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**EXHIBIT A
HAWAII RULES OF
PROFESSIONAL CONDUCT**

Adopted June 25, 2013;
Effective January 1, 2014

**PREAMBLE: A LAWYER'S
RESPONSIBILITIES**

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

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

[3] In addition to these representational functions, a lawyer may serve as a third-party neutral, a nonrepresentational role helping the parties to resolve a dispute or other matter. Some of these Rules apply directly to lawyers who are or have served as third-party neutrals. *See* Rules 1.12, 2.2, and 2.4 of these Rules. In addition, there are Rules that apply to lawyers who are not active in the practice of law or to practicing lawyers even when they are acting in a nonprofessional capacity. For example, a lawyer who commits fraud in the conduct of a business is subject to discipline for engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation. *See* Rule 8.4 of these Rules.

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

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

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

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

[8] A lawyer's responsibilities as a representative of clients, an officer of the legal system, and a public citizen are usually harmonious. Thus, when an opposing party is well represented, a lawyer can be a zealous advocate on behalf of a

Rule 1.2. SCOPE OF REPRESENTATION AND ALLOCATION OF AUTHORITY BETWEEN CLIENT AND LAWYER.

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

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

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

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning, or application of the law, and may counsel or assist a client regarding conduct expressly permitted by Hawai'i law, provided that the lawyer counsels the client about the legal consequences, under other applicable law, of the client's proposed course of conduct.

(e) When a lawyer knows or reasonably should know that a client expects assistance not permitted by the Rules of Professional Conduct or other law, the lawyer shall consult with the client regarding the relevant limitations on the lawyer's conduct. See Rule 1.4(a)(5) of these Rules.

COMMENTS:

Allocation of Authority Between Client and Lawyer

[1] *Paragraph (a) confers upon the client the ultimate authority to determine the purposes to be served by legal*

representation, within the limits imposed by law and the lawyer's professional obligations. The decisions specified in paragraph (a), such as whether to settle a civil matter, must be made by the client. See Rule 1.4(a)(1) of these Rules for the lawyer's duty to communicate with the client about such decisions. With respect to the means by which the client's objectives are to be pursued, the lawyer shall consult with the client as required by Rule 1.4(a)(2) and may take such action as is impliedly authorized to carry out the representation.

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

[3] *At the outset of representation, the client may authorize the lawyer to take specific action on the client's behalf without further consultation. Absent a material change in circumstances and subject to Rule 1.4 of these Rules, a lawyer may rely on such*

an advance authorization. The client may, however, revoke such authority at any time.

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

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

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

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

limitation is a factor to be considered when determining the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation. See Rule 1.1 of these Rules.

[8] All agreements concerning a lawyer's representation of a client must accord with the Rules of Professional Conduct and other law. See, e.g., Rules 1.1, 1.8, and 5.6 of these Rules. Where the client is a fiduciary, the lawyer may be charged with special obligations in dealing with a beneficiary. See, e.g., Rule 42 of the Hawaii Probate Rules.

Criminal, Fraudulent and Prohibited Transactions

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

[10] When the client's course of action has already begun and is continuing, the lawyer's responsibility is especially delicate. The lawyer is required to avoid assisting the client, for example, by drafting or delivering documents that the lawyer knows are fraudulent or by suggesting how the wrongdoing might be concealed. A lawyer may not continue assisting a client in conduct that the lawyer originally supposed was legally proper but then discovers is criminal or fraudulent. The lawyer must, therefore, withdraw from the representation of the client in the matter. See Rule 1.16(a) of these Rules. In some cases, withdrawal alone might be insufficient. See Rules 1.6 and 4.1 of these Rules. It may be necessary

for the lawyer to give notice of the fact of withdrawal and to disaffirm any opinion, document, affirmation or the like.

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

[12] If a lawyer comes to know or reasonably should know that a client expects assistance not permitted by the Rules of Professional Conduct or other law, or if the lawyer knows he or she cannot comply with client instructions due to the duties imposed by these Rules or other law, the lawyer must consult with the client regarding the limitations on the lawyer's conduct. See Rule 1.4(a)(5) of these Rules.

(Amended October 20, 2015, effective October 20, 2015.)

Rule 1.3. DILIGENCE.

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

COMMENTS:

[1] A lawyer should pursue a matter on behalf of a client despite opposition, obstruction, or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf. A lawyer is not bound, however, to press for every advantage that might be realized for a client. For example, a lawyer may have authority to

exercise professional discretion in determining the means by which a matter should be pursued. See Rule 1.2 of these Rules. The lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect.

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

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

[4] Unless the relationship is terminated as provided in Rule 1.16, a lawyer should carry through to conclusion all matters undertaken for a client. If a lawyer's employment is limited to a specific matter, the relationship terminates when the matter has been resolved. If a lawyer has served a client over a substantial period in a variety of matters, the client sometimes may assume that the lawyer will continue to serve on a continuing basis unless the lawyer gives notice of withdrawal. Doubt about whether a client-lawyer relationship still exists should be clarified by the lawyer, preferably in writing, so that the client will not mistakenly suppose the lawyer is looking after the client's affairs when the lawyer has ceased to do so. For example, if a lawyer has handled a judicial or administrative proceeding that produced a result adverse to the client, and the lawyer and the client have

not agreed that the lawyer will handle the matter on appeal, the lawyer must consult with the client about the possibility of appeal before relinquishing responsibility for the matter. See Rule 1.4(a)(2) of these Rules. Whether the lawyer is obligated to prosecute the appeal for the client depends on the scope of the representation the lawyer has agreed to provide to the client. See Rule 1.2 of these Rules.

Rule 1.4. COMMUNICATION.

(a) A lawyer shall:

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

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

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

(4) promptly comply with reasonable requests for information;

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

(6) promptly inform the client of a written offer of settlement in a civil controversy or a proffered plea bargain in a criminal case which the lawyer receives.

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

COMMENTS:

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

Communicating with Client

[2] *If these Rules require that a particular decision about the representation be made by the client, such as when a lawyer receives an offer of a settlement in a civil controversy or is proffered a plea bargain in*

a criminal case, paragraph (a)(1) requires that the lawyer promptly inform the client of its substance and secure the client's consent prior to taking action, unless prior discussions with the client have left it clear that the proposal will be unacceptable. See Rule 1.2(a) of these Rules.

