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An Overview of the Law of Professional Responsibility: The Rules of Professional Conduct Annotated and Analyzed

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AN OVERVIEW OF THE LAW OF PROFESSIONAL RESPONSIBILITY: THE RULES OF PROFESSIONAL CONDUCT ANNOTATED AND ANALYZED

Robert H. Aronson*

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I. INTRODUCTION

On September 1, 1985, the Washington Rules of Professional Conduct (RPC) became effective. Despite a number of significant differences,[1] the RPC are virtually identical to the Model Rules of Professional Conduct (Model Rules), adopted by the American Bar Association (ABA) in August 1983. Most practicing attorneys are unable to keep up to date in this area in light of this major development, along with the substantial number of recent United States and Washington Supreme Court decisions concerning lawyers' ethics and professional responsibility. Many attorneys are unaware of the significant differences between the now superseded Code of Professional Responsibility (CPR)[2] and the RPC and the effect of recent judicial decisions interpreting both the CPR and RPC. Consequently, a review and analysis of the law of professional responsibility, including the RPC and relevant case and statutory law, should prove helpful to Washington attorneys.

This Article contains two parts with different purposes. The first part consists of an introduction and critique of the recently adopted Washington Rules of Professional Conduct. Some of the rules that differ from the Model Rules, that violate Constitutional requirements, or that inappropriately resolve competing policies are evaluated. Two of the most important areas—confidentiality and advertising—are treated separately and in-depth in student Survey Comments.[3] The second part of this Article consists of an overview of the law of professional responsibility in Washington. It follows the organization and rule sequence of the RPC, with annotations, applications, and interpretations from the ABA Model Rule Comments[4] and judicial decisions from Washington and elsewhere. This

1. *See, e.g., infra* notes 34–35 and accompanying text.

2. Effective January 1, 1972, to September 5, 1986.

3. *See* Survey Comment, *Lawyer Advertising*, 61 WASH. L. REV. 903 (1986); Survey Comment, *Confidentiality Under the Washington Rules of Professional Conduct*, 61 WASH. L. REV. 913 (1986) [hereinafter cited as Survey Comment, *Confidentiality*].

4. The "Scope" section of the Model Rules provides:

> The Comment accompanying each Rule explains and illustrates the meaning and purpose of the Rule. . . . The Comments are intended as guides to interpretation, but the text of each Rule is authoritative. Research notes were prepared to compare counterparts in the ABA Model Code of Professional Responsibility. . . and to provide selected references to other authorities. The notes have not been adopted, do not constitute part of the Model Rules, and are not intended to affect the application or interpretation of the Rules and Comments.

As discussed *infra* note 10 and accompanying text, it is the author's belief that the Comments provide useful, if not essential, elucidation, interpretation, and application of the individual rules. They will undoubtedly be employed by Washington courts and the Washington State Bar Association as, at the least, helpful legislative history and, possibly, as dispositive when on point. *See infra* text accompanying note 10. Therefore, those portions of the Comments necessary to understand or apply the Rules are cited or excerpted when appropriate.

Although the Comments have not been published in Washington, they may be found in Selected

overview may be employed in understanding and applying the law of professional responsibility *as it presently exists*. Citations to cases predating the effective date of the RPC have been included only when the law they interpret is unchanged by the adoption of the RPC.

II. CRITIQUE OF THE RPC

A. *Organization of the RPC*

Even a cursory glance at the RPC reveals a striking departure from the CPR: The Canons,[5] Ethical Considerations,[6] and Disciplinary Rules[7] have been replaced with Rules.[8] The change is welcome because the effects and applications of the Ethical Considerations under the CPR were never very clear. Although by definition they were intended to be "aspirational," they were treated variously by courts and bar disciplinary authorities as having no weight in evaluating lawyers' conduct, as helpful in interpreting unclear Disciplinary Rules, as legislative history with respect to the Disciplinary Rules, and as binding, i.e., having the identical effect as Disciplinary Rules. The result was lack of uniformity in application, confusion among attorneys in attempting to determine their ethical *obligations*, and the inappropriate use of many of the Ethical Considerations.

Statutes, Rules and Standards on the Legal Profession (West 1985), Selected Standards on Professional Responsibility (Foundation Press 1986) (Morgan & Rotunda eds.), and any official ABA publication of the Model Rules.

As stated in the "Scope" section of the Model Rules, the research Notes, unlike the Comments, were not adopted and do not constitute part of the Model Rules. Therefore, they have not been included or cited as such in the overview. However, when the legal authorities contained in the Notes accurately reflect or explain the law of Professional Responsibility in Washington, they have been included as annotations.

5. The Canons are statements of axiomatic norms, expressing in general terms the standards of professional conduct expected of lawyers in their relationships with the public, with the legal system, and with the legal profession. They embody the general concepts from which the Ethical Considerations and the Disciplinary Rules are derived.

CPR Preliminary Statement.

6. The Ethical Considerations are aspirational in character and represent the objectives toward which every member of the profession should strive. They constitute a body of principles upon which the lawyer can rely for guidance in many specific situations.

Id.

7. The Disciplinary Rules, unlike the Ethical Considerations, are mandatory in character. The Disciplinary Rules state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action.

Id.

8. The Rules of Professional Conduct are mandatory in character. The rules state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action.

RPC Preliminary Statement.

The RPC, on the other hand, contain only Rules. In the Scope section of the Model Rules, a section unfortunately not included in the Washington RPC, Rules are described as follows:

> Some of the Rules are imperatives, cast in the terms "shall" or "shall not." These define proper conduct for purposes of professional discipline. Others, generally cast in the term "may" are permissive and define areas under the Rules in which the lawyer has professional discretion. No disciplinary action should be taken when the lawyer chooses not to act or acts within the bounds of such discretion. Other Rules define the nature of relationships between the lawyer and others.[9]

Thus, for purposes of lawyer discipline and the establishment of a clear minimum level of ethical lawyer conduct, the RPC constitute a substantial improvement over the CPR. Those who suggest that the deletion of the Ethical Considerations is undesirable because lawyers should aspire to a level of practice far above the minimum should consider that there are numerous sources for determining aspirational goals. An attorney who desires to engage in the most ethical and responsible practice of law may consult with colleagues, hornbooks and treatises, statements in judicial opinions, ABA and state bar ethics opinions, the Ethical Considerations of the CPR, and his or her own conscience. But at least the minimum *requirements* of the profession will be both clear and uncontradictory.

B. *Omission of ABA Model Rules Commentary*

The Washington Supreme Court, in adopting the recommendations of the State Bar Task Force, unfortunately neither adopted nor even published the Comments to the Model Rules. Although the Rules state the minimum level of ethical conduct, the intended interpretation and application of each Rule is not always self-evident. The Comments provide that necessary interpretation and application. The ABA and the states that have substantially adopted the Model Rules have also adopted the Comments. To the extent that the Washington courts and State Bar are aided by interpretation and application of identical rules by courts in other jurisdictions, the Comments will be used by those courts as legislative history and to resolve ambiguities. In fact, on a number of occasions, the Washington courts have relied on the legislative history and judicial interpretation of federal codes in construing and applying identical provisions in Washington codes.[10]

9. Model Rules Scope section.

10. *See, e.g.*, Harding v. Will, 81 Wn. 2d 132, 500 P.2d 91 (1972); *In re* Green, 14 Wn. App. 939, 546 P.2d 1230 (1976); Eberle v. Sutor, 3 Wn. App. 387, 389, 475 P.2d 564, 566 (1970) ("[w]here a federal rule has been adopted as the state rule, the construction of the former should be applied to the latter").

Since the Comments will be relied upon in other jurisdictions, they will inevitably be employed by Washington courts. They should be adopted by the Washington Supreme Court as part of the CPR to avoid any ambiguity or misunderstanding.

C. *Greater Emphasis on Nonlitigation Conduct of Attorneys*

One of the frequent criticisms of the CPR was that it was directed primarily to attorneys as litigators. The RPC improve upon the CPR in addressing the ethical responsibilities of lawyers in nonlitigational and nonadversary proceedings.[11] Likewise, the attorney's relationship with clients and adversaries in pretrial preparation and during pretrial discovery has been given expanded treatment in the RPC.[12] And several provisions of the CPR that were only aspirational in nature (i.e., Ethical Considerations), but are essential to the ethical practice of law, are now mandatory Rules.[13]

D. *Requirement of Written Fee and Consent Agreements*

A significant improvement over the CPR is found in a number of Rules requiring that understandings between attorney and client be reduced to writing. Although such a writing requirement is in no way essential to the ethical practice of law, a substantial amount of client dissatisfaction (manifested in bar complaints and legal malpractice actions) and unnecessary questioning of attorneys' conduct and motives has been caused by proceedings to determine the precise nature of alleged agreements. Thus, the RPC require that contingent fee agreements,[14] and client consent to the attorney's conflict of interest in certain situations,[15] must be in writing. In addition to ensuring that the client fully understands the nature and implications of these important agreements, the writing requirement will resolve many of the disputes as to who agreed to what.

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11. *See, e.g.*, RPC Rules 2.1 (advisor); 2.2 (intermediary); 2.3 (evaluator); 5.1 and 5.2 (supervisory and subordinate lawyers); 5.3 (responsibility for nonlawyer assistants); 6.4 (law reform activities).

12. *See, e.g.*, RPC Rules 1.1–1.4; 3.2; 3.4. *See also infra* notes 39–67, 200, 218–37, and accompanying text.

13. *See, e.g.*, CPR EC 6-4 and RPC Rule 1.3 (diligence); CPR EC 7-8 and RPC Rule 1.4(a) (communication with client); CPR EC 7-20 and RPC Rules 3.2 (expediting litigation), and 3.4(d) (frivolous discovery requests and refusal to comply with "legally proper" discovery requests by opponent).

14. RPC Rule 1.5(c). The Rule also requires that "[u]pon the 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."

15. *See* RPC Rules 1.7(b)(2), 1.8(b), 1.8(h), 1.9(a), and 2.2(a).

In light of the benefits of the writing requirement, however, it is somewhat perplexing that, with respect to noncontingent fee agreements, the RPC provide that the fee must be communicated to the client, *"preferably* in writing, before or within a reasonable time after commencing the representation."[16] In addition, no explanation is provided for the omission by the Washington Supreme Court of the writing requirement when a lawyer obtains consent from the client for entering into a business relationship or acquiring "an ownership, possessory, security or other pecuniary interest adverse to a client."[17] Since Model Rule 1.8(a) requires client consent to the potential or actual conflict of interest to be in writing, and the RPC require written consent in the other conflict situations, it would seem that a compelling reason would be necessary to justify the departure in the area where disputes are most acrimonious and most damaging to the image of lawyers and the legal profession.[18]

E. Omission of Rules Regarding Corporate and Other Organizational Clients

It is also unclear why the Rules Committee did not recommend and the Washington Supreme Court did not adopt Model Rule 1.13, providing that a "lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents," and prescribing procedures whereby the attorney for an organization can determine the best interests of the organization and prevent certain constituents from harming the interests of the public or others in the organization. The RPC omit the provision altogether, and incorporate no alternative to replace it. It is, in the

16. RPC Rule 1.5(b) (emphasis added). Since there are just as many disputes over the nature of the fee agreement in noncontingent fee cases, and since the requirement of communicating the agreement to the client is only "within a reasonable time after commencing the representation," there appears to be no basis for not *requiring* a written fee agreement in all cases.

17. RPC Rule 1.8(a).

18. Despite the failure of RPC Rule 1.8 to *require* that client consent be in writing, attorneys in Washington would be well advised to obtain written consent before engaging in business transactions with their clients. *See, e.g.,* Matter of McGlothlen, 99 Wn. 2d 515, 663 P.2d 1330 (1983). In *McGlothlen,* the hearing officer and the Disciplinary Board disagreed as to whether the attorney's disclosure to the client was sufficient. The court stated that "the burden upon the attorney defending his or her actions is a great one," *id.* at 524, 663 P.2d at 1335, and quoted 7 C.J.S. *Attorney and Client* § 127 (1980) as follows:

> So strict is the rule on this subject that dealings between an attorney and his client are held, as against the attorney, to be prima facie fraudulent, and to sustain a transaction of advantage to himself with his client the attorney has the burden of showing not only that he used no undue influence but that he gave his client all the information and advice which it would have been his duty to give if he himself had not been interested, and that the transaction was as beneficial to the client as it would have been had the client dealt with a stranger.

99 Wn. 2d at 525, 663 P.2d at 1335.

author's opinion, essential that the RPC include *some* rule regarding the duties of a lawyer for an organizational client.[19]

F. Judicial Law Clerks

Under RPC Rule 1.12(b), a judicial law clerk "may negotiate for employment with a party or attorney involved in a matter in which the clerk is participating personally and substantially, but only after the lawyer has notified the judge. . . ." A judge, on the other hand, may not negotiate at all for employment under those circumstances.[20] However, judicial decisions regarding the ethical responsibilities of judicial law clerks have held law clerks to the same standards regarding conflicts of interest as are applicable to the judges for whom the law clerks work. Therefore, if the judge would be required to disqualify him or herself due to a conflict, so also must the law clerk. In fact, the law clerk's conflict could infect the decision of the judge, despite the judge's claim that the law clerk had no responsibility for the final decision.[21]

A *judge* may avoid disqualification despite a conflict only if, following disclosure, "the parties and lawyers, independently of the judge's participation, all agree in writing that the judge's relationship is immaterial or that his financial interest is insubstantial . . . ."[22] Therefore, in order to avoid the possibility of a subsequent challenge to an entire trial or appeal, based on the law clerk's negotiations for employment with one of the lawyers or firms involved in litigation in which the clerk "personally and substantially" participates, the law clerk (or judge) should be required to notify *both parties and obtain consent.*

G. Solicitation Rule May Be Unconstitutional As to Direct Mail Advertising

Finally, with respect to specific rules, RPC Rule 7.3, to the extent that it purports to define and prohibit direct mail advertising as solicitation, would

19. Even under the CPR, EC 5-18 provided some guidance to attorneys in Washington. The author has received more requests to speak or consult on this issue, and there appears to be more confusion concerning the ethical requirements, than with respect to any other ethical problem. If the reason for omitting Model Rule 1.13 was based on disagreement with the policies inherent in the Rule, then it should have been amended, rather than ignoring the subject altogether. For a general discussion of the ethical responsibilities of corporate lawyers, see Riger, *The Model Rules and Corporate Practice—New Ethics for a Competitive Era,* 17 CONN. L. REV. 729 (1985).

20. RPC Rule 1.12(b).

21. *See, e.g.,* Hall v. Small Business Admin., 695 F.2d 175 (5th Cir. 1983).

22. CODE OF JUDICIAL CONDUCT (CJC) Canon 3(D).

appear to be unconstitutional.[23] Direct mail advertising appears to fit more within the protection of *advertising* established by the Supreme Court in *Bates v. State Bar of Arizona,*[24] *In re R.M.J.,*[25] and *Zauderer v. Office of Disciplinary Counsel,*[26] and is less susceptible to the abuses feared by the Court with respect to in-person *solicitation* in *Ohralik v. Ohio State Bar.*[27] Because the use of direct mail advertising is not amenable to the abuses of in-person solicitation, and has been held to be constitutionally protected by the overwhelming majority of the courts that have faced the issue, the words "by mail" and "by letter or other writing" should be deleted from the definition of "solicit" in RPC Rule 7.3.[28]

H. Confidentiality vs. Protection of the Public and the Integrity of the Courts

The rules that have been most controversial throughout the country and which are the least justifiable as enacted in the RPC, are RPC Rules 1.6 and 3.3 dealing with the tension between the lawyer's duties of candor and confidentiality. Under RPC Rule 1.6(b)(1), there is an exception to the duty of confidentiality with respect to information "the lawyer reasonably believes necessary . . . [t]o prevent the client from committing a crime." This is a departure from the ABA's Model Rule 1.6(b)(1);[29] and most states that have considered the Model Rules have rejected the ABA's version.[30] However, whereas RPC Rule 1.6 *permits* revelation of confidences and secrets[31] only to prevent the client from committing a *future crime,* other jurisdictions that have adopted or proposed adoption of the new rules have also permitted (in some cases *required*[32]) revelation necessary to prevent a

23. *See, e.g., In re* Madsen, 68 Ill.2d 472, 370 N.E.2d 199 (1977); Kentucky Bar Ass'n v. Stuart, 568 S.W.2d 933 (Ky. 1978); Woll v. Kelley, 116 Mich. App. 191, 323 N.W.2d 560 (1982); *In re* Appert, 315 N.W.2d 204 (Minn. 1981); Koffler v. Joint Bar Ass'n, 51 N.Y.2d 140, 412 N.E.2d 927, 432 N.Y.S.2d 872 (1980), *cert. denied,* 450 U.S. 1026 (1981). For an in-depth analysis of this issue, see Survey Comment, *Lawyer Advertising, supra* note 3.

24. 433 U.S. 350 (1977).

25. 455 U.S. 191 (1982).

26. 105 S. Ct. 2265 (1985).

27. 436 U.S. 447 (1978).

28. *See* Survey Comment, *Lawyer Advertising, supra* note 3 (discussing *Zauderer* and its application to "targeted" and direct mail advertising).

29. *See* Survey Comment, *Confidentiality, supra* note 3.

30. *See, e.g.,* Md. Rule 1.6; N.J. Rule 1.6; N.H. Rule 1.6; Wis. Rule 1.6. *See also infra* notes 31–34.

31. Unlike the Model Rules, the Washington RPC retained the distinction between *confidences* ("information protected by the attorney-client privilege under applicable law"), and *secrets* ("other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client").

32. *See, e.g.,* N.J. Rule 1.6 (mandatory disclosure of information necessary to prevent client from

future *fraud*,[33] and to *rectify* criminal or *fraudulent acts* in the furtherance of which the lawyer's services had been used.[34]

Under former CPR DR 7-102(B)(1), a lawyer in Washington who received information clearly establishing that his client had,

> in the course of the representation, perpetrated a fraud upon a person or tribunal, shall promptly call upon his client to rectify the same, and if his client refuses or is unable to do so, he *shall* reveal the fraud to the affected tribunal and *may* reveal the fraud to the affected person.[35]

Under RPC Rule 1.6(b)(1) as adopted, lawyers in Washington are not *permitted* to reveal either the client's intent to defraud another or prior fraud in furtherance of which the lawyer's services had been used, and are not *required* to reveal even the client's intent to kill another person. At a time when public respect for lawyers is at an all-time low and lawyers have been increasingly found in complicity with their client's criminal or fraudulent conduct, it is unfortunate that the Washington Supreme Court has gone on record as *lessening* the duty of lawyers to protect the public from their clients' criminal and fraudulent conduct. Although the reasons for vigilant protection of client confidences are strong,[36] these policy bases disappear when the client seeks, not representation with respect to past acts (whether criminal or not), but rather to harm others in the future. Likewise, a client is entitled to complete confidentiality with respect to proper legal representation, but has no justified expectation of confidentiality when he uses the attorney to perpetrate a fraud on another person. It is a mistake for Washington to prohibit revelation under those circumstances when it required revelation under the CPR.

Washington should clearly reaffirm its commitment to protect the public and the integrity of lawyers in the legal system, consistent with its strong concern for client confidentiality, by adopting a rule such as that recently adopted by the New Jersey Supreme Court: "A lawyer shall reveal such confidences or secrets to the extent the lawyer reasonably believes necessary . . . [t]o prevent the client from committing a criminal or fraudulent

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committing criminal, illegal, or fraudulent act which lawyer reasonably believes is likely to result in death or substantial bodily harm or substantial injury to financial or property interest, or to perpetrate a fraud upon a tribunal); Ariz. Rule 1.6 (mandatory disclosure of information reasonably necessary to prevent client from committing crime likely to result in death or substantial bodily harm; permissive disclosure of client's intent to commit any crime and information necessary to prevent it); Conn. Rule 1.6 (same as Ariz.).

33. *See, e.g.*, Md. Rule 1.6; N.J. Rule 1.6.

34. *See, e.g.*, Conn. Rule 1.6; Wis. Rule 1.6.

35. Emphasis added.

36. *See infra* note 85 and accompanying text. The author is a strong supporter of attorney-client confidentiality, and would permit few, if any, exceptions that would impair the *legitimate* representation of a client's interests. *See* Aronson, *Professional Responsibility: Education and Enforcement*, 51 WASH. L. REV. 273 (1976).

act," and in addition, "[a] lawyer may reveal such confidences or secrets to the extent the lawyer reasonably believes necessary . . . [t]o rectify a criminal or fraudulent act in the furtherance of which the lawyer's services had been used."[37]

Adoption of New Jersey Rule 1.6 would also make RPC Rule 3.3 more reasonable. Under Model Rule 3.3(a)(2), a lawyer shall not knowingly "[f]ail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client." Under Model Rule 3.3(a)(4), "[i]f a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures." And, under Model Rule 3.3(b), these duties of disclosure "apply even if compliance requires disclosure of information otherwise protected by rule 1.6."

RPC Rule 3.3, however, would only permit disclosure of materially false statements to a tribunal if not prohibited under RPC Rule 1.6. Since RPC Rule 1.6 only permits disclosure of the client's intent to commit a crime, RPC Rules 1.6 and 3.3 permit far less candor to the court than the CPR[38] or Rules 1.6 and 3.3 as proposed or adopted in other states (and even less candor than under the ABA's criticized Model Rules). Adoption of a Rule 1.6 like that of New Jersey's Rule 1.6 would eliminate the need to change the language in Model Rule 3.3, since disclosure of a client's criminal or fraudulent acts during the course of representation would not be prohibited under New Jersey Rule 1.6. If RPC Rule 1.6 is not amended, then RPC Rule 3.3 should at least be amended to conform to Model Rule 3.3.

III. OVERVIEW OF THE RPC

TITLE I. CLIENT-LAWYER RELATIONSHIP

Rule 1.1 Competence

The standard for competent representation[39] derived from legal malpractice cases is "that degree of care, skill, diligence and knowledge commonly possessed and exercised by a reasonable, careful and prudent lawyer in the practice of law" in Washington.[40] In order to determine if a lawyer has the requisite legal knowledge and skill to represent a client, there are several relevant factors that can be examined. These include the complexity and specialized nature of the matter; the lawyer's general experience; the

37. N.J. Rule 1.6
38. *See* CPR DR 7-102(B)(2). *See also* Survey Comment, *Confidentiality, supra* note 3.
39. RPC Rule 1.1.
40. Walker v. Bangs, 92 Wn. 2d 854, 859, 601 P.2d 1279, 1282 (1979) (quoting Cook, Flanagan & Berst v. Clausing, 73 Wn. 2d 393, 395, 438 P.2d 865, 867 (1968)).

lawyer's training and experience in the field; the amount of preparation and study the lawyer is able to give the matter; and whether it is feasible *(and if the client consents)* to refer the matter to, or associate with, a lawyer of established competence in the field in question.[41]

A lawyer does not necessarily need special training or prior experience to handle a wholly novel field if she can gain the necessary level of competence through reasonable preparation.[42] But the lawyer must possess such fundamental legal skills as the ability to analyze precedent, evaluate evidence, and draft legal documents.[43] In an emergency, a lawyer may give advice or assistance although she does not have the requisite skill, if referral, consultation, or association with another lawyer is impractical. But the client's interests should never be jeopardized.[44]

In order to ensure that lawyers keep current with recent developments in the law, every Washington lawyer is required to complete at least fifteen credit hours of approved continuing legal education a year.[45]

Rule 1.2 Scope of Representation

Both the lawyer and the client are responsible for determining the scope of the representation that the lawyer will engage in on behalf of the client. While the client has the ultimate authority to determine the scope of the lawyer's representation, the lawyer is responsible for informing the client of, and operating within, the limitations imposed by the RPC and applicable laws. Within these limits, the client has the right to discuss with the lawyer the means that will be employed to pursue a particular matter.[46] However, this does not mean that the lawyer is required to pursue objectives or means simply because it is the client's wish, particularly if the lawyer finds the means or objectives repugnant to his beliefs.

A lawyer is to exercise his independent professional judgment at all stages of his relationship with a client. However, the ultimate control of a matter is in the hands of the client, who has broad authority as to the course of action to be taken. The Rules state, with regard to objectives, that a

41. Model Rule 1.1 comment.

42. Thus, a lawyer acts competently if he exercises reasonable professional judgment, even though his opinion on a difficult or unsettled question of law is erroneous. *See, e.g.*, Hansen v. Wightman, 14 Wn. App. 78, 538 P.2d 1238 (1975); Smith v. St. Paul Fire & Marine Ins. Co., 366 F. Supp. 1283 (M.D. La. 1973), *aff'd*, 500 F.2d 1131 (5th Cir. 1974). *But cf.* Procanik v. Cillo, 206 N.J. Super. 270, 502 A.2d 94 (1985) (lawyer in specialized practice has duty to disclose clearly to clients his informed opinion that settled law, which bars clients' claim, is ripe for reconsideration and to notify client of subsequent change in settled law).

43. *See supra* note 42.

44. *Id.*

45. ADMISSION TO PRACTICE RULES (APR), Rule 11.2.

46. *See* Model Rule 1.2 comment.

lawyer *"shall consult with the client as to the means by which they are to be pursued."*[47] This indicates that the lawyer may not take independent action on behalf of his client without at least consultation. Decisions that will affect the merits of the case or substantially prejudice the client's rights may only be made by the client. Typical examples of such decisions in *civil cases* include the decision to accept a settlement offer[48] or to waive an affirmative defense; and, in *criminal actions,* the basic decision to plead to a charge, waive jury trial, testify, or to appeal a conviction.[49]

Since the power to make the decision is the client's, she may, after being informed of the various legal factors affecting her situation, make a decision to forego the legally available objectives or methods because of what she considers to be overriding nonlegal factors, such as expenses to be incurred, or concern for third persons who might be adversely affected.[50] Even where the decision is the client's, it is the lawyer's responsibility to insure that the decision is an informed one. The lawyer should advise the client of the possible effects of both the legal and nonlegal alternatives that are available.

Those decisions which can be left to the lawyer are not spelled out in the RPC. Generally they are recognized to encompass the procedural details of litigation (often referred to as "tactics"), such as the choice of motions, the scope of discovery, nonsubstantive stipulations, which witnesses to call, and the nature of direct and cross-examination.[51] While the lawyer is bound to respect the decision of the client, representation of a client *"does not constitute an endorsement of the client's political, economic, social or moral views or activities."*[52] This disclaimer is necessary to ensure that legal representation should not be denied to anybody, particularly those who have unpopular beliefs.[53]

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47. RPC Rule 1.2(a) (emphasis added). In other jurisdictions, it has been held that (absent express or implied permission) a lawyer cannot consent to extensions of time, waiver of forfeiture, or otherwise alter the terms of a contract. *E.g.*, Olfe v. Gordon, 93 Wis. 2d 173, 286 N.W.2d 573 (1980) (ignoring client's instructions concerning such matters as obtaining a specific type of security for payment under a contract of sale); Ashworth v. Hankins, 248 Ark. 567, 452 S.W.2d 838 (1970).

