

STATE OF WISCONSIN

IN SUPREME COURT

In the Matter of the Amendment of
Supreme Court Rules Chapter 20
Rules of Professional Conduct for Attorneys

PETITION

PETITION

Wisconsin Ethics 2000 Committee respectfully petitions the Wisconsin Supreme Court to revise the Rules of Professional Conduct for Attorneys (Chapter 20, Supreme Court Rules) as recommended in the committee's Proposed Amendments to Supreme Court Rules Chapter 20 attached to this Petition.

BACKGROUND

Mission. The Wisconsin Supreme Court created the Wisconsin Ethics 2000 Committee in February 2003 and issued the following Mission Statement:

The Commission on the Evaluation of the Rules of Professional Conduct, commonly known as Ethics 2000, was a commission appointed by the American Bar Association to review the ABA Model Rules of Professional Conduct and propose changes or revisions to update the rules for today's legal practice. The commission was charged to conduct a comprehensive study and evaluation of the ethical and professionalism precepts of the legal profession; examine and evaluate the Model Rules and the rules governing professional conduct in the state and federal jurisdictions; conduct original research, surveys,

and hearings; and formulate recommendations for action. The commission completed its work in 2001 and proposed changes to the Model Rules which the ABA House of Delegates considered and adopted in part in 2002.

In response, the Supreme Court of Wisconsin has created the Wisconsin Ethics 2000 Committee. Its mission is as follows:

1. The committee shall conduct a comprehensive review of the Wisconsin Rules of Professional Conduct for Attorneys in light of the changes, both proposed and adopted, to the Model Rules by the commission, and any other changes the committee deems appropriate. This shall include consideration of the rules petition to be submitted to the court from the Fee Arbitration Study Committee; the committee shall respond to that petition at the court's public hearing on the matter in the fall, 2003. The committee shall not consider matters relating to multi-jurisdictional or multi-disciplinary practice.
2. The committee shall recommend changes, if any, to the existing Wisconsin Rules via a petition to this court for a rules change. The petition, with detailed comments, shall be filed by October, 2004. The court anticipates scheduling the matter for a public hearing in winter, 2004.
3. In the interest of providing full and fair consideration of these important public policy issues, the committee shall solicit comments from the bench, bar, and public. In planning its meeting, the committee shall consider the state's fiscal condition and keep expenditures at a minimum, so far as consistent with conducting a comprehensive review. Accordingly, the committee is urged to seek

written submissions and utilize teleconferencing and subcommittees as appropriate.

This Petition is filed by the committee pursuant to the court's direction in the Mission Statement.

Meetings. The full committee had ten day-long meetings, which were held on April 21, June 24, September 23, and November 18, 2003, and on January 27, March 1, March 23, April 27, May 17, and June 24, 2004. Five subcommittees held many additional meetings in person and by teleconference. Considerable work was also performed by email, which was facilitated by a list serve hosted by the State Bar of Wisconsin.

Outreach. Tentative drafts of the committee's proposals have been posted on the State Bar web site since late April, 2004.

Members of the committee met with approximately two hundred state bar members in a three-hour session at the annual meeting of the State Bar in Madison on May 7, 2004. In addition, committee members met with many other groups of lawyers and laypersons, including at meetings sponsored by Milwaukee Bar Association, Waukesha County Bar Association, Barron County Bar Association, Inns of Court in Brown County and Milwaukee County, Eau Claire County Bar Association, Wausau Early Bird Rotary Club, Dane County Bar Association, Wisconsin chapter of the American Corporate Counsel Association, Legal Aid Society of Milwaukee, Wisconsin Legislative Institute, Wisconsin Prosecutors Seminar, Wisconsin Bar non-resident members in Chicago and Minnesota, Wisconsin Department of Justice, Civil Trial Counsel of Wisconsin, Marquette University Law School, and University of Wisconsin

Law School Resource Center on Impaired Driving. The committee also consulted in person and in writing with the Wisconsin Supreme Court Fee Arbitration Study Committee, particularly with respect to issues concerning fees.

In addition to the extensive comments received in these various meeting, the committee received written submissions from a number of individuals and groups. Among the groups submitting written comments were the Government Lawyers Division of the State Bar, the State Public Defender's Office, and the Lawyer Dispute Resolution Committee.

GENERAL COMMENTS

Format. The attached proposal concerning Supreme Court Rules Chapter 20 contains the following components:

- The current rules are presented in a red-line format that highlights all proposed changes (i.e. amendments to current rules, proposed new rules, proposed deletions of current rules).
- With respect to proposed rules that differ from their counterpart provisions in the American Bar Association Model Rules of Professional Conduct (August 2003), a Wisconsin Committee Comment is included that identifies the difference between the proposed rule and the model rule.
- The Preamble and Scope sections of the Model Rules and ABA comments to each model rule are included, without noting changes from prior versions.

The committee recommends that the court retain the current format of chapter 20. Currently, only the "black letter" provision of each rule is promulgated by the court, but

the Preamble and Scope sections of the Model Rules and ABA comments to each model rule are included in chapter 20 for information purposes. This approach provides helpful guidance to the meaning of the rules and is consistent with the design of the Model Rules.

See Model Rules Scope ¶21.

The committee recommends including in chapter 20, for information purposes, Wisconsin Committee Comments for rules that differ from their model rule counterparts. These comments identify differences from the model rules; for the most part, they do not explain or justify those differences. Under this approach, the rule language speaks for itself, and additional interpretive problems are not introduced in the Wisconsin Committee Comments.

Working assumptions. The ABA Ethics 2000 Commission proposed, and the American Bar Association adopted, very extensive changes to the model rules. The great majority of these changes, however, are intended to clarify rather than change existing duties. For this reason, a cursory review of the committee's proposals may be misleading. While the committee, following the lead of the ABA, proposes amendments to over half of the rules, the vast majority of these proposed amendments clarify rather than alter existing policy. After approximately twenty years of experience under the model rules as adopted in most jurisdictions, certain gaps and ambiguities have surfaced. Much of this revision resolves those problems without significantly changing underlying policy.

In undertaking its analysis and formulating its proposals, the committee generally deferred to the model rule formulations of duty, unless an important policy concern dictated otherwise. This policy preference in favor of the model rules is appropriate, in

the committee's view, for a number of reasons. First, the ABA Ethics 2000 Commission performed careful and high-quality work in developing its proposals, with extensive involvement by a wide array of experts both within and outside the legal community. Second, the model rule formulation is enriched by interpretive guidance provided by courts and commentators; this benefit is reduced when minor changes in language are incorporated into the Wisconsin rule. Third, many legal matters have multi-state dimensions so that consistency among the states is desirable, at least when important policy concerns are not involved.

This mild deference to model rule language means that the committee generally did not "tweak" the wording of proposed rules for stylistic reasons. Absent a meaningful policy concern, the committee generally recommends adoption of the model rule as it is written.

KEY PROPOSALS

The committee recognizes that certain of its proposals involve significant changes that should be specially brought to the court's attention. The following proposals fall in that category.

Rule 1.0 Terminology. This new rule defines certain terms used throughout the rules. Among its most significant provisions is the standard of "informed consent" which is applied in the proposed rules to many decisions that clients are responsible for making. The rules do not currently include "informed consent" as the standard. In addition, the committee proposes definitions for "misrepresentation" (to include only intentional misrepresentation) and "prosecutor" (to include municipal prosecutors and prosecutors in juvenile court) that are not contained in the model rule.

Rule 1.5 Fees. Amendments to this rule are pending before the court by virtue of a petition filed by the court’s Fee Arbitration Study Committee. The present proposal, which differs in a couple of respects from the committee’s response to the Fee Arbitration Study Committee petition, was developed after consultation with the Fee Arbitration Study Committee and based on comments by lawyers and others.

Rule 1.6 Confidentiality. The proposal contains the distinctive exception to the duty of confidentiality that is in the current rule, arising in certain cases involving client crimes and frauds. The proposal adopts the model rule exceptions for compliance with a court order to testify and also for disclosures that “comply with other law.” Because of the latter exception, the committee proposes deletion of the current reference to §§ 19.43 and 19.44, Stats.

Rule 1.8 Conflicts of interest: prohibited transactions. Among other proposed changes, the committee recommends deletion of the insurance defense exception to the requirement that a client consent to the lawyer’s fee being paid by a third party. One of the recurring themes in the proposed rules is that lawyers clarify their relationships, and the committee views this as equally important in the insurance defense setting. See Marten Transport, Ltd. v. Hartford Specialty Co., 194 Wis. 2d 1, 533 N.W.2d 452 (1995).

Rule 1.10 Imputed disqualification: general rule. The committee proposes that, when a lawyer changes firms, the lawyer’s conflict of interest in a matter will not be imputed to lawyers at the new firm if (1) the conflict arises from legal services that were only minor and isolated and (2) the personally disqualified lawyer is timely screened from participation. The committee believes that this limited screening rule protects important client interests, while responding in a fair and practical way to the abuse of

disqualification motions as a litigation strategy. See generally *Nelson v. Green Builders, Inc.*, 823 F. Supp. 1439 (E.D. Wis. 1993).

Rule 1.18 Duties to prospective clients. The committee recommends that the court adopt this new rule which currently has no counterpart in chapter 20.

Rule 2.2 Intermediary and Rule 2.4 Lawyer serving as third-party neutral. The committee recommends that Rule 2.2 be deleted in its entirety, as it is in the revised model rules, because the issues addressed by this rule are better dealt with in other rules, including conflicts of interest rules and new Rule 2.4. New Rule 2.4 defines the role and obligations of service as a third-party neutral.

Rule 3.8 Special responsibilities of a prosecutor. The committee proposes new provisions, not contained in the model rule, to clarify what communications are permissible between a prosecutor and an unrepresented defendant. The committee believes that a prosecutor should be able to negotiate a plea with an unrepresented defendant, but the prosecutor should not provide other legal advice or assistance to the defendant in the process.

Rule 3.10 Threatening criminal prosecution. The committee recommends that this provision, which has no counterpart in the model rules, be deleted. The standards for establishing a violation of the rule are high, and the facts of individual cases will often contain sufficient ambiguity to make the rule inapplicable. See generally *In re Disciplinary Proceedings against Coe*, 2003 WI 117, 665 N.W.2d 849, 265 Wis.2d 27 (2003). To the extent that threats to present criminal charges amount to extortion, the conduct can be prosecuted under appropriate provisions in Rule 8.4.

Rule 4.1 Truthfulness in statements to others. The committee proposes a new paragraph, not found in the model rule, that recognizes that prosecutors may advise and supervise others with respect to lawful undercover investigations that involve deception. The failure of the rules to address this issue leaves such conduct largely unregulated because the parameters of ethical conduct are unstated. Moreover, the committee believes that it is wise to encourage the supervision by prosecutors of investigations so that the rights of suspects will be protected.

Rule 4.5 Guardians ad litem. The committee proposes this new rule, which has no counterpart in the model rules, in order that guardians ad litem understand that their conduct is governed by the rules, even though their responsibilities may differ, in some respects, from those in the usual representation.

Rule 6.1 Pro bono publico service. The committee proposes that lawyers be required to file a report annually concerning their pro bono activities. This requirement is recommended as a way to emphasize the pro bono responsibilities of lawyers and to collect information about pro bono services and needs. The model rule does not contain a reporting requirement.

Rule 6.5 Nonprofit and court-annexed limited legal services programs. This new rule, which is part of the model rules, provides limited protection against disqualifying conflicts of interest for certain legal advice hotlines and advice-only clinics that qualify.

Rule 7.6 Political contributions to obtain government legal engagements or appointments by judges. This is a new model rule, designed to prohibit “pay-to-play” practices. The committee did not see this as a problem in Wisconsin, but believes that the express prohibition of such practices is sound policy.

Rule 8.4 Misconduct. The committee has proposed two new paragraphs that are not included in the model rule. Paragraph (h) restates the lawyer's duty to cooperate in the investigation of a grievance, in the belief that placement of the duty in chapter 20 will provide better notice to lawyers. Paragraph (i) makes it misconduct to harass a person on the basis of sex, race, age, creed, religion, color, national origin, disability, sexual preference or marital status in connection with the lawyer's professional activities. This provision is intended to reinforce the strong commitment to equal justice under law.

CONCLUSION

This petition and the attached proposal will be posted on the State Bar web site. The committee may meet again if comments from others are such that a meeting would be appropriate to consider additional revisions. The committee expresses its gratitude to the court for this opportunity to be of service.

Respectfully submitted this _____ day of _____, 2004.

WISCONSIN ETHICS 2000 COMMITTEE

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1 **WISCONSIN ETHICS 2000 COMMITTEE**

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4 **PROPOSED AMENDMENTS TO SUPREME COURT RULES CHAPTER 20**

5 **RULES OF PROFESSIONAL CONDUCT FOR ATTORNEYS**

6

7 **PREAMBLE: A LAWYER'S RESPONSIBILITIES**

8

9 [1] A lawyer, as a member of the legal profession, is a representative of
10 clients, an officer of the legal system and a public citizen having special
11 responsibility for the quality of justice.

12

13 [2] As a representative of clients, a lawyer performs various functions. As
14 advisor, a lawyer provides a client with an informed understanding of the client's
15 legal rights and obligations and explains their practical implications. As advocate,
16 a lawyer zealously asserts the client's position under the rules of the adversary
17 system. As negotiator, a lawyer seeks a result advantageous to the client but
18 consistent with requirements of honest dealings with others. As an evaluator, a
19 lawyer acts by examining a client's legal affairs and reporting about them to the
20 client or to others.

21

22 [3] In addition to these representational functions, a lawyer may serve as a
23 third-party neutral, a nonrepresentational role helping the parties to resolve a
24 dispute or other matter. Some of these Rules apply directly to lawyers who are or
25 have served as third-party neutrals. See, e.g., Rules 1.12 and 2.4. In addition,
26 there are Rules that apply to lawyers who are not active in the practice of law or
27 to practicing lawyers even when they are acting in a nonprofessional capacity.
28 For example, a lawyer who commits fraud in the conduct of a business is subject
29 to discipline for engaging in conduct involving dishonesty, fraud, deceit or
30 misrepresentation. See Rule 8.4.

31

32 [4] In all professional functions a lawyer should be competent, prompt and
33 diligent. A lawyer should maintain communication with a client concerning the
34 representation. A lawyer should keep in confidence information relating to
35 representation of a client except so far as disclosure is required or permitted by
36 the Rules of Professional Conduct or other law.

37

38 [5] A lawyer's conduct should conform to the requirements of the law, both in
39 professional service to clients and in the lawyer's business and personal affairs.
40 A lawyer should use the law's procedures only for legitimate purposes and not to
41 harass or intimidate others. A lawyer should demonstrate respect for the legal
42 system and for those who serve it, including judges, other lawyers and public
43 officials. While it is a lawyer's duty, when necessary, to challenge the rectitude of
44 official action, it is also a lawyer's duty to uphold legal process.

1 [6] As a public citizen, a lawyer should seek improvement of the law, access
2 to the legal system, the administration of justice and the quality of service
3 rendered by the legal profession. As a member of a learned profession, a lawyer
4 should cultivate knowledge of the law beyond its use for clients, employ that
5 knowledge in reform of the law and work to strengthen legal education. In
6 addition, a lawyer should further the public's understanding of and confidence in
7 the rule of law and the justice system because legal institutions in a constitutional
8 democracy depend on popular participation and support to maintain their
9 authority. A lawyer should be mindful of deficiencies in the administration of
10 justice and of the fact that the poor, and sometimes persons who are not poor,
11 cannot afford adequate legal assistance. Therefore, all lawyers should devote
12 professional time and resources and use civic influence to ensure equal access
13 to our system of justice for all those who because of economic or social barriers
14 cannot afford or secure adequate legal counsel. A lawyer should aid the legal
15 profession in pursuing these objectives and should help the bar regulate itself in
16 the public interest.

17

18 [7] Many of a lawyer's professional responsibilities are prescribed in the Rules
19 of Professional Conduct, as well as substantive and procedural law. However, a
20 lawyer is also guided by personal conscience and the approbation of professional
21 peers. A lawyer should strive to attain the highest level of skill, to improve the law
22 and the legal profession and to exemplify the legal profession's ideals of public
23 service.

24

25 [8] A lawyer's responsibilities as a representative of clients, an officer of the
26 legal system and a public citizen are usually harmonious. Thus, when an
27 opposing party is well represented, a lawyer can be a zealous advocate on
28 behalf of a client and at the same time assume that justice is being done. So
29 also, a lawyer can be sure that preserving client confidences ordinarily serves the
30 public interest because people are more likely to seek legal advice, and thereby
31 heed their legal obligations, when they know their communications will be private.

32

33 [9] In the nature of law practice, however, conflicting responsibilities are
34 encountered. Virtually all difficult ethical problems arise from conflict between a
35 lawyer's responsibilities to clients, to the legal system and to the lawyer's own
36 interest in remaining an ethical person while earning a satisfactory living. The
37 Rules of Professional Conduct often prescribe terms for resolving such conflicts.
38 Within the framework of these Rules, however, many difficult issues of
39 professional discretion can arise. Such issues must be resolved through the
40 exercise of sensitive professional and moral judgment guided by the basic
41 principles underlying the Rules. These principles include the lawyer's obligation
42 zealously to protect and pursue a client's legitimate interests, within the bounds
43 of the law, while maintaining a professional, courteous and civil attitude toward all
44 persons involved in the legal system.

45

1 [10] The legal profession is largely self-governing. Although other professions
2 also have been granted powers of self-government, the legal profession is
3 unique in this respect because of the close relationship between the profession
4 and the processes of government and law enforcement. This connection is
5 manifested in the fact that ultimate authority over the legal profession is vested
6 largely in the courts.

7
8 [11] To the extent that lawyers meet the obligations of their professional
9 calling, the occasion for government regulation is obviated. Self-regulation also
10 helps maintain the legal profession's independence from government domination.
11 An independent legal profession is an important force in preserving government
12 under law, for abuse of legal authority is more readily challenged by a profession
13 whose members are not dependent on government for the right to practice.

14
15 [12] The legal profession's relative autonomy carries with it special
16 responsibilities of self-government. The profession has a responsibility to assure
17 that its regulations are conceived in the public interest and not in furtherance of
18 parochial or self-interested concerns of the bar. Every lawyer is responsible for
19 observance of the Rules of Professional Conduct. A lawyer should also aid in
20 securing their observance by other lawyers. Neglect of these responsibilities
21 compromises the independence of the profession and the public interest which it
22 serves.

23
24 [13] Lawyers play a vital role in the preservation of society. The fulfillment of
25 this role requires an understanding by lawyers of their relationship to our legal
26 system. The Rules of Professional Conduct, when properly applied, serve to
27 define that relationship.

28
29 **SCOPE**
30

31 [14] The Rules of Professional Conduct are rules of reason. They should be
32 interpreted with reference to the purposes of legal representation and of the law
33 itself. Some of the Rules are imperatives, cast in the terms "shall" or "shall not."
34 These define proper conduct for purposes of professional discipline. Others,
35 generally cast in the term "may," are permissive and define areas under the
36 Rules in which the lawyer has discretion to exercise professional judgment. No
37 disciplinary action should be taken when the lawyer chooses not to act or acts
38 within the bounds of such discretion. Other Rules define the nature of
39 relationships between the lawyer and others. The Rules are thus partly obligatory
40 and disciplinary and partly constitutive and descriptive in that they define a
41 lawyer's professional role. Many of the Comments use the term "should."
42 Comments do not add obligations to the Rules but provide guidance for
43 practicing in compliance with the Rules.

44
45 [15] The Rules presuppose a larger legal context shaping the lawyer's role.
46 That context includes court rules and statutes relating to matters of licensure,

1 laws defining specific obligations of lawyers and substantive and procedural law
2 in general. The Comments are sometimes used to alert lawyers to their
3 responsibilities under such other law.

4

5 [16] Compliance with the Rules, as with all law in an open society, depends
6 primarily upon understanding and voluntary compliance, secondarily upon
7 reinforcement by peer and public opinion and finally, when necessary, upon
8 enforcement through disciplinary proceedings. The Rules do not, however,
9 exhaust the moral and ethical considerations that should inform a lawyer, for no
10 worthwhile human activity can be completely defined by legal rules. The Rules
11 simply provide a framework for the ethical practice of law.

12

13 [17] Furthermore, for purposes of determining the lawyer's authority and
14 responsibility, principles of substantive law external to these Rules determine
15 whether a client-lawyer relationship exists. Most of the duties flowing from the
16 client-lawyer relationship attach only after the client has requested the lawyer to
17 render legal services and the lawyer has agreed to do so. But there are some
18 duties, such as that of confidentiality under Rule 1.6, that attach when the lawyer
19 agrees to consider whether a client-lawyer relationship shall be established. See
20 Rule 1.18. Whether a client-lawyer relationship exists for any specific purpose
21 can depend on the circumstances and may be a question of fact.

22

23 [18] Under various legal provisions, including constitutional, statutory and
24 common law, the responsibilities of government lawyers may include authority
25 concerning legal matters that ordinarily reposes in the client in private client-
26 lawyer relationships. For example, a lawyer for a government agency may have
27 authority on behalf of the government to decide upon settlement or whether to
28 appeal from an adverse judgment. Such authority in various respects is generally
29 vested in the attorney general and the state's attorney in state government, and
30 their federal counterparts, and the same may be true of other government law
31 officers. Also, lawyers under the supervision of these officers may be authorized
32 to represent several government agencies in intragovernmental legal
33 controversies in circumstances where a private lawyer could not represent
34 multiple private clients. These Rules do not abrogate any such authority.

35

36 [19] Failure to comply with an obligation or prohibition imposed by a Rule is a
37 basis for invoking the disciplinary process. The Rules presuppose that
38 disciplinary assessment of a lawyer's conduct will be made on the basis of the
39 facts and circumstances as they existed at the time of the conduct in question
40 and in recognition of the fact that a lawyer often has to act upon uncertain or
41 incomplete evidence of the situation. Moreover, the Rules presuppose that
42 whether or not discipline should be imposed for a violation, and the severity of a
43 sanction, depend on all the circumstances, such as the willfulness and
44 seriousness of the violation, extenuating factors and whether there have been
45 previous violations.

1 [20] Violation of a Rule should not itself give rise to a cause of action against
2 a lawyer nor should it create any presumption in such a case that a legal duty
3 has been breached. In addition, violation of a Rule does not necessarily warrant
4 any other nondisciplinary remedy, such as disqualification of a lawyer in pending
5 litigation. The Rules are designed to provide guidance to lawyers and to provide
6 a structure for regulating conduct through disciplinary agencies. They are not
7 designed to be a basis for civil liability. Furthermore, the purpose of the Rules
8 can be subverted when they are invoked by opposing parties as procedural
9 weapons. The fact that a Rule is a just basis for a lawyer's self-assessment, or
10 for sanctioning a lawyer under the administration of a disciplinary authority, does
11 not imply that an antagonist in a collateral proceeding or transaction has standing
12 to seek enforcement of the Rule. Nevertheless, since the Rules do establish
13 standards of conduct by lawyers, a lawyer's violation of a Rule may be evidence
14 of breach of the applicable standard of conduct.

15

16 [21] The Comment accompanying each Rule explains and illustrates the
17 meaning and purpose of the Rule. The Preamble and this note on Scope provide
18 general orientation. The Comments are intended as guides to interpretation, but
19 the text of each Rule is authoritative.

20

21 SCR 20:1.0 Terminology

22

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

26

27 (b) "Consult" or "Consultation" denotes communication of information
28 reasonably sufficient to permit the client to appreciate the significance of the matter
29 in question.

30

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

38

39 (d) "Firm" or "law firm" denotes a lawyer or lawyers in a law partnership,
40 professional corporation, sole proprietorship or other association authorized to
41 practice law; or lawyers employed in a legal services organization or the legal
42 department of a corporation or other organization, including a government entity.

43

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

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

5
6 (g) "Knowingly," "known," or "knows" denotes actual knowledge of the fact in
7 question. A person's knowledge may be inferred from circumstances.

8
9 (h) "Misrepresentation" does not include negligent or strict liability
10 misrepresentation.

11
12 (i) "Partner" denotes a member of a partnership, a shareholder in a law firm
13 organized as a professional corporation, or a member of an association
14 authorized to practice law.

15
16 (j) A "prosecutor" includes a government attorney or special prosecutor (i) in a
17 criminal case or delinquency action or (ii) acting in connection with the protection
18 of a child or (iii) acting as a municipal prosecutor;

19
20 (k) "Reasonable" or "reasonably" when used in relation to conduct by a lawyer
21 denotes the conduct of a reasonably prudent and competent lawyer.

22
23 (l) "Reasonable belief" or "reasonably believes" when used in reference to a
24 lawyer denotes that the lawyer believes the matter in question and that the
25 circumstances are such that the belief is reasonable.

26
27 (m) "Reasonably should know" when used in reference to a lawyer denotes
28 that a lawyer of reasonable prudence and competence would ascertain the
29 matter in question.

30
31 (n) "Screened" denotes the isolation of a lawyer from any participation in a
32 matter through the timely imposition of procedures within a firm that are
33 reasonably adequate under the circumstances to protect information that the
34 isolated lawyer is obligated to protect under these Rules or other law.

35
36 (o) "Substantial" when used in reference to degree or extent denotes a
37 material matter of clear and weighty importance.

38
39 (p) "Tribunal" denotes a court, an arbitrator in a binding arbitration proceeding
40 or a legislative body, administrative agency or other body acting in an
41 adjudicative capacity. A legislative body, administrative agency or other body
42 acts in an adjudicative capacity when a neutral official, after the presentation of
43 evidence or legal argument by a party or parties, will render a binding legal
44 judgment directly affecting a party's interests in a particular matter.

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

7

8 **Wisconsin Committee Comment**

9

10 The Committee has added definitions of "consult," "misrepresentation," and
11 "prosecutor" that are not part of the Model Rule. In the definition of "firm," the
12 phrase "including a government entity" is added to make the coverage more
13 explicit. Because the provisions of the rule are renumbered to preserve the
14 alphabetical arrangement, caution should be used when referring to the ABA
15 Comment.

16

17 **ABA Comment**

18

19 *Confirmed in Writing*

20

21 [1] If it is not feasible to obtain or transmit a written confirmation at the time
22 the client gives informed consent, then the lawyer must obtain or transmit it within
23 a reasonable time thereafter. If a lawyer has obtained a client's informed consent,
24 the lawyer may act in reliance on that consent so long as it is confirmed in writing
25 within a reasonable time thereafter.

26

27 *Firm*

28

29 [2] Whether two or more lawyers constitute a firm within paragraph (c) can
30 depend on the specific facts. For example, two practitioners who share office
31 space and occasionally consult or assist each other ordinarily would not be
32 regarded as constituting a firm. However, if they present themselves to the public
33 in a way that suggests that they are a firm or conduct themselves as a firm, they
34 should be regarded as a firm for purposes of the Rules. The terms of any formal
35 agreement between associated lawyers are relevant in determining whether they
36 are a firm, as is the fact that they have mutual access to information concerning
37 the clients they serve. Furthermore, it is relevant in doubtful cases to consider the
38 underlying purpose of the Rule that is involved. A group of lawyers could be
39 regarded as a firm for purposes of the Rule that the same lawyer should not
40 represent opposing parties in litigation, while it might not be so regarded for
41 purposes of the Rule that information acquired by one lawyer is attributed to
42 another.

43

44 [3] With respect to the law department of an organization, including the
45 government, there is ordinarily no question that the members of the department
46 constitute a firm within the meaning of the Rules of Professional Conduct. There

1 can be uncertainty, however, as to the identity of the client. For example, it may
2 not be clear whether the law department of a corporation represents a subsidiary
3 or an affiliated corporation, as well as the corporation by which the members of
4 the department are directly employed. A similar question can arise concerning an
5 unincorporated association and its local affiliates.

6

7 [4] Similar questions can also arise with respect to lawyers in legal aid and
8 legal services organizations. Depending upon the structure of the organization,
9 the entire organization or different components of it may constitute a firm or firms
10 for purposes of these Rules.

11

12 *Fraud*

13

14 [5] When used in these Rules, the terms "fraud" or "fraudulent" refer to
15 conduct that is characterized as such under the substantive or procedural law of
16 the applicable jurisdiction and has a purpose to deceive. This does not include
17 merely negligent misrepresentation or negligent failure to apprise another of
18 relevant information. For purposes of these Rules, it is not necessary that anyone
19 has suffered damages or relied on the misrepresentation or failure to inform.

20

21 *Informed Consent*

22

23 [6] Many of the Rules of Professional Conduct require the lawyer to obtain the
24 informed consent of a client or other person (e.g., a former client or, under
25 certain circumstances, a prospective client) before accepting or continuing
26 representation or pursuing a course of conduct. See, e.g., Rules 1.2(c), 1.6(a)
27 and 1.7(b). The communication necessary to obtain such consent will vary
28 according to the Rule involved and the circumstances giving rise to the need to
29 obtain informed consent. The lawyer must make reasonable efforts to ensure that
30 the client or other person possesses information reasonably adequate to make
31 an informed decision. Ordinarily, this will require communication that includes a
32 disclosure of the facts and circumstances giving rise to the situation, any
33 explanation reasonably necessary to inform the client or other person of the
34 material advantages and disadvantages of the proposed course of conduct and a
35 discussion of the client's or other person's options and alternatives. In some
36 circumstances it may be appropriate for a lawyer to advise a client or other
37 person to seek the advice of other counsel. A lawyer need not inform a client or
38 other person of facts or implications already known to the client or other person;
39 nevertheless, a lawyer who does not personally inform the client or other person
40 assumes the risk that the client or other person is inadequately informed and the
41 consent is invalid. In determining whether the information and explanation
42 provided are reasonably adequate, relevant factors include whether the client or
43 other person is experienced in legal matters generally and in making decisions of
44 the type involved, and whether the client or other person is independently
45 represented by other counsel in giving the consent. Normally, such persons need
46 less information and explanation than others, and generally a client or other

1 person who is independently represented by other counsel in giving the consent
2 should be assumed to have given informed consent.

3

4 [7] Obtaining informed consent will usually require an affirmative response by
5 the client or other person. In general, a lawyer may not assume consent from a
6 client's or other person's silence. Consent may be inferred, however, from the
7 conduct of a client or other person who has reasonably adequate information
8 about the matter. A number of Rules require that a person's consent be
9 confirmed in writing. See Rules 1.7(b) and 1.9(a). For a definition of "writing" and
10 "confirmed in writing," see paragraphs (n) and (b). Other Rules require that a
11 client's consent be obtained in a writing signed by the client. See, e.g., Rules
12 1.8(a) and (g). For a definition of "signed," see paragraph (n).

13

14 **Screened**

15

16 [8] This definition applies to situations where screening of a personally
17 disqualified lawyer is permitted to remove imputation of a conflict of interest
18 under Rules 1.11, 1.12 or 1.18.

19

20 [9] The purpose of screening is to assure the affected parties that confidential
21 information known by the personally disqualified lawyer remains protected. The
22 personally disqualified lawyer should acknowledge the obligation not to
23 communicate with any of the other lawyers in the firm with respect to the matter.
24 Similarly, other lawyers in the firm who are working on the matter should be
25 informed that the screening is in place and that they may not communicate with
26 the personally disqualified lawyer with respect to the matter. Additional screening
27 measures that are appropriate for the particular matter will depend on the
28 circumstances. To implement, reinforce and remind all affected lawyers of the
29 presence of the screening, it may be appropriate for the firm to undertake such
30 procedures as a written undertaking by the screened lawyer to avoid any
31 communication with other firm personnel and any contact with any firm files or
32 other materials relating to the matter, written notice and instructions to all other
33 firm personnel forbidding any communication with the screened lawyer relating to
34 the matter, denial of access by the screened lawyer to firm files or other materials
35 relating to the matter and periodic reminders of the screen to the screened
36 lawyer and all other firm personnel.

37

38 [10] In order to be effective, screening measures must be implemented as
39 soon as practical after a lawyer or law firm knows or reasonably should know that
40 there is a need for screening.

41

42 **CLIENT-LAWYER RELATIONSHIP**

43

44 **SCR 20:1.1 Competence**

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

4

5 **ABA Comment**

6

7 *Legal Knowledge and Skill*

8

9 [1] In determining whether a lawyer employs the requisite knowledge and skill
10 in a particular matter, relevant factors include the relative complexity and
11 specialized nature of the matter, the lawyer's general experience, the lawyer's
12 training and experience in the field in question, the preparation and study the
13 lawyer is able to give the matter and whether it is feasible to refer the matter to,
14 or associate or consult with, a lawyer of established competence in the field in
15 question. In many instances, the required proficiency is that of a general
16 practitioner. Expertise in a particular field of law may be required in some
17 circumstances.

18

19 [2] A lawyer need not necessarily have special training or prior experience to
20 handle legal problems of a type with which the lawyer is unfamiliar. A newly
21 admitted lawyer can be as competent as a practitioner with long experience.
22 Some important legal skills, such as the analysis of precedent, the evaluation of
23 evidence and legal drafting, are required in all legal problems. Perhaps the most
24 fundamental legal skill consists of determining what kind of legal problems a
25 situation may involve, a skill that necessarily transcends any particular
26 specialized knowledge. A lawyer can provide adequate representation in a wholly
27 novel field through necessary study. Competent representation can also be
28 provided through the association of a lawyer of established competence in the
29 field in question.

30

31 [3] In an emergency a lawyer may give advice or assistance in a matter in
32 which the lawyer does not have the skill ordinarily required where referral to or
33 consultation or association with another lawyer would be impractical. Even in an
34 emergency, however, assistance should be limited to that reasonably necessary
35 in the circumstances, for ill-considered action under emergency conditions can
36 jeopardize the client's interest.

37

38 [4] A lawyer may accept representation where the requisite level of
39 competence can be achieved by reasonable preparation. This applies as well to
40 a lawyer who is appointed as counsel for an unrepresented person. See also
41 Rule 6.2.

42

43 *Thoroughness and Preparation*

44

45 [5] Competent handling of a particular matter includes inquiry into and
46 analysis of the factual and legal elements of the problem, and use of methods

1 and procedures meeting the standards of competent practitioners. It also
2 includes adequate preparation. The required attention and preparation are
3 determined in part by what is at stake; major litigation and complex transactions
4 ordinarily require more extensive treatment than matters of lesser complexity and
5 consequence. An agreement between the lawyer and the client regarding the
6 scope of the representation may limit the matters for which the lawyer is
7 responsible. See Rule 1.2(c).

8

9 *Maintaining Competence*

10

11 [6] To maintain the requisite knowledge and skill, a lawyer should keep
12 abreast of changes in the law and its practice, engage in continuing study and
13 education and comply with all continuing legal education requirements to which
14 the lawyer is subject.

15

16 **SCR 20:1.2 Scope of representation and allocation of authority between**
17 **lawyer and client**

18

19 (a) A Subject to paragraphs (c) and (d), a lawyer shall abide by a client's
20 decisions concerning the objectives of representation, subject to paragraphs (c),
21 (d) and (e), and, as required by Rule 1.4, shall consult with the client as to the
22 means by which they are to be pursued. A lawyer may take such action on behalf
23 of the client as is impliedly authorized to carry out the representation. A lawyer
24 shall abide by a client's decision whether to accept an offer of settlement or settle
25 a matter. In a criminal case or any proceeding that could result in deprivation of
26 liberty, the lawyer shall abide by the client's decision, after consultation with the
27 lawyer, as to a plea to be entered, whether to waive jury trial and whether the client
28 will testify.

29

30 (b) A lawyer's representation of a client, including representation by
31 appointment, does not constitute an endorsement of the client's political,
32 economic, social or moral views or activities.

33

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

37

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

43

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

1
2 **Wisconsin Committee Comment**
3

4 The Committee has retained in paragraph (a) the application of the duties
5 stated to "any proceeding that could result in deprivation of liberty." The Model
6 Rule does not include this language.
7

8 **ABA Comment**
9

10 *Allocation of Authority between Client and Lawyer*
11

12 [1] Paragraph (a) confers upon the client the ultimate authority to determine
13 the purposes to be served by legal representation, within the limits imposed by
14 law and the lawyer's professional obligations. The decisions specified in
15 paragraph (a), such as whether to settle a civil matter, must also be made by the
16 client. See Rule 1.4(a)(1) for the lawyer's duty to communicate with the client
17 about such decisions. With respect to the means by which the client's objectives
18 are to be pursued, the lawyer shall consult with the client as required by Rule
19 1.4(a)(2) and may take such action as is impliedly authorized to carry out the
20 representation.
21

22 [2] On occasion, however, a lawyer and a client may disagree about the
23 means to be used to accomplish the client's objectives. Clients normally defer to
24 the special knowledge and skill of their lawyer with respect to the means to be
25 used to accomplish their objectives, particularly with respect to technical, legal
26 and tactical matters. Conversely, lawyers usually defer to the client regarding
27 such questions as the expense to be incurred and concern for third persons who
28 might be adversely affected. Because of the varied nature of the matters about
29 which a lawyer and client might disagree and because the actions in question
30 may implicate the interests of a tribunal or other persons, this Rule does not
31 prescribe how such disagreements are to be resolved. Other law, however, may
32 be applicable and should be consulted by the lawyer. The lawyer should also
33 consult with the client and seek a mutually acceptable resolution of the
34 disagreement. If such efforts are unavailing and the lawyer has a fundamental
35 disagreement with the client, the lawyer may withdraw from the representation.
36 See Rule 1.16(b)(4). Conversely, the client may resolve the disagreement by
37 discharging the lawyer. See Rule 1.16(a)(3).
38

39 [3] At the outset of a representation, the client may authorize the lawyer to
40 take specific action on the client's behalf without further consultation. Absent a
41 material change in circumstances and subject to Rule 1.4, a lawyer may rely on
42 such an advance authorization. The client may, however, revoke such authority
43 at any time.
44

1 [4] In a case in which the client appears to be suffering diminished capacity,
2 the lawyer's duty to abide by the client's decisions is to be guided by reference to
3 Rule 1.14.

4

5 *Independence from Client's Views or Activities*

6

7 [5] Legal representation should not be denied to people who are unable to
8 afford legal services, or whose cause is controversial or the subject of popular
9 disapproval. By the same token, representing a client does not constitute
10 approval of the client's views or activities.

11

12 *Agreements Limiting Scope of Representation*

13

14 [6] The scope of services to be provided by a lawyer may be limited by
15 agreement with the client or by the terms under which the lawyer's services are
16 made available to the client. When a lawyer has been retained by an insurer to
17 represent an insured, for example, the representation may be limited to matters
18 related to the insurance coverage. A limited representation may be appropriate
19 because the client has limited objectives for the representation. In addition, the
20 terms upon which representation is undertaken may exclude specific means that
21 might otherwise be used to accomplish the client's objectives. Such limitations
22 may exclude actions that the client thinks are too costly or that the lawyer
23 regards as repugnant or imprudent.