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

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

Explaining Matters

[5] *The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is*

willing and able to do so. Adequacy of communication depends in part on the kind of advice or assistance that is involved. For example, when there is time to explain a proposal made in a negotiation, the lawyer should review all important provisions with the client before proceeding to an agreement. In litigation, a lawyer should explain the general strategy and prospects of success and ordinarily should consult the client on tactics that are likely to result in significant expense or to injure or coerce others. On the other hand, a lawyer ordinarily will not be expected to describe trial or negotiation strategy in detail. The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests, and the client's overall requirements as to the character of representation. In certain circumstances, such as when a lawyer asks a client to consent to a representation affected by a conflict of interest, the client must give consent after consultation, as defined in Rule 1.0(c).

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

Withholding Information

[7] In some circumstances, a lawyer may be justified in delaying transmission of information when the client would be likely to react imprudently to an immediate

communication. A lawyer might withhold a psychiatric diagnosis of a client when the examining psychiatrist indicates that disclosure would harm the client. A lawyer may not withhold information to serve the lawyer's own interest or convenience or the interests or convenience of another person. Rules of court or court orders governing litigation may provide that information supplied to a lawyer may not be disclosed to the client. Rule 3.4(e) directs compliance with such Rules or orders.

Rule 1.5. FEES.

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

- (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
- (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
- (3) the fee customarily charged in the locality for similar legal services;
- (4) the amount involved and the results obtained;
- (5) the time limitations imposed by the client or by the circumstances;
- (6) the nature and length of the professional relationship with the client;
- (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
- (8) whether the fee is fixed or contingent, and in contingency fee cases the risk of no recovery and the conscionability of the fee in light of the net recovery to the client.

(b) Manner In Which Fees are Earned. The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or the rates of the fee or expenses shall also be

communicated to the client. Fee payments received by a lawyer before legal services have been rendered are presumed to be unearned and shall be held in a trust account pursuant to Rule 1.15 of these Rules.

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

(d) When Contingency Fees are Prohibited. A lawyer shall not enter into an arrangement for, charge, or collect:

- (1) any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony or support, or property settlement in lieu thereof; or
- (2) a contingent fee for representing a defendant in a criminal case.

(e) Division of Fees Amongst Lawyers. A division of fees between lawyers who are not in the same firm may be made only if:

- (1) the division is in proportion to the services performed by each lawyer and, by written agreement with the client, each lawyer assumes joint responsibility for the representation;
- (2) the client is advised of and does not object to the participation of all the lawyers involved; and
- (3) the total fee is reasonable.

(f) Inapplicability of This Rule. This Rule does not prohibit payment to a former partner or associate pursuant to a separation or retirement agreement.

COMMENTS:

Reasonableness of Fee and Expenses

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

Basis or Rate of Fee

[2] When the lawyer has regularly represented a client, they ordinarily will have evolved an understanding concerning the basis or rate of the fee, and the expenses for which the client will be responsible. In a new client-lawyer relationship, however, an understanding as to the fee and expenses must be promptly established. Generally, it is desirable to furnish the client with at least a simple memorandum or a copy of the lawyer's customary fee arrangements that states the general nature of the legal services to be provided; the basis, rate, or total amount of the fee; and whether and to what extent the client will be responsible for any costs, expenses, or disbursements in the course of the representation. When developments occur that render an earlier estimate substantially inaccurate, a revised estimate should be provided to the client. A written statement concerning the terms of the engagement reduces the possibility of misunderstanding.

[3] Contingent fees, like any other fees, are subject to the reasonableness standard of paragraph (a) of this Rule. In determining whether a particular contingent fee is reasonable, or whether it is reasonable to charge any form of contingent fee, a

lawyer must consider the factors that are relevant under the circumstances. Applicable law may impose limitations on contingent fees, such as a ceiling on the percentage allowable, or may require a lawyer to offer clients an alternative basis for the fee. Applicable law also may apply to situations other than a contingent fee, for example, government regulations regarding fees in certain tax matters.

Terms of Payment

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

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

implications. Applicable law may impose limitations on contingent fees, such as Haw. Rev. Stat. § 607-15.5.

Contingency fee agreements may be proper in proceedings to enforce or satisfy a judgment for property distribution or past due alimony or child support.

Prohibited Contingent Fees

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

Division of Fee

[7] A division of fee is a single billing to a client covering the fee of two or more lawyers who are not in the same firm. A division of fee facilitates association of more than one lawyer in a matter in which neither alone could serve the client as well, and most often is used when the fee is contingent and the division is between a referring lawyer and a trial specialist. Paragraph (e) does not require disclosure to the client of the share that each lawyer is to receive, though contingent fee agreements must be in a writing signed by the client and must otherwise comply with paragraph (c) of this Rule. Joint responsibility for the representation entails financial and ethical responsibility for the representation as if the lawyers were associated in a partnership. See Rule 5.1 of these Rules. A lawyer should refer a matter only to a lawyer the referring lawyer reasonably believes is competent to handle the matter. See Rule 1.1 of these Rules.

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

Disputes over Fees

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

Rule 1.6. CONFIDENTIALITY OF INFORMATION.

(a) A lawyer shall not reveal confidential information relating to the representation of a client unless the client consents after consultation, the disclosure is impliedly authorized in order to carry out the representation, or as stated in paragraph (b) or (c).

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

(1) to prevent the client from committing a criminal or fraudulent act that the lawyer reasonably believes is likely to result in death or substantial bodily harm, or in substantial injury to the financial interests or property of another;

(2) to rectify the consequences of a client's act which the lawyer reasonably believes to have been criminal or fraudulent and in the furtherance of which the lawyer's services had been used;

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

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

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

(5) to prevent a public official or public agency from committing a criminal or illegal act that a government lawyer reasonably believes is likely to result in harm to the public good;

(6) to rectify the consequences of a public official's or a public agency's act which the government lawyer reasonably believes to have been criminal or illegal and harmful to the public good; or

(7) to the extent strictly necessary to comply with other law, fiduciary obligations, or court orders.

(c) A lawyer shall reveal information that clearly establishes a criminal or fraudulent act of the client in the furtherance of which the lawyer's services had been used, to the extent reasonably necessary to rectify the consequences of such act, where the act has resulted in substantial injury to the financial interests or property of another.

COMMENTS:

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

[2] A fundamental principle in the client-lawyer relationship is that, in the absence of the client's consent after consultation, the lawyer must not reveal information relating to the representation. See Rule 1.0(c) of these Rules for the definition of consultation. This contributes to the trust that is the hallmark of the client-lawyer relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs

this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld.