48. *See supra* note 47. *In re* Marriage of Ebbighausen, 42 Wn. App. 99, 708 P.2d 1220 (1985).

49. RPC Rule 1.2 and Model Rule 1.2 comment. *See, e.g.*, United States v. Neff, 525 F.2d 361 (8th Cir. 1975); Hudson v. Alabama, 493 F.2d 171 (5th Cir. 1974).

50. *See* Model Rule 1.2 comment.

51. *See* State v. Osborne, 102 Wn. 2d 87, 684 P.2d 683 (1984); State v. Adams, 91 Wn. 2d 86, 586 P.2d 1168 (1978). "When one hires an attorney to represent him in litigation, that attorney has full charge of the case as far as procedure and remedy are concerned. He is trained and skilled in the law. A client has no knowledge of procedure and intrusts [sic] this to the attorney he employs." Shores Co. v. Iowa Chem. Co., 268 N.W. 581, 582 (Iowa 1936). *Accord* United States v. Marshall, 488 F.2d 1169 (9th Cir. 1973).

52. RPC Rule 1.2(b) (emphasis added).

53. *See* Model Rule 1.2 comment; Olender, *Symposium, The Right to Counsel and the "Unpopular Cause"—Let Us Admit Impediments,* 20 U. PITT. L. REV. 749 (1959).

The objectives or scope of services provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer's services are made available to the client.[54] A public defender, for example, may only be allowed to handle criminal matters and not civil. A retainer between a private attorney and client may be for a specific purpose.[55] The limitations may also exclude objectives or means that may be repugnant or imprudent.

A lawyer is required to give the client an honest opinion about the possible consequences of the client's actions. But the lawyer may not give advice to take actions which she *knows*[56] are criminal or fraudulent.[57] When a client has already taken a course of action that is illegal, a lawyer may not give advice which may further that course of action (for example, advice on how to conceal tax fraud). To this end, if the lawyer were helping a client and then found out that the transaction was illegal, the lawyer would be required to stop giving assistance. A lawyer may not knowingly participate in a sham transaction or a transaction to defraud anyone.[58] A lawyer may, however, "counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law."[59] A lawyer may have a duty to a beneficiary when the client is a fiduciary.[60]

54. *See* RPC Rule 1.2(c).

55. *See* Model Rule 1.2 comment.

56. As stated in the Terminology section of the RPC, "knowingly," "known," or "knows" "denotes actual knowledge of the fact in question. A person's knowledge may be inferred from the circumstances."

57. RPC Rule 1.2(d). *See also* ABA Comm. on Professional Ethics, Formal Op. 84 (1932).

58. *See, e.g.,* Florida Bar v. Beaver, 248 So. 2d 477 (Fla. 1971) (attempt to misrepresent client's financial condition in a pending divorce).

59. *See supra* note 57. Justice Holmes, in Superior Oil Co. v. Mississippi, 280 U.S. 390, 395–96 (1930), stated:

> The fact that [the client] desired to evade the law, as it is called, is immaterial, because the very meaning of a line in the law is that you intentionally may go as close to it as you can if you do not pass it . . . . It is a matter of proximity and degree as to which minds will differ . . . .

The approach whereby the attorney advises a client as to the dictates of the law and the ramifications of various alternative courses of action, leaving it to the client to decide which course to take, is often referred to as the "Anatomy of a Murder Approach," from TRAVER, ANATOMY OF A MURDER (1958). The attorney may assume, in the absence of *"knowledge"* to the contrary, that the client, informed of the bounds of the law, will choose to stay *within* those bounds, rather than use the information to break the law. However, attorney conduct that substantially contributes to the accomplishment of the client's criminal or fraudulent purpose is clearly improper. *See, e.g., In re* Blatt, 65 N.J. 539, 324 A.2d 15 (1974) (drafting documents necessary to achieve client's purpose); *In re* La Duca, 62 N.J. 133, 299 A.2d 405 (1973) (negotiating on behalf of the client); *In re* Feltman, 51 N.J. 27, 237 A.2d 473 (1968) (supplying a form to be used in the client's scheme).

60. Model Rule 1.2 comment.

Rule 1.3 Diligence

A lawyer should take the necessary steps to accomplish the objective of a matter in a timely fashion so as not to prejudice the client's interests (for example, by filing a late appeal or overlooking the statute of limitations).[61] A lawyer should also maintain a manageable case load in order to leave enough time so that all clients can be effectively represented. Further, unless the lawyer notifies the client as to the termination of the relationship, the lawyer should complete all matters undertaken.[62]

Rule 1.4 Communication

A lawyer must keep the client reasonably informed of any actions the lawyer is taking.[63] The lawyer must inform the client of communications or negotiations with other parties so that the client may make an informed decision as to serious offers.[64] The lawyer must also inform the client of any settlement or plea bargain offers made by an opposing party. Even if the offer is not satisfactory in the lawyer's view, the client must be informed of the offer and then be apprised of the lawyer's opinion, since the ultimate decision rests with the client.[65] The client may, however, give the lawyer prior permission to reject an offer if the offer would be unacceptable to the client. There may be some circumstances in which a lawyer may be justified in delaying transmission of information where, for example, immediate communication would cause the client to act imprudently,[66] or where, due

61. *See, e.g.*, Daugert v. Pappas, 104 Wn. 2d 254, 704 P.2d 600 (1985); People v. King, 191 Colo. 120, 550 P.2d 848 (1976); *In re* Parise, 53 A.D.2d 272, 385 N.Y.S.2d 805 (1976).

62. *See* Spindell v. State Bar, 13 Cal. 3d 253, 530 P.2d 168, 118 Cal. Rptr. 480 (1975).

63. As stated by one legal commentator:

> The lawyer must communicate to the client, *in language the client understands*, what the various available courses of action are and why the particular course of action was chosen over the others, before the action is taken. . . . Over half of the complaints received by the Committee on Professional Ethics and Conduct. . . are filed because the lawyer failed to *properly* communicate with the client.

Gaudineer, *Ethics and Malpractice*, 26 DRAKE L. REV. 88, 115 (1976). Thus, courts have imposed discipline for failure to advise clients as to the status of their affairs, *e.g.*, State v. Martindale, 215 Kan. 667, 527 P.2d 703 (1974), or to respond to a client's request for information, *see e.g.*, People v. James, 180 Colo. 133, 502 P.2d 1105 (1972); *In re* Miller, 54 A.D.2d 69, 387 N.Y.S.2d 445 (1976). In addition, if the attorney advises a course of action that may result in adverse consequences to the client, she must also advise the client of the risks, as well as the available alternatives and their consequences. *See, e.g.*, Smith v. St. Paul Fire & Marine Ins. Co., 366 F. Supp. 1283 (M.D. La. 1973), *aff'd*, 500 F.2d 1131 (5th Cir. 1974).

64. *See* RPC Rule 1.4(b).

65. *See, e.g.*, Fowler v. American Fed. of Tobacco Growers, 195 Va. 770, 80 S.E.2d 554 (1954) (possibility that agreement would create a more extensive obligation than the client desired to assume).

66. *See* Model Rule 1.4 comment ("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.")

to mental illness, the client cannot make a rational decision.[67]

The lawyer is not expected to explain or relay communications to every member of a client organization or group, but should keep representatives of the organization or group informed.[68]

Rule 1.5 Fees

The fee arrangement for representation of a client is a matter left for the individual attorney and client. There are, however, certain principles governing the setting of fees and the form of compensation. Since many clients have little or no experience in dealing with attorneys and their fee structures, a lawyer has a duty to explain fully to his clients the reasons for the particular fee arrangement that he proposes, especially when the lawyer has not represented the client before.[69] It is also advisable, in order to prevent subsequent misunderstandings, that the lawyer and his client reach an agreement as to the basis of the fee charges as early as possible in the professional relationship. Such an agreement should, in most instances, be reduced to writing.[70]

A *contingent fee* is a fee that is dependent on the outcome of a client's case and is payable from the judgment proceeds.[71] Usually, such fees take the form of a set percentage of the recovery, the fee being zero if there is no recovery.[72] In certain specific instances contingent fees are prohibited.[73] A

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67. *See* RPC Rule 1.13 and Model Rule 1.14 comment. (Because Washington did not adopt Model Rule 1.13, RPC Rules 1.13, 1.14, and 1.15 correspond to Model Rules 1.14, 1.15, and 1.16.)

68. Model Rule 1.4 comment.

69. *See* RPC Rule 1.5(b).

70. *Id.*

> 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.

Model Rule 1.5 comment.

71. *See* R. ARONSON, ATTORNEY-CLIENT FEE ARRANGEMENTS: REGULATION AND REVIEW 74 (1980). For a survey of legislation and judicial decisions concerning contingent fee arrangements, see *id.* at 74–118.

72. *See also* Ross v. Scannell, 97 Wn. 2d 598, 608–09, 647 P.2d 1004, 1010 (1982) (quoting Ramey v. Graves, 112 Wash. 88, 91, 191 P. 801 (1920)):

> The rule is that, where the compensation of an attorney is to be paid to him contingently on the successful prosecution of a suit and he is discharged or prevented from performing the service, the measure of damages is not the contingent fee agreed upon, but reasonable compensation for the services actually rendered.

73. In addition, "[w]hen 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." Model Rule 1.5 comment. Likewise, a contingent fee agreement may be unreasonable if employed in a simple case presenting no real difficulty. *See, e.g.*, Kiser v. Miller, 364 F. Supp. 1311 (D.D.C. 1973), *rev'd sub nom.* Pete v. UMW Welfare & Retire. Fund, 517 F.2d 1275 (D.C. 1975); Anderson v. Kennelly, 37 Colo. App. 217, 547 P.2d 260 (1975).

contingent fee is prohibited in a domestic relations matter where the fee would be "contingent upon the securing of a dissolution or annulment of marriage or upon the amount of maintenance or support, or property settlement in lieu thereof (except in postdissolution proceedings)."[74] Contingent fees are flatly prohibited in criminal cases.

When contingent fees are permissible, the attorney must reduce the agreement to writing and state the method by which the fee is to be determined, including the percentages that shall accrue to the lawyer in the event of settlement, trial, or appeal,[75] and litigation or other expenses to be deducted, including whether they are to be deducted before or after the contingent fee is calculated.[76] Following resolution of the matter, the attorney must furnish the client with a written statement, including the outcome of the matter, whether there was a recovery, and if there was a recovery, the remittance due the client and its method of determination.[77]

A lawyer's fee for services must be reasonable.[78] A *reasonable fee* is defined as a fee that an attorney of ordinary prudence would charge in a like situation (an objective standard).[79] The factors to be considered in determining reasonableness include:

a. The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

b. The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

c. The fee customarily charged in the locality for similar legal services;

d. The amount involved and the results obtained;

e. The time limitations imposed by the client or by the circumstances;

f. The nature and length of the professional relationship with the client;

74. RPC Rule 1.5(d)(1). *See also In re* Smith, 42 Wn. 2d 188, 254 P.2d 464 (1953).

75. RPC Rule 1.5(c).

76. *Id.*

77. *Id.*

78. RPC Rule 1.5(a). In civil litigation, the lawyer carries the burden of demonstrating the amount of the fee and its reasonableness. *See, e.g.*, Kennedy v. Clausing, 74 Wn. 2d 483, 445 P.2d 637 (1968).

79. What constitutes a reasonable fee can vary from case to case. *See generally* R. ARONSON, *supra* note 71, at 28–56. Although comparison with fees of other attorneys in the area is permissible, in Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975), the Court declared that the imposition of a minimum fee schedule by state bar associations was a violation of the federal antitrust laws. *See also infra* note 339 and accompanying text.

g. The experience, reputation, and ability of the lawyer or lawyers performing the services; and

h. Whether the fee is fixed or contingent.[80]

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."[81] The division of fees allows an attorney to associate with another attorney or attorneys in cases where the sole attorney could not serve his client as well without some outside help. In Washington, a division of fees may only be made if: (a) "[t]he division is between the lawyer and a duly authorized lawyer referral service of either the Washington State Bar Association or of one of the county bar associations of this state;" or (b) "[t]he division is in proportion to the services provided by each lawyer or, by written agreement with the client, each lawyer assumes joint responsibility for the representation; the client is advised of and does not object to the participation of all the lawyers involved; and the total fee is reasonable."[82]

Rule 1.6 Confidentiality

An attorney has a specific obligation to preserve the confidences and secrets of a client. This has long been considered one of the most important responsibilities owed the client. *Confidences* refers to information received by the attorney which is protected by the evidentiary attorney-client privilege.[83] Generally, the attorney-client privilege will be said to apply to

80. RPC Rule 1.5(a)(1)-(8).

81. Model Rule 1.5 comment.

82. RPC Rule 1.5(e). In McNeary v. American Cyanamid Co., 105 Wn. 2d 136, 712 P.2d 845 (1986), the Washington Supreme Court, interpreting former CPR DR 2-107, held:

> We believe the disciplinary rule indicates that division of fees by attorneys jointly participating in handling a case must take into account proportionate shares of services. . . . To let an attorney refer a case to another, perform some initial services, and then receive half the fee allows the avoidance of the rule and our holding in *Belli* [v. Shaw, 29 Wn. App. 875, 631 P.2d 980 (1981), *aff'd*, 98 Wn. 2d 569, 657 P.2d 315 (1983)].
>
> On the other hand, CPR DR 2-107 should not mean that attorneys must "correlate each minute spent on a case to each penny earned therefrom in order to achieve proportionality between 'the responsibility assumed and services performed' on the one hand and each attorney's share of the fee on the other." Fitzgibbon v. Carey, 70 Or. App. 127, 137, 688 P.2d 1367 (1984), *review denied*, 298 Or. 553, 695 P.2d 49 (1985).

McNeary, 105 Wn. 2d at 142, 712 P.2d at 848. On its face, RPC Rule 1.5(e)(2) would appear to permit referral fees under the limitations noted. However, a referral fee to an attorney who has performed no legal services should be paid with extreme caution. Although the court in *McNeary* recognized that RPC Rule 1.5(e)(2) is a "different provision" from DR 2-107, *see McNeary* at 139 n.4, 712 P.2d at 847 n.4, it did not temper its strong disapproval of referral fees. In addition, RPC Rule 7.2(c) provides that an attorney may not "give anything of value to a person for recommending the lawyer's services . . . ." Unless another lawyer is not considered "a person," then pure referral fees are impermissible under RPC Rule 7.2(c), even if not barred by RPC Rule 1.5(e)(2).

83. RPC Rule 1.6(a).

confidential communications made by an individual to an attorney unless the client has consented to disclosure after consultation, "except for disclosures that are impliedly authorized in order to carry out the representation" or as stated in RPC Rule 1.6(b).[84] The purpose of the rule is to promote full disclosure between the client and the lawyer so that the lawyer can most capably represent the client.[85]

All of the evidentiary exceptions to the attorney-client privilege apply to the definition of confidences as well. Thus, suppose client *A* is sought by the police as a suspect in certain criminal activity, and *A* contacts attorney *X* and tells him of his whereabouts for the purpose of securing legal advice from *X*. Under such circumstances, *X* may not reveal *A*'s whereabouts. However, *X* may not actively assist *A* in avoiding the authorities. Furthermore, if *A* has jumped bail, *X* is under an obligation to inform the court of *A*'s whereabouts.[86]

Another situation requiring close analysis under the attorney-client privilege is indicated by *In re Armani,*[87] and *People v. Belge,*[88] where a client employed two attorneys to represent him in a murder trial. During their discussion, the client admitted to the murder and also revealed two other unrelated murders, giving complete details as to where the bodies of the victims could be found. The attorneys withheld all information concerning the two murders from both the authorities and the parents of the victims. Both the disciplinary committee and the courts that reviewed the attorneys' conduct held that the attorneys had acted properly within the scope of the attorney-client privilege.[89]

The attorney-client privilege is limited to *communications* as opposed to the underlying *facts*. Therefore, parties may be interviewed about facts observed by them, but not any communications about those facts revealed to counsel.[90] The attorney-client privilege is also limited to communications *between the attorney and client.* If the substance of the communication is revealed to another who is not a party to the privileged relationship, the privilege is destroyed.[91] However, the obligation to preserve the client's

84. *Id.*

85. Upjohn Co. v. United States, 449 U.S. 383, 389 (1981); Heidebrink v. Moriwaki, 104 Wn. 2d 392, 706 P.2d 212 (1985); State v. Chervenell, 99 Wn. 2d 309, 316, 662 P.2d 836, 840 (1983). *See generally* R. ARONSON, THE LAW OF EVIDENCE IN WASHINGTON V-3 to V-5 (1986).

86. *See* ABA Comm. on Professional Ethics, Formal Op. 155 (1936).

87. 83 Misc. 2d 252, 371 N.Y.S.2d 563 (1975).

88. 50 A.D.2d 1088, 376 N.Y.S.2d 771 (1975), *aff'd,* 41 N.Y.2d 60, 390 N.Y.S.2d 867, 359 N.E.2d 377 (1976).

89. *Id. See also* N.Y. State Bar Ass'n, Formal Op. 479 (1978).

90. *See* Wright v. Group Health Hosp., 103 Wn. 2d 192, 195, 691 P.2d 564, 566 (1984) (citing Upjohn Co. v. United States, 449 U.S. 383 (1981)).

91. R. ARONSON, *supra* note 85, V-2 to V-7. *See also* State v. Vandenberg, 19 Wn. App. 182, 575 P.2d 254 (1978) (once attorney's version of facts is made known to jury for impeachment, con-

confidences also extends to such essential third persons as clerks and secretaries, who are necessary to enable the lawyer to perform her duties properly. Therefore, revelation to such intermediaries, for the purpose of facilitating the representation, does not destroy the privilege.[92] Where the client is a corporation or other organizational entity, the privilege applies only to (1) communications, (2) made by the organization's employees and (3) concerning matters within the scope of their duties, (4) to its counsel acting as such, (5) at the direction of organizational superiors, (6) in order to secure legal advice.[93]

Secrets encompass "other information that the attorney has received pursuant to the relationship with the client that the client has requested to be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client."[94] The professional duty to preserve all secrets is broader than the attorney-client privilege in several ways. The obligation applies in every situation and not just in judicial proceedings.[95] A lawyer must not reveal any confidence or secret gained in the professional relationship. This is true even if the information was gained before or after the relationship existed. And the client is not required to indicate to the attorney that the information is a secret or should be held in confidence. Unlike the attorney-client *privilege*, the *ethical duty* to maintain confidences and secrets applies to information communicated by the client in the presence of other persons. Thus, for example, suppose that attorney *X* is representing *A* in negotiations with *Y*. Any information that *X* learns during these negotiations, such as trade secrets, is not covered by the attorney-client privilege due to the presence of *Y*. Such information does fall, however, within *X*'s obligation to preserve his client's secrets.

The duty of nondisclosure covers the period prior and subsequent to the creation of the attorney-client relationship, as well as during the relationship. Further, a lawyer must protect confidential information even if no attorney-client relationship is established.[96] The theory behind this rule is that an attorney cannot make an evaluation of a potential client's case unless the client is completely candid, and a potential client will not be completely candid unless his conversations with the attorney are considered confidential, whether or not the attorney eventually takes the case.[97] Similarly,

fidentiality destroyed).

92. *See* R. ARONSON, *supra* note 85, V-2. *See also* City & County of San Francisco v. Superior Court, 37 Cal. 2d 227, 231 P.2d 26 (1951).

93. Upjohn Co. v. United States, 449 U.S. 383 (1981).

94. *Id.*

95. *See* Model Rule 1.6 comment. *See also* RESTATEMENT (SECOND) OF AGENCY § 396 (1957).

96. *See* Heidebrink v. Moriwaki, 104 Wn. 2d 392, 706 P.2d 212 (1985).

97. *See* Model Rule 1.6 comment.

after employment terminates, the lawyer must continue to protect all confidences and secrets learned during the course of the relationship.[98]

Not only must the attorney protect against the disclosure of confidential information by himself, but must also ensure that others do not disclose the information for their own purposes. At all times, the lawyer must take care to prevent employees and fellow firm members from disclosing or utilizing confidential information obtained from a client.[99] On the other hand, it is not improper for a lawyer to give limited, necessary information to an outside agency for such purposes as bookkeeping, provided she warns the agency that the information must be kept confidential.[100] Failure to use reasonable care in keeping these outsiders from disclosing confidential information is a violation of the RPC.

Any information acquired in the course of representing a client may not be used to the disadvantage of the client, or even by the lawyer for the lawyer's own purposes, absent informed consent by the client. For example, suppose that a client is an inventor and an officer in a major corporation. He has a consultation with his attorney concerning some personal affairs and an important invention that he has just developed for the corporation. Although the lawyer realizes the importance of the invention to the corporation, she may not deal in the corporation's stock without the informed consent of the client. She is, of course, also subject to the insider trading provisions of the Securities Acts.

Exceptions

A lawyer may reveal confidences or secrets in five limited instances: first, where the client has consented to disclosure after being fully informed as to the consequences of consent, or second, where the confidence or secret is required to be disclosed by law or court order. Third, the attorney may reveal communications concerning the intention of the client to commit a future crime.[101] This exception allows disclosure by the attorney of all

98. *Id.*

99. *See* RPC Rule 5.3. However, "[l]awyers 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." Model Rule 1.6 comment.

100. *See, e.g.*, RULES FOR LAWYER DISCIPLINE (RLD), Rule 13.1, authorizing the State Bar Disciplinary Board to examine the books and records of any lawyer or firm of lawyers, selected at random, or on the basis of complaints or suspected violation of RPC Rule 1.14 ("Preserving Identity of Funds and Property of a Client"). However, any such examinations "shall extend only to the books and records of such lawyer or firm of lawyers." RLD 13.1(a).

101. RPC Rule 1.6(b)(1). In such a case, the client has not sought advice from a lawyer *acting in his professional capacity.*

In order that the [privilege] may apply there must be both professional confidence and professional

information necessary to prevent the crime.[102] In addition, confidentiality is destroyed if the attorney gives advice to the client, under circumstances whereby a reasonable person would know that the advice is criminal, in order to commit a crime or fraud, and the client acts on that advice.[103] It is important to note that the basic duty of nondisclosure continues to apply to all confidential communications which reveal that the client *has already* committed a crime or other unlawful act.[104] The scope of the exception is less clear when the incriminating evidence is not communicated but *presented* to the attorney. Those courts which have addressed the issue have held that an attorney may not take or retain possession of the "fruits or instrumentalities" of a crime.[105]

> employment, but if the client has a criminal object in view . . . one of these elements must necessarily be absent. The client must either conspire with his [counsel] or deceive him. If his criminal object is avowed, the client does not consult his adviser professionally, because it cannot be the [lawyer's] business to further any criminal object. If the client does not avow his object, he reposes no confidence.

State v. Phelps, 545 P.2d 901, 904 (Or. App. 1976) (quoting Queen v. Cox, [1884] 14 Q.B. 153, 168). In addition, unlike *past* criminal acts, which the lawyer cannot prevent, revelation of the client's intent to commit a *future* crime can serve to protect innocent third persons.

102. The Rule provides for revelation of only such confidential information as the lawyer "reasonably believes necessary" to prevent the crime. Further, it should be noted that the Rule is *permissive* only; failure to disclose is not a violation of the Rule:

> 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.

Model Rule 1.6 comment. Whereas the *ethical provision* is only permissive, however, it is possible that the attorney could be *compelled* to reveal the information in a judicial proceeding under the "future crime or fraud" exception to the attorney-client privilege. *See generally* R. ARONSON, *supra* note 85, V-8 to V-9. Likewise, the attorney's failure to disclose might also subject him to tort liability for failure to warn a known intended victim. *Compare* Tarasoff v. Regents, 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (1976) (since ethical standards of psychiatric profession permitted disclosure under the circumstances, failure to warn foreseeable victim of a known danger presented by his patient breached psychiatrist's common law duty to warn or disclose), *and* Dike v. Dike, 75 Wn. 2d 1, 448 P.2d 490 (1968) (attorneys must, upon learning that a client plans an assault or other violent crime, warn foreseeable victims), *with* Hawkins v. King County, 24 Wn. App. 338, 602 P.2d 361 (1979) ("[T]he obligation to warn, when confidentiality would be compromised to the client's detriment, must be permissible at most, unless it appears beyond a reasonable doubt that the client has formed a firm intention to inflict serious personal injuries on an unknowing third person.").

103. *See* UNIF. R. EVID. 502(d)(1), 13 U.L.A. 250 (1980) (confidentialty destroyed if advice was obtained to "commit what the client knew or reasonably should have known to be a crime or fraud"); Glade v. Superior Court, 76 Cal. App. 3d 738, 143 Cal. Rptr. 119 (1978); Clark v. State, 159 Tex. Crim. 187, 261 S.W.2d 339 (advice to "ditch" the murder weapon), *cert. denied*, 346 U.S. 855 (1953).

104. *See generally* Model Rule 1.6 comment.

105. *See, e.g.*, State *ex rel.* Sowers v. Olwell, 64 Wn. 2d 828, 833–35, 394 P.2d 681, 684–85 (1964) (prosecutor's subpoena duces tecum demanding production by attorney of knife obtained from client unenforceable; however, attorney had duty, "as an officer of the court," to turn over such criminal evidence "after a reasonable period" to the prosecution, to avoid becoming a "repository for the

Disclosure of confidences or secrets may also be permitted in two additional circumstances: where disclosure is necessary (1) to establish or collect a fee, or (2) to defend the lawyer or his employees or associates against accusations of wrongful conduct.[106] The accusations may take one of several forms. First, the client may sue the attorney for malpractice or breach of contract. Second, the client may file a complaint with the local grievance committee. Third, the attorney's conduct in the representation may form the basis of a criminal charge or civil claim by third parties. In such cases, confidences or secrets may be revealed if they are relevant to the proceedings. In one case, an attorney, who had worked on the registration of securities for his firm's client, and had disagreed with his superiors over their nondisclosure of certain facts in the registration statement, resigned from the firm. He then filed an affidavit with the SEC, detailing his efforts to convince his firm to rectify the nondisclosure and reporting their contemplated nondisclosure in another securities registration. Subsequently, the attorney was named, along with the law firm and the client, as a defendant in a stockholder's suit for violations of the securities law and for negligence, fraud, and deceit. In exchange for having his name dropped as a defendant, he presented a copy of his earlier affidavit to the plaintiff's attorneys. The court held that the attorney had not breached his duty of confidentiality, since he "had a right to make an appropriate disclosure with respect to his role in the public offering," and since information obtained from the client was incidental, rather than central, to the disclosure he made.[107]

The RPC have eliminated the CPR exception to the nondisclosure duty where the client engages in fraud during the representation. Former CPR DR 7-102(B)(1) required revelation to the affected tribunal and permitted revelation to the affected person of the client's perpetration of a fraud

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suppression of criminal evidence"); Clutchette v. Rushen, 770 F.2d 1469 (9th Cir. 1985); *In re* Ryder, 263 F. Supp. 360 (E.D. Va. 1967), *aff'd*, 381 F.2d 713 (1967); Morrell v. State, 575 P.2d 1200 (Alaska 1978). In addition, although an attorney has no duty to reveal the *whereabouts* of the proceeds or evidence of his client's criminal conduct, and may even take pictures to preserve the evidence, *see In re* Armani, 83 Misc. 2d 252, 371 N.Y.S.2d 563 (1975); People v. Belge, 50 A.D.2d 1088, 376 N.Y.S.2d 771 (1975), *aff'd*, 41 N.Y.2d 60, 390 N.Y.S.2d 867, 359 N.E.2d 377 (1976), the evidence must be turned over to the prosecution if it is *moved or altered* in any way to avoid responsibility for the destruction of evidence. *See, e.g.*, People v. Meredith, 29 Cal. 3d 682, 631 P.2d 46, 175 Cal. Rptr. 612 (1981). *See generally* Note, *Legal Ethics and the Destruction of Evidence*, 88 YALE L.J. 1665 (1979).

