exception of the deletion in proposed subsection (c)(2) [which appears as subsection (b)(2) of the Model Rule] of any reference to qualified referral services. The model version reads as follows: "pay the usual charges of a legal service plan or a not-for-profit or qualified lawyer referral service. A qualified lawyer referral service is a lawyer referral service that has been approved by an appropriate regulatory authority."

Proposed Rule 7.2(d) differs slightly from Model Rule 7.2(c). The Model Rule inserts the words "or law firm" after "lawyer." Given the uncertainties of disciplining a law firm, the Commission believes it preferable to continue to require the name of an individual responsible lawyer.

Sections (e)-(i) of proposed Rule 7.2 do not appear in the Model Rule.

Other Commission Comments Regarding Proposed Changes from the Current S.C. Rules of Professional Conduct:

A change is recommended in paragraph (a) to delete references to specific forms of public media and substitute a reference to electronic communication to accommodate new technology.

The proposed change in Rule 7.2(b) imposes a filing requirement for all forms of media advertisement and certain other forms of advertisement.

A change in proposed paragraph (c) acknowledges the existence of legal services plans.

The addition of an address requirement in paragraph (d) is in addition to the requirements of paragraph (i).

Comparison with S.C. Bar Recommendation:

The S.C. Bar recommends deleting the words "this Rule and" from paragraph (a), as well as deleting in their entirety paragraphs (b) and (f) of the proposed Rule. The S.C. Bar did not consider the specific changes reflected in proposed paragraph (b). Otherwise, the proposed Rule is identical to the S.C. Bar recommendation.

Comment

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

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

[3] Questions of effectiveness and taste in advertising are matters of speculation and subjective judgment. Some jurisdictions have had extensive prohibitions against television advertising, against advertising going beyond specified facts about a lawyer, or against "undignified" advertising. ~~[4]~~ Television is now one of the most powerful media for getting information to the public, particularly persons of low and moderate income; prohibiting television advertising, therefore, would impede the flow of information about legal services to many sectors of the public. Limiting the information that may be advertised has a similar effect and assumes that the bar can accurately forecast the kind of information that the public would regard as relevant. Similarly, electronic media, such as the Internet, can be an important source of information about legal services, and lawful communication by electronic mail is permitted by this Rule, but see Rule 7.3(a) for the prohibition against the solicitation of a prospective client through a real-time electronic exchange that is not initiated by the prospective client.

~~[5]~~ [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.

Record of Advertising

~~[6]~~ [5] Paragraph (b) imposes upon the lawyer the responsibility for reviewing each advertisement prior to dissemination to ensure its compliance with the Rules of Professional Conduct. It also requires that a record of the content and use of advertising be kept in order to facilitate enforcement of this Rule. A copy of each advertisement disseminated through any form of public media also must be filed with the Commission on Lawyer Conduct at the time that the advertisement is first disseminated. Public media include, but are not limited to, radio, television, newspapers, magazines, websites, and outdoor advertising. Advertisements not disseminated by public media are not required to be filed if they do not contain content beyond directory information. Directory information includes the name of the lawyer or law firm, a lawyer's job title, jurisdictions in which the lawyer is admitted to practice, the lawyer's mailing and electronic addresses, and the lawyer's telephone and facsimile numbers. Generally, this exception to the filing requirement will include most business cards, letterhead, basic telephone directory listings, law directories such as "Martindale-Hubbell" or a desk book created by a bar association, and office signage. The Rule ~~It~~ does not require that advertising be subject to review prior to dissemination. Such a requirement would be burdensome and expensive relative to its possible benefits, and may be of doubtful constitutionality.

Paying Others to Recommend a Lawyer

~~[7]~~ [6] ~~A lawyer is allowed to pay for an advertising permitted by this Rule, but otherwise is~~ Lawyers are not permitted to pay ~~another person~~ others for channeling professional work. ~~This restriction does not prevent an organization or person other than the lawyer from advertising or recommending the lawyers services. Thus, a legal aid agency or prepaid legal services plan may pay to advertise legal services provided under its auspices. Likewise, a lawyer may participate in not for profit lawyer referral programs and pay the usual fees charged by such programs. Paragraph (c) does not prohibit paying regular compensation to an assistant, such as a secretary, to prepare communications permitted by this Rule.~~ Paragraph (c)(1), however, allows a lawyer to pay for advertising and communications permitted by this Rule, including the cost of print directory listings, on-line directory listings, newspaper ads, television and radio airtime, domain-name registrations, sponsorship fees, banner ads, and group advertising. A lawyer may compensate employees, agents and vendors who are engaged to provide marketing or client-development services, such as publicists, public relations personnel, business development staff and website designers. See Rule 5.3 for the duties of lawyers and law firms with respect to the conduct of nonlawyers who prepare marketing materials for them.

[7] A lawyer may pay the usual charges of a legal service plan or a not-for-profit lawyer referral service. A legal service plan is a

prepaid or group legal service plan or a similar delivery system that assists prospective clients to secure legal representation. A lawyer referral service, on the other hand, is any organization that holds itself out to the public as a lawyer referral service. Such referral services are understood by laypersons to be consumer-oriented organizations that provide unbiased referrals to lawyers with appropriate experience in the subject matter of the representation and afford other client protections, such as complaint procedures or malpractice insurance requirements. Consequently, this Rule only permits a lawyer to pay the usual charges of a not-for-profit lawyer referral service. The "usual ~~fees~~ charges" may include a portion of legal fees collected by ~~an attorney~~ a lawyer from clients referred by the service when that portion of fees is collected to support the expenses projected for the referral service.

[8] A lawyer who accepts assignments or referrals from a legal service plan or referrals from a lawyer referral service must act reasonably to assure that the activities of the plan or service are compatible with the lawyer's professional obligations. See Rule 5.3. Legal service plans and lawyer referral services may communicate with prospective clients, but such communication must be in conformity with these Rules. Thus, advertising must not be false or misleading, as would be the case if the communications of a group advertising program or a group legal services plan would mislead prospective clients to think that it was a lawyer referral service sponsored by a state agent or bar association. See also Rule 7.3(b).

Comparison of Proposed Comments with Model Comments under the 2002 ABA Model Rule:

Proposed Comments [1]-[4] are identical to the Model Comments.

Proposed Comment [5] is retained in a modified form from the current South Carolina Comments and does not appear in the Model Comments.

Proposed Comment [6] is identical to Model Comment [5], with the exception of the internal cross-reference to the Rule which has been changed to reflect the numbering of the proposed South Carolina version.

Proposed Comment [7] is similar to Model Comment [6], but deletes a reference to "qualified" referral services in the next to last sentence and deletes the final two sentences of the Model Comment. The deleted material reads as follows:

> ***"A qualified lawyer referral service is one that is approved by an appropriate regulatory authority as affording adequate protections for prospective clients. See, e.g., the American Bar Association's Model Supreme Court Rules Governing Lawyer Referral Services and Model Lawyer Referral and Information Service Quality Assurance Act (requiring that organizations that are identified as lawyer referral services (i) permit the participation of all lawyers who are licensed and eligible to practice in the jurisdiction and who meet reasonable objective eligibility requirements as may be established by the referral service for the protection of prospective clients; (ii) require each participating lawyer to carry reasonably adequate malpractice insurance; (iii) act reasonably to assess client satisfaction and address client complaints; and (iv) do not refer prospective clients to lawyers who own, operate or are employed by the referral service.)"***

The final sentence of proposed Comment [7] is retained from the current South Carolina Comments and does not appear in the Model Comments.