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

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

Authorized Disclosure

[5] *Except to the extent that the client's instructions or special circumstances*

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

Disclosure Adverse to Client

[6] *The confidentiality rule is subject to limited exceptions. In becoming privy to information about a client, a lawyer may realize that the client has used or intends to use the lawyer's services in the furtherance of criminal or fraudulent conduct. The lawyer may not counsel or assist a client in conduct that is criminal or fraudulent. See Rule 1.2(d) of these Rules. Similarly, a lawyer has a duty under Rule 3.3(a)(4) of these Rules not to use false evidence, which is but one example of the more general duty prescribed in Rule 1.2(d) to avoid assisting a client in criminal or fraudulent conduct.*

[7] *The lawyer may have been innocently involved in past conduct by the client that was criminal or fraudulent. In such a situation, the lawyer has not violated Rule 1.2(d) of these Rules because to "counsel or assist" criminal or fraudulent conduct requires knowing that the conduct is of that character. Nevertheless, to extend the protection of Rule 1.6 to information possessed by the lawyer with respect to such conduct would have the effect of assisting the client in such conduct in violation of the policy expressed in Rule 1.2(d).*

[8] *Where the lawyer's information falls short of clearly establishing a criminal or fraudulent act by the client, but supports a reasonable belief by the lawyer that a criminal or fraudulent act has occurred, the discretionary disclosure provisions of Rule*

1.6(b)(2) of these Rules may be applicable. Where the lawyer's information clearly establishes the criminal or fraudulent act, the mandatory disclosure requirement of Rule 1.6(c) may be applicable. The requirement that the lawyer's services must have been used by the client in the furtherance of the criminal or fraudulent act means that the services must have been a substantial element in enabling the client to accomplish the criminal or fraudulent enterprise. The term "rectify" as used in Rule 1.6(b)(2) and (c) means that if the lawyer reasonably believes or where information clearly establishes a client's act to have been criminal or fraudulent and in the furtherance of which the lawyer's services have been used, the lawyer may or shall promptly call upon the client to make right what is wrong. If the client refuses or is unable to right the wrong, the lawyer may or shall reveal confidential information to the affected person or entity to the extent reasonably necessary to remedy the consequences of the criminal or fraudulent activity. The application of the discretionary "may" of Rule 1.6(b)(2) or the mandatory "shall" of Rule 1.6(c) will depend on the quality of information in the lawyer's possession. In terms of the discretionary disclosure provisions of Rule 1.6(b)(6), the term "rectify" means that if the government lawyer reasonably believes that a public official's or a public agency's act was criminal or illegal and harmful to the public, the lawyer may promptly call upon the public official or the public agency to make right what is wrong, and if the official or agency refuses or is unable to do so, the government lawyer may reveal confidential information to the person or entity affected by the official's or agency's criminal or fraudulent act which is harmful to the public good, to the extent reasonably necessary to remedy the consequences of such acts. See also Comments [14]-[16] to this Rule.

[9] The lawyer may learn that a client intends prospective conduct that is criminal or fraudulent and likely to result in

death, substantial bodily harm, or substantial injury to the financial interests or property of another. As stated in Rule 1.6(b)(1), the lawyer has professional discretion to reveal information in order to prevent such consequences. The lawyer may make a disclosure in order to prevent such consequences which the lawyer reasonably believes are intended by a client. It is very difficult for a lawyer to know when such a heinous purpose will actually be carried out, for the client may have a change of mind.

[10] A lawyer's confidentiality obligations do not preclude a lawyer from securing confidential legal advice about the lawyer's personal responsibility to comply with these Rules. In most situations, disclosing information to secure such advice will be impliedly authorized for the lawyer to carry out the representation. Even when the disclosure is not impliedly authorized, paragraph (b)(3) permits such disclosure because of the importance of a lawyer's compliance with the Rules of Professional Conduct.

[11] Where a legal claim or disciplinary charge alleges complicity of the lawyer in a client's conduct or other misconduct of the lawyer involving representation of the client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense. The same is true with respect to a claim involving the conduct or representation of a former client. Such a charge can arise in a civil, criminal, disciplinary, or other proceeding and can be based on a wrong allegedly committed by the lawyer against the client or on a wrong alleged by a third person, for example, a person claiming to have been defrauded by the lawyer and client acting together. The lawyer's right to respond arises when an assertion of such complicity has been made. Paragraph (b)(4) does not require the lawyer to await the commencement of an action or proceeding that charges such complicity, so that the defense may be established by responding directly to a third party who has made such

an assertion. The right to defend also applies, of course, where a proceeding has been commenced.

[12] A lawyer entitled to a fee is permitted by paragraph (b)(4) to prove the services rendered in an action to collect it. This aspect of the Rule expresses the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary.

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

[14] A lawyer may be ordered to reveal information relating to the representation of a client by a court or by another tribunal or governmental entity claiming authority pursuant to other law to compel the disclosure. Absent consent of the client, after consultation, to do otherwise, the lawyer should assert on behalf of the client all nonfrivolous claims that the order is not authorized by other law or that the information sought is protected against disclosure by the client-lawyer privilege. The client-lawyer privilege is differently defined in various jurisdictions. If a lawyer is called as a witness to give testimony concerning a client, absent waiver by the client, Rule 1.6(a) requires the lawyer to invoke the privilege when it is applicable. Under Rule 1.6(b)(7), the lawyer must comply with the final orders of a court or other tribunal of competent jurisdiction requiring the lawyer to give information about the client.

[15] Paragraph (b) permits, and paragraph (c) requires, disclosure only to the extent the lawyer reasonably believes the

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

[16] Paragraph (b) permits, but does not require, the disclosure of information relating to a client's representation if the lawyer reasonably believes the disclosure is necessary to accomplish the purposes specified in paragraphs (b)(1) through (b)(7). In exercising the discretion conferred by this Rule, the lawyer may consider such factors as the nature of the lawyer's own involvement in the transaction and factors that may mitigate or partially excuse the conduct in question. A lawyer's decision not to disclose the information, as permitted by the discretion provided in paragraph (b), does not violate this Rule. Disclosure may be required, however, by other Rules. For example, some Rules require disclosure if such disclosure would be permitted by paragraph (b). See Rules 4.1(b), 8.1 and 8.3(c) of these Rules. Rule 3.3, on the other hand, requires disclosure in some circumstances regardless of whether such disclosure is permitted by this Rule. See Rule 3.3(b) of these Rules.

Withdrawal

[17] If the lawyer's services will be used by the client in materially furthering a course of criminal or fraudulent conduct, the lawyer must withdraw, as stated in Rule 1.16(a)(1) of these Rules. Furthermore, neither this Rule nor Rule 1.8(b) nor Rule 1.16(d) prevent the lawyer from giving

notice of the fact of withdrawal, and the lawyer may also withdraw or disaffirm any opinion, document, affirmation, or the like.

Acting Competently to Preserve Confidentiality

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

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

Former Client

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

Organization as Client

[21] Where the client is an organization, the disclosures in this Rule work in conjunction with Rule 1.13 of these Rules.

Rule 1.7. CONFLICT OF INTEREST: GENERAL RULE.