106. RPC Rule 1.6(b)(2).

107. Meyerhoffer v. Empire Fire & Marine Ins. Co., 497 F.2d 1190, 1194–95 (2d Cir.) (relying on former CPR DR 4-101(B), permitting a lawyer to reveal confidences and secrets necessary to defend himself against "an accusation of wrongful conduct"), *cert. denied*, 419 U.S. 998 (1974). A number of commentators have argued that the exception, now arguably part of RPC Rule 1.6(b)(2), should be limited to self-defense disclosures in response to accusations *by the client*, on a waiver theory. *See generally* Levine, *Self-Interest or Self-Defense: Lawyer Disregard of the Attorney-Client Privilege for Profit and Protection*, 5 HOFSTRA L. REV. 783 (1977).

during the course of the representation. There is no such requirement (or even permission) in the RPC.[108] However, under RPC Rule 1.15(b)(1), the lawyer may *withdraw* if the client "persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent."[109]

Rule 1.7 Conflict of Interest

A lawyer must be very careful not to enter into a relationship where there is a potential conflict of interest that is likely to affect adversely his ability to exercise independent and professional judgment.[110] Where an impermissible conflict is found to exist, the lawyer may be subject to disqualification, loss of fees, and civil liability for malpractice, even if formal disciplinary action is not undertaken.[111]

A lawyer may not represent two clients whose interests are directly adverse to one another except under the narrow circumstances noted below.[112] The reasons for this rule should be obvious. Since the lawyer has a duty to represent each client so that the client's interests are protected, if the lawyer were to represent clients who were adverse to each other, one client's interests necessarily would suffer. If an impermissible conflict of interest exists before representation is undertaken, representation should be declined.[113]

An impermissible conflict may exist if there is substantial discrepancy in the parties' testimony, incompatibility in positions in relation to an opposing party, or substantially different possibilities of settlement of claims or liabilities in question.[114] Dual representation of clients with adverse interests is permitted only if "[t]he lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and [e]ach client consents in writing after consultation and a full disclosure of the material facts (following authorization from the other client to make such a disclosure)."[115] If the clients' interests are truly adverse, however,

108. For a criticism of this deletion, see *supra* notes 31–37 and accompanying text.

109. RPC Rule 1.15(b)(2). *See generally* Model Rule 1.6 comment.

110. "A lawyer's loyalty . . . may be diluted by a limitless number of personal interests—financial security, prestige, and self-esteem—and interests of third persons—family, friends, business associates, employer, legal profession, and society as a whole." Aronson, *Conflict of Interest Problems of the Private Practioner*, in ABA, PROFESSIONAL RESPONSIBILITY: A GUIDE FOR ATTORNEYS 91, 93 (Ream ed. 1978).

111. *See* Aronson, *Conflict of Interest*, 52 WASH. L. REV. 807, 810 (1977), and authorities cited therein.

112. RPC Rule 1.7(a).

113. *See* Model Rule 1.7 comment. *See also* RPC Rule 1.15(a)(1).

114. *See generally* Aronson, *supra* note 111, at 821–32.

115. RPC Rule 1.7(a)(1)–(2). It has been held that, absent consent, a lawyer may not undertake representation adverse to a current client even in an entirely unrelated matter. *See, e.g.*, IBM Corp. v.

rarely will an attorney's belief that she can adequately represent both be "reasonable". One test for identifying an impermissible conflict is that when a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent.[116]

If there is just the possibility that a conflict of interest may arise, such that the representation of one 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,"[117] the critical questions concern the likelihood that a conflict will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or will foreclose courses of action that reasonably should be pursued on behalf of the client.[118] Therefore, the attorney should explain the implications of the common representation, including the advantages and risks involved, and suggest that the client obtain the advice of independent counsel.[119]

If an actual conflict does arise between the interests of the various clients, an attorney is subject to discipline if she fails to withdraw from the case. If, for example, Husband and Wife are seeking a dissolution and wish to have Attorney handle the matter and if, after Attorney fully explains to each of them the various conflicts that could arise, they both wish her to continue and notify her of this fact in writing, then Attorney may do so if she reasonably believes that she can undertake the representation without adversely affecting either's interests. If it later appears that a property

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Levin, 579 F.2d 271 (3d Cir. 1978); Chateau de Ville Prods. v. Tams-Whitmark Music Library, 474 F. Supp. 223 (S.D.N.Y. 1979).

116. Model Rule 1.7 comment.

117. RPC Rule 1.7(b).

118. *See id.;* Yablonski v. United Mine Workers, 448 F.2d 1175, 1179–80 (D.C. Cir. 1971) (per curiam) ("Whether facts are discovered and legal positions taken which would create such a conflict of interest . . . may well be determined by the approach which counsel . . . takes in this case. We think that the objectives . . . would be much better served by having an unquestionably independent new counsel . . . ."), *cert. denied,* 406 U.S. 906 (1972).

119. *See* Bowers v. Transamerica Title Ins. Co., 100 Wn. 2d 581, 588–89, 675 P.2d 193, 199 (1983). This requirement has been referred to as a requirement of "full disclosure." One court has stated that "full disclosure" implies communicating "all of the facts and implications" of an attorney's representation of multiple clients and any circumstances which might cause a client to question the undivided loyalty of the lawyer. City Council v. Sakai, 58 Hawaii 390, 570 P.2d 565, 574 (1977). It has also been held that such disclosure includes a clear explanation of the risks and disadvantages to the client and an explanation of the advantages of seeking independent legal advice. *In re* James, 452 A.2d 163 (D.C. 1982), *cert. denied,* 460 U.S. 1038 (1983); *In re* Boivin, 271 Or. 419, 533 P.2d 171 (1975). It has generally been accepted that the requirement of full disclosure is not satisfied by merely informing the client of the fact of multiple representation. *See, e.g.,* Unified Sewerage Agency v. Jelco, Inc., 646 F.2d 1339 (9th Cir. 1981).

settlement cannot be reached, Attorney should withdraw from the case and advise both Husband and Wife to seek separate attorneys.

A lawyer, or any partner, associate, or lawyer affiliated with the lawyer in question, should avoid accepting or continuing a relationship with a client where the interests of the client may conflict with (or simply be divergent from) the interests of another client and such differences will or are likely to affect the lawyer's ability to exercise independent professional judgment. In this connection, all doubts are to be resolved against the propriety of the representation.[120]

If a third party is paying for the representation of a client, the lawyer must make certain that the client consents after consultation, that there is no interference with the lawyer's independence of professional judgment, and that the confidences and secrets of the client are protected.[121] Suppose that *X* is the attorney for an insurance company. *A* is one of the company's insureds and has just had an automobile accident. Under *A's* insurance contract, the insurance company has an obligation to provide *A* with a defense if an action is brought against him. At the same time, the insurance company seeks to deny *A's* claim on the basis of an exclusion in the insurance policy. *X* may represent either the insurance company or *A*, but not both. *X* may represent *A* if *X* reasonably believes that the representation of *A* will not be adversely affected by his relationship with the insurance company. *X* may not reveal any of *A's* confidences to the insurance company. The insurance company must hire outside counsel for the case that *X* does not take.[122]

Rule 1.8 Conflict of Interest; Prohibited Transactions; Current Client

When representing a client, a lawyer is prohibited from participating in certain transactions. The reasons for the prohibition are: first, by participating in these transactions, the lawyer may be faced with a conflict of interest; and second, even if there is no actual conflict of interest, participation in the transactions may *appear to be* improper conduct on the part of the lawyer.

A lawyer may not enter into a business transaction with a client or knowingly acquire ownership, possessory, security, or pecuniary interests adverse to a client, unless: (1) the transaction is fair and reasonable; (2) the client is informed in writing of the terms of the agreement in a manner that the client can understand; (3) the client is given a reasonable opportunity to

120. *See* Model Rule 1.7 comment. Thus, "[i]t has been suggested that a good rule of thumb is 'When in doubt, don't.'" Wash. State Bar Ass'n Legal Ethics Comm., Op. No. 161, *reprinted in* 29 WASH. STATE BAR NEWS 47 (Oct. 1975).

121. RPC Rule 1.8(f).

122. *See generally* Aronson, *supra* note 111, at 822–25.

seek the advice of independent counsel; (4) and the client consents.[123] A lawyer may not use information gained in the representation of a client to the client's disadvantage unless the client consents *in writing* after consultation.[124] If the lawyer is related to opposing counsel in a matter, the client must be informed of this relationship and must consent after consultation.[125] Nor may the lawyer prepare an instrument giving the lawyer or the lawyer's relatives any substantial gift. This includes gifts by will or other methods.[126] An exception is made when the lawyer is related to the donee.[127]

A lawyer may not, prior to the conclusion of the representation, "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."[128]

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123. RPC Rule 1.8(a).

124. RPC Rule 1.8(b). *See* Carson v. Fogg, 34 Wash. 448, 76 P. 112 (1904). The attorney might also be subject to civil liability under other law for use of any information gained in the course of representation. *See, e.g.,* SEC v. Hall, FED. SEC. L. RPTR. (CCH) § 97,292 (D.D.C. 1980).

125. RPC Rule 1.8(i). "Rule 1.8(i) applies to related lawyers who are in different firms. Related lawyers in the same firm are governed by RPC Rules 1.7, 1.9, and 1.10. The disqualification stated in RPC Rule 1.8(i) is personal and is not imputed to members of firms with whom the lawyers are associated." Model Rule 1.8 comment. *See generally* Note, *Legal Ethics—Representation of Differing Interests by Husband and Wife: Appearances of Impropriety and Unavoidable Conflicts of Interests?*, 52 DEN. L.J. 735 (1975). A recent California case suggests that the Rule may well apply to lovers, as well as spouses. In People v. Jackson, 167 Cal. App. 3d 829, 213 Cal. Rptr. 521 (1985), the court reversed a conviction of assault with intent to commit rape because defense counsel was dating the prosecutor. Although they were never married nor engaged to each other, did not ever live together, and defense counsel never divulged confidential defense information to the prosecution, the court held that appellate courts may not "indulge in nice calculations as to the amount of [resulting] prejudice when a conviction is attacked on the ground that an appointed lawyer was influenced by a conflict of interest.'" *Id.*, 213 Cal. Rptr. at 522. "Such an apparently close relationship between counsel directly opposing each other in a criminal prosecution naturally and reasonably gives rise to speculation that the professional judgment of counsel as well as the zealous representation to which an accused is entitled has been compromised." 213 Cal.Rptr. at 523.

126. *See also* Estate of Shaughnessy, 104 Wn. 2d 89, 702 P.2d 132 (1985), decided prior to the effective date of RPC Rule 1.8(c), holding the attorney entitled to recover fees in connection with a good faith attempt to probate a lost will which he had drawn for a client, in which he was named executor, and which contained gifts to him. However, the court stated that its holding:

> does not mean we approve of attorneys drawing wills in which they are either executors or beneficiaries or both. Even with a finding of good faith, as in this case, such actions cannot help but engender suspicion and, as here, lengthy and expensive will contests. . . . [I]t is an activity of which we disapprove, in which we believe no attorney should engage, and which should not occur in the future.

Id. at 96–97, 702 P.2d at 136. Four dissenting justices would have held that "no fees of any nature should accrue to the benefit of the lawyer," and that he "should not only not benefit from the estate, but should not in any way benefit from the fruits of the estate, either by way of a bequest or having the estate pay any part of his attorney's fees or a fee as personal representative." *Id.* at 97, 702 P.2d at 136–37 (Brachtenbach, J., dissenting).

127. RPC Rule 1.8(c).

128. RPC Rule 1.8(d). The conflict inherent in such literary or media rights agreements is not only

A lawyer may not advance or guarantee financial assistance to her client, except that she may advance the expenses of litigation, provided that the client remains ultimately liable for such expenses.[129] A lawyer may not acquire a proprietary interest in a cause of action or subject matter of litigation, except that the lawyer may "[a]cquire a lien granted by law to secure the lawyer's fee or expense,[130] and [c]ontract with a client for a reasonable contingent fee in a civil case."[131] Where an attorney is properly representing two or more parties,[132] she may not participate in making an aggregate settlement of claims for or against the clients, or in criminal cases an aggregate agreement as to guilty or nolo contendere pleas, unless each client consents after consultation, including disclosure of the existence and nature of all the claims or pleas involved and the participation of each person in the settlement.[133]

A lawyer may not make an agreement limiting the lawyer's liability to a client for malpractice, unless permitted by law and the client is represented by independent counsel or is informed in writing that independent representation is appropriate.[134]

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ethically improper, but can also result in reversal of a criminal defendant's conviction on the basis of ineffective assistance of counsel. *See, e.g.*, Maxwell v. Superior Court, 101 Cal. App. 3d 735, 161 Cal. Rptr. 849 (1980), *superseded*, 30 Cal. 3d 606, 639 P.2d 248, 180 Cal. Rptr. 177 (1982) (criminal defendant may waive conflict if the waiver is knowing and voluntary); People v. Corona, 80 Cal. App. 3d 684, 145 Cal. Rptr. 894 (1978).

129. RPC Rule 1.8(e). Expenses of litigation include "court costs, expenses of investigation, expenses of medical examination, and costs of obtaining and presenting evidence." *Id.*

130. *See* WASH. REV. CODE § 60.40.010 (1985). *See also* Ross v. Scannell, 97 Wn. 2d 598, 604, 647 P.2d 1004, 1007–08 (1982):

> The statute in part is merely declaratory of the general or retaining lien recognized at common law. This possessory and passive lien gives an attorney the right to retain papers and documents which come into the attorney's possession during the course of his professional employment. It is a possessory and passive lien and is not enforceable by foreclosure and sale.
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> * * *
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> The statute, however, also goes beyond the common law in recognizing the special or charging lien. This lien is upon the judgment obtained for the client as a result of the attorney's professional services to secure his compensation.

However, the statute is to be strictly construed, and does not permit attorneys' attaching liens to real property for unadjudicated and unliquidated claims. *Id. See* WASH. REV. CODE § 60.40.010(4) (1985). *See also* RPC Rule 1.15(d).

131. RPC Rule 1.8(j).

132. *See* RPC Rule 1.7(a)(1), (2), *supra* at text accompanying notes 107–19.

133. RPC Rule 1.8(g). It would appear, however, that RPC Rule 1.8(g) would not apply where the interests of multiple claimants are separately represented. *Cf. In re* Lauderdale, 15 Wn. App. 321, 549 P.2d 42 (1976) (wrongful death settlement, involving claims of two minor children represented by a guardian ad litem, and two adult children and a surviving spouse represented by counsel).

134. RPC Rule 1.8(h). Rarely, if ever, would an agreement limiting the lawyer's liability to the client for malpractice be deemed to be appropriate. Such an agreement was strictly prohibited under CPR DR 6-102(A), and it is unlikely, except in an unusual case, that a completely independent attorney would be able to conscientiously recommend acceptance by the client of such an agreement.

Rule 1.9 Conflict of Interest; Former Client

After the professional relationship with a client has terminated, the lawyer's duty to avoid a conflict of interest is still applicable with respect to future prospective clients. Thus, under RPC Rule 1.9, a lawyer who has represented a client in a matter may not thereafter represent a second client in the *same or a substantially related matter*[135] in which that person's interests are materially adverse to the interests of the former client, unless the former client consents in writing after consultation and a full disclosure of the material facts.[136] Nor may the attorney use confidences or secrets relating to the representation to the disadvantage of the former client, except as RPC Rule 1.6 would permit.[137]

The scope of a "matter" in relation to this rule depends on the particular situation or transaction. If the lawyer has been directly involved in a matter or specific transaction, subsequent representation of clients whose positions are adverse to the former client is prohibited.[138] On the other hand, if the lawyer has formerly represented a client in one matter and a subsequent matter arises in which the lawyer is representing a new client in a new matter, the position of which is adverse to the former client, but the transaction is not related to the former representation in any way, then the lawyer may represent the subsequent client.[139] A lawyer is bound by RPC Rule 1.6 to preserve all

135. *See* Kurbitz v. Kurbitz, 77 Wn. 2d 943, 468 P.2d 673 (1970).

136. Cases decided prior to the adoption of the Model Rules held that, since the disqualification in RPC Rule 1.9(a) was intended to benefit the former client, it could be waived. *See, e.g., In re* Yarn Processing Patent Validity Litigation, 530 F.2d 83 (5th Cir. 1976).

137. RPC Rule 1.9(a), (b). The duty of loyalty is also implicated when an attorney switches sides and opposes a former client on a matter in which the attorney provided legal advice. *See, e.g., In re* Evans, 113 Ariz. 458, 556 P.2d 792 (1976).

138. *See* Model Rule 1.9 comment. The primary test is whether the former and present representation are "substantially related," so that the attorney *could have* obtained confidential information from his former client beneficial to his present client. *See, e.g.,* Intercapital Corp. of Or. v. Intercapital Corp. of Wash., 41 Wn. App. 9, 700 P.2d 1213 (1985); Chugach Elec. Ass'n v. United States Dist. Court, 370 F.2d 441 (9th Cir.), *cert. denied,* 389 U.S. 820 (1967). *See also* Analytica, Inc. v. NPD Research, Inc., 708 F.2d 1263 (7th Cir. 1983) (disqualification due to former representation so clearly required that law firm should be sanctioned for bad faith resistance to the disqualification motion). However, since the "substantial relationship" test *presumes* that confidential disclosures were made in the course of the prior representation and that the lawyer would use the information adversely on behalf of the current client, it is necessary to "examine the facts, circumstances and legal issues" raised in the former representation. Realco Services, Inc. v. Holt, 479 F. Supp. 867, 872 n.4 (E.D. Pa. 1979) ("The disruption and prejudice that befall a client whose counsel is disqualified are reasons to avoid a hasty conclusion in favor of disqualification, based merely on a 'doubt' about the propriety of the representation.").

139. Model Rule 1.9 comment. *See, e.g.,* Duncan v. Merrill Lynch, Pierce, Fenner & Smith, 646 F.2d 1020 (5th Cir.) (absent specific description of the prior matters, broker did not meet its burden of proving that a "substantial relationship" existed between the present and prior matters), *cert. denied,* 454 U.S. 895 (1981).

confidences and secrets of the former client. Thus, the lawyer must be careful not to reveal information that is generally known when the application of such information in a particular situation would be detrimental to the former client and was gained in the former relationship.[140]

Rule 1.10 Imputed Disqualification

The principles behind the disqualification of a single attorney, when a conflict of interest arises, apply also to lawyers associated with firms,[141] and to the firm itself. When a conflict of interest arises, the firm or the attorney should inform the client as to the possible conflict of interest and explain the implications of the situation. The attorney or firm should withdraw from the representation if possible, but if this is not possible, they must obtain the client's informed consent to continue the representation. An attorney leaving or joining a firm has a duty to former clients to avoid any conflict of interest that might result from the attorney's past or present affiliation with the firm.[142] Since attorneys in firms often consult with one another, an attorney must ensure that the loyalty to a former or prospective client is never jeopardized by revealing confidential information that could compromise the client due to a conflict of interest.[143] Thus, 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 RPC Rules 1.7, 1.8(c), 1.9, or 2.2.[144] Disqualification prescribed by RPC Rule 1.10 may be waived by the affected client under the conditions stated in RPC Rule 1.7.[145]

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140. *See* Model Rule 1.6 comment, Model Rule 1.9 comment.

141. Model Rule 1.10 comment, provides:

> For purposes of the Rules of Professional Conduct, the term "firm" includes lawyers in a private firm, and lawyers employed in the legal department of a corporation or other organization, or in a legal services organization. Whether two or more lawyers constitute a firm within this definition can depend on the specific facts. For example, two practitioners who share office space and occasionally consult or assist each other ordinarily would not be regarded as constituting a firm. However, if they present themselves to the public in a way suggesting that they are a firm or conduct themselves as a firm, they should be regarded as a firm for purposes of the Rules.

See also Intercapital Corp. of Or. v. Intercapital Corp. of Wash., 41 Wn. App. 9, 700 P.2d 1213 (1985); General Elec. Co. v. Valeron Corp., 428 F. Supp. 68 (E.D. Mich. 1977) (corporate law department); Borden v. Borden, 277 A.2d 89 (D.C. 1971) (neighborhood legal services office).

142. *See* RPC Rule 1.10(b), (c). *See also* Schloetter v. Railoc of Indiana, Inc., 546 F.2d 706 (7th Cir. 1976) (former associates).

143. *See* RPC Rule 1.10(b), (c).

144. RPC Rule 1.10(a).

145. RPC Rule 1.10(d). Unlike RPC Rule 1.11, this Rule does not provide for "screening" as a mechanism to avert disqualification, absent a waiver by the affected client. *See, e.g.,* Westinghouse Elec. Corp. v. Kerr-McGee Corp., 580 F.2d 1311 (7th Cir.), *cert. denied,* 439 U.S. 955 (1978). *See infra* note 148 and accompanying text.

Rule 1.11 Successive Government and Private Employment

The main purpose of this rule is to prevent the lawyer from using any knowledge that was gained in confidence while a public employee to benefit a client.[146] The same rules of confidentiality that apply to a client should apply to knowledge gained while working for the government in a professional capacity. Of course, this does not mean that an attorney cannot use knowledge gained to which the public would also have access.

A lawyer may not represent a private client in connection with a matter in which he participated "personally and substantially" as a public officer or employee, unless the appropriate government agency consents after consultation.[147] If the lawyer is or becomes associated with a firm representing a private client, no lawyer in the firm may represent the client unless the disqualified lawyer does not participate in the matter (i.e., is "screened"[148]) and receives no fees therefrom, and written notice is promptly given to the appropriate agency.[149]

A lawyer may not, in the representation of a client, use any confidential government information gained about a person while employed by a government agency, when the client's position is adverse to that person. The lawyer's firm may participate in the matter only if the lawyer is "screened" as above.[150] A lawyer serving as a public officer or employee may not participate in a matter in which she participated "personally and substantially" while in private practice. Nor may she negotiate for private employment with a party or its attorney in such a matter.[151]

Rule 1.12 Former Judge or Arbitrator.

This rule deals substantially with the same issues found in RPC Rule 1.11. A judge or arbitrator who resigns and then enters private practice must

146. *See generally* Aronson, *supra* note 111, at 835–48.

147. RPC Rule 1.11(a). *See generally* Morgan, *Appropriate Limits on Participation by a Former Agency Official in Matters Before an Agency,* 1980 DUKE L.J. 1.

148. *See, e.g.,* City of Hoquiam v. Public Employment Relations Comm'n, 29 Wn. App. 319, 628 P.2d 1314 (1981), *rev'd,* 97 Wn. 2d 481, 646 P.2d 129 (1982). Screening has occasionally been referred to as erecting a "Chinese Wall" between the the attorney and her partners and associates. *See also* Lipton & Mazur, *The Chinese Wall Solution to the Conflict Problems of Securities Firms,* 50 N.Y.U. L. REV. 459 (1975).

149. RPC Rule 1.11(a).

150. *See id.;* RPC Rule 1.11(b). With respect to the nature of the screening required, see Armstrong v. McAlpin, 625 F.2d 433 (2d Cir. 1980) (en banc), *vacated,* 449 U.S. 1106 (1981).

151. RPC Rule 1.11(c). "The purpose most often ascribed to the limitation of former government attorneys is to avoid 'the manifest possibility that a former government lawyer's action as a public official might be influenced (or open to the charge that it had been influenced) by the hope of later being employed privately to uphold or upset what he had done.'" Woods v. Covington County Bank, 537 F.2d 804, 814 (5th Cir. 1976) (quoting ABA Comm. on Professional Ethics Formal Op. No. 37 (1981)).

avoid a conflict of interest when dealing with a client. Thus, an attorney may not represent a client in any matter in which she was judge or arbitrator (or law clerk[152]) while on the bench, unless all parties consent after disclosure.[153] The lawyer's firm is also disqualified, unless the requirements of the RPC Rule 1.10 exception to firm disqualification are met.[154]

A judge or other judicial officer may not negotiate for employment with a party or its attorney in a matter in which she is participating "personally and substantially." A law clerk may not negotiate for employment with a party or its attorney unless he has notified the judge or arbitrator in the matter.[155]

Rule 1.13 Client Under a Disability

When it becomes apparent to a lawyer that his client does not have the ability to make informed decisions, due to mental disability, minority, or for some other reason, the lawyer should try to maintain a normal client-lawyer relationship.[156] However, if the lawyer reasonably believes the client cannot adequately act in his own interest, he may seek to have a guardian appointed for the client, or take other protective action.[157]

Rule 1.14 Preserving Identity of Funds and Property of a Client

Because of the fiduciary nature of the client-lawyer relationship, a lawyer must separate from his own properties, and endeavor to keep safe, those

152. See, e.g., Hall v. Small Business Admin., 695 F.2d 175 (5th Cir. 1983), a sexual discrimination class action. The law clerk for the federal magistrate to whom the case was assigned qualified as a member of the plaintiff class and was totally convinced of the lawsuit's merits. She participated in the pretrial proceedings. When the defendant's attorney called the magistrate's attention to this "housekeeping problem," the law clerk opted out of the class. During trial, she took notes and prepared bench memoranda for the judge. She subsequently, but just before the magistrate rendered his decision, accepted a job with the plaintiff's lead counsel. The magistrate denied the defendant's motion to vacate the judgment and recuse himself, describing the law clerk as "little more than an amanuensis" in the case, adding: "I don't think that any female law clerk is going to give me a lot of input on how to decide a case." *Id.* at 178. The Fifth Circuit reversed, stating that a "clerk is forbidden to do all that is prohibited to the judge." *Id.* at 179.