Proposed Comment [8] is identical to Model Comment [7] except for the final sentence, in which the Commission recommends a reference to Rule 7.3, rather than the model language, which reads "Nor could the lawyer allow in-person, telephonic, or real-time contacts that would violate Rule 7.3."

The proposed Comments do not include Model Comment [8], which reads:

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

Other Commission Comments Regarding Proposed Changes in the Comments from the Current S.C. Comments:

Comment [5] reflects the addition of a filing requirement for advertisements in Rule 7.2(b). Otherwise, the proposed revisions to the Comments are intended to provide additional guidance and not to change existing South Carolina law.

Comparison of Proposed Comments with S.C. Bar Recommendation:

The S.C. Bar recommends deletion of proposed Comment [5].

The S.C. Bar recommendation does not include the final sentence of proposed Comment [7].

The S.C. Bar recommends the model language for the final sentence of proposed Comment [8].

Otherwise, the proposed Comments are identical to the S.C. Bar recommendation.

RULE 7.3: DIRECT CONTACT WITH PROSPECTIVE CLIENTS

(a) A lawyer shall not by in-person, ~~or~~ live telephone or real-time electronic contact solicit professional employment from a prospective client ~~with whom the lawyer has no family or prior professional relationship~~ when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain, unless the person contacted:

(1) is a lawyer; or

(2) has a family, close personal, or prior professional relationship with the lawyer.

(b) A lawyer shall not solicit professional employment from a prospective client by direct written ~~or~~, recorded or electronic communication or by in-person, telephone, telegraph, ~~or~~ facsimile or realtime electronic contact even when not otherwise prohibited by paragraph (a), if:

(1) the prospective client has made known to the lawyer a desire not to be solicited by the lawyer;

(2) the solicitation involves coercion, duress, harassment, fraud, overreaching, intimidation or undue influence;

(3) the solicitation concerns an action for personal injury or wrongful death or otherwise relates to an accident or disaster involving the person solicited or a relative of that person unless the accident or disaster occurred more than thirty (30) days prior to the solicitation;

(4) the solicitation concerns a specific matter and the lawyer knows, or reasonably should know, that the person solicited is represented by a lawyer in the matter; or

(5) the lawyer knows, or reasonably should know, that the physical, emotional, or mental state of the person makes it unlikely that the person would exercise reasonable judgment in employing a lawyer.

~~(i)~~(c) Every written or recorded communication subject to this Rule shall be filed with the Commission on Lawyer Conduct within ten (10) days after any written communication is sent or any recorded communication is made together with a fee of $50.00 ~~$10.00~~. If a written communication is sent or a recorded communication is made generally to persons similarly situated, a representative copy may be filed with a listing of those persons to whom the communication was sent. ~~(j)~~ Any lawyer who uses written or recorded solicitation shall maintain a file for two years showing the following:

(1) The basis by which the lawyer knows the person solicited needs legal services; and

(2) The factual basis for any statements made in the written or recorded communication.

~~(c)~~(d) Every written, recorded or electronic communication from a lawyer soliciting professional employment from a prospective client known to be in need of legal services in a particular matter, and with whom the lawyer has no family, close personal or prior professional relationship, shall conform to Rules 7.1 and 7.2 and, in addition, must conform to the following provisions:

(1) The words "ADVERTISING MATERIAL," printed in capital letters and in prominent type, shall appear on the front of the outside envelope and on the front of each page of the material. Every such recorded communication shall clearly state both at the beginning and at the end that the communication is an advertisement.

(2) Each written or recorded solicitation must include the following statements:

(A) "You may wish to consult your lawyer or another lawyer instead of me (us). You may obtain information about other lawyers by consulting the Yellow Pages or by calling the South Carolina Bar Lawyer Referral Service at

799-7100 in Columbia or toll-free at 1-800-868-2284. If you have already engaged a lawyer in connection with the legal matter referred to in this communication, you should direct any questions you have to that lawyer" and

(B) "The exact nature of your legal situation will depend on many facts not known to me (us) at this time. You should understand that the advice and information in this communication is general and that your own situation may vary."

Where the solicitation is written, the above statements must be in a type no smaller than that used in the body of the communication.

(3) Each written or recorded solicitation must include the following statement: "ANY COMPLAINTS ABOUT THIS LETTER (OR RECORDING) OR THE REPRESENTATIONS OF ANY LAWYER MAY BE DIRECTED TO THE COMMISSION ON LAWYER CONDUCT, POST OFFICE BOX 12159, COLUMBIA, SOUTH CAROLINA 29211-TELEPHONE NUMBER 803-734-2038." Where the solicitation is written, this statement must be printed in capital letters and in a size no smaller than that used in the body of the communication.

~~(d)~~(c) Written communications mailed to prospective clients shall be sent only by regular U.S. mail, not by registered mail or other forms of restricted or certified delivery.

~~(e)~~ (f)Written communications mailed to prospective clients shall not be made to resemble legal pleadings or other legal documents.

~~(f)~~(g) Any written communication prompted by a specific occurrence involving or affecting the intended recipient of the communication or a family member shall disclose how the lawyer obtained the information prompting the communication.

~~(g)~~(h) A written communication seeking employment by a specific prospective client in a specific matter shall not reveal on the envelope, or on the outside of a self-mailing brochure or pamphlet, the nature of the client's legal problem.

~~(h)~~(i) If a lawyer knows that a lawyer other than the lawyer whose name or signature appears on the communication will actually handle the case or matter, or that the case or matter will be referred to another lawyer or law firm, any written communication concerning a specific matter shall include a statement so advising the potential client.

~~(k)~~(j) Notwithstanding the prohibitions in paragraph (a), a lawyer may participate with a prepaid or group legal service plan operated by an organization not owned or directed by the lawyer 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. A lawyer may participate with a prepaid or group legal service plan only if the plan is established in compliance with all statutory and regulatory requirements imposed upon such plans under South Carolina law. Lawyers who participate in a legal service plan must make reasonable efforts to assure that the plan sponsors are in compliance with Rules 7.1, 7.2 and 7.3(b).

Comparison with 2002 ABA Model Rule:

Proposed Rule 7.3(a) is identical to 2002 ABA Model Rule 7.3(a).

Proposed Rule 7.3(b) includes the words "telegraph" and "facsimile," which do not appear in 2002 ABA Model Rule 7.3(b). These methods of communication were retained in deference to the current South Carolina Rule.

Proposed Rule 7.3(b)(2) includes the words "fraud, overreaching, intimidation or undue influence" which do not appear in 2002 ABA Model Rule 7.3(b)(2).

Proposed Rule 7.3 (b)(3), (4), and (5) do not appear in the Model Rule.

Proposed Rule 7.3 (c) does not appear in the Model Rule.

Proposed Rule 7.3 (d)(1) varies from, but is similar in substance to, 2002 ABA Model Rule 7.3(c). Section 7.3 of the Model Rule reads as follows:

> ***"(c) Every written, recorded or electronic communication from a lawyer soliciting professional employment from a prospective client known to be in need of legal services in a particular matter shall include the words "Advertising Material," on the outside envelope, if any, and at the beginning and ending of any recorded or electronic communication, unless the recipient of the communication is a person specified in paragraphs (a)(1) or (a)(2)."***

Proposed sections (e)-(i) of Rule 7.3 do not appear in the Model Rule and are retained from the current South Carolina Rule.