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

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

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

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

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

(2) the representation is not prohibited by law;

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

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

(c) When representation of multiple clients in a single matter is contemplated, the consultation shall include explanation of the implications of the common representations, including both the advantages and the risks involved.

COMMENTS:

General Principles

[1] Loyalty and independent judgment are essential elements in the lawyer's relationship to a client. Concurrent conflicts of interest can arise when the lawyer's responsibilities to another client, a former client or a third person diverge from the lawyer's own interests. For the specific Rule regarding certain concurrent conflicts of interest, see Rule 1.8 of these Rules. For

former client conflicts of interest, see Rule 1.9. For conflicts of interest involving prospective clients, see Rule 1.18. For definitions of “consult” or “consulting,” and “confirmed in writing,” see Rule 1.0(c) and (b).

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

[3] A conflict of interest may exist before representation is undertaken, in which event the representation must be declined, unless the lawyer obtains the consent of each client after consultation, under the conditions of paragraph (b). To determine whether a conflict of interest exists, a lawyer should adopt reasonable procedures, appropriate for the size and type of firm and practice, to determine in both litigation and non-litigation matters the persons and issues involved. See also Comments [3] and [4] on Rule 5.1 of these Rules. Ignorance caused by a failure to institute such procedures will not excuse a lawyer’s violation of this Rule. As to whether a client-lawyer relationship exists or, having once been established, is continuing, see Comment [4] to Rule 1.3 and Scope.

[4] If a conflict arises after representation has been undertaken, the lawyer ordinarily must withdraw from the representation, unless the lawyer has obtained the consent of the client after

consultation, under the conditions of paragraph (b). See Rule 1.16 of these Rules. Where more than one client is involved, whether the lawyer may continue to represent any of the clients is determined both by the lawyer’s ability to comply with duties owed to the former client and by the lawyer’s ability to represent adequately the remaining client or clients, given the lawyer’s duties to the former client. See Rule 1.9 of these Rules. See also Comments [5] and [29] of this Rule.

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

Identifying Conflicts of Interest: Directly Adverse

[6] Loyalty to a current client prohibits undertaking representation directly adverse to that client without that client’s consent after consultation. Thus, absent consent, a lawyer may not act as an advocate in one matter against a person the lawyer represents in some other matter, even when the matters are wholly unrelated. The client as to whom the representation is directly adverse is likely to feel betrayed, and the resulting damage to the client-lawyer relationship is likely to impair the lawyer’s ability to represent the client effectively. In addition, the client on whose behalf the adverse representation is

undertaken reasonably may fear that the lawyer will pursue that client's case less effectively out of deference to the other client, i.e., that the representation may be materially limited by the lawyer's interest in retaining the current client. Similarly, a directly adverse conflict may arise when a lawyer is required to cross-examine a client who appears as a witness in a lawsuit involving another client, as when the testimony will be damaging to the client who is represented in the lawsuit. On the other hand, simultaneous representation in unrelated matters of clients whose interests are only economically adverse, such as representation of competing economic enterprises in unrelated litigation, does not ordinarily constitute a conflict of interest and thus may not require consent of the respective clients.

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

Identifying Conflicts of Interest: Material Limitation

[8] Even where there is no direct adversity of interest, a conflict of interest exists if there is a significant risk that a lawyer's ability to consider, recommend, or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer's other responsibilities or interests. For example, a lawyer asked to represent several individuals seeking to form a joint venture is likely to be materially limited in the lawyer's ability to recommend or advocate all possible positions that each might take because of the lawyer's duty of loyalty to the others. The conflict in effect forecloses alternatives that would otherwise be available to the client. The mere possibility of subsequent harm does not itself

require disclosure and consent. The critical questions are the likelihood that a difference in interests will arise and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client.

Lawyer's Responsibilities to Former Clients and Other Third Persons

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

Personal Interest Conflicts

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

[11] When lawyers representing different clients in the same matter or in substantially related matters are closely

related by blood or marriage, there is a significant risk that client confidences will be revealed and that the lawyer's family relationship will interfere with both loyalty and independent professional judgment. As a result, each client is entitled to know of the existence and implications of the relationship between the lawyers before the client agrees to representation by the lawyer. Thus, lawyer X, related to lawyer, Y, e.g., as parent, child, sibling or spouse, ordinarily may not represent a client in a matter where lawyer Y is representing another party in that matter, unless each client gives consent after consultation. The disqualification arising from a close family relationship is personal and ordinarily is not imputed to members of firms with whom the lawyers are associated. See Rule 1.8(k) of these Rules and Comment [20] to Rule 1.8.

[12] A lawyer is prohibited from engaging in a sexual relationship with a client unless the sexual relationship predates the formation of the client-lawyer relationship.

Interest of Person Paying for a Lawyer's Service

[13] A lawyer may be paid from a source other than the client, including a co-client, if the client is informed of that fact and consents, and the arrangement does not compromise the lawyer's duty of loyalty or independent judgment to the client. See Rule 1.8(f) of these Rules. For example, when an insurer and its insured have conflicting interests in a matter arising from a liability insurance agreement, and the insurer is required to provide special counsel for the insured, the arrangement should assure the special counsel's professional independence. If acceptance of the payment from any other source presents a significant risk that the lawyer's representation of the client will be materially limited by the lawyer's own interest in accommodating the person paying the lawyer's fee or by the lawyer's responsibilities to a payer who is also a co-client, then the lawyer must comply with the

requirements of paragraph (b) before accepting the representation, including determining whether the conflict can reasonably be consented to and, if so, that the client has adequate information about the material risks of the representation.

Prohibited Representations

[14] Ordinarily, clients may consent to representation notwithstanding a conflict. However, as indicated in paragraph (b), some conflicts make representation impossible, regardless of a client's willingness to consent. In such situations, the conflict cannot reasonably be consented to because the lawyer involved cannot reasonably ask the client for consent and cannot provide independent, objective representation even if the client were to consent. See Comment [15] to Rule 1.7. When the lawyer is representing more than one client, the question of whether reasonable consent is possible must be resolved as to each client.

[15] The question of whether a perceived conflict of interest can reasonably be consented to is typically determined by considering whether the interests of the clients will be adequately protected if the clients are permitted to give their consent, after consultation, to representation burdened by a conflict of interest. Under paragraph (b)(1), the representation is prohibited if in the circumstances the lawyer cannot reasonably conclude that the lawyer will be able to provide competent and diligent representation. See Rule 1.1 (competence) and Rule 1.3 (diligence) of these Rules. When a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent. Resolving questions of conflict of interest is primarily the responsibility of the lawyer undertaking the representation. In litigation, a court may raise the question when there is reason to infer that the

lawyer has neglected the responsibility. In a criminal case, inquiry by the court is generally required when a lawyer represents multiple defendants. Where the conflict is such that it clearly calls into question the fair or efficient administration of justice, opposing counsel may properly raise the question. Such an objection should be viewed with caution, however, for it can be misused as a technique of harassment.