153. RPC Rule 1.12(a).

154. RPC Rule 1.12(c).

155. RPC Rule 1.12(b).

156. RPC Rule 1.13(a). *See generally* Brakel, *The Role of the Lawyer in the Mental Health Field,* 1977 AM. BAR FOUND. RESEARCH J. 467; Mickenberg, *The Silent Clients: Legal and Ethical Considerations in Representing Severely and Profoundly Retarded Individuals,* 31 STAN. L. REV. 625 (1979); Kay & Segal, *The Role of the Attorney in Juvenile Court Proceedings: A Non-Polar Approach,* 61 GEO. L.J. 1401 (1973).

157. RPC Rule 1.13(b). In addition, "[i]f 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)." Model Rule 1.14 comment. *See also In re* Quesnell, 83 Wn. 2d 224, 517 P.2d 568 (1973).

funds and other properties belonging to the client. This is not merely an aspirational goal; any violation of the rules governing use of a client's property will subject a lawyer to substantial discipline, even if no actual loss has occurred.[158] In addition, in the event of any loss of such funds, the lawyer is subject to personal liability whether or not she profited personally in any respect.

A lawyer must give prompt notice to the client of receipt of the client's funds or other properties, identify and label them properly and place them in a safe place (for example, a safe deposit box), maintain complete records and render appropriate accounts to the client about them, and pay promptly or deliver upon request the funds or other properties.[159] As a basic protection, all funds belonging in whole or in part to the client must be deposited in a separate account, and the only funds belonging to the lawyer or firm which may be deposited there are funds sufficient to pay bank charges.[160] Client funds must be deposited in one or more interest-bearing accounts, normally separate accounts for each client or a pooled account with subaccounting to compute the interest owed to each client.[161]

Funds that are nominal in amount or held for a short period of time must be placed in a pooled interest-bearing account.[162] The interest accruing on this account, less any transaction costs, must be paid to The Legal Foundation of Washington, established by the Washington Supreme Court to administer such IOLTA (Interest on Lawyer Trust Account) funds.[163] The lawyer may, but need not, notify the client of the intended use of such funds.[164] This entire procedure, implemented in many jurisdictions, has been upheld against constitutional challenge by state supreme courts.[165] The United States Supreme Court has denied certiorari with respect to a

158. *See, e.g., In re* Moynihan, 97 Wn. 2d 237, 643 P.2d 439 (1982). Disbarment is the usual sanction. *In re* Vetter, 104 Wn. 2d 779, 711 P.2d 284 (1985); *In re* Sawyer, 98 Wn. 2d 584, 656 P.2d 503 (1983).

159. RPC Rule 1.14(b)(1)–(4). *See also In re* Deschane, 84 Wn. 2d 514, 527 P.2d 683 (1974); *In re* Kennedy, 80 Wn. 2d 222, 492 P.2d 1364 (1972).

160. RPC Rule 1.14(a).

161. RPC Rule 1.14(c).

162. *Id.*

163. The substantial amounts transferred to the Legal Foundation are employed to fund public interest programs such as legal aid programs, loans for law students, and programs designed to improve the administration of justice.

164. RPC Rule 1.14(c)(1).

165. *See, e.g.,* Carroll v. State Bar, 166 Cal. App. 3d 1193, 213 Cal. Rptr. 305, *cert. denied,* 106 S. Ct. 142 (1985); *In re* Interest on Trust Accounts, 402 So. 2d 389, 395–96 (Fla. 1981) (use of client money in this manner not a "taking" of the funds from client without compensation in violation of fifth and fourteenth Amendments). The Internal Revenue Service has ruled that the interest income from trust accounts is tax exempt if used for the public service purposes indicated *supra* note 163. *See* Rev. Rul. 81-209, 1981-2 C.B. 16.

challenge to the California IOLTA plan.[166] In determining whether client funds should be deposited in such an IOLTA account or an interest-bearing account, a lawyer should consider whether the funds are likely to provide a net return to the client, including such factors as the amount of interest the funds are likely to earn, the cost of establishing and administering the account, and the capability of the financial institutions to calculate and pay interest to individual clients.[167]

Where fixed portions of the funds received become due and owing to the lawyer as fees or for expenses, he is authorized to withdraw such portions so long as the client does not dispute the sums.[168] If there is any dispute, the disputed amount must remain in the separate client account pending resolution of the controversy.[169] In order to ensure compliance with the provisions of RPC Rule 1.14, the State Bar Board of Governors may audit any lawyer's books at any time and for any reason. The lawyer must cooperate with such audits, and must complete, execute, and deliver to the State Bar an annual written declaration or questionnaire on or before the specified date of delivery.[170]

Rule 1.15 Declining or Terminating Representation

Before attempting to terminate the relationship at any stage of the proceedings, the lawyer has three general responsibilities. First, if permission for withdrawal is required by the rules of a tribunal, such permission must be obtained from the tribunal prior to withdrawing from the case.[171]

166. Carroll v. State Bar, 166 Cal. App. 3d 1193, 213 Cal. Rptr. 305, *cert. denied*, 106 S. Ct. 142 (1985).

167. RPC Rule 1.14(c)(3)(i)–(iii).

168. RPC Rule 1.14(a). Prior to the adoption of the RPC, Washington permitted, under CPR DR 9-102(A)(2), a lawyer to assert a lien and deduct sums equal to the amount owed the lawyer from the trust funds without consent by the client. *See* Crane Co. v. Paul, 15 Wn. App. 212, 548 P.2d 337 (1976). *See also* Ross v. Scannell, discussed *supra* note 130.

169. *See supra* note 168. Model Rule 1.15 comment also provides:

> 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 lawyer is not required to remit the portion from which the fee is to be paid. However, a lawyer may not hold funds to coerce a client into accepting the lawyer's contention. The disputed portion of the funds should be kept in trust 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.

170. RLD Rules 13.1–13.3.

171. *See, e.g.*, Hansen v. Wightman, 14 Wn. App. 78, 538 P.2d 1238 (1975). Model Rule 1.16 comment provides:

> When a lawyer has been appointed to represent a client, withdrawal ordinarily requires approval of the appointing authority. *See also* Rule 6.2. Difficulty may be encountered if withdrawal is based on the client's demand that the lawyer engage in unprofessional conduct. The court may wish an explanation for the withdrawal, while the lawyer may be bound to keep confidential the facts that would constitute such an explanation. The lawyer's statement that professional considerations require termination of the representation ordinarily should be accepted as sufficient.

Second, the lawyer must take whatever reasonable steps are necessary to avoid foreseeable prejudice to the rights of his client.[172] Such steps include providing reasonable notice, allowing time to employ other counsel, delivering all papers and properties to the client, and cooperating with any counsel subsequently employed. In Washington, retaining liens, whereby the attorney retains client papers and properties, are permissible so long as the client is not thereby deprived of material necessary to his legal representation.[173] For example, suppose that attorney *X* is representing both the passenger and the driver of a passenger vehicle in a personal injury case against *A*. *X* discovers a conflict in his representation due to *A*'s assertion of contributory negligence as a defense. *X* therefore decides to withdraw from the driver's case. *X* must inform the driver of his decision and obtain all necessary continuances so that the driver will have time to obtain a new attorney. *X* must also return to the driver all documents and other property belonging to her and assist her new attorney to the extent possible.

Another example is where attorney *X* represented *B* in her arguably frivolous personal injury action. Following dismissal of the case for failure to state a claim, client wishes to appeal. Before *X* may withdraw to avoid violation of RPC Rule 3.1, he must either file a notice of appeal or inform *B* of the need to file such notice and the time limit in which it must be filed. Third, the attorney must return any part of a fee that was paid in advance and has not been earned at the time of termination.

The Washington RPC distinguish between situations in which the attorney *must* withdraw (mandatory withdrawal) and situations where she is *permitted* to withdraw (permissive withdrawal). Withdrawal is mandatory (after obtaining permission from the tribunal when required by law) if: (1) the lawyer knows or it becomes obvious that continued employment will violate the RPC or other law;[174] (2) the lawyer's mental or physical condition materially impairs her ability to represent her client;[175] or (3) the

172. *See* RPC Rule 1.15(b), (d). As stated in *Hansen*, 14 Wn. App. at 97, 538 P.2d at 1251: "When a lawyer . . . withdraw[s] for cause, a duty remains to protect the client. The attorney must give notice of withdrawal, suggest employment of other counsel, return papers and property to which the client is entitled, cooperate with succeeding counsel, refund compensation not earned and minimize the possibility of harm to the client."

173. *See* WASH. REV. CODE § 60.40.010 (1985). *See also* Ross v. Scannell, 97 Wn. 2d 598, 647 P.2d 1004 (1982), discussed *supra* note 130; Academy of Calif. Optometrists v. Superior Court, 51 Cal. App. 3d 999, 124 Cal. Rptr. 668, 672 (1975); Goldsmith v. Pyramid Communications, 362 F. Supp. 694, 698 (S.D.N.Y. 1973).

174. RPC Rule 1.15(a)(1). Although a lawyer must ordinarily withdraw if the client *demands* that the lawyer engage in conduct that is illegal or violates the RPC, the lawyer is not required to 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." Model Rule 1.16 comment.

175. RPC Rule 1.15(a)(2). ABA STANDARDS FOR LAWYER DISCIPLINE AND DISABILITY PROCEEDINGS (1983), Standards 12.1–12.6, provide that, even absent a pending ethics charge, a lawyer can be transferred to inactive status, amounting to a suspension from practice, if it is shown that a "mental or

client discharges the lawyer.[176]

If grounds for mandatory withdrawal do not exist, the lawyer *may* withdraw if withdrawal can be accomplished without material adverse effect on the legitimate interests of the client, or if:[177]

(1) The client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;[178]

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physical condition prevents him from competently representing the interests of his clients . . . ." RLD 10.2 provides for discretionary transfer (following a hearing) to disability inactive status when "it appears to a review committee that there is reasonable cause to believe that an active lawyer is unable adequately to practice law because of insanity, mental illness, senility, excessive use of alcohol or drugs, or other mental or physical incapacity . . . ." Under RLD Rule 10.1, transfer to disability inactive status is automatic if an active lawyer:

> (1) has been found to be incapable of assisting in his or her own defense in a criminal action; or (2) has been acquitted of a crime on the ground of insanity; or (3) has had a guardian (but not a limited guardian) appointed for his or her person or estate upon a finding of incompetency; or (4) has been found to be mentally incapable of conducting the practice of law in any other jurisdiction . . . .

In *In re* Ryan, 97 Wn. 2d 284, 644 P.2d 675 (1982), the attorney had been in private practice for over two years, but refused any new cases after about 20 months, believing "that many of the cases he was handling were fabricated or did not represent actual cases or controversies." He also believed that family and friends were referring "bogus" cases to him. He filed a lawsuit against numerous persons whom he alleged had "staged" a case he was handling. When the Disciplinary Board began an investigation, he filed a second lawsuit against numerous former clients, lawyers and an insurance company. *Id.* at 285–87, 644 P.2d at 675–76. The Washington Supreme Court upheld the Disciplinary Board's recommendation that the attorney be suspended, since, "if restored to active status, [he] might make irrational judgments concerning the merits of cases brought before him and might continue to subject clients to litigation based on allegations of conspiracy and fabrication." The court concluded:

> Ryan asserts that an attorney can be transferred to inactive status upon a finding of mental illness or other mental incapacity and that such terms are too vague to withstand a constitutional challenge. Ryan overlooks, however, the qualifying condition of the rule that the mental condition must cause the attorney to be unable to conduct his/her law practice adequately. . . . Thus, the bar must establish that an attorney is unable to conduct the practice of law adequately because of insanity, mental illness, senility, excessive use of alcohol or drugs, or other mental incapacity. . . . Given the inherently uncertain nature of mental illness and the broad ranges of the practice of law, we fail to perceive how a more definite standard could be articulated.

Id. at 287–88, 644 P.2d at 677.

176. RPC Rule 1.15(a)(3). Model Rule 1.16 comment states:

> 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.

177. RPC Rule 1.15(b). As the "or if" language of the Rule indicates, the attorney may withdraw under any of the enumerated grounds, *even if* withdrawal cannot be accomplished "without material adverse effect on the legitimate interests of the client." However, the attorney must still "take steps to the extent reasonably practicable to protect [the] client's interests." RPC Rule 1.15(d).

178. RPC Rule 1.15(b)(1). *See, e.g.*, Knapp v. McFarland, 457 F.2d 881 (2d Cir.) (inconsistent statements by client in separate litigations), *cert. denied*, 409 U.S. 850 (1972). *See generally* Gruenbaum, *Corporate/Securities Lawyers: Disclosure Responsibility, Liability to Investors and* National Student Marketing Corp., 54 NOTRE DAME LAW. 795, 816 & n.108 (1979); Cappuccio, *Ethical Problems of the Tax Practitioner in New Jersey*, 9 SETON HALL L. REV. 177, 190–97 (1978); Evans, Bialkin, Cooney, Shipman & Van Dusen, *Responsibility of Lawyers Advising Mangagement*, 30 BUS. LAW. 13, 17 (1975).

(2) The client has used the lawyer's services to perpetrate a crime or fraud;[179]

(3) The client insists upon pursuing an objective that the lawyer considers repugnant or imprudent;[180]

(4) The client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;[181]

(5) The representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or[182]

(6) Other good cause for withdrawal exists.[183]

The court may order an attorney to continue representation regardless of any grounds for withdrawal. The lawyer should continue representation to the best of his ability within the framework of the RPC.[184]

TITLE II. COUNSELOR

Rule 2.1 Advisor

Often attorneys only advise their clients as to *legal* courses of action available to the client. However, other considerations, such as moral, political, economic, and social factors, may be relevant to a client's situation. In giving advice to a client, the attorney may refer to such factors when suggesting alternative courses of action.[185]

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179. RPC Rule 1.15(b)(2). Model Rule 1.16 comment states:

> 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.

180. RPC Rule 1.15(b)(3).

181. RPC Rule 1.15(b)(4).

182. RPC Rule 1.15(b)(5).

183. RPC Rule 1.15(b)(6).

184. RPC Rule 1.15(c). Permission may be denied if withdrawal would adversely affect opposing parties or impede the administration of justice; e.g., withdrawal on the eve of litigation. *See, e.g.*, Ripoll v. Kenin, 303 So. 2d 83 (Fla. Ct. App. 1974); Brothers v. Burt, 27 N.Y.2d 905, 265 N.E.2d 922, 317 N.Y.S.2d 626 (1970). When withdrawal is based on a client's unlawful conduct, it is improper (except in criminal cases) to require the lawyer to continue. *See, e.g., In re* A., 276 Or. 225, 554 P.2d 479 (1976).

185. RPC Rule 2.1. Model Rule 2.1 comment also provides:

> 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

Rule 2.2 Intermediary

A lawyer acts as an intermediary[186] when he represents[187] two or more parties with potentially conflicting interests.[188] One of the factors examined to see if the lawyer is acting as an intermediary is the sharing of the responsibility for the lawyer's fees by the parties.[189] When acting as an intermediary, the lawyer must take certain precautions to avoid a conflict of interest. The lawyer has a duty to inform each of the clients of the implications of common representation, including the risks and advantages involved, and the effect on the attorney-client privilege.[190] In addition, the lawyer must obtain each client's consent to the common representation.[191] The lawyer's duty to provide adequate representation requires that the lawyer should not act as an intermediary unless he reasonably believes that he will be able to act in the best interests of each client.[192] The lawyer also

course of action in the face of conflicting recommendations of experts. *See generally* Williams, *Professionalism and the Corporate Bar,* 36 BUS. LAW. 159 (1980); Lehman, *The Pursuit of a Client's Interest,* 77 MICH. L. REV. 1078 (1979); *Professional Responsibility: Report of the Joint Conference,* 44 A.B.A. J. 1159, 1161 (1958).

186. "[F]or example, in helping to organize a business in which two or more clients are entrepreneurs, working out the financial reorganization of an enterprise in which two or more clients have an interest, arranging a property distribution in settlement of an estate or mediating a dispute between clients." Model Rule 2.2 comment.

187. Thus, according to Model Rule 2.2 comment:

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

188. *Id. See supra* text accompanying notes 112–16. Examples of cases in which an attorney's potential conflict of interest was considered in relation to dual representation include: Halvorsen v. Halvorsen, 3 Wn. App. 827, 479 P.2d 161 (1970) (spouses seeking separation or dissolution); *In re* Kali, 116 Ariz. 285, 569 P.2d 227 (1977) (lender and borrower); Craft Builders, Inc. v. Ellis D. Taylor, Inc., 254 A.2d 233 (Del. 1969) (buyer and seller); *In re* Lanza, 65 N.J. 347, 322 A.2d 445 (1974) (formulating and committing detailed agreement to writing).

189. Model Rule 2.2 comment.

190. RPC Rule 2.2(a)(1). Model Rule 2.2 comment states: "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."*See also* R. ARONSON, *supra* note 85, at V-5.

191. RPC Rule 2.2(a)(1). As indicated *supra* at note 119 and accompanying text, the consent obtained must be based on full disclosure, including an explanation of the problems that could arise from potential conflicting interests and the desirability of obtaining the advice of independent counsel. *See, e.g.,* Bowers v. Transamerica Title Ins. Co., 100 Wn. 2d 581, 675 P.2d 193 (1983); Sayler v. Elberfeld Mfg. Co., 30 Wn. App. 955, 639 P.2d 785 (1982); Florida Bar v. Teitelman, 261 So. 2d 140 (Fla. 1972). *See generally* Aronson, *supra* note 111, at 826–27 and authorities cited therein.

192. RPC Rule 2.2(a)(2). The Rule also requires that the lawyer reasonably believe "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." The attorney may not favor the interests of one of the clients or abandon one client to protect the other.

must reasonably believe that the common representation will not interfere with his responsibilities and that he can maintain impartiality.[193] The lawyer must withdraw if requested by any client or if he can no longer fulfill his ethical obligations. In that event, he may not represent any of the clients.[194]

Rule 2.3 Evaluation for Use by Third Persons

A lawyer may undertake an evaluation[195] of a matter for someone other than the client[196] if the undertaking of the evaluation will not cause a conflict of interest or otherwise harm the client, and the client consents after consultation. Any information relating to the evaluation is protected under RPC Rule 1.6.[197]

Klemm v. Superior Court, 75 Cal. App. 3d 893, 142 Cal. Rptr. 509 (1977); Attorney Grievance Comm. v. Lockhart, 285 Md. 586, 403 A.2d 1241 (1979).

193. RPC Rule 2.2(a)(3). Model Rule 2.2 comment states:

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

In addition, the lawyer's ability to serve as mediator may depend upon whether he has greater loyalty to either of the clients: "For example, a lawyer who has represented one of the clients for a long period and in a variety of matters might have diff[i]culty being impartial between that client and one to whom the lawyer has only recently been introduced." *Id. See also* Friedlander v. Friedlander, 80 Wn. 2d 293, 303, 494 P.2d 208, 214 (1972).

194. RPC Rule 2.2(c). *See, e.g.*, Brennan's v. Brennan's Restaurant, Inc., 590 F.2d 168 (5th Cir. 1979).

195. [F]or 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.

Model Rule 2.3 comment.

196. An evaluation *of a client* for use by a third party should be distinguished from an investigation of a third party *on behalf of a client:*

> For example, a lawyer retained by a purchaser to analyze a vendor's title to property does not have a client-lawyer relationship with the vendor. So also, an investigation into a person's affairs by a government lawyer, or by special counsel employed by the government, is not an evaluation as that term is used in this Rule. The question is whether the lawyer is retained by the person whose affairs are being examined.

Model Rule 2.3 comment.

197. *See* RPC Rule 2.3. The duty to protect confidentiality may sometimes conflict with the attorney's obligations to those who will rely on the evaluation not to provide information that is misleading or fraudulent. *See* Roberts v. Ball, Hunt, Hart, Brown & Baerwitz, 57 Cal. App. 3d 104, 128 Cal. Rptr. 901 (1976); ABA, *Statement of Policy Regarding Lawyers' Responses to Auditors' Requests for Information*, 31 Bus. Law. 1709, 1711–12, 1715 (1976).

TITLE III. ADVOCATE

Rule 3.1 Meritorious Claims and Contentions

Advocates deal with past conduct and must take the facts as they find them. They should therefore resolve all doubts as to the bounds of the law in favor of the client.[198] In furtherance of the client's cause, an advocate may urge any permissible construction of the law that is favorable to the client without regard to the likelihood of success. The advocate, however, may never assert a frivolous position in litigation. Frivolous in this context means that the position is supported neither by the existing law nor by a good faith argument to extend, modify, or reverse the existing law. However, in a criminal case, defense counsel may defend so as to require that every element of the charge is established.[199]

Rule 3.2 Expediting Litigation

A lawyer should not engage in delaying tactics during litigation when the only purpose is to frustrate, harass, or maliciously injure another. Delay

198. *See* CPR EC 7-3. "[A] lawyer who is asked to advise his client . . . may freely urge the statement of positions most favorable to the client just as long as there is reasonable basis for those positions." ABA Comm. on Professional Ethics Formal Op. 314 (1965). As stated in ABA Comm. on Professional Ethics Formal Op. 280 (1949):

> The lawyer . . . is not an umpire, but an advocate. He is under no duty to refrain from making every proper argument in support of any legal point because he is not convinced of its inherent soundness. . . . His personal belief in the soundness of his cause or of the authorities supporting it, is irrelevant.

199. *See* RPC Rule 3.1. Model Rule 3.1 comment provides:

> 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. 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 a good faith argument for an extension, modification or reversal of existing law.

At the same time, federal and state court rules of civil procedure require that an attorney sign each pleading and that such signature constitutes a certification that, to the best of the attorney's knowledge and belief, there is good ground to support the pleading and that it is not interposed for purposes of delay. Willful violations of the rule are stated to be grounds for disciplinary action. *See* FED. R. CIV. P. 11; WASH. R. CIV. P. 11. Despite infrequent enforcement of Rule 11 in the past, the trend is to impose sanctions on attorneys who simply "buy" time for their clients without any hope of ultimate success for their cause. *See, e.g.*, Textor v. Board of Regents, 87 F.R.D. 751 (N.D. Ill. 1980) (failure of plaintiff's attorney to correct an overly broad complaint); *In re* National Student Mktg. Litig., 78 F.R.D. 726 (D.D.C. 1978) (Rule 11 also applicable to counterclaims), *aff'd*, 663 F.2d 178 (D.C. Cir. 1980); Miller v. Schweickart, 413 F. Supp. 1059 (S.D.N.Y. 1976) (complaint based only on unverified rumor and hearsay); Kinee v. Abraham Lincoln Sav. & Loan Ass'n., 365 F. Supp. 975 (E.D. Pa. 1973) (plaintiff's naming of 177 mortgage and thrift institutions as class action defendants when plaintiff did not know until after discovery began which of the named defendants actually followed the alleged practices; plaintiff's counsel required to pay personally the costs and expenses of the dismissed defendants).

should only be used when it is necessary to further the client's legitimate interests, and does not include delay for the sole purpose of realizing a financial or other benefit.[200]

Rule 3.3 Candor Toward the Tribunal

A lawyer is responsible for the preparation and compilation of documents and pleadings in litigation and judicial proceedings. Ordinarily, a lawyer is not required to have personal knowledge of all the facts and representations contained in these documents if the lawyer, as an advocate, is representing a client in a matter and the assertions are made on behalf of the client.[201] However, when a lawyer is making assertions based on his own knowledge, such as in an affidavit or an open representation in court, he must make reasonably diligent inquiries to ascertain the truthfulness of the assertions.[202] There may be instances where failure to make a disclosure of a fact that an attorney knows to be false will be equivalent to an affirmative misrepresentation.[203]

RPC Rule 3.3 provides that a lawyer may not knowingly make a false statement of material fact or law to a tribunal,[204] or "[f]ail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client *unless such disclosure is prohibited by [RPC R]ule 1.6*."[205] The lawyer also may not knowingly fail to disclose

200. *See* RPC Rule 3.2 and Model Rule 3.2 comment. According to the Model Rule Comment, the test is "whether a competent lawyer acting in good faith would regard the course of action as having some substantial purpose other than delay."

201. Model Rule 3.3 comment.

202. *Id.*

203. *Id.; see, e.g.*, Matter of Witt, 96 Wn. 2d 56, 633 P.2d 880 (1981); *In re* Hubert, 265 Or. 27, 507 P.2d 1141 (1973).

204. RPC Rule 3.3(a)(1). As stated in *In re* Schildhaus, 23 A.D.2d 152, 259 N.Y.S.2d 631, 635–36, *aff'd*, 16 N.Y.2d 748, 262 N.Y.S.2d 118, 209 N.E.2d 732 (1965):

> The lawyer's function in the administration of justice requires a rigid adherence on his part to [the rule] prescribing candor and fairness in all dealings with the court. The deliberate effort on the part of a lawyer to mislead the court in a material manner, whether by express misrepresentations, unfair and evasive tactics or other irresponsible means, has a tendency to obstruct justice; and there can be no justification for the same.

The duty of candor and fairness is also applicable on appeal, where the court:

> is entitled to a fair statement of the facts from attorneys . . . not an exaggerated, self serving version . . . or an omission of crucial facts. When the Court finds that it can not rely upon the statement of a lawyer, the lawyer has lost his effectiveness with the Court and has therefore, in fact, injured his client.

Cooper v. State, 309 N.E.2d 807, 808 (Ind. 1974). *Accord* Frausto v. Legal Aid Soc'y, 563 F.2d 1324 (9th Cir. 1977).

205. RPC Rule 3.3(a)(2) (emphasis added). *See In re* Vetter, 104 Wn. 2d 779, 784–87, 711 P.2d 284, 287–89 (1985). This Rule, by its reference to RPC Rule 1.6, would appear to create some ambiguity, since RPC Rule 1.6(b)(1) *permits* the revelation of confidences or secrets "to the extent the

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 the opposing counsel.[206] The theory behind this rule is that the purpose of litigation is to promote truth and justice. The lawyer is not required to *advocate* the controlling authority, and may argue that it should be distiguished or its application to the present case abandoned, but it still must be acknowledged so that an informed decision may be made.