24

25 [7] Although this Rule affords the lawyer and client substantial latitude to limit
26 the representation, the limitation must be reasonable under the circumstances. If,
27 for example, a client's objective is limited to securing general information about
28 the law the client needs in order to handle a common and typically uncomplicated
29 legal problem, the lawyer and client may agree that the lawyer's services will be
30 limited to a brief telephone consultation. Such a limitation, however, would not be
31 reasonable if the time allotted was not sufficient to yield advice upon which the
32 client could rely. Although an agreement for a limited representation does not
33 exempt a lawyer from the duty to provide competent representation, the limitation
34 is a factor to be considered when determining the legal knowledge, skill,
35 thoroughness and preparation reasonably necessary for the representation. See
36 Rule 1.1.

37

38 [8] All agreements concerning a lawyer's representation of a client must
39 accord with the Rules of Professional Conduct and other law. See, e.g., Rules
40 1.1, 1.8 and 5.6.

41

42 *Criminal, Fraudulent and Prohibited Transactions*

43

44 [9] Paragraph (d) prohibits a lawyer from knowingly counseling or assisting a
45 client to commit a crime or fraud. This prohibition, however, does not preclude
46 the lawyer from giving an honest opinion about the actual consequences that

1 appear likely to result from a client's conduct. Nor does the fact that a client uses
2 advice in a course of action that is criminal or fraudulent of itself make a lawyer a
3 party to the course of action. There is a critical distinction between presenting an
4 analysis of legal aspects of questionable conduct and recommending the means
5 by which a crime or fraud might be committed with impunity.

6

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

18

19 [11] Where the client is a fiduciary, the lawyer may be charged with special
20 obligations in dealings with a beneficiary.

21

22 [12] Paragraph (d) applies whether or not the defrauded party is a party to the
23 transaction. Hence, a lawyer must not participate in a transaction to effectuate
24 criminal or fraudulent avoidance of tax liability. Paragraph (d) does not preclude
25 undertaking a criminal defense incident to a general retainer for legal services to
26 a lawful enterprise. The last clause of paragraph (d) recognizes that determining
27 the validity or interpretation of a statute or regulation may require a course of
28 action involving disobedience of the statute or regulation or of the interpretation
29 placed upon it by governmental authorities.

30

31 [13] If a lawyer comes to know or reasonably should know that a client
32 expects assistance not permitted by the Rules of Professional Conduct or other
33 law or if the lawyer intends to act contrary to the client's instructions, the lawyer
34 must consult with the client regarding the limitations on the lawyer's conduct. See
35 Rule 1.4(a)(5).

36

37 **SCR 20:1.3 Diligence**

38

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

41

42 **ABA Comment**

43

44 [1] A lawyer should pursue a matter on behalf of a client despite opposition,
45 obstruction or personal inconvenience to the lawyer, and take whatever lawful
46 and ethical measures are required to vindicate a client's cause or endeavor. A

1 lawyer must also act with commitment and dedication to the interests of the client
2 and with zeal in advocacy upon the client's behalf. A lawyer is not bound,
3 however, to press for every advantage that might be realized for a client. For
4 example, a lawyer may have authority to exercise professional discretion in
5 determining the means by which a matter should be pursued. See Rule 1.2. The
6 lawyer's duty to act with reasonable diligence does not require the use of
7 offensive tactics or preclude the treating of all persons involved in the legal
8 process with courtesy and respect.

9

10 [2] A lawyer's work load must be controlled so that each matter can be
11 handled competently.

12

13 [3] Perhaps no professional shortcoming is more widely resented than
14 procrastination. A client's interests often can be adversely affected by the
15 passage of time or the change of conditions; in extreme instances, as when a
16 lawyer overlooks a statute of limitations, the client's legal position may be
17 destroyed. Even when the client's interests are not affected in substance,
18 however, unreasonable delay can cause a client needless anxiety and
19 undermine confidence in the lawyer's trustworthiness. A lawyer's duty to act with
20 reasonable promptness, however, does not preclude the lawyer from agreeing to
21 a reasonable request for a postponement that will not prejudice the lawyer's
22 client.

23

24 [4] Unless the relationship is terminated as provided in Rule 1.16, a lawyer
25 should carry through to conclusion all matters undertaken for a client. If a
26 lawyer's employment is limited to a specific matter, the relationship terminates
27 when the matter has been resolved. If a lawyer has served a client over a
28 substantial period in a variety of matters, the client sometimes may assume that
29 the lawyer will continue to serve on a continuing basis unless the lawyer gives
30 notice of withdrawal. Doubt about whether a client-lawyer relationship still exists
31 should be clarified by the lawyer, preferably in writing, so that the client will not
32 mistakenly suppose the lawyer is looking after the client's affairs when the lawyer
33 has ceased to do so. For example, if a lawyer has handled a judicial or
34 administrative proceeding that produced a result adverse to the client and the
35 lawyer and the client have not agreed that the lawyer will handle the matter on
36 appeal, the lawyer must consult with the client about the possibility of appeal
37 before relinquishing responsibility for the matter. See Rule 1.4(a)(2). Whether the
38 lawyer is obligated to prosecute the appeal for the client depends on the scope of
39 the representation the lawyer has agreed to provide to the client. See Rule 1.2.

40

41 [5] To prevent neglect of client matters in the event of a sole practitioner's
42 death or disability, the duty of diligence may require that each sole practitioner
43 prepare a plan, in conformity with applicable rules, that designates another
44 competent lawyer to review client files, notify each client of the lawyer's death or
45 disability, and determine whether there is a need for immediate protective action.
46 Cf. Rule 28 of the American Bar Association Model Rules for Lawyer Disciplinary

1 Enforcement (providing for court appointment of a lawyer to inventory files and
2 take other protective action in absence of a plan providing for another lawyer to
3 protect the interests of the clients of a deceased or disabled lawyer).

4

5 **SCR 20:1.4 Communication**

6

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

9

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

13

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

16

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

18

19 (4) promptly comply with reasonable requests by the client for
20 information; and

21

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

25

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

28

29 **Wisconsin Committee Comment**

30

31 Paragraph (a)(4) differs from the Model Rule in that the words "by the client"
32 added for the sake of clarity.

33

34 **ABA Comment**

35

36 [1] Reasonable communication between the lawyer and the client is
37 necessary for the client effectively to participate in the representation.

38

39 *Communicating with Client*

40

41 [2] If these Rules require that a particular decision about the representation
42 be made by the client, paragraph (a)(1) requires that the lawyer promptly consult
43 with and secure the client's consent prior to taking action unless prior discussions
44 with the client have resolved what action the client wants the lawyer to take. For
45 example, a lawyer who receives from opposing counsel an offer of settlement in
46 a civil controversy or a proffered plea bargain in a criminal case must promptly

1 inform the client of its substance unless the client has previously indicated that
2 the proposal will be acceptable or unacceptable or has authorized the lawyer to
3 accept or to reject the offer. See Rule 1.2(a).

4

5 [3] Paragraph (a)(2) requires the lawyer to reasonably consult with the client
6 about the means to be used to accomplish the client's objectives. In some
7 situations — depending on both the importance of the action under consideration
8 and the feasibility of consulting with the client — this duty will require consultation
9 prior to taking action. In other circumstances, such as during a trial when an
10 immediate decision must be made, the exigency of the situation may require the
11 lawyer to act without prior consultation. In such cases the lawyer must
12 nonetheless act reasonably to inform the client of actions the lawyer has taken
13 on the client's behalf. Additionally, paragraph (a)(3) requires that the lawyer keep
14 the client reasonably informed about the status of the matter, such as significant
15 developments affecting the timing or the substance of the representation.

16

17 [4] A lawyer's regular communication with clients will minimize the occasions
18 on which a client will need to request information concerning the representation.
19 When a client makes a reasonable request for information, however, paragraph
20 (a)(4) requires prompt compliance with the request, or if a prompt response is not
21 feasible, that the lawyer, or a member of the lawyer's staff, acknowledge receipt
22 of the request and advise the client when a response may be expected. Client
23 telephone calls should be promptly returned or acknowledged.

24

Explaining Matters

25

26 [5] The client should have sufficient information to participate intelligently in
27 decisions concerning the objectives of the representation and the means by
28 which they are to be pursued, to the extent the client is willing and able to do so.
29 Adequacy of communication depends in part on the kind of advice or assistance
30 that is involved. For example, when there is time to explain a proposal made in a
31 negotiation, the lawyer should review all important provisions with the client
32 before proceeding to an agreement. In litigation a lawyer should explain the
33 general strategy and prospects of success and ordinarily should consult the client
34 on tactics that are likely to result in significant expense or to injure or coerce
35 others. On the other hand, a lawyer ordinarily will not be expected to describe
36 trial or negotiation strategy in detail. The guiding principle is that the lawyer
37 should fulfill reasonable client expectations for information consistent with the
38 duty to act in the client's best interests, and the client's overall requirements as to
39 the character of representation. In certain circumstances, such as when a lawyer
40 asks a client to consent to a representation affected by a conflict of interest, the
41 client must give informed consent, as defined in Rule 1.0(e).

42

43

44 [6] Ordinarily, the information to be provided is that appropriate for a client
45 who is a comprehending and responsible adult. However, fully informing the
46 client according to this standard may be impracticable, for example, where the

1 client is a child or suffers from diminished capacity. See Rule 1.14. When the
2 client is an organization or group, it is often impossible or inappropriate to inform
3 every one of its members about its legal affairs; ordinarily, the lawyer should
4 address communications to the appropriate officials of the organization. See Rule
5 1.13. Where many routine matters are involved, a system of limited or occasional
6 reporting may be arranged with the client.

7

8 *Withholding Information*

9

10 [7] In some circumstances, a lawyer may be justified in delaying transmission
11 of information when the client would be likely to react imprudently to an
12 immediate communication. Thus, a lawyer might withhold a psychiatric diagnosis
13 of a client when the examining psychiatrist indicates that disclosure would harm
14 the client. A lawyer may not withhold information to serve the lawyer's own
15 interest or convenience or the interests or convenience of another person. Rules
16 or court orders governing litigation may provide that information supplied to a
17 lawyer may not be disclosed to the client. Rule 3.4(c) directs compliance with
18 such rules or orders.

19

20 **SCR 20:1.5 Fees**

21

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

- 26
- 27 (1) the time and labor required, the novelty and difficulty of the questions
28 involved, and the skill requisite to perform the legal service properly;
- 29
- 30 (2) the likelihood, if apparent to the client, that the acceptance of the
31 particular employment will preclude other employment by the lawyer;
- 32
- 33 (3) the fee customarily charged in the locality for similar legal services;
- 34
- 35 (4) the amount involved and the results obtained;
- 36
- 37 (5) the time limitations imposed by the client or by the circumstances;
- 38
- 39 (6) the nature and length of the professional relationship with the client;
- 40
- 41 (7) the experience, reputation, and ability of the lawyer or lawyers
42 performing the services; and
- 43
- 44 (8) whether the fee is fixed or contingent.
- 45

1 (b) When the lawyer has not regularly represented the client, (1) The scope
2 of the representation and the basis or rate of the fee and expenses for which the
3 client will be responsible shall be communicated to the client, preferably in
4 writing, before or within a reasonable time after commencing the representation,
5 except when the lawyer will charge a regularly represented client on the same
6 basis or rate. If it is reasonably foreseeable that the total cost of representation to
7 the client, including attorney's fees, will be \$1000 or less, the communication
8 may be oral or in writing. Any changes in the basis or rate of the fee or expenses
9 shall also be communicated in writing to the client.

10 (2) If the total cost of representation to the client, including attorney's
11 fees, is more than \$1000, the purpose and effect of any retainer or advance
12 fee that is paid to the lawyer shall be communicated in writing.

13 (3) A lawyer shall promptly respond to a client's request for information
14 concerning fees and expenses.

15 (c) A fee may be contingent on the outcome of the matter for which the
16 service is rendered, except in a matter in which a contingent fee is prohibited by
17 paragraph (d) or other law. A contingent fee agreement shall be in a writing
18 signed by the client, and shall state the method by which the fee is to be
19 determined, including the percentage or percentages that shall accrue to the
20 lawyer in the event of settlement, trial or appeal; litigation and other expenses to
21 be deducted from the recovery; and whether such expenses are to be deducted
22 before or after the contingent fee is calculated. The agreement must clearly notify
23 the client of any expenses for which the client will be liable whether or not the
24 client is the prevailing party. Upon conclusion of a contingent fee matter, the
25 lawyer shall provide the client with a written statement stating the outcome of the
26 matter and if there is a recovery, showing the remittance to the client and the
27 method of its determination.

28 (d) A lawyer shall not enter into an arrangement for, charge, or collect a
29 contingent fee:

30 (1) in any action affecting the family, including but not limited to divorce,
31 legal separation, annulment, determination of paternity, setting of support and
32 maintenance, setting of custody and physical placement, property division,
33 partition of marital property, termination of parental rights and adoption,
34 provided that nothing herein shall prohibit a contingent fee for the collection of
35 past due amounts of support or maintenance.

36 (2) for representing a defendant in a criminal case or any proceeding that
37 could result in deprivation of liberty.

38 (e) A division of a fee between lawyers who are not in the same firm may be
39 made only if the total fee is reasonable and:

1 (1) the division is ~~in proportion to~~ based on the services performed by
2 each lawyer, and the client is advised of and does not object to the participation
3 of all the lawyers involved and is informed if the fee will increase as a result of
4 their involvement; or
5

6 (2) the lawyers formerly practiced together and the payment to one lawyer
7 is pursuant to a separation or retirement agreement between them; or
8

9 (3) ~~by written agreement with the client pursuant to the referral of a matter~~
10 ~~between the lawyers,~~ each lawyer assumes joint ~~the same ethical~~
11 responsibility for the representation ~~as if the lawyers were partners in the~~
12 ~~same firm;~~ the client is informed of the terms of the referral arrangement,
13 including the share each lawyer will receive and whether the overall fee ~~will~~
14 ~~increase, and the client consents in a writing signed by the client.~~ advised of
15 ~~and does not object to the participation of all the lawyers involved and is~~
16 ~~informed if the fee will increase as result of their involvement; and~~ (3) the total
17 ~~fee is reasonable.~~
18

19
20 **Wisconsin Committee Comment**
21

22 Paragraph (b) differs from the Model Rule in requiring that fee and expense
23 information usually must be communicated to the client in writing, unless the total
24 cost of representation will be \$1000 or less. In instances when a lawyer has
25 regularly represented a client, any changes in the basis or rate of the fee or
26 expenses may be communicated in writing to the client by a proper reference on
27 the periodic billing statement provided to the client within a reasonable time after
28 the basis or rate of the fee or expenses has been changed. The communication
29 to the client through the billing statement should clearly indicate that a change in
30 the basis or rate of the fee or expenses has occurred along with an indication of
31 the new basis or rate of the fee or expenses. A lawyer should advise the client at
32 the time of commencement of representation of the likelihood of a periodic
33 change in the basis or rate of the fee or expenses that will be charged to the
34 client.
35

36 In addition, paragraph (b) differs from the Model Rule in requiring that the
37 purpose and effect of any retainer or advance fee paid to the lawyer shall be
38 communicated in writing and that a lawyer shall promptly respond to a client's
39 request for information concerning fees and expenses. The lawyer should inform
40 the client of the purpose and effect of any retainer or advance fee. Specifically,
41 the lawyer should identify whether any portion, and if so what portion, of the fee
42 is a true retainer. A true nonrefundable retainer is a fee that a lawyer charges
43 the client not necessarily for specific services to be performed but, for example,
44 to ensure the lawyer's availability whenever the client may need legal services.
45 These fees become the property of the lawyer when received and may not be
46 deposited into the lawyer's trust account. In addition, they are presumed to be

1 nonrefundable, provided that they meet the "reasonable" standard of SCR
2 20:1.5. Such retainers are to be distinguished from an "advance" which
3 generally is considered to be earned only as services are performed, and which
4 should be deposited into the lawyer's trust account. [SCR 20:1.15.] These funds
5 do not belong to the lawyer and should be returned if not earned. SCR
6 20:1.16(d) expressly provides that any "advance payment of fee that has not
7 been earned" should be returned to the client upon termination of the
8 representation. See also State Bar of Wisconsin Committee on Professional
9 Ethics, Opinion E-93-4.

10
11 Paragraph (d) preserves the more explicit statement of limitations on
12 contingent fees that has been part of Wisconsin law since the original adoption of
13 the Rules of Professional Conduct in the state.

14
15 Paragraph (e) differs from the Model Rule in several respects. The division of
16 a fee "based on" rather than "in proportion to" the services performed clarifies
17 that fee divisions need not consist of a percentage calculation. The rule also
18 recognizes that lawyers who formerly practiced together may divide a fee
19 pursuant to a separation or retirement agreement between them. In addition, the
20 standards governing referral arrangements are made more explicit.

21
22 **ABA Comment**

23
24 *Reasonableness of Fee and Expenses*

25
26 [1] Paragraph (a) requires that lawyers charge fees that are reasonable under
27 the circumstances. The factors specified in (1) through (8) are not exclusive. Nor
28 will each factor be relevant in each instance. Paragraph (a) also requires that
29 expenses for which the client will be charged must be reasonable. A lawyer may
30 seek reimbursement for the cost of services performed in-house, such as
31 copying, or for other expenses incurred in-house, such as telephone charges,
32 either by charging a reasonable amount to which the client has agreed in
33 advance or by charging an amount that reasonably reflects the cost incurred by
34 the lawyer.

35
36 *Basis or Rate of Fee*

37
38 [2] When the lawyer has regularly represented a client, they ordinarily will
39 have evolved an understanding concerning the basis or rate of the fee and the
40 expenses for which the client will be responsible. In a new client-lawyer
41 relationship, however, an understanding as to fees and expenses must be
42 promptly established. Generally, it is desirable to furnish the client with at least a
43 simple memorandum or copy of the lawyer's customary fee arrangements that
44 states the general nature of the legal services to be provided, the basis, rate or
45 total amount of the fee and whether and to what extent the client will be
46 responsible for any costs, expenses or disbursements in the course of the

1 representation. A written statement concerning the terms of the engagement
2 reduces the possibility of misunderstanding.

3

4 [3] Contingent fees, like any other fees, are subject to the reasonableness
5 standard of paragraph (a) of this Rule. In determining whether a particular
6 contingent fee is reasonable, or whether it is reasonable to charge any form of
7 contingent fee, a lawyer must consider the factors that are relevant under the
8 circumstances. Applicable law may impose limitations on contingent fees, such
9 as a ceiling on the percentage allowable, or may require a lawyer to offer clients
10 an alternative basis for the fee. Applicable law also may apply to situations other
11 than a contingent fee, for example, government regulations regarding fees in
12 certain tax matters.

13

14 *Terms of Payment*

15

16 [4] A lawyer may require advance payment of a fee, but is obliged to return
17 any unearned portion. See Rule 1.16(d). A lawyer may accept property in
18 payment for services, such as an ownership interest in an enterprise, providing
19 this does not involve acquisition of a proprietary interest in the cause of action or
20 subject matter of the litigation contrary to Rule 1.8 (i). However, a fee paid in
21 property instead of money may be subject to the requirements of Rule 1.8(a)
22 because such fees often have the essential qualities of a business transaction
23 with the client.

24

25 [5] An agreement may not be made whose terms might induce the lawyer
26 improperly to curtail services for the client or perform them in a way contrary to
27 the client's interest. For example, a lawyer should not enter into an agreement
28 whereby services are to be provided only up to a stated amount when it is
29 foreseeable that more extensive services probably will be required, unless the
30 situation is adequately explained to the client. Otherwise, the client might have to
31 bargain for further assistance in the midst of a proceeding or transaction.
32 However, it is proper to define the extent of services in light of the client's ability
33 to pay. A lawyer should not exploit a fee arrangement based primarily on hourly
34 charges by using wasteful procedures.

35

36 *Prohibited Contingent Fees*

37

38 [6] Paragraph (d) prohibits a lawyer from charging a contingent fee in a
39 domestic relations matter when payment is contingent upon the securing of a
40 divorce or upon the amount of alimony or support or property settlement to be
41 obtained. This provision does not preclude a contract for a contingent fee for
42 legal representation in connection with the recovery of post-judgment balances
43 due under support, alimony or other financial orders because such contracts do
44 not implicate the same policy concerns.

45

46 *Division of Fee*

1 [7] A division of fee is a single billing to a client covering the fee of two or
2 more lawyers who are not in the same firm. A division of fee facilitates
3 association of more than one lawyer in a matter in which neither alone could
4 serve the client as well, and most often is used when the fee is contingent and
5 the division is between a referring lawyer and a trial specialist. Paragraph (e)
6 permits the lawyers to divide a fee either on the basis of the proportion of
7 services they render or if each lawyer assumes responsibility for the
8 representation as a whole. In addition, the client must agree to the arrangement,
9 including the share that each lawyer is to receive, and the agreement must be
10 confirmed in writing. Contingent fee agreements must be in a writing signed by
11 the client and must otherwise comply with paragraph (c) of this Rule. Joint
12 responsibility for the representation entails financial and ethical responsibility for
13 the representation as if the lawyers were associated in a partnership. A lawyer
14 should only refer a matter to a lawyer whom the referring lawyer reasonably
15 believes is competent to handle the matter. See Rule 1.1.

16
17 [8] Paragraph (e) does not prohibit or regulate division of fees to be received
18 in the future for work done when lawyers were previously associated in a law
19 firm.
20

21
22 *Disputes over Fees*
23

24 [9] If a procedure has been established for resolution of fee disputes, such as
25 an arbitration or mediation procedure established by the bar, the lawyer must
26 comply with the procedure when it is mandatory, and, even when it is voluntary,
27 the lawyer should conscientiously consider submitting to it. Law may prescribe a
28 procedure for determining a lawyer's fee, for example, in representation of an
29 executor or administrator, a class or a person entitled to a reasonable fee as part
30 of the measure of damages. The lawyer entitled to such a fee and a lawyer
31 representing another party concerned with the fee should comply with the
32 prescribed procedure.

33
34 **SCR 20:1.6 Confidentiality**
35

36 (a) A lawyer shall not reveal information relating to the representation of a
37 client unless the client gives informed consent, ~~consents after consultation~~,
38 except for disclosures that are impliedly authorized in order to carry out the
39 representation, and except as stated in paragraphs (b), and (c) and (d).

40
41 (b) A lawyer shall reveal such information relating to the representation of a
42 client to the extent the lawyer reasonably believes necessary to prevent the client
43 from committing a criminal or fraudulent act that the lawyer reasonably believes is
44 likely to result in death or substantial bodily harm or in substantial injury to the
45 financial interest or property of another.

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

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

4 (2) to prevent, mitigate or rectify substantial injury to the financial interests
5 or property of another that is reasonably certain to result or has resulted from
6 the client's commission of a crime or fraud in furtherance of which the client
7 has used the lawyer's services to rectify the consequences of a client's criminal
8 or fraudulent act in the furtherance of which the lawyer's services had been
9 used;

10 (3) to secure legal advice about the lawyer's conduct under these Rules;

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

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

17 (d) ~~This rule does not prohibit a lawyer from revealing the name or identity of a~~
18 ~~client to comply with ss. 19.43 and 19.44, Stats. 1985-86, the code of ethics for~~
19 ~~public officials and employees.~~

20 **Wisconsin Committee Comment**

21 The rule retains in paragraph (b) the mandatory disclosure requirements that
22 have been a part of the Wisconsin rules since their initial adoption. Paragraph
23 (c) differs from its counterpart, Model Rule 1.6(b), as necessary to take account
24 of the mandatory disclosure requirements in Wisconsin. Due to substantive and
25 numbering differences, special care should be taken in consulting the ABA
26 Comment.

27 **ABA Comment**

28 [1] This Rule governs the disclosure by a lawyer of information relating to the
29 representation of a client during the lawyer's representation of the client. See
30 Rule 1.18 for the lawyer's duties with respect to information provided to the
31 lawyer by a prospective client, Rule 1.9(c)(2) for the lawyer's duty not to reveal
32 information relating to the lawyer's prior representation of a former client and
33 Rules 1.8(b) and 1.9(c)(1) for the lawyer's duties with respect to the use of such
34 information to the disadvantage of clients and former clients.

1 [2] A fundamental principle in the client-lawyer relationship is that, in the
2 absence of the client's informed consent, the lawyer must not reveal information
3 relating to the representation. See Rule 1.0(e) for the definition of informed
4 consent. This contributes to the trust that is the hallmark of the client-lawyer
5 relationship. The client is thereby encouraged to seek legal assistance and to
6 communicate fully and frankly with the lawyer even as to embarrassing or legally
7 damaging subject matter. The lawyer needs this information to represent the
8 client effectively and, if necessary, to advise the client to refrain from wrongful
9 conduct. Almost without exception, clients come to lawyers in order to determine
10 their rights and what is, in the complex of laws and regulations, deemed to be
11 legal and correct. Based upon experience, lawyers know that almost all clients
12 follow the advice given, and the law is upheld.

13
14 [3] The principle of client-lawyer confidentiality is given effect by related
15 bodies of law: the attorney-client privilege, the work product doctrine and the rule
16 of confidentiality established in professional ethics. The attorney-client privilege
17 and work-product doctrine apply in judicial and other proceedings in which a
18 lawyer may be called as a witness or otherwise required to produce evidence
19 concerning a client. The rule of client-lawyer confidentiality applies in situations
20 other than those where evidence is sought from the lawyer through compulsion
21 of law. The confidentiality rule, for example, applies not only to matters
22 communicated in confidence by the client but also to all information relating to
23 the representation, whatever its source. A lawyer may not disclose such
24 information except as authorized or required by the Rules of Professional
25 Conduct or other law. See also Scope.

26
27 [4] Paragraph (a) prohibits a lawyer from revealing information relating to the
28 representation of a client. This prohibition also applies to disclosures by a lawyer
29 that do not in themselves reveal protected information but could reasonably lead
30 to the discovery of such information by a third person. A lawyer's use of a
31 hypothetical to discuss issues relating to the representation is permissible so
32 long as there is no reasonable likelihood that the listener will be able to ascertain
33 the identity of the client or the situation involved.

34
35 *Authorized Disclosure*

36
37 [5] Except to the extent that the client's instructions or special circumstances
38 limit that authority, a lawyer is impliedly authorized to make disclosures about a
39 client when appropriate in carrying out the representation. In some situations, for
40 example, a lawyer may be impliedly authorized to admit a fact that cannot
41 properly be disputed or to make a disclosure that facilitates a satisfactory
42 conclusion to a matter. Lawyers in a firm may, in the course of the firm's practice,
43 disclose to each other information relating to a client of the firm, unless the client
44 has instructed that particular information be confined to specified lawyers.

45
46 *Disclosure Adverse to Client*

1
2 [6] Although the public interest is usually best served by a strict rule requiring
3 lawyers to preserve the confidentiality of information relating to the
4 representation of their clients, the confidentiality rule is subject to limited
5 exceptions. Paragraph (b)(1) recognizes the overriding value of life and physical
6 integrity and permits disclosure reasonably necessary to prevent reasonably
7 certain death or substantial bodily harm. Such harm is reasonably certain to
8 occur if it will be suffered imminently or if there is a present and substantial threat
9 that a person will suffer such harm at a later date if the lawyer fails to take action
10 necessary to eliminate the threat. Thus, a lawyer who knows that a client has
11 accidentally discharged toxic waste into a town's water supply may reveal this
12 information to the authorities if there is a present and substantial risk that a
13 person who drinks the water will contract a life-threatening or debilitating disease
14 and the lawyer's disclosure is necessary to eliminate the threat or reduce the
15 number of victims.

16
17 [7] Paragraph (b)(2) is a limited exception to the rule of confidentiality that
18 permits the lawyer to reveal information to the extent necessary to enable
19 affected persons or appropriate authorities to prevent the client from committing
20 a crime or fraud, as defined in Rule 1.0(d), that is reasonably certain to result in
21 substantial injury to the financial or property interests of another and in
22 furtherance of which the client has used or is using the lawyer's services. Such a
23 serious abuse of the client-lawyer relationship by the client forfeits the protection
24 of this Rule. The client can, of course, prevent such disclosure by refraining from
25 the wrongful conduct. Although paragraph (b)(2) does not require the lawyer to
26 reveal the client's misconduct, the lawyer may not counsel or assist the client in
27 conduct the lawyer knows is criminal or fraudulent. See Rule 1.2(d). See also
28 Rule 1.16 with respect to the lawyer's obligation or right to withdraw from the
29 representation of the client in such circumstances, and Rule 1.13(c), which
30 permits the lawyer, where the client is an organization, to reveal information
31 relating to the representation in limited circumstances.

32
33 [8] Paragraph (b)(3) addresses the situation in which the lawyer does not
34 learn of the client's crime or fraud until after it has been consummated. Although
35 the client no longer has the option of preventing disclosure by refraining from the
36 wrongful conduct, there will be situations in which the loss suffered by the
37 affected person can be prevented, rectified or mitigated. In such situations, the
38 lawyer may disclose information relating to the representation to the extent
39 necessary to enable the affected persons to prevent or mitigate reasonably
40 certain losses or to attempt to recoup their losses. Paragraph (b)(3) does not
41 apply when a person who has committed a crime or fraud thereafter employs a
42 lawyer for representation concerning that offense.

43
44 [9] A lawyer's confidentiality obligations do not preclude a lawyer from
45 securing confidential legal advice about the lawyer's personal responsibility to
46 comply with these Rules. In most situations, disclosing information to secure

1 such advice will be impliedly authorized for the lawyer to carry out the
2 representation. Even when the disclosure is not impliedly authorized, paragraph
3 (b)(4) permits such disclosure because of the importance of a lawyer's
4 compliance with the Rules of Professional Conduct.

5
6 [10] Where a legal claim or disciplinary charge alleges complicity of the
7 lawyer in a client's conduct or other misconduct of the lawyer involving
8 representation of the client, the lawyer may respond to the extent the lawyer
9 reasonably believes necessary to establish a defense. The same is true with
10 respect to a claim involving the conduct or representation of a former client. Such
11 a charge can arise in a civil, criminal, disciplinary or other proceeding and can be
12 based on a wrong allegedly committed by the lawyer against the client or on a
13 wrong alleged by a third person, for example, a person claiming to have been
14 defrauded by the lawyer and client acting together. The lawyer's right to respond
15 arises when an assertion of such complicity has been made. Paragraph (b)(5)
16 does not require the lawyer to await the commencement of an action or
17 proceeding that charges such complicity, so that the defense may be established
18 by responding directly to a third party who has made such an assertion. The right
19 to defend also applies, of course, where a proceeding has been commenced.

20
21 [11] A lawyer entitled to a fee is permitted by paragraph (b)(5) to prove the
22 services rendered in an action to collect it. This aspect of the rule expresses the
23 principle that the beneficiary of a fiduciary relationship may not exploit it to the
24 detriment of the fiduciary.

25
26 [12] Other law may require that a lawyer disclose information about a client.
27 Whether such a law supersedes Rule 1.6 is a question of law beyond the scope
28 of these Rules. When disclosure of information relating to the representation
29 appears to be required by other law, the lawyer must discuss the matter with the
30 client to the extent required by Rule 1.4. If, however, the other law supersedes
31 this Rule and requires disclosure, paragraph (b)(6) permits the lawyer to make
32 such disclosures as are necessary to comply with the law.

33
34 [13] A lawyer may be ordered to reveal information relating to the
35 representation of a client by a court or by another tribunal or governmental entity
36 claiming authority pursuant to other law to compel the disclosure. Absent
37 informed consent of the client to do otherwise, the lawyer should assert on behalf
38 of the client all nonfrivolous claims that the order is not authorized by other law or
39 that the information sought is protected against disclosure by the attorney-client
40 privilege or other applicable law. In the event of an adverse ruling, the lawyer
41 must consult with the client about the possibility of appeal to the extent required
42 by Rule 1.4. Unless review is sought, however, paragraph (b)(6) permits the
43 lawyer to comply with the court's order.

44
45 [14] Paragraph (b) permits disclosure only to the extent the lawyer reasonably
46 believes the disclosure is necessary to accomplish one of the purposes specified.

1 Where practicable, the lawyer should first seek to persuade the client to take
2 suitable action to obviate the need for disclosure. In any case, a disclosure
3 adverse to the client's interest should be no greater than the lawyer reasonably
4 believes necessary to accomplish the purpose. If the disclosure will be made in
5 connection with a judicial proceeding, the disclosure should be made in a manner
6 that limits access to the information to the tribunal or other persons having a
7 need to know it and appropriate protective orders or other arrangements should
8 be sought by the lawyer to the fullest extent practicable.
9

10 [15] Paragraph (b) permits but does not require the disclosure of information
11 relating to a client's representation to accomplish the purposes specified in
12 paragraphs (b)(1) through (b)(6). In exercising the discretion conferred by this
13 Rule, the lawyer may consider such factors as the nature of the lawyer's
14 relationship with the client and with those who might be injured by the client, the
15 lawyer's own involvement in the transaction and factors that may extenuate the
16 conduct in question. A lawyer's decision not to disclose as permitted by
17 paragraph (b) does not violate this Rule. Disclosure may be required, however,
18 by other Rules. Some Rules require disclosure only if such disclosure would be
19 permitted by paragraph (b). See Rules 1.2(d), 4.1(b), 8.1 and 8.3. Rule 3.3, on
20 the other hand, requires disclosure in some circumstances regardless of whether
21 such disclosure is permitted by this Rule. See Rule 3.3(c).

22

23 *Acting Competently to Preserve Confidentiality*

24

25 [16] A lawyer must act competently to safeguard information relating to the
26 representation of a client against inadvertent or unauthorized disclosure by the
27 lawyer or other persons who are participating in the representation of the client or
28 who are subject to the lawyer's supervision. See Rules 1.1, 5.1 and 5.3.

29 [17] When transmitting a communication that includes information relating to
30 the representation of a client, the lawyer must take reasonable precautions to
31 prevent the information from coming into the hands of unintended recipients. This
32 duty, however, does not require that the lawyer use special security measures if
33 the method of communication affords a reasonable expectation of privacy.
34 Special circumstances, however, may warrant special precautions. Factors to be
35 considered in determining the reasonableness of the lawyer's expectation of
36 confidentiality include the sensitivity of the information and the extent to which
37 the privacy of the communication is protected by law or by a confidentiality
38 agreement. A client may require the lawyer to implement special security
39 measures not required by this Rule or may give informed consent to the use of a
40 means of communication that would otherwise be prohibited by this Rule.
41

42

43 *Former Client*

44

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

4

5 **SCR 20:1.7 Conflicts of interest: general rule current clients**

6

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

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

11 (2) each client consents after consultation.

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

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

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

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

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

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

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

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

33 (2) the representation is not prohibited by law;

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

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

6
7 **ABA Comment**

8
9 *General Principles*

10
11 [1] Loyalty and independent judgment are essential elements in the lawyer's
12 relationship to a client. Concurrent conflicts of interest can arise from the lawyer's
13 responsibilities to another client, a former client or a third person or from the
14 lawyer's own interests. For specific Rules regarding certain concurrent conflicts
15 of interest, see Rule 1.8. For former client conflicts of interest, see Rule 1.9. For
16 conflicts of interest involving prospective clients, see Rule 1.18. For definitions of
17 "informed consent" and "confirmed in writing," see Rule 1.0(e) and (b).

18
19 [2] Resolution of a conflict of interest problem under this Rule requires the
20 lawyer to: 1) clearly identify the client or clients; 2) determine whether a conflict of
21 interest exists; 3) decide whether the representation may be undertaken despite
22 the existence of a conflict, i.e., whether the conflict is consentable; and 4) if so,
23 consult with the clients affected under paragraph (a) and obtain their informed
24 consent, confirmed in writing. The clients affected under paragraph (a) include
25 both of the clients referred to in paragraph (a)(1) and the one or more clients
26 whose representation might be materially limited under paragraph (a)(2).

27
28 [3] A conflict of interest may exist before representation is undertaken, in
29 which event the representation must be declined, unless the lawyer obtains the
30 informed consent of each client under the conditions of paragraph (b). To
31 determine whether a conflict of interest exists, a lawyer should adopt reasonable
32 procedures, appropriate for the size and type of firm and practice, to determine in
33 both litigation and non-litigation matters the persons and issues involved. See
34 also Comment to Rule 5.1. Ignorance caused by a failure to institute such
35 procedures will not excuse a lawyer's violation of this Rule. As to whether a
36 client-lawyer relationship exists or, having once been established, is continuing,
37 see Comment to Rule 1.3 and Scope.

38
39 [4] If a conflict arises after representation has been undertaken, the lawyer
40 ordinarily must withdraw from the representation, unless the lawyer has obtained
41 the informed consent of the client under the conditions of paragraph (b). See
42 Rule 1.16. Where more than one client is involved, whether the lawyer may
43 continue to represent any of the clients is determined both by the lawyer's ability
44 to comply with duties owed to the former client and by the lawyer's ability to
45 represent adequately the remaining client or clients, given the lawyer's duties to
46 the former client. See Rule 1.9. See also Comments [5] and [29].

1
2 [5] Unforeseeable developments, such as changes in corporate and other
3 organizational affiliations or the addition or realignment of parties in litigation,
4 might create conflicts in the midst of a representation, as when a company sued
5 by the lawyer on behalf of one client is bought by another client represented by
6 the lawyer in an unrelated matter. Depending on the circumstances, the lawyer
7 may have the option to withdraw from one of the representations in order to avoid
8 the conflict. The lawyer must seek court approval where necessary and take
9 steps to minimize harm to the clients. See Rule 1.16. The lawyer must continue
10 to protect the confidences of the client from whose representation the lawyer has
11 withdrawn. See Rule 1.9(c).

12

13 *Identifying Conflicts of Interest: Directly Adverse*

14

15 [6] Loyalty to a current client prohibits undertaking representation directly
16 adverse to that client without that client's informed consent. Thus, absent
17 consent, a lawyer may not act as an advocate in one matter against a person the
18 lawyer represents in some other matter, even when the matters are wholly
19 unrelated. The client as to whom the representation is directly adverse is likely to
20 feel betrayed, and the resulting damage to the client-lawyer relationship is likely
21 to impair the lawyer's ability to represent the client effectively. In addition, the
22 client on whose behalf the adverse representation is undertaken reasonably may
23 fear that the lawyer will pursue that client's case less effectively out of deference
24 to the other client, i.e., that the representation may be materially limited by the
25 lawyer's interest in retaining the current client. Similarly, a directly adverse
26 conflict may arise when a lawyer is required to cross-examine a client who
27 appears as a witness in a lawsuit involving another client, as when the testimony
28 will be damaging to the client who is represented in the lawsuit. On the other
29 hand, simultaneous representation in unrelated matters of clients whose interests
30 are only economically adverse, such as representation of competing economic
31 enterprises in unrelated litigation, does not ordinarily constitute a conflict of
32 interest and thus may not require consent of the respective clients.

33

34 [7] Directly adverse conflicts can also arise in transactional matters. For
35 example, if a lawyer is asked to represent the seller of a business in negotiations
36 with a buyer represented by the lawyer, not in the same transaction but in
37 another, unrelated matter, the lawyer could not undertake the representation
38 without the informed consent of each client.