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

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

Valid Consent

[18] Valid client consent requires that each affected client be aware of the relevant

circumstances and of the material and reasonably foreseeable ways that the conflict could have adverse effects on the interests of that client. See Rule 1.0(c) of these Rules (defining what valid consultation consists of). The information required depends on the nature of the conflict and the nature of the risks involved. The process of obtaining valid consent in some instances will require a recommendation to consult independent counsel. When representation of multiple clients in a single matter is undertaken, the information must include the implications of the common representation, including possible effects on loyalty, confidentiality, and the client-lawyer privilege and the advantages and risks involved. See Comments [30] and [31] (effect of common representation on confidentiality).

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

Consent Confirmed in Writing

[20] Paragraph (b) requires the lawyer to obtain consent of the client after proper consultation and to confirm the consent in writing. Such a writing may consist of a document executed by the client or one that the lawyer promptly records and transmits to the client following an oral consent. See Rule 1.0(b) of these Rules. See

also Rule 1.0(o) (writing includes electronic transmissions). If it is not feasible to obtain or transmit the writing at the time the client gives consent, then the lawyer must obtain or transmit it within a reasonable time thereafter. See Rule 1.0(b). The requirement of a writing does not supplant the need in most cases for the lawyer to talk with the client, to explain the risks and advantages, if any, of representation burdened with a conflict of interest, as well as reasonably available alternatives, and to afford the client a reasonable opportunity to consider the risks and alternatives and to raise questions and concerns. Rather, the writing is required in order to impress upon clients the seriousness of the decision the client is being asked to make and to avoid disputes or ambiguities that might later occur in the absence of a writing.

Revoking Consent

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

Consent to Future Conflict

[22] Whether a lawyer may properly request a client to waive conflicts that might arise in the future is subject to the test of paragraph (b). The effectiveness of such waivers is generally determined by the extent to which the client reasonably understands the material risks that the waiver entails. The more comprehensive the explanation of the types of future representations that might arise and the actual and reasonably foreseeable adverse consequences of those

representations, the greater the likelihood that the client will have the requisite understanding. Thus, if the client agrees to consent to a particular type of conflict with which the client is already familiar, then the consent ordinarily will be effective with regard to that type of conflict. If the consent is general and open-ended, then the consent ordinarily will be ineffective, because it is not reasonably likely that the client will have understood the material risks involved. In any case, advanced consent cannot be effective if the circumstances that materialize in the future are such as would make it unreasonable under paragraph (b) for the lawyer to seek consent.

Conflicts in Litigation

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

[24] Ordinarily a lawyer may take inconsistent legal positions in different tribunals at different times on behalf of different clients. The mere fact that advocating a legal position on behalf of one client might create precedent adverse to the interests of a client represented by the lawyer in an unrelated matter does not

create a conflict of interest. A conflict of interest exists, however, if there is a significant risk that a lawyer's action on behalf of one client will materially limit the lawyer's effectiveness in representing another client in a different case, for example, when a decision favoring one client will create a precedent likely to seriously weaken the position taken on behalf of the other client. Factors relevant in determining whether the clients need to be advised of the risk include: where the cases are pending, whether the issue is substantive or procedural, the temporal relationship between the matters, the significance of the issue to the immediate and long-term interests of the clients involved and the clients' reasonable expectations in retaining the lawyer. If there is significant risk of material limitation, then absent consent by the affected clients after consultation, the lawyer must refuse one of the representations or withdraw from one or both matters.

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

Nonlitigation Conflicts

[26] Conflicts of interest under paragraphs (a)(1) and (a)(2) arise in contexts other than litigation. For a discussion of directly adverse conflicts in transactional matters, see Comment [7]. Relevant factors in determining whether there is significant potential for material limitation include the duration and intimacy of the lawyer's relationship with the client or

clients involved, the functions being performed by the lawyer, the likelihood that disagreements will arise, and the likely prejudice to the client from the conflict. The question is often one of proximity and degree. See Comment [8].

[27] For example, conflict questions may arise in estate planning and estate administration. A lawyer may be called upon to prepare wills for several family members, such as husband and wife, and, depending upon the circumstances, a conflict of interest may be present. In order to comply with conflict of interest Rules, the lawyer should make clear the lawyer's relationship to the parties involved.

[28] A lawyer may not represent multiple parties to a negotiation whose interests are fundamentally antagonistic to each other, but common representation is permissible where the clients are generally aligned in interest. In an effective multiple representation, the lawyer seeks to resolve potentially adverse interests by developing the parties' mutual interests, in order to avoid obligating the clients to obtain separate representation and incurring the resulting additional costs.

Special Considerations in Common Representation

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

clients, representation of multiple clients is improper when it is unlikely that impartiality can be maintained. Generally, if the relationship between the parties has already assumed antagonism, the possibility that the clients' interests can be adequately served by common representation is not very good. Other relevant factors are whether the lawyer subsequently will represent both parties on a continuing basis and whether the situation involves creating or terminating a relationship between the parties.

[30] A particularly important factor in determining the appropriateness of common representation is the effect of such representation on client-lawyer confidentiality and the client-lawyer privilege. The prevailing Rule is that, between commonly represented clients, the privilege of client-lawyer confidentiality does not attach. Hence, it must be assumed that if litigation does arise between the clients, the privilege will not protect any previous communications with the lawyer. Clients should be so advised before being asked to consent to common representation.

[31] As to the duty of confidentiality, continued common representation will almost certainly be inadequate if one client asks the lawyer not to disclose to the other client information relevant to the common representation. This is so because the lawyer has an equal duty of loyalty to each client, and each client has the right to be informed of anything bearing on the representation that might affect that client's interests and the right to expect that the lawyer will use that information to that client's benefit. See Rule 1.4 of these Rules. The lawyer should, at the outset of the common representation and as part of the process of obtaining each client's valid consent after consultation, advise each client that information will be shared and that the lawyer will have to withdraw if one client decides that some matter material to the representation should be kept from the other. In limited circumstances, it may be

appropriate for the lawyer to proceed with the representation when the clients have agreed, after being properly informed, that the lawyer will keep certain information confidential. For example, the lawyer may reasonably conclude that the failure to disclose one client's trade secrets to another client will not adversely affect representation involving a joint venture between the clients and agree to keep that information confidential with the valid consent, after consultation, of both clients.