Further, the lawyer is prohibited from offering evidence that the lawyer *knows* to be false, including perjured testimony.[207] If the lawyer *reasonably believes* evidence is false, she *may* refuse to offer it.[208] In addition, if the lawyer *comes to know* that offered material evidence *was* false, she must promptly disclose this knowledge to the tribunal *unless prohibited under RPC Rule 1.6,*[209] in which case she may seek to withdraw.[210] Although the above duties are clear in most situations, the lawyer's duty when a criminal defendant intends to commit perjury is unclear.[211] The conflict between the

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lawyer reasonably believes necessary" to prevent the commission of a crime. Thus, in a roundabout way, RPC Rules 1.6 and 3.3(a)(2) would appear to *require* revelation to a tribunal of material facts necessary to avoid assisting a *criminal act,* but *prohibit* revelation of a material fact if necessary to avoid assisting the client's *fraudulent act.* Model Rule 3.3(a)(2) does not include the phrase "unless such disclosure is prohibited by rule 1.6." Rather, Model Rule 3.3(b) provides that the duties under RPC Rule 3.3(a) "continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by rule 1.6."

206. RPC Rule 3.3(a)(3).

207. RPC Rule 3.3(a)(4). *See* State v. Lavaris, 41 Wn. App. 856, 859 n.1, 707 P.2d 134, 136 n.1 (1985). For a definition of "knows," as employed in the RPC, see *supra* note 56.

208. RPC Rule 3.3(e). As employed in the RPC, "reasonable belief" or "reasonably believes" "denotes that the lawyer believes the matter in questicn and that the circumstances are such that the belief is reasonable." Terminology section, RPC. This is, at least in part, a subjective standard, as opposed to "reasonably should know", which "denotes that a lawyer of reasonable prudence and competence would ascertain the matter in question"—an objective standard. *Id.*

209. RPC Rule 3.3(c). In State v. Henderson, 205 Kan. 231, 468 P.2d 136, 141 (1970) (footnote omitted), the court stated:

> While as a general rule counsel is not allowed to disclose information imparted to him by his client or acquired during their professional relation, unless authorized to do so by the client himself, the announced intention of a client to commit perjury, or any other crime, is not included within the confidences which an attorney is bound to respect.

210. RPC Rule 3.3(d). *See, e.g., In re* A., 276 Or. 225, 554 P.2d 479 (1976); *In re* Malloy, 248 N.W.2d 43 (N.D. 1976); Committee on Professional Ethics v. Crary, 245 N.W.2d 298 (Iowa 1976). Before seeking to withdraw, however, the lawyer must first "make reasonable efforts to convince the client to consent to disclosure." RPC Rule 3.3(d).

211. *See* RPC Rule 3.3(g): "Constitutional law defining the right to assistance of counsel in criminal cases may supersede the obligations stated in this rule." *See also* Model Rule 3.3 comment; Lowery v. Cardwell, 575 F.2d 727 (9th Cir. 1978), discussed *infra* note 215 and accompanying text. Since a defendant in a criminal case has an absolute right to testify in his own defense, and since any action by defense counsel implying that his testimony is false could implicate the defendant's rights to effective assistance of counsel and due process, the attorney is placed in a virtually unresolvable dilemma.

> 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

duty of confidentiality and a criminal defendant's right to testify in his own behalf, versus the duty of candor to the tribunal, has yet to be resolved.[212]

In one such case, attorney *X* represented *A* in a trial (wherein *A* was found guilty) on the charge of possession of a deadly weapon by a prisoner. Prior to trial, *A* told *X* that the knives that were in his possession had belonged to him. After the trial, *A* told *X* that he thought he could find some people to testify on his behalf. *X* acted properly in refusing to assist *A* by appealing or moving for a new trial based on this "new" evidence.[213]

In another case, *X* represented a criminal defendant charged with murder. When the defendant surprised *X* by falsely testifying that she had not been present at the scene of the murder, *X* followed the ABA Standards Relating to the Defense Function[214] in obtaining a recess, advising the defendant against perjuring herself, moving to withdraw when she refused this advice, and, upon denial of the motion, ceasing to question her further and not arguing her credibility during closing argument. The appellate court held that *X*'s conduct improperly indicated his belief to the trial judge (who, in the absence of a jury, was the trier of fact) that his client was lying, and thereby *X* violated the defendant's right to due process.[215]

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principles; it exempts the lawyer from the duty to disclose false evidence but subjects the client to an implicit disclosure of information imparted to counsel. Another suggested resolution, of relatively recent origin, is that the advocate be entirely excused from the duty to reveal perjury if the perjury is that of the client. This is a coherent solution but makes the advocate a knowing instrument of perjury.

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

Model Rule 3.3 comment. It should be noted, however, that the Comment is based on Model Rule 3.3(b), which requires disclosure "even if compliance requires disclosure of information otherwise protected by rule 1.6." RPC Rule 3.3(a)(2), (c) & (d), however, provide the opposite, i.e., "unless such disclosure is prohibited by rule 1.6." Notes 29–38 and accompanying text, *supra*, compare and critique these contrasting positions. For a comparison of the varying points of view on this issue, see Aronson, *supra* note 36, at 314–20 (and authorities cited therein); Rieger, *Client Perjury: A Proposed Resolution of the Constitutional and Ethical Issues*, 70 MINN. L. REV. 121 (1985); Wolfram, *Client Perjury*, 50 S. CAL. L. REV. 809 (1977); Brazil, *Unanticipated Client Perjury and the Collision of Rules of Ethics, Evidence, and Constitutional Law*, 44 MO. L. REV. 601 (1979). For judicial treatment of the dilemma, see, e.g., United States v. Curtis, 742 F.2d 1070 (7th Cir. 1984); People v. Schultheis, 638 P.2d 8 (Colo. 1981); State v. Fosnight, 235 Kan. 52, 679 P.2d 174 (1984); Matter of Goodwin, 279 S.C. 274, 305 S.E.2d 578 (1983).

212. Whiteside v. Scurr, 744 F.2d 1323, *reh'g en banc denied*, 750 F.2d 713 (8th Cir. 1984), *rev'd sub nom.* Nix v. Whiteside, 106 S. Ct. 988 (1986).

213. *In re* Branch, 70 Cal. 2d 200, 449 P.2d 174, 74 Cal. Rptr. 238 (1969).

214. *See* ABA STANDARDS RELATING TO THE PROSECUTION FUNCTION AND THE DEFENSE FUNCTION (Approved Draft 1971). This provision was subsequently withdrawn and an essentially similar provision, ABA STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE, Defense Function Standard 4-7.7 (2d ed., Tent. Draft, Approved 1979), could not be agreed upon by the ABA.

215. Lowery v. Cardwell, 575 F.2d 727 (9th Cir. 1978).

Finally, in *Nix v. Whiteside,*[216] an attorney represented a criminal defendant charged with murder. The defendant alleged self-defense. When the defendant proposed to testify falsely[217] that the victim attacked him with a gun, counsel threatened to withdraw and inform the trial court, and stated that he "probably would be allowed to attempt to impeach that particular testimony."[218] The defendant testified, but said nothing about the gun,[219] and was convicted. On appeal by the client of the denial of his federal habeas corpus petition, the Eighth Circuit reversed his conviction on the grounds of ineffective assistance of counsel.[220] The United States Supreme Court reversed, reinstating the conviction.[221] Although the Court's holding was unanimous[222] that the defendant was not denied effective assistance of counsel, in concurring opinions, four justices clearly indicated that the decision should not be read to establish the required—or even uniformly proper—attorney response to a criminal defendant's intended perjury.[223]

216. 106 S. Ct. 988 (1986).

217. The federal courts accepted the state court assumption that the defendant's proposed testimony, concerning seeing something "metallic" in the victim's hand, was false. 106 S. Ct. at 993. It is at least arguable that defense counsel had an insufficient basis to refuse to present the evidence on the mere suspicion of its falsity. *See* 106 S. Ct. at 1007 (Stevens, J., concurring).

218. 106 S. Ct. at 997 n.7.

219. In fact, on cross-examination, the defendant admitted that he had not actually seen a gun in the victim's hand. *Id.* at 992.

220. Whiteside v. Scurr, 744 F.2d 1323, *rehearing en banc denied,* 750 F.2d 713 (8th Cir. 1984), *rev'd sub nom.* Nix v. Whiteside, 106 S. Ct. 988 (1986).

221. 106 S. Ct. 988 (1986).

222. The basis for the decision was that, under the two-pronged test of Strickland v. Washington, 466 U.S. 668 (1984), counsel's conduct in successfully dissuading his client from committing the crime of perjury "fell within the wide range of professional responses to threatened client perjury acceptable under the Sixth Amendment," *Nix,* 106 S. Ct. at 994, and there was no prejudice in that "Whiteside has no valid claim that confidence in the result of his trial has been diminished by his desisting from the contemplated perjury." *Id.* at 999.

223. *See* 106 S. Ct. at 1007 (Stevens, J., concurring). Chief Justice Burger, writing for the majority, stated:

> When examining attorney conduct, a court must be careful not to narrow the range of conduct acceptable under the Sixth Amendment so restrictively as to constitutionalize particular standards of professional conduct and thereby intrude into the State's proper authority to define and apply the standards of professional conduct applicable to those it admits to practice in its courts. In some future case challenging attorney conduct in the course of a state court trial, we may need to define with greater precision the weight to be given to recognized canons of ethics, the standards established by the State in statutes or profesional codes, and the Sixth Amendment, in defining the proper scope and limits on that conduct. Here we need not face that question, since virtually all of the sources speak with one voice.

Id. at 994. Interestingly, the court cited (along with numerous additional authorities) CPR DR 7-102(B)(1) and Model Rule 3.3(a)(4) as requiring counsel's disclosure of client perjury to the court "even if disclosure compromises client confidences." *Id.* at 995. Since Washington amended Model Rule 3.3, replacing the quoted language with the language, "unless such disclosure is prohibited by rule 1.6," Washigton defense counsel's duty is not so clear. *See supra* note 205 and acompanying text; *see also* Survey Comment, *Confidentiality, supra* note 3.

Rather, as stated by Justice Brennan:[224]

> This Court has no constitutional authority to establish rules of ethical conduct for lawyers practicing in the state courts. Nor does the Court enjoy any statutory grants of jurisdiction over legal ethics.
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> Unfortunately, the court seems unable to resist the temptation of sharing with the legal community its vision of ethical conduct. But let there be no mistake: the Court's essay regarding what constitutes the correct response to a criminal client's suggestion that he will perjure himself is pure discourse without force of law. . . . [T]hat issue is a thorny one, . . . but it is not an issue presented by this case. Lawyers, judges, bar associations, students and others should understand that the problem has not now been "decided."

Rule 3.4 Fairness to Opposing Party and Counsel

Though ill feelings may exist between clients, such feelings should not influence a lawyer in his conduct, attitude, and demeanor toward opposing lawyers. A lawyer should not make unfair or derogatory personal references to opposing counsel,[225] and should accede to reasonable requests regarding court proceedings, continuances, waiver of procedural formalities, and similar matters which do not prejudice the rights of clients.

Whereas the lawyer is required to zealously defend the client, RPC Rule 3.4 delineates certain courses of action which the lawyer may not use in representing a client. Again, the underlying theory behind this rule is that justice can only be served when truthful disclosure of the facts is made known to the trier of fact in an efficient manner. First, an attorney must respect the rules of the court. Thus, an attorney may not disregard, or advise a client to disregard, a rule of a tribunal.[226] The lawyer may, however, take whatever steps are appropriate, in good faith, to test the validity of such a rule. This can include openly refusing to obey a rule based on the assertion that no valid obligation exists.[227] But if the attorney intentionally or habitually violates the rules of the court, he is subject to disciplinary action.[228] The lawyer is also under an affirmative obligation to reveal the identity of his client to the court, unless the identity is privileged

224. 106 S. Ct. at 1000 (Brennan, J., concurring).
225. *See, e.g.*, State v. Turner, 217 Kan. 574, 538 P.2d 966 (1975).
226. RPC Rule 3.4(c). *See, e.g.*, Chapman v. Pacific Tel. & Tel. Co., 613 F.2d 193 (9th Cir. 1979).
227. *See supra* note 226.
228. *See, e.g.*, *In re* Vetter, 104 Wn. 2d 779, 711 P.2d 284 (1985).

or irrelevant.[229] Further, a lawyer may not advise or cause a prospective witness to secrete himself or leave the jurisdiction to avoid serving as a witness. This rule is an extension of the lawyer's affirmative obligation not to suppress evidence that he or his client is legally obligated to produce.[230] Nor may the attorney fail to make "reasonably diligent effort" to comply with a legally proper discovery request.[231]

A lawyer should not participate in any way in the payment of compensation to a witness contingent upon the content of the witness' testimony or the outcome of the litigation.[232] Payment to witnesses may only be based on reasonable expenses incurred in testifying, reasonable compensation for lost time, and a reasonable professional fee for the services of an expert witness.[233]

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229. *See generally* R. ARONSON, *supra* note 85, at V-7 to V-8.

230. *See* RPC Rule 3.4(a). *See* State v. Wright, 87 Wn. 2d 783, 557 P.2d 1 (1976) (destruction of evidence improper where there was a "reasonable possibility" that it was material to innocence of the accused).

231. RPC Rule 3.4(d). The Rule also prohibits the making of frivolous discovery requests. Increasing judicial concern over discovery abuse has been evident on a number of fronts. In Roadway Express, Inc. v. Piper, 447 U.S. 752, 757 n.4 (1980) (footnote omitted), the Supreme Court stated:

> Due to sloth, inattention, or desire to seize tactical advantage, lawyers have long indulged in dilatory practices. A number of factors legitimately may lengthen a lawsuit, and the parties themselves may cause some of the delays. Nevertheless, many actions are extended unnecessarily by lawyers who exploit or abuse judicial procedures, especially the liberal rules for pretrial discovery.

Thus, where there is repeated defiance of court orders, dismissal of the entire cause of action may be an appropriate remedy. National Hockey League v. Metropolitan Hockey Club, 427 U.S. 639, 640 (1976) (per curiam) (refusal for 17 months to answer "crucial" interrogatories); Chira v. Lockheed Aircraft Corp., 634 F.2d 664, 666 (2d Cir. 1980) (doing "absolutely nothing at all" to comply with discovery orders or move the case to trial); Cine Forty-Second St. Theatre Corp. v. Allied Artists Pictures Corp., 602 F.2d 1062 (2d Cir. 1979) (refusal for three years, without moving for protective order, to comply with specific orders to answer interrogatories on damages). *See also* Litton Sys., Inc. v. American Tel. & Tel., 700 F.2d 785 (2d. Cir. 1983) (dismissal denied for engaging in a "pattern of intentional concealment of evidence;" however, denial of all costs and attorneys' fees (over $10 million) to which plaintiff would otherwise be entitled), *cert. denied,* 464 U.S. 1073 (1984).

In assessing fees and costs, the federal courts can also use the provisions of 28 U.S.C. § 1927 (1985), which provides that:

> [a]ny attorney or other person admitted to conduct cases in any court of the United States . . . who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

See also supra note 231 (frivolous pleadings). *See generally* Brazil, *The Adversary Character of Civil Discovery: A Critique and Proposal for Change,* 31 VAND. L. REV. 1295 (1978).

232. *See* RPC Rule 3.4(b); Model Rule 3.4 comment.

233. Model Rule 3.4 comment states that:

> [w]ith 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.

A lawyer may not refer to inadmissible evidence at trial, nor to any matter which she has no reasonable basis to believe will be relevant to the case or supported by admissible evidence.[234] For example, suppose attorney *X* represents *A* in a personal injury case in which *A* fell down some stairs that were under the control and ownership of *B*. In her opening statement, *X* states that she will introduce evidence that *B* knew the stairs were in dangerous condition, and that he fixed the stairs right after *A*'s accident. It is improper for *X* to refer to *B*'s repair of the stairs, because such evidence is inadmissible.[235] Similarly, unless *X* has other evidence to introduce showing that *B* knew of the dangerous condition, her entire reference in this context is also improper.

A lawyer may not state a personal opinion with respect to the justness of a cause, a witness' credibility, a civil litigant's culpability, or an accused's guilt or innocence.[236] An attorney may, however, make an argument upon a logical analysis of the evidence with respect to the foregoing matters. For example, in a final argument, a lawyer may not say to the jury, "After listening to the testimony, I don't believe the defendant and there is no reason why you should either." He may, however, examine the conflicts in the testimony and the fact that the defendant has a criminal record, and state that the evidence casts serious doubt on whether the defendant was telling the truth. Finally, it is improper for an attorney to pose questions to a witness which he has no reasonable basis to believe are relevant and which are intended to degrade a witness or other person.[237]

Rule 3.5 Impartiality and Decorum of the Tribunal

Due to a concern for the integrity of legal proceedings and the importance of the appearance of fairness to our legal system, the RPC forbid improper contact with jurors and the courts, whether before a judicial or administrative tribunal.[238] Thus, the lawyer connected with a trial may not

234. RPC Rule 3.4(e). *See, e.g.*, Hawk v. Superior Court, 42 Cal. App. 3d 108, 124, 116 Cal. Rptr. 713, 723 (1974), *cert. denied*, 421 U.S. 1012 (1975) (among other things, stating to the jury that his client "was stripped of his presumption of innocence by the press with the help of the Sheriff's Office").

235. *See* WASH. R. EVID. 407. In the example, since *B* has admitted ownership and control, admissibility could not be premised on the exception in WASH. R. EVID. 407.

236. RPC Rule 3.4(f). *See also* State v. Reed, 102 Wn. 2d 140, 684 P.2d 699 (1984); State v. Monk, 42 Wn. App. 320, 324–25, 711 P.2d 365, 367–68 (1985); State v. Martin, 41 Wn. App. 133, 139-40, 703 P.2d 309, 312–13 (1985).

237. *See generally* Rules 3.4(e) and 4.4. *See, e.g.*, Hawk v. Superior Court, 42 Cal. App. 3d 108, 116 Cal. Rptr. 713 (1974) (stating that a witness was a thief, doing a year in jail, without adequate basis for impeachment), *cert. denied*, 421 U.S. 1012 (1975).

238. *See* Model Rule 3.5 comment: "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

communicate with anyone known to be a member of the jury venire unless the communication is in the course of official proceedings.[239] Similarly, a lawyer may not conduct or cause another person to conduct a vexatious or harassing investigation of a venireman or an ultimate juror.[240] Except within the course of official proceedings, an attorney, whether or not connected with the case, shall not communicate directly or indirectly with a juror concerning the case.[241] A lawyer is, however, permitted to discuss a verdict with the jury after the trial, so that she may have the opportunity to determine if the verdict is subject to legal challenge. But the attorney, in conducting such discussions, is not permitted to ask questions calculated to harass or embarrass a juror or influence his actions in future jury service.[242] For example, if attorney *X*, in his discussions with juror *A*, discovers that juror *B* might have committed an impropriety that would be grounds for a new trial, *X* may question other members of the jury to determine the extent of *B*'s impropriety, but should avoid questioning *B* directly, as such questions may harass *B* or influence his actions in future jury service.

A lawyer may not communicate with a judge or official about the merits of a pending case except in the direct course of official proceedings, when permitted by law, or when she notifies the opposing party of her intention to make a presentation to the judge or official.[243] Nor may the lawyer engage in conduct intended to disrupt a tribunal.[244]

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which an advocate should be familiar. A lawyer is required to avoid contributing to a violation of such provisions." Washington adopted the Code of Judicial Conduct (CJC), effective January 1, 1974. CJC Canon 3(A)(4) provides that a judge, "except as authorized by law, [should] neither initiate nor consider ex parte or other communicatons concerning a pending or impending proceeding."

239. *See* RPC Rule 3.5(a).

240. *See* RPC Rule 4.4.

241. RPC Rule 3.5(b). *See, e.g.*, Florida Bar v. Peterson, 418 So. 2d 246 (Fla. 1982).

242. *See* RPC Rule 4.4.

243. *See* RPC Rule 3.5(b) and CJC Canon 3(A)(4) (although ex parte communications are proscribed, the judge "may obtain the advice of a disinterested expert on the law applicable to a proceeding before him, by amicus curiae only, if he affords the parties reasonable opportunity to respond"). *See also* People v. Hertz, 638 P.2d 794 (Colo. 1982); *In re* Moody, 428 N.E.2d 1257 (Ind. 1981); *In re* Bell, 294 Or. 202, 655 P.2d 569 (1982).

244. RPC Rule 3.5(c). Model Rule 3.5 comment provides:

> The advocate's function is to present evidence and argument so that the cause may be decided according to law. Refraining from abusive or obstreperous conduct is a corollary of the advocate's right to speak on behalf of litigants. A lawyer may stand firm against abuse by a judge but should avoid reciprocation; the judge's default is no justification for similar dereliction by an advocate. An advocate can present the cause, protect the record for subsequent review and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics.

See State v. Reed, 102 Wn. 2d 140, 684 P.2d 699 (1984). *See also* Hawk v. Superior Court, 42 Cal. App. 3d 108, 116 Cal. Rptr. 713, 724 (1974) (behavior referred to by the court as a "[d]isplay of offensive personality"), *cert. denied*, 421 U.S. 1012 (1975). *See generally* Aronson, *supra* note 36, at 292–93 (discussing United States v. Seale, 461 F.2d 345 (7th Cir. 1972); *In re* Dellinger, 461 F.2d 389 (7th Cir. 1972), and related authorities).

Rule 3.6 Trial Publicity

In order to maintain the dignity of the profession and insure against prejudicial publicity, the RPC provide restraints on public statements by lawyers on either side with regard to the matter at issue in a civil or criminal trial. RPC Rule 3.6 has been formulated with the intention of striking a balance between "protecting the right to a fair trial and safeguarding the right of free expression."[245] Thus, a lawyer in either a criminal or civil setting may not participate in any prohibited extrajudicial statement if a reasonable person would expect that such a statement would be disseminated by the public communications media and the lawyer "knows" or "reasonably should know"[246] that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding.[247]

A lawyer may not make any prejudical statements with respect to a civil matter triable to a jury, a criminal matter, or any other proceeding which could lead to incarceration.[248] Statements considered *prejudicial* include: references to a party's (or criminal suspect's) character, reputation, or prior criminal record;[249] the possibility of a guilty plea or the existence of a confession, admission, or statement by the accused, or his failure to give the same;[250] the performance or result of a test or examination;[251] the identity, testimony, or credibility of a prospective witness;[252] an opinion as to the guilt or innocence of the accused, the evidence, or the merits of the case against the accused;[253] or information which the lawyer "knows or reasonably should know"[254] would be inadmissible at trial and would create a substantial risk of prejudicing a fair trial.[255]

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245. Model Rule 3.6 comment. *See* Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976); Sheppard v. Maxwell, 384 U.S. 333 (1966).

246. This is an objective standard, denoting "that a lawyer of reasonable prudence and competence would ascertain the matter in question." RPC, Terminology section. *See* State v. Wixon, 30 Wn. App. 63, 631 P.2d 1033 (1981); Louisiana State Bar Ass'n v. Karst, 428 So. 2d 406, 409 (La. 1983) ("where it is shown that an attorney knew, or in good faith should have known, of the falsity of his accusations, that attorney's unsubstantiated, subjective belief in the truth of those accusations, however genuine, will not excuse his violation"); *In re* Hinds, 90 N.J. 604, 449 A.2d 483 (1982).

247. RPC Rule 3.6(a). *See* State v. Bonner, 21 Wn. App. 783, 587 P.2d 580 (1978).

248. RPC Rule 3.6(b). *See* Levine v. United States Dist. Ct., 764 F.2d 590 (9th Cir. 1985).

249. RPC Rule 3.6(b)(1). *See Levine*, 764 F.2d at 599.

250. RPC Rule 3.6(b)(2). *See Wixon*, 30 Wn. App. at 69, 631 P.2d at 1038 (1981).

251. RPC Rule 3.6(b)(3). The Rule also prohibits statements relating to "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." *See Levine*, 764 F.2d at 599.

252. RPC Rule 3.6(b)(1).

253. *See* RPC Rule 3.6(b)(3), (4). *See, e.g.*, State v. Bonner, 21 Wn. App. 783, 791, 587 P.2d 580, 585 (1978).

254. *See supra* note 56.

255. RPC Rule 3.6(b)(5). In addition, RPC Rule 3.6(b)(6) prohibits statements relating to "the fact

Statements that are *permissible* include: any information in the public record;[256] the fact that an investigation is in progress and the general scope of the investigation, including the description of the offense;[257] and the identity of the persons involved, such as the victim in a criminal case, but only to the extent permitted by law.[258] In addition, a lawyer may issue a request for assistance in obtaining evidence or apprehending a suspect,[259] or a warning if there is reason to believe that a person involved constitutes a danger to the public.[260] In a criminal case, a lawyer may announce basic facts such as the name, age, residence, occupation, and family status of the accused, the identity of the victim (if authorized by law), the nature of the charge, the scheduling of any step in the judicial proceedings, and that the accused denies the charges made against her.[261]

The RPC require that, in addition to avoiding improper public comments, the lawyer must exercise reasonable care to prevent employees and associates from making extrajudicial statements that the attorney is precluded from making.[262] For example, suppose that police officers commonly disclose to the press information falling under the above prohibitions. Unless the prosecutor takes reasonable measures to prevent such disclosures, he will violate RPC Rules 3.6 and 3.8.[263]

Rule 3.7 Lawyer as Witness

A lawyer ordinarily may not act as advocate at trial where the lawyer or a firm member is likely to be a necessary[264] witness.[265] In such a situation,

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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." *See also Levine,* 764 F.2d at 599.

256. RPC Rule 3.6(c)(2). *But see Wixon,* 30 Wn. App. at 69–70, 631 P.2d at 1038 (mere fact that defendant's statements are in public record does not take into account possible prejudicial effect of prosecutor's publication of statement).

257. In a civil case, an attorney may state "the general nature of the claim or defense." RPC Rule 3.6(c)(1).

258. RPC Rule 3.6(c)(3).

259. *See* RPC Rule 3.6(c)(5); 3.6(c)(7)(ii).

260. *See* RPC Rule 3.6(c)(6) (statement permissible if "there exists the likelihood of substantial harm to an individual or to the public interest").

261. *See* RPC Rule 3.6(c)(1), (3), (4) & (7)(i).

262. *See* RPC Rule 5.3; RPC Rule 3.8(e) (prosecutors); Model Rule 5.3 comment.

263. This result assumes that, in the terms of RPC Rule 5.3(b), the prosecutor has "direct supervisory authority over" the police officers. RPC Rule 3.8(e) would clearly apply, since police officers are "law enforcement personnel."

264. It has been held that the attorney's testimony must be genuinely *needed,* not just *helpful.* J.P. Foley & Co. v. Vanderbilt, 523 F.2d 1357, 1359 (2d Cir. 1975); Connell v. Clairol, Inc., 440 F. Supp. 17, 18 n.1 (N.D. Ga. 1977). And, in Borman v. Borman, 378 Mass. 775, 393 N.E.2d 847, 857 (1979), the court stated that (1) if it is counsel's and his client's best judgment that they can get by without testimony from counsel, then it is not up to the other party to urge upon them a different plan of presentation that

the attorney should refuse employment or, if he has already been retained, he should withdraw from the case.[266] Clearly, if there is a question as to whether he will be called as a witness, all doubts should be resolved in favor of withdrawing from the case. Exceptions to this rule include instances where "[t]he testimony relates to an issue that is either uncontested or a formality."[267] In a proceeding concerning an uncontested will, for example, an attorney may testify as to the testamentary capacity of the decedent. Another exception is where "[t]he testimony relates to the nature and value of legal services rendered in the case."[268] If a client's suit against another includes a legitimate cause of action for attorney's fees, the attorney may testify to the value of the services rendered to the client.