39

40 *Identifying Conflicts of Interest: Material Limitation*

41

42 [8] Even where there is no direct adverseness, a conflict of interest exists if
43 there is a significant risk that a lawyer's ability to consider, recommend or carry
44 out an appropriate course of action for the client will be materially limited as a
45 result of the lawyer's other responsibilities or interests. For example, a lawyer
46 asked to represent several individuals seeking to form a joint venture is likely to

1 be materially limited in the lawyer's ability to recommend or advocate all possible
2 positions that each might take because of the lawyer's duty of loyalty to the
3 others. The conflict in effect forecloses alternatives that would otherwise be
4 available to the client. The mere possibility of subsequent harm does not itself
5 require disclosure and consent. The critical questions are the likelihood that a
6 difference in interests will eventuate and, if it does, whether it will materially
7 interfere with the lawyer's independent professional judgment in considering
8 alternatives or foreclose courses of action that reasonably should be pursued on
9 behalf of the client.

10

11 *Lawyer's Responsibilities to Former Clients and Other Third Persons*

12

13 [9] In addition to conflicts with other current clients, a lawyer's duties of loyalty
14 and independence may be materially limited by responsibilities to former clients
15 under Rule 1.9 or by the lawyer's responsibilities to other persons, such as
16 fiduciary duties arising from a lawyer's service as a trustee, executor or corporate
17 director.

18

19 *Personal Interest Conflicts*

20

21 [10] The lawyer's own interests should not be permitted to have an adverse
22 effect on representation of a client. For example, if the probity of a lawyer's own
23 conduct in a transaction is in serious question, it may be difficult or impossible for
24 the lawyer to give a client detached advice. Similarly, when a lawyer has
25 discussions concerning possible employment with an opponent of the lawyer's
26 client, or with a law firm representing the opponent, such discussions could
27 materially limit the lawyer's representation of the client. In addition, a lawyer may
28 not allow related business interests to affect representation, for example, by
29 referring clients to an enterprise in which the lawyer has an undisclosed financial
30 interest. See Rule 1.8 for specific Rules pertaining to a number of personal
31 interest conflicts, including business transactions with clients. See also Rule 1.10
32 (personal interest conflicts under Rule 1.7 ordinarily are not imputed to other
33 lawyers in a law firm).

34

35 [11] When lawyers representing different clients in the same matter or in
36 substantially related matters are closely related by blood or marriage, there may
37 be a significant risk that client confidences will be revealed and that the lawyer's
38 family relationship will interfere with both loyalty and independent professional
39 judgment. As a result, each client is entitled to know of the existence and
40 implications of the relationship between the lawyers before the lawyer agrees to
41 undertake the representation. Thus, a lawyer related to another lawyer, e.g., as
42 parent, child, sibling or spouse, ordinarily may not represent a client in a matter
43 where that lawyer is representing another party, unless each client gives
44 informed consent. The disqualification arising from a close family relationship is
45 personal and ordinarily is not imputed to members of firms with whom the
46 lawyers are associated. See Rule 1.10.

1 [12] A lawyer is prohibited from engaging in sexual relationships with a client
2 unless the sexual relationship predates the formation of the client-lawyer
3 relationship. See Rule 1.8(j).

4

5 *Interest of Person Paying for a Lawyer's Service*

6

7 [13] A lawyer may be paid from a source other than the client, including a co-
8 client, if the client is informed of that fact and consents and the arrangement
9 does not compromise the lawyer's duty of loyalty or independent judgment to the
10 client. See Rule 1.8(f). If acceptance of the payment from any other source
11 presents a significant risk that the lawyer's representation of the client will be
12 materially limited by the lawyer's own interest in accommodating the person
13 paying the lawyer's fee or by the lawyer's responsibilities to a payer who is also a
14 co-client, then the lawyer must comply with the requirements of paragraph (b)
15 before accepting the representation, including determining whether the conflict is
16 consentable and, if so, that the client has adequate information about the
17 material risks of the representation.

18

19 *Prohibited Representations*

20

21 [14] Ordinarily, clients may consent to representation notwithstanding a
22 conflict. However, as indicated in paragraph (b), some conflicts are
23 nonconsentable, meaning that the lawyer involved cannot properly ask for such
24 agreement or provide representation on the basis of the client's consent. When
25 the lawyer is representing more than one client, the question of consentability
26 must be resolved as to each client.

27

28 [15] Consentability is typically determined by considering whether the
29 interests of the clients will be adequately protected if the clients are permitted to
30 give their informed consent to representation burdened by a conflict of interest.
31 Thus, under paragraph (b)(1), representation is prohibited if in the circumstances
32 the lawyer cannot reasonably conclude that the lawyer will be able to provide
33 competent and diligent representation. See Rule 1.1 (competence) and Rule 1.3
34 (diligence).

35

36 [16] Paragraph (b)(2) describes conflicts that are nonconsentable because
37 the representation is prohibited by applicable law. For example, in some states
38 substantive law provides that the same lawyer may not represent more than one
39 defendant in a capital case, even with the consent of the clients, and under
40 federal criminal statutes certain representations by a former government lawyer
41 are prohibited, despite the informed consent of the former client. In addition,
42 decisional law in some states limits the ability of a governmental client, such as a
43 municipality, to consent to a conflict of interest.

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

10

11 *Informed Consent*

12

13 [18] Informed consent requires that each affected client be aware of the
14 relevant circumstances and of the material and reasonably foreseeable ways that
15 the conflict could have adverse effects on the interests of that client. See Rule
16 1.0(e) (informed consent). The information required depends on the nature of the
17 conflict and the nature of the risks involved. When representation of multiple
18 clients in a single matter is undertaken, the information must include the
19 implications of the common representation, including possible effects on loyalty,
20 confidentiality and the attorney-client privilege and the advantages and risks
21 involved. See Comments [30] and [31] (effect of common representation on
22 confidentiality).

23

24 [19] Under some circumstances it may be impossible to make the disclosure
25 necessary to obtain consent. For example, when the lawyer represents different
26 clients in related matters and one of the clients refuses to consent to the
27 disclosure necessary to permit the other client to make an informed decision, the
28 lawyer cannot properly ask the latter to consent. In some cases the alternative to
29 common representation can be that each party may have to obtain separate
30 representation with the possibility of incurring additional costs. These costs,
31 along with the benefits of securing separate representation, are factors that may
32 be considered by the affected client in determining whether common
33 representation is in the client's interests.

34

35 *Consent Confirmed in Writing*

36

37 [20] Paragraph (b) requires the lawyer to obtain the informed consent of the
38 client, confirmed in writing. Such a writing may consist of a document executed
39 by the client or one that the lawyer promptly records and transmits to the client
40 following an oral consent. See Rule 1.0(b). See also Rule 1.0(n) (writing includes
41 electronic transmission). If it is not feasible to obtain or transmit the writing at the
42 time the client gives informed consent, then the lawyer must obtain or transmit it
43 within a reasonable time thereafter. See Rule 1.0(b). The requirement of a writing
44 does not supplant the need in most cases for the lawyer to talk with the client, to
45 explain the risks and advantages, if any, of representation burdened with a
46 conflict of interest, as well as reasonably available alternatives, and to afford the

1 client a reasonable opportunity to consider the risks and alternatives and to raise
2 questions and concerns. Rather, the writing is required in order to impress upon
3 clients the seriousness of the decision the client is being asked to make and to
4 avoid disputes or ambiguities that might later occur in the absence of a writing.

5

6 *Revoking Consent*

7

8 [21] A client who has given consent to a conflict may revoke the consent and,
9 like any other client, may terminate the lawyer's representation at any time.
10 Whether revoking consent to the client's own representation precludes the lawyer
11 from continuing to represent other clients depends on the circumstances,
12 including the nature of the conflict, whether the client revoked consent because
13 of a material change in circumstances, the reasonable expectations of the other
14 client and whether material detriment to the other clients or the lawyer would
15 result.

16

17 *Consent to Future Conflict*

18

19 [22] Whether a lawyer may properly request a client to waive conflicts that
20 might arise in the future is subject to the test of paragraph (b). The effectiveness
21 of such waivers is generally determined by the extent to which the client
22 reasonably understands the material risks that the waiver entails. The more
23 comprehensive the explanation of the types of future representations that might
24 arise and the actual and reasonably foreseeable adverse consequences of those
25 representations, the greater the likelihood that the client will have the requisite
26 understanding. Thus, if the client agrees to consent to a particular type of conflict
27 with which the client is already familiar, then the consent ordinarily will be
28 effective with regard to that type of conflict. If the consent is general and open-
29 ended, then the consent ordinarily will be ineffective, because it is not reasonably
30 likely that the client will have understood the material risks involved. On the other
31 hand, if the client is an experienced user of the legal services involved and is
32 reasonably informed regarding the risk that a conflict may arise, such consent is
33 more likely to be effective, particularly if, e.g., the client is independently
34 represented by other counsel in giving consent and the consent is limited to
35 future conflicts unrelated to the subject of the representation. In any case,
36 advance consent cannot be effective if the circumstances that materialize in the
37 future are such as would make the conflict nonconsentable under paragraph (b).

38

39 *Conflicts in Litigation*

40

41 [23] Paragraph (b)(3) prohibits representation of opposing parties in the same
42 litigation, regardless of the clients' consent. On the other hand, simultaneous
43 representation of parties whose interests in litigation may conflict, such as
44 plaintiffs or defendants, is governed by paragraph (a)(2). A conflict may exist
45 by reason of substantial discrepancy in the parties' testimony, incompatibility in
46 positions in relation to an opposing party or the fact that there are substantially

1 different possibilities of settlement of the claims or liabilities in question. Such
2 conflicts can arise in criminal cases as well as civil. The potential for conflict of
3 interest in representing multiple defendants in a criminal case is so grave that
4 ordinarily a lawyer should decline to represent more than one codefendant. On
5 the other hand, common representation of persons having similar interests in civil
6 litigation is proper if the requirements of paragraph (b) are met.

7

8 [24] Ordinarily a lawyer may take inconsistent legal positions in different
9 tribunals at different times on behalf of different clients. The mere fact that
10 advocating a legal position on behalf of one client might create precedent
11 adverse to the interests of a client represented by the lawyer in an unrelated
12 matter does not create a conflict of interest. A conflict of interest exists, however,
13 if there is a significant risk that a lawyer's action on behalf of one client will
14 materially limit the lawyer's effectiveness in representing another client in a
15 different case; for example, when a decision favoring one client will create a
16 precedent likely to seriously weaken the position taken on behalf of the other
17 client. Factors relevant in determining whether the clients need to be advised of
18 the risk include: where the cases are pending, whether the issue is substantive or
19 procedural, the temporal relationship between the matters, the significance of the
20 issue to the immediate and long-term interests of the clients involved and the
21 clients' reasonable expectations in retaining the lawyer. If there is significant risk
22 of material limitation, then absent informed consent of the affected clients, the
23 lawyer must refuse one of the representations or withdraw from one or both
24 matters.

25

26 [25] When a lawyer represents or seeks to represent a class of plaintiffs or
27 defendants in a class-action lawsuit, unnamed members of the class are
28 ordinarily not considered to be clients of the lawyer for purposes of applying
29 paragraph (a)(1) of this Rule. Thus, the lawyer does not typically need to get the
30 consent of such a person before representing a client suing the person in an
31 unrelated matter. Similarly, a lawyer seeking to represent an opponent in a class
32 action does not typically need the consent of an unnamed member of the class
33 whom the lawyer represents in an unrelated matter.

34

35 *Nonlitigation Conflicts*

36

37 [26] Conflicts of interest under paragraphs (a)(1) and (a)(2) arise in contexts
38 other than litigation. For a discussion of directly adverse conflicts in transactional
39 matters, see Comment [7]. Relevant factors in determining whether there is
40 significant potential for material limitation include the duration and intimacy of the
41 lawyer's relationship with the client or clients involved, the functions being
42 performed by the lawyer, the likelihood that disagreements will arise and the
43 likely prejudice to the client from the conflict. The question is often one of
44 proximity and degree. See Comment [8].

45

1 [27] For example, conflict questions may arise in estate planning and estate
2 administration. A lawyer may be called upon to prepare wills for several family
3 members, such as husband and wife, and, depending upon the circumstances, a
4 conflict of interest may be present. In estate administration the identity of the
5 client may be unclear under the law of a particular jurisdiction. Under one view,
6 the client is the fiduciary; under another view the client is the estate or trust,
7 including its beneficiaries. In order to comply with conflict of interest rules, the
8 lawyer should make clear the lawyer's relationship to the parties involved.
9

10 [28] Whether a conflict is consentable depends on the circumstances. For
11 example, a lawyer may not represent multiple parties to a negotiation whose
12 interests are fundamentally antagonistic to each other, but common
13 representation is permissible where the clients are generally aligned in interest
14 even though there is some difference in interest among them. Thus, a lawyer
15 may seek to establish or adjust a relationship between clients on an amicable
16 and mutually advantageous basis; for example, in helping to organize a business
17 in which two or more clients are entrepreneurs, working out the financial
18 reorganization of an enterprise in which two or more clients have an interest or
19 arranging a property distribution in settlement of an estate. The lawyer seeks to
20 resolve potentially adverse interests by developing the parties' mutual interests.
21 Otherwise, each party might have to obtain separate representation, with the
22 possibility of incurring additional cost, complication or even litigation. Given these
23 and other relevant factors, the clients may prefer that the lawyer act for all of
24 them.
25

26 *Special Considerations in Common Representation*

27

28 [29] In considering whether to represent multiple clients in the same matter, a
29 lawyer should be mindful that if the common representation fails because the
30 potentially adverse interests cannot be reconciled, the result can be additional
31 cost, embarrassment and recrimination. Ordinarily, the lawyer will be forced to
32 withdraw from representing all of the clients if the common representation fails. In
33 some situations, the risk of failure is so great that multiple representation is
34 plainly impossible. For example, a lawyer cannot undertake common
35 representation of clients where contentious litigation or negotiations between
36 them are imminent or contemplated. Moreover, because the lawyer is required to
37 be impartial between commonly represented clients, representation of multiple
38 clients is improper when it is unlikely that impartiality can be maintained.
39 Generally, if the relationship between the parties has already assumed
40 antagonism, the possibility that the clients' interests can be adequately served by
41 common representation is not very good. Other relevant factors are whether the
42 lawyer subsequently will represent both parties on a continuing basis and
43 whether the situation involves creating or terminating a relationship between the
44 parties.
45

1 [30] A particularly important factor in determining the appropriateness of
2 common representation is the effect on client-lawyer confidentiality and the
3 attorney-client privilege. With regard to the attorney-client privilege, the prevailing
4 rule is that, as between commonly represented clients, the privilege does not
5 attach. Hence, it must be assumed that if litigation eventuates between the
6 clients, the privilege will not protect any such communications, and the clients
7 should be so advised.

8
9 [31] As to the duty of confidentiality, continued common representation will
10 almost certainly be inadequate if one client asks the lawyer not to disclose to the
11 other client information relevant to the common representation. This is so
12 because the lawyer has an equal duty of loyalty to each client, and each client
13 has the right to be informed of anything bearing on the representation that might
14 affect that client's interests and the right to expect that the lawyer will use that
15 information to that client's benefit. See Rule 1.4. The lawyer should, at the outset
16 of the common representation and as part of the process of obtaining each
17 client's informed consent, advise each client that information will be shared and
18 that the lawyer will have to withdraw if one client decides that some matter
19 material to the representation should be kept from the other. In limited
20 circumstances, it may be appropriate for the lawyer to proceed with the
21 representation when the clients have agreed, after being properly informed, that
22 the lawyer will keep certain information confidential. For example, the lawyer may
23 reasonably conclude that failure to disclose one client's trade secrets to another
24 client will not adversely affect representation involving a joint venture between
25 the clients and agree to keep that information confidential with the informed
26 consent of both clients.

27
28 [32] When seeking to establish or adjust a relationship between clients, the
29 lawyer should make clear that the lawyer's role is not that of partisanship
30 normally expected in other circumstances and, thus, that the clients may be
31 required to assume greater responsibility for decisions than when each client is
32 separately represented. Any limitations on the scope of the representation made
33 necessary as a result of the common representation should be fully explained to
34 the clients at the outset of the representation. See Rule 1.2(c).

35
36 [33] Subject to the above limitations, each client in the common
37 representation has the right to loyal and diligent representation and the protection
38 of Rule 1.9 concerning the obligations to a former client. The client also has the
39 right to discharge the lawyer as stated in Rule 1.16.

40
41 *Organizational Clients*

42
43 [34] A lawyer who represents a corporation or other organization does not, by
44 virtue of that representation, necessarily represent any constituent or affiliated
45 organization, such as a parent or subsidiary. See Rule 1.13(a). Thus, the lawyer
46 for an organization is not barred from accepting representation adverse to an

1 affiliate in an unrelated matter, unless the circumstances are such that the
2 affiliate should also be considered a client of the lawyer, there is an
3 understanding between the lawyer and the organizational client that the lawyer
4 will avoid representation adverse to the client's affiliates, or the lawyer's
5 obligations to either the organizational client or the new client are likely to limit
6 materially the lawyer's representation of the other client.

7

8 [35] A lawyer for a corporation or other organization who is also a member of
9 its board of directors should determine whether the responsibilities of the two
10 roles may conflict. The lawyer may be called on to advise the corporation in
11 matters involving actions of the directors. Consideration should be given to the
12 frequency with which such situations may arise, the potential intensity of the
13 conflict, the effect of the lawyer's resignation from the board and the possibility of
14 the corporation's obtaining legal advice from another lawyer in such situations. If
15 there is material risk that the dual role will compromise the lawyer's
16 independence of professional judgment, the lawyer should not serve as a director
17 or should cease to act as the corporation's lawyer when conflicts of interest arise.
18 The lawyer should advise the other members of the board that in some
19 circumstances matters discussed at board meetings while the lawyer is present
20 in the capacity of director might not be protected by the attorney-client privilege
21 and that conflict of interest considerations might require the lawyer's recusal as a
22 director or might require the lawyer and the lawyer's firm to decline
23 representation of the corporation in a matter.

24

25 SCR 20:1.8 Conflict of interest: prohibited transactions

26

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

30

31 (1) the transaction and terms on which the lawyer acquires the interest are
32 fair and reasonable to the client and are fully disclosed and transmitted in
33 writing ~~to the client~~ in a manner which that can be reasonably understood by
34 the client;

35

36 (2) the client is advised in writing of the desirability of seeking and is given
37 a reasonable opportunity to seek the advice of independent legal counsel in
38 on the transaction; and

39

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

44

45 (b) A lawyer shall not use information relating to representation of a client to
46 the disadvantage of the client unless the client consents after consultation gives

1 informed consent, except as permitted or required by Rule 1.6 or Rule 3.3 these
2 Rules.

3
4 (c) A lawyer shall not solicit any substantial gift from a client, including a
5 testamentary gift, nor prepare an instrument giving the lawyer or a person related to
6 the lawyer as parent, child, sibling, or spouse any substantial gift from a client,
7 including a testamentary gift, except where (1) the client is related to the donee, (2)
8 the donee is a natural object of the bounty of the client, (3) there is no reasonable
9 ground to anticipate a contest, or a claim of undue influence or for the public to lose
10 confidence in the integrity of the bar and (4) the amount of the gift or bequest is
11 reasonable and natural under the circumstances. For purposes of this paragraph,
12 related persons include a spouse, child, grandchild, parent, grandparent or other
13 relative or individual with whom the lawyer or the client maintains a close, familial
14 relationship.

15
16 (d) Prior to the conclusion of representation of a client, a lawyer shall not
17 make or negotiate an agreement giving the lawyer literary or media rights to a
18 portrayal or account based in substantial part on information relating to the
19 representation.

20
21 (e) A lawyer shall not provide financial assistance to a client in connection with
22 pending or contemplated litigation, except that:

23
24 (1) a lawyer may advance court costs and expenses of litigation, the
25 repayment of which may be contingent on the outcome of the matter; and

26
27 (2) a lawyer representing an indigent client may pay court costs and
28 expenses of litigation on behalf of the client.

29
30 (f) A lawyer shall not accept compensation for representing a client from one
31 other than the client unless:

32
33 (1) the client consents after consultation gives informed consent, provided
34 that no further consent or consultation need be given if the client has given
35 consent pursuant to the terms of an agreement or policy requiring an
36 organization or insurer to retain counsel on the client's behalf;

37
38 (2) there is no interference with the lawyer's independence of professional
39 judgment or with the client-lawyer relationship; and

40
41 (3) information relating to representation of a client is protected as
42 required by Rule 1.6.

43
44 (g) A lawyer who represents two or more clients shall not participate in
45 making an aggregate settlement of the claims of or against the clients, or in a
46 criminal case an aggregated agreement as to guilty or nolo contendere pleas,

1 unless each client ~~consents after consultation including gives informed consent, in~~
2 ~~a writing signed by the client. The lawyer's disclosure of shall include~~ the
3 existence and nature of all the claims or pleas involved and of the participation of
4 each person in the settlement.

5
6 (h) A lawyer shall not:

7
8 (1) ~~make an agreement prospectively limiting the lawyer's liability to a~~
9 ~~client for malpractice unless permitted by law and the client is independently~~
10 ~~represented in making the agreement;~~; or

11
12 (2) ~~settle a claim or potential claim for such liability with an unrepresented~~
13 ~~client or former client without first advising unless that person is advised~~ in
14 ~~writing that of the desirability of seeking and is given a reasonable opportunity~~
15 ~~to seek the advice of independent representation is appropriate legal counsel~~
16 ~~in connection therewith;~~; or

17
18 (3) ~~make an agreement limiting the client's right to report the lawyer's~~
19 ~~conduct to disciplinary authorities.~~

20
21 (i) ~~A lawyer related to another lawyer as parent, child, sibling or spouse shall~~
22 ~~not represent a client in a representation directly adverse to a person whom the~~
23 ~~lawyer knows is represented by the other lawyer except upon consent by the~~
24 ~~client after consultation regarding the relationship.~~

25
26 (i) A lawyer shall not acquire a proprietary interest in the cause of action or
27 subject matter of litigation the lawyer is conducting for a client, except that the
28 lawyer may:

29
30 (1) acquire a lien ~~granted authorized~~ by law to secure the lawyer's fee or
31 expenses; and

32
33 (2) contract with a client for a reasonable contingent fee in a civil case.

34
35 (j) (k)(1) In this paragraph:

36
37 (i) ~~"Sexual relations" means sexual intercourse or any other intentional~~
38 ~~touching of the intimate parts of a person or causing the person to touch~~
39 ~~the intimate parts of the lawyer.~~

40
41 (ii) ~~If the client is an organization, "client" means any individual who~~
42 ~~oversees the representation and gives instructions to the lawyer on behalf of~~
43 ~~the organization.~~

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

4

5 (1) In this paragraph, "sexual relations" means sexual intercourse or any
6 other intentional touching of the intimate parts of a person or causing the
7 person to touch the intimate parts of the lawyer.

8

9 (2) When the client is an organization, a lawyer for the organization
10 (whether inside counsel or outside counsel) shall not have sexual relations
11 with a constituent of the organization who supervises, directs or regularly
12 consults with that lawyer concerning the organization's legal matters.

13

14 (3) In-house attorneys representing governmental or corporate entities are
15 governed by SCR 20:1.7 (b) rather than by this paragraph with respect to sexual
16 relations with other employees of the entity they represent.

17

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

20

21 Wisconsin Committee Comment

22

23 This Rule differs from the Model Rule in three respects. Paragraph (c)
24 incorporates the decisions in State v. Collentine, 39 Wis. 2d 375, 159 NW2d 50
25 (1968), and State v. Beaudry, 53 Wis. 2d 148, 191 NW2d 842 (1971). Paragraph
26 (h) prohibits a lawyer from making an agreement limiting the client's right to report
27 the lawyer's conduct to disciplinary authorities. Paragraph (j) includes language
28 from ABA Comment [19].

29

30 ABA Comment

31

32 *Business Transactions Between Client and Lawyer*

33

34 [1] A lawyer's legal skill and training, together with the relationship of trust and
35 confidence between lawyer and client, create the possibility of overreaching
36 when the lawyer participates in a business, property or financial transaction with
37 a client, for example, a loan or sales transaction or a lawyer investment on behalf
38 of a client. The requirements of paragraph (a) must be met even when the
39 transaction is not closely related to the subject matter of the representation, as
40 when a lawyer drafting a will for a client learns that the client needs money for
41 unrelated expenses and offers to make a loan to the client. The Rule applies to
42 lawyers engaged in the sale of goods or services related to the practice of law,
43 for example, the sale of title insurance or investment services to existing clients
44 of the lawyer's legal practice. See Rule 5.7. It also applies to lawyers purchasing
45 property from estates they represent. It does not apply to ordinary fee
46 arrangements between client and lawyer, which are governed by Rule 1.5,

1 although its requirements must be met when the lawyer accepts an interest in the
2 client's business or other nonmonetary property as payment of all or part of a fee.
3 In addition, the Rule does not apply to standard commercial transactions
4 between the lawyer and the client for products or services that the client
5 generally markets to others, for example, banking or brokerage services, medical
6 services, products manufactured or distributed by the client, and utilities'
7 services. In such transactions, the lawyer has no advantage in dealing with the
8 client, and the restrictions in paragraph (a) are unnecessary and impracticable.

9

10 [2] Paragraph (a)(1) requires that the transaction itself be fair to the client and
11 that its essential terms be communicated to the client, in writing, in a manner that
12 can be reasonably understood. Paragraph (a)(2) requires that the client also be
13 advised, in writing, of the desirability of seeking the advice of independent legal
14 counsel. It also requires that the client be given a reasonable opportunity to
15 obtain such advice. Paragraph (a)(3) requires that the lawyer obtain the client's
16 informed consent, in a writing signed by the client, both to the essential terms of
17 the transaction and to the lawyer's role. When necessary, the lawyer should
18 discuss both the material risks of the proposed transaction, including any risk
19 presented by the lawyer's involvement, and the existence of reasonably available
20 alternatives and should explain why the advice of independent legal counsel is
21 desirable. See Rule 1.0(e) (definition of informed consent).

22

23 [3] The risk to a client is greatest when the client expects the lawyer to
24 represent the client in the transaction itself or when the lawyer's financial interest
25 otherwise poses a significant risk that the lawyer's representation of the client will
26 be materially limited by the lawyer's financial interest in the transaction. Here the
27 lawyer's role requires that the lawyer must comply, not only with the requirements
28 of paragraph (a), but also with the requirements of Rule 1.7. Under that Rule, the
29 lawyer must disclose the risks associated with the lawyer's dual role as both legal
30 adviser and participant in the transaction, such as the risk that the lawyer will
31 structure the transaction or give legal advice in a way that favors the lawyer's
32 interests at the expense of the client. Moreover, the lawyer must obtain the
33 client's informed consent. In some cases, the lawyer's interest may be such that
34 Rule 1.7 will preclude the lawyer from seeking the client's consent to the
35 transaction.

36

37 [4] If the client is independently represented in the transaction, paragraph
38 (a)(2) of this Rule is inapplicable, and the paragraph (a)(1) requirement for full
39 disclosure is satisfied either by a written disclosure by the lawyer involved in the
40 transaction or by the client's independent counsel. The fact that the client was
41 independently represented in the transaction is relevant in determining whether
42 the agreement was fair and reasonable to the client as paragraph (a)(1) further
43 requires.

44

45 *Use of Information Related to Representation*

46

1 [5] Use of information relating to the representation to the disadvantage of the
2 client violates the lawyer's duty of loyalty. Paragraph (b) applies when the
3 information is used to benefit either the lawyer or a third person, such as another
4 client or business associate of the lawyer. For example, if a lawyer learns that a
5 client intends to purchase and develop several parcels of land, the lawyer may
6 not use that information to purchase one of the parcels in competition with the
7 client or to recommend that another client make such a purchase. The Rule does
8 not prohibit uses that do not disadvantage the client. For example, a lawyer who
9 learns a government agency's interpretation of trade legislation during the
10 representation of one client may properly use that information to benefit other
11 clients. Paragraph (b) prohibits disadvantageous use of client information unless
12 the client gives informed consent, except as permitted or required by these
13 Rules. See Rules 1.2(d), 1.6, 1.9(c), 3.3, 4.1(b), 8.1 and 8.3.

14

15 *Gifts to Lawyers*

16

17 [6] A lawyer may accept a gift from a client, if the transaction meets general
18 standards of fairness. For example, a simple gift such as a present given at a
19 holiday or as a token of appreciation is permitted. If a client offers the lawyer a
20 more substantial gift, paragraph (c) does not prohibit the lawyer from accepting it,
21 although such a gift may be voidable by the client under the doctrine of undue
22 influence, which treats client gifts as presumptively fraudulent. In any event, due
23 to concerns about overreaching and imposition on clients, a lawyer may not
24 suggest that a substantial gift be made to the lawyer or for the lawyer's benefit,
25 except where the lawyer is related to the client as set forth in paragraph (c).

26

27 [7] If effectuation of a substantial gift requires preparing a legal instrument
28 such as a will or conveyance the client should have the detached advice that
29 another lawyer can provide. The sole exception to this Rule is where the client is
30 a relative of the donee.

31

32 [8] This Rule does not prohibit a lawyer from seeking to have the lawyer or a
33 partner or associate of the lawyer named as executor of the client's estate or to
34 another potentially lucrative fiduciary position. Nevertheless, such appointments
35 will be subject to the general conflict of interest provision in Rule 1.7 when there
36 is a significant risk that the lawyer's interest in obtaining the appointment will
37 materially limit the lawyer's independent professional judgment in advising the
38 client concerning the choice of an executor or other fiduciary. In obtaining the
39 client's informed consent to the conflict, the lawyer should advise the client
40 concerning the nature and extent of the lawyer's financial interest in the
41 appointment, as well as the availability of alternative candidates for the position.

42

43 *Literary Rights*

44

45 [9] An agreement by which a lawyer acquires literary or media rights
46 concerning the conduct of the representation creates a conflict between the

1 interests of the client and the personal interests of the lawyer. Measures suitable
2 in the representation of the client may detract from the publication value of an
3 account of the representation. Paragraph (d) does not prohibit a lawyer
4 representing a client in a transaction concerning literary property from agreeing
5 that the lawyer's fee shall consist of a share in ownership in the property, if the
6 arrangement conforms to Rule 1.5 and paragraphs (a) and (i).

7

8 *Financial Assistance*

9

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

21

22 *Person Paying for a Lawyer's Services*

23

24 [11] Lawyers are frequently asked to represent a client under circumstances
25 in which a third person will compensate the lawyer, in whole or in part. The third
26 person might be a relative or friend, an indemnitor (such as a liability insurance
27 company) or a co-client (such as a corporation sued along with one or more of its
28 employees). Because third-party payers frequently have interests that differ from
29 those of the client, including interests in minimizing the amount spent on the
30 representation and in learning how the representation is progressing, lawyers are
31 prohibited from accepting or continuing such representations unless the lawyer
32 determines that there will be no interference with the lawyer's independent
33 professional judgment and there is informed consent from the client. See also
34 Rule 5.4(c) (prohibiting interference with a lawyer's professional judgment by one
35 who recommends, employs or pays the lawyer to render legal services for
36 another).

37

38 [12] Sometimes, it will be sufficient for the lawyer to obtain the client's
39 informed consent regarding the fact of the payment and the identity of the third-
40 party payer. If, however, the fee arrangement creates a conflict of interest for the
41 lawyer, then the lawyer must comply with Rule 1.7. The lawyer must also
42 conform to the requirements of Rule 1.6 concerning confidentiality. Under Rule
43 1.7(a), a conflict of interest exists if there is significant risk that the lawyer's
44 representation of the client will be materially limited by the lawyer's own interest
45 in the fee arrangement or by the lawyer's responsibilities to the third-party payer
46 (for example, when the third-party payer is a co-client). Under Rule 1.7(b), the

1 lawyer may accept or continue the representation with the informed consent of
2 each affected client, unless the conflict is nonconsentable under that paragraph.
3 Under Rule 1.7(b), the informed consent must be confirmed in writing.

4

5 *Aggregate Settlements*

6

7 [13] Differences in willingness to make or accept an offer of settlement are
8 among the risks of common representation of multiple clients by a single lawyer.
9 Under Rule 1.7, this is one of the risks that should be discussed before
10 undertaking the representation, as part of the process of obtaining the clients'
11 informed consent. In addition, Rule 1.2(a) protects each client's right to have the
12 final say in deciding whether to accept or reject an offer of settlement and in
13 deciding whether to enter a guilty or nolo contendere plea in a criminal case. The
14 rule stated in this paragraph is a corollary of both these Rules and provides that,
15 before any settlement offer or plea bargain is made or accepted on behalf of
16 multiple clients, the lawyer must inform each of them about all the material terms
17 of the settlement, including what the other clients will receive or pay if the
18 settlement or plea offer is accepted. See also Rule 1.0(e) (definition of informed
19 consent). Lawyers representing a class of plaintiffs or defendants, or those
20 proceeding derivatively, may not have a full client-lawyer relationship with each
21 member of the class; nevertheless, such lawyers must comply with applicable
22 rules regulating notification of class members and other procedural requirements
23 designed to ensure adequate protection of the entire class.

24

25 *Limiting Liability and Settling Malpractice Claims*

26

27 [14] Agreements prospectively limiting a lawyer's liability for malpractice are
28 prohibited unless the client is independently represented in making the
29 agreement because they are likely to undermine competent and diligent
30 representation. Also, many clients are unable to evaluate the desirability of
31 making such an agreement before a dispute has arisen, particularly if they are
32 then represented by the lawyer seeking the agreement. This paragraph does not,
33 however, prohibit a lawyer from entering into an agreement with the client to
34 arbitrate legal malpractice claims, provided such agreements are enforceable
35 and the client is fully informed of the scope and effect of the agreement. Nor
36 does this paragraph limit the ability of lawyers to practice in the form of a limited-
37 liability entity, where permitted by law, provided that each lawyer remains
38 personally liable to the client for his or her own conduct and the firm complies
39 with any conditions required by law, such as provisions requiring client
40 notification or maintenance of adequate liability insurance. Nor does it prohibit an
41 agreement in accordance with Rule 1.2 that defines the scope of the
42 representation, although a definition of scope that makes the obligations of
43 representation illusory will amount to an attempt to limit liability.

44

45 [15] Agreements settling a claim or a potential claim for malpractice are not
46 prohibited by this Rule. Nevertheless, in view of the danger that a lawyer will take

1 unfair advantage of an unrepresented client or former client, the lawyer must first
2 advise such a person in writing of the appropriateness of independent
3 representation in connection with such a settlement. In addition, the lawyer must
4 give the client or former client a reasonable opportunity to find and consult
5 independent counsel.

6

7 *Acquiring Proprietary Interest in Litigation*

8

9 [16] Paragraph (i) states the traditional general rule that lawyers are
10 prohibited from acquiring a proprietary interest in litigation. Like paragraph (e),
11 the general rule has its basis in common law champerty and maintenance and is
12 designed to avoid giving the lawyer too great an interest in the representation. In
13 addition, when the lawyer acquires an ownership interest in the subject of the
14 representation, it will be more difficult for a client to discharge the lawyer if the
15 client so desires. The Rule is subject to specific exceptions developed in
16 decisional law and continued in these Rules. The exception for certain advances
17 of the costs of litigation is set forth in paragraph (e). In addition, paragraph (i)
18 sets forth exceptions for liens authorized by law to secure the lawyer's fees or
19 expenses and contracts for reasonable contingent fees. The law of each
20 jurisdiction determines which liens are authorized by law. These may include
21 liens granted by statute, liens originating in common law and liens acquired by
22 contract with the client. When a lawyer acquires by contract a security interest in
23 property other than that recovered through the lawyer's efforts in the litigation,
24 such an acquisition is a business or financial transaction with a client and is
25 governed by the requirements of paragraph (a). Contracts for contingent fees in
26 civil cases are governed by Rule 1.5.

27

28 *Client-Lawyer Sexual Relationships*

29

30 [17] The relationship between lawyer and client is a fiduciary one in which the
31 lawyer occupies the highest position of trust and confidence. The relationship is
32 almost always unequal; thus, a sexual relationship between lawyer and client can
33 involve unfair exploitation of the lawyer's fiduciary role, in violation of the lawyer's
34 basic ethical obligation not to use the trust of the client to the client's
35 disadvantage. In addition, such a relationship presents a significant danger that,
36 because of the lawyer's emotional involvement, the lawyer will be unable to
37 represent the client without impairment of the exercise of independent
38 professional judgment. Moreover, a blurred line between the professional and
39 personal relationships may make it difficult to predict to what extent client
40 confidences will be protected by the attorney-client evidentiary privilege, since
41 client confidences are protected by privilege only when they are imparted in the
42 context of the client-lawyer relationship. Because of the significant danger of
43 harm to client interests and because the client's own emotional involvement
44 renders it unlikely that the client could give adequate informed consent, this Rule
45 prohibits the lawyer from having sexual relations with a client regardless of

1 whether the relationship is consensual and regardless of the absence of
2 prejudice to the client.

3

4 [18] Sexual relationships that predate the client-lawyer relationship are not
5 prohibited. Issues relating to the exploitation of the fiduciary relationship and
6 client dependency are diminished when the sexual relationship existed prior to
7 the commencement of the client-lawyer relationship. However, before proceeding
8 with the representation in these circumstances, the lawyer should consider
9 whether the lawyer's ability to represent the client will be materially limited by the
10 relationship. See Rule 1.7(a)(2).

11

12 [19] When the client is an organization, paragraph (j) of this Rule prohibits a
13 lawyer for the organization (whether inside counsel or outside counsel) from
14 having a sexual relationship with a constituent of the organization who
15 supervises, directs or regularly consults with that lawyer concerning the
16 organization's legal matters.

17

18 *Imputation of Prohibitions*

19

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

27

28 **SCR 20:1.9 Conflict of interest: Duties to former clients**

29

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

35

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

39

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

41

42 (2) about whom the lawyer had acquired information protected by Rules
43 1.6 and 1.9(c) that is material to the matter;

44

45 unless the former client gives informed consent, confirmed in writing.

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

4
5 (1) use information relating to the representation to the disadvantage of
6 the former client except as Rule 1.6 these Rules would permit or require with
7 respect to a client, or when the information has become generally known; or
8

9 (2) reveal information relating to the representation except as these Rules
10 would permit or require with respect to a client.

11
12 **ABA Comment**

13
14 [1] After termination of a client-lawyer relationship, a lawyer has certain
15 continuing duties with respect to confidentiality and conflicts of interest and thus
16 may not represent another client except in conformity with this Rule. Under this
17 Rule, for example, a lawyer could not properly seek to rescind on behalf of a new
18 client a contract drafted on behalf of the former client. So also a lawyer who has
19 prosecuted an accused person could not properly represent the accused in a
20 subsequent civil action against the government concerning the same transaction.
21 Nor could a lawyer who has represented multiple clients in a matter represent
22 one of the clients against the others in the same or a substantially related matter
23 after a dispute arose among the clients in that matter, unless all affected clients
24 give informed consent. See Comment [9]. Current and former government
25 lawyers must comply with this Rule to the extent required by Rule 1.11.