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

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

Organizational Clients

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

organizational client that the lawyer will avoid representation adverse to the client's affiliates, or the lawyer's obligations to either the organizational client or the new client are likely to limit materially the lawyer's representation of the other client.

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

Rule 1.8. CONFLICT OF INTEREST: PROHIBITED TRANSACTIONS.

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

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

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

(3) the client consents in writing to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

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

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

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

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

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

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

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

(1) the client consents after consultation;

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

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

Rule 3.4. FAIRNESS TO OPPOSING PARTY AND COUNSEL.

A lawyer shall not:

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

(b) falsify evidence or counsel or assist a witness to testify falsely;

(c) offer an inducement that is prohibited by law or pay, offer to pay, or acquiesce in the payment of compensation to a witness contingent upon the content of the witness' testimony or the outcome of the case. But a lawyer may advance, guarantee, or acquiesce in the payment of:

(1) expenses reasonably incurred by a witness in attending or testifying;

(2) reasonable compensation to a witness for the witness' loss of time in attending or testifying; or

(3) a reasonable fee for the professional services of an expert witness;

(d) advise or cause a person to secrete himself or herself or to leave the jurisdiction of a tribunal for the purpose of making the person unavailable as a witness therein;

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

(f) 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;

(g) 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;

(h) 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; or

(i) present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter.

COMMENTS:

[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.*

[3] *Paragraph (h) permits a lawyer to advise employees of a client to refrain from giving information to another party, for the employees may identify their interests with those of the client. See also Rule 4.2 of these Rules.*

Rule 3.5. IMPARTIALITY AND DECORUM OF THE TRIBUNAL.

(a) **Influencing Decision Maker.** A lawyer shall not seek to influence a judge, juror, prospective juror, discharged juror, or other decision maker by means prohibited by law.

(b) **Harassing or Embarrassing Decision Maker.** A lawyer shall not harass a judge, juror, prospective juror, discharged juror, or other decision maker or embarrass such person in such capacity.

(c) **Disruption of Tribunal.** A lawyer shall not engage in conduct intended or reasonably likely to disrupt a tribunal.

(d) **Communication with a Judge or Official.** In an adversary proceeding, a lawyer shall not communicate as to the merits of the cause with a judge or an official before whom the proceeding is pending except:

(1) in the course of the official proceeding in the cause;

(2) in writing if the lawyer promptly delivers a copy of the writing to the opposing counsel or to the adverse party if not represented by a lawyer; or

(3) orally upon notice to opposing counsel or to the adverse party if not represented by a lawyer.

(e) **Communication with Jurors.** A lawyer shall not:

(1) before the trial of a case with which the lawyer is connected, communicate with anyone the lawyer knows to be a member of the venire from which the jury will be selected, with respect to the case or with the intent or reasonable likelihood of influencing the member with respect to the case;

(2) during the trial of a case with which the lawyer is connected, communicate with a juror except in the course of the proceedings, with the judge and opposing counsel present;

(3) during the trial of a case with which the lawyer is not connected, communicate with a juror concerning the case;

(4) after dismissal of the jury in a case with which the lawyer is connected, communicate with a juror regarding the trial except that:

(i) upon leave of the court, which leave shall be freely granted, a lawyer may ask questions of, or respond to questions from, jurors about the trial, provided that the lawyer does so in a manner that is not calculated to harass or embarrass any juror and

does not seek to influence the juror's actions in future jury service in any particular case; and

(ii) upon leave of the court for good cause shown, a lawyer who believes there are grounds for legal challenge to a verdict may conduct an in-court examination of jurors or former jurors to determine whether the verdict is subject to challenge. A motion for in-court examination of discharged jurors under this subsection (e)(4)(ii) shall be served no later than 10 days after the judgment has been entered unless good cause is shown for the failure to serve the motion within that time. If the examination is permitted, the court shall prescribe the time, manner, place, and scope of the examination.

COMMENTS:

[1] *Many forms of improper influence upon a tribunal are proscribed by criminal law. A lawyer is required to avoid contributing to a violation of such provisions.*

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

[3] *It has long been recognized and acknowledged that post-discharge respectful conduct between a trial lawyer (or those acting on the lawyer's behalf) and jurors before whom the lawyer has appeared benefits both the lawyer and the jurors. The lawyer may gain insights that enable the lawyer to better represent future clients and the juror may have some mysteries (usually related to the admission or rejection of evidence) solved so as to better appreciate the workings of the justice system. In addition, it is not at all uncommon for*

lawyers and judges to talk casually about a former case that has become final. Hawai'i's original HRPC 3.5(a) and (b), adopted in December 1993, provided:

A lawyer shall not:

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

(b) communicate *ex parte* with such a person except as permitted by law; or

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

Original HRPC 3.5(a) and (b) appeared to preclude "all post-trial communications between attorneys and jurors, relating to the subject matter of the trial, in the presence of all parties to the proceeding or their legal representatives." *State v. Furutani*, 76 Hawai'i 172, 177, n.8, 873 P.2d 51, 56 n.8 (1994). The same prohibition would logically have applied to lawyer-judge post-decision contacts. The supreme court asserted that HRPC 3.5 prohibited post-trial contact that was permissible under DR 7-108 of the prior Code of Professional Responsibility. *Id.*

As interpreted, original HRPC 3.5 prohibited post-trial contact in an oblique manner: original paragraph (a) precluded seeking "to influence a judge, juror, prospective juror or other official" while original paragraph (b) precluded "communicat[ion] *ex parte* with such a person." A discharged juror was not specifically referenced in original HRPC 3.5(a)-(c). Original HRPC 3.5 referred to jurors and prospective jurors. There are sound public policy reasons for precluding *ex parte* contact with jurors and prospective jurors, and limiting contact with discharged jurors.

Enforcement of original HRPC 3.5(b) was enjoined by the United States District Court for the District of Hawai'i in *Rapp v. Disciplinary Board*, United States District Court Civ. No. 95-00779 DAE. While the *Rapp* case was pending in federal court the supreme court proposed, the Hawai'i State Bar Association approved, and, on May 8,

1996, the supreme court adopted amendments so that HRPC 3.5 provided:

Rule 3.5 *I M P A R T I A L I T Y A N D DECORUM OF THE TRIBUNAL*

(a) A lawyer shall not:

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

(2) communicate *ex parte* with such a person except as provided in subsection (b) of this Rule; or

(3) engage in conduct intended to disrupt a tribunal.

(b) After the jury is discharged, a lawyer may ask questions of, or respond to questions from, jurors provided the lawyer does so in a manner that neither harasses nor embarrasses the juror and does not seek to influence the juror's actions in future jury service. Likewise, after final disposition of a matter a lawyer may ask questions of a judge or other official regarding the matter and may respond to questions from the judge or other official, provided the lawyer does so in a manner that neither harasses nor embarrasses the judge or official and does not seek to influence the judge's or official's actions in future judicial or official service. A juror or judge is free to refuse to comment or respond.