Another exception is permitted where the lawyer has been called *by the opposing party* and the court rules that the lawyer may continue to act as an advocate.[269] Generally, if opposing counsel legitimately calls the attorney to give testimony prejudicial to her client, it would be improper to remain as counsel in the case. The rule gives the trial court discretion to allow the attorney to continue.[270]

Finally, the lawyer may act as a witness where the trial judge finds that disqualification would work a substantial hardship on the client and the

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would necessitate disqualification, and (2) only when a present intention to forego the testimony of counsel appears obviously contrary to the client's interests should the judge reject counsel's best judgment in the matter and order disqualification. *But see* Supreme Beef Processors, Inc. v. American Consumer Indus., 441 F. Supp. 1064, 1068 (N.D. Tex. 1977).

265. RPC Rule 3.7. As stated in Model Rule 3.7 comment:

> Combining the roles of advocate and witness can prejudice the opposing party and can involve a conflict of interest between the lawyer and client.
>
> The opposing party has proper objection where the combination of roles may prejudice that party's rights in the litigation. A witness is required to testify on the basis of personal knowledge, while an advocate is expected to explain and comment on evidence given by others. It may not be clear whether a statement by an advocate-witness should be taken as proof or as an analysis of the proof.

266. *See* RPC Rule 1.15(a)(1).

267. RPC Rule 3.7(a).

268. RPC Rule 3.7(b). "[W]here 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." Model Rule 3.7 comment.

269. RPC Rule 3.7(c).

270. The cases indicate judicial reluctance to disqualify when a party indicates an intention to call the opposing party's lawyer as a witness. The possibilities for abuse are substantial. *See, e.g.*, Kroungold v. Triester, 521 F.2d 763, 766 (3d Cir. 1975) (citing a statement by the drafters of CPR DR 5-102(B) that the rule was not intended to permit a lawyer to call opposing counsel as a witness and thereby disqualify such counsel); Freeman v. Kulicke & Soffa Indus., 449 F. Supp. 974, 977–78 (E.D. Pa.), *aff'd without opinion*, 591 F.2d 1334 (3d Cir. 1978) (holding that, in order to be deemed "prejudicial," the projected testimony cannot be "de minimis," but must be so adverse to the factual assertions offered on behalf of the client that the bar or the client might have an interest in the independence of the witness or his partner in discrediting that testimony); Graphic Process Co. v. Superior Court, 95 Cal. App. 3d 43, 156 Cal. Rptr. 841 (1979) (overturning trial court's order granting disqualification as an abuse of discretion).

likelihood of the lawyer being a necessary witness was not reasonably foreseeable before trial.[271] Suppose that attorney *X* represents *B* in a highly complex case which is in the middle of trial. *X*'s testimony becomes highly relevant to the case at this point, but he cannot withdraw from the case because *B* would not be able to secure adequate replacement representation on such short notice. If a continuance is not possible, *X* should be permitted to testify and to continue to represent *B*.

Rule 3.8 Special Responsibilities of a Prosecutor

Public prosecutors and similarly situated government attorneys have a responsibility to the public as well as the legal profession in exercising their prosecutorial functions. Their obligation is to seek justice, not merely to obtain a conviction or a favorable judgment.[272] Several areas of the prosecutor's special responsibilities are addressed in RPC Rule 3.8.[273] The public

271. RPC Rule 3.7(d). *See* Model Rule 3.7 comment, stating that the Rule:

> recognizes that a balancing is required between the interests of the client and those of the opposing party. Whether the opposing party is likely to suffer prejudice depends on the nature of the case, the importance and probable tenor of the lawyer's testimony, and the probability that the lawyer's testimony will conflict with that of other witnesses. Even if there is risk of such prejudice, in determining whether the lawyer should be disqualified due regard must be given to the effect of disqualification on the lawyer's client. It is relevant that one or both parties could reasonably foresee that the lawyer would probably be a witness.

See Harris v. Superior Court, 97 Cal. App. 3d 488, 158 Cal. Rptr. 807 (1979). In *Harris,* plaintiffs had previously obtained a judgment against a negligent driver unable to respond fully in damages, and then claimed damages from their own medical insurers for bad faith breach of contract. Defendants' insurers moved to disqualify plaintiffs' attorney on the ground that he would be called to testify about the negotiations with defendants, matters critical to plaintiffs' bad faith claim, and also about emotional distress that he had witnessed, pertinent to the punitive damages claim. The court held that, despite this potential dual role as witness and adversary, the attorney's continued representation was required to avoid great hardship to plaintiffs and, therefore, the trial court's disqualification order was an abuse of discretion. *See also* Lyle v. Superior Court, 122 Cal. App. 3d 470, 175 Cal. Rptr. 918 (1981).

272. *See* Berger v. United States, 295 U.S. 78 (1935); ABA Comm. on Professional Ethics, Formal Op. No. 150 (1936).

> The public prosecutor cannot take as a guide for the conduct of his office the standards of an attorney appearing on behalf of an individual client. The freedom elsewhere wisely granted to partisan advocacy must be severely curtailed if the prosecutor's duties are to be properly discharged. The public prosecutor must recall that he occupies a dual role, being obligated, on the one hand, to furnish that adversary element essential to the informed decision of any controversy, but being possessed, on the other, of important governmental powers that are pledged to the accomplishment of one objective only, that of impartial justice. Where the prosecutor is recreant to the trust implicit in his office, he undermines confidence, not only in his profession, but in government and the very ideal of justice itself.

Professional Responsibility: Report of the Joint Conference, 44 A.B.A. J. 1159, 1218 (1958).

273. In addition to the ethical responsibilities specifically delineated in the Rule, the prosecutor is obligated to adhere to all other provisions of the RPC and to conform her conduct to the dictates of justice. For an extreme example of prosecutorial misconduct at trial, resulting in the dismissal of the entire prosecution, see United States v. Banks, 383 F. Supp. 389, *appeal dismissed,* 513 F.2d 1329 (8th Cir. 1975). *See also* State v. Tourtellotte, 88 Wn. 2d 579, 564 P.2d 799 (1977) (prosecutor attempted to

prosecutor must refrain from bringing charges which she knows are not supported by probable cause,[274] and must make reasonable efforts to ensure that the right of the accused to have and obtain counsel has been afforded.[275] This duty also includes ensuring that the accused does not waive important pretrial rights because of a lack of understanding due to the fact that he is not represented.[276] Once charges are brought, the prosecutor must make timely disclosure to the defense of all evidence of an exculpatory nature or evidence that would tend to reduce the punishment (for example, at sentencing).[277]

Rule 3.9 Advocate in Nonadjudicative Proceedings

A lawyer who is representing a client before a legislative or administrative tribunal in a nonadjudicative proceeding must disclose the fact that he is appearing in a representative capacity and fulfill his duties of fairness and candor and should not engage in ex parte contacts.[278]

TITLE IV. TRANSACTIONS WITH PERSONS OTHER THAN CLIENTS

Rule 4.1 Truthfulness in Statements to Others

A lawyer generally does not have a duty to inform opposing parties of relevant facts that are unknown to them.[279] However, a lawyer may not

withdraw from plea agreement); State v. Case, 49 Wn. 2d 66, 298 P.2d 500 (1956) (misconduct during closing argument); State v. Socolofsky, 283 Kan. 1020, 666 P.2d 725 (1983) (following defendant's acquittal, prosecutor sent, anonymously, copy of newspaper article reporting that defendant had pleaded guilty to another charge of selling LSD, to each of the jurors).

274. RPC Rule 3.8(a). *See generally* ABA STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE, THE PROSECUTION FUNCTION, Standard 3-3.4 (1974).

275. *See* RPC Rule 3.8(b).

276. *See* RPC Rule 3.8(c). The Rule does not "forbid the lawful questioning of a suspect who has knowingly waived the rights to counsel and silence." Model Rule 3.8 comment.

277. *See* RPC Rule 3.8(d). In addition to the ethical requirements, the Supreme Court has held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." Brady v. Maryland, 373 U.S. 83, 87 (1963). *See* United States v. Agurs, 427 U.S. 97, 110–11 (1976) ("there are situations in which evidence is obviously of such substantial value to the defense that elementary fairness requires it to be disclosed even without a specific request"). Under FED. R. CRIM. P. 16(c), both prosecutors and defense counsel are under a continuing duty to disclose:

> If, prior to or during trial, a party discovers additional evidence or material previously requested or ordered, which is subject to discovery or inspection under this rule, he shall promptly notify the other party or his attorney or the court of the existence of the additional evidence or material.

See also United States v. Bailleaux, 685 F.2d 1105 (9th Cir. 1982).

278. RPC Rule 3.9 (citing RPC Rules 3.3(a)–(e), 3.4(a)–(c), & 3.5).

279. Model Rule 4.1 comment. However, "[a] misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false. Misrepresentations

knowingly "[m]ake a false statement of material fact[280] or law to a third person,"[281] or 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 under RPC Rule 1.6).[282]

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can also occur by failure to act." *Id.* With respect to ethical issues in negotiation by lawers, see White, *Machiavelli and the Bar: Ethical Limitations on Lying in Negotiation,* 1980 AM. BAR FOUND. RESEARCH J. 926; Rubin, *A Causerie on Lawyers' Ethics in Negotiation,* 35 LA. L. REV. 577 (1975). Important recent works on negotiation goals, styles, and techniques include: R. FISHER & W. URY, GETTING TO YES (1981); G. WILLIAMS, LEGAL NEGOTIATION AND SETTLEMENT (1983); Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving,* 31 UCLA L. REV. 754 (1984).

280. Model Rule 4.1 comment states:

> Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are in this category, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud.

281. RPC Rule 4.1(a). Neither may the lawyer provide false statements for the client's use in a transaction with a third person. *See, e.g.,* SEC v. Frank, 388 F.2d 486 (2d Cir. 1968); United States v. Benjamin, 328 F.2d 854 (2d Cir.), *cert. denied,* 377 U.S. 953 (1964). Although knowledge of falsity is a prerequisite for imposing penalties generally, *see* Aaron v. SEC, 446 U.S. 680 (1980), such knowledge may be shown by proof that the lawyer "deliberately closed his eyes to facts he had a duty to see, . . . or recklessly stated as facts things of which he was ignorant." *Benjamin,* 328 F.2d at 862 (footnotes omitted).

282. RPC Rule 4.1(b). As stated in Model Rule 4.1 comment, this section "recognizes that subtantive law may require a lawyer to disclose certain information to avoid being deemed to have assisted the client's crime or fraud." *See, e.g.,* Felts v. National Account Sys. Ass'n, 469 F. Supp. 54 (N.D. Miss. 1978); Gross, *Attorneys and Their Corporate Clients: SEC Rule 2(e) and the Georgetown Whistle-Blowing Proposal,* 3 CORP. L. REV. 197, 208–13 (1980). In *In re* Carter and Johnson, FED. SEC. LAW REP.(CCH) § 82,847 (S.E.C., Feb. 28, 1981), the Commission stated with respect to SEC Rule 2(e)(1)(ii) (1970) (permitting Commission to deny privilege of practicing before it to any attorney found "to have engaged in unethical or improper professional conduct"):

> When a lawyer with significant responsibilities in the effectuation of a company's compliance with the disclosure requirements of the federal securities laws becomes aware that his client is engaged in a substantial and continuing failure to satisfy those disclosure requirements, his continued participation violates professional standards unless he takes prompt steps to end the client's noncompliance.

Id. at p. 84,172. However, the attorney should take action internal to the company or resign, rather than disclose the client's violations or intended violations to third persons. *Id.* at p. 84,173 n.78. *See also* SEC v. National Student Mktg. Corp., 457 F. Supp. 682 (D.D.C. 1978) (withdrawal may serve to prevent consummation of an illegal or fraudulent transaction by terminating the lawyer's participation and assistance).

In addition, it is improper to provide a legal opinion on a transaction that discloses only favorable facts when the lawyer knowingly omits material facts likely to affect another's decision in the matter. *See, e.g.,* Roberts v. Ball, Hunt, Hart, Brown & Baerwitz, 57 Cal. App. 3d 104, 128 Cal. Rptr. 901 (1976); *In re* Malloy, 248 N.W.2d 43 (N.D. 1976).

Finally, an attorney may have a duty to disclose information necessary to protect unknowing potential victims from death or serious bodily injury at the hands of his client. Hawkins v. King County, 24 Wn. App. 338, 602 P.2d 361 (1979). *See supra* notes 101–02 and accompanying text.

Rule 4.2 Communication with Person Represented by Counsel

When dealing with a person who is represented by counsel, a lawyer may not communicate directly with the person about the subject matter of the representation unless she has opposing counsel's permission or is permitted to do so by law.[283] The purpose of this rule is to ensure that every party is fairly represented and that no undue influence is exerted by counsel.[284] In *Wright v. Group Health Hospital,*[285] in connection with events leading to a medical malpractice action, a defendant hospital corporation prohibited its current employees from conducting ex parte interviews with plaintiffs' attorneys. The court held the prohibition was impermissible. Where the adverse party is a corporation or other organizational entity, an attorney should not undertake, without consent of counsel, communication with *high level managerial employees and agents who speak for the organization;* but other employees who may have been witnesses to relevant occurrences and transactions may usually be interviewed without prior permission of counsel for the organization. "[T]he best interpretation of 'party' in litigation involving corporations is only those employees who have the legal authority to 'bind' the corporation in a legal evidentiary sense, *i.e.*, those employees who have 'speaking authority' for the corporation."[286]

Rule 4.3 Dealing with Unrepresented Person

Whenever a lawyer knows or reasonably should know that an unrepresented third person believes the lawyer to be disinterested, the lawyer

283. RPC Rule 4.2. *See also* Crane v. State Bar, 30 Cal. 3d 117, 177 Cal. Rptr. 670, 635 P.2d 163 (1981). Model Rule 4.2 comment adds:

> This Rule does not prohibit communication with a party, or an employee or agent of a party, concerning matters outside the representation. For example, the existence of a controversy between a government agency and a private party, or between two organizations, does not prohibit a lawyer for either from communicating with nonlawyer representatives of the other regarding a separate matter. Also, parties to a matter may communicate directly with each other and a lawyer having independent justification for communicating with the other party is permitted to do so. Communications authorized by law include, for example, the right of a party to a controversy with a government agency to speak with government officials about the matter.

Prosecutors are bound by the Rule and generally may not interview a represented defendant, either at the defendant's own request, *see, e.g.*, People v. Green, 274 N.W.2d 448 (Mich. 1979), or in connection with the investigation of another crime, *e.g.*, State v. Yatman, 320 So. 2d 401 (Fla. Dist. Ct. App. 1975), without first notifying defense counsel, thereby providing an opportunity for consultation.

284. *See* Wright v. Group Health Hosp., 103 Wn. 2d 192, 691 P.2d 564 (1984).

285. *Id.*

286. *Id.* at 200, 691 P.2d at 569.

should make reasonable efforts to explain his role as counsel to his client, and that he has a duty to promote the best interests of his client.[287]

Rule 4.4 Respect for Rights of Third Person.

In maintaining respect for the rights of third persons, a lawyer may not use means that have no substantial purpose other than to embarrass, delay, burden, or injure a third person, or obtain evidence by means that are violative of such person's legal rights.[288]

TITLE V. LAW FIRMS AND ASSOCIATIONS

Rule 5.1 Responsibilities of a Partner or Supervisory Lawyer

Any lawyer who has supervisory authority over other attorneys, for example, a partner in a law firm or a supervising attorney in a government agency, must reasonably ensure that the lawyers under her authority conform to the RPC.[289] A lawyer is responsible for another lawyer's violation of the RPC if: "[t]he lawyer *orders* or, with knowledge of the specific conduct, *ratifies* the specific conduct involved;"[290] or "[t]he lawyer is a partner in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action."[291]

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287. *See* RPC Rule 4.3; Model Rule 4.3 comment:

> An unrepresented person, particularly one not experienced in dealing with legal matters, might assume that a lawyer is disinterested in loyalties or is a disinterested authority on the law even when the lawyer represents a client. During the course of a lawyer's representation of a client, the lawyer should not give advice to an unrepresented person other than the advice to obtain counsel.

288. RPC Rule 4.4. *See, e.g.,* Smith v. Union Pac. R.R., 214 Kan. 128, 519 P.2d 1101 (1974) (harassing jurors); Olberg v. Minneapolis Gas Co., 291 Minn. 334, 191 N.W.2d 418 (1971) (harassing jurors).

289. *See* RPC Rule 5.1(a), (b). *See also, e.g., In re* Schroeter, 80 Wn. 2d 1, 489 P.2d 917 (1971); Vaughn v. State Bar, 6 Cal. 3d 847, 494 P.2d 1257, 100 Cal. Rptr. 713 (1972); Model Rule 5.1 comment provides:

> The measures required to fulfill the responsibility prescribed in paragraphs (a) and (b) can depend on the firm's structure and the nature of its practice. In a small firm, informal supervision and occasional admonition ordinarily might be sufficient. In a large firm, or in practice situations in which intensely difficult ethical problems frequently arise, more elaborate procedures may be necessary. Some firms, for example, have a procedure whereby junior lawyers can make confidential referral of ethical problems directly to a designated senior partner or special committee. See Rule 5.2. Firms, whether large or small, may also rely on continuing legal education in professional ethics. In any event, the ethical atmosphere of a firm can influence the conduct of all its members and a lawyer having authority over the work of another may not assume that the subordinate lawyer will inevitably conform to the Rules.

290. RPC Rule 5.1(c)(1) (emphasis added). *See also* RPC Rule 8.4(a).

291. RPC Rule 5.1(c)(2). As stated in Model Rule 5.1 comment:

Whether a lawyer has such supervisory authority in particular circumstances is a question of fact.

Rule 5.2 Responsibilities of a Subordinate Lawyer

A lawyer must always abide by the RPC. He cannot justify a violation of the Rules by saying: "I was only following orders."[292] However, where an attorney has been asked to handle a particular matter by a supervisor, whose resolution of an "arguable question of professional duty" is reasonable, the attorney may follow the supervisor's instructions without fear of ethical violation, even if the supervisor's resolution is subsequently determined to be improper under the RPC.[293]

Rule 5.3 Responsibilities Regarding Nonlawyer Assistants

Any lawyer who has supervisory authority over nonlawyer assistants must reasonably act to ensure that their conduct is compatible with the professional obligations of the lawyer.[294] A lawyer is responsible for the

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Partners of a private firm have at least indirect responsibility for all work being done by the firm, while a partner in charge of a particular matter ordinarily has direct authority over other firm lawyers engaged in the matter. Appropriate remedial action by a partner would depend on the immediacy of the partner's involvement and the seriousness of the misconduct. The supervisor is required to intervene to prevent avoidable consequences of misconduct if the supervisor knows that the misconduct occurred. Thus, if a supervising lawyer knows that a subordinate misrepresented a matter to an opposing party in negotiation, the supervisor as well as the subordinate has a duty to correct the resulting misapprehension.

It should be noted that if the firm did not have in effect "measures giving reasonable assurance that all lawyers in the firm conform to" the RPC, the supervisory lawyer would be in violation of RPC Rule 5.1(b), even though there was no direction, ratification or knowledge of the violation. Model Rule 5.1 comment. "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." *Id. See also In re* Gladstone, 16 A.D.2d 512, 229 N.Y.S.2d 663 (1962) (attorney continued in practice as a partner when he should have known of the fraudulent practices of the firm); *In re* Brown, 389 Ill. 516, 59 N.E.2d 855 (1945) (lawyer at least suspected that partner's activities were not confined to lawful practice).

292. *See* RPC Rule 5.2(a). The lawyer's subordinate role may be relevant in determining whether he had the knowledge required to render conduct a violation under the RPC. Model Rule 5.2 comment. "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." *Id.* For an in-depth analysis of the subordinate lawyer's ethical responsibilities and the justifications for disobeying the supervisor, see Levinson, *To a Young Lawyer: Thoughts on Disobedience*, 50 Mo. L. Rev. 483 (1985).

293. *See* RPC Rule 5.2(b). "For example, if a question arises whether the interests of two clients conflict under Rule 1.7, the supervisor's reasonable resolution of the question should protect the subordinate professionally if the resolution is subsequently challenged." Model Rule 5.2 comment.

294. RPC Rule 5.3(a), (b). All lawyers with *direct* supervisory authority over the nonlawyer must make reasonable efforts to ensure compliance with the RPC, RPC Rule 5.3(b), whereas firm partners must also "make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct" complies with the RPC. RPC Rule 5.3(a).

Lawyers generally employ assistants in their practice, including secretaries, investigators, law student interns, and paraprofessionals. Such assistants, whether employees or independent contractors, act for the lawyer in rendition of the lawyer's professional services. A lawyer should give such assistants appropriate instruction and supervision concerning the ethical aspects of their

actions of nonlegal personnel if: the conduct of such persons would be in violation of the RPC if engaged in by the lawyer and "[t]he lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved;"[295] or the lawyer is a partner in the law firm in which the individuals are employed, or has direct supervisory authority over them, and knows of the conduct at a time when its consequences can be avoided or mitigated, but fails to take reasonable remedial action.[296]

Rule 5.4 Professional Independence of a Lawyer.

As a general rule, a lawyer or law firm may not share legal fees with a nonlawyer.[297] This includes payment in any form, gifts or loans, in return for the referral of a case or client.[298] There are three exceptions. First, a firm may pay death benefits, for a reasonable period of time, to a lawyer's estate

employment, particularly regarding the obligation not to disclose information relating to representation of the client, and should be responsible for their work product.

Model Rule 5.3 comment. Under ADMISSION TO PRACTICE RULES (APR), Rule 9, "[q]ualified law students, enrolled law clerks, and graduates of approved law schools may be admitted to the status of legal intern and be granted a limited license to engage in the practice of law" if, among other requirements, they obtain a "supervising lawyer" to assume the responsibilities required under APR 9(d):

> (1) The supervising lawyer or another lawyer from the same office shall direct, supervise and review all of the work of the legal intern and both shall assume personal professional responsibility for any work undertaken by the legal intern while under the lawyer's supervision. . . .
>
> (5) The failure of a supervising lawyer, or lawyer acting as a supervising lawyer, to provide adequate supervision or to comply with the duties set forth in this rule shall be grounds for disciplinary action pursuant to the Rules for Lawyer Discipline.
>
> (6) For purposes of the attorney-client privilege, an intern shall be considered a subordinate of the lawyer providing supervision for the intern.

In City of Seattle v. Ratliff, 100 Wn. 2d 212, 667 P.2d 630 (1983), the Washington Supreme Court held that "representation by a law student pursuant to rule 9 does not deny a defendant his or her right to counsel as long as the student strictly complies with rule 9 requirements." *Id.* at 213, 667 P.2d at 631. After noting that the supervising attorney must assume professional responsibility for the legal intern's work, the court stated that "representation by a rule 9 intern under the active supervision of a licensed attorney will most likely result in a higher caliber representation than than provided by a novice attorney sitting alone. There is no constitutional infirmity in such representation." *Id.* at 218, 667 P.2d at 633. *See also* People v. Perez, 24 Cal. 3d 133, 594 P.2d 1, 155 Cal. Rptr. 176 (1979).

295. RPC Rule 5.3(c)(1).

296. RPC Rule 5.3(c)(2).

297. RPC Rule 5.4(a).

298. RPC Rule 5.4 poses significant difficulties for attorneys interested in becoming part of prepaid legal sevices plans operated by insurance companies. *See* Schwartz & Archer, *Prepaid Grows Up*, LEGAL ECONOMICS 32, 38 (July/August 1983). In the Proposed Final Draft of the Model RPC (May 30, 1981), Rule 5.4 permitted a lawyer to "be employed by an organization in which a financial interest is held or managerial authority is exercised by a nonlawyer, . . . such as [an] insurance company," so long as the professional independence of the lawyer was safeguarded. However, this proposal was defeated by the House of Delegates in favor of the adopted version of Rule 5.4, despite warnings that it would negatively impact on prepaid legal services programs. *Midyear Meeting of ABA*, 51 U.S.L.W. 2488, 2493 (Feb. 22, 1983).

or beneficiary.[299] Second, a lawyer who completes unfinished legal business of a deceased lawyer may pay the deceased's estate compensation for the reasonable value of the services rendered by the deceased lawyer.[300] Finally, a lawyer or a firm may include nonlawyer employees in a profit-sharing compensation or retirement plan.[301]

A lawyer may not enter into a partnership with a nonlawyer if any of the partnership activities constitute the practice of law.[302] Further, a lawyer who is recommended or employed or whose fee is paid by a third party may not allow the third party to direct or regulate the lawyer's professional judgment concerning the representation of the client.[303]

A lawyer may not participate in a professional corporation or association authorized to practice law for profit if: (1)"[a] nonlawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration;"[304] (2)"[a] nonlawyer is a corporate director or officer (other than as secretary or treasurer);"[305] or (3) "[a] nonlawyer has the right to direct or control the professional judgment of a lawyer."[306]

Rule 5.5 Unauthorized Practice of Law

A lawyer is subject to the licensing regulations of any jurisdiction in which he intends to practice.[307] In most jurisdictions, the lawyer must either be admitted to practice[308] or permitted to appear *pro hac vice*. Although the procedures for *pro hac vice* appearances differ among jurisdictions, all require that the attorney at least be admitted in *some* state.[309] Because an out-of-state attorney's interest in appearing *pro hac vice* is not among those interests protected by the due process clause of the fourteenth

299. *See* RPC 5.4(a)(1).
300. RPC 5.4(a)(2).
301. RPC Rule 5.4(a)(3).
302. RPC Rule 5.4(b).
303. RPC Rule 5.4(c).
304. RPC Rule 5.4(d)(1).
305. RPC Rule 5.4(d)(2).
306. RPC Rule 5.4(d)(3).
307. *See* RPC Rule 5.5(a).
308. *See* RPC Rule 8.1 for requirements for admission.
309. *See, e.g.*, APR 8(b):

A member in good standing of the Bar of any other state or territory of the United States or of the District of Columbia, who is a resident of and maintains a practice in such other state, territory, or District, may appear as a lawyer in the trial of any action or proceeding only (i) with the permission of the court or tribunal in which the action or proceeding is pending, and (ii) in association with an active member of the Bar Association, who shall be the lawyer of record therein, responsible for the conduct thereof, and present at all proceedings.

amendment, his application for permission to so appear may be denied without a hearing or other procedural due process.[310]

In addition to regulating the admission of lawyers, every jurisdiction has sought to prevent the unauthorized practice of law.[311] Criminal (usually misdemeanor) sanctions may be imposed on the nonlawyers, and lawyers may not *assist* a person who is not a member of the Bar with respect to conduct constituting the unauthorized practice of law.[312] This prohibition is predicated upon the public's need for integrity and competence of those persons purporting to render "legal" services. However, it is not unauthorized practice for a layperson to represent himself.[313] The simple sharing of office space by a lawyer and nonlawyer is permissible only if the offices are physically separate in fact and appear so in the public eye.[314] Further, precautions must be taken so that the nonlawyer's clients are not influenced to consult with the attorney sharing the offices when they are in need of legal advice.