Proposed section (j) is identical to Model Rule 7.3(d) with the exception of the final two sentences. The next to last sentence is not found in the Model Rule or Comments. The final sentence is moved to Rule 7.3 (j), in slightly modified form, from the Comments.

Other Commission Comments Regarding Proposed Changes from the Current S.C. Rules of Professional Conduct:

The South Carolina Supreme Court and the Bar have studied the issue of lawyer advertising and communications thoroughly in recent years. Therefore, the Commission has not proposed extensive substantive revisions to the current South Carolina Rule 7.3, beyond updating the Rule to pertain clearly to electronic communications.

Proposed Rules 7.3 (a) and (d) are changed substantively to create an exception for solicitations of lawyers and persons with whom the soliciting lawyer has an existing close personal relationship, as well as family and persons with whom the lawyer has a prior professional relationship. The current Rule includes only the latter categories.

Current sections (i) and (j) have been moved in the proposed Rule to become new section (c). This move is intended to reduce confusion under the current rule as to whether the filing requirements pertain to all communications or only those subject to paragraph (c). The change reverses the position taken in S.C. Bar Ethics Adv. Op. # 95-31 that, under the current rule, only communications covered by proposed paragraph (d) need be filed.

The next to final sentence of proposed Rule 7.3(j) is new.

The final sentence of proposed Rule 7.3(j) is derived from the final sentence of the current South Carolina Comments to Rule 7.3. The phrase "must reasonably assure" has been changed to "must make reasonable efforts to assure."

Comparison with S.C. Bar Recommendation:

The S.C. Bar recommends deleting the words "telegraph" and "facsimile" from proposed Rule 7.3(b).

The S.C. Bar recommendation would include the filing and retention requirements of section (c) as subsections of section (d). This appears to be a substantive, and not merely editorial, distinction. Thereafter, the lettering of the remaining sections of the S.C. Bar recommendation differs from the proposed rule.

The S.C. Bar recommendation does not include the words "close personal" in Rule 7.3(d).

The S.C. Bar recommendation does not include proposed Rule 7.3(i).
The S.C. Bar recommendation does not include the next to last sentence of proposed Rule 7.3(j).

Otherwise, the proposed Rule 7.3 is identical to the S.C. Bar recommendation.

Comment

[1] There is a potential for abuse inherent in direct in-person or, live telephone or real-time electronic contact by a lawyer with a prospective client known to need legal services. These forms of contact between a lawyer and a prospective client subject the layperson to the private importuning of the trained advocate in a direct interpersonal encounter. The prospective client, who may already feel overwhelmed by the circumstances giving rise to the need for legal services, may find it difficult fully to evaluate all available alternatives with reasoned judgment and appropriate self-interest in the face of the lawyer's presence and insistence upon being retained immediately. The situation is fraught with the possibility of undue influence, intimidation, and overreaching.

[2] The use of general advertising and written ~~and,~~ recorded or electronic communications to transmit information from lawyer to prospective client, rather than direct in-person ~~or,~~ live telephone or real-time electronic contact, will help to assure that the information flows cleanly as well as freely. The contents of advertisements and communications permitted under Rule 7.2 ~~are~~ 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, misleading, deceptive, or unfair communications, in violation of Rule 7.1. The contents of direct in-person ~~or~~, live telephone or real-time electronic conversations between a lawyer ~~to~~ and a prospective client can be disputed and ~~are~~ 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.

[3] There is far less likelihood that a lawyer would engage in abusive practices against an individual who is a former client, or with whom the lawyer has a ~~prior~~ close personal or ~~professional~~ family relationship, or ~~where~~ 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(d) ~~(c)~~ are not applicable in those

situations. Also, paragraph (a) is not intended to prohibit a lawyer from participating in constitutionally protected activities of public or charitable legal-service organizations or bona fide political, social, civic, fraternal, employee or trade organizations whose purposes include providing or recommending legal services to its members or beneficiaries.

[4] But even permitted forms of solicitation can be abused. Thus, any solicitation which contains information which is false, misleading, deceptive or unfair within the meaning of Rule 7.1; which involves coercion, duress, harassment, fraud, overreaching, intimidating or undue influence within the meaning of Rule 7.3(b)(2); which involves contact with a prospective client who has made known to the lawyer a desire not to be solicited by the lawyer within the meaning of Rule 7.3(b)(1); which involves contact with a person the lawyer reasonably should know is represented by another lawyer in the matter; or which involves contact with a prospective client the lawyer reasonably should know is physically, emotionally or mentally incapable of exercising reasonable judgment in choosing a lawyer under Rule 7.3 (b)(5) is prohibited. Moreover, if after sending a letter or other communication to a client as permitted by Rule 7.2, the lawyer receives no response, any further effort to communicate with the prospective client may violate the provisions of Rule 7.3(b).

[5] The public views direct solicitation in the immediate wake of an accident as an intrusion on the personal privacy and tranquility of citizens. The 30-day restriction in paragraph (b)(3) is meant to forestall the outrage and irritation with the legal profession engendered by crass commercial intrusion by attorneys upon a citizen's personal grief in a time of trauma. The rule is limited to a brief period, and lawyer advertising permitted under Rule 7.2 offers alternative means of conveying necessary information about the need for legal services and the qualifications of available lawyers and law firms to those who may be in need of legal services without subjecting the prospective client to direct persuasion that may overwhelm the client's judgment.

[6] This Rule is not intended to prohibit a lawyer from contacting representatives of organizations or groups that may be interested in establishing a group or prepaid legal plan for their members, insureds, beneficiaries or other third parties for the purpose of informing such entities of the availability of and details concerning the plan or arrangement which the lawyer or lawyer's firm is willing to offer. This form of communication is not directed to a prospective client. Rather, it is usually addressed to an individual acting in a fiduciary capacity seeking a supplier of legal services for others who may, if they choose, become prospective clients of the lawyer. Under these circumstances, the activity which the lawyer undertakes in communicating with such representatives and the type of information transmitted to the individual are functionally similar to and serve the same purpose as advertising permitted under Rule 7.2.

[7] The requirement in Rule 7.3 (d)~~(c)~~ that certain communications be marked "Advertising Material" does not apply to communications sent in response to requests of potential clients or their spokespersons or sponsors. General announcements by lawyers, including changes in personnel or office location, do not constitute communications soliciting professional employment from a client known to be in need of legal services within the meaning of this Rule.

[8] Requiring communications to be marked as advertisements sent only be regular U.S. mail and prohibiting communications from resembling legal documents is designed to allow the recipient to chose whether or not to read the solicitation without fear or legal repercussions. In addition, the lawyer or law firm should reveal the source of information used to determine that the recipient has a potential legal problem. Disclosure of this information source will help the recipient understand the extent of knowledge the lawyer or law firm has regarding the recipient's particular situation and will avoid misleading the recipient into believing that the lawyer has particularized knowledge about the recipient's matter if the lawyer does not.