26
27 [2] The scope of a "matter" for purposes of this Rule depends on the facts of a
28 particular situation or transaction. The lawyer's involvement in a matter can also
29 be a question of degree. When a lawyer has been directly involved in a specific
30 transaction, subsequent representation of other clients with materially adverse
31 interests in that transaction clearly is prohibited. On the other hand, a lawyer who
32 recurrently handled a type of problem for a former client is not precluded from
33 later representing another client in a factually distinct problem of that type even
34 though the subsequent representation involves a position adverse to the prior
35 client. Similar considerations can apply to the reassignment of military lawyers
36 between defense and prosecution functions within the same military jurisdictions.
37 The underlying question is whether the lawyer was so involved in the matter that
38 the subsequent representation can be justly regarded as a changing of sides in
39 the matter in question.

40
41 [3] Matters are "substantially related" for purposes of this Rule if they involve
42 the same transaction or legal dispute or if there otherwise is a substantial risk
43 that confidential factual information as would normally have been obtained in the
44 prior representation would materially advance the client's position in the
45 subsequent matter. For example, a lawyer who has represented a
46 businessperson and learned extensive private financial information about that

1 person may not then represent that person's spouse in seeking a divorce.
2 Similarly, a lawyer who has previously represented a client in securing
3 environmental permits to build a shopping center would be precluded from
4 representing neighbors seeking to oppose rezoning of the property on the basis
5 of environmental considerations; however, the lawyer would not be precluded, on
6 the grounds of substantial relationship, from defending a tenant of the completed
7 shopping center in resisting eviction for nonpayment of rent. Information that has
8 been disclosed to the public or to other parties adverse to the former client
9 ordinarily will not be disqualifying. Information acquired in a prior representation
10 may have been rendered obsolete by the passage of time, a circumstance that
11 may be relevant in determining whether two representations are substantially
12 related. In the case of an organizational client, general knowledge of the client's
13 policies and practices ordinarily will not preclude a subsequent representation; on
14 the other hand, knowledge of specific facts gained in a prior representation that
15 are relevant to the matter in question ordinarily will preclude such a
16 representation. A former client is not required to reveal the confidential
17 information learned by the lawyer in order to establish a substantial risk that the
18 lawyer has confidential information to use in the subsequent matter. A conclusion
19 about the possession of such information may be based on the nature of the
20 services the lawyer provided the former client and information that would in
21 ordinary practice be learned by a lawyer providing such services.

22

23 *Lawyers Moving Between Firms*

24

25 [4] When lawyers have been associated within a firm but then end their
26 association, the question of whether a lawyer should undertake representation is
27 more complicated. There are several competing considerations. First, the client
28 previously represented by the former firm must be reasonably assured that the
29 principle of loyalty to the client is not compromised. Second, the rule should not
30 be so broadly cast as to preclude other persons from having reasonable choice
31 of legal counsel. Third, the rule should not unreasonably hamper lawyers from
32 forming new associations and taking on new clients after having left a previous
33 association. In this connection, it should be recognized that today many lawyers
34 practice in firms, that many lawyers to some degree limit their practice to one
35 field or another, and that many move from one association to another several
36 times in their careers. If the concept of imputation were applied with unqualified
37 rigor, the result would be radical curtailment of the opportunity of lawyers to move
38 from one practice setting to another and of the opportunity of clients to change
39 counsel.

40

41 [5] Paragraph (b) operates to disqualify the lawyer only when the lawyer
42 involved has actual knowledge of information protected by Rules 1.6 and 1.9(c).
43 Thus, if a lawyer while with one firm acquired no knowledge or information
44 relating to a particular client of the firm, and that lawyer later joined another firm,
45 neither the lawyer individually nor the second firm is disqualified from
46 representing another client in the same or a related matter even though the

1 interests of the two clients conflict. See Rule 1.10(b) for the restrictions on a firm
2 once a lawyer has terminated association with the firm.

3

4 [6] Application of paragraph (b) depends on a situation's particular facts,
5 aided by inferences, deductions or working presumptions that reasonably may be
6 made about the way in which lawyers work together. A lawyer may have general
7 access to files of all clients of a law firm and may regularly participate in
8 discussions of their affairs; it should be inferred that such a lawyer in fact is privy
9 to all information about all the firm's clients. In contrast, another lawyer may have
10 access to the files of only a limited number of clients and participate in
11 discussions of the affairs of no other clients; in the absence of information to the
12 contrary, it should be inferred that such a lawyer in fact is privy to information
13 about the clients actually served but not those of other clients. In such an inquiry,
14 the burden of proof should rest upon the firm whose disqualification is sought.

15

16 [7] Independent of the question of disqualification of a firm, a lawyer changing
17 professional association has a continuing duty to preserve confidentiality of
18 information about a client formerly represented. See Rules 1.6 and 1.9(c).

19

20 [8] Paragraph (c) provides that information acquired by the lawyer in the
21 course of representing a client may not subsequently be used or revealed by the
22 lawyer to the disadvantage of the client. However, the fact that a lawyer has once
23 served a client does not preclude the lawyer from using generally known
24 information about that client when later representing another client.

25

26 [9] The provisions of this Rule are for the protection of former clients and can
27 be waived if the client gives informed consent, which consent must be confirmed
28 in writing under paragraphs (a) and (b). See Rule 1.0(e). With regard to the
29 effectiveness of an advance waiver, see Comment [22] to Rule 1.7. With regard
30 to disqualification of a firm with which a lawyer is or was formerly associated, see
31 Rule 1.10.

32

33 **SCR 20:1.10 Imputed disqualification: general rule**

34

35 (a) While lawyers are associated in a firm, none of them shall knowingly
36 represent a client when any one of them practicing alone would be prohibited from
37 doing so by Rules 1.7, ~~1.8(c), or 1.9 or 2.2. unless~~

38

39 (1) the prohibition is based on a personal interest of the prohibited lawyer
40 and does not present a significant risk of materially limiting the representation
41 of the client by the remaining lawyers in the firm; or

42

43 (2) the prohibition arises under Rule 1.9 and

1 (i) the personally disqualified lawyer performed no more than minor
2 and isolated services in the disqualifying representation and did so
3 only at a firm with which the lawyer is no longer associated;

4
5 (ii) the personally disqualified lawyer is timely screened from any
6 participation in the matter and is apportioned no part of the fee
7 therefrom; and

8
9 (iii) written notice is promptly given to any affected former client to
10 enable the affected client to ascertain compliance with the provisions
11 of this Rule.

12
13 (b) When a lawyer becomes associated with a firm, the firm may not
14 knowingly represent a person in the same or a substantially related matter in
15 which that lawyer, or a firm with which the lawyer was associated, had previously
16 represented a client whose interests are materially adverse to that person and
17 about whom the lawyer had acquired information protected by Rules 1.6 and
18 1.9(b) that is material to the matter.

19
20 (e) (b) When a lawyer has terminated an association with a firm, the firm is not
21 prohibited from thereafter representing a person with interests materially adverse to
22 those of a client represented by the formerly associated lawyer and not currently
23 represented by the firm, unless:

24
25 (1) the matter is the same or substantially related to that in which the
26 formerly associated lawyer represented the client; and

27
28 (2) any lawyer remaining in the firm has information protected by Rules 1.6
29 and 1.9(b)(c) that is material to the matter.

30
31 (d) (c) A disqualification prescribed by this rule may be waived by the affected
32 client under the conditions stated in Rule 1.7.

33
34 (d) The disqualification of lawyers associated in a firm with former or current
35 government lawyers is governed by Rule 1.11.

36
37 **Wisconsin Committee Comment**

38
39 Paragraph (a) differs from the Model Rule in not imputing conflicts of interest
40 in limited circumstances where the personally disqualified lawyer is timely
41 screened from the matter.

42
43 **ABA Comment**

44
45 *Definition of "Firm"*

1 [1] For purposes of the Rules of Professional Conduct, the term "firm"
2 denotes lawyers in a law partnership, professional corporation, sole
3 proprietorship or other association authorized to practice law; or lawyers
4 employed in a legal services organization or the legal department of a
5 corporation or other organization. See Rule 1.0(c). Whether two or more lawyers
6 constitute a firm within this definition can depend on the specific facts. See Rule
7 1.0, Comments [2] - [4].
8

9 *Principles of Imputed Disqualification*
10

11 [2] The rule of imputed disqualification stated in paragraph (a) gives effect to
12 the principle of loyalty to the client as it applies to lawyers who practice in a law
13 firm. Such situations can be considered from the premise that a firm of lawyers is
14 essentially one lawyer for purposes of the rules governing loyalty to the client, or
15 from the premise that each lawyer is vicariously bound by the obligation of loyalty
16 owed by each lawyer with whom the lawyer is associated. Paragraph (a)
17 operates only among the lawyers currently associated in a firm. When a lawyer
18 moves from one firm to another, the situation is governed by Rules 1.9(b) and
19 1.10(b).
20

21 [3] The rule in paragraph (a) does not prohibit representation where neither
22 questions of client loyalty nor protection of confidential information are presented.
23 Where one lawyer in a firm could not effectively represent a given client because
24 of strong political beliefs, for example, but that lawyer will do no work on the case
25 and the personal beliefs of the lawyer will not materially limit the representation
26 by others in the firm, the firm should not be disqualified. On the other hand, if an
27 opposing party in a case were owned by a lawyer in the law firm, and others in
28 the firm would be materially limited in pursuing the matter because of loyalty to
29 that lawyer, the personal disqualification of the lawyer would be imputed to all
30 others in the firm.
31

32 [4] The rule in paragraph (a) also does not prohibit representation by others in
33 the law firm where the person prohibited from involvement in a matter is a
34 nonlawyer, such as a paralegal or legal secretary. Nor does paragraph (a)
35 prohibit representation if the lawyer is prohibited from acting because of events
36 before the person became a lawyer, for example, work that the person did while
37 a law student. Such persons, however, ordinarily must be screened from any
38 personal participation in the matter to avoid communication to others in the firm
39 of confidential information that both the nonlawyers and the firm have a legal duty
40 to protect. See Rules 1.0(k) and 5.3.
41

42 [5] Rule 1.10(b) operates to permit a law firm, under certain circumstances, to
43 represent a person with interests directly adverse to those of a client represented
44 by a lawyer who formerly was associated with the firm. The Rule applies
45 regardless of when the formerly associated lawyer represented the client.
46 However, the law firm may not represent a person with interests adverse to those

1 of a present client of the firm, which would violate Rule 1.7. Moreover, the firm
2 may not represent the person where the matter is the same or substantially
3 related to that in which the formerly associated lawyer represented the client and
4 any other lawyer currently in the firm has material information protected by Rules
5 1.6 and 1.9(c).

6
7 [6] Rule 1.10(c) removes imputation with the informed consent of the affected
8 client or former client under the conditions stated in Rule 1.7. The conditions
9 stated in Rule 1.7 require the lawyer to determine that the representation is not
10 prohibited by Rule 1.7(b) and that each affected client or former client has given
11 informed consent to the representation, confirmed in writing. In some cases, the
12 risk may be so severe that the conflict may not be cured by client consent. For a
13 discussion of the effectiveness of client waivers of conflicts that might arise in the
14 future, see Rule 1.7, Comment [22]. For a definition of informed consent, see
15 Rule 1.0(e).

16
17 [7] Where a lawyer has joined a private firm after having represented the
18 government, imputation is governed by Rule 1.11(b) and (c), not this Rule. Under
19 Rule 1.11(d), where a lawyer represents the government after having served
20 clients in private practice, nongovernmental employment or in another
21 government agency, former-client conflicts are not imputed to government
22 lawyers associated with the individually disqualified lawyer.

23
24 [8] Where a lawyer is prohibited from engaging in certain transactions under
25 Rule 1.8, paragraph (k) of that Rule, and not this Rule, determines whether that
26 prohibition also applies to other lawyers associated in a firm with the personally
27 prohibited lawyer.

28
29 **SCR 20:1.11 Successive Special conflicts of interest for former and current**
30 **government officers and private employment employees**

31
32 (a) Except as law may otherwise expressly permit, a lawyer who has
33 formerly served as a public officer or employee of the government:

34
35 (1) is subject to Rule 1.9(c); and

36
37 (2) shall not otherwise represent a private client in connection with a
38 matter in which the lawyer participated personally and substantially as a
39 public officer or employee, unless the appropriate government agency
40 consents after consultation gives its informed consent, confirmed in writing,
41 to the representation.

42
43 (b) No When a lawyer is disqualified from representation under paragraph (a),
44 no lawyer in a firm with which that lawyer is associated may knowingly undertake
45 or continue representation in such a matter unless:

1 (1) the disqualified lawyer is timely screened from any participation in the
2 matter and is apportioned no part of the fee therefrom; and
3

4 (2) written notice is promptly given to the appropriate government agency
5 to enable it to ascertain compliance with the provisions of this rule.
6

7 (b) (c) Except as law may otherwise expressly permit, a lawyer having
8 information that the lawyer knows is confidential government information about a
9 person acquired when the lawyer was a public officer or employee, may not
10 represent a private client whose interests are adverse to that person in a matter
11 in which the information could be used to the material disadvantage of that
12 person. As used in this Rule, the term "confidential government information"
13 means information that has been obtained under governmental authority and
14 which, at the time this Rule is applied, the government is prohibited by law from
15 disclosing to the public or has a legal privilege not to disclose and which is not
16 otherwise available to the public. A firm with which that lawyer is associated may
17 undertake or continue representation in the matter only if the disqualified lawyer
18 is timely screened from any participation in the matter and is apportioned no part
19 of the fee therefrom.
20

21 (e) (d) Except as law may otherwise expressly permit, a lawyer currently
22 serving as a public officer or employee:
23

24 (1) is subject to Rules 1.7 and 1.9; and
25

26 (2) shall not:
27

28 (1) (i) participate in a matter in which the lawyer participated personally
29 and substantially while in private practice or nongovernmental
30 employment, unless under applicable law no one is, or by lawful
delegation may be, authorized to act in the lawyer's stead in the matter the
31 appropriate government agency gives its informed consent, confirmed in
32 writing; or
33

34 (2) (ii) negotiate for private employment with any person who is involved
35 as a party or as attorney for a party in a matter in which the lawyer is
36 participating personally and substantially, except that a lawyer serving as a
law clerk to a judge, other adjudicative officer or arbitrator may negotiate
37 for private employment as permitted by Rule 1.12(b) and subject to the
38 conditions stated in Rule 1.12(b).
39

40 (d) (e) As used in this Rule, the term "matter" includes:
41

42 (1) any judicial or other proceeding, application, request for a ruling or
43 other determination, contract, claim, controversy, investigation, charge,
44

1 accusation, arrest or other particular matter involving a specific party or
2 parties, and

3
4 (2) any other matter covered by the conflict of interest rules of the
5 appropriate government agency.

6
7 ~~(e) As used in this Rule, the term "confidential government information"~~
8 ~~means information which has been obtained under governmental authority and~~
9 ~~which, at the time this rule is applied, the government is prohibited by law from~~
10 ~~disclosing to the public or has a legal privilege not to disclose, and which is not~~
11 ~~otherwise available to the public.~~

12
13 (f) The conflicts of a lawyer currently serving as an officer or employee of the
14 government are not imputed to the other lawyers in the agency. However, where
15 such a lawyer has a conflict that would lead to imputation in a non-government
16 setting, the lawyer shall be timely screened from any participation in the matter to
17 which the conflict applies.

18
19 **Wisconsin Committee Comment**

20
21 Paragraph (f) has no counterpart in the Model Rules, although it is based on
22 statements made in paragraph [2] of the ABA Comment.

23
24 **ABA Comment**

25
26 [1] A lawyer who has served or is currently serving as a public officer or
27 employee is personally subject to the Rules of Professional Conduct, including
28 the prohibition against concurrent conflicts of interest stated in Rule 1.7. In
29 addition, such a lawyer may be subject to statutes and government regulations
30 regarding conflict of interest. Such statutes and regulations may circumscribe the
31 extent to which the government agency may give consent under this Rule. See
32 Rule 1.0(e) for the definition of informed consent.

33
34 [2] Paragraphs (a)(1), (a)(2) and (d)(1) restate the obligations of an individual
35 lawyer who has served or is currently serving as an officer or employee of the
36 government toward a former government or private client. Rule 1.10 is not
37 applicable to the conflicts of interest addressed by this Rule. Rather, paragraph
38 (b) sets forth a special imputation rule for former government lawyers that
39 provides for screening and notice. Because of the special problems raised by
40 imputation within a government agency, paragraph (d) does not impute the
41 conflicts of a lawyer currently serving as an officer or employee of the
42 government to other associated government officers or employees, although
43 ordinarily it will be prudent to screen such lawyers.

44
45 [3] Paragraphs (a)(2) and (d)(2) apply regardless of whether a lawyer is
46 adverse to a former client and are thus designed not only to protect the former

1 client, but also to prevent a lawyer from exploiting public office for the advantage
2 of another client. For example, a lawyer who has pursued a claim on behalf of
3 the government may not pursue the same claim on behalf of a later private client
4 after the lawyer has left government service, except when authorized to do so by
5 the government agency under paragraph (a). Similarly, a lawyer who has
6 pursued a claim on behalf of a private client may not pursue the claim on behalf
7 of the government, except when authorized to do so by paragraph (d). As with
8 paragraphs (a)(1) and (d)(1), Rule 1.10 is not applicable to the conflicts of
9 interest addressed by these paragraphs.

10

11 [4] This Rule represents a balancing of interests. On the one hand, where the
12 successive clients are a government agency and another client, public or private,
13 the risk exists that power or discretion vested in that agency might be used for
14 the special benefit of the other client. A lawyer should not be in a position where
15 benefit to the other client might affect performance of the lawyer's professional
16 functions on behalf of the government. Also, unfair advantage could accrue to the
17 other client by reason of access to confidential government information about the
18 client's adversary obtainable only through the lawyer's government service. On
19 the other hand, the rules governing lawyers presently or formerly employed by a
20 government agency should not be so restrictive as to inhibit transfer of
21 employment to and from the government. The government has a legitimate need
22 to attract qualified lawyers as well as to maintain high ethical standards. Thus a
23 former government lawyer is disqualified only from particular matters in which the
24 lawyer participated personally and substantially. The provisions for screening and
25 waiver in paragraph (b) are necessary to prevent the disqualification rule from
26 imposing too severe a deterrent against entering public service. The limitation of
27 disqualification in paragraphs (a)(2) and (d)(2) to matters involving a specific
28 party or parties, rather than extending disqualification to all substantive issues on
29 which the lawyer worked, serves a similar function.

30

31 [5] When a lawyer has been employed by one government agency and then
32 moves to a second government agency, it may be appropriate to treat that
33 second agency as another client for purposes of this Rule, as when a lawyer is
34 employed by a city and subsequently is employed by a federal agency. However,
35 because the conflict of interest is governed by paragraph (d), the latter agency is
36 not required to screen the lawyer as paragraph (b) requires a law firm to do. The
37 question of whether two government agencies should be regarded as the same
38 or different clients for conflict of interest purposes is beyond the scope of these
39 Rules. See Rule 1.13 Comment [9].

40

41 [6] Paragraphs (b) and (c) contemplate a screening arrangement. See Rule
42 1.0(k) (requirements for screening procedures). These paragraphs do not prohibit
43 a lawyer from receiving a salary or partnership share established by prior
44 independent agreement, but that lawyer may not receive compensation directly
45 relating the lawyer's compensation to the fee in the matter in which the lawyer is
46 disqualified.

1
2 [7] Notice, including a description of the screened lawyer's prior
3 representation and of the screening procedures employed, generally should be
4 given as soon as practicable after the need for screening becomes apparent.

5
6 [8] Paragraph (c) operates only when the lawyer in question has knowledge of
7 the information, which means actual knowledge; it does not operate with respect
8 to information that merely could be imputed to the lawyer.

9
10 [9] Paragraphs (a) and (d) do not prohibit a lawyer from jointly representing a
11 private party and a government agency when doing so is permitted by Rule 1.7
12 and is not otherwise prohibited by law.

13
14 [10] For purposes of paragraph (e) of this Rule, a "matter" may continue in
15 another form. In determining whether two particular matters are the same, the
16 lawyer should consider the extent to which the matters involve the same basic
17 facts, the same or related parties, and the time elapsed.

18
19 **SCR 20:1.12 Former judge, or arbitrator, mediator or other third-party
20 neutral**

21
22 (a) A lawyer shall not represent anyone in connection with a matter in which
23 the lawyer participated personally and substantially as a judge or other
24 adjudicative officer.

25
26 (a)(b) Except as stated in paragraph (e)(d), a lawyer shall not represent
27 anyone in connection with a matter in which the lawyer participated personally
28 and substantially as a judge or other adjudicative officer or law clerk to such a
29 person or as an arbitrator, mediator or other third-party neutral or as a law clerk
30 to a judge, other adjudicative officer or arbitrator, unless all parties to the
31 proceeding consent after consultation.

32
33 (b)(e) A lawyer shall not negotiate for employment with any person who is
34 involved as a party or as lawyer for a party in a matter in which the lawyer is
35 participating personally and substantially as a judge or other adjudicative officer
36 or as an arbitrator, mediator or other third-party neutral. A lawyer serving as a
37 law clerk to a judge, or other adjudicative officer or arbitrator may negotiate for
38 employment with a party or lawyer involved in a matter in which the clerk is
39 participating personally and substantially, but only after the lawyer has notified
40 the judge, or other adjudicative officer or arbitrator.

41
42 (c)(d) If a lawyer is disqualified by paragraph (a), no lawyer in a firm with
43 which that lawyer is associated may knowingly undertake or continue
44 representation in the matter unless:

1 (1) the disqualified lawyer is timely screened from any participation in the
2 matter and is apportioned no part of the fee therefrom; and
3

4 (2) written notice is promptly given to the parties and any appropriate
5 tribunal to enable ~~it~~ them to ascertain compliance with the provisions of this
6 rule.
7

8 (d)(e) An arbitrator selected as a partisan of a party in a multimember
9 arbitration panel is not prohibited from subsequently representing that party in the
10 matter, provided that all parties to the proceeding give informed consent,
11 confirmed in writing.
12

13 **Wisconsin Committee Comment**

14

15 Paragraph (a) differs from the Model Rule in that the conflict identified is not
16 subject to waiver by consent of the parties involved. As such, paragraph [2] of the
17 ABA Comment should be read with caution. Paragraph (d) differs in that written
18 consent of the parties is required.
19

20 **ABA Comment** 21

22 [1] This Rule generally parallels Rule 1.11. The term "personally and
23 substantially" signifies that a judge who was a member of a multimember court,
24 and thereafter left judicial office to practice law, is not prohibited from
25 representing a client in a matter pending in the court, but in which the former
26 judge did not participate. So also the fact that a former judge exercised
27 administrative responsibility in a court does not prevent the former judge from
28 acting as a lawyer in a matter where the judge had previously exercised remote
29 or incidental administrative responsibility that did not affect the merits. Compare
30 the Comment to Rule 1.11. The term "adjudicative officer" includes such officials
31 as judges pro tempore, referees, special masters, hearing officers and other
32 parajudicial officers, and also lawyers who serve as part-time judges.
33 Compliance Canons A(2), B(2) and C of the Model Code of Judicial Conduct
34 provide that a part-time judge, judge pro tempore or retired judge recalled to
35 active service, may not "act as a lawyer in any proceeding in which he served as
36 a judge or in any other proceeding related thereto." Although phrased differently
37 from this Rule, those Rules correspond in meaning.
38

39 [2] Like former judges, lawyers who have served as arbitrators, mediators or
40 other third-party neutrals may be asked to represent a client in a matter in which
41 the lawyer participated personally and substantially. This Rule forbids such
42 representation unless all of the parties to the proceedings give their informed
43 consent, confirmed in writing. See Rule 1.0(e) and (b). Other law or codes of
44 ethics governing third-party neutrals may impose more stringent standards of
45 personal or imputed disqualification. See Rule 2.4.
46

1 [3] Although lawyers who serve as third-party neutrals do not have
2 information concerning the parties that is protected under Rule 1.6, they typically
3 owe the parties an obligation of confidentiality under law or codes of ethics
4 governing third-party neutrals. Thus, paragraph (c) provides that conflicts of the
5 personally disqualified lawyer will be imputed to other lawyers in a law firm
6 unless the conditions of this paragraph are met.

7
8 [4] Requirements for screening procedures are stated in Rule 1.0(k).
9 Paragraph (c)(1) does not prohibit the screened lawyer from receiving a salary or
10 partnership share established by prior independent agreement, but that lawyer
11 may not receive compensation directly related to the matter in which the lawyer is
12 disqualified.

13
14 [5] Notice, including a description of the screened lawyer's prior
15 representation and of the screening procedures employed, generally should be
16 given as soon as practicable after the need for screening becomes apparent.

17
18 **SCR 20:1.13 Organization as client**

19
20 (a) A lawyer employed or retained by an organization represents the
21 organization acting through its duly authorized constituents.

22
23 (b) If a lawyer for an organization knows that an officer, employee or other
24 person associated with the organization is engaged in action, intends to act or
25 refuses to act in a matter related to the representation that is a violation of a legal
26 obligation to the organization, or a violation of law which reasonably might be
27 imputed to the organization, and that is likely to result in substantial injury to the
28 organization, then the lawyer shall proceed as is reasonably necessary in the best
29 interest of the organization. ~~In determining how to proceed, the lawyer shall give~~
30 ~~due consideration to the seriousness of the violation and its consequences, the~~
31 ~~scope and nature of the lawyer's representation, the responsibility in the~~
32 ~~organization and the apparent motivation of the person involved, the policies of the~~
33 ~~organization concerning such matters and any other relevant considerations.~~ Any
34 ~~measures taken shall be designed to minimize disruption of the organization and~~
35 ~~the risk of revealing information relating to the representation to persons outside the~~
36 ~~organization. Such measures may include among others:~~

37
38 (1) ~~asking reconsideration of the matter;~~

39
40 (2) ~~advising that a separate legal opinion on the matter be sought for~~
41 ~~presentation to appropriate authority in the organization; and~~

42
43 (3) ~~referring~~

44
45 Unless the lawyer reasonably believes that it is not necessary in the best interest
46 of the organization to do so, the lawyer shall refer the matter to higher authority in

1 the organization, including, if warranted by the circumstances, seriousness of the
2 matter, referral to the highest authority that can act in behalf of the organization as
3 determined by applicable law.

4

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

6

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

12

13 (2) the lawyer reasonably believes that the violation is reasonably certain
14 to result in substantial injury to the organization,

15

16 then the lawyer may: resign in accordance with Rule 1.16, reveal information
17 relating to the representation whether or not Rule 1.6 permits such disclosure,
18 but only if and to the extent the lawyer reasonably believes necessary to prevent
19 substantial injury to the organization.

20

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

26

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

33

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

38

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

45

1 (h) Notwithstanding other provisions of this Rule, a lawyer shall comply with
2 the disclosure requirements of Rule 1.6(b).

3

4 **Wisconsin Committee Comment**

5

6 Paragraph (h) differs from the Model Rule and calls attention to the
7 mandatory disclosure provisions contained in Wisconsin Rule 1.6(b).

8

9 **ABA Comment**

10

11 *The Entity as the Client*

12

13 [1] An organizational client is a legal entity, but it cannot act except through its
14 officers, directors, employees, shareholders and other constituents. Officers,
15 directors, employees and shareholders are the constituents of the corporate
16 organizational client. The duties defined in this Comment apply equally to
17 unincorporated associations. "Other constituents" as used in this Comment
18 means the positions equivalent to officers, directors, employees and
19 shareholders held by persons acting for organizational clients that are not
20 corporations.

21

22 [2] When one of the constituents of an organizational client communicates
23 with the organization's lawyer in that person's organizational capacity, the
24 communication is protected by Rule 1.6. Thus, by way of example, if an
25 organizational client requests its lawyer to investigate allegations of wrongdoing,
26 interviews made in the course of that investigation between the lawyer and the
27 client's employees or other constituents are covered by Rule 1.6. This does not
28 mean, however, that constituents of an organizational client are the clients of the
29 lawyer. The lawyer may not disclose to such constituents information relating to
30 the representation except for disclosures explicitly or impliedly authorized by the
31 organizational client in order to carry out the representation or as otherwise
32 permitted by Rule 1.6.

33

34 [3] When constituents of the organization make decisions for it, the decisions
35 ordinarily must be accepted by the lawyer even if their utility or prudence is
36 doubtful. Decisions concerning policy and operations, including ones entailing
37 serious risk, are not as such in the lawyer's province. Paragraph (b) makes clear,
38 however, that when the lawyer knows that the organization is likely to be
39 substantially injured by action of an officer or other constituent that violates a
40 legal obligation to the organization or is in violation of law that might be imputed
41 to the organization, the lawyer must proceed as is reasonably necessary in the
42 best interest of the organization. As defined in Rule 1.0(f), knowledge can be
43 inferred from circumstances, and a lawyer cannot ignore the obvious.

44

45 [4] In determining how to proceed under paragraph (b), the lawyer should give
46 due consideration to the seriousness of the violation and its consequences, the

1 responsibility in the organization and the apparent motivation of the person
2 involved, the policies of the organization concerning such matters, and any other
3 relevant considerations. Ordinarily, referral to a higher authority would be
4 necessary. In some circumstances, however, it may be appropriate for the lawyer
5 to ask the constituent to reconsider the matter; for example, if the circumstances
6 involve a constituent's innocent misunderstanding of law and subsequent
7 acceptance of the lawyer's advice, the lawyer may reasonably conclude that the
8 best interest of the organization does not require that the matter be referred to
9 higher authority. If a constituent persists in conduct contrary to the lawyer's
10 advice, it will be necessary for the lawyer to take steps to have the matter
11 reviewed by a higher authority in the organization. If the matter is of sufficient
12 seriousness and importance or urgency to the organization, referral to higher
13 authority in the organization may be necessary even if the lawyer has not
14 communicated with the constituent. Any measures taken should, to the extent
15 practicable, minimize the risk of revealing information relating to the
16 representation to persons outside the organization. Even in circumstances where
17 a lawyer is not obligated by Rule 1.13 to proceed, a lawyer may bring to the
18 attention of an organizational client, including its highest authority, matters that
19 the lawyer reasonably believes to be of sufficient importance to warrant doing so
20 in the best interest of the organization.

21

22 [5] Paragraph (b) also makes clear that when it is reasonably necessary to
23 enable the organization to address the matter in a timely and appropriate
24 manner, the lawyer must refer the matter to higher authority, including, if
25 warranted by the circumstances, the highest authority that can act on behalf of
26 the organization under applicable law. The organization's highest authority to
27 whom a matter may be referred ordinarily will be the board of directors or similar
28 governing body. However, applicable law may prescribe that under certain
29 conditions the highest authority reposes elsewhere, for example, in the
30 independent directors of a corporation.

31

32 *Relation to Other Rules*

33

34 [6] The authority and responsibility provided in this Rule are concurrent with
35 the authority and responsibility provided in other Rules. In particular, this Rule
36 does not limit or expand the lawyer's responsibility under Rules 1.8, 1.16, 3.3 or
37 4.1. Paragraph (c) of this Rule supplements Rule 1.6(b) by providing an
38 additional basis upon which the lawyer may reveal information relating to the
39 representation, but does not modify, restrict, or limit the provisions of Rule
40 1.6(b)(1) - (6). Under paragraph (c) the lawyer may reveal such information only
41 when the organization's highest authority insists upon or fails to address
42 threatened or ongoing action that is clearly a violation of law, and then only to the
43 extent the lawyer reasonably believes necessary to prevent reasonably certain
44 substantial injury to the organization. It is not necessary that the lawyer's services
45 be used in furtherance of the violation, but it is required that the matter be related
46 to the lawyer's representation of the organization. If the lawyer's services are

1 being used by an organization to further a crime or fraud by the organization,
2 Rules 1.6(b)(2) and 1.6(b)(3) may permit the lawyer to disclose confidential
3 information. In such circumstances Rule 1.2(d) may also be applicable, in which
4 event, withdrawal from the representation under Rule 1.16(a)(1) may be required.
5

6 [7] Paragraph (d) makes clear that the authority of a lawyer to disclose
7 information relating to a representation in circumstances described in paragraph
8 (c) does not apply with respect to information relating to a lawyer's engagement
9 by an organization to investigate an alleged violation of law or to defend the
10 organization or an officer, employee or other person associated with the
11 organization against a claim arising out of an alleged violation of law. This is
12 necessary in order to enable organizational clients to enjoy the full benefits of
13 legal counsel in conducting an investigation or defending against a claim.
14

15 [8] A lawyer who reasonably believes that he or she has been discharged
16 because of the lawyer's actions taken pursuant to paragraph (b) or (c), or who
17 withdraws in circumstances that require or permit the lawyer to take action under
18 either of these paragraphs, must proceed as the lawyer reasonably believes
19 necessary to assure that the organization's highest authority is informed of the
20 lawyer's discharge or withdrawal.
21

22 *Government Agency*

23

24 [9] The duty defined in this Rule applies to governmental organizations.
25 Defining precisely the identity of the client and prescribing the resulting
26 obligations of such lawyers may be more difficult in the government context and
27 is a matter beyond the scope of these Rules. See Scope [18]. Although in some
28 circumstances the client may be a specific agency, it may also be a branch of
29 government, such as the executive branch, or the government as a whole. For
30 example, if the action or failure to act involves the head of a bureau, either the
31 department of which the bureau is a part or the relevant branch of government
32 may be the client for purposes of this Rule. Moreover, in a matter involving the
33 conduct of government officials, a government lawyer may have authority under
34 applicable law to question such conduct more extensively than that of a lawyer
35 for a private organization in similar circumstances. Thus, when the client is a
36 governmental organization, a different balance may be appropriate between
37 maintaining confidentiality and assuring that the wrongful act is prevented or
38 rectified, for public business is involved. In addition, duties of lawyers employed
39 by the government or lawyers in military service may be defined by statutes and
40 regulation. This Rule does not limit that authority. See Scope.
41

42 *Clarifying the Lawyer's Role*

43

44 [10] There are times when the organization's interest may be or become
45 adverse to those of one or more of its constituents. In such circumstances the
46 lawyer should advise any constituent, whose interest the lawyer finds adverse to

1 that of the organization of the conflict or potential conflict of interest, that the
2 lawyer cannot represent such constituent, and that such person may wish to
3 obtain independent representation. Care must be taken to assure that the
4 individual understands that, when there is such adversity of interest, the lawyer
5 for the organization cannot provide legal representation for that constituent
6 individual, and that discussions between the lawyer for the organization and the
7 individual may not be privileged.

8

9 [11] Whether such a warning should be given by the lawyer for the
10 organization to any constituent individual may turn on the facts of each case.

11

12 *Dual Representation*

13

14 [12] Paragraph (g) recognizes that a lawyer for an organization may also
15 represent a principal officer or major shareholder.

16

17 *Derivative Actions*

18

19 [13] Under generally prevailing law, the shareholders or members of a
20 corporation may bring suit to compel the directors to perform their legal
21 obligations in the supervision of the organization. Members of unincorporated
22 associations have essentially the same right. Such an action may be brought
23 nominally by the organization, but usually is, in fact, a legal controversy over
24 management of the organization.

25

26 [14] The question can arise whether counsel for the organization may defend
27 such an action. The proposition that the organization is the lawyer's client does
28 not alone resolve the issue. Most derivative actions are a normal incident of an
29 organization's affairs, to be defended by the organization's lawyer like any other
30 suit. However, if the claim involves serious charges of wrongdoing by those in
31 control of the organization, a conflict may arise between the lawyer's duty to the
32 organization and the lawyer's relationship with the board. In those circumstances,
33 Rule 1.7 governs who should represent the directors and the organization.

34

35 **SCR 20:1.14 Client under a disability with diminished capacity**

36

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

42

43 (b) A lawyer may seek the appointment of a guardian or take other protective
44 action with respect to a client only when When the lawyer reasonably believes
45 that the client has diminished capacity, is at risk of substantial physical, financial
46 or other harm unless action is taken and cannot adequately act in the client's own

1 interest, the lawyer may take reasonably necessary protective action, including
2 consulting with individuals or entities that have the ability to take action to protect
3 the client and, in appropriate cases, seeking the appointment of a guardian ad
4 litem, conservator or guardian.

5
6 (c) Information relating to the representation of a client with diminished
7 capacity is protected by Rule 1.6. When taking protective action pursuant to
8 paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal
9 information about the client, but only to the extent reasonably necessary to
10 protect the client's interests.

11

12 **ABA Comment**

13

14 [1] The normal client-lawyer relationship is based on the assumption that the
15 client, when properly advised and assisted, is capable of making decisions about
16 important matters. When the client is a minor or suffers from a diminished mental
17 capacity, however, maintaining the ordinary client-lawyer relationship may not be
18 possible in all respects. In particular, a severely incapacitated person may have
19 no power to make legally binding decisions. Nevertheless, a client with
20 diminished capacity often has the ability to understand, deliberate upon, and
21 reach conclusions about matters affecting the client's own well-being. For
22 example, children as young as five or six years of age, and certainly those of ten
23 or twelve, are regarded as having opinions that are entitled to weight in legal
24 proceedings concerning their custody. So also, it is recognized that some
25 persons of advanced age can be quite capable of handling routine financial
26 matters while needing special legal protection concerning major transactions.

27
28 [2] The fact that a client suffers a disability does not diminish the lawyer's
29 obligation to treat the client with attention and respect. Even if the person has a
30 legal representative, the lawyer should as far as possible accord the represented
31 person the status of client, particularly in maintaining communication.

32
33 [3] The client may wish to have family members or other persons participate
34 in discussions with the lawyer. When necessary to assist in the representation,
35 the presence of such persons generally does not affect the applicability of the
36 attorney-client evidentiary privilege. Nevertheless, the lawyer must keep the
37 client's interests foremost and, except for protective action authorized under
38 paragraph (b), must look to the client, and not family members, to make
39 decisions on the client's behalf.

40
41 [4] If a legal representative has already been appointed for the client, the
42 lawyer should ordinarily look to the representative for decisions on behalf of the
43 client. In matters involving a minor, whether the lawyer should look to the parents
44 as natural guardians may depend on the type of proceeding or matter in which
45 the lawyer is representing the minor. If the lawyer represents the guardian as
46 distinct from the ward, and is aware that the guardian is acting adversely to the

1 ward's interest, the lawyer may have an obligation to prevent or rectify the
2 guardian's misconduct. See Rule 1.2(d).