The RPC do not attempt to set forth a single definition of those activities which constitute the unauthorized practice of law.[315] However, the former

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310. Leis v. Flynt, 439 U.S. 438 (1979).

311. *See generally* Rhode, *Policing the Professional Monopoly; A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*, 34 STAN. L. REV. 1 (1981); Weckstein, *Limitations on the Right to Counsel: The Unauthorized Practice of Law*, 1978 UTAH L. REV. 649.

312. RPC Rule 5.5(b). According to Model Rule 5.5 comment:

> Paragraph (b) does not prohibit a lawyer from employing the services of paraprofessionals and delegating functions to them, so long as the lawyer supervises the delegated work and retains responsibility for their work. See Rule 5.3. Likewise, it does not prohibit lawyers from providing professional advice and instruction to nonlawyers whose employment requires knowledge of law; for example, claims adjusters, employees of financial or commercial institutions, social workers, accountants and persons employed in government agencies. In addition, a lawyer may counsel nonlawyers who wish to proceed pro se.

313. Thus, Washington has recognized an exception to any prohibition against the unauthorized practice of law:

> when a party to a legal document selects, prepares or drafts the document or represents himself in court proceedings. Both of these exceptions are based upon a
>
> > belief that a layperson may desire to act *on his own behalf* with respect to *his* legal rights and obligations without the benefit of counsel.
> >
> > The "pro se" exceptions are quite limited and apply only if the layperson is acting solely *on his own behalf.*

Hagen & Van Camp v. Kassler Escrow, Inc., 96 Wn. 2d 443, 450, 635 P.2d 730, 734 (1981) (quoting Washington State Bar Ass'n v. Great W. Union Fed. Sav. & Loan Ass'n, 91 Wn. 2d 48, 57, 586 P.2d 870, 876 (1978)). A developing area of unauthorized practice and the "pro se" exception consists of selling "kits" to consumers whereby the consumer can then appear pro se. The most prevalent is a "divorce kit" which can be purchased containing sample papers which the consumer can fill out and file with the court in a pro se appearance for dissolution of marriage. *Compare* Florida Bar v. Peake, 364 So. 2d 431 (Fla. 1978) (unauthorized practice), *with In re* Thompson, 574 S.W.2d 365 (Mo. 1978) (not unauthorized practice). *See generally* Special Project, *The Unauthorized Practice of Law and Pro Se Divorce: An Empirical Analysis*, 86 YALE L.J. 104 (1976).

314. *See, e.g.*, Wash. State Bar Ass'n Legal Ethics Comm. Ops. 30, 31 (June 1954).

315. *See* Model Rule 5.5 comment: "The definition of the practice of law is established by law and

CPR and cases interpreting it employed a functional definition, referring to the practice of law as it "relates to the rendition of services for others that call for the *professional judgment* of a lawyer."[316] Where the professional *judgment* of a lawyer is not involved, nonlawyers, such as court clerks, abstracters, and many government officials, are authorized to engage in occupations requiring a special *knowledge* of law in certain areas.[317] Some examples of the distinctions and applications of the doctrine follow.

First, in theory, lay tax advisers may not counsel individuals as to the legal implications of their conduct but may, if qualified (for example, accountants), prepare tax returns for clients. If a client goes to see his tax accountant to consult with her concerning tax shelters for his large income, the accountant may not give advice to the client concerning tax shelters because such advice requires the professional judgment of a lawyer as to the legality of specific action under the tax laws.

Estate planners may not draft wills or prepare plans for specific individuals, but may disseminate general information to the public through commercial or noncommercial means. One estate planner published a book entitled *How to Avoid Probate!*, which was, in effect, a "do-it-yourself" probate kit. He was subsequently charged with practicing law without a license. The court held that he was not engaging in the unauthorized practice of law.[318] In effect, he was instead merely disseminating information to the public to enable individuals to represent themselves.

Many unauthorized practice cases, particularly in Washington, have involved the drafting or filling in the blanks of standardized real estate documents. Thus, it has been held that the practice of law includes "selection and completion of form legal documents, or the drafting of such documents, including deeds, mortgages, deeds of trust, promissory notes, and agreements modifying these documents."[319] However, the Washington Supreme Court recently created a narrow exception to its uniform disapproval of all such activity by real estate agents and brokers. In *Cultum v.*

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."

316. CPR EC 3-5.

317. In State *ex rel.* Pearson v. Gould, 437 N.E.2d 41, 42 (Ind. 1982), although the court held that "[a] person who gives legal advice to clients and transacts business for them in matters connected with the law is engaged in the practice of law," the court permitted nonlawyers to represent employees in hearings before a state employment board. *See also* State Bar v. Galloway, 124 Mich. App. 271, 335 N.W.2d 475 (1983) *aff'd*, 422 Mich. 188, 369 N.W.2d 839 (1985) (nonattorney may represent employer in proceedings before Michigan Employment Security Commission).

318. New York County Lawyers' Ass'n v. Dacey, 287 N.Y.S.2d 422 (1967).

319. Bowers v. Transamerica Title Ins. Co., 100 Wn. 2d 581, 586, 675 P.2d 193, 197 (1983) (quoting Washington State Bar Ass'n v. Great W. Union Fed. Sav. & Loan Ass'n, 91 Wn. 2d 48, 55, 586 P.2d 870 (1978)).

Heritage House Realtors,[320] the court reviewed a judgment against a realtor for damages stemming from an allegedly ambiguous earnest money form prepared by the real estate agent. Although holding that completion of standardized real estate forms probably constitutes the practice of law, the court decided that, under certain narrow conditions, it should no longer be considered "unauthorized:"

> Our decision provides that a real estate broker or salesperson is permitted to complete simple printed standardized real estate forms, which forms must be approved by a lawyer, it being understood that these forms shall not be used for other than simple real estate transactions which arise in the usual course of the broker's business and that such forms will be used only in connection with real estate transactions actually handled by such broker or salesperson as a broker or salesperson and then without charge for the simple service of completing the forms.[321]

The court noted, however, that such brokers or salespersons will be *held to the same standard as attorneys for purposes of malpractice liability.*[322]

Corporations, other than nonprofit legal service groups or recognized professional corporations, generally may not represent a client directly in judicial proceedings or provide representation through their attorney-employees. In addition, corporations, unlike individuals, may not represent themselves.[323]

Full-time judges and court officers (including clerks) may not practice law.[324] Under Admission to Practice Rules (APR) Rule 9, "[q]ualified law students, enrolled law clerks, and graduates of approved law schools may be admitted to the status of legal intern and be granted a limited license to engage in the practice of law only as provided in this rule." Although the legal intern may not be paid by a client for his services, he may be paid for services by his employer-supervisor. The legal intern may advise or negotiate on behalf of a person referred by the supervising lawyer, and may prepare necessary pleadings, motions, briefs, or other documents, without

320. 103 Wn. 2d 623, 694 P.2d 630 (1985).

321. *Id.* at 630, 694 P.2d at 635.

322. *Id.* at 628, 694 P.2d at 633. *See also* Torres v. Fiol, 110 Ill. App. 3d 9, 10, 441 N.E.2d 1300, 1301 (1982).

323. *See, e.g.*, Turner v. American Bar Ass'n, 407 F. Supp. 451, 476 (N.D. Tex. 1975) (sitting by designation):

> Corporations and partnerships, both of which are fictional legal persons, obviously cannot appear for themselves personally. With regard to these two types of business associations, the long standing and consistent court interpretation[s] . . . [are] that they must be represented by licensed counsel. . . . Corporations and partnerships, by their very nature, are unable to represent themselves and the consistent interpretation . . . is that the only proper representative of a corporation or a partnership is a licensed attorney, not an unlicensed layman regardless of how close his association with the partnership or corporation.

324. *See, e.g.*, CJC Canon 5(F).

the presence of the supervising lawyer. However, the lawyer must be present if the intern is to participate in superior court or court of appeals proceedings (including depositions).[325]

An attorney must use great care if she attempts to practice another profession simultaneously with the practice of law. She cannot hold herself out as a specialist in the nonlegal area in any advertisement, office sign, or other public communication which relates to her practice of law.[326] However, *academic degrees,* as opposed to *professional licenses,* may be included in advertisements or the lawyer's letterhead.[327]

Rule 5.6 Restrictions on Right to Practice

Noncompetition partnership, employment, or settlement agreements, restricting the right of a lawyer to practice after termination of the relationship, except agreements concerning benefits upon retirement, are prohibited.[328]

TITLE VI. PUBLIC SERVICE

Rule 6.1 Pro Bono Publico Service

While the rules do not *require* a lawyer to provide public interest legal services, she *should* render these services for the benefit of the community whenever possible to ensure that legal representation is not denied to persons of limited means.[329]

325. ADMISSION TO PRACTICE RULES Rule 9.

326. *See* Survey Comment, *Lawyer Advertising, supra* note 3.

327. *See* CPR DR 2-102(E), (F). The continuing validity of this DR is questionable in light of *In re* R.M.J., 455 U.S. 191 (1982). *See generally infra* notes 350–53 and accompanying text.

328. RPC Rule 5.6(a)–(b). Model Rule 5.6 comment states:

> An agreement restricting the right of partners or associates to practice after leaving a firm not only limits their professional autonomy but also limits the freedom of clients to choose a lawyer. Paragraph (a) prohibits such agreements except for restrictions incident to provisions concerning retirement benefits for service with the firm.
>
> Paragraph (b) prohibits a lawyer from agreeing not to represent other persons in connection with settling a claim on behalf of a client.

329. RPC Rule 6.1. The Rule also provides: "A lawyer may discharge this responsibility by providing professional services at no fee or a reduced fee to persons of limited means or to public service or charitable groups or organizations, by service in activities for improving the law, the legal system or the legal profession, and by financial support for organizations that provide legal services to persons of limited means." Model Rule 6.1 comment states:

> 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. An ABA Committee has defined public interest law as legal services offered at a substantially reduced or no fee in the areas of poverty law, civil rights law,

Rule 6.2 Accepting Appointments

While all lawyers have the qualified freedom to choose whom they wish to represent, a lawyer may not seek to avoid appointments by a tribunal to

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representation of charitable organizations and efforts toward improving the justice system. *See* ABA Special Committee on Public Interest Practice, Recommendations (Aug. 1975), *reprinted in Awarding Attorneys' Fees: Hearings Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary,* 94th Cong., 1st Sess. 67 (1975) (statement of Charles A. Hobbs). When representing the "public interest," it is sometimes difficult for an attorney to separate his own notions of means and priorities from those of his client.

> In public interest practice, an attorney is likely to have as his client an individual or group representing a public interest extending well beyond the client's own immediate sphere of concern. If, having undertaken a given case, a public interest lawyer discovers that his client wants it handled in a fashion the attorney believes antithetical to the broad public interest involved, serious conflict may arise. For example, the lawyer may wish to press a case to a conclusion in order to establish an important precedent; the client may decide that what he wants is a quick out-of-court settlement. In most such cases the lawyer's duty to his client will clearly be paramount; in some instances, however—as where the client's wishes are capricious—the solution to such a conflict may lie in the lawyer's excusing himself from further service of his client in the case. But this course has obvious disadvantages, not merely for the lawyer himself but also for his client, who presumably retained him in the reasonable expectation that his service would be rendered throughout the duration of the suit. In the final analysis, perhaps the only way of coping with the problem is for the lawyer to be as candid as possible with his client from the outset of the case about his view of the meaning of the case and the strategies which should be employed.

Halpern & Cunningham, *Reflections on the New Public Interest Law: Theory and Practice at the Center for Law and Social Policy,* 59 GEO. L.J. 1095, 1109–10 (1971).

In addition, ethical problems of conflict of interest, lawyer as witness, solicitation, and advancement of costs and expenses, are of particular concern to public interest lawyers involved in class action litigation. *See* Underwood, *Legal Ethics and Class Actions: Problems, Tactics and Judicial Responses,* 71 KY. L.J. 787 (1982–83). One particular problem arises when the lawyer himself both seeks to be the lawyer for the class and the class representative. It must be recognized that the attorney in major class actions is likely to receive more, by way of legal fees, than any of the class action members will receive as their pro rata share of any recovery. In Marek v. Chesny, 105 S. Ct. 3012 (1985), the Supreme Court held that settlement offers that lump together in a single figure damages and costs (including attorneys' fees in actions brought under statutes that define "costs" to include attorneys' fees) are valid under FED. R. CIV. P. 68. Consequently, because of the temptation placed on the attorney to settle the matter on terms less favorable to the class in an effort to obtain a large legal fee, the vast majority of courts forbid a lawyer for the class from being the class representative. Underwood, *supra,* at 791–94 (and cases cited therein). *See, e.g., In re* Cadillac V8-6-4 Class Action, 93 N.J. 412, 439, 461 A.2d 736, 750 (1983). In Jeff D. v. Evans, 743 F.2d 648 (9th Cir. 1984), *cert. granted,* 105 S. Ct. 2319 (1985), the court held that Idaho officials would have to pay fees to a lawyer despite his agreement to forego a fee award. The agreement on fees was part of the settlement of a class action the lawyer brought to improve conditions for mentally retarded children in state institutions. The court held that the defense request that the lawyer waive fees put his interests in conflict with those of his client. The conflict was heightened in the case because the plaintiffs sought only injunctive relief, not money damages that could be shared with the lawyer.

> The crux of the problem is the possibility of diverging interests of the lawyer and the class. The attorney may be tempted with a generous fee offer as a *quid pro quo* for a less than optimal settlement. Alternatively, the defendant may condition settlement on the attorney's waiver of fees, creating a particularly severe conflict when important interests of class members are at stake.

Jeff D., 743 F.2d at 652. For a discussion of problems in obtaining compensation in public interest litigation, analysis of statutory and judicially-created awards, and a listing of federal fee statutes, see R. ARONSON, *supra* note 71, at 119–62.

represent any person *except for good cause*.[330] Examples of "good cause" for avoiding or refusing appointment include[331] situations where representing the client is likely to result in violation of the RPC;[332] where representing the client is likely to result in an unreasonable financial burden on the lawyer;[333] or where "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."[334]

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330. RPC Rule 6.2. As indicated by Model Rule 6.2 comment:

> A lawyer ordinarily is not obliged to accept a client whose character or cause the lawyer regards as repugnant. The lawyer's freedom to select clients is, however, qualified. All lawyers have a responsibility to assist in providing pro bono publico service. See Rule 6.1. An individual lawyer fulfills this responsibility by accepting a fair share of unpopular matters or indigent or unpopular clients. A lawyer may also be subject to appointment by a court to serve unpopular clients or persons unable to afford legal services.

An issue of recent concern involves the question of whether a court may compel an attorney to engage in pro bono representation for no fee. *See, e.g.*, Cunningham v. Superior Court, No. B004588, slip op. (Ventura Cty. Super. Ct., Feb. 6, 1986) (court order to perform pro bono representation without compensation denied attorney equal protection of the law); Scott v. Roper, 688 S.W.2d 757 (Mo. 1985):

> We deem it admirable for either individual attorneys or associations of attorneys to volunteer pro bono legal representation and strongly urge the continuation of such commendable practices. It is both permissible and proper for voluntary associations of attorneys to condition membership upon members doing a certain amount of pro bono representation and courts may appoint such attorneys in civil cases as well as any other attorneys who volunteer and agree to serve without compensation. The courts of this state have not inherent power to appoint or compel attorneys to serve in civil actions without compensation. Providing for such representation and the funding thereof is a matter for legislative action.

Id. at 769. Arguments that uncompensated compelled appointments are an involuntary servitude in violation of the thirteenth amendment have been uniformly rejected as without merit, however. *See, e.g.*, Bradshaw v. United States Dist. Ct., 742 F.2d 515, 517 n.2 (9th Cir. 1984); Family Div. Trial Lawyers v. Moultrie, 725 F.2d 695, 704–05 (D.C. Cir. 1984). *See generally* Fisch, *Coercive Appointments of Counsel in Civil Cases in Forma Pauperis: An Easy Case Makes Hard Law,* 50 Mo. L. Rev. 527 (1985); Shapiro, *The Enigma of the Lawyer's Duty to Serve,* 55 N.Y.U. L. Rev. 735 (1980).

331. Model Rule 6.2 comment states:

> 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.

For a case reversing an attorney's six-month suspension for refusing to retract his expression of "disgust" at the Eighth Circuit's allegedly excessive documentation requirement and inadequate compensation for representing indigent criminal defendants in federal court, see *In re* Snyder, 105 S. Ct. 2874 (1985).

332. RPC Rule 6.2(a).

333. RPC Rule 6.2(b).

334. RPC Rule 6.2(c).

Rule 6.3 Membership in Legal Services Organization

A lawyer may participate in a legal services organization despite its service to clients with interests adverse to a client of the lawyer or her firm, so long as the lawyer's obligations to the client under RPC Rule 1.7 (conflict of interest) would not be compromised,[335] and there is no likelihood of "a material adverse effect on the representation of a client of the organization whose interests are adverse to a client of the lawyer."[336]

Rule 6.4 Law Reform Activities Affecting Client Interests

A lawyer is not prohibited from participating in law reform activities that may affect a client's interests.[337] However, when the lawyer knows that the interests of a client will be materially benefited, she should disclose that fact to the organization or agency seeking the reform, but need not disclose the identity of the client.[338]

TITLE VII. INFORMATION ABOUT LEGAL SERVICES

A number of recent decisions have caused the ABA and Washington State Bar Association to reformulate their restrictions regarding attorneys' advertising. In *Goldfarb v. Virginia State Bar,*[339] the Court banned minimum fee schedules and declared lawyers acting in their commercial capacities to be subject to antitrust regulation; and, in *Bigelow v. Virginia,*[340] the Court found certain commercial advertising prohibited by statute to be within the protection of the first amendment.

In *Bates v. State Bar of Arizona,*[341] the Court balanced attorney advertising and "the dangers of suppressing information" against "the dangers arising from its free flow," and resolved the issue in favor of permitting attorney advertising. The limits of *Bates* and the extent of permissible

335. RPC Rule 6.3(a).

336. RPC Rule 6.3(b). Model Rule 6.3 comment states:

> 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.

337. *See* RPC Rule 6.4.

338. RPC Rule 6.4.

339. 421 U.S. 773 (1975).

340. 421 U.S. 809 (1975).

341. 433 U.S. 350 (1977).

attorney advertising are still subject to debate.[342] Under *Bates,* not all advertising is permitted. First, there is no first amendment protection for an advertisement that is false or misleading.[343] Second, the Court noted in *Bates* that, "under some circumstances," regulation might be permitted with respect to claims of quality which cannot be verified (i.e., "best trial lawyer in the state").[344] In addition, the Court suggested some restrictions as to "taste," but the dimensions of this restriction are as yet unresolved.[345] These decisions, along with substantial input from the legal community, have led to the formulation of the guidelines found in RPC Rules 7.1 to 7.5. In addition, *Zauderer v. Office of Disciplinary Counsel,*[346] discussed *infra,*[347] has clarified the standard and its applicability in several areas, along with the distinction between advertising and solicitation.[348]

Rule 7.1 Communications Concerning a Lawyer's Services

The RPC reflect the growing concern of the courts and the legal profession for dissemination of information to members of the public, so that they might make an informed decision as to their options concerning legal representation.[349] A lawyer may never *"make a false or misleading communication about the lawyer or the lawyer's services."*[350] This Rule covers communications made directly to a party, as well as those representations made through advertising. A communication is false or misleading if: (1) 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;"[351] or (2) "is likely to create an unjustified expectation about results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate the rules of professional conduct or other law."[352] For example, a lawyer who advertises the fact that he does

342. *See* Survey Comment, *Lawyer Advertising, supra* note 3.

343. Bates v. State Bar, 433 U.S. at 383. *See infra* RPC Rule 7.1 at notes 350–53.

344. *See Bates,* 433 U.S. at 383–84.; RPC Rule 7.1(c).

345. *See* Survey Comment, *Lawyer Advertising, supra* note 3; *In re* R.M.J., 455 U.S. 191 (1982).

346. 105 S. Ct. 2265 (1985).

347. *See infra* notes 371–76 and accompanying text.

348. *See* Survey Comment, *Lawyer Advertising, supra* note 3.

349. *See* Bates v. State Bar, 433 U.S. 350 (1977); Zauderer v. Office of Disciplinary Counsel, 105 S. Ct. 2265 (1985).

350. RPC Rule 7.1 (emphasis added). *See Bates,* 433 U.S. 350; *In re* R.M.J., 455 U.S. 191 (1982).

351. RPC Rule 7.1(a). *See, e.g., Zauderer,* 105 S. Ct. at 2273, 2282–84 (advertising offer to refund legal fees of client convicted of drunk driving and to represent civil litigants on a contingent fee basis failed to disclose, respectively, the possibility of plea bargaining and the clients' liability for court costs).

352. RPC Rule 7.1(b). As stated in Model Rule 7.1 comment:

The prohibition in paragraph (b) of statements that may create "unjustified expectations" would

personal injury work, stating that his past three clients have recovered over $500,000 each, may create the inference that the lawyer always wins large settlements for his clients, regardless of the merits or extent of their injuries. A communication is also false or misleading if it "compares the lawyer's services with other lawyers' services, unless the comparison can be factually substantiated."[353]

Rule 7.2 Advertising

RPC Rule 7.2 permits lawyers to advertise their services through public media, including newspaper, telephone directory, legal directory, periodical, outdoor, radio, television, and written communications, so long as the communications do not constitute *solicitation* as defined in RPC Rule 7.3.[354] There are, however, several requirements with which attorneys must comply. First, a copy or recording of the advertisement or written communication must be kept for at least two years after it has been used.[355] Along with this copy, the lawyer must keep a record of where and when it was used.[356] Second, the name of at least one lawyer responsible for the content of the advertisment or communication must be stated in the communication.[357]

Third, a lawyer may pay the reasonable cost of advertising, including the usual charges of a not-for-profit lawyer referral service or other legal

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> 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.

353. RPC Rule 7.1(c). *See also* Penn. Bar Ass'n Comm. on Legal Ethics and Professional Responsibility, Formal Op. No. 85-170 (1985) (claims using subjective terms such as "experienced," "expert," "highly qualified," or "competent" are difficult for a nonlawyer to confirm, measure or verify, are inherently misleading, and should, therefore, be barred) (citing Spencer v. Honorable Justices, 579 F. Supp. 880 (E.D. Pa. 1984), *aff'd*, 760 F.2d 261 (3d Cir. 1985)).

354. RPC Rule 7.2(a). The Rule thus 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.

Model Rule 7.2 comment. In addition, the Rule removes the prohibition against "undignified" advertising. *See id.*

355. RPC Rule 7.2(b).

356. *Id.* However, the Rule 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." Model Rule 7.2 comment.

357. RPC Rule 7.2(d).

service organization.[358] An attorney may not, however, pay any form of compensation, or make gifts or loans, to any layperson or lawyer in return for the referral of a case or client.[359] This rule applies to *all* cases, even if the layperson was not requested by the attorney to refer cases to him, and even if there was no agreement that any compensation would be paid.[360] The reasoning for the rule is that if laypersons were to receive compensation for referrals, a market system would develop in which laypersons would refer clients and cases to attorneys on the basis of the size of payments made as opposed to the competency of the lawyer. In addition, the practice would create a risk of misrepresentation and undue influence, and, unlike advertising, there would be no permanent record available for review.

Rule 7.3 Direct Contact with Prospective Clients

A lawyer may not solicit professional employment unless the person being contacted is a former client or a relative.[361] The reason for this rule is that direct solicitation may be "fraught with the possibility of undue influence, intimidation and over-reaching."[362] In-person encounters, unlike advertising, may exert undue pressure and often demand immediate response, without providing the opportunity for comparison or reflection. Direct solicitation includes contact in person, by telephone or telegraph, by letter or other writing,[363] or by other communication directed to a specific

358. RPC Rule 7.2(c).

359. *Id.* "This restriction does not prevent an organization or person other than the lawyer from advertising or recommending the lawyer's services. Thus, a legal aid agency or prepaid legal services plan may pay to advertise legal services provided under its auspices." Model Rule 7.2 comment.

360. *See, e.g., In re* Carroll, 124 Ariz. 80, 602 P.2d 461 (1979) (impermissible for attorney to "ratify" referrals by third parties by continued acceptance of such referrals and provision of special credit treatment and cash). *Cf. In re* Appert, 315 N.W.2d 204 (Minn. 1981) (no evidence that attorneys' providing referring party information for research was conditioned on or given as compensation for referral of cases to the firm).

361. RPC Rule 7.3.

362. Model Rule 7.3 comment. *See also* Ohralik v. State Bar Ass'n, 436 U.S. 447, 464–65 (1978).

363. *But see supra* notes 23–28 and accompanying text; Survey Comment, *Lawyer Advertising, supra* note 3. According to Model Rule 7.3 comment, the justification for banning solicitation by mail, rather than permitting it as a form of advertising, is as follows:

> Direct mail solicitation cannot be effectively regulated by means less drastic than outright prohibition. One proposed safeguard is to require that the designation "Advertising" be stamped on any envelope containing a solicitation letter. This would do nothing to assure the accuracy and reliability of the contents. Another suggestion is that solicitation letters be filed with a state regulatory agency. This would be ineffective as a practical matter. State lawyer discipline agencies struggle for resources to investigate specific complaints, much less for those necessary to screen lawyers' mail solicitation material.