[9] Paragraph (j ~~k~~) of this Rule ~~would permit an attorney~~ permits a lawyer to participate with an organization which uses personal contact to solicit members for its group or prepaid legal service plan, provided that the personal contact is not undertaken by any lawyer who would be a provider of legal services through the plan. The organization referred to in paragraph (j ~~k~~) must not be owned by or directed, whether as manager or otherwise, by any lawyer or law firm that participates in the plan. For example, paragraph (j ~~k~~) would not permit a lawyer to create an organization controlled directly or indirectly by the lawyer and use the organization for the in-person or telephone solicitation of legal employment of the lawyer through memberships in the plan or otherwise. The communication permitted by these organizations also must not be directed to a person known to need legal services in a particular matter, but is to be designed to inform potential plan members generally of another means of affordable legal services. ~~Lawyers who participate in a legal service plan must reasonably assure that the plan sponsors are in compliance with Rules 7.1,7.2 and 7.3(b).~~

Comparison of Proposed Comments with Model Comments under the 2002 ABA Model Rule:

Proposed Comments [1], [3], [6], and [7] are identical to Model Comments [1], [4], [6], and [7], except that the internal cross-references to Rule 7.3 have been changed to reflect the South Carolina version of the Rule.

Proposed Comment [2] is identical to Model Comment [3] with the exception of the third sentence, in which the proposed Comment substitutes the words "false, misleading, deceptive, or unfair" for the words "false and misleading" used in the Model Comment.

Model Comment [2] is not included among the proposed Comments, but its substance is set forth in part in proposed Comment [5].

Proposed Comment [4] is based upon Model Comment [5]. The second sentence of proposed Comment [4] contains the words "which involves contact with a person the lawyer reasonably should know is represented by another lawyer in the matter; or which involves contact with a prospective client the lawyer reasonably should know is physically, emotionally or mentally incapable of exercising reasonable judgment in choosing a lawyer under Rule 7.3 (b)(5)." These words do not appear in the Model Comment, but reflect the South Carolina variation of Rule 7.3(b).

Proposed Comments [5] and [8] are not included in the Model Comments, but are retained from the current S.C. Comments.

Proposed Comment [9] is identical to Model Comment [8], with two exceptions. The internal cross-references to Rule 7.3 have been changed to reflect the South Carolina version of the Rule. Also, in the second sentence, the words "referred to in paragraph (j)" do not appear in the Model Comment.

Other Commission Comments Regarding Proposed Changes in the Comments from the Current S.C. Comments:

The proposed revisions to the Comments are not substantive beyond the changes in the proposed Rule.

Comparison of Proposed Comments with S.C. Bar Recommendation:

The S.C. Bar recommends inclusion of Model Comment [2]. The Commission, however, believes that the substance of that Comment duplicates proposed Comment [5], which is retained from the current South Carolina Comments.

In proposed Comment [2], the S.C. Bar recommends the language of the Model Comment.

In proposed Comment [4], the S.C. Bar does not recommend inclusion of the additional language beyond that proposed by the Model Comment.

The S.C. Bar recommendation does not include proposed Comments [5] or [8], which are retained from the current South Carolina Comments.

In proposed Comment [7], the S.C. Bar recommends adding a final sentence citing to Rule 7.3. The Commission believes this unnecessary because these are Comments to that Rule.

In proposed Comment [9], the S.C. Bar recommends the language of the Model Comment.

RULE 7.4: ~~Certified Specialization and Limitation of Practice~~ COMMUNICATION OF FIELDS OF PRACTICE AND SPECIALIZATION

(a) A lawyer who is certified under the Rule on Lawyer Competence, Rule 408, SCACR, is entitled to advertise or state publicly in any manner otherwise permitted by these rules that the lawyer is certified as a specialist in the pertinent specialty field by the Supreme Court of South Carolina.

(b) A lawyer who is not certified as a specialist but who concentrates in, limits his or her practice to, or wishes to announce a willingness to accept cases in a particular field may so advertise or publicly state in any manner otherwise permitted by these rules. To avoid confusing or misleading the public and to protect the objectives of the South Carolina certified specialization program, any such advertisement or statements shall be strictly factual and shall not contain any form of the words "certified," "specialist," "expert," or "authority"except as permitted by Rule 7.4(d).

(c) A lawyer admitted to engage in patent practice before the United States Patent and Trademark Office may use the designation ~~"patents,"~~"Patent Attorney~~,~~" or ~~"patent lawyer" or any combination of those terms~~ a substantially similar designation. A lawyer engaged in the trademark practice may use the designation "trademarks," "trademark attorney," or "trademark lawyer" or any combination of those terms.

(d) A lawyer engaged in admiralty practice may use the designation "admiralty," "proctor in admiralty~~,~~" ~~or "admiralty lawyer" or any combination of those terms~~ or a substantially similar designation.

Comparison with 2002 ABA Model Rule:

Proposed paragraphs (a) and (b) are retained from the current South Carolina Rule 7.4 and do not appear in the Model Rule. Model Rule 7.4(a) reads as follows: "A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law."

The first sentence of proposed paragraph (c) is similar to Model paragraph (b). The second sentence does not appear in the Model version. Proposed paragraph (d) is identical to Model paragraph (c).

The proposed Rule 7.4 omits Model Rule 7.4(d) which reads as follows: "(d) A lawyer shall not state or imply that a lawyer is certified as a specialist in a particular field of law, unless: (1) the lawyer has been certified as a specialist by an organization that has been approved by an appropriate state authority or that has been accredited by the American Bar Association; and (2) the name of the certifying organization is clearly identified in the communication."

Other Commission Comments Regarding Proposed Changes from the Current S.C. Rules of Professional Conduct:

The changes are primarily stylistic.

Comparison with S.C. Bar Recommendation:

The S.C. Bar recommends retaining the current South Carolina rule with the addition of a new section (b) which would read as follows:

> *"(b) A lawyer who is certified by an independent certifying organization accredited by the American Bar Association or that has been approved by the Supreme Court Commission on Continuing Legal Education and Specialization" to offer certification in South Carolina is entitled to advertise or state publicly, in any manner otherwise permitted by these Rules, that the lawyer is certified in the pertinent specialty field. Any advertisement or public statement announcing certification shall identify the independent certifying organization by which the lawyer is certified."*

The S.C. Bar would modify current South Carolina Rule 7.4(b) [redesignated as paragraph (c) in the S.C. Bar recommendation] to allow communication claiming specialization when expressly permitted to do so by the Rule.

Comment

[1] ~~This~~ Paragraph (b) of this Rule permits a lawyer to indicate areas of practice in communications about the lawyer's services, for example, in a telephone directory or other advertising. If a lawyer practices only in certain fields, or will not accept matters except in such fields, the lawyer is permitted ~~so~~ to so indicate.

[2] ~~Recognition of specialization in patent matters is a matter of~~ Paragraph (c) recognizes the long-established policy of the Patent and Trademark Office for the designation of lawyers practicing before the Office. Paragraph (d) recognizes that ~~D~~designation of admiralty practice has a long historical tradition associated with maritime commerce and the federal courts.

Comparison of Proposed Comments with Model Comments under the 2002 ABA Model Rule:

Because Model Comment [1] refers to the different structure of the Model Rule, only portions of that Model Comment are included in the Proposed Comments. Model Comment [1] reads in its entirety as follows:

> *"Paragraph (a) of this Rule permits a lawyer to indicate areas of practice in communications about the lawyer's services. If a lawyer practices only in certain fields, or will not accept matters except in a specified field or fields, the lawyer is permitted to so indicate. A lawyer is generally permitted to state that the lawyer is a 'specialist,' practices a 'specialty,' or 'specializes in' particular fields, but such communications are subject to the 'false and misleading' standard applied in Rule 7.1 to communications concerning a lawyer's services."*

Proposed Comment [2] is identical to Model Comment [2] except for the internal cross-references and the capitalization of "Admiralty" in the model version.