3

4 *Taking Protective Action*

5

6 [5] If a lawyer reasonably believes that a client is at risk of substantial
7 physical, financial or other harm unless action is taken, and that a normal client-
8 lawyer relationship cannot be maintained as provided in paragraph (a) because
9 the client lacks sufficient capacity to communicate or to make adequately
10 considered decisions in connection with the representation, then paragraph (b)
11 permits the lawyer to take protective measures deemed necessary. Such
12 measures could include: consulting with family members, using a reconsideration
13 period to permit clarification or improvement of circumstances, using voluntary
14 surrogate decisionmaking tools such as durable powers of attorney or consulting
15 with support groups, professional services, adult-protective agencies or other
16 individuals or entities that have the ability to protect the client. In taking any
17 protective action, the lawyer should be guided by such factors as the wishes and
18 values of the client to the extent known, the client's best interests and the goals
19 of intruding into the client's decisionmaking autonomy to the least extent feasible,
20 maximizing client capacities and respecting the client's family and social
21 connections.

22

23 [6] In determining the extent of the client's diminished capacity, the lawyer
24 should consider and balance such factors as: the client's ability to articulate
25 reasoning leading to a decision, variability of state of mind and ability to
26 appreciate consequences of a decision; the substantive fairness of a decision;
27 and the consistency of a decision with the known long-term commitments and
28 values of the client. In appropriate circumstances, the lawyer may seek guidance
29 from an appropriate diagnostician.

30

31 [7] If a legal representative has not been appointed, the lawyer should
32 consider whether appointment of a guardian ad litem, conservator or guardian is
33 necessary to protect the client's interests. Thus, if a client with diminished
34 capacity has substantial property that should be sold for the client's benefit,
35 effective completion of the transaction may require appointment of a legal
36 representative. In addition, rules of procedure in litigation sometimes provide that
37 minors or persons with diminished capacity must be represented by a guardian
38 or next friend if they do not have a general guardian. In many circumstances,
39 however, appointment of a legal representative may be more expensive or
40 traumatic for the client than circumstances in fact require. Evaluation of such
41 circumstances is a matter entrusted to the professional judgment of the lawyer. In
42 considering alternatives, however, the lawyer should be aware of any law that
43 requires the lawyer to advocate the least restrictive action on behalf of the client.

44

45 *Disclosure of the Client's Condition*

46

1 [8] Disclosure of the client's diminished capacity could adversely affect the
2 client's interests. For example, raising the question of diminished capacity could,
3 in some circumstances, lead to proceedings for involuntary commitment.
4 Information relating to the representation is protected by Rule 1.6. Therefore,
5 unless authorized to do so, the lawyer may not disclose such information. When
6 taking protective action pursuant to paragraph (b), the lawyer is impliedly
7 authorized to make the necessary disclosures, even when the client directs the
8 lawyer to the contrary. Nevertheless, given the risks of disclosure, paragraph (c)
9 limits what the lawyer may disclose in consulting with other individuals or entities
10 or seeking the appointment of a legal representative. At the very least, the lawyer
11 should determine whether it is likely that the person or entity consulted with will
12 act adversely to the client's interests before discussing matters related to the
13 client. The lawyer's position in such cases is an unavoidably difficult one.

14

15 *Emergency Legal Assistance*

16

17 [9] In an emergency where the health, safety or a financial interest of a
18 person with seriously diminished capacity is threatened with imminent and
19 irreparable harm, a lawyer may take legal action on behalf of such a person even
20 though the person is unable to establish a client-lawyer relationship or to make or
21 express considered judgments about the matter, when the person or another
22 acting in good faith on that person's behalf has consulted with the lawyer. Even in
23 such an emergency, however, the lawyer should not act unless the lawyer
24 reasonably believes that the person has no other lawyer, agent or other
25 representative available. The lawyer should take legal action on behalf of the
26 person only to the extent reasonably necessary to maintain the status quo or
27 otherwise avoid imminent and irreparable harm. A lawyer who undertakes to
28 represent a person in such an exigent situation has the same duties under these
29 Rules as the lawyer would with respect to a client.

30

31 [10] A lawyer who acts on behalf of a person with seriously diminished
32 capacity in an emergency should keep the confidences of the person as if
33 dealing with a client, disclosing them only to the extent necessary to accomplish
34 the intended protective action. The lawyer should disclose to any tribunal
35 involved and to any other counsel involved the nature of his or her relationship
36 with the person. The lawyer should take steps to regularize the relationship or
37 implement other protective solutions as soon as possible. Normally, a lawyer
38 would not seek compensation for such emergency actions taken.

39

40 **SCR 20:1.15**

41

42 **Note:** This Rule was revised recently by the Wisconsin Supreme Court and,
43 therefore, was not further reviewed by the Wisconsin Committee except to insure
44 its compatibility with other provisions of these Rules.

45

1 **SCR 20:1.16 Declining or terminating representation**

2
3 (a) Except as stated in paragraph (c), a lawyer shall not represent a client or,
4 where representation has commenced, shall withdraw from the representation of
5 a client if:

6
7 (1) the representation will result in violation of the rules of professional
8 conduct or other law;

9
10 (2) the lawyer's physical or mental condition materially impairs the lawyer's
11 ability to represent the client; or

12 (3) the lawyer is discharged.

13
14 (b) Except as stated in paragraph (c), a lawyer may withdraw from
15 representing a client if:

16
17 (1) withdrawal can be accomplished without material adverse effect on the
18 interests of the client, ~~or if:~~

19
20 ~~(1) (2)~~ the client persists in a course of action involving the lawyer's
21 services that the lawyer reasonably believes is criminal or fraudulent;

22
23 ~~(2) (3)~~ the client has used the lawyer's services to perpetrate a crime or
24 fraud;

25
26 ~~(3) (4)~~ a the client insists upon pursuing an objective taking action that the
27 lawyer considers repugnant or imprudent with which the lawyer has a
28 fundamental disagreement;

29
30 ~~(4) (5)~~ the client fails substantially to fulfill an obligation to the lawyer
31 regarding the lawyer's services and has been given reasonable warning that
32 the lawyer will withdraw unless the obligation is fulfilled;

33
34 ~~(5) (6)~~ the representation will result in an unreasonable financial burden on
35 the lawyer or has been rendered unreasonably difficult by the client; or

36
37 ~~(6) (7)~~ other good cause for withdrawal exists.

38
39 (c) A lawyer must comply with applicable law requiring notice to or permission
40 of a tribunal when terminating a representation. When ordered to do so by a
41 tribunal, a lawyer shall continue representation notwithstanding good cause for
42 terminating the representation.

43
44 (d) Upon termination of representation, a lawyer shall take steps to the extent
45 reasonably practicable to protect a client's interests, such as giving reasonable

1 notice to the client, allowing time for employment of other counsel, surrendering
2 papers and property to which the client is entitled and refunding any advance
3 payment of fee or expense that has not been earned or incurred. The lawyer may
4 retain papers relating to the client to the extent permitted by other law.

5

6 **Wisconsin Committee Comment**

7

8 With respect to the last sentence of paragraph (d), it should be noted that a
9 State Bar ethics opinion suggests that lawyers in Wisconsin do not have a
10 retaining lien with respect to client papers. See State Bar of Wis., Comm. on Prof
11 Ethics Formal Op. E-95-4.

12

13 **ABA Comment**

14

15 [1] A lawyer should not accept representation in a matter unless it can be
16 performed competently, promptly, without improper conflict of interest and to
17 completion. Ordinarily, a representation in a matter is completed when the
18 agreed-upon assistance has been concluded. See Rules 1.2(c) and 6.5. See also
19 Rule 1.3, Comment [4].

20

21 *Mandatory Withdrawal*

22

23 [2] A lawyer ordinarily must decline or withdraw from representation if the
24 client demands that the lawyer engage in conduct that is illegal or violates the
25 Rules of Professional Conduct or other law. The lawyer is not obliged to decline
26 or withdraw simply because the client suggests such a course of conduct; a client
27 may make such a suggestion in the hope that a lawyer will not be constrained by
28 a professional obligation.

29

30 [3] When a lawyer has been appointed to represent a client, withdrawal
31 ordinarily requires approval of the appointing authority. See also Rule 6.2.
32 Similarly, court approval or notice to the court is often required by applicable law
33 before a lawyer withdraws from pending litigation. Difficulty may be encountered
34 if withdrawal is based on the client's demand that the lawyer engage in
35 unprofessional conduct. The court may request an explanation for the
36 withdrawal, while the lawyer may be bound to keep confidential the facts that
37 would constitute such an explanation. The lawyer's statement that professional
38 considerations require termination of the representation ordinarily should be
39 accepted as sufficient. Lawyers should be mindful of their obligations to both
40 clients and the court under Rules 1.6 and 3.3.

41

42 *Discharge*

43

44 [4] A client has a right to discharge a lawyer at any time, with or without
45 cause, subject to liability for payment for the lawyer's services. Where future

1 dispute about the withdrawal may be anticipated, it may be advisable to prepare
2 a written statement reciting the circumstances.

3

4 [5] Whether a client can discharge appointed counsel may depend on
5 applicable law. A client seeking to do so should be given a full explanation of the
6 consequences. These consequences may include a decision by the appointing
7 authority that appointment of successor counsel is unjustified, thus requiring self-
8 representation by the client.

9

10 [6] If the client has severely diminished capacity, the client may lack the legal
11 capacity to discharge the lawyer, and in any event the discharge may be
12 seriously adverse to the client's interests. The lawyer should make special effort
13 to help the client consider the consequences and may take reasonably
14 necessary protective action as provided in Rule 1.14.

15

16 *Optional Withdrawal*

17

18 [7] A lawyer may withdraw from representation in some circumstances. The
19 lawyer has the option to withdraw if it can be accomplished without material
20 adverse effect on the client's interests. Withdrawal is also justified if the client
21 persists in a course of action that the lawyer reasonably believes is criminal or
22 fraudulent, for a lawyer is not required to be associated with such conduct even if
23 the lawyer does not further it. Withdrawal is also permitted if the lawyer's services
24 were misused in the past even if that would materially prejudice the client. The
25 lawyer may also withdraw where the client insists on taking action that the lawyer
26 considers repugnant or with which the lawyer has a fundamental disagreement.

27

28 [8] A lawyer may withdraw if the client refuses to abide by the terms of an
29 agreement relating to the representation, such as an agreement concerning fees
30 or court costs or an agreement limiting the objectives of the representation.

31

32 *Assisting the Client upon Withdrawal*

33

34 [9] Even if the lawyer has been unfairly discharged by the client, a lawyer
35 must take all reasonable steps to mitigate the consequences to the client. The
36 lawyer may retain papers as security for a fee only to the extent permitted by law.
37 See Rule 1.15.

38

39 **SCR 20:1.17 Sale of law practice**

40

41 A lawyer or a law firm may sell or purchase a law practice, or an area of
42 practice, including good will, if the following conditions are satisfied:

43

44 (a) The seller ceases to engage in the private practice of law, or in the area of
45 practice that has been sold, in the geographic area or in the jurisdiction in which
46 the practice has been conducted;

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

3
4 (c) Actual The seller gives written notice ~~is given~~ to each of the seller's
5 affected clients regarding:

6 (1) the proposed sale;

7
8 (2) ~~the terms of any proposed change in the fee arrangement authorized~~
9 ~~by paragraph (d);~~

10 (3) ~~(2)~~ the client's right to retain other counsel or to take possession of the
11 file; and

12
13 (4) ~~(3)~~ the fact that the client's consent to the ~~sale transfer of the client's~~
14 ~~files~~ will be presumed if the client does not take any action or does not
15 otherwise object within ninety (90) days of receipt of the notice.

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

21
22 (d) The fees charged clients shall not be increased by reason of the sale. ~~The~~
23 ~~purchaser may, however, refuse to undertake the representation unless the client~~
24 ~~consents to pay the purchaser fees at a rate not exceeding the fees charged by the~~
25 ~~purchaser for rendering substantially similar services prior to the initiation of the~~
26 ~~purchase negotiations.~~

27
28 **Wisconsin Committee Comment**

29
30 Paragraph (c) requires notice only to "affected" clients, which is a limitation not
31 contained in the Model Rule.

32
33 **ABA Comment**

34
35 [1] The practice of law is a profession, not merely a business. Clients are not
36 commodities that can be purchased and sold at will. Pursuant to this Rule, when
37 a lawyer or an entire firm ceases to practice, or ceases to practice in an area of
38 law, and other lawyers or firms take over the representation, the selling lawyer or
39 firm may obtain compensation for the reasonable value of the practice as may
40 withdrawing partners of law firms. See Rules 5.4 and 5.6.

41
42 *Termination of Practice by the Seller*

1
2 [2] The requirement that all of the private practice, or all of an area of practice,
3 be sold is satisfied if the seller in good faith makes the entire practice, or the area
4 of practice, available for sale to the purchasers. The fact that a number of the
5 seller's clients decide not to be represented by the purchasers but take their
6 matters elsewhere, therefore, does not result in a violation. Return to private
7 practice as a result of an unanticipated change in circumstances does not
8 necessarily result in a violation. For example, a lawyer who has sold the practice
9 to accept an appointment to judicial office does not violate the requirement that
10 the sale be attendant to cessation of practice if the lawyer later resumes private
11 practice upon being defeated in a contested or a retention election for the office
12 or resigns from a judiciary position.

13
14 [3] The requirement that the seller cease to engage in the private practice of
15 law does not prohibit employment as a lawyer on the staff of a public agency or a
16 legal services entity that provides legal services to the poor, or as in-house
17 counsel to a business.

18
19 [4] The Rule permits a sale of an entire practice attendant upon retirement
20 from the private practice of law within the jurisdiction. Its provisions, therefore,
21 accommodate the lawyer who sells the practice on the occasion of moving to
22 another state. Some states are so large that a move from one locale therein to
23 another is tantamount to leaving the jurisdiction in which the lawyer has engaged
24 in the practice of law. To also accommodate lawyers so situated, states may
25 permit the sale of the practice when the lawyer leaves the geographical area
26 rather than the jurisdiction. The alternative desired should be indicated by
27 selecting one of the two provided for in Rule 1.17(a).

28
29 [5] This Rule also permits a lawyer or law firm to sell an area of practice. If an
30 area of practice is sold and the lawyer remains in the active practice of law, the
31 lawyer must cease accepting any matters in the area of practice that has been
32 sold, either as counsel or co-counsel or by assuming joint responsibility for a
33 matter in connection with the division of a fee with another lawyer as would
34 otherwise be permitted by Rule 1.5(e). For example, a lawyer with a substantial
35 number of estate planning matters and a substantial number of probate
36 administration cases may sell the estate planning portion of the practice but
37 remain in the practice of law by concentrating on probate administration;
38 however, that practitioner may not thereafter accept any estate planning matters.
39 Although a lawyer who leaves a jurisdiction or geographical area typically would
40 sell the entire practice, this Rule permits the lawyer to limit the sale to one or
41 more areas of the practice, thereby preserving the lawyer's right to continue
42 practice in the areas of the practice that were not sold.

43
44 *Sale of Entire Practice or Entire Area of Practice*
45

1 [6] The Rule requires that the seller's entire practice, or an entire area of
2 practice, be sold. The prohibition against sale of less than an entire practice area
3 protects those clients whose matters are less lucrative and who might find it
4 difficult to secure other counsel if a sale could be limited to substantial fee-
5 generating matters. The purchasers are required to undertake all client matters in
6 the practice or practice area, subject to client consent. This requirement is
7 satisfied, however, even if a purchaser is unable to undertake a particular client
8 matter because of a conflict of interest.

9

10 *Client Confidences, Consent and Notice*

11

12 [7] Negotiations between seller and prospective purchaser prior to disclosure
13 of information relating to a specific representation of an identifiable client no more
14 violate the confidentiality provisions of Model Rule 1.6 than do preliminary
15 discussions concerning the possible association of another lawyer or mergers
16 between firms, with respect to which client consent is not required. Providing the
17 purchaser access to client-specific information relating to the representation and
18 to the file, however, requires client consent. The Rule provides that before such
19 information can be disclosed by the seller to the purchaser the client must be
20 given actual written notice of the contemplated sale, including the identity of the
21 purchaser, and must be told that the decision to consent or make other
22 arrangements must be made within 90 days. If nothing is heard from the client
23 within that time, consent to the sale is presumed.

24

25 [8] A lawyer or law firm ceasing to practice cannot be required to remain in
26 practice because some clients cannot be given actual notice of the proposed
27 purchase. Since these clients cannot themselves consent to the purchase or
28 direct any other disposition of their files, the Rule requires an order from a court
29 having jurisdiction authorizing their transfer or other disposition. The Court can
30 be expected to determine whether reasonable efforts to locate the client have
31 been exhausted, and whether the absent client's legitimate interests will be
32 served by authorizing the transfer of the file so that the purchaser may continue
33 the representation. Preservation of client confidences requires that the petition
34 for a court order be considered in camera. (A procedure by which such an order
35 can be obtained needs to be established in jurisdictions in which it presently does
36 not exist).

37

38 [9] All elements of client autonomy, including the client's absolute right to
39 discharge a lawyer and transfer the representation to another, survive the sale of
40 the practice or area of practice.

41

42 *Fee Arrangements Between Client and Purchaser*

43

44 [10] The sale may not be financed by increases in fees charged the clients of
45 the practice. Existing arrangements between the seller and the client as to fees
46 and the scope of the work must be honored by the purchaser.

1
2 *Other Applicable Ethical Standards*
3

4 [11] Lawyers participating in the sale of a law practice or a practice area are
5 subject to the ethical standards applicable to involving another lawyer in the
6 representation of a client. These include, for example, the seller's obligation to
7 exercise competence in identifying a purchaser qualified to assume the practice
8 and the purchaser's obligation to undertake the representation competently (see
9 Rule 1.1); the obligation to avoid disqualifying conflicts, and to secure the client's
10 informed consent for those conflicts that can be agreed to (see Rule 1.7
11 regarding conflicts and Rule 1.0(e) for the definition of informed consent); and the
12 obligation to protect information relating to the representation (see Rules 1.6 and
13 1.9).

14
15 [12] If approval of the substitution of the purchasing lawyer for the selling
16 lawyer is required by the rules of any tribunal in which a matter is pending, such
17 approval must be obtained before the matter can be included in the sale (see
18 Rule 1.16).

19
20 *Applicability of the Rule*
21

22 [13] This Rule applies to the sale of a law practice of a deceased, disabled or
23 disappeared lawyer. Thus, the seller may be represented by a non-lawyer
24 representative not subject to these Rules. Since, however, no lawyer may
25 participate in a sale of a law practice which does not conform to the requirements
26 of this Rule, the representatives of the seller as well as the purchasing lawyer
27 can be expected to see to it that they are met.

28
29 [14] Admission to or retirement from a law partnership or professional
30 association, retirement plans and similar arrangements, and a sale of tangible
31 assets of a law practice, do not constitute a sale or purchase governed by this
32 Rule.

33
34 [15] This Rule does not apply to the transfers of legal representation between
35 lawyers when such transfers are unrelated to the sale of a practice or an area of
36 practice.

37
38 **SCR 20:1.18 Duties to prospective client**

39
40 (a) A person who discusses with a lawyer the possibility of forming a client-
41 lawyer relationship with respect to a matter is a prospective client.

42
43 (b) Even when no client-lawyer relationship ensues, a lawyer who has had
44 discussions with a prospective client shall not use or reveal information learned
45 in the consultation, except as Rule 1.9 would permit with respect to information of
46 a former client.

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

9
10 (d) When the lawyer has received disqualifying information as defined in
11 paragraph (c), representation is permissible if:

12 (1) both the affected client and the prospective client have given informed
13 consent, confirmed in writing, or:

14 (2) the lawyer who received the information took reasonable measures to
15 avoid exposure to more disqualifying information than was reasonably
16 necessary to determine whether to represent the prospective client; and

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

19 (ii) written notice is promptly given to the prospective client.

20
21 **ABA Comment**

22 [1] Prospective clients, like clients, may disclose information to a lawyer,
23 place documents or other property in the lawyer's custody, or rely on the lawyer's
24 advice. A lawyer's discussions with a prospective client usually are limited in time
25 and depth and leave both the prospective client and the lawyer free (and
26 sometimes required) to proceed no further. Hence, prospective clients should
27 receive some but not all of the protection afforded clients.

28 [2] Not all persons who communicate information to a lawyer are entitled to
29 protection under this Rule. A person who communicates information unilaterally
30 to a lawyer, without any reasonable expectation that the lawyer is willing to
31 discuss the possibility of forming a client-lawyer relationship, is not a "prospective
32 client" within the meaning of paragraph (a).

33
34 [3] It is often necessary for a prospective client to reveal information to the
35 lawyer during an initial consultation prior to the decision about formation of a
36 client-lawyer relationship. The lawyer often must learn such information to
37 determine whether there is a conflict of interest with an existing client and
38 whether the matter is one that the lawyer is willing to undertake. Paragraph (b)
39 prohibits the lawyer from using or revealing that information, except as permitted

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

4

5 [4] In order to avoid acquiring disqualifying information from a prospective
6 client, a lawyer considering whether or not to undertake a new matter should limit
7 the initial interview to only such information as reasonably appears necessary for
8 that purpose. Where the information indicates that a conflict of interest or other
9 reason for non-representation exists, the lawyer should so inform the prospective
10 client or decline the representation. If the prospective client wishes to retain the
11 lawyer, and if consent is possible under Rule 1.7, then consent from all affected
12 present or former clients must be obtained before accepting the representation.

13

14 [5] A lawyer may condition conversations with a prospective client on the
15 person's informed consent that no information disclosed during the consultation
16 will prohibit the lawyer from representing a different client in the matter. See Rule
17 1.0(e) for the definition of informed consent. If the agreement expressly so
18 provides, the prospective client may also consent to the lawyer's subsequent use
19 of information received from the prospective client.

20

21 [6] Even in the absence of an agreement, under paragraph (c), the lawyer is
22 not prohibited from representing a client with interests adverse to those of the
23 prospective client in the same or a substantially related matter unless the lawyer
24 has received from the prospective client information that could be significantly
25 harmful if used in the matter.

26

27 [7] Under paragraph (c), the prohibition in this Rule is imputed to other
28 lawyers as provided in Rule 1.10, but, under paragraph (d)(1), imputation may be
29 avoided if the lawyer obtains the informed consent, confirmed in writing, of both
30 the prospective and affected clients. In the alternative, imputation may be
31 avoided if the conditions of paragraph (d)(2) are met and all disqualified lawyers
32 are timely screened and written notice is promptly given to the prospective client.
33 See Rule 1.0(k) (requirements for screening procedures). Paragraph (d)(2)(i)
34 does not prohibit the screened lawyer from receiving a salary or partnership
35 share established by prior independent agreement, but that lawyer may not
36 receive compensation directly related to the matter in which the lawyer is
37 disqualified.

38

39 [8] Notice, including a general description of the subject matter about which
40 the lawyer was consulted, and of the screening procedures employed, generally
41 should be given as soon as practicable after the need for screening becomes
42 apparent.

43

44 [9] For the duty of competence of a lawyer who gives assistance on the merits
45 of a matter to a prospective client, see Rule 1.1. For a lawyer's duties when a

1 prospective client entrusts valuables or papers to the lawyer's care, see Rule
2 1.15.

3

4 **COUNSELOR**

5

6 **SCR 20:2.1 Advisor**

7

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

12

13 **ABA Comment**

14

15 *Scope of Advice*

16

17 [1] A client is entitled to straightforward advice expressing the lawyer's honest
18 assessment. Legal advice often involves unpleasant facts and alternatives that a
19 client may be disinclined to confront. In presenting advice, a lawyer endeavors to
20 sustain the client's morale and may put advice in as acceptable a form as
21 honesty permits. However, a lawyer should not be deterred from giving candid
22 advice by the prospect that the advice will be unpalatable to the client.

23

24 [2] Advice couched in narrow legal terms may be of little value to a client,
25 especially where practical considerations, such as cost or effects on other
26 people, are predominant. Purely technical legal advice, therefore, can sometimes
27 be inadequate. It is proper for a lawyer to refer to relevant moral and ethical
28 considerations in giving advice. Although a lawyer is not a moral advisor as such,
29 moral and ethical considerations impinge upon most legal questions and may
30 decisively influence how the law will be applied.

31

32 [3] A client may expressly or impliedly ask the lawyer for purely technical
33 advice. When such a request is made by a client experienced in legal matters,
34 the lawyer may accept it at face value. When such a request is made by a client
35 inexperienced in legal matters, however, the lawyer's responsibility as advisor
36 may include indicating that more may be involved than strictly legal
37 considerations.

38

39 [4] Matters that go beyond strictly legal questions may also be in the domain
40 of another profession. Family matters can involve problems within the
41 professional competence of psychiatry, clinical psychology or social work;
42 business matters can involve problems within the competence of the accounting
43 profession or of financial specialists. Where consultation with a professional in
44 another field is itself something a competent lawyer would recommend, the
45 lawyer should make such a recommendation. At the same time, a lawyer's advice

1 at its best often consists of recommending a course of action in the face of
2 conflicting recommendations of experts.

3

4 *Offering Advice*

5

6 [5] In general, a lawyer is not expected to give advice until asked by the client.
7 However, when a lawyer knows that a client proposes a course of action that is
8 likely to result in substantial adverse legal consequences to the client, the
9 lawyer's duty to the client under Rule 1.4 may require that the lawyer offer advice
10 if the client's course of action is related to the representation. Similarly, when a
11 matter is likely to involve litigation, it may be necessary under Rule 1.4 to inform
12 the client of forms of dispute resolution that might constitute reasonable
13 alternatives to litigation. A lawyer ordinarily has no duty to initiate investigation of
14 a client's affairs or to give advice that the client has indicated is unwanted, but a
15 lawyer may initiate advice to a client when doing so appears to be in the client's
16 interest.

17

18 **SCR 20:2.2 Intermediary**

19

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

21

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

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

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

34 (b) ~~While acting as intermediary, the lawyer shall consult with each client~~
35 ~~concerning the decisions to be made and the considerations relevant in making~~
36 ~~them, so that each client can make adequately informed decisions.~~

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

1 **SCR 20:2.3 Evaluation for use by third persons**

2
3 (a) A lawyer may undertake provide an evaluation of a matter affecting a
4 client for the use of someone other than the client if:—(1) the lawyer reasonably
5 believes that making the evaluation is compatible with other aspects of the
6 lawyer's relationship with the client; and.

7
8 (2) (b) When the lawyer knows or reasonably should know that the evaluation
9 is likely to affect the client's interests materially and adversely, the lawyer shall
10 not provide the evaluation unless the client consents after consultation gives
11 informed consent.

12
13 (b) (c) Except as disclosure is required authorized in connection with a report
14 of an evaluation, information relating to the evaluation is otherwise protected by
15 Rule 1.6.

16
17 **ABA Comment**

18
19 *Definition*

20
21 [1] An evaluation may be performed at the client's direction or when impliedly
22 authorized in order to carry out the representation. See Rule 1.2. Such an
23 evaluation may be for the primary purpose of establishing information for the
24 benefit of third parties; for example, an opinion concerning the title of property
25 rendered at the behest of a vendor for the information of a prospective
26 purchaser, or at the behest of a borrower for the information of a prospective
27 lender. In some situations, the evaluation may be required by a government
28 agency; for example, an opinion concerning the legality of the securities
29 registered for sale under the securities laws. In other instances, the evaluation
30 may be required by a third person, such as a purchaser of a business.

31
32 [2] A legal evaluation should be distinguished from an investigation of a
33 person with whom the lawyer does not have a client-lawyer relationship. For
34 example, a lawyer retained by a purchaser to analyze a vendor's title to property
35 does not have a client-lawyer relationship with the vendor. So also, an
36 investigation into a person's affairs by a government lawyer, or by special
37 counsel by a government lawyer, or by special counsel employed by the
38 government, is not an evaluation as that term is used in this Rule. The question
39 is whether the lawyer is retained by the person whose affairs are being
40 examined. When the lawyer is retained by that person, the general rules
41 concerning loyalty to client and preservation of confidences apply, which is not
42 the case if the lawyer is retained by someone else. For this reason, it is essential
43 to identify the person by whom the lawyer is retained. This should be made clear
44 not only to the person under examination, but also to others to whom the results
45 are to be made available.

1 *Duties Owed to Third Person and Client*

2

3 [3] When the evaluation is intended for the information or use of a third
4 person, a legal duty to that person may or may not arise. That legal question is
5 beyond the scope of this Rule. However, since such an evaluation involves a
6 departure from the normal client-lawyer relationship, careful analysis of the
7 situation is required. The lawyer must be satisfied as a matter of professional
8 judgment that making the evaluation is compatible with other functions
9 undertaken in behalf of the client. For example, if the lawyer is acting as
10 advocate in defending the client against charges of fraud, it would normally be
11 incompatible with that responsibility for the lawyer to perform an evaluation for
12 others concerning the same or a related transaction. Assuming no such
13 impediment is apparent, however, the lawyer should advise the client of the
14 implications of the evaluation, particularly the lawyer's responsibilities to third
15 persons and the duty to disseminate the findings.

16

17 *Access to and Disclosure of Information*

18

19 [4] The quality of an evaluation depends on the freedom and extent of the
20 investigation upon which it is based. Ordinarily a lawyer should have whatever
21 latitude of investigation seems necessary as a matter of professional judgment.
22 Under some circumstances, however, the terms of the evaluation may be limited.
23 For example, certain issues or sources may be categorically excluded, or the
24 scope of search may be limited by time constraints or the noncooperation of
25 persons having relevant information. Any such limitations that are material to the
26 evaluation should be described in the report. If after a lawyer has commenced an
27 evaluation, the client refuses to comply with the terms upon which it was
28 understood the evaluation was to have been made, the lawyer's obligations are
29 determined by law, having reference to the terms of the client's agreement and
30 the surrounding circumstances. In no circumstances is the lawyer permitted to
31 knowingly make a false statement of material fact or law in providing an
32 evaluation under this Rule. See Rule 4.1.

33

34 *Obtaining Client's Informed Consent*

35

36 [5] Information relating to an evaluation is protected by Rule 1.6. In many
37 situations, providing an evaluation to a third party poses no significant risk to the
38 client; thus, the lawyer may be impliedly authorized to disclose information to
39 carry out the representation. See Rule 1.6(a). Where, however, it is reasonably
40 likely that providing the evaluation will affect the client's interests materially and
41 adversely, the lawyer must first obtain the client's consent after the client has
42 been adequately informed concerning the important possible effects on the
43 client's interests. See Rules 1.6(a) and 1.0(e).

44

45 *Financial Auditors' Requests for Information*

1 [6] When a question concerning the legal situation of a client arises at the
2 instance of the client's financial auditor and the question is referred to the lawyer,
3 the lawyer's response may be made in accordance with procedures recognized
4 in the legal profession. Such a procedure is set forth in the American Bar
5 Association Statement of Policy Regarding Lawyers' Responses to Auditors'
6 Requests for Information, adopted in 1975.

7

8 **SCR 20:2.4 Lawyer serving as third-party neutral**

9

10 (a) A lawyer serves as a third-party neutral when the lawyer assists two or
11 more persons who are not clients of the lawyer to reach a resolution of a dispute
12 or other matter that has arisen between them. Service as a third-party neutral
13 may include service as an arbitrator, a mediator or in such other capacity as will
14 enable the lawyer to assist the parties to resolve the matter.

15

16 (b) A lawyer serving as a third-party neutral shall inform unrepresented
17 parties that the lawyer is not representing them. When the lawyer knows or
18 reasonably should know that a party does not understand the lawyer's role in the
19 matter, the lawyer shall explain the difference between the lawyer's role as a
20 third-party neutral and a lawyer's role as one who represents a client.

21

22 **ABA Comment**

23

24 [1] Alternative dispute resolution has become a substantial part of the civil
25 justice system. Aside from representing clients in dispute-resolution processes,
26 lawyers often serve as third-party neutrals. A third-party neutral is a person, such
27 as a mediator, arbitrator, conciliator or evaluator, who assists the parties,
28 represented or unrepresented, in the resolution of a dispute or in the
29 arrangement of a transaction. Whether a third-party neutral serves primarily as a
30 facilitator, evaluator or decisionmaker depends on the particular process that is
31 either selected by the parties or mandated by a court.

32

33 [2] The role of a third-party neutral is not unique to lawyers, although, in some
34 court-connected contexts, only lawyers are allowed to serve in this role or to
35 handle certain types of cases. In performing this role, the lawyer may be subject
36 to court rules or other law that apply either to third-party neutrals generally or to
37 lawyers serving as third-party neutrals. Lawyer-neutrals may also be subject to
38 various codes of ethics, such as the Code of Ethics for Arbitration in Commercial
39 Disputes prepared by a joint committee of the American Bar Association and the
40 American Arbitration Association or the Model Standards of Conduct for
41 Mediators jointly prepared by the American Bar Association, the American
42 Arbitration Association and the Society of Professionals in Dispute Resolution.

43

44 [3] Unlike nonlawyers who serve as third-party neutrals, lawyers serving in
45 this role may experience unique problems as a result of differences between the
46 role of a third-party neutral and a lawyer's service as a client representative. The

1 potential for confusion is significant when the parties are unrepresented in the
2 process. Thus, paragraph (b) requires a lawyer-neutral to inform unrepresented
3 parties that the lawyer is not representing them. For some parties, particularly
4 parties who frequently use dispute-resolution processes, this information will be
5 sufficient. For others, particularly those who are using the process for the first
6 time, more information will be required. Where appropriate, the lawyer should
7 inform unrepresented parties of the important differences between the lawyer's
8 role as third-party neutral and a lawyer's role as a client representative, including
9 the inapplicability of the attorney-client evidentiary privilege. The extent of
10 disclosure required under this paragraph will depend on the particular parties
11 involved and the subject matter of the proceeding, as well as the particular
12 features of the dispute-resolution process selected.

13

14 [4] A lawyer who serves as a third-party neutral subsequently may be asked
15 to serve as a lawyer representing a client in the same matter. The conflicts of
16 interest that arise for both the individual lawyer and the lawyer's law firm are
17 addressed in Rule 1.12.

18

19 [5] Lawyers who represent clients in alternative dispute-resolution processes
20 are governed by the Rules of Professional Conduct. When the dispute-resolution
21 process takes place before a tribunal, as in binding arbitration (see Rule 1.0(m)),
22 the lawyer's duty of candor is governed by Rule 3.3. Otherwise, the lawyer's duty
23 of candor toward both the third-party neutral and other parties is governed by
24 Rule 4.1.

25

26 **ADVOCATE**

27

28 **SCR 20:3.1 Meritorious claims and contentions**

29

30 (a) In representing a client, a lawyer shall not:

31

32 (1) knowingly advance a claim or defense that is unwarranted under
33 existing law, except that the lawyer may advance such claim or defense if it can
34 be supported by good faith argument for an extension, modification or reversal
35 of existing law;

36

37 (2) knowingly advance a factual position unless there is a basis for doing so
38 that is not frivolous; or

39

40 (3) file a suit, assert a position, conduct a defense, delay a trial or take other
41 action on behalf of the client when the lawyer knows or when it is obvious that
42 such an action would serve merely to harass or maliciously injure another.

43

44 (b) A lawyer for the defendant in a criminal proceeding, or the respondent in
45 a proceeding that could result in deprivation of liberty, may nevertheless so

1 defend the proceeding as to require that every element of the case be
2 established.

3

4 **Wisconsin Committee Comment**

5

6 This Rule differs from the Model Rule in expressly establishing a subjective
7 test for an ethical violation. Thus, a different standard applies in the discipline
8 context than the objective standard for the imposition of costs and fees under
9 sec. 814.025, Stats.

10

11 **ABA Comment**

12

13 [1] The advocate has a duty to use legal procedure for the fullest benefit of
14 the client's cause, but also a duty not to abuse legal procedure. The law, both
15 procedural and substantive, establishes the limits within which an advocate may
16 proceed. However, the law is not always clear and never is static. Accordingly, in
17 determining the proper scope of advocacy, account must be taken of the law's
18 ambiguities and potential for change.

19

20 [2] The filing of an action or defense or similar action taken for a client is not
21 frivolous merely because the facts have not first been fully substantiated or
22 because the lawyer expects to develop vital evidence only by discovery. What is
23 required of lawyers, however, is that they inform themselves about the facts of
24 their clients' cases and the applicable law and determine that they can make
25 good faith arguments in support of their clients' positions. Such action is not
26 frivolous even though the lawyer believes that the client's position ultimately will
27 not prevail. The action is frivolous, however, if the lawyer is unable either to make
28 a good faith argument on the merits of the action taken or to support the action
29 taken by a good faith argument for an extension, modification or reversal of
30 existing law.

31

32 [3] The lawyer's obligations under this Rule are subordinate to federal or state
33 constitutional law that entitles a defendant in a criminal matter to the assistance
34 of counsel in presenting a claim or contention that otherwise would be prohibited
35 by this Rule.

36

37 **SCR 20:3.2 Expediting litigation**

38

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

41

42 **ABA Comment**

43

44 [1] Dilatory practices bring the administration of justice into disrepute.
45 Although there will be occasions when a lawyer may properly seek a
46 postponement for personal reasons, it is not proper for a lawyer to routinely fail to

1 expedite litigation solely for the convenience of the advocates. Nor will a failure to
2 expedite be reasonable if done for the purpose of frustrating an opposing party's
3 attempt to obtain rightful redress or repose. It is not a justification that similar
4 conduct is often tolerated by the bench and bar. The question is whether a
5 competent lawyer acting in good faith would regard the course of action as
6 having some substantial purpose other than delay. Realizing financial or other
7 benefit from otherwise improper delay in litigation is not a legitimate interest of
8 the client.

9

10 **SCR 20:3.3 Candor toward the tribunal**

11

12 (a) A lawyer shall not knowingly:

13

14 (1) make a false statement of fact or law to a tribunal or fail to correct a
15 false statement of material fact or law previously made to the tribunal by the
16 lawyer;

17

18 (2) fail to disclose a material fact to a tribunal when disclosure is
19 necessary to avoid assisting a criminal or fraudulent act by the client;

20

21 (3) (2) fail to disclose to the tribunal legal authority in the controlling
22 jurisdiction known to the lawyer to be directly adverse to the position of the
23 client and not disclosed by opposing counsel; or

24

25 (4) (3) offer evidence that the lawyer knows to be false. If a lawyer, the
26 lawyer's client, or a witness called by the lawyer, has offered material
27 evidence and the lawyer comes to know of its falsity, the lawyer shall take
28 reasonable remedial measures, including, if necessary, disclosure to the
29 tribunal. A lawyer may refuse to offer evidence, other than the testimony of a
30 defendant in a criminal matter, that the lawyer reasonably believes is false.

31

32 (b) A lawyer who represents a client in an adjudicative proceeding and who
33 knows that a person intends to engage, is engaging or has engaged in criminal
34 or fraudulent conduct related to the proceeding shall take reasonable remedial
35 measures, including, if necessary, disclosure to the tribunal.

36

37 (b) (c) The duties stated in paragraph paragraphs (a) and (b) apply even if
38 compliance requires disclosure of information otherwise protected by Rule 1.6.

39

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

42

43 (d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material
44 facts known to the lawyer that will enable the tribunal to make an informed
45 decision, whether or not the facts are adverse.

1 **Wisconsin Committee Comment**
2

3 Unlike its Model Rule counterpart, paragraph (c) does not specify when the
4 duties expire. For this reason, ABA Comment [13] is inapplicable.