COMMENTS:

In anticipation of further amendment after a decision in *Rapp v. Disciplinary Board*, subsection (b) was intended to be an interim rule.

In *Rapp*, the United States District Court for the District of Hawai'i concluded:

. . . that [original HRPC] 3.5(b) as interpreted and applied suffer[ed] from two chief infirmities. First, the language of the rule prohibiting *ex parte* communication with jurors "except as permitted by law," is unconstitutionally vague and overbroad. . . . The plain language of [original] Rule 3.5(b) [did] not specifically indicate whether a judge ha[d] the authority to grant leave, or whether "good cause" or "exigent

circumstances" for seeing the interviews must be shown. Moreover, this court has not found any Hawai'i case law which either sets forth an exception to [original] Rule 3.5(b) in circumstances where counsel suspect that jury misconduct has occurred or a procedure that an attorney needs to follow if that attorney does have suspicions. Additionally, no Hawai'i case has discussed what might amount to good cause warranting jury interviews, if good cause is the applicable standard. . . . [I]t is unclear how the rule would be applied in circumstances which may warrant the grant of post verdict interviews by a trial court. That is, a description of the mechanism for review by a trial judge is conspicuously absent from the rule. Moreover, the standard "as permitted by law" provides little guidance to lawyers as to when jurors can appropriately be contacted. . . .

Second, the probable efficacy of [original] Rule 3.5, as it has been interpreted by the Hawai'i Supreme Court, in protecting jury members and their verdicts is minimal at best. . . . If the aim of Rule 3.5 is to protect the sanctity of jury verdicts and prevent jury harassment, it misses the mark. Instead, as interpreted, the rule would theoretically allow two unscrupulous lawyers who agree to interview jurors together, to engage in a jury harassment "free for all" with no court supervision. Clearly, the limitations [original] Rule 3.5 places on ex parte jury communications is not well-tailored to achieve the State's compelling interests.

The United States District Court concluded:

. . . the State Defendants have demonstrated a compelling interest in preserving the integrity of the trial process by protecting jurors from post trial harassment and unnecessary intrusion by lawyers. There is no question that a properly tailored rule . . . can pass constitutional muster.

The United States District recognized two compelling state interests that could

justify a rule restricting attorney contact with jurors: "[1] the public policy holding jury deliberations and verdicts inviolable and [2] the aim of protecting the privacy of jurors." However, the United States District Court concluded original HRPC 3.5(b) was not sufficiently tailored to meet the State's compelling interests and enjoined its enforcement.

Upon review of the United States District Court's order, the Supreme Court of Hawai'i proposed additional amendments to Rule 3.5. After discussions with the Hawai'i State Bar Association and the Disciplinary Board and consideration of the concerns expressed by those entities, the supreme court adopted the current Rule. The current Rule eliminates the phrase "as permitted by law." In furtherance of the valid public policy interests in keeping jury deliberations inviolable and protecting the privacy of jurors, subdivision (e) retains the trial judge as the gatekeeper between the attorneys and the jury.

Further, subdivision (e) sets standards by which to determine requests for post-discharge juror interviews. Subdivision (e)(4)(i) recognizes that respectful post-discharge debriefing of a jury is beneficial to both lawyers and jurors. The possibility of jury harassment requires the oversight of the judge, but where the purpose of the requested interview is to educate the lawyer and the jury, the value of respectful debriefing is such that leave for respectful post-trial debriefing should be freely granted. Subdivision (e)(4)(i) presumes that discharged jurors are free to decline participation in such post-trial debriefings. Subdivision (e)(4)(ii) is designed to enforce the policies of holding jury thought processes inviolable and protecting the privacy of jurors. Thus, to avoid juror harassment by unscrupulous lawyers and lawyers on fishing expeditions, as well as the jury harassment free for all referred to by the United States District Court, an attorney seeking to challenge a verdict due to jury irregularity must (i) show

good cause for a belief that grounds for a challenge exist, (ii) obtain leave of the court to question a juror or jurors and, if the motion to examine the jury is granted, (iii) conduct the examination in court and under conditions set by the judge. In sum, Rule 3.5(e) provides oversight by the trial judge, circumstances in which communications with jurors are permitted, and standards by which to decide requests to interview discharged jurors.

Rule 3.6. TRIAL PUBLICITY.

(a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

(b) Notwithstanding paragraph (a), a lawyer may state:

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

(2) information contained in a public record;

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

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

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

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

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

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

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

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

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

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

(d) No lawyer associated in a firm or government agency with a lawyer subject to paragraph (a) shall make a statement prohibited by paragraph (a).

COMMENTS:

[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(e) of these Rules requires compliance with such rules.*

[3] *The Rule sets forth a basic general prohibition against a lawyer making statements that the lawyer knows or should know will have a substantial likelihood of*

materially prejudicing an adjudicative proceeding. Recognizing that the public value of informed commentary is great and the likelihood of prejudice to a proceeding by the commentary of a lawyer who is not involved in the proceeding is small, the Rule applies only to lawyers who are, or who have been, involved in the investigation or litigation of a case, and their associates.

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

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

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

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

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

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

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

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

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

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

Rule 3.7. LAWYER AS WITNESS.

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

(1) the testimony relates to an uncontested issue;

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

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

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

COMMENTS:

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

Advocate-Witness Rule

[2] *The tribunal may object when the trier of fact may be confused or misled by a lawyer serving as both advocate and witness. The opposing party may object where the combination of roles may prejudice that party's rights in the litigation. A witness is required to testify on the basis of personal knowledge, while an advocate is expected to explain and comment on evidence given by others. It may not be clear whether a statement by an advocate-witness should be taken as proof or as an analysis of the proof.*

[3] *To protect the tribunal, paragraph (a) prohibits a lawyer from simultaneously serving as advocate and necessary witness except in those circumstances specified in paragraphs (a)(1) through (a)(3). Paragraph (a)(1) recognizes that if the testimony will be uncontested, the ambiguities in the dual role are purely theoretical. Paragraph (a)(2) recognizes that where the testimony concerns the extent and value of legal services rendered in the action in which the testimony is offered, permitting the lawyers to testify avoids the need for a second trial with new counsel to resolve that*

issue. Moreover, in such a situation the judge has first hand knowledge of the matter in issue; hence, there is less dependence on the adversary process to test the credibility of the testimony.