Model Comment [3] is deleted. It reads as follows:

> *"[3] Paragraph (d) permits a lawyer to state that the lawyer is certified as a specialist in a field of law if such certification is granted by an organization approved by an appropriate state authority or accredited by the American Bar Association or another organization, such as a state bar association, that has been approved by the state authority to accredit organizations that certify lawyers 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 insure that a lawyer's recognition as a specialist is meaningful and reliable. In order to insure that consumers can obtain access to useful*

information about an organization granting certification, the name of the certifying organization must be included in any communication regarding the certification."

Other Commission Comments Regarding Proposed Changes in the Comments from the Current S.C. Comments:

The proposed revisions to the Comments are not substantive beyond the changes in the proposed Rule.

Comparison of Proposed Comments with S.C. Bar Recommendation:

The S.C. Bar recommends proposed Comment [1], but with a minor stylistic difference, beginning the Comment with "This Rule permits ...."

The S.C. Bar recommends retaining the current South Carolina version of proposed Comment [2], but designating that Comment as Comment [5].

The S.C. Bar recommends three additional Comments, which are set forth below:

"[2] A lawyer may concentrate in certain practice areas or limit a practice to particular areas of law and may publicly indicate those limitations. However, only lawyers certified as a specialist in a particular practice area by the Supreme Court of South Carolina or by an independent certifying organization accredited by the American Bar Association (ABA) or approved by the Supreme Court Commission on Continuing Legal Education and Specialization (Commission) to offer certification in South Carolina may use any form of the words 'certified,' 'specialist,' 'expert,' or 'authority' in public statements or advertisements.

"[3] Certification is currently offered by the Supreme Court of South Carolina, under its specialization program administered by the Commission, in estate planning and probate law, taxation law, employment and labor law, and bankruptcy and debtor-creditor law. Independent certifying organizations accredited by the ABA which are currently authorized to offer certification in South Carolina are the National Board of Trial Advocacy which offers certification in civil, criminal, and family law trial advocacy and the American Board of Professional Liability Attorneys which offers certification in accountancy, medical, and legal malpractice. Independent certifying organizations accredited by the ABA meet objective and consistently applied standards similar to those of the Commission. This approach is consistent with Peel v. Attorney Registration and Disciplinary Commission, 496 U.S. 91 (1990).

"[4] Both South Carolina's specialization program and the ABA's independent certifying organization accreditation program certify expertise, not mere competency. However, there are specialization programs in which mere competency is the standard."

RULE 7.5: FIRM NAMES AND LETTERHEADS

(a) A lawyer shall not use a firm name, letterhead or other professional designation that violates Rule 7.1. A trade name may be used by a lawyer in private practice if it does not imply a connection with a government agency or with a public or charitable legal services organization and is not otherwise in violation of Rule 7.1.

(b) A law firm with offices in more than one jurisdiction may use the same name or other professional designation in each jurisdiction, but identification of the lawyers in an office of the firm shall indicate the jurisdictional limitations on those not licensed to practice in the jurisdiction where the office is located.

(c) The name of a lawyer holding a public office shall not be used in the name of a law firm, or in communications on its behalf, during any substantial period in which the lawyer is not actively and regularly practicing with the firm.

(d) Lawyers may state or imply that they practice in a partnership or other organization only when that is the fact.

Comparison with 2002 ABA Model Rule:

Proposed Rule 7.5 is identical to 2002 ABA Model Rule 7.5.

Other Commission Comments Regarding Proposed Changes from the Current S.C. Rules of Professional Conduct:

The change in paragraph (b) recognizes that other professional designations such as web sites are governed by the Rule.

Comparison with S.C. Bar Recommendation:

Proposed Rule 7.5 is identical to the S.C. Bar recommendation.

Comment

[1] A firm may be designated by the names of all or some of its members, by the names of deceased members where there has been a continuing succession in the firm's identity or by a trade name such as the "ABC Legal Clinic." A lawyer or law firm may also be designated by a distinctive website address or comparable professional designation. Although the United States Supreme Court has held that legislation may prohibit the use of trade names in professional practice, use of such names in law practice is acceptable so long as it is not misleading. ~~[2]~~ If a private firm uses a trade name that includes a geographical name such as "Springfield Legal Clinic," an express disclaimer that it is a public legal aid agency may be required to avoid a misleading implication. It may be observed that any firm name including the name of a deceased partner is, strictly speaking, a trade name. The use of such names to designate law firms has proven a useful means of identification. However, it is misleading to use the name of a lawyer not associated with the firm or a predecessor of the firm or the name of a non lawyer.

[2]~~[3]~~ With regard to paragraph (d), lawyers sharing office facilities, but who are not in fact ~~partners~~ associated with each other in a law firm, may not denominate themselves as, for example, "Smith and Jones," for that title suggests ~~partnership in the practice of~~ that they are practicing law together in a firm.

Comparison of Proposed Comments with Model Comments under the 2002 ABA Model Rule:

The proposed Comments are identical to Model Comments.

Other Commission Comments Regarding Proposed Changes in the Comments from the Current S.C. Comments:

The proposed revisions to the Comments are not substantive beyond the changes in the proposed Rule.

Comparison of Proposed Comments with S.C. Bar Recommendation:

The proposed Comments are identical to the S.C. Bar recommendation.

RULE 7.6 : POLITICAL CONTRIBUTIONS TO OBTAIN GOVERNMENT LEGAL ENGAGEMENTS OR APPOINTMENTS BY JUDGES

[The Commission does NOT recommend adoption of Rule 7.6. Rule 7.6 is a new Model Rule adopted by the ABA in 2001 in response to complaints by municipal bond lawyers in New York. The Commission feels the Rule is unnecessary in South Carolina, and would be very difficult to enforce.]

Comparison with S.C. Bar Recommendation:

The S.C. Bar recommends adoption of 2002 ABA Model Rule 7.6 and its accompanying Comments. For information the Model Rule and Comments are set forth below in their entirety:

"RULE 7.6: POLITICAL CONTRIBUTIONS TO OBTAIN GOVERNMENT LEGAL ENGAGEMENTS OR APPOINTMENTS BY JUDGES

A lawyer or law firm shall not accept a government legal engagement or an appointment by a judge if the lawyer or law firm makes a political contribution or solicits political contributions for the purpose of obtaining or being considered for that type of legal engagement or appointment.

Comment

"[1] Lawyers have a right to participate fully in the political process which includes making and soliciting political contributions to candidates for judicial and other public office. Nevertheless, when lawyers make or solicit political contributions in order to obtain an engagement for legal work awarded by a government agency, or to obtain appointment by a judge, the public may legitimately question whether the lawyers engaged to perform the work are selected on the basis of competence and merit. In such a circumstance, the integrity of the profession is undermined.

"[2] The term "political contribution" denotes any gift subscription loan advance or deposit of anything of value made directly or indirectly to a candidate, incumbent, political party or campaign committee to influence or provide financial support for election to or retention in judicial or other government office. Political contributions in initiative and referendum elections are not included. For purposes of this Rule, the term "political contribution" does not include uncompensated services.