5
6 **ABA Comment**
7

8 [1] This Rule governs the conduct of a lawyer who is representing a client in
9 the proceedings of a tribunal. See Rule 1.0(m) for the definition of "tribunal." It
10 also applies when the lawyer is representing a client in an ancillary proceeding
11 conducted pursuant to the tribunal's adjudicative authority, such as a deposition.
12 Thus, for example, paragraph (a)(3) requires a lawyer to take reasonable
13 remedial measures if the lawyer comes to know that a client who is testifying in a
14 deposition has offered evidence that is false.

15
16 [2] This Rule sets forth the special duties of lawyers as officers of the court to
17 avoid conduct that undermines the integrity of the adjudicative process. A lawyer
18 acting as an advocate in an adjudicative proceeding has an obligation to present
19 the client's case with persuasive force. Performance of that duty while
20 maintaining confidences of the client, however, is qualified by the advocate's duty
21 of candor to the tribunal. Consequently, although a lawyer in an adversary
22 proceeding is not required to present an impartial exposition of the law or to
23 vouch for the evidence submitted in a cause, the lawyer must not allow the
24 tribunal to be misled by false statements of law or fact or evidence that the
25 lawyer knows to be false.

26
27 *Representations by a Lawyer*
28

29
30 [3] An advocate is responsible for pleadings and other documents prepared
31 for litigation, but is usually not required to have personal knowledge of matters
32 asserted therein, for litigation documents ordinarily present assertions by the
33 client, or by someone on the client's behalf, and not assertions by the lawyer.
34 Compare Rule 3.1. However, an assertion purporting to be on the lawyer's own
35 knowledge, as in an affidavit by the lawyer or in a statement in open court, may
36 properly be made only when the lawyer knows the assertion is true or believes it
37 to be true on the basis of a reasonably diligent inquiry. There are circumstances
38 where failure to make a disclosure is the equivalent of an affirmative
39 misrepresentation. The obligation prescribed in Rule 1.2(d) not to counsel a client
40 to commit or assist the client in committing a fraud applies in litigation. Regarding
41 compliance with Rule 1.2(d), see the Comment to that Rule. See also the
42 Comment to Rule 8.4(b).

43 *Legal Argument*
44

45
46 [4] Legal argument based on a knowingly false representation of law
47 constitutes dishonesty toward the tribunal. A lawyer is not required to make a

1 disinterested exposition of the law, but must recognize the existence of pertinent
2 legal authorities. Furthermore, as stated in paragraph (a)(2), an advocate has a
3 duty to disclose directly adverse authority in the controlling jurisdiction that has
4 not been disclosed by the opposing party. The underlying concept is that legal
5 argument is a discussion seeking to determine the legal premises properly
6 applicable to the case.

7

8 *Offering Evidence*

9

10 [5] Paragraph (a)(3) requires that the lawyer refuse to offer evidence that the
11 lawyer knows to be false, regardless of the client's wishes. This duty is premised
12 on the lawyer's obligation as an officer of the court to prevent the trier of fact from
13 being misled by false evidence. A lawyer does not violate this Rule if the lawyer
14 offers the evidence for the purpose of establishing its falsity.

15

16 [6] If a lawyer knows that the client intends to testify falsely or wants the
17 lawyer to introduce false evidence, the lawyer should seek to persuade the client
18 that the evidence should not be offered. If the persuasion is ineffective and the
19 lawyer continues to represent the client, the lawyer must refuse to offer the false
20 evidence. If only a portion of a witness's testimony will be false, the lawyer may
21 call the witness to testify but may not elicit or otherwise permit the witness to
22 present the testimony that the lawyer knows is false.

23

24 [7] The duties stated in paragraphs (a) and (b) apply to all lawyers, including
25 defense counsel in criminal cases. In some jurisdictions, however, courts have
26 required counsel to present the accused as a witness or to give a narrative
27 statement if the accused so desires, even if counsel knows that the testimony or
28 statement will be false. The obligation of the advocate under the Rules of
29 Professional Conduct is subordinate to such requirements. See also Comment
30 [9].

31

32 [8] The prohibition against offering false evidence only applies if the lawyer
33 knows that the evidence is false. A lawyer's reasonable belief that evidence is
34 false does not preclude its presentation to the trier of fact. A lawyer's knowledge
35 that evidence is false, however, can be inferred from the circumstances. See
36 Rule 1.0(f). Thus, although a lawyer should resolve doubts about the veracity of
37 testimony or other evidence in favor of the client, the lawyer cannot ignore an
38 obvious falsehood.

39

40 [9] Although paragraph (a)(3) only prohibits a lawyer from offering evidence
41 the lawyer knows to be false, it permits the lawyer to refuse to offer testimony or
42 other proof that the lawyer reasonably believes is false. Offering such proof may
43 reflect adversely on the lawyer's ability to discriminate in the quality of evidence
44 and thus impair the lawyer's effectiveness as an advocate. Because of the
45 special protections historically provided criminal defendants, however, this Rule
46 does not permit a lawyer to refuse to offer the testimony of such a client where

1 the lawyer reasonably believes but does not know that the testimony will be false.
2 Unless the lawyer knows the testimony will be false, the lawyer must honor the
3 client's decision to testify. See also Comment [7].

4

5 *Remedial Measures*

6

7 [10] Having offered material evidence in the belief that it was true, a lawyer
8 may subsequently come to know that the evidence is false. Or, a lawyer may be
9 surprised when the lawyer's client, or another witness called by the lawyer, offers
10 testimony the lawyer knows to be false, either during the lawyer's direct
11 examination or in response to cross-examination by the opposing lawyer. In such
12 situations or if the lawyer knows of the falsity of testimony elicited from the client
13 during a deposition, the lawyer must take reasonable remedial measures. In such
14 situations, the advocate's proper course is to remonstrate with the client
15 confidentially, advise the client of the lawyer's duty of candor to the tribunal and
16 seek the client's cooperation with respect to the withdrawal or correction of the
17 false statements or evidence. If that fails, the advocate must take further
18 remedial action. If withdrawal from the representation is not permitted or will not
19 undo the effect of the false evidence, the advocate must make such disclosure to
20 the tribunal as is reasonably necessary to remedy the situation, even if doing so
21 requires the lawyer to reveal information that otherwise would be protected by
22 Rule 1.6. It is for the tribunal then to determine what should be done — making a
23 statement about the matter to the trier of fact, ordering a mistrial or perhaps
24 nothing.

25

26 [11] The disclosure of a client's false testimony can result in grave
27 consequences to the client, including not only a sense of betrayal but also loss of
28 the case and perhaps a prosecution for perjury. But the alternative is that the
29 lawyer cooperate in deceiving the court, thereby subverting the truth-finding
30 process which the adversary system is designed to implement. See Rule 1.2(d).
31 Furthermore, unless it is clearly understood that the lawyer will act upon the duty
32 to disclose the existence of false evidence, the client can simply reject the
33 lawyer's advice to reveal the false evidence and insist that the lawyer keep silent.
34 Thus the client could in effect coerce the lawyer into being a party to fraud on the
35 court.

36

37 *Preserving Integrity of Adjudicative Process*

38

39 [12] Lawyers have a special obligation to protect a tribunal against criminal or
40 fraudulent conduct that undermines the integrity of the adjudicative process, such
41 as bribing, intimidating or otherwise unlawfully communicating with a witness,
42 juror, court official or other participant in the proceeding, unlawfully destroying or
43 concealing documents or other evidence or failing to disclose information to the
44 tribunal when required by law to do so. Thus, paragraph (b) requires a lawyer to
45 take reasonable remedial measures, including disclosure if necessary, whenever
46 the lawyer knows that a person, including the lawyer's client, intends to engage,

1 is engaging or has engaged in criminal or fraudulent conduct related to the
2 proceeding.

3

4 *Duration of Obligation*

5

6 [13] A practical time limit on the obligation to rectify false evidence or false
7 statements of law and fact has to be established. The conclusion of the
8 proceeding is a reasonably definite point for the termination of the obligation. A
9 proceeding has concluded within the meaning of this Rule when a final judgment
10 in the proceeding has been affirmed on appeal or the time for review has passed.

11

12 *Ex Parte Proceedings*

13

14 [14] Ordinarily, an advocate has the limited responsibility of presenting one
15 side of the matters that a tribunal should consider in reaching a decision; the
16 conflicting position is expected to be presented by the opposing party. However,
17 in any ex parte proceeding, such as an application for a temporary restraining
18 order, there is no balance of presentation by opposing advocates. The object of
19 an ex parte proceeding is nevertheless to yield a substantially just result. The
20 judge has an affirmative responsibility to accord the absent party just
21 consideration. The lawyer for the represented party has the correlative duty to
22 make disclosures of material facts known to the lawyer and that the lawyer
23 reasonably believes are necessary to an informed decision.

24

25 *Withdrawal*

26

27 [15] Normally, a lawyer's compliance with the duty of candor imposed by this
28 Rule does not require that the lawyer withdraw from the representation of a client
29 whose interests will be or have been adversely affected by the lawyer's
30 disclosure. The lawyer may, however, be required by Rule 1.16(a) to seek
31 permission of the tribunal to withdraw if the lawyer's compliance with this Rule's
32 duty of candor results in such an extreme deterioration of the client-lawyer
33 relationship that the lawyer can no longer competently represent the client. Also
34 see Rule 1.16(b) for the circumstances in which a lawyer will be permitted to
35 seek a tribunal's permission to withdraw. In connection with a request for
36 permission to withdraw that is premised on a client's misconduct, a lawyer may
37 reveal information relating to the representation only to the extent reasonably
38 necessary to comply with this Rule or as otherwise permitted by Rule 1.6.

39

40 **SCR 20:3.4 Fairness to opposing party and counsel**

41

42 A lawyer shall not:

43

44 (a) unlawfully obstruct another party's access to evidence or unlawfully alter,
45 destroy or conceal a document or other material having potential evidentiary
46 value. A lawyer shall not counsel or assist another person to do any such act;

(b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;

(c) knowingly disobey an obligation under the rules of a tribunal, except for an open refusal based on an assertion that no valid obligation exists;

(d) in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party;

(e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused; or

(f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

(1) the person is a relative or an employee or other agent of a client; and

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

ABA Comment

[1] The procedure of the adversary system contemplates that the evidence in a case is to be marshalled competitively by the contending parties. Fair competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery procedure, and the like.

[2] Documents and other items of evidence are often essential to establish a claim or defense. Subject to evidentiary privileges, the right of an opposing party, including the government, to obtain evidence through discovery or subpoena is an important procedural right. The exercise of that right can be frustrated if relevant material is altered, concealed or destroyed. Applicable law in many jurisdictions makes it an offense to destroy material for purpose of impairing its availability in a pending proceeding or one whose commencement can be foreseen. Falsifying evidence is also generally a criminal offense. Paragraph (a) applies to evidentiary material generally, including computerized information. Applicable law may permit a lawyer to take temporary possession of physical evidence of client crimes for the purpose of conducting a limited examination that will not alter or destroy material characteristics of the evidence. In such a case,

1 applicable law may require the lawyer to turn the evidence over to the police or
2 other prosecuting authority, depending on the circumstances.

3
4 [3] With regard to paragraph (b), it is not improper to pay a witness's
5 expenses or to compensate an expert witness on terms permitted by law. The
6 common law rule in most jurisdictions is that it is improper to pay an occurrence
7 witness any fee for testifying and that it is improper to pay an expert witness a
8 contingent fee.

9
10 [4] Paragraph (f) permits a lawyer to advise employees of a client to refrain
11 from giving information to another party, for the employees may identify their
12 interests with those of the client. See also Rule 4.2.

13
14 **Rule 3.5 Impartiality and decorum of the tribunal**

15
16 A lawyer shall not:

17
18 (a) seek to influence a judge, juror, prospective juror or other official by
19 means prohibited by law;

20
21 (b) communicate ex parte with such a person ~~except as permitted during the~~
22 ~~proceeding unless authorized to do so by law or court order~~ or for scheduling
23 purposes if permitted by the court. If communication between a lawyer and judge
24 has occurred in order to schedule the matter, the lawyer involved shall promptly
25 notify the lawyer for the other party or the other party, if unrepresented, of such
26 communication;

27
28 (c) communicate with a juror or prospective juror after discharge of the jury if:

29
30 (1) the communication is prohibited by law or court order;

31
32 (2) the juror has made known to the lawyer a desire not to communicate;
33 or

34
35 (3) the communication involves misrepresentation, coercion, duress or
36 harassment; or

37
38 (c) (d) engage in conduct intended to disrupt a tribunal.

39
40 **Wisconsin Committee Comment**

41
42 Paragraph (b) differs from the Model Rule in that it expressly imposes a duty
43 promptly to notify other parties in the event of an ex parte communication with a
44 judge concerning scheduling.

45
46 **ABA Comment**

1 [1] Many forms of improper influence upon a tribunal are proscribed by
2 criminal law. Others are specified in the ABA Model Code of Judicial Conduct,
3 with which an advocate should be familiar. A lawyer is required to avoid
4 contributing to a violation of such provisions.

5
6 [2] During a proceeding a lawyer may not communicate ex parte with persons
7 serving in an official capacity in the proceeding, such as judges, masters or
8 jurors, unless authorized to do so by law or court order.

9
10 [3] A lawyer may on occasion want to communicate with a juror or prospective
11 juror after the jury has been discharged. The lawyer may do so unless the
12 communication is prohibited by law or a court order but must respect the desire
13 of the juror not to talk with the lawyer. The lawyer may not engage in improper
14 conduct during the communication.

15
16 [4] The advocate's function is to present evidence and argument so that the
17 cause may be decided according to law. Refraining from abusive or obstreperous
18 conduct is a corollary of the advocate's right to speak on behalf of litigants. A
19 lawyer may stand firm against abuse by a judge but should avoid reciprocation;
20 the judge's default is no justification for similar dereliction by an advocate. An
21 advocate can present the cause, protect the record for subsequent review and
22 preserve professional integrity by patient firmness no less effectively than by
23 belligerence or theatrics.

24
25 [5] The duty to refrain from disruptive conduct applies to any proceeding of a
26 tribunal, including a deposition. See Rule 1.0(m).

27
28 **SCR 20:3.6 Trial publicity**

29
30 (a) A lawyer who is participating or has participated in the investigation or
31 litigation of a matter shall not make an extrajudicial statement that ~~a reasonable~~
32 ~~person would expect to~~ ~~the lawyer knows or reasonably should know will~~ be
33 disseminated by means of public communication ~~if the lawyer knows or~~
34 ~~reasonably should know that it and~~ will have a substantial likelihood of materially
35 prejudicing an adjudicative proceeding in the matter.

36
37 (b) A statement referred to in paragraph (a) ordinarily is likely to have such
38 an effect when it refers to a civil matter triable to a jury, a criminal matter, or any
39 other proceeding that could result in deprivation of liberty, and the statement
40 relates to:

41
42 (1) the character, credibility, reputation or criminal record of a party, suspect
43 in a criminal investigation or witness, or the identity of a witness, or the expected
44 testimony of a party or witness;

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

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

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

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

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

(c) Notwithstanding paragraphs (a) and (b)(1-5), a lawyer may state:

(1) the claim, offense or defense involved and, except when prohibited by law, the identity of the persons involved;

(2) information contained in a public record;

(3) that an investigation of a matter is in progress;

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

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

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

(7) in a criminal case, in addition to subparagraphs (1) through (6):

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

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

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

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

5 (d) Notwithstanding paragraph (a), a lawyer may make a statement that a
6 reasonable lawyer would believe is required to protect a client from the
7 substantial likelihood of undue prejudicial effect of recent publicity not initiated by
8 the lawyer or the lawyer's client. A statement made pursuant to this paragraph
9 shall be limited to such information that as is necessary to mitigate the recent
10 adverse publicity.

12 (e) A No lawyer associated in a firm or government agency with a lawyer
13 subject to paragraph (a) shall not make a statement prohibited by paragraph (a).

Wisconsin Committee Comment

Paragraph (b) contains provisions found in ABA Comment [5] but not contained in the Model Rule. Because of the addition of paragraph (b), this Rule and the Model Rule have differing numbering, so that care should be used in consulting the ABA Comment.

ABA Comment

[1] It is difficult to strike a balance between protecting the right to a fair trial and safeguarding the right of free expression. Preserving the right to a fair trial necessarily entails some curtailment of the information that may be disseminated about a party prior to trial, particularly where trial by jury is involved. If there were no such limits, the result would be the practical nullification of the protective effect of the rules of forensic decorum and the exclusionary rules of evidence. On the other hand, there are vital social interests served by the free dissemination of information about events having legal consequences and about legal proceedings themselves. The public has a right to know about threats to its safety and measures aimed at assuring its security. It also has a legitimate interest in the conduct of judicial proceedings, particularly in matters of general public concern. Furthermore, the subject matter of legal proceedings is often of direct significance in debate and deliberation over questions of public policy.

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

[3] The Rule sets forth a basic general prohibition against a lawyer's making statements that the lawyer knows or should know will have a substantial likelihood of materially prejudicing an adjudicative proceeding. Recognizing that the public value of informed commentary is great and the likelihood of prejudice to a proceeding by the commentary of a lawyer who is not involved in the

1 proceeding is small, the rule applies only to lawyers who are, or who have been
2 involved in the investigation or litigation of a case, and their associates.

3

4 [4] Paragraph (b) identifies specific matters about which a lawyer's statements
5 would not ordinarily be considered to present a substantial likelihood of material
6 prejudice, and should not in any event be considered prohibited by the general
7 prohibition of paragraph (a). Paragraph (b) is not intended to be an exhaustive
8 listing of the subjects upon which a lawyer may make a statement, but
9 statements on other matters may be subject to paragraph (a).

10

11 [5] There are, on the other hand, certain subjects that are more likely than not
12 to have a material prejudicial effect on a proceeding, particularly when they refer
13 to a civil matter triable to a jury, a criminal matter, or any other proceeding that
14 could result in incarceration. These subjects relate to:

15

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

19

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

24

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

28

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

31

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

35

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

40

41 [6] Another relevant factor in determining prejudice is the nature of the
42 proceeding involved. Criminal jury trials will be most sensitive to extrajudicial
43 speech. Civil trials may be less sensitive. Non-jury hearings and arbitration
44 proceedings may be even less affected. The Rule will still place limitations on
45 prejudicial comments in these cases, but the likelihood of prejudice may be
46 different depending on the type of proceeding.

1 [7] Finally, extrajudicial statements that might otherwise raise a question
2 under this Rule may be permissible when they are made in response to
3 statements made publicly by another party, another party's lawyer, or third
4 persons, where a reasonable lawyer would believe a public response is required
5 in order to avoid prejudice to the lawyer's client. When prejudicial statements
6 have been publicly made by others, responsive statements may have the
7 salutary effect of lessening any resulting adverse impact on the adjudicative
8 proceeding. Such responsive statements should be limited to contain only such
9 information as is necessary to mitigate undue prejudice created by the
10 statements made by others.
11

12 [8] See Rule 3.8(f) for additional duties of prosecutors in connection with
13 extrajudicial statements about criminal proceedings.
14

15 **SCR 20:3.7 Lawyer as witness**

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

18 (1) the testimony relates to an uncontested issue;
19

20 (2) the testimony relates to the nature and value of legal services rendered
21 in the case; or
22

23 (3) disqualification of the lawyer would work substantial hardship on the
24 client.
25

26 (b) A lawyer may act as advocate in a trial in which another lawyer in the
27 lawyer's firm is likely to be called as a witness unless precluded from doing so by
28 Rule 1.7 or Rule 1.9.
29

30 **ABA Comment**
31

32 [1] Combining the roles of advocate and witness can prejudice the tribunal
33 and the opposing party and can also involve a conflict of interest between the
34 lawyer and client.
35

36 **Advocate-Witness Rule**
37

38 [2] The tribunal has proper objection when the trier of fact may be confused or
39 misled by a lawyer serving as both advocate and witness. The opposing party
40 has proper objection where the combination of roles may prejudice that party's
41 rights in the litigation. A witness is required to testify on the basis of personal
42 knowledge, while an advocate is expected to explain and comment on evidence
43
44

1 given by others. It may not be clear whether a statement by an advocate-witness
2 should be taken as proof or as an analysis of the proof.

3
4 [3] To protect the tribunal, paragraph (a) prohibits a lawyer from
5 simultaneously serving as advocate and necessary witness except in those
6 circumstances specified in paragraphs (a)(1) through (a)(3). Paragraph (a)(1)
7 recognizes that if the testimony will be uncontested, the ambiguities in the dual
8 role are purely theoretical. Paragraph (a)(2) recognizes that where the testimony
9 concerns the extent and value of legal services rendered in the action in which
10 the testimony is offered, permitting the lawyers to testify avoids the need for a
11 second trial with new counsel to resolve that issue. Moreover, in such a situation
12 the judge has firsthand knowledge of the matter in issue; hence, there is less
13 dependence on the adversary process to test the credibility of the testimony.
14

15 [4] Apart from these two exceptions, paragraph (a)(3) recognizes that a
16 balancing is required between the interests of the client and those of the tribunal
17 and the opposing party. Whether the tribunal is likely to be misled or the
18 opposing party is likely to suffer prejudice depends on the nature of the case, the
19 importance and probable tenor of the lawyer's testimony, and the probability that
20 the lawyer's testimony will conflict with that of other witnesses. Even if there is
21 risk of such prejudice, in determining whether the lawyer should be disqualified,
22 due regard must be given to the effect of disqualification on the lawyer's client. It
23 is relevant that one or both parties could reasonably foresee that the lawyer
24 would probably be a witness. The conflict of interest principles stated in Rules
25 1.7, 1.9 and 1.10 have no application to this aspect of the problem.
26

27 [5] Because the tribunal is not likely to be misled when a lawyer acts as
28 advocate in a trial in which another lawyer in the lawyer's firm will testify as a
29 necessary witness, paragraph (b) permits the lawyer to do so except in situations
30 involving a conflict of interest.
31

32 *Conflict of Interest*

33
34 [6] In determining if it is permissible to act as advocate in a trial in which the
35 lawyer will be a necessary witness, the lawyer must also consider that the dual
36 role may give rise to a conflict of interest that will require compliance with Rules
37 1.7 or 1.9. For example, if there is likely to be substantial conflict between the
38 testimony of the client and that of the lawyer the representation involves a conflict
39 of interest that requires compliance with Rule 1.7. This would be true even
40 though the lawyer might not be prohibited by paragraph (a) from simultaneously
41 serving as advocate and witness because the lawyer's disqualification would
42 work a substantial hardship on the client. Similarly, a lawyer who might be
43 permitted to simultaneously serve as an advocate and a witness by paragraph
44 (a)(3) might be precluded from doing so by Rule 1.9. The problem can arise
45 whether the lawyer is called as a witness on behalf of the client or is called by the
46 opposing party. Determining whether or not such a conflict exists is primarily the

1 responsibility of the lawyer involved. If there is a conflict of interest, the lawyer
2 must secure the client's informed consent, confirmed in writing. In some cases,
3 the lawyer will be precluded from seeking the client's consent. See Rule 1.7. See
4 Rule 1.0(b) for the definition of "confirmed in writing" and Rule 1.0(e) for the
5 definition of "informed consent."

6

7 [7] Paragraph (b) provides that a lawyer is not disqualified from serving as an
8 advocate because a lawyer with whom the lawyer is associated in a firm is
9 precluded from doing so by paragraph (a). If, however, the testifying lawyer
10 would also be disqualified by Rule 1.7 or Rule 1.9 from representing the client in
11 the matter, other lawyers in the firm will be precluded from representing the client
12 by Rule 1.10 unless the client gives informed consent under the conditions stated
13 in Rule 1.7.

14

15 **SCR 20:3.8 Special responsibilities of a prosecutor**

16

17 ~~The prosecutor in a criminal case shall:~~

18

19 (a) ~~A prosecutor in a criminal case or a proceeding that could result in~~
20 ~~deprivation of liberty shall refrain from prosecuting not prosecute~~ a charge that
21 the prosecutor knows is not supported by probable cause;

22

23 (b) ~~make reasonable efforts to assure that the accused has been advised of~~
24 ~~the right to, and the procedure for obtaining counsel and has been given~~
25 ~~reasonable opportunity to obtain counsel;~~

26

27 (c) ~~not seek to obtain from an unrepresented accused a waiver of important~~
28 ~~pretrial rights, such as the right to a preliminary hearing;~~

29

30 (b) When communicating with an unrepresented person, a prosecutor shall
31 inform the person of his or her role and interest in the matter.

32

33 (c) When communicating after the commencement of litigation with an
34 unrepresented person who has a constitutional or statutory right to counsel, the
35 prosecutor shall inform the person of the right to counsel and the procedures to
36 obtain counsel and shall ensure that the person has been given a reasonable
37 opportunity to obtain counsel.

38

39 (d) When communicating with an unrepresented person after the
40 commencement of litigation, a prosecutor may discuss the matter, provide
41 information regarding settlement, and negotiate a resolution which may include a
42 waiver of constitutional and statutory rights, but a prosecutor shall not:

43

44 (1) otherwise provide legal advice to the person, including, but not limited
45 to whether to obtain counsel, whether to accept or reject a settlement offer,

1 whether to waive important procedural rights or how the tribunal is likely to
2 rule in the case, or

4 (2) assist the person in the completion of (i) guilty plea forms (ii) forms for
5 the waiver of a preliminary hearing or (iii) forms for the waiver of a jury trial.

7 (e) A prosecutor shall not subpoena a lawyer in a grand jury or other
8 proceeding to present evidence about a past or present client unless the
9 prosecutor reasonably believes:

11 (1) the information sought is not protected from disclosure by any
12 applicable privilege;

14 (2) the evidence sought is essential to the successful completion of an
15 ongoing investigation or prosecution; and

17 (3) there is no other feasible alternative to obtain the information.;

19 (f) A prosecutor in a criminal case or a proceeding that could result in
20 deprivation of liberty shall:

22 (d)(1) make timely disclosure to the defense of all evidence or information
23 known to the prosecutor that tends to negate the guilt of the accused or
24 mitigates the offense, and, in connection with sentencing, disclose to the
25 defense and to the tribunal all unprivileged mitigating information known to
26 the prosecutor, except when the prosecutor is relieved of this responsibility by
27 a protective order of the tribunal; and

29 (e)(2) exercise reasonable care to prevent investigators, law enforcement
30 personnel, employees or other persons assisting or associated with the
31 prosecutor in a criminal case from making an extrajudicial statement that the
32 prosecutor would be prohibited from making under Rule 3.6.

34 **Wisconsin Committee Comment**

36 Although there is considerable overlap between this Rule and the Model Rule,
37 new provisions are added and some Model Rule provisions are renumbered. For
38 this reason, care should be used in consulting the ABA Comment.

40 **ABA Comment**

42 [1] A prosecutor has the responsibility of a minister of justice and not simply
43 that of an advocate. This responsibility carries with it specific obligations to see
44 that the defendant is accorded procedural justice and that guilt is decided upon
45 the basis of sufficient evidence. Precisely how far the prosecutor is required to go
46 in this direction is a matter of debate and varies in different jurisdictions. Many

1 jurisdictions have adopted the ABA Standards of Criminal Justice Relating to the
2 Prosecution Function, which in turn are the product of prolonged and careful
3 deliberation by lawyers experienced in both criminal prosecution and defense.
4 Applicable law may require other measures by the prosecutor and knowing
5 disregard of those obligations or a systematic abuse of prosecutorial discretion
6 could constitute a violation of Rule 8.4.

7

8 [2] In some jurisdictions, a defendant may waive a preliminary hearing and
9 thereby lose a valuable opportunity to challenge probable cause. Accordingly,
10 prosecutors should not seek to obtain waivers of preliminary hearings or other
11 important pretrial rights from unrepresented accused persons. Paragraph (c)
12 does not apply, however, to an accused appearing *pro se* with the approval of
13 the tribunal. Nor does it forbid the lawful questioning of an uncharged suspect
14 who has knowingly waived the rights to counsel and silence.

15

16 [3] The exception in paragraph (d) recognizes that a prosecutor may seek an
17 appropriate protective order from the tribunal if disclosure of information to the
18 defense could result in substantial harm to an individual or to the public interest.

19

20 [4] Paragraph (e) is intended to limit the issuance of lawyer subpoenas in
21 grand jury and other criminal proceedings to those situations in which there is a
22 genuine need to intrude into the client-lawyer relationship.

23

24 [5] Paragraph (f) supplements Rule 3.6, which prohibits extrajudicial
25 statements that have a substantial likelihood of prejudicing an adjudicatory
26 proceeding. In the context of a criminal prosecution, a prosecutor's extrajudicial
27 statement can create the additional problem of increasing public condemnation of
28 the accused. Although the announcement of an indictment, for example, will
29 necessarily have severe consequences for the accused, a prosecutor can, and
30 should, avoid comments which have no legitimate law enforcement purpose and
31 have a substantial likelihood of increasing public opprobrium of the accused.
32 Nothing in this Comment is intended to restrict the statements which a prosecutor
33 may make which comply with Rule 3.6(b) or 3.6(c).

34

35 [6] Like other lawyers, prosecutors are subject to Rules 5.1 and 5.3, which
36 relate to responsibilities regarding lawyers and nonlawyers who work for or are
37 associated with the lawyer's office. Paragraph (f) reminds the prosecutor of the
38 importance of these obligations in connection with the unique dangers of
39 improper extrajudicial statements in a criminal case. In addition, paragraph (f)
40 requires a prosecutor to exercise reasonable care to prevent persons assisting or
41 associated with the prosecutor from making improper extrajudicial statements,
42 even when such persons are not under the direct supervision of the prosecutor.
43 Ordinarily, the reasonable care standard will be satisfied if the prosecutor issues
44 the appropriate cautions to law- enforcement personnel and other relevant
45 individuals.

1 **SCR 20:3.9 Advocate in nonadjudicative proceedings**

2
3 A lawyer representing a client before a legislative body or administrative
4 tribunal agency in a nonadjudicative proceeding shall disclose that the
5 appearance is in a representative capacity and shall conform to the provisions of
6 Rules 3.3(a) through (c), 3.4(a) through (c), and 3.5.

7
8 **ABA Comment**

9
10 [1] In representation before bodies such as legislatures, municipal councils,
11 and executive and administrative agencies acting in a rule-making or policy-
12 making capacity, lawyers present facts, formulate issues and advance argument
13 in the matters under consideration. The decision-making body, like a court,
14 should be able to rely on the integrity of the submissions made to it. A lawyer
15 appearing before such a body must deal with it honestly and in conformity with
16 applicable rules of procedure. See Rules 3.3(a) through (c), 3.4(a) through (c)
17 and 3.5.

18
19 [2] Lawyers have no exclusive right to appear before nonadjudicative bodies,
20 as they do before a court. The requirements of this Rule therefore may subject
21 lawyers to regulations inapplicable to advocates who are not lawyers. However,
22 legislatures and administrative agencies have a right to expect lawyers to deal
23 with them as they deal with courts.

24
25 [3] This Rule only applies when a lawyer represents a client in connection
26 with an official hearing or meeting of a governmental agency or a legislative body
27 to which the lawyer or the lawyer's client is presenting evidence or argument. It
28 does not apply to representation of a client in a negotiation or other bilateral
29 transaction with a governmental agency or in connection with an application for a
30 license or other privilege or the client's compliance with generally applicable
31 reporting requirements, such as the filing of income-tax returns. Nor does it apply
32 to the representation of a client in connection with an investigation or
33 examination of the client's affairs conducted by government investigators or
34 examiners. Representation in such matters is governed by Rules 4.1 through 4.4.

35
36 **SCR 20:3.10 Threatening criminal prosecution**

37
38 ~~A lawyer shall not present, participate in presenting or threaten to present~~
39 ~~criminal charges solely to obtain an advantage in a civil matter.~~

40
41 **TRANSACTIONS WITH PERSONS OTHER THAN CLIENTS**

42
43 **SCR 20:4.1 Truthfulness in statements to others**

44
45 (a) In the course of representing a client a lawyer shall not knowingly:

1 (a) (1) make a false statement of a material fact or law to a third person; or
2

3 (b) (2) fail to disclose a material fact to a third person when disclosure is
4 necessary to avoid assisting a criminal or fraudulent act by a client, unless
5 disclosure is prohibited by Rule 1.6.

6

7 (b) Notwithstanding paragraph (a) and Rules 5.3(c)(1) and 8.4, a prosecutor
8 may advise or supervise others with respect to lawful investigative activities
9 involving deception.

10

11 **Wisconsin Committee Comment**

12

13 Paragraph (b) has no counterpart in the Model Rule. As a general matter, a
14 lawyer may advise a client concerning whether proposed conduct is lawful. See
15 Rule 1.2(d). This is allowed even in circumstances in which the conduct involves
16 some form of deception, for example the use of testers to investigate unlawful
17 discrimination or the use of undercover detectives to investigate theft in the
18 workplace. When the lawyer personally participates in the deception, serious
19 questions arise. See Rule 8.4(c). Paragraph (b) recognizes that, where the law
20 expressly permits it, lawyers who are prosecutors may have limited involvement
21 in certain investigative activities involving deception.

22

23 **ABA Comment**

24

25 *Misrepresentation*

26

27 [1] A lawyer is required to be truthful when dealing with others on a client's
28 behalf, but generally has no affirmative duty to inform an opposing party of
29 relevant facts. A misrepresentation can occur if the lawyer incorporates or affirms
30 a statement of another person that the lawyer knows is false. Misrepresentations
31 can also occur by partially true but misleading statements or omissions that are
32 the equivalent of affirmative false statements. For dishonest conduct that does
33 not amount to a false statement or for misrepresentations by a lawyer other than
34 in the course of representing a client, see Rule 8.4.

35

36 *Statements of Fact*

37

38 [2] This Rule refers to statements of fact. Whether a particular statement
39 should be regarded as one of fact can depend on the circumstances. Under
40 generally accepted conventions in negotiation, certain types of statements
41 ordinarily are not taken as statements of material fact. Estimates of price or value
42 placed on the subject of a transaction and a party's intentions as to an
43 acceptable settlement of a claim are ordinarily in this category, and so is the
44 existence of an undisclosed principal except where nondisclosure of the principal
45 would constitute fraud. Lawyers should be mindful of their obligations under
46 applicable law to avoid criminal and tortious misrepresentation.

1
2 *Crime or Fraud by Client*
3

4 [3] Under Rule 1.2(d), a lawyer is prohibited from counseling or assisting a
5 client in conduct that the lawyer knows is criminal or fraudulent. Paragraph (b)
6 states a specific application of the principle set forth in Rule 1.2(d) and addresses
7 the situation where a client's crime or fraud takes the form of a lie or
8 misrepresentation. Ordinarily, a lawyer can avoid assisting a client's crime or
9 fraud by withdrawing from the representation. Sometimes it may be necessary for
10 the lawyer to give notice of the fact of withdrawal and to disaffirm an opinion,
11 document, affirmation or the like. In extreme cases, substantive law may require
12 a lawyer to disclose information relating to the representation to avoid being
13 deemed to have assisted the client's crime or fraud. If the lawyer can avoid
14 assisting a client's crime or fraud only by disclosing this information, then under
15 paragraph (b) the lawyer is required to do so, unless the disclosure is prohibited
16 by Rule 1.6.

17
18 **SCR 20:4.2 Communication with person represented by counsel**
19

20 In representing a client, a lawyer shall not communicate about the subject of
21 the representation with a party person the lawyer knows to be represented by
22 another lawyer in the matter, unless the lawyer has the consent of the other
23 lawyer or is authorized to do so by law to do so or a court order.

24
25 **ABA Comment**
26

27 [1] This Rule contributes to the proper functioning of the legal system by
28 protecting a person who has chosen to be represented by a lawyer in a matter
29 against possible overreaching by other lawyers who are participating in the
30 matter, interference by those lawyers with the client-lawyer relationship and the
31 uncounseled disclosure of information relating to the representation.

32 [2] This Rule applies to communications with any person who is represented
33 by counsel concerning the matter to which the communication relates.

34 [3] The Rule applies even though the represented person initiates or consents
35 to the communication. A lawyer must immediately terminate communication with
36 a person if, after commencing communication, the lawyer learns that the person
37 is one with whom communication is not permitted by this Rule.

38 [4] This Rule does not prohibit communication with a represented person, or
39 an employee or agent of such a person, concerning matters outside the
40 representation. For example, the existence of a controversy between a
41 government agency and a private party, or between two organizations, does not
42 prohibit a lawyer for either from communicating with nonlawyer representatives of
43 the other regarding a separate matter. Nor does this Rule preclude

1 communication with a represented person who is seeking advice from a lawyer
2 who is not otherwise representing a client in the matter. A lawyer may not make a
3 communication prohibited by this Rule through the acts of another. See Rule
4 8.4(a). Parties to a matter may communicate directly with each other, and a
5 lawyer is not prohibited from advising a client concerning a communication that
6 the client is legally entitled to make. Also, a lawyer having independent
7 justification or legal authorization for communicating with a represented person is
8 permitted to do so.

9

10 [5] Communications authorized by law may include communications by a
11 lawyer on behalf of a client who is exercising a constitutional or other legal right
12 to communicate with the government. Communications authorized by law may
13 also include investigative activities of lawyers representing governmental entities,
14 directly or through investigative agents, prior to the commencement of criminal or
15 civil enforcement proceedings. When communicating with the accused in a
16 criminal matter, a government lawyer must comply with this Rule in addition to
17 honoring the constitutional rights of the accused. The fact that a communication
18 does not violate a state or federal constitutional right is insufficient to establish
19 that the communication is permissible under this Rule.

20

21 [6] A lawyer who is uncertain whether a communication with a represented
22 person is permissible may seek a court order. A lawyer may also seek a court
23 order in exceptional circumstances to authorize a communication that would
24 otherwise be prohibited by this Rule, for example, where communication with a
25 person represented by counsel is necessary to avoid reasonably certain injury.

26

27 [7] In the case of a represented organization, this Rule prohibits
28 communications with a constituent of the organization who supervises, directs or
29 regularly consults with the organization's lawyer concerning the matter or has
30 authority to obligate the organization with respect to the matter or whose act or
31 omission in connection with the matter may be imputed to the organization for
32 purposes of civil or criminal liability. Consent of the organization's lawyer is not
33 required for communication with a former constituent. If a constituent of the
34 organization is represented in the matter by his or her own counsel, the consent
35 by that counsel to a communication will be sufficient for purposes of this Rule.
36 Compare Rule 3.4(f). In communicating with a current or former constituent of an
37 organization, a lawyer must not use methods of obtaining evidence that violate
38 the legal rights of the organization. See Rule 4.4.

39

40 [8] The prohibition on communications with a represented person only applies
41 in circumstances where the lawyer knows that the person is in fact represented in
42 the matter to be discussed. This means that the lawyer has actual knowledge of
43 the fact of the representation; but such actual knowledge may be inferred from
44 the circumstances. See Rule 1.0(f). Thus, the lawyer cannot evade the
45 requirement of obtaining the consent of counsel by closing eyes to the obvious.