It should be noted, however, that the ABA's Commission on Advertising decided on October 18, 1985, to propose amendments to ABA Model Rule 7.3 that would permit targeted mail advertising. In addition, Pennsylvania's Committee on Legal Ethics and Professional Responsibility, one of the first

recipient.[364] A lawyer may, however, distribute information, circulars and advertisments to persons who are generally *"not known to need legal services of the kind provided by the lawyer in a particular matter, but who are so situated that they might in general find such services useful."*[365] However, it may be solicitation for a lawyer to accept employment at the request of an individual if the lawyer has volunteered specific legal advice to that person when she was not his client at that time. The United States Supreme Court has stated that in-person solicitation for financial gain, under circumstances likely to result in harm to the client, may be constitutionally proscribed.[366]

Exceptions to the rule against direct solicitation do exist in some circumstances. Solicitation is permitted when the individual to whom the advice was volunteered is a close friend, relative, or former client.[367] Suppose, for example, that attorney *X* originally represented *A* and *B* in setting up their business. Due to the nature of the law at the time, the business was set up as a partnership. *X* later calls *B* to inform her of a change in the law that would make a corporation more advantageous. *X* may accept employment if *A* and *B* ask him to incorporate the business. A lawyer may also accept employment resulting from educational activities conducted or sponsored by a qualified legal assistance organization, so long as those educational activities were not designed to promote publicity or employment for particular lawyers.[368] Further, solicitation motivated by political goals, at least when on behalf of a nonprofit organization engaging in a form of political expression, may be disciplined only when it *actually produces* the harm

state bar association committees to recommend adoption of the ABA Model Rules, recently rejected the Model Rule 7.3 ban on targeted mail solicitation. Penn. Bar Ass'n Comm. on Legal Ethics and Professional Responsibility, Formal Op. No. 85-170 (1985) ("Those states that have considered Rule 7.3 have rejected it in favor of the more liberal provisions contained in the original Kutak Commission proposals, which would permit direct mailings so long as the written communications are neither false nor misleading, subject to certain very limited exceptions.").

364. RPC Rule 7.3.

365. RPC Rule 7.3 (emphasis added). As stated in Model Rule 7.3 comment:

> General mailings not speaking to a specific matter do not pose the same danger of abuse as targeted mailings, and therefore are not prohibited by this Rule. The representations made in such mailings are necessarily general rather than tailored, less importuning than informative. They are addressed to recipients unlikely to be specially vulnerable at the time, hence who are likely to be more skeptical about unsubstantiated claims. General mailings not addressed to recipients involved in a specific legal matter or incident, therefore, more closely resemble permissible advertising rather than prohibited solicitation.

But see supra notes 23–28 and accompanying text; Survey Comment, *Lawyer Advertising, supra* note 3.

366. Ohralik v. State Bar Ass'n, 436 U.S. 447 (1978).

367. *See* RPC Rule 7.3.

368. *See* CPR DR 2-104(A)(2), (4). With respect to in-person solicitation, the basic principle is probably still applicable.

that the regulation seeks to prevent, such as improper coercion or misrepresentation.[369] Likewise, "collective activity undertaken to obtain meaningful access to the courts is a fundamental right within the protection of the First Amendment," and may not be punished or prohibited.[370]

"Targeted" advertising is a final exception to the rule against direct solicitation. In *Zauderer v. Office of Disciplinary Counsel*,[371] an attorney took out newspaper advertisements asking women readers whether they had used the Dalkon Shield intrauterine device, advising that they might have legal recourse, and suggesting that the attorney would handle their cases on a contingent fee basis wherein "no legal fees are owed." The Court overturned Ohio's discipline of the attorney for improper solicitation. The Court reiterated the following test: "Commercial speech that is not false or deceptive . . . may be restricted only in the service of a substantial government interest, and only through means that directly advance that interest."[372] In addition, the Court held unobjectionable the fact that the advertising was "geared to persons with a specific legal problem" and that it contained the legal advice that such persons might have a valid legal claim.[373]

Despite the fact that the advertisement possessed all the elements of solicitation except *personal contact*, the Court stated that the "advertisement—and print advertising generally—poses much less risk" than in-person solicitation, and lacks "the coercive force of the personal presence of a trained advocate."[374] However, the Court upheld reasonable disclosure requirements, for example, that an advertisement about contingent fee retainers must disclose whether the client would be liable for court costs.[375] Although "unjustified or unduly burdensome disclosure requirements might offend the First Amendment by chilling protected commercial speech . . . an advertiser's rights are adequately protected as long as disclosure requirements are reasonably related to the State's interest in preventing deception of 'consumers'."[376]

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369. *In re* Primus, 436 U.S. 412 (1978).

370. United Transp. Union v. State Bar, 401 U.S. 576, 585–86 (1971) (upholding Union's payment of investigators to actively solicit injured members to employ certain attorneys under contingent fee arrangements). *See also* NAACP v. Button, 371 U.S. 415 (1963); Brotherhood of R.R. Trainmen v. Virginia, 377 U.S. 1 (1964); United Mine Workers v. Illinois State Bar Ass'n, 389 U.S. 217 (1967).

371. 105 S. Ct. 2265 (1985). *See also* Survey Comment, *Lawyer Advertising, supra* note 3.

372. *Id.* at 2275.

373. *Id.* at 2277.

374. *Id.*

375. *Id.* at 2282–84.

376. *Id.* at 2282.

Rule 7.4 Communication of Fields of Practice

A lawyer is permitted to communicate the fact that he does or does not practice in particular fields of law.[377] The communication of this information does not necessarily imply special competence in any particular area.[378] The "permissible statements" approach, whereby state bar associations allowed only those statements expressly permitted in the associations' advertising rules or that were expressly approved by state bar authorities on a case-by-case basis, was invalidated in *In re R.M.J.*[379] Whereas the Model Rule version of Rule 7.4 permits a lawyer to represent himself as a specialist in the fields of patent and admiralty, and provides that a state may designate any other area of specialty, Washington only allows an attorney to represent himself as specializing in patent law if he is

377. RPC Rule 7.4. *See In re* R.M.J., 455 U.S. 191 (1982).

378. For that reason, Model Rule 7.4 comment, provides that "stating that the lawyer is a 'specialist' or that the lawyer's practice 'is limited to' or 'concentrated in' particular fields is not permitted. . . [U]se of these terms may be misleading unless the lawyer is certified or recognized in accordance with procedures in the state where the lawyer is licensed to practice." *See* Zimmerman v. Office of Grievance Committees, 79 A.D.2d 263, 267 App. A., 438 N.Y.S.2d 400, 404 App. A., *appeal dismissed*, 53 N.Y.2d 937, 440 N.Y.S.2d 1029, 423 N.E.2d 416 (1981) (since purpose of listing fields of practice was "to convey the impression that the advertising lawyers have a special expertise in the area of law in which their name is listed," the disclaimer that the ad does not indicate any certification of expertise therein is, at best, "ambiguous"); Lovett & Linder Ltd. v. Carter, 523 F. Supp. 903, 911 (D.R.I. 1981) ("[t]he disclaimer type of ad is even more pernicious in that it deliberately states an untruth, *i.e.*, lack of expertise in areas in which the lawyer believes that he or she is a qualified expert").

Misleading or deceptive advertising of fields of practice in a manner that appears to indicate expertise may also result in liability under the Consumer Protection Act, WASH. REV. CODE §§ 19.86.010–.920 (1985). *See* Short v. Demopolis, 103 Wn. 2d 52, 691 P.2d 163 (1984). WASH. REV. CODE § 19.86.020 (1985) provides: "Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful." Further, WASH. REV. CODE § 19.86.010(2) (1985) states that "'Trade' and 'commerce' shall include the sale of assets or services, and any commerce directly or indirectly affecting the people of the state of Washington." In *Short*, the Washington Supreme Court held that "certain entrepreneurial aspects of the practice of law may fall within the 'trade or commerce' definition of the CPA [Consumer Protection Act]." *Id.* at 60, 691 P.2d at 168. The "entrepreneurial aspects" of legal practice include "how the price of legal services is determined, billed, and collected and the way a law firm obtains, retains, and dismisses clients." *Id.* at 61, 691 P.2d at 168. Clearly, then, an attorney's advertising for legal business would be subject to the CPA, with its provision for attorney's fees and potential treble damages. *See* WASH. REV. CODE § 19.86.090 (1985). In addition, it has been persuasively argued that, when a lawyer advertises fields of practice or that her practice is limited to certain areas, the listing implies that the lawyer is better than those not listed "and further implies a factual representation of experience." Devine, *Letting the Market Control Advertising by Lawyers: A Suggested Remedy for the Misled Client*, 31 BUFFALO L. REV. 351, 372–74 (1982). Therefore, the lawyer should be held to a specialist's degree of care for purposes of malpractice liability. *Id.*

379. 455 U.S. 191 (1982) (overturning discipline of an attorney for advertising "personal injury" and "real estate" fields of practice, instead of "torts" and "property" as required by state bar rules).

admitted to practice before the United States Patent and Trademark Office.[380]

Rule 7.5 Firm Names and Designations

Lawyers in private practice may not use a *trade name*.[381] A law firm may, however, continue to use the names of members who are retired or deceased.[382] Lawyers may also use the term "legal clinic" in the name of the firm, alone, in conjunction with a geographical location, or with the name of one or more members of the firm, so long as the name is not misleading, and does not raise unjustified expectations.[383] Thus, one Alabama lawyer, with offices on University Boulevard near the University of Alabama-Birmingham, changed the firm name to "University Legal Center." The court held the name was deceptive because the lawyer had no affiliation with the university, and the general public was likely to associate the lawyer with the university.[384]

A law firm with offices in more than one jurisdiction may use the same firm name in each jurisdiction.[385] However, when identifying its lawyers the firm must list the jurisdictional limitations of those lawyers not licensed to practice in that jurisdiction.[386] If a member of a firm holds a public office, the firm may not use her name in the firm name or any communications during any substantial period in which the lawyer is not actively and regularly practicing with the firm.[387] Finally, "[l]awyers may state or imply

380. For analysis and criticism of Washington's departure from Model Rule 7.4, see Survey Comment, *Lawyer Advertising, supra* note 3.

381. RPC Rule 7.5(a). *See also* Survey Comment, *Lawyer Advertising, supra* note 3.

382. RPC Rule 7.5(a). Model Rule 7.5 comment states:

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.

383. *See* RPC Rule 7.5(a); Model Rule 7.5 comment.

384. Mezrano v. Alabama Bar, 434 So. 2d 732, 736 (Ala. 1983). *See also In re* Oldtowne Legal Clinic, P.A., 285 Md. 132, 400 A.2d 1111 (1979) (finding "The Oldtowne Legal Clinic" impermissible); *In re* Shepard, 92 A.D.2d 978, 459 N.Y.S.2d 632 (1983) (finding "The People's Law Firm of Jan L. Shepard, Attorney P.C." impermissible). *Cf.* Florida Bar v. Fetterman, 439 So. 2d 835 (Fla. 1983) ("The Law Team, Fetterman and Associates" permissible); *In re* Shannon, 292 Or. 339, 638 P.2d 482 (1982) ("Shannon and Johnson's Hollywood Law Center" permissible).

385. RPC Rule 7.5(b).

386. *Id. See, e.g.*, New York Crim. & Civ. Bar v. Jacoby, 92 A.D.2d 817, 460 N.Y.S.2d 309 (1983), *aff'd*, 61 N.Y.2d 130, 472 N.Y.S.2d 890, 460 N.E.2d 1325 (1984) (use of the name "Jacoby & Meyers" not violative of New York prohibitions on unauthorized practice of law where letterhead listed name of New York partner first and indicated after the names of both Jacoby and Meyers that they were licensed in California only).

387. RPC Rule 7.5(c).

that they practice in a partnership or other organization only when that is the fact."[388]

TITLE VIII. MAINTAINING THE INTEGRITY OF THE PROFESSION

Given the unique nature of the legal profession in society, every lawyer is obligated to assist in the improvement of the legal system and to assure that the profession itself is not brought into disrepute. Many of the provisions in the RPC attempt to promote this concept in the course of regulating relationships with a client. In addition, the provisions in Title VIII are designed specifically to give substance to the lawyer's obligations to the legal system and the profession. When explicit ethical guidelines do not exist to control a lawyer's conduct, he should determine his conduct in a manner that promotes public confidence in the integrity and efficiency of the legal profession.

Rule 8.1 Bar Admission Matters

In regulating admission to practice, each jurisdiction has formulated certain prerequisites. While the details of satisfying them vary by state and federal district, the applicant normally must meet educational requirements, pass a bar examination (except where waived in certain jurisdictions), and demonstrate that he or she is a person of good moral character.[389] But in order to satisfy constitutional requirements under the privileges and immunities, due process, and equal protection clauses, any prerequisite "must have a rational connection with the applicant's fitness or capacity to practice law."[390]

Educational requirements vary widely among the states. Washington requires an undergraduate degree plus graduation from an ABA accredited

388. RPC Rule 7.5(d). Model Rule 7.5 comment states, with respect to this Rule, that "lawyers sharing office facilities, but who are not in fact partners, may not denominate themselves as, for example, 'Smith and Jones,' for that title suggests partnership in the practice of law."

389. *See, e.g.*, APR 3(a), 4. Courts have uniformly concluded that the bar examination, including both essay and multiple-choice (as in the Multistate Bar Examination) questions, is rationally related to determination of competency of an individual practioner. This is true even though the results of prior examinations show a higher failure rate for minority groups. *See, e.g.*, Delgado v. McTighe, 522 F. Supp. 886 (E.D. Pa. 1981). It has been held that bar examiners need have no ascertainable grading standard for evaluating examinations, particularly the essay portion of the examination. Bowens v. Board of Law Examiners, 57 N.C. App. 78, 291 S.E.2d 170 (1982). However, equal protection requires that applicants with identical scores be given the same treatment, that is, either passed or failed. *See, e.g.*, *In re* Randolph-Seng, 669 P.2d 400 (Utah 1983).

390. Schware v. Board of Bar Examiners, 353 U.S. 232, 239 (1957).

law school.[391] Under very stringent requirements, Washington will allow the substitution of a legal clerkship in place of the formal legal study.[392]

A state may not require that an applicant be a citizen of the United States.[393] Residency requirements are found in some, but not all states, and there is some disagreement in the courts as to their constitutional validity. A six-month requirement prior to practicing in the state was upheld on the ground that the period was reasonable and necessary for the purpose of investigating the morals and character of the applicant.[394] But in *Supreme Court of New Hampshire v. Piper,*[395] the Court held that New Hampshire's requirement of residency, or the expressed intent to become a resident at the time of swearing in, violated the privileges and immunities clause.[396] The Court found that there was not a "substantial reason" for the residency requirement and that the total prohibition of nonresidents did not bear a substantial relationship to the objectives of the state.[397]

Every jurisdiction places on each applicant the burden of showing that he or she possesses *"good moral character."*[398] Each applicant is required to answer a detailed background questionnaire and to furnish references.[399] Refusal to furnish this information is a sufficient ground for rejection of the applicant.[400] For example, it has been held that an applicant who refused to answer questions concerning his possible membership in the Communist Party could be rejected because such inquiries are merely a prelude to an investigation into his moral character.[401] This is true regardless of whether affirmative answers would justify denial of admission.[402]

391. APR 3(b)(2); APR 6(a)(2). *See In re* Schatz, 80 Wn. 2d 604, 497 P.2d 153 (1972) (State Bar not required under Constitution to give "full faith and credit" to California accreditation process; denial of non-ABA, California-accredited law school graduate's right to sit for the Washington bar examination upheld).

392. APR 3(b)(2), APR 6.

393. *In re* Griffiths, 413 U.S. 717 (1973). *See* APR 3(b)(1) (a person must be either "(i) a citizen of the United States, or (ii) an alien lawfully admitted for permanent residence in accordance with federal immigration and naturalization law").

394. Suffling v. Bondurant, 339 F. Supp. 257, *aff'd,* 409 U.S. 1020 (1972).

395. 105 S. Ct. 1272 (1985).

396. U.S. CONST. art. IV, § 2.

397. *Id. See also* Sheley v. Alaska Bar Ass'n, 620 P.2d 640 (Alaska 1980) (invalidating, under the privileges and immunities clause, U.S. CONST. art. IV, § 2, a durational residency requirement that all applicants to the Alaska bar be a resident of the state for a 30-day period prior to taking the bar examination).

398. *See, e.g.,* APR 3(a), 5(a).

399. *See* APR 3(d).

400. *See* APR 7(b).

401. Konigsberg v. State Bar, 366 U.S. 36 (1961).

402. *Id. See* Baird v. State Bar, 401 U.S. 1 (1971) (refusal to disclose mere "memberships" or mere "beliefs" cannot be used for exclusion, but questions regarding memberships or beliefs can be asked as preliminary to further inquiry). *See also In re* Brooks, 57 Wn. 2d 66, 355 P.2d 840 (1960) (applicant's conviction for resisting draft sufficient basis for denial of application).

Lawyers are subject to discipline if they make a materially false representation,[403] or knowingly fail to disclose a material fact requested in connection with an application for admission, unless the information is confidential under RPC Rule 1.6.[404] An applicant is entitled to procedural due process with regard to actions taken by the bar representatives reviewing his application. This includes the right to a hearing before the bar committee and confrontation of adverse witnesses, as well as the right to judicial review of the denial of an application based on bad moral character.[405]

The purpose of the bar committee's investigation into the background of an applicant is to determine if there is anything in her past which reflects adversely upon her honesty and integrity, i.e., whether any of the applicant's past conduct involved "moral turpitude,"[406] which is defined as conduct contrary to justice, honesty, modesty, or good morals.[407] A variety of illegal acts, such as draft evasion and possession of marijuana for personal use, may or may not be acts involving "moral turpitude," depending upon the nature of the offense and the intent of the individual.[408] For

403. RPC Rule 8.1(a).

404. RPC Rule 8.1(b). In addition, the Rule provides that a lawyer may not "fail to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter." Model Rule 8.1 comment states:

> 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.

405. *See, e.g.*, Martin B. v. Committee of Bar Examiners, 33 Cal. 3d 717, 661 P.2d 160, 190 Cal. Rptr. 610 (1983). *See also* APR 5(d).

406. *See, e.g., In re* Wright, 102 Wn. 2d 855, 858, 690 P.2d 1134, 1136 (1984) (quoting *In re* G.W.L., 364 So. 2d 454, 458 (Fla. 1978)):

> In our view, a finding of a lack of "good moral character" should not be restricted to those acts that reflect moral turpitude. A more appropriate definition of the phrase requires an inclusion of acts and conduct which would cause a reasonable man to have substantial doubts about an individual's honesty, fairness, and respect for the rights of others and for the laws of the state and nation.

407. *See In re* Hopkins, 54 Wash. 569, 572, 103 P. 805 (1909) (in context of disciplinary proceeding). *Hopkins* has been cited repeatedly as establishing the standard for moral turpitude in Washington. *See, e.g., In re* Fortun, 97 Wn. 2d 240, 643 P.2d 447, 448 (1982).

408. Examples from recent cases include: Cord v. Gibb, 219 Va. 1019, 254 S.E.2d 71 (1979) (sharing ownership of home with person of opposite sex to whom applicant was not married held to be unorthodox, but not rationally related to fitness to practice law); *In re* Beasley, 243 Ga. 134, 252 S.E.2d 615 (1979) (admission may be denied for failure to fulfill legal obligation of paying past due child support); *In re* Eimers, 358 So. 2d 7 (Fla. 1978) (society's interest in having honest lawyers not threatened merely because of applicant's homosexual orientation). *Compare In re* Groot, 365 So. 2d 164 (Fla. 1978) (applicant cannot be denied admission for asserting valid legal rights, such as filing bankruptcy), *with In re* Fitzpatrick, 247 Ga. 55, 273 S.E.2d 618 (1981) (failure to disclose such information on bar application justification for denial of admission) *and In re* G.W.L., 364 So. 2d 454 (Fla. 1978) (when circumstances surrounding the filing of bankruptcy raise serious questions about

example, an applicant who used aliases to hide his Jewish background from employers, and who had been arrested along with other discontented laborers, was found not to have committed an act of "moral turpitude."[409]

Rule 8.2 Judicial and Legal Officials

The purpose of this Rule is to help maintain public confidence in the administration of justice. Although lawyers should be encouraged to make constructive suggestions and criticisms which would improve the administration of justice, false and inflammatory statements, comments, and criticisms of judges and public officials should be discouraged.[410] A lawyer may not make a statement known to be false, "or with reckless disregard as to its truth or falsity," concerning the qualifications or integrity of a judge, public officer, or judicial candidate.[411] Lawyers publicly criticizing judges should be certain of their complaint, use appropriate language, and avoid

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applicant's moral fitness, denial of admission appropriate). *See also In re* Walker, 112 Ariz. 134, 539 P.2d 891 (1975) (denial of admission for failure to register for the draft permissible, since such failure is a felony), *cert. denied,* 424 U.S. 956 (1976); *In re* Willis, 288 N.C. 1, 215 S.E.2d 771 (drunk driving conviction, by itself, not indicative of poor moral character), *appeal dismissed,* 423 U.S. 976 (1975).

Even prior unlawful activity may not be sufficient to demonstrate *present* unfitness if it was the result of "youthful indiscretion" or the applicant has demonstrated exemplary behavior for a substantial period of time following the unlawful conduct. *See, e.g.,* Martin B. v. Committee of Bar Examiners, 33 Cal. 3d 717, 661 P.2d 160, 190 Cal. Rptr. 610 (1983). However, the fact that the unlawful conduct was uncharged, or even resulted in an acquittal, will not necessarily prevent a finding of unfitness to practice. *Id. See* RLD 1.1(a); *In re* Fortun, 97 Wn. 2d 240, 643 P.2d 447 (1982).

409. Schware v. Board of Bar Examiners, 353 U.S. 232 (1957).

410. *See* Model Rule 8.2 comment. The Supreme Court has held that false statements about public officals may be punished only if the speaker acts with knowledge that the statement is "false or with reckless disregard of whether it is false or not." New York Times Co. v. Sullivan, 376 U.S. 254, 279–80 (1964); Note, In re *Erdmann: What Lawyers Can Say About Judges,* 38 ALB. L. REV. 600, 609–10 (1974) ("Since disciplinary actions against attorneys seem to constitute a serious deterrent to free political discussion, it is arguable that such actions should be subject to the same constitutional limitations as the Supreme Court has imposed in defamation actions.").

411. *See* RPC Rule 8.2(a). See, e.g., *In re* Donohoe, 90 Wn. 2d 173, 580 P.2d 1093 (1978), where the court responded to the lawyer's first amendment defense of a false advertising campaign against the incumbent judge as follows:

> We agree that a person does not surrender freedom of expression rights when becoming a licensed attorney. . . . However, we do not believe that the First Amendment protects one who utters a statement with knowledge of its falsity, even in the context of a judicial campaign. Such speech is not beneficial to the public and is generally harmful to the person against whom it is directed. . . . [T]he Code of Judicial Conduct requires a judicial candidate to maintain the dignity appropriate to judicial office. . . . As a minimum, this places upon that person a burden present regardless of his candidacy—to abide by the Code of Professional Responsibility, including abstention from conduct involving dishonesty. . . . One who publishes a statement with knowledge of its falsity during the course of a judicial campaign is subject to discipline pursuant to [the Code].

Id. at 181-82, 580 P.2d at 1077. *See also* Comment, *Ethical Conduct in a Judicial Campaign: Is Campaigning an Ethical Activity?,* 57 WASH. L. REV. 119, 135–37 (1981).

petty criticism.[412] A lawyer who is a candidate for judicial office must comply with the applicable provisions of the Code of Judicial Conduct,[413] including those that preclude false or misleading campaign statements, personal solicitation of funds, and any hints as to the rulings the judge might make upon election.[414]

Rule 8.3 Reporting Professional Misconduct

A lawyer has a duty to report a violation of the RPC by another attorney, or the Code of Judicial Conduct by a judge, that "raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer,"[415] or the "judge's fitness for office."[416] As stated in the Commentary to Model Rule 8.3:

> 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 . . . is more appropriate in the circumstances. Similar considerations apply to the reporting of judicial misconduct.[417]

Rule 8.4 Misconduct

In addition to violation of specific prohibitions contained in the seven Titles of the RPC, an attorney may not:

> (1) 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;[418]
>
> (2) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;[419]

412. *See, e.g.*, *In re* Frerichs, 238 N.W.2d 764 (Iowa 1976); *In re* Shimek, 284 So. 2d 686 (Fla. 1973); *see also* RPC Rule 3.5.

413. RPC Rule 8.2(b).

414. *See* CODE OF JUDICIAL CONDUCT Canons 7(A)(1), 7(B)(1)(c), 7(B)(1)(d) & 7(B)(2).

415. RPC Rule 8.3(a).

416. RPC Rule 8.3(b).

417. However, the Rule "does not require disclosure of information otherwise protected by rule 1.6." RPC Rule 8.3(c).

418. RPC Rule 8.4(a). Thus, for example, an attorney may not ask a secretary, paralegal, law student, or client to engage in any conduct prohibited with respect to the lawyer; e.g., even though a client may speak directly with an opposing party represented by a lawyer, *see* Model Rule 4.2 comment, *supra* note 271, it would be improper for the attorney to instruct his client what to say to the opposing party or to negotiate a settlement without consulting opposing counsel.

419. RPC Rule 8.4(b). Model Rule 8.4 comment states:

> Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses

(3) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;[420]

(4) engage in conduct that is prejudicial to the administration of justice;[421]

(5) state or imply an ability to influence improperly a government agency or official;[422] or

(6) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.[423]

Rule 8.5 Jurisdiction

A lawyer licensed or admitted for any purpose to practice in Washington is subject to Washington's disciplinary authority, although engaged in practice elsewhere.[424]

> involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offense carry no such implication. Traditionally, the distinction was drawn in terms of offenses involving "moral turpitude." That concept can be construed to include offenses concerning some matters of personal morality, such as adultery and comparable offenses, that have no specific connection to fitness for the practice of law. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, or breach of trust, or serious interference with the administration of justice are in that category. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.

Thus, in *In re* McGrath, 98 Wn. 2d 337, 341, 655 P.2d 232, 234 (1982), the court held that a conviction of assault with a deadly weapon is not, per se, a crime involving moral turpitude. A determination of moral turpitude depends on whether the crime is one which offends common standards of honesty, good morals, and justice which most people would follow without regard to whether the same conduct happens to offend the criminal law. *Id.* at 342, 655 P.2d at 234. *See also In re* Fortun, 97 Wn. 2d 240, 643 P.2d 447 (1982) (growing and processing 25,000 pounds of marijuana plants is a "gross and intentional violation of the law").

420. RPC Rule 8.4(c). *See, e.g., In re* Rosellini, 97 Wn. 2d 373, 646 P.2d 122 (1982); *In re* Krogh, 85 Wn. 2d 462, 536 P.2d 578 (1975). As stated in Model Rule 8.4 comment:

> Lawyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer's abuse of public office can suggest an inability to fulfill the professional role of attorney. The same is true of abuse of positions of private trust such as trustee, executor, administrator, guardian, agent and officer, director or manager of a corporation or other organization.

421. RPC Rule 8.4(d).

422. RPC Rule 8.4(e).

423. RPC Rule 8.4(f).

424. RPC Rule 8.5. Model Rule 8.5 comment also states: "If the rules of professional conduct in . . . two jurisdictions [in which a lawyer is licensed and practices] differ, principles of conflict of laws may apply."