"[3] Subject to the exceptions below, (i) the term "government legal engagement" denotes any engagement to provide legal services that a public official has the direct or indirect power to award; and (ii) the term "appointment by judge" denotes an appointment to a position such as referee, commissioner, special master, receiver, guardian or other similar position that is made by a judge. Those terms do not, however, include (a) substantially uncompensated services; (b) engagements or appointments made on the basis of experience expertise, professional qualifications and cost following a request for proposal or other process that is free from influence based upon political contributions; and (c) engagements or appointments made on a rotational basis from a list compiled without regard to political contributions.

"[4] The term "lawyer or law firm" includes a political action committee or other entity owned or controlled by a lawyer or law firm.

"[5] Political contributions are for the purpose of obtaining or being considered for a government legal engagement or appointment by a judge if, but for the desire to be considered for the legal engagement or appointment, the lawyer or law firm would not have made or solicited the contributions. The purpose may be determined by an examination of the circumstances in which the contributions occur. For example, one or more contributions that in the aggregate are substantial in relation to other contributions by lawyers or law firms, made for the benefit of an official in a position to influence award of a government legal engagement, and followed by an award of the legal engagement to the contributing or soliciting lawyer or the lawyer's firm would support an inference that the purpose of the contributions was to obtain the engagement, absent other factors that weigh against existence of the proscribed purpose. Those factors may include among others that the contribution or solicitation was made to further a political, social, or economic interest or because of an existing personal, family, or professional relationship with a candidate.

"[6] If a lawyer makes or solicits a political contribution under circumstances that constitute bribery or another crime, Rule 8.4(b) is implicated."

MAINTAINING THE INTEGRITY OF THE PROFESSION

RULE 8.1: BAR ADMISSION AND DISCIPLINARY MATTERS

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

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

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

Comparison with 2002 ABA Model Rule:

Proposed Rule 8.1 is identical to 2002 ABA Model Rule 8.1.

Other Commission Comments Regarding Proposed Changes from the Current S.C. Rules of Professional Conduct:

No change is proposed.

Comparison with S.C. Bar Recommendation:

The proposed Rule is identical to the recommendation of the S.C. Bar.

Comment

[1] The duty imposed by this Rule extends to persons seeking admission to the bar as well as to lawyers. Hence, if a person makes a material false statement in connection with an application for admission, it may be the basis for subsequent disciplinary action if the person is admitted, and in any event may be relevant in a subsequent admission application. The duty imposed by this Rule applies to a

lawyer's own admission or discipline as well as that of others. Thus, it is a separate professional offense for a lawyer to knowingly make a misrepresentation or omission in connection with a disciplinary investigation of the lawyer's own conduct. ~~This~~ Paragraph (b) of this Rule also requires correction of any prior misstatement in the matter that the applicant or lawyer may have made and affirmative clarification of any misunderstanding on the part of the admissions or disciplinary authority of which the person involved becomes aware.

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

[3] A lawyer representing an applicant for admission to the bar, or representing a lawyer who is the subject of a disciplinary inquiry or proceeding, is governed by the rules applicable to the client-lawyer relationship, including Rule 1.6 and, in some cases, Rule 3.3.

Comparison of Proposed Comments with Model Comments under the 2002 ABA Model Rule:

The proposed Comments are identical to the Model Comments.

Other Commission Comments Regarding Proposed Changes in the Comments from the Current S.C. Comments:

The proposed changes clarify the applicant's duty to correct misstatements and clarify that Rules regarding both confidentiality and disclosure of false statements apply to a lawyer representing an applicant.

Comparison of Proposed Comments with S.C. Bar Recommendation:

The proposed Comments are identical to the recommendation of the S.C. Bar.

RULE 8.2: JUDICIAL AND LEGAL OFFICIALS

(a) A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office.

(b) A lawyer who is a candidate for judicial office shall comply with the applicable provisions of the Code of Judicial Conduct.

Comparison with 2002 ABA Model Rule:

Proposed Rule 8.2 is identical to 2002 ABA Model Rule 8.2.

Other Commission Comments Regarding Proposed Changes from the Current S.C. Rules of Professional Conduct:

No change is proposed.

Comparison with S.C. Bar Recommendation:

The proposed Rule is identical to the recommendation of the S.C. Bar.

Comment

[1] Assessments by lawyers are relied on in evaluating the professional or personal fitness of persons being considered for election or appointment to judicial office and to public legal offices, such as attorney general, prosecuting attorney and public defender. Expressing honest and candid opinions on such matters contributes to improving the administration of justice. Conversely, false statements by a lawyer can unfairly undermine public confidence in the administration of justice.

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

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

Comparison of Proposed Comments with Model Comments under the 2002 ABA Model Rule:

The proposed Comments are identical to the Model Comments.

Other Commission Comments Regarding Proposed Changes in the Comments from the Current S.C. Comments:

No change is proposed.

Comparison of Proposed Comments with S.C. Bar Recommendation:

The proposed Comments are identical to the recommendation of the S.C. Bar.

RULE 8.3: REPORTING PROFESSIONAL MISCONDUCT

(a) A lawyer ~~having knowledge~~ who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.

(b) A lawyer ~~having knowledge~~ who knows that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's honesty, trustworthiness, or fitness for office in other respects shall inform the appropriate authority.

(c) This Rule does not require disclosure of information otherwise protected by Rule 1.6.

(d) Inquiries or information received by the South Carolina Bar Lawyers ~~Caring About~~ Helping Lawyers Committee or an equivalent county bar association committee regarding the need for treatment for alcohol, drug abuse or depression, or by the South Carolina Bar law office management assistance program or an equivalent county bar association program regarding a lawyer seeking the program assistance, shall not be disclosed to the disciplinary authority without written permission of the lawyer receiving assistance. Any such inquiry or information shall enjoy the same confidence as information protected by the attorney-client privilege under applicable law.

Comparison with 2002 ABA Model Rule:

Proposed Rule 8.3(a) is identical to 2002 ABA Model Rule 8.3(a).

Model Rule 8.3(b) does not include the words " honesty, trustworthiness, or" prior to "fitness." The recommended language is retained from the current South Carolina Rule.

Model Rule 8.3(c) includes the following additional language: "or information gained by a lawyer or judge while serving as a member of an approved lawyers assistance program to the extent that such information would be confidential if it were communicated subject to the attorney-client privilege."

Other Commission Comments Regarding Proposed Changes from the Current S.C. Rules of Professional Conduct:

The only changes are stylistic.

Comparison with S.C. Bar Recommendation:

The S.C. Bar would substitute the word "allow" for the word "require" in Rule 8.3(c).

The S.C. Bar also recommends adding the language "or information gained by a lawyer or judge while participating in an approved lawyers assistance program, such as the S.C. Bar Lawyers Helping Lawyers program, any S.C. Bar law office management assistance program and any equivalent county bar association assistance program" to the end of paragraph (c) and deleting paragraph (d).

Otherwise, the proposed Rule is identical to the recommendation of the S.C. Bar.

Comment

[1] Self-regulation of the legal profession requires that members of the profession initiate disciplinary investigation when they know of a violation of the Rules of Professional Conduct. Lawyers have a similar obligation with respect to judicial misconduct. An apparently isolated violation may indicate a pattern of misconduct that only a disciplinary investigation can uncover. Reporting a violation is especially important where the victim is unlikely to discover the offense. The South Carolina version of paragraph (b) modifies the model version by specifically including "honesty" and "trustworthiness" to parallel the requirement of paragraph (a).