46

1 [9] In the event the person with whom the lawyer communicates is not known
2 to be represented by counsel in the matter, the lawyer's communications are
3 subject to Rule 4.3.

4

5 **SCR 20:4.3 Dealing with unrepresented person**

6

7 In dealing on behalf of a client with a person who is not represented by
8 counsel, a lawyer shall ~~not state or imply that the lawyer is disinterested inform~~
9 ~~such person of the lawyer's role in the matter~~. When the lawyer knows or
10 reasonably should know that the unrepresented person misunderstands the
11 lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the
12 misunderstanding. ~~The lawyer shall not give legal advice to an unrepresented~~
13 ~~person, other than the advice to secure counsel, if the lawyer knows or~~
14 ~~reasonably should know that the interests of such a person are or have a~~
15 ~~reasonable possibility of being in conflict with the interests of the client.~~

16

17 **Wisconsin Committee Comment**

18

19 This Rule differs from the Model Rule in requiring lawyers to inform
20 unrepresented persons of the lawyer's role in the matter, whereas the Model
21 Rule requires only that the lawyer not state or imply that the lawyer is
22 disinterested. A similar obligation to clarify the lawyer's role is expressed in Rules
23 1.13(f) and 3.8(b).

24

25 **ABA Comment**

26

27 [1] An unrepresented person, particularly one not experienced in dealing with
28 legal matters, might assume that a lawyer is disinterested in loyalties or is a
29 disinterested authority on the law even when the lawyer represents a client. In
30 order to avoid a misunderstanding, a lawyer will typically need to identify the
31 lawyer's client and, where necessary, explain that the client has interests
32 opposed to those of the unrepresented person. For misunderstandings that
33 sometimes arise when a lawyer for an organization deals with an unrepresented
34 constituent, see Rule 1.13(f).

35

36 [2] The Rule distinguishes between situations involving unrepresented
37 persons whose interests may be adverse to those of the lawyer's client and those
38 in which the person's interests are not in conflict with the client's. In the former
39 situation, the possibility that the lawyer will compromise the unrepresented
40 person's interests is so great that the Rule prohibits the giving of any advice,
41 apart from the advice to obtain counsel. Whether a lawyer is giving impermissible
42 advice may depend on the experience and sophistication of the unrepresented
43 person, as well as the setting in which the behavior and comments occur. This
44 Rule does not prohibit a lawyer from negotiating the terms of a transaction or
45 settling a dispute with an unrepresented person. So long as the lawyer has
46 explained that the lawyer represents an adverse party and is not representing the

1 person, the lawyer may inform the person of the terms on which the lawyer's
2 client will enter into an agreement or settle a matter, prepare documents that
3 require the person's signature and explain the lawyer's own view of the meaning
4 of the document or the lawyer's view of the underlying legal obligations.

5

6 **SCR 20:4.4 Respect for rights of third persons**

7

8 (a) In representing a client, a lawyer shall not use means that have no
9 substantial purpose other than to embarrass, delay, or burden a third person, or
10 use methods of obtaining evidence that violate the legal rights of such a person.

11 (b) A lawyer who receives a document relating to the representation of the
12 lawyer's client and knows or reasonably should know that the document was
13 inadvertently sent shall promptly notify the sender.

14

15 **ABA Comment**

16

17 [1] Responsibility to a client requires a lawyer to subordinate the interests of
18 others to those of the client, but that responsibility does not imply that a lawyer
19 may disregard the rights of third persons. It is impractical to catalogue all such
20 rights, but they include legal restrictions on methods of obtaining evidence from
21 third persons and unwarranted intrusions into privileged relationships, such as
22 the client-lawyer relationship.

23

24 [2] Paragraph (b) recognizes that lawyers sometimes receive documents that
25 were mistakenly sent or produced by opposing parties or their lawyers. If a
26 lawyer knows or reasonably should know that such a document was sent
27 inadvertently, then this Rule requires the lawyer to promptly notify the sender in
28 order to permit that person to take protective measures. Whether the lawyer is
29 required to take additional steps, such as returning the original document, is a
30 matter of law beyond the scope of these Rules, as is the question of whether the
31 privileged status of a document has been waived. Similarly, this Rule does not
32 address the legal duties of a lawyer who receives a document that the lawyer
33 knows or reasonably should know may have been wrongfully obtained by the
34 sending person. For purposes of this Rule, "document" includes e-mail or other
35 electronic modes of transmission subject to being read or put into readable form.

36

37 [3] Some lawyers may choose to return a document unread, for example,
38 when the lawyer learns before receiving the document that it was inadvertently
39 sent to the wrong address. Where a lawyer is not required by applicable law to
40 do so, the decision to voluntarily return such a document is a matter of
41 professional judgment ordinarily reserved to the lawyer. See Rules 1.2 and 1.4.

42

43 **SCR 20:4.5 Guardians ad litem**

44

1 A lawyer appointed to act as a guardian ad litem or as an attorney for the best
2 interests of an individual represents, and shall act in, the individual's best
3 interests, even if doing so is contrary to the individual's wishes. A lawyer so
4 appointed shall comply with the Rules of Professional Conduct, except with
5 respect to requirements concerning client consent or direction.

6

7 **Wisconsin Committee Comment**

8

9 The Model Rules do not contain a counterpart provision. The role of
10 guardians ad litem is defined consistent with reported decisions. See, e.g., Paige
11 K.B. v. Molepske, 219 Wis. 2d 418, 580 N.W.2d 289 (1998); In re Steveon R.A.,
12 196 Wis. 2d 171, 537 N.W.2d 142 (Ct. App. 1995). Eligibility for appointment as a
13 guardian ad litem is governed by Supreme Court Rules, Ch. 35-36. The Rule
14 expressly notes that a lawyer acting as guardian ad litem represents the best
15 interests of the child or ward for whom the lawyer is appointed. Because the child
16 or ward of a guardian ad litem is not a client in the usual sense of that term, care
17 should be used in applying these Rules, particularly Rules 1.2 and 1.6.

18

19 **LAW FIRMS AND ASSOCIATIONS**

20

21 **SCR 20:5.1 Responsibilities of a partner or partners, managers, and**
22 **supervisory lawyer lawyers**

24 (a) A partner in a law firm, and a lawyer who individually or together with other
25 lawyers possesses comparable managerial authority in a law firm, shall make
26 reasonable efforts to ensure that the firm has in effect measures giving
27 reasonable assurance that all lawyers in the firm conform to the Rules of
28 Professional Conduct.

30 (b) A lawyer having direct supervisory authority over another lawyer shall
31 make reasonable efforts to ensure that the other lawyer conforms to the Rules of
32 Professional Conduct.

34 (c) A lawyer shall be responsible for another lawyer's violation of the Rules of
35 Professional Conduct if:

37 (1) the lawyer orders or, with knowledge of the specific conduct, ratifies
38 the conduct involved; or

40 (2) the lawyer is a partner or has comparable managerial authority in the
41 law firm in which the other lawyer practices, or has direct supervisory
42 authority over the other lawyer, and knows of the conduct at a time when its
43 consequences can be avoided or mitigated but fails to take reasonable
44 remedial action.

45

46 **ABA Comment**

1
2 [1] Paragraph (a) applies to lawyers who have managerial authority over the
3 professional work of a firm. See Rule 1.0(c). This includes members of a
4 partnership, the shareholders in a law firm organized as a professional
5 corporation, and members of other associations authorized to practice law;
6 lawyers having comparable managerial authority in a legal services organization
7 or a law department of an enterprise or government agency; and lawyers who
8 have intermediate managerial responsibilities in a firm. Paragraph (b) applies to
9 lawyers who have supervisory authority over the work of other lawyers in a firm.

10
11 [2] Paragraph (a) requires lawyers with managerial authority within a firm to
12 make reasonable efforts to establish internal policies and procedures designed to
13 provide reasonable assurance that all lawyers in the firm will conform to the
14 Rules of Professional Conduct. Such policies and procedures include those
15 designed to detect and resolve conflicts of interest, identify dates by which
16 actions must be taken in pending matters, account for client funds and property
17 and ensure that inexperienced lawyers are properly supervised.

18
19 [3] Other measures that may be required to fulfill the responsibility prescribed
20 in paragraph (a) can depend on the firm's structure and the nature of its practice.
21 In a small firm of experienced lawyers, informal supervision and periodic review
22 of compliance with the required systems ordinarily will suffice. In a large firm, or
23 in practice situations in which difficult ethical problems frequently arise, more
24 elaborate measures may be necessary. Some firms, for example, have a
25 procedure whereby junior lawyers can make confidential referral of ethical
26 problems directly to a designated senior partner or special committee. See Rule
27 5.2. Firms, whether large or small, may also rely on continuing legal education in
28 professional ethics. In any event, the ethical atmosphere of a firm can influence
29 the conduct of all its members and the partners may not assume that all lawyers
30 associated with the firm will inevitably conform to the Rules.

31
32 [4] Paragraph (c) expresses a general principle of personal responsibility for
33 acts of another. See also Rule 8.4(a).

34
35 [5] Paragraph (c)(2) defines the duty of a partner or other lawyer having
36 comparable managerial authority in a law firm, as well as a lawyer who has direct
37 supervisory authority over performance of specific legal work by another lawyer.
38 Whether a lawyer has supervisory authority in particular circumstances is a
39 question of fact. Partners and lawyers with comparable authority have at least
40 indirect responsibility for all work being done by the firm, while a partner or
41 manager in charge of a particular matter ordinarily also has supervisory
42 responsibility for the work of other firm lawyers engaged in the matter.
43 Appropriate remedial action by a partner or managing lawyer would depend on
44 the immediacy of that lawyer's involvement and the seriousness of the
45 misconduct. A supervisor is required to intervene to prevent avoidable
46 consequences of misconduct if the supervisor knows that the misconduct

1 occurred. Thus, if a supervising lawyer knows that a subordinate misrepresented
2 a matter to an opposing party in negotiation, the supervisor as well as the
3 subordinate has a duty to correct the resulting misapprehension.

4

5 [6] Professional misconduct by a lawyer under supervision could reveal a
6 violation of paragraph (b) on the part of the supervisory lawyer even though it
7 does not entail a violation of paragraph (c) because there was no direction,
8 ratification or knowledge of the violation.

9

10 [7] Apart from this Rule and Rule 8.4(a), a lawyer does not have disciplinary
11 liability for the conduct of a partner, associate or subordinate. Whether a lawyer
12 may be liable civilly or criminally for another lawyer's conduct is a question of law
13 beyond the scope of these Rules.

14

15 [8] The duties imposed by this Rule on managing and supervising lawyers do
16 not alter the personal duty of each lawyer in a firm to abide by the Rules of
17 Professional Conduct. See Rule 5.2(a).

18

19 **SCR 20:5.2 Responsibilities of a subordinate lawyer**

20

21 (a) A lawyer is bound by the Rules of Professional Conduct notwithstanding
22 that the lawyer acted at the direction of another person.

23

24 (b) A subordinate lawyer does not violate the Rules of Professional Conduct if
25 that lawyer acts in accordance with a supervisory lawyer's reasonable resolution
26 of an arguable question of professional duty.

27

28 **ABA Comment**

29

30 [1] Although a lawyer is not relieved of responsibility for a violation by the fact
31 that the lawyer acted at the direction of a supervisor, that fact may be relevant in
32 determining whether a lawyer had the knowledge required to render conduct a
33 violation of the Rules. For example, if a subordinate filed a frivolous pleading at
34 the direction of a supervisor, the subordinate would not be guilty of a professional
35 violation unless the subordinate knew of the document's frivolous character.

36

37 [2] When lawyers in a supervisor-subordinate relationship encounter a matter
38 involving professional judgment as to ethical duty, the supervisor may assume
39 responsibility for making the judgment. Otherwise a consistent course of action or
40 position could not be taken. If the question can reasonably be answered only one
41 way, the duty of both lawyers is clear and they are equally responsible for
42 fulfilling it. However, if the question is reasonably arguable, someone has to
43 decide upon the course of action. That authority ordinarily reposes in the
44 supervisor, and a subordinate may be guided accordingly. For example, if a
45 question arises whether the interests of two clients conflict under Rule 1.7, the

1 supervisor's reasonable resolution of the question should protect the subordinate
2 professionally if the resolution is subsequently challenged.

3

4 **SCR 20:5.3 Responsibilities regarding nonlawyer assistants**

5

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

8

9 (a) a partner, and a lawyer who individually or together with other lawyers
10 possesses comparable managerial authority in a law firm shall make reasonable
11 efforts to ensure that the firm has in effect measures giving reasonable
12 assurance that the person's conduct is compatible with the professional
13 obligations of the lawyer;

14

15 (b) a lawyer having direct supervisory authority over the nonlawyer shall make
16 reasonable efforts to ensure that the person's conduct is compatible with the
17 professional obligations of the lawyer; and

18

19 (c) a lawyer shall be responsible for conduct of such a person that would be a
20 violation of the Rules of Professional Conduct if engaged in by a lawyer if:

21

22 (1) the lawyer orders or, with the knowledge of the specific conduct,
23 ratifies the conduct involved; or

24

25 (2) the lawyer is a partner or has comparable managerial authority in the
26 law firm in which the person is employed, or has direct supervisory authority
27 over the person, and knows of the conduct at a time when its consequences
28 can be avoided or mitigated but fails to take reasonable remedial action.

29

30 **ABA Comment**

31

32 [1] Lawyers generally employ assistants in their practice, including
33 secretaries, investigators, law student interns, and paraprofessionals. Such
34 assistants, whether employees or independent contractors, act for the lawyer in
35 rendition of the lawyer's professional services. A lawyer must give such
36 assistants appropriate instruction and supervision concerning the ethical aspects
37 of their employment, particularly regarding the obligation not to disclose
38 information relating to representation of the client, and should be responsible for
39 their work product. The measures employed in supervising nonlawyers should
40 take account of the fact that they do not have legal training and are not subject to
41 professional discipline.

42

43 [2] Paragraph (a) requires lawyers with managerial authority within a law firm
44 to make reasonable efforts to establish internal policies and procedures designed
45 to provide reasonable assurance that nonlawyers in the firm will act in a way
46 compatible with the Rules of Professional Conduct. See Comment [1] to Rule

1 5.1. Paragraph (b) applies to lawyers who have supervisory authority over the
2 work of a nonlawyer. Paragraph (c) specifies the circumstances in which a lawyer
3 is responsible for conduct of a nonlawyer that would be a violation of the Rules of
4 Professional Conduct if engaged in by a lawyer.

5

6 **SCR 20:5.4 Professional independence of a lawyer**

7

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

10 (1) an agreement by a lawyer with the lawyer's firm, partner, or associate
11 may provide for the payment of money, over a reasonable period of time after
12 the lawyer's death, to the lawyer's estate or to one or more specified persons;

13 (2) a lawyer who purchases the practice of a deceased, disabled, or
14 disappeared lawyer may, pursuant to the provisions of Rule 1.17, pay to the
15 estate or other representative of that lawyer the agreed-upon purchase price;
16 and

17 (3) a lawyer or law firm may include nonlawyer employees in a
18 compensation or retirement plan, even though the plan is based in whole or in
19 part on a profit-sharing arrangement; and

20 (4) a lawyer may share court-awarded legal fees with a nonprofit
21 organization that employed, retained or recommended employment of the
22 lawyer in the matter.

23

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

26

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

30

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

33

34 (1) a nonlawyer owns any interest therein, except that a fiduciary
35 representative of the estate of a lawyer may hold the stock or interest of the
36 lawyer for a reasonable time during administration;

37

38 (2) a nonlawyer is a corporate director or officer thereof or occupies the
39 position of similar responsibility in any form of association other than a
40 corporation; or

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

ABA Comment

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

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

SCR 20:5.5 Unauthorized practice of law

A lawyer shall not:

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

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

Wisconsin Committee Comment

This Rule does not include the extensive provisions concerning multijurisdictional practice that are contained in the Model Rule. For this reason, the ABA Comment is not included. The following paragraph was included in the old ABA comment.

The definition of the practice of law is established by law and varies from one jurisdiction to another. Whatever the definition, limiting the practice of law to members of the bar protects the public against rendition of legal services by unqualified persons. Paragraph (b) does not prohibit a lawyer from employing the services of paraprofessionals and delegating functions to them, so long as the lawyer supervises the delegated work and retains responsibility for their work. See Rule 5.3. Likewise, it does not prohibit lawyers from providing professional advice and instruction to nonlawyers whose employment requires knowledge of law; for example, claims adjusters, employees of financial or commercial institutions, social workers, accountants and persons employed in government agencies. In addition, a lawyer may counsel nonlawyers who wish to proceed pro se.

1

2 **SCR 20:5.6 Restrictions on right to practice**

3

4 A lawyer shall not participate in offering or making:

5

6 (a) a partnership or, shareholders, operating, employment, or other similar
7 type of agreement that restricts the right of a lawyer to practice after termination
8 of the relationship, except an agreement concerning benefits upon retirement; or

9

10 (b) an agreement in which a restriction on the lawyer's right to practice is part
11 of the settlement of a client controversy ~~between private parties~~.

12

13 **ABA Comment**

14

15 [1] An agreement restricting the right of lawyers to practice after leaving a firm
16 not only limits their professional autonomy but also limits the freedom of clients to
17 choose a lawyer. Paragraph (a) prohibits such agreements except for restrictions
18 incident to provisions concerning retirement benefits for service with the firm.

19

20 [2] Paragraph (b) prohibits a lawyer from agreeing not to represent other
21 persons in connection with settling a claim on behalf of a client.

22

23 [3] This Rule does not apply to prohibit restrictions that may be included in the
24 terms of the sale of a law practice pursuant to Rule 1.17.

25

26 **SCR 20:5.7 Limited liability legal practice.**

27

28 (a)(1) A lawyer may be a member of a law firm that is organized as a limited
29 liability organization solely to render professional legal services under the
30 laws of this state, including chs. 178 and 183 and subch XIX of ch. 180. The
31 lawyer may practice in or as a limited liability organization if the lawyer is
32 otherwise licensed to practice law in this state and the organization is
33 registered under sub. (b).

34

35 (2) Nothing in this rule or the laws under which the lawyer or law firm is
36 organized shall relieve a lawyer from personal liability for any acts, errors or
37 omissions of the lawyer arising out of the performance of professional services.

38

39 (b) A lawyer or law firm that is organized as a limited liability organization shall
40 file an annual registration with the state bar of Wisconsin in a form and with a filing
41 fee that shall be determined by the state bar. The annual registration shall be
42 signed by a lawyer who is licensed to practice law in this state and who holds an
43 ownership interest in the organization seeking to register under this rule. The
44 annual registration shall include all of the following.

45

46 (1) The name and address of the organization.

1 (2) The names, residence addresses, states or jurisdictions where licensed
2 to practice law, and attorney registration numbers of the lawyers in the
3 organization and their ownership interest in the organization.

4
5 (3) A representation that at the time of the filing each lawyer in the
6 organization is in good standing in this state or, if licensed to practice law
7 elsewhere, in the states or jurisdictions in which he or she is licensed.
8
9

10 (4) A certificate of insurance issued by an insurance carrier certifying that it
11 has issued to the organization a professional liability policy to the organization
12 as provided in sub. (bm).

13 (5) Such other information as may be required from time to time by the
14 state bar of Wisconsin.

15 (bm) The professional liability policy under sub. (b)(4) shall identify the name of
16 the professional liability carrier, the policy number, the expiration date and the
17 limits and deductible. Such professional liability insurance shall provide not less
18 than the following limits of liability:

19 (1) For a firm composed of 1 to 3 lawyers, \$100,000 of combined indemnity
20 and defense cost coverage per claim, with a \$300,000 aggregate combined
21 indemnity and defense cost coverage amount per policy period.

22 (2) For a firm composed of 4 to 6 lawyers, \$250,000 of combined indemnity
23 and defense cost coverage per claim, with \$750,000 aggregate combined
24 indemnity and defense cost coverage amount per policy period.

25 (3) For a firm composed of 7 to 14 lawyers, \$500,000 of combined
26 indemnity and defense cost coverage per claim, with \$1,000,000 aggregate
27 combined indemnity and defense cost coverage amount per policy period.

28 (4) For a firm composed of 15 to 30 lawyers, \$1,000,000 of combined
29 indemnity and defense cost coverage per claim, with \$2,000,000 aggregate
30 combined indemnity and defense cost coverage amount per policy period.

31 (5) For a firm composed of 31 to 50 lawyers, \$4,000,000 of combined
32 indemnity and defense cost coverage per claim, with \$4,000,000 aggregate
33 combined indemnity and defense cost coverage amount per policy period.

34 (6) For a firm composed of 51 or more lawyers, \$10,000,000 of combined
35 indemnity and defense cost coverage per claim, with \$10,000,000 aggregate
36 combined indemnity and defense cost coverage amount per policy period.

1 (c) Nothing in this rule or the laws under which a lawyer or law firm is
2 organized shall diminish a lawyer's or law firm's obligations or responsibilities
3 under any provisions of this chapter.

4

5 (d) A law firm that is organized as a limited liability organization under the laws
6 of any other state or jurisdiction or of the United States solely for the purpose of
7 rendering professional legal services that is authorized to do business in
8 Wisconsin and that has at least one lawyer licensed to practice law in Wisconsin
9 may register under this rule by complying with the provisions of sub. (b).

10

11 (e) A lawyer or law firm that is organized as a limited liability organization shall
12 do all of the following:

13

14 (1) Include a written designation of the limited liability structure as part of its
15 name.

16

17 (2) Provide to clients and potential clients in writing a plain-English
18 summary of the features of the limited liability law under which it is organized
19 and the applicable provisions of this chapter.

20

21 **Wisconsin Committee Comment**

22

23 This Rule has no counterpart in the Model Rules. Model Rule 5.7, concerning
24 law-related services, is not part of these Rules.

25

26 **PUBLIC SERVICE**

27

28 **SCR 20:6.1 Pro bono publico service**

29

30 (a) A lawyer should render public interest provide pro bono legal service. A
31 lawyer may discharge this responsibility by providing Pro bono legal service
32 includes professional services provided at no fee or a reduced fee to persons of
33 limited means or to public service or charitable groups or organizations that provide
34 services to persons of limited means, by service in activities for improving the law,
35 the legal system or the legal profession, and or by financial support for
36 organizations that provide legal services to persons of limited means. A lawyer
37 discharges this responsibility by providing annually 50 hours of pro bono legal
38 service or a comparable amount of financial support for organizations that provide
39 legal services to persons of limited means.

40

41 (b) The professional responsibility recognized in paragraph (a) is aspirational
42 rather than mandatory in nature. The failure to provide legal services or make
43 charitable legal service contributions under this rule will not subject a lawyer to
44 discipline.

1 (c) Each member of the bar shall file annually on a form prescribed by the
2 Supreme Court a report stating whether the lawyer has discharged his or her
3 responsibility to provide pro bono legal service under paragraph (a).

4

5 **Wisconsin Committee Comment**

6

7 The Wisconsin rule differs from the Model Rule in the way it defines the pro
8 bono publico responsibility and in requiring an annual report concerning whether
9 the lawyer has discharged the responsibility. The responsibility to provide 50
10 hours of service annually assumes that the lawyer is working full-time as a
11 lawyer. Lawyers working less than full-time have a responsibility in proportion to
12 their professional time commitment. The amount of financial support that is
13 comparable to 50 hours of service depends on a number of factors, including the
14 lawyer's income from legal services and the lawyer's financial circumstances.

15

16 **ABA Comment**

17

18 [1] Every lawyer, regardless of professional prominence or professional work
19 load, has a responsibility to provide legal services to those unable to pay, and
20 personal involvement in the problems of the disadvantaged can be one of the
21 most rewarding experiences in the life of a lawyer. The American Bar Association
22 urges all lawyers to provide a minimum of 50 hours of pro bono services
23 annually. States, however, may decide to choose a higher or lower number of
24 hours of annual service (which may be expressed as a percentage of a lawyer's
25 professional time) depending upon local needs and local conditions. It is
26 recognized that in some years a lawyer may render greater or fewer hours than
27 the annual standard specified, but during the course of his or her legal career,
28 each lawyer should render on average per year, the number of hours set forth in
29 this Rule. Services can be performed in civil matters or in criminal or
30 quasi-criminal matters for which there is no government obligation to provide
31 funds for legal representation, such as post-conviction death penalty appeal
32 cases.

33

34 [2] Paragraphs (a)(1) and (2) recognize the critical need for legal services
35 that exists among persons of limited means by providing that a substantial
36 majority of the legal services rendered annually to the disadvantaged be
37 furnished without fee or expectation of fee. Legal services under these
38 paragraphs consist of a full range of activities, including individual and class
39 representation, the provision of legal advice, legislative lobbying, administrative
40 rule making and the provision of free training or mentoring to those who
41 represent persons of limited means. The variety of these activities should
42 facilitate participation by government lawyers, even when restrictions exist on
43 their engaging in the outside practice of law.

44

45 [3] Persons eligible for legal services under paragraphs (a)(1) and (2) are
46 those who qualify for participation in programs funded by the Legal Services

1 Corporation and those whose incomes and financial resources are slightly above
2 the guidelines utilized by such programs but nevertheless, cannot afford counsel.
3 Legal services can be rendered to individuals or to organizations such as
4 homeless shelters, battered women's centers and food pantries that serve those
5 of limited means. The term "governmental organizations" includes, but is not
6 limited to, public protection programs and sections of governmental or public
7 sector agencies.

8

9 [4] Because service must be provided without fee or expectation of fee, the
10 intent of the lawyer to render free legal services is essential for the work
11 performed to fall within the meaning of paragraphs (a)(1) and (2). Accordingly,
12 services rendered cannot be considered pro bono if an anticipated fee is
13 uncollected, but the award of statutory attorneys' fees in a case originally
14 accepted as pro bono would not disqualify such services from inclusion under
15 this section. Lawyers who do receive fees in such cases are encouraged to
16 contribute an appropriate portion of such fees to organizations or projects that
17 benefit persons of limited means.

18

19 [5] While it is possible for a lawyer to fulfill the annual responsibility to
20 perform pro bono services exclusively through activities described in paragraphs
21 (a)(1) and (2), to the extent that any hours of service remained unfulfilled, the
22 remaining commitment can be met in a variety of ways as set forth in paragraph
23 (b). Constitutional, statutory or regulatory restrictions may prohibit or impede
24 government and public sector lawyers and judges from performing the pro bono
25 services outlined in paragraphs (a)(1) and (2). Accordingly, where those
26 restrictions apply, government and public sector lawyers and judges may fulfill
27 their pro bono responsibility by performing services outlined in paragraph (b).

28

29 [6] Paragraph (b)(1) includes the provision of certain types of legal services
30 to those whose incomes and financial resources place them above limited
31 means. It also permits the pro bono lawyer to accept a substantially reduced fee
32 for services. Examples of the types of issues that may be addressed under this
33 paragraph include First Amendment claims, Title VII claims and environmental
34 protection claims. Additionally, a wide range of organizations may be
35 represented, including social service, medical research, cultural and religious
36 groups.

37

38 [7] Paragraph (b)(2) covers instances in which lawyers agree to and receive
39 a modest fee for furnishing legal services to persons of limited means.
40 Participation in judicare programs and acceptance of court appointments in which
41 the fee is substantially below a lawyer's usual rate are encouraged under this
42 section.

43

44 [8] Paragraph (b)(3) recognizes the value of lawyers engaging in activities
45 that improve the law, the legal system or the legal profession. Serving on bar
46 association committees, serving on boards of pro bono or legal services

1 programs, taking part in Law Day activities, acting as a continuing legal
2 education instructor, a mediator or an arbitrator and engaging in legislative
3 lobbying to improve the law, the legal system or the profession are a few
4 examples of the many activities that fall within this paragraph.

5
6 [9] Because the provision of pro bono services is a professional
7 responsibility, it is the individual ethical commitment of each lawyer.
8 Nevertheless, there may be times when it is not feasible for a lawyer to engage in
9 pro bono services. At such times a lawyer may discharge the pro bono
10 responsibility by providing financial support to organizations providing free legal
11 services to persons of limited means. Such financial support should be
12 reasonably equivalent to the value of the hours of service that would have
13 otherwise been provided. In addition, at times it may be more feasible to satisfy
14 the pro bono responsibility collectively, as by a firm's aggregate pro bono
15 activities.

16
17 [10] Because the efforts of individual lawyers are not enough to meet the
18 need for free legal services that exists among persons of limited means, the
19 government and the profession have instituted additional programs to provide
20 those services. Every lawyer should financially support such programs, in
21 addition to either providing direct pro bono services or making financial
22 contributions when pro bono service is not feasible.

23
24 [11] Law firms should act reasonably to enable and encourage all lawyers in
25 the firm to provide the pro bono legal services called for by this Rule.

26
27 [12] The responsibility set forth in this Rule is not intended to be enforced
28 through disciplinary process.

29
30 **SCR 20:6.2 Accepting appointments**

31
32 A lawyer shall not seek to avoid appointment by a tribunal to represent a person
33 except for good cause, such as:

34
35 (a) representing the client is likely to result in violation of the Rules of
36 Professional Conduct or other law;

37
38 (b) representing the client is likely to result in an unreasonable financial burden
39 on the lawyer; or

40
41 (c) the client or the cause is so repugnant to the lawyer as to be likely to impair
42 the client-lawyer relationship or the lawyer's ability to represent the client.

43
44 **ABA Comment**

1 [1] A lawyer ordinarily is not obliged to accept a client whose character or
2 cause the lawyer regards as repugnant. The lawyer's freedom to select clients is,
3 however, qualified. All lawyers have a responsibility to assist in providing pro
4 bono publico service. See Rule 6.1. An individual lawyer fulfills this responsibility
5 by accepting a fair share of unpopular matters or indigent or unpopular clients. A
6 lawyer may also be subject to appointment by a court to serve unpopular clients
7 or persons unable to afford legal services.

8

9 *Appointed Counsel*

10

11 [2] For good cause a lawyer may seek to decline an appointment to represent
12 a person who cannot afford to retain counsel or whose cause is unpopular. Good
13 cause exists if the lawyer could not handle the matter competently, see Rule 1.1,
14 or if undertaking the representation would result in an improper conflict of
15 interest, for example, when the client or the cause is so repugnant to the lawyer
16 as to be likely to impair the client-lawyer relationship or the lawyer's ability to
17 represent the client. A lawyer may also seek to decline an appointment if
18 acceptance would be unreasonably burdensome, for example, when it would
19 impose a financial sacrifice so great as to be unjust.

20

21 [3] An appointed lawyer has the same obligations to the client as retained
22 counsel, including the obligations of loyalty and confidentiality, and is subject to
23 the same limitations on the client-lawyer relationship, such as the obligation to
24 refrain from assisting the client in violation of the Rules.

25

26 **SCR 20:6.3 Membership in legal services organization**

27

28 A lawyer may serve as a director, officer or member of a legal services
29 organization, apart from the law firm in which the lawyer practices, notwithstanding
30 that the organization serves persons having interests adverse to a client of the
31 lawyer. The lawyer shall not knowingly participate in a decision or action of the
32 organization:

33

34 (a) if participating in the decision would be incompatible with the lawyer's
35 obligations to a client under Rule 1.7; or

36

37 (b) where the decision could have a material adverse effect on the
38 representation of a client of the organization whose interests are adverse to a client
39 of the lawyer.

40

41 **ABA Comment**

42

43 [1] Lawyers should be encouraged to support and participate in legal service
44 organizations. A lawyer who is an officer or a member of such an organization
45 does not thereby have a client-lawyer relationship with persons served by the
46 organization. However, there is potential conflict between the interests of such

1 persons and the interests of the lawyer's clients. If the possibility of such conflict
2 disqualified a lawyer from serving on the board of a legal services organization,
3 the profession's involvement in such organizations would be severely curtailed.
4

5 [2] It may be necessary in appropriate cases to reassure a client of the
6 organization that the representation will not be affected by conflicting loyalties of
7 a member of the board. Established, written policies in this respect can enhance
8 the credibility of such assurances.
9

10 **SCR 20:6.4 Law reform activities affecting client interests**

11 A lawyer may serve as a director, officer or member of an organization involved
12 in reform of the law or its administration notwithstanding that the reform may affect
13 the interests of a client of the lawyer. When the lawyer knows that the interests of a
14 client may be materially benefited by a decision in which the lawyer participates, the
15 lawyer shall disclose that fact but need not identify the client.
16

17 **ABA Comment**

18 [1] Lawyers involved in organizations seeking law reform generally do not
19 have a client-lawyer relationship with the organization. Otherwise, it might follow
20 that a lawyer could not be involved in a bar association law reform program that
21 might indirectly affect a client. See also Rule 1.2(b). For example, a lawyer
22 specializing in antitrust litigation might be regarded as disqualified from
23 participating in drafting revisions of rules governing that subject. In determining
24 the nature and scope of participation in such activities, a lawyer should be
25 mindful of obligations to clients under other Rules, particularly Rule 1.7. A lawyer
26 is professionally obligated to protect the integrity of the program by making an
27 appropriate disclosure within the organization when the lawyer knows a private
28 client might be materially benefitted.
29

30 **SCR 20:6.5 Nonprofit and court-annexed limited legal services programs**

31 (a) A lawyer who, under the auspices of a program sponsored by a nonprofit
32 organization, a bar association or a court, provides short-term limited legal
33 services to a client without expectation by either the lawyer or the client that the
34 lawyer will provide continuing representation in the matter:
35

36 (1) is subject to Rules 1.7 and 1.9(a) only if the lawyer knows that the
37 representation of the client involves a conflict of interest; and
38

39 (2) is subject to Rule 1.10 only if the lawyer knows that another lawyer
40 associated with the lawyer in a law firm is disqualified by Rule 1.7 or 1.9(a)
41 with respect to the matter.
42

1 (b) Except as provided in paragraph (a)(2), Rule 1.10 is inapplicable to a
2 representation governed by this Rule.

3

4 **Wisconsin Committee Comment**

5

6 Unlike the Model Rule, paragraph (a) expressly provides coverage for
7 programs sponsored by bar associations.

8

9 **ABA Comment**

10

11 [1] Legal services organizations, courts and various nonprofit organizations
12 have established programs through which lawyers provide short-term limited legal
13 services — such as advice or the completion of legal forms - that will assist persons
14 to address their legal problems without further representation by a lawyer. In these
15 programs, such as legal-advice hotlines, advice-only clinics or pro se counseling
16 programs, a client-lawyer relationship is established, but there is no expectation
17 that the lawyer's representation of the client will continue beyond the limited
18 consultation. Such programs are normally operated under circumstances in which it
19 is not feasible for a lawyer to systematically screen for conflicts of interest as is
20 generally required before undertaking a representation. See, e.g., Rules 1.7, 1.9
21 and 1.10.

22

23 [2] A lawyer who provides short-term limited legal services pursuant to this
24 Rule must secure the client's informed consent to the limited scope of the
25 representation. See Rule 1.2(c). If a short-term limited representation would not
26 be reasonable under the circumstances, the lawyer may offer advice to the client
27 but must also advise the client of the need for further assistance of counsel.
28 Except as provided in this Rule, the Rules of Professional Conduct, including
29 Rules 1.6 and 1.9(c), are applicable to the limited representation.

30

31 [3] Because a lawyer who is representing a client in the circumstances
32 addressed by this Rule ordinarily is not able to check systematically for conflicts
33 of interest, paragraph (a) requires compliance with Rules 1.7 or 1.9(a) only if the
34 lawyer knows that the representation presents a conflict of interest for the lawyer,
35 and with Rule 1.10 only if the lawyer knows that another lawyer in the lawyer's
36 firm is disqualified by Rules 1.7 or 1.9(a) in the matter.

37

38 [4] Because the limited nature of the services significantly reduces the risk of
39 conflicts of interest with other matters being handled by the lawyer's firm,
40 paragraph (b) provides that Rule 1.10 is inapplicable to a representation
41 governed by this Rule except as provided by paragraph (a)(2). Paragraph (a)(2)
42 requires the participating lawyer to comply with Rule 1.10 when the lawyer knows
43 that the lawyer's firm is disqualified by Rules 1.7 or 1.9(a). By virtue of paragraph
44 (b), however, a lawyer's participation in a short-term limited legal services
45 program will not preclude the lawyer's firm from undertaking or continuing the
46 representation of a client with interests adverse to a client being represented

1 under the program's auspices. Nor will the personal disqualification of a lawyer
2 participating in the program be imputed to other lawyers participating in the
3 program.

4

5 [5] If, after commencing a short-term limited representation in accordance
6 with this Rule, a lawyer undertakes to represent the client in the matter on an
7 ongoing basis, Rules 1.7, 1.9(a) and 1.10 become applicable.

8

9 **INFORMATION ABOUT LEGAL SERVICES**

10 **SCR 20:7.1 Communications concerning a lawyer's services**

11 (a) A lawyer shall not make a false or misleading communication about the
12 lawyer or the lawyer's services. A communication is false or misleading if it:

13 (1) (a) contains a material misrepresentation of fact or law, or omits a fact
14 necessary to make the statement considered as a whole not materially misleading;

15 (2) (b) is likely to create an unjustified expectation about results the lawyer
16 can achieve, or states or implies that the lawyer can achieve results by means
17 that violate the Rules of Professional Conduct or other law; or

18 (3) (c) compares the lawyer's services with other lawyers' services, unless
19 the comparison can be factually substantiated; or

20 (4) (d) contains any paid testimonial about, or paid endorsement of, the
21 lawyer without identifying the fact that payment has been made or, if the
22 testimonial or endorsement is not made by an actual client, without identifying
23 that fact.

24 **Wisconsin Committee Comment**

25 Paragraphs (b) through (d) are not contained in the Model Rule.

26 **ABA Comment**

27 [1] This Rule governs all communications about a lawyer's services, including
28 advertising permitted by Rule 7.2. Whatever means are used to make known a
29 lawyer's services, statements about them must be truthful.

30

31 [2] Truthful statements that are misleading are also prohibited by this Rule. A
32 truthful statement is misleading if it omits a fact necessary to make the lawyer's
33 communication considered as a whole not materially misleading. A truthful
34 statement is also misleading if there is a substantial likelihood that it will lead a
35 reasonable person to formulate a specific conclusion about the lawyer or the
36 lawyer's services for which there is no reasonable factual foundation.

[3] An advertisement that truthfully reports a lawyer's achievements on behalf of clients or former clients may be misleading if presented so as to lead a reasonable person to form an unjustified expectation that the same results could be obtained for other clients in similar matters without reference to the specific factual and legal circumstances of each client's case. Similarly, an unsubstantiated comparison of the lawyer's services or fees with the services or fees of other lawyers may be misleading if presented with such specificity as would lead a reasonable person to conclude that the comparison can be substantiated. The inclusion of an appropriate disclaimer or qualifying language may preclude a finding that a statement is likely to create unjustified expectations or otherwise mislead a prospective client.

[4] See also Rule 8.4(e) for the prohibition against stating or implying an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law.

SCR 20:7.2 Advertising

(a) Subject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise services through written, recorded or electronic communication, including public media, such as a telephone directory, legal directory, newspaper or other periodical, outdoor, radio or television, or through direct mail advertising distributed generally to persons not known to need legal services of the kind provided by the lawyer in a particular matter.

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

(1) pay the reasonable cost of advertisements or communications advertising or written communication permitted by this rule;

(2) and may pay the usual charges of a legal service plan or a not-for-profit or qualified lawyer referral service or other legal service organization, and pay for a law practice in accordance with SCR 20:1.17. A qualified lawyer referral service is a lawyer referral service that has been approved by an appropriate regulatory authority;

(3) pay for a law practice in accordance with Rule 1.17; and

(4) refer clients to another lawyer or nonlawyer professional pursuant to an agreement not otherwise prohibited under these Rules that provides for the other person or refer clients or customers to the lawyer, if

(i) the reciprocal referral arrangement is not exclusive;

1 (ii) the client gives informed consent;

2

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

5

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

8

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

11

12 **Wisconsin Committee Comment**

13

14 Paragraph (b)(4) differs from the Model Rule by requiring additional safeguards
15 consistent with those found in Rule 1.8(f).

16

17 **ABA Comment**

18

19 [1] To assist the public in obtaining legal services, lawyers should be allowed
20 to make known their services not only through reputation but also through
21 organized information campaigns in the form of advertising. Advertising involves
22 an active quest for clients, contrary to the tradition that a lawyer should not seek
23 clientele. However, the public's need to know about legal services can be fulfilled
24 in part through advertising. This need is particularly acute in the case of persons
25 of moderate means who have not made extensive use of legal services. The
26 interest in expanding public information about legal services ought to prevail over
27 considerations of tradition. Nevertheless, advertising by lawyers entails the risk of
28 practices that are misleading or overreaching.

29

30 [2] This Rule permits public dissemination of information concerning a
31 lawyer's name or firm name, address and telephone number; the kinds of
32 services the lawyer will undertake; the basis on which the lawyer's fees are
33 determined, including prices for specific services and payment and credit
34 arrangements; a lawyer's foreign language ability; names of references and, with
35 their consent, names of clients regularly represented; and other information that
36 might invite the attention of those seeking legal assistance.

37

38 [3] Questions of effectiveness and taste in advertising are matters of
39 speculation and subjective judgment. Some jurisdictions have had extensive
40 prohibitions against television advertising, against advertising going beyond
41 specified facts about a lawyer, or against "undignified" advertising. Television is
42 now one of the most powerful media for getting information to the public,
43 particularly persons of low and moderate income; prohibiting television
44 advertising, therefore, would impede the flow of information about legal services
45 to many sectors of the public. Limiting the information that may be advertised has
46 a similar effect and assumes that the bar can accurately forecast the kind of

1 information that the public would regard as relevant. Similarly, electronic media,
2 such as the Internet, can be an important source of information about legal
3 services, and lawful communication by electronic mail is permitted by this Rule.
4 But see Rule 7.3(a) for the prohibition against the solicitation of a prospective
5 client through a real-time electronic exchange that is not initiated by the
6 prospective client.

7

8 [4] Neither this Rule nor Rule 7.3 prohibits communications authorized by law,
9 such as notice to members of a class in class action litigation.

10

11 *Paying Others to Recommend a Lawyer*

12

13 [5] Lawyers are not permitted to pay others for channeling professional work.
14 Paragraph (b)(1), however, allows a lawyer to pay for advertising and
15 communications permitted by this Rule, including the costs of print directory
16 listings, on-line directory listings, newspaper ads, television and radio airtime,
17 domain-name registrations, sponsorship fees, banner ads, and group advertising.
18 A lawyer may compensate employees, agents and vendors who are engaged to
19 provide marketing or client-development services, such as publicists, public-
20 relations personnel, business-development staff and website designers. See
21 Rule 5.3 for the duties of lawyers and law firms with respect to the conduct of
22 nonlawyers who prepare marketing materials for them.

23

24 [6] A lawyer may pay the usual charges of a legal service plan or a not-for-
25 profit or qualified lawyer referral service. A legal service plan is a prepaid or
26 group legal service plan or a similar delivery system that assists prospective
27 clients to secure legal representation. A lawyer referral service, on the other
28 hand, is any organization that holds itself out to the public as a lawyer referral
29 service. Such referral services are understood by laypersons to be consumer-
30 oriented organizations that provide unbiased referrals to lawyers with appropriate
31 experience in the subject matter of the representation and afford other client
32 protections, such as complaint procedures or malpractice insurance
33 requirements. Consequently, this Rule only permits a lawyer to pay the usual
34 charges of a not-for-profit or qualified lawyer referral service. A qualified lawyer
35 referral service is one that is approved by an appropriate regulatory authority as
36 affording adequate protections for prospective clients. See, e.g., the American
37 Bar Association's Model Supreme Court Rules Governing Lawyer Referral
38 Services and Model Lawyer Referral and Information Service Quality Assurance
39 Act (requiring that organizations that are identified as lawyer referral services (i)
40 permit the participation of all lawyers who are licensed and eligible to practice in
41 the jurisdiction and who meet reasonable objective eligibility requirements as
42 may be established by the referral service for the protection of prospective
43 clients; (ii) require each participating lawyer to carry reasonably adequate
44 malpractice insurance; (iii) act reasonably to assess client satisfaction and
45 address client complaints; and (iv) do not refer prospective clients to lawyers who
46 own, operate or are employed by the referral service.)

1
2 [7] A lawyer who accepts assignments or referrals from a legal service plan or
3 referrals from a lawyer referral service must act reasonably to assure that the
4 activities of the plan or service are compatible with the lawyer's professional
5 obligations. See Rule 5.3. Legal service plans and lawyer referral services may
6 communicate with prospective clients, but such communication must be in
7 conformity with these Rules. Thus, advertising must not be false or misleading,
8 as would be the case if the communications of a group advertising program or a
9 group legal services plan would mislead prospective clients to think that it was a
10 lawyer referral service sponsored by a state agency or bar association. Nor could
11 the lawyer allow in-person, telephonic, or real-time contacts that would violate
12 Rule 7.3.

13
14 [8] A lawyer also may agree to refer clients to another lawyer or a nonlawyer
15 professional, in return for the undertaking of that person to refer clients or
16 customers to the lawyer. Such reciprocal referral arrangements must not interfere
17 with the lawyer's professional judgment as to making referrals or as to providing
18 substantive legal services. See Rules 2.1 and 5.4(c). Except as provided in Rule
19 1.5(e), a lawyer who receives referrals from a lawyer or nonlawyer professional
20 must not pay anything solely for the referral, but the lawyer does not violate
21 paragraph (b) of this Rule by agreeing to refer clients to the other lawyer or
22 nonlawyer professional, so long as the reciprocal referral agreement is not
23 exclusive and the client is informed of the referral agreement. Conflicts of interest
24 created by such arrangements are governed by Rule 1.7. Reciprocal referral
25 agreements should not be of indefinite duration and should be reviewed
26 periodically to determine whether they comply with these Rules. This Rule does
27 not restrict referrals or divisions of revenues or net income among lawyers within
28 firms comprised of multiple entities.

29
30 **SCR 20:7.3 Direct contact with prospective clients**
31

32 (a) ~~Subject to the requirements of Rule 7.1 and paragraphs (b) and (d), a
33 lawyer may initiate written communication, not involving personal or telephone
34 contact, with persons known to need legal services of the kind provided by the
35 lawyer in a particular matter, for the purpose of obtaining professional employment.~~

36
37 (b) ~~A written communication under par. (a) shall be conspicuously labeled with
38 the word "Advertisement" and a copy of it shall be filed with the office of lawyer
39 regulation within 5 days of its dissemination.~~

40
41 (c) ~~A lawyer shall not initiate personal contact, including telephone contact,
42 with a prospective client for the purpose of obtaining professional employment
43 except in the following circumstances and subject to the requirements of Rule 7.1
44 and paragraph (d):~~

1 (1) If the prospective client is a close friend, relative or former client, or one
2 whom the lawyer reasonably believes to be a client.

3

4 (2) Under the auspices of a public or charitable legal services organization.

5

6 (3) Under the auspices of a bona fide political, social, civic, fraternal,
7 employee or trade organization whose purposes include but are not limited to
8 providing or recommending legal services, if the legal services are related to the
9 principal purposes of the organization.

10

11 (d) A lawyer shall not initiate a written communication under paragraph (a) or
12 personal contact (including telephone contact) under paragraph (c) if:

13

14 (a) A lawyer shall not by in-person or, live telephone or real-time electronic
15 contact solicit professional employment from a prospective client when a significant
16 motive for the lawyer's doing so is the lawyer's pecuniary gain, unless the person
17 contacted:

18

19 (1) is a lawyer; or

20

21 (2) has a family, close personal, or prior professional relationship with the
22 lawyer.

23

24 (b) A lawyer shall not solicit professional employment from a prospective
25 client by written, recorded or electronic communication or by in-person,
26 telephone or real-time electronic contact even when not otherwise prohibited by
27 paragraph (a), if:

28

29 (1) the lawyer knows or reasonably should know that the physical,
30 emotional or mental state of the person makes it unlikely that the person
31 would exercise reasonable judgment in employing a lawyer; or

32

33 (2) the person prospective client has made known to the lawyer a desire
34 not to receive a communication from be solicited by the lawyer; or

35

36 (3) the communication solicitation involves coercion, duress or
37 harassment.

38

39 (c) Every written, recorded or electronic communication from a lawyer soliciting
40 professional employment from a prospective client known to be in need of legal
41 services in a particular matter shall include the words "Advertising Material" on the
42 outside envelope, if any, and at the beginning and ending of any recorded or
43 electronic communication, unless the recipient of the communication is a person
44 specified in paragraphs (a)(1) or (a)(2), and a copy of it shall be filed with the Office
45 of Lawyer Regulation within five days of its dissemination.

1 (d) Notwithstanding the prohibitions in paragraph (a), a lawyer may
2 participate with a prepaid or group legal service plan operated by an organization
3 not owned or directed by the lawyer that uses in-person or telephone contact to
4 solicit memberships or subscriptions for the plan from persons who are not
5 known to need legal services in a particular matter covered by the plan.

6
7 (f) (e) Except as permitted under SCR 11.06, a lawyer, at his or his instance,
8 shall not draft legal documents, such as wills, trust instruments or contracts,
9 which require or imply that the lawyer's services be used in relation to that
10 document.

11
12 **Wisconsin Committee Comment**

13
14 The Rule differs from the Model Rule in that paragraph (b)(1) has been added,
15 as have the last clause of paragraph (c) and all of paragraph (e). These provisions
16 are carried forward from the prior Wisconsin Rule.

17
18 **ABA Comment**

19
20 [1] There is a potential for abuse inherent in direct in-person, live telephone or
21 real-time electronic contact by a lawyer with a prospective client known to need
22 legal services. These forms of contact between a lawyer and a prospective client
23 subject the layperson to the private importuning of the trained advocate in a
24 direct interpersonal encounter. The prospective client, who may already feel
25 overwhelmed by the circumstances giving rise to the need for legal services, may
26 find it difficult fully to evaluate all available alternatives with reasoned judgment
27 and appropriate self-interest in the face of the lawyer's presence and insistence
28 upon being retained immediately. The situation is fraught with the possibility of
29 undue influence, intimidation, and over-reaching.

30
31 [2] This potential for abuse inherent in direct in-person, live telephone or real-
32 time electronic solicitation of prospective clients justifies its prohibition,
33 particularly since lawyer advertising and written and recorded communication
34 permitted under Rule 7.2 offer alternative means of conveying necessary
35 information to those who may be in need of legal services. Advertising and
36 written and recorded communications which may be mailed or autodialed make it
37 possible for a prospective client to be informed about the need for legal services,
38 and about the qualifications of available lawyers and law firms, without subjecting
39 the prospective client to direct in-person, telephone or real-time electronic
40 persuasion that may overwhelm the client's judgment.

41
42 [3] The use of general advertising and written, recorded or electronic
43 communications to transmit information from lawyer to prospective client, rather
44 than direct in-person, live telephone or real-time electronic contact, will help to
45 assure that the information flows cleanly as well as freely. The contents of
46 advertisements and communications permitted under Rule 7.2 can be

1 permanently recorded so that they cannot be disputed and may be shared with
2 others who know the lawyer. This potential for informal review is itself likely to
3 help guard against statements and claims that might constitute false and
4 misleading communications, in violation of Rule 7.1. The contents of direct in-
5 person, live telephone or real-time electronic conversations between a lawyer
6 and a prospective client can be disputed and may not be subject to third-party
7 scrutiny. Consequently, they are much more likely to approach (and occasionally
8 cross) the dividing line between accurate representations and those that are false
9 and misleading.

10

11 [4] There is far less likelihood that a lawyer would engage in abusive practices
12 against an individual who is a former client, or with whom the lawyer has close
13 personal or family relationship, or in situations in which the lawyer is motivated by
14 considerations other than the lawyer's pecuniary gain. Nor is there a serious
15 potential for abuse when the person contacted is a lawyer. Consequently, the
16 general prohibition in Rule 7.3(a) and the requirements of Rule 7.3(c) are not
17 applicable in those situations. Also, paragraph (a) is not intended to prohibit a
18 lawyer from participating in constitutionally protected activities of public or
19 charitable legal-service organizations or bona fide political, social, civic,
20 fraternal, employee or trade organizations whose purposes include providing or
21 recommending legal services to its members or beneficiaries.

22

23 [5] But even permitted forms of solicitation can be abused. Thus, any
24 solicitation which contains information which is false or misleading within the
25 meaning of Rule 7.1, which involves coercion, duress or harassment within the
26 meaning of Rule 7.3(b)(2), or which involves contact with a prospective client
27 who has made known to the lawyer a desire not to be solicited by the lawyer
28 within the meaning of Rule 7.3(b)(1) is prohibited. Moreover, if after sending a
29 letter or other communication to a client as permitted by Rule 7.2 the lawyer
30 receives no response, any further effort to communicate with the prospective
31 client may violate the provisions of Rule 7.3(b).

32

33 [6] This Rule is not intended to prohibit a lawyer from contacting
34 representatives of organizations or groups that may be interested in establishing
35 a group or prepaid legal plan for their members, insureds, beneficiaries or other
36 third parties for the purpose of informing such entities of the availability of and
37 details concerning the plan or arrangement which the lawyer or lawyer's firm is
38 willing to offer. This form of communication is not directed to a prospective client.
39 Rather, it is usually addressed to an individual acting in a fiduciary capacity
40 seeking a supplier of legal services for others who may, if they choose, become
41 prospective clients of the lawyer. Under these circumstances, the activity which
42 the lawyer undertakes in communicating with such representatives and the type
43 of information transmitted to the individual are functionally similar to and serve
44 the same purpose as advertising permitted under Rule 7.2.

45

1 [7] The requirement in Rule 7.3(c) that certain communications be marked
2 "Advertising Material" does not apply to communications sent in response to
3 requests of potential clients or their spokespersons or sponsors. General
4 announcements by lawyers, including changes in personnel or office location, do
5 not constitute communications soliciting professional employment from a client
6 known to be in need of legal services within the meaning of this Rule.

7
8 [8] Paragraph (d) of this Rule permits a lawyer to participate with an
9 organization which uses personal contact to solicit members for its group or
10 prepaid legal service plan, provided that the personal contact is not undertaken
11 by any lawyer who would be a provider of legal services through the plan. The
12 organization must not be owned by or directed (whether as manager or
13 otherwise) by any lawyer or law firm that participates in the plan. For example,
14 paragraph (d) would not permit a lawyer to create an organization controlled
15 directly or indirectly by the lawyer and use the organization for the in-person or
16 telephone solicitation of legal employment of the lawyer through memberships in
17 the plan or otherwise. The communication permitted by these organizations also
18 must not be directed to a person known to need legal services in a particular
19 matter, but is to be designed to inform potential plan members generally of
20 another means of affordable legal services. Lawyers who participate in a legal
21 service plan must reasonably assure that the plan sponsors are in compliance
22 with Rules 7.1, 7.2 and 7.3(b). See 8.4(a).

23
24 **SCR 20:7.4 Communication of fields of practice**

25
26 (a) A lawyer may communicate the fact that the lawyer does or does not
27 practice in particular fields of law. ~~A lawyer shall not state or imply that the lawyer is~~
28 ~~a "specialist", "certified", or words of similar import except as follows:~~

29
30 (a) (b) A lawyer admitted to engage in patent practice before the United States
31 Patent and Trademark Office may use the designation "patent attorney" or a
32 substantially similar designation.

33
34 (b) (c) A lawyer engaged in admiralty practice may use the designation
35 "admiralty", "proctor in admiralty" or a substantially similar designation.

36
37 (c) (d) A lawyer ~~may communicate the fact that he or she has been~~ ~~shall not~~
38 ~~state or imply that a lawyer is certified as a specialist in a particular field of law,~~
39 ~~unless:~~

40
41 (1) ~~by a named organization or authority but only if that certification is~~
42 ~~granted by an organization or authority whose specialty certification program is~~
43 ~~the lawyer has been certified as a specialist by an organization that has been~~
44 ~~approved by an appropriate state authority or that has been accredited by the~~
45 ~~American Bar Association; and~~

1 (2) the name of the certifying organization is clearly identified in the
2 communication.

3
4 **ABA Comment**

5 [1] Paragraph (a) of this Rule permits a lawyer to indicate areas of practice in
6 communications about the lawyer's services. If a lawyer practices only in certain
7 fields, or will not accept matters except in a specified field or fields, the lawyer is
8 permitted to so indicate. A lawyer is generally permitted to state that the lawyer is
9 a "specialist," practices a "specialty," or "specializes in" particular fields, but such
10 communications are subject to the "false and misleading" standard applied in
11 Rule 7.1 to communications concerning a lawyer's services.

12
13 [2] Paragraph (b) recognizes the long-established policy of the Patent and
14 Trademark Office for the designation of lawyers practicing before the Office.
15 Paragraph (c) recognizes that designation of Admiralty practice has a long
16 historical tradition associated with maritime commerce and the federal courts.

17
18 [3] Paragraph (d) permits a lawyer to state that the lawyer is certified as a
19 specialist in a field of law if such certification is granted by an organization
20 approved by an appropriate state authority or accredited by the American Bar
21 Association or another organization, such as a state bar association, that has
22 been approved by the state authority to accredit organizations that certify lawyers
23 as specialists. Certification signifies that an objective entity has recognized an
24 advanced degree of knowledge and experience in the specialty area greater than
25 is suggested by general licensure to practice law. Certifying organizations may
26 be expected to apply standards of experience, knowledge and proficiency to
27 insure that a lawyer's recognition as a specialist is meaningful and reliable. In
28 order to insure that consumers can obtain access to useful information about an
29 organization granting certification, the name of the certifying organization must
30 be included in any communication regarding the certification.

31
32 **SCR 20:7.5 Firm names and letterheads**

33
34 (a) A lawyer shall not use a firm name, letterhead or other professional
35 designation that violates Rule 7.1. A trade name may be used by a lawyer in private
36 practice if it does not imply a connection with a government agency or with a public
37 or charitable legal services organization and is not otherwise in violation of Rule
38 7.1.

39
40 (b) A law firm with offices in more than one jurisdiction may use the same name
41 or other professional designation in each jurisdiction, but identification of the
42 lawyers in an office of the firm shall indicate the jurisdictional limitations on those
43 not licensed to practice in the jurisdiction where the office is located.

1 (c) The name of a lawyer holding a public office shall not be used in the name
2 of a law firm, or in communications on its behalf, during any substantial period in
3 which the lawyer is not actively and regularly practicing with the firm.

4

5 (d) Lawyers may state or imply that they practice in a partnership or other
6 organization only when that is the fact.

7

8 **ABA Comment**

9

10 [1] A firm may be designated by the names of all or some of its members, by
11 the names of deceased members where there has been a continuing succession
12 in the firm's identity or by a trade name such as the "ABC Legal Clinic." A lawyer
13 or law firm may also be designated by a distinctive website address or
14 comparable professional designation. Although the United States Supreme Court
15 has held that legislation may prohibit the use of trade names in professional
16 practice, use of such names in law practice is acceptable so long as it is not
17 misleading. If a private firm uses a trade name that includes a geographical
18 name such as "Springfield Legal Clinic," an express disclaimer that it is a public
19 legal aid agency may be required to avoid a misleading implication. It may be
20 observed that any firm name including the name of a deceased partner is, strictly
21 speaking, a trade name. The use of such names to designate law firms has
22 proven a useful means of identification. However, it is misleading to use the
23 name of a lawyer not associated with the firm or a predecessor of the firm, or the
24 name of a nonlawyer.

25

26 [2] With regard to paragraph (d), lawyers sharing office facilities, but who are
27 not in fact associated with each other in a law firm, may not denominate
28 themselves as, for example, "Smith and Jones," for that title suggests that they
29 are practicing law together in a firm.

30

31 **SCR 20:7.6 Political contributions to obtain government legal**
engagements or appointments by judges

32

33 A lawyer or law firm shall not accept a government legal engagement or an
appointment by a judge if the lawyer or law firm makes a political contribution or
solicits political contributions for the purpose of obtaining or being considered for
that type of legal engagement or appointment.

34

35 **ABA Comment**

36

37 [1] Lawyers have a right to participate fully in the political process, which
38 includes making and soliciting political contributions to candidates for judicial and
39 other public office. Nevertheless, when lawyers make or solicit political
40 contributions in order to obtain an engagement for legal work awarded by a
41 government agency, or to obtain appointment by a judge, the public may
42 legitimately question whether the lawyers engaged to perform the work are

1 selected on the basis of competence and merit. In such a circumstance, the
2 integrity of the profession is undermined.

3

4 [2] The term "political contribution" denotes any gift, subscription, loan,
5 advance or deposit of anything of value made directly or indirectly to a candidate,
6 incumbent, political party or campaign committee to influence or provide financial
7 support for election to or retention in judicial or other government office. Political
8 contributions in initiative and referendum elections are not included. For
9 purposes of this Rule, the term "political contribution" does not include
10 uncompensated services.

11

12 [3] Subject to the exceptions below, (i) the term "government legal
13 engagement" denotes any engagement to provide legal services that a public
14 official has the direct or indirect power to award; and (ii) the term "appointment by
15 a judge" denotes an appointment to a position such as referee, commissioner,
16 special master, receiver, guardian or other similar position that is made by a
17 judge. Those terms do not, however, include (a) substantially uncompensated
18 services; (b) engagements or appointments made on the basis of experience,
19 expertise, professional qualifications and cost following a request for proposal or
20 other process that is free from influence based upon political contributions; and
21 (c) engagements or appointments made on a rotational basis from a list compiled
22 without regard to political contributions.

23

24 [4] The term "lawyer or law firm" includes a political action committee or other
25 entity owned or controlled by a lawyer or law firm.

26

27 [5] Political contributions are for the purpose of obtaining or being considered
28 for a government legal engagement or appointment by a judge if, but for the
29 desire to be considered for the legal engagement or appointment, the lawyer or
30 law firm would not have made or solicited the contributions. The purpose may be
31 determined by an examination of the circumstances in which the contributions
32 occur. For example, one or more contributions that in the aggregate are
33 substantial in relation to other contributions by lawyers or law firms, made for the
34 benefit of an official in a position to influence award of a government legal
35 engagement, and followed by an award of the legal engagement to the
36 contributing or soliciting lawyer or the lawyer's firm would support an inference
37 that the purpose of the contributions was to obtain the engagement, absent other
38 factors that weigh against existence of the proscribed purpose. Those factors
39 may include among others that the contribution or solicitation was made to
40 further a political, social, or economic interest or because of an existing personal,
41 family, or professional relationship with a candidate.

42

43 [6] If a lawyer makes or solicits a political contribution under circumstances
44 that constitute bribery or another crime, Rule 8.4(b) is implicated.

MAINTAINING THE INTEGRITY OF THE PROFESSION

SCR 20:8.1 Bar admission and disciplinary matters

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

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

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

ABA Comment

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

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

[3] A lawyer representing an applicant for admission to the bar, or representing a lawyer who is the subject of a disciplinary inquiry or proceeding, is governed by the rules applicable to the client-lawyer relationship, including Rule 1.6 and, in some cases, Rule 3.3.

SCR 20:8.2 Judicial and legal officials

- (a) A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or

1 integrity of a judge, adjudicatory officer or public legal officer, or of a candidate for
2 election or appointment to judicial or legal office.

3

4 (b) A lawyer who is a candidate for judicial office shall comply with the
5 applicable provisions of the code of judicial conduct.

6

7 **ABA Comment**

8

9 [1] Assessments by lawyers are relied on in evaluating the professional or
10 personal fitness of persons being considered for election or appointment to
11 judicial office and to public legal offices, such as attorney general, prosecuting
12 attorney and public defender. Expressing honest and candid opinions on such
13 matters contributes to improving the administration of justice. Conversely, false
14 statements by a lawyer can unfairly undermine public confidence in the
15 administration of justice.

16

17 [2] When a lawyer seeks judicial office, the lawyer should be bound by
18 applicable limitations on political activity.

19

20 [3] To maintain the fair and independent administration of justice, lawyers are
21 encouraged to continue traditional efforts to defend judges and courts unjustly
22 criticized.

23

24 **SCR 20:8.3 Reporting professional misconduct**

25

26 (a) A lawyer ~~having knowledge~~ who knows that another lawyer has committed a
27 violation of the Rules of Professional Conduct that raises a substantial question as
28 to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects,
29 shall inform the appropriate professional authority.

30

31 (b) A lawyer ~~having knowledge~~ who knows that a judge has committed a
32 violation of applicable rules of judicial conduct that raises a substantial question
33 as to the judge's fitness for office shall inform the appropriate authority.

34

35 (c) If the information revealing misconduct under subsections (a) or (b) is
36 confidential under Rule 1.6, the lawyer shall consult with the client about the matter
37 and abide by the client's wishes to the extent required by Rule 1.6.

38

39 (d) This rule does not require disclosure of any of the following:

40

41 (1) Information gained by a lawyer or judge while participating in an approved
42 lawyers assistance program, otherwise protected by Rule 1.6.

43

44 (2) Information acquired by one of the following:

1 (i) A member of any committee or organization approved by any bar association
2 to assist ill or disabled lawyers where such information is acquired in the course of
3 assisting an ill or disabled lawyer.

4
5 (ii) Any person selected by a court or any bar association to mediate or
6 arbitrate disputes between lawyers arising out of a professional or economic
7 dispute involving law firm dissolutions, termination or departure of one or more
8 lawyers from a law firm where such information is acquired in the course of
9 mediating or arbitrating the dispute between lawyers.

10
11 **Wisconsin Committee Comment**

12
13 The requirement under paragraph (c) that the lawyer consult with the client is
14 not expressly included in the Model Rule.

15
16 **ABA Comment**

17
18 [1] Self-regulation of the legal profession requires that members of the
19 profession initiate disciplinary investigation when they know of a violation of the
20 Rules of Professional Conduct. Lawyers have a similar obligation with respect to
21 judicial misconduct. An apparently isolated violation may indicate a pattern of
22 misconduct that only a disciplinary investigation can uncover. Reporting a
23 violation is especially important where the victim is unlikely to discover the
24 offense.

25
26 [2] A report about misconduct is not required where it would involve violation
27 of Rule 1.6. However, a lawyer should encourage a client to consent to
28 disclosure where prosecution would not substantially prejudice the client's
29 interests.

30
31 [3] If a lawyer were obliged to report every violation of the Rules, the failure to
32 report any violation would itself be a professional offense. Such a requirement
33 existed in many jurisdictions but proved to be unenforceable. This Rule limits the
34 reporting obligation to those offenses that a self-regulating profession must
35 vigorously endeavor to prevent. A measure of judgment is, therefore, required in
36 complying with the provisions of this Rule. The term "substantial" refers to the
37 seriousness of the possible offense and not the quantum of evidence of which
38 the lawyer is aware. A report should be made to the bar disciplinary agency
39 unless some other agency, such as a peer review agency, is more appropriate in
40 the circumstances. Similar considerations apply to the reporting of judicial
41 misconduct.

42
43 [4] The duty to report professional misconduct does not apply to a lawyer
44 retained to represent a lawyer whose professional conduct is in question. Such a
45 situation is governed by the Rules applicable to the client-lawyer relationship.

1 [5] Information about a lawyer's or judge's misconduct or fitness may be
2 received by a lawyer in the course of that lawyer's participation in an approved
3 lawyers or judges assistance program. In that circumstance, providing for an
4 exception to the reporting requirements of paragraphs (a) and (b) of this Rule
5 encourages lawyers and judges to seek treatment through such a program.
6 Conversely, without such an exception, lawyers and judges may hesitate to seek
7 assistance from these programs, which may then result in additional harm to their
8 professional careers and additional injury to the welfare of clients and the public.
9 These Rules do not otherwise address the confidentiality of information received
10 by a lawyer or judge participating in an approved lawyers assistance program;
11 such an obligation, however, may be imposed by the rules of the program or
12 other law.

13

14 **SCR 20:8.4 Misconduct**

15

16 It is professional misconduct for a lawyer to:

17

18 (a) violate or attempt to violate the Rules of Professional Conduct, knowingly
19 assist or induce another to do so, or do so through the acts of another;

20

21 (b) commit a criminal act that reflects adversely on the lawyer's honesty,
22 trustworthiness or fitness as a lawyer in other respects;

23

24 (c) engage in conduct involving:

25

26 (1) dishonesty, fraud, or deceit; or

27

28 (2) misrepresentation;

29

30 (d) state or imply an ability to influence improperly a government agency or
31 official or to achieve results by means that violate the Rules of Professional
32 Conduct or other law;

33

34 (e) knowingly assist a judge or judicial officer in conduct that is a violation of
35 applicable rules of judicial conduct or other law; or

36

37 (f) violate a statute, supreme court rule, supreme court order or supreme court
38 decision regulating the conduct of lawyers; or

39

40 (g) violate the attorney's oath;

41

42 (h) fail to cooperate in the investigation of a grievance filed with the office of
43 lawyer regulation as required by Rules 21.15(4), 22.001(9)(b), 22.03(2), 22.03(6),
44 or 22.04(1) ; or

45

1 (i) harass a person on the basis of sex, race, age, creed, religion, color,
2 national origin, disability, sexual preference or marital status in connection with
3 the lawyer's professional activities.

4

5

6 **Wisconsin Committee Comment**

7

8 Paragraph (c) differs from the Model Rule in separating misrepresentation from
9 dishonesty, fraud, and deceit. See also Rule 1.0(h). Paragraphs (f) through (i) do
10 not have counterparts in the Model Rule. What constitutes harassment under
11 paragraph (i) may be determined with reference to anti-discrimination legislation
12 and interpretive case law. Harassment ordinarily involves the active burdening of
13 another, rather than mere passive failure to act properly. Because of differences in
14 content and numbering, care should be used when consulting the ABA Comment.

15

16 **ABA Comment**

17

18 [1] Lawyers are subject to discipline when they violate or attempt to violate
19 the Rules of Professional Conduct, knowingly assist or induce another to do so or
20 do so through the acts of another, as when they request or instruct an agent to
21 do so on the lawyer's behalf. Paragraph (a), however, does not prohibit a lawyer
22 from advising a client concerning action the client is legally entitled to take.

23

24 [2] Many kinds of illegal conduct reflect adversely on fitness to practice law,
25 such as offenses involving fraud and the offense of willful failure to file an income
26 tax return. However, some kinds of offenses carry no such implication.
27 Traditionally, the distinction was drawn in terms of offenses involving "moral
28 turpitude." That concept can be construed to include offenses concerning some
29 matters of personal morality, such as adultery and comparable offenses, that
30 have no specific connection to fitness for the practice of law. Although a lawyer is
31 personally answerable to the entire criminal law, a lawyer should be
32 professionally answerable only for offenses that indicate lack of those
33 characteristics relevant to law practice. Offenses involving violence, dishonesty,
34 breach of trust, or serious interference with the administration of justice are in
35 that category. A pattern of repeated offenses, even ones of minor significance
36 when considered separately, can indicate indifference to legal obligation.

37

38 [3] A lawyer who, in the course of representing a client, knowingly manifests
39 by words or conduct, bias or prejudice based upon race, sex, religion, national
40 origin, disability, age, sexual orientation or socioeconomic status, violates
41 paragraph (d) when such actions are prejudicial to the administration of justice.
42 Legitimate advocacy respecting the foregoing factors does not violate paragraph
43 (d). A trial judge's finding that peremptory challenges were exercised on a
44 discriminatory basis does not alone establish a violation of this rule.

1 [4] A lawyer may refuse to comply with an obligation imposed by law upon a
2 good faith belief that no valid obligation exists. The provisions of Rule 1.2(d)
3 concerning a good faith challenge to the validity, scope, meaning or application
4 of the law apply to challenges of legal regulation of the practice of law.

5 [5] Lawyers holding public office assume legal responsibilities going beyond
6 those of other citizens. A lawyer's abuse of public office can suggest an inability
7 to fulfill the professional role of lawyers. The same is true of abuse of positions of
8 private trust such as trustee, executor, administrator, guardian, agent and officer,
9 director or manager of a corporation or other organization.

11 **SCR 20:8.5 Disciplinary authority; choice of law**

12 (a) Disciplinary Authority. A lawyer admitted to the bar of this state is subject to
13 the disciplinary authority of this state regardless of where the lawyer's conduct
14 occurs. A lawyer not admitted to the bar allowed by a court of this state is also
15 subject to the disciplinary authority of this state if the lawyer provides or offers to
16 provide any legal services in this state to appear and participate in a proceeding in
17 that court is subject to the disciplinary authority of this state for conduct that occurs
18 in connection with that proceeding. For the same conduct, a A lawyer may be
19 subject to the disciplinary authority of both this state and another jurisdiction for the
20 same conduct where the lawyer is admitted to the bar or allowed to appear in a
21 court proceeding.

22 (b) Choice of Law. In the exercise of the disciplinary authority of this state, the
23 rules of professional conduct to be applied shall be as follows:

24 (1) for conduct in connection with a proceeding in matter pending before a
25 tribunal court before which a lawyer has been authorized to appear, either by
26 admission to the bar in the jurisdiction or by the court specifically for purposes of
27 that proceeding, the rules to be applied shall be the rules of the jurisdiction in
28 which the court tribunal sits, unless the rules of the court tribunal provide
29 otherwise; and

30 (2) for any other conduct, the rules of the jurisdiction in which the lawyer's
31 conduct occurred, or, if the predominant effect of the conduct is in a different
32 jurisdiction, the rules of that jurisdiction shall be applied to the conduct. A
33 lawyer shall not be subject to discipline if the lawyer's conduct conforms to the
34 rules of a jurisdiction in which the lawyer reasonably believes the predominant
35 effect of the lawyer's conduct will occur.

36 (i) if the lawyer is admitted to the bar of only this state, the rules to be
37 applied shall be the rules of this state.

38 (ii) if the lawyer is admitted to the bars of this state and another
39 jurisdiction, the rules to be applied shall be the rules of the admitting

1 jurisdiction in which the lawyer principally practices, except that if particular
2 conduct clearly has its predominant effect in another jurisdiction in which the
3 lawyer is admitted to the bar, the rules of that jurisdiction shall be applied to
4 that conduct.

5

6 **ABA Comment**

7

8 *Disciplinary Authority*

9

10 [1] It is longstanding law that the conduct of a lawyer admitted to practice in
11 this jurisdiction is subject to the disciplinary authority of this jurisdiction.
12 Extension of the disciplinary authority of this jurisdiction to other lawyers who
13 provide or offer to provide legal services in this jurisdiction is for the protection of
14 the citizens of this jurisdiction. Reciprocal enforcement of a jurisdiction's
15 disciplinary findings and sanctions will further advance the purposes of this Rule.
16 See, Rules 6 and 22, *ABA Model Rules for Lawyer Disciplinary Enforcement*. A
17 lawyer who is subject to the disciplinary authority of this jurisdiction under Rule
18 8.5(a) appoints an official to be designated by this Court to receive service of
19 process in this jurisdiction. The fact that the lawyer is subject to the disciplinary
20 authority of this jurisdiction may be a factor in determining whether personal
21 jurisdiction may be asserted over the lawyer for civil matters.

22

23 *Choice of Law*

24

25 [2] A lawyer may be potentially subject to more than one set of rules of
26 professional conduct which impose different obligations. The lawyer may be
27 licensed to practice in more than one jurisdiction with differing rules, or may be
28 admitted to practice before a particular court with rules that differ from those of
29 the jurisdiction or jurisdictions in which the lawyer is licensed to practice.
30 Additionally, the lawyer's conduct may involve significant contacts with more than
31 one jurisdiction.

32

33 [3] Paragraph (b) seeks to resolve such potential conflicts. Its premise is that
34 minimizing conflicts between rules, as well as uncertainty about which rules are
35 applicable, is in the best interest of both clients and the profession (as well as the
36 bodies having authority to regulate the profession). Accordingly, it takes the
37 approach of (i) providing that any particular conduct of a lawyer shall be subject
38 to only one set of rules of professional conduct, (ii) making the determination of
39 which set of rules applies to particular conduct as straightforward as possible,
40 consistent with recognition of appropriate regulatory interests of relevant
41 jurisdictions, and (iii) providing protection from discipline for lawyers who act
42 reasonably in the face of uncertainty.

43

44 [4] Paragraph (b)(1) provides that as to a lawyer's conduct relating to a
45 proceeding pending before a tribunal, the lawyer shall be subject only to the rules
46 of the jurisdiction in which the tribunal sits unless the rules of the tribunal,
47 including its choice of law rule, provide otherwise. As to all other conduct,

1 including conduct in anticipation of a proceeding not yet pending before a
2 tribunal, paragraph (b)(2) provides that a lawyer shall be subject to the rules of
3 the jurisdiction in which the lawyer's conduct occurred, or, if the predominant
4 effect of the conduct is in another jurisdiction, the rules of that jurisdiction shall be
5 applied to the conduct. In the case of conduct in anticipation of a proceeding that
6 is likely to be before a tribunal, the predominant effect of such conduct could be
7 where the conduct occurred, where the tribunal sits or in another jurisdiction.
8

9 [5] When a lawyer's conduct involves significant contacts with more than one
10 jurisdiction, it may not be clear whether the predominant effect of the lawyer's
11 conduct will occur in a jurisdiction other than the one in which the conduct
12 occurred. So long as the lawyer's conduct conforms to the rules of a jurisdiction
13 in which the lawyer reasonably believes the predominant effect will occur, the
14 lawyer shall not be subject to discipline under this Rule.
15

16 [6] If two admitting jurisdictions were to proceed against a lawyer for the
17 same conduct, they should, applying this rule, identify the same governing ethics
18 rules. They should take all appropriate steps to see that they do apply the same
19 rule to the same conduct, and in all events should avoid proceeding against a
20 lawyer on the basis of two inconsistent rules.
21

22 [7] The choice of law provision applies to lawyers engaged in transnational
23 practice, unless international law, treaties or other agreements between
24 competent regulatory authorities in the affected jurisdictions provide otherwise.
25