~~[2] 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][~~3~~] A report about misconduct is not required where it would involve violation of Rule 1.6. However, a lawyer should encourage a client to consent to disclosure where prosecution would not substantially prejudice the client's interests.

[3][~~4~~] If a lawyer were obliged to report every violation of the Rules, the failure to report any violation would itself be a professional offense. Such a requirement existed in many jurisdictions but proved to be unenforceable. This Rule limits the reporting obligation to those offenses that a self-regulating profession must vigorously endeavor to prevent. A measure of judgment is, therefore, required in complying with the provisions of this Rule. The term "substantial" refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware. A report should be made to the bar disciplinary agency unless some other agency, such as a peer review agency, is more appropriate in the circumstances. Similar considerations apply to the reporting of judicial misconduct.

[4][~~5~~] The duty to report professional misconduct does not apply to a lawyer retained to represent a lawyer whose professional conduct is in question. Such a situation is governed by the Rules applicable to the client-lawyer relationship.

[5] Paragraph (d) encourages lawyers to seek assistance from the South Carolina Bar Lawyers Helping Lawyers Committee, from a South Carolina Bar ~~and~~ law office management assistance program, or from an equivalent county bar association programs without fear of being reported for violating the Rules of Professional Conduct. 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 paragraphs (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. These Rules do not otherwise address the confidentiality of information received by a lawyer or judge participating in an approved lawyers assistance program; such an obligation, however, may be imposed by the rules of the program or other law.

~~[6] Paragraph (d) was added to the Model Rules to encourage lawyers to seek assistance from the South Carolina Bar Lawyers Caring about Lawyers Committee and Law Office Management Assistance Program or equivalent county bar association programs without fear of being reported for violating the Rules of Professional Responsibility.~~

Comparison of Proposed Comments with Model Comments under the 2002 ABA Model Rule:

The final sentence of proposed Comment [1] does not appear in the Model Comments.

Proposed Comments [2]-[4] are identical to the Model Comments.

The first sentence of Comment [5] does not appear in the Model Comments.

Other Commission Comments Regarding Proposed Changes in the Comments from the Current S.C. Comments:

The proposed changes are not intended to be substantive.

Comparison of Proposed Comments with S.C. Bar Recommendation:

The S.C. Bar recommends inserting the final sentence of proposed Comment [1] as the third sentence of that Comment.

The S.C. Bar recommendation did not include the first sentence of proposed Comment [5].

Otherwise, the proposed Comments are identical to the S.C. Bar recommendation.

RULE 8.4: MISCONDUCT

It is professional misconduct for a lawyer to:

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

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

(c) ~~engage in conduct~~ commit a criminal act involving moral turpitude;

(d) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(e) engage in conduct that is prejudicial to the administration of justice;

(f) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law; or

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

Comparison with 2002 ABA Model Rule:

Proposed Rule 8.4 retains paragraph (c) specifically barring criminal acts involving moral turpitude. This provision has been deleted from the Model Rule. The lettering of subsequent paragraphs differs from the Model Rule, reflecting this change.

Otherwise, proposed Rule 8.4 is identical to 2002 ABA Model Rule 8.4.

Other Commission Comments Regarding Proposed Changes from the Current S.C. Rules of Professional Conduct:

Proposed paragraph (c) concerning moral turpitude would refer only to criminal acts, rather than to any conduct of that type.

Comparison with S.C. Bar Recommendation:

The S.C. Bar recommendation did not include proposed paragraph (c).

Comment

[1] Lawyers are subject to discipline when they violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so or do so through the acts of another, as when they request or instruct an agent to do so on the lawyer's behalf. Paragraph (a), however, does not prohibit a lawyer from advising a client concerning action the client is legally entitled to take.

~~[1]~~[2] ~~A lawyer should maintain high standards of professional conduct and should refrain from all illegal and morally reprehensible conduct.~~ Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud~~, violence, dishonesty, breach of trust, or serious interference with the administration of justice,~~ and the offense of willful failure to file an income tax return. 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. ~~Because of the lawyer's position in society, even minor violations of law by the lawyer may tend to lessen public confidence in the legal profession.~~ The South Carolina version of this Rule also specifically includes criminal acts involving moral turpitude as professional misconduct. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.

~~[2] The South Carolina version of this Rule differs from the Model Rules in that it includes conduct involving moral turpitude as professional misconduct. This is carried over from DR 1-102(A)(3).~~

[3] A lawyer who, in the course of representing a client, knowingly manifests by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, violates paragraph (d) when such actions are prejudicial to the administration of justice. Legitimate advocacy respecting the foregoing factors does not violate paragraph (d). A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule.

~~[3]~~[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.

~~[4]~~[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 of Proposed Comments with Model Comments under the 2002 ABA Model Rule:

Model Comment [2] includes three additional sentences after the first sentence that have been deleted from the proposed Comment. The Model Comment does not include the next to last sentence of proposed Comment [2]. These changes are consistent with the retention in proposed South Carolina Rule 8.4 of a ban on crimes of moral turpitude. The deleted language reads as follows: "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."

Otherwise, the proposed Comments are identical to the Model Comments.

Other Commission Comments Regarding Proposed Changes in the Comments from the Current S.C. Comments:

Proposed Comment [3] provides for discipline when a lawyer engages in biased speech or conduct that prejudices the administration of justice. No similar Comment now exists.

Comparison of Proposed Comments with S.C. Bar Recommendation:

The S.C. Bar recommended the language of Model Comment [2]. Otherwise, the proposed Comments are identical to the S.C. Bar recommendation.

RULE 8.5: ~~JURISDICTION~~ DISCIPLINARY AUTHORITY; CHOICE OF LAW

(a) Disciplinary Authority. A lawyer admitted to practice to this jurisdiction is subject to the disciplinary authority of this jurisdiction ~~although engaged in practice elsewhere~~, regardless of where the lawyer's conduct occurs. A lawyer not admitted in this jurisdiction is also subject to the disciplinary authority of this jurisdiction if the lawyer provides or offers to provide any legal services in this jurisdiction. A lawyer may be subject to the disciplinary authority of both this jurisdiction and another jurisdiction for the same conduct.

(b) Choice of Law. In any exercise of the disciplinary authority of this jurisdiction, the rules of professional conduct to be applied shall be as follows:

(1) for conduct in connection with a matter pending before a tribunal, the rules of the jurisdiction in which the tribunal sits, unless the rules of the tribunal provide otherwise; and

(2) for any other conduct, the rules of the jurisdiction in which the lawyer's conduct occurred, or, if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction shall be applied to the conduct. A lawyer shall not be subject to discipline if the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect of the lawyer's conduct will occur.

(c) A lawyer giving advice or providing services that would be considered to be the practice of law if provided while the lawyer was affiliated with a law firm is subject to the Rules of Professional Conduct with respect to the giving of such advice or the providing of such services whether or not the lawyer is actively engaged in the practice of law or affiliated with a law firm. In giving such advice and in providing such services, a lawyer shall be considered to be representing a client for the purposes of the Rules of Professional Conduct.

Comparison with 2002 ABA Model Rule:

Proposed paragraph (c) does not appear in 2002 ABA Model Rule 8.5.

Other Commission Comments Regarding Proposed Changes from the Current S.C. Rules of Professional Conduct:

The changes proposed in Rule 8.5(a) are intended to clarify existing practice and appear consistent with S.C. App. Ct. R. 418.

South Carolina has not previously adopted any version of the Model Rules regarding choice of law. The Commission believes the 2002 Model version of Rule 8.5(b) is a great improvement over previous Model Rules. While recommending its adoption, the Commission notes that the addition of paragraph (b) may not be necessary, given existing South Carolina jurisprudence on choice of law matters.

The Commission also notes that, under this proposal, a South Carolina lawyer, appearing in a matter before a court of another jurisdiction, could engage in conduct in South Carolina that is permitted by that other jurisdiction, even though similar conduct would be prohibited by South Carolina. See, e.g., Rule 4.5 (Threatening Criminal Prosecution). The

S.C. Bar recommendation attempts to eliminate that possibility, but creates a potential ambiguity in determining where particular conduct occurs (for example, if a lawyer in another state were by mail to threaten criminal prosecution of a party resident in South Carolina).

Paragraph (c) applies the Rules of Professional Conduct to a lawyer rendering legal advice in any setting to the same extent as if the lawyer were representing a client in a law firm setting.

Comparison with S.C. Bar Recommendation:

The S.C. Bar recommends modifying proposed paragraph (b)(1) by creating two subparts. Following the word "unless," the Bar recommends inserting the following language: "(i) the lawyer's conduct occurred in this jurisdiction, in which case the rules of the jurisdiction shall be applied, or (ii)..."

Comment

~~[1] In modern practice lawyers frequently act outside the territorial limits of the jurisdiction in which they are licensed to practice, either in another state or outside the United States. In doing so, they remain subject to the governing authority of the jurisdiction in which they are licensed to practice. If their activity in another jurisdiction is substantial and continuous, it may constitute practice of law in that jurisdiction. See Rule 5.5.~~

~~[2] If the rules of professional conduct in the two jurisdictions differ, principles of conflict of laws may apply. Similar problems can arise when a lawyer is licensed to practice in more than one jurisdiction.~~

~~[3] Where the lawyer is licensed to practice law in two jurisdiction which impose conflicting obligations, applicable rules of choice of law may govern the situation. A related problem arises with respect to practice before a federal tribunal, where the general authority of the states to regulate the practice of law must be reconciled with such authority as federal tribunals may have to regulate practice before them.~~

Disciplinary Authority

[1] It is longstanding law that the conduct of a lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction. Extension of the disciplinary authority of this jurisdiction to other lawyers who provide or offer to provide legal services in this jurisdiction is for the protection of the citizens of this jurisdiction. Reciprocal enforcement of a jurisdiction's disciplinary findings and sanctions will further advance the purposes of this Rule. See S.C. App. Ct. R. 413, Rule 29 (S.C. Rules for Lawyer Disciplinary Enforcement). A lawyer who is subject to the disciplinary authority of this jurisdiction under Rule 8.5(a) appoints an official to be designated by this Court to receive service of process in this jurisdiction. The fact that the lawyer is subject to the disciplinary authority of this jurisdiction may be a factor in determining whether personal jurisdiction may be asserted over the lawyer for civil matters.

Choice of Law

[2] A lawyer may be potentially subject to more than one set of rules of professional conduct which impose different obligations. The lawyer may be licensed to practice in more than one jurisdiction with differing rules, or may be admitted to practice before a particular court with rules that differ from those of the jurisdiction or jurisdictions in which the lawyer is licensed to practice. Additionally, the lawyer's conduct may involve significant contacts with more than one jurisdiction.

[3] Paragraph (b) seeks to resolve such potential conflicts. Its premise is that minimizing conflicts between rules, as well as uncertainty about which rules are applicable, is in the best interest of both clients and the profession (as well as the bodies having authority to regulate the profession). Accordingly, it takes the approach of (i) providing that any particular conduct of a lawyer shall be subject to only one set of rules of professional conduct, (ii) making the determination of which set of rules applies to particular conduct as straightforward as possible, consistent with recognition of appropriate regulatory interests of relevant jurisdictions, and (iii) providing protection from discipline for lawyers who act reasonably in the face of uncertainty.

[4] Paragraph (b)(1) provides that as to a lawyer's conduct relating to a proceeding ~~in~~ pending before a tribunal, the lawyer shall be subject only to the rules of the jurisdiction in which the tribunal sits unless the rules of the tribunal, including its choice of law rule, provide otherwise. As to all other conduct, including conduct in anticipation of a proceeding not yet pending before a tribunal, paragraph (b)(2) provides that a lawyer shall be subject to the rules of the jurisdiction in which the lawyer's conduct occurred, or if the predominant

effect of the conduct is in another jurisdiction, the rules of that jurisdiction shall be applied to the conduct. In the case of conduct in anticipation of a proceeding that is likely to be before a tribunal, the predominant effect of such conduct could be where the conduct occurred, where the tribunal sits or in another jurisdiction.

[5] When a lawyer's conduct involves significant contacts with more than one jurisdiction, it may not be clear whether the predominant effect of the lawyer's conduct will occur in a jurisdiction other than the one in which the conduct occurred. So long as the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect will occur, the lawyer shall not be subject to discipline under this Rule.

[6] If two admitting jurisdictions were to proceed against a lawyer for the same conduct, they should, applying this rule, identify the same governing ethics rules. They should take all appropriate steps to see that they do apply the same rule to the same conduct, and in all events should avoid proceeding against a lawyer on the basis of two inconsistent rules.

[7] The choice of law provision applies to lawyers engaged in transnational practice, unless international law, treaties or other agreements between competent regulatory authorities in the affected jurisdictions provide otherwise.

[8] The Rules of Professional Conduct apply to a lawyer giving advice or providing services that are not prohibited as the unauthorized practice of law when provided by a non-lawyer but are considered the practice of law when provided by a lawyer. For instance, an accountant giving tax advice to a client is not normally engaged in the unauthorized practice of law. However, if a lawyer gives the same advice, he or she is giving legal advice and is subject to the Rules of Professional Conduct, whether working for a law firm, or an accounting firm, a consulting firm, or another enterprise. Of course, this is also true if the lawyer is giving advice or providing services that would constitute the unauthorized practice of law by a non-lawyer. In giving both kinds of advice and in providing both kinds of services, a lawyer is considered to be representing a client for the purposes of determining which of these Rules govern the lawyer's conduct. This rule does not permit lawyers to engage in activities that would otherwise violate Rules 5.4 or 5.5 or any of the other Rules of Professional Conduct.

Comparison of Proposed Comments with Model Comments under the 2002 ABA Model Rule:

Proposed Comment [8] does not appear in the Model Comments. Otherwise, the proposed Comments are identical to the Model Comments, with the exception of the cross-reference in proposed Comment [1] to the South Carolina Rules for Lawyer Disciplinary Enforcement. The Model Comment refers to the ABA Model version of those Rules.

Other Commission Comments Regarding Proposed Changes in the Comments from the Current S.C. Comments:

The proposed Comments replace in their entirety the previous Comments.

Comparison of Proposed Comments with S.C. Bar Recommendation:

The S.C. Bar recommends inserting language into Comment [4] consistent with its variation of Rule 8.5 (b)(1). It would insert in the first sentence after the word "unless" the words "the lawyer's conduct occurs in this jurisdiction."

Otherwse, the proposed Comments are identical to the S.C. Bar recommendation, with the exception of the cross-reference in proposed Comment [1], which is left in the Model form under the S.C. Bar recommendation.