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

[5] *A recurring situation involves the lawyer as impeaching witness, that is, as the means by which another witness' prior inconsistent statement is to be proved. In such a situation the need for such impeachment should be foreseen not only in preparation for trial but even in advance of the initial witness interview that produced the impeaching material. Cf. ABA Standards Relating to the Administration of Criminal Justice, The Defense Function, Standard 4-4.3(e): "[The lawyer] should avoid interviewing a prospective witness except in the presence of a third person."*

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

Conflict of Interest

[7] In determining if it is permissible to act as advocate in a trial in which the lawyer will be a necessary witness, the lawyer must also consider that the dual role may give rise to a conflict of interest that will require compliance with Rule 1.7 or Rule 1.9 of these Rules. For example, if there is likely to be substantial conflict between the testimony of the client and that of the lawyer, the representation involves a conflict of interest that requires compliance with Rule 1.7. This would be true even though the lawyer might not be prohibited by paragraph (a) from simultaneously serving as advocate and witness because the lawyer's disqualification would work as a substantial hardship on the client. Similarly, a lawyer who might be permitted to simultaneously serve as an advocate and a witness by paragraph (a)(3) might be precluded from doing so by Rule 1.9. The problem can arise whether the lawyer is called as a witness on behalf of the client or is called by the opposing party. Determining whether or not such a conflict exists is primarily the responsibility of the lawyer involved. If there is a conflict of interest, the lawyer must secure the client's consent after consultation, confirmed in writing. In some cases, the lawyer will be precluded from seeking the client's consent. See Rule 1.7. See Rule 1.0(b) for the definition of "confirmed in writing" and Rule 1.0(c) for the definition of "consultation."

[8] Paragraph (b) provides that a lawyer is not disqualified from serving as an advocate because a lawyer with whom the lawyer is associated in a firm is precluded from doing so by paragraph (a). If, however, the testifying lawyer would also be disqualified by Rule 1.7 or Rule 1.9 of these Rules from representing the client in the matter, other lawyers in the firm will be precluded from representing the client by

Rule 1.10, unless the client consents after consultation under the conditions stated in Rule 1.7.

(Amended October 21, 2013, effective January 1, 2014.)

Rule 3.8. PERFORMING THE DUTY OF PUBLIC PROSECUTOR OR OTHER GOVERNMENT LAWYER.

A public prosecutor or other government lawyer shall:

(a) not institute or cause to be instituted criminal charges when the prosecutor or government lawyer knows or it is obvious that the charges are not supported by probable cause; and

(b) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal.

(c) When a prosecutor knows of new, credible, and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall

(1) promptly disclose that evidence to an appropriate court or authority; and

(2) if the conviction was obtained in the State of Hawai'i, promptly disclose that evidence to the defendant and the office of the public defender, unless a court orders otherwise.

(d) A prosecutor's independent judgment, made in good faith, that the new evidence is not of such nature as to trigger the obligations of section (c), though subsequently determined to have been erroneous, does not constitute a violation of this Rule.

COMMENTS:

[1] A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice, that guilt is decided upon the basis of sufficient evidence, and that special precautions are

taken to prevent and to rectify the convictions of innocent persons. The extent of mandated remedial action is a matter of debate. See, e.g., ABA Standards of Criminal Justice Relating to Prosecution Function. Competent representation may require a prosecutor to undertake some procedural and remedial measures as a matter of obligation. See also Rule 3.3(d) of these Rules, governing ex parte proceedings. Applicable law may require other measures by the prosecutor. Knowing disregard of those obligations or a systematic abuse of prosecutorial discretion could constitute a violation of Rule 8.4 of these Rules.

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

[3] *“Defense” as used in paragraph (b) refers to a defense lawyer or a defendant if unrepresented.*

[4] *See Rule 3.6(d) of these Rules for restrictions on extrajudicial statements by investigators and other persons employed by lawyers in criminal cases.*

[5] *With respect to paragraph (c), consistent with the objectives of Rules 4.2 and 4.3 of these Rules, disclosure to a represented defendant must be made through the defendant’s counsel, and, in the case of an unrepresented defendant, would ordinarily be accompanied by a request to a court for the appointment of counsel to assist the defendant in taking such legal measures as may be appropriate.*

(Amended October 21, 2013, effective January 1, 2014.)

**Rule 3.9. A D V O C A T E I N
N O N - A D J U D I C A T I V E
P R O C E E D I N G S.**

A lawyer representing a client before a legislative or administrative body in a nonadjudicative proceeding shall disclose that the appearance is in a representative capacity and shall conform to the

provisions of Rules 3.3(a) through (c), 3.4(a) through (e), and 3.5 of these Rules.

COMMENTS:

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

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

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

Rule 4.1. TRUTHFULNESS IN STATEMENTS TO OTHERS.

In the course of representing a client a lawyer shall not knowingly:

- (a) make a false statement of material fact or law to a third person; or
- (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client.

COMMENTS:**Misrepresentation**

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

Statements of Fact

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

Crime or Fraud by Client

[3] *Under Rule 1.2(d) of these Rules, a lawyer is prohibited from counseling or assisting a client in conduct that the lawyer knows is criminal or fraudulent. Paragraph (b) states a specific application of the principle set forth in Rule 1.2(d) and addresses the situation where a client's crime or fraud takes the form of a lie or misrepresentation. Ordinarily, a lawyer can avoid assisting a client's crime or fraud by withdrawing from the representation. Sometimes it may be necessary for the lawyer to give notice of the fact of the withdrawal and to disaffirm an opinion, document, affirmation or the like. In extreme cases, substantive law may require a lawyer to disclose information relating to the representation to avoid being deemed to have assisted the client's crime or fraud. See Rules 1.2 and 1.6.*

Rule 4.2. COMMUNICATION WITH PERSON REPRESENTED BY COUNSEL.

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

COMMENTS:

[1] *This Rule does not prohibit communication with a represented person, or an employee or agent of such a person, concerning matters outside the representation. For example, the existence of a controversy between a government agency and a private party, or between two organizations, does not prohibit a lawyer for either from communicating with nonlawyer representatives of the other regarding a separate matter. Also, parties to a matter may communicate directly with each other and a lawyer having independent justification or legal authority for communicating with a represented person is permitted to do so. Communications*

authorized by law include, for example, the right of a party to a controversy with a government agency to speak with government officials about the matter.

[2] Communications authorized by law also include constitutionally permissible investigative activities of lawyers representing governmental entities, directly or through investigative agents, prior to the commencement of criminal or civil enforcement proceedings, where there is applicable judicial precedent that either has found the activity permissible under this Rule or has found this Rule inapplicable. However, the Rule imposes ethical restrictions that go beyond those imposed by constitutional provisions.

[3] This Rule also applies to communications with any person whether or not a party to a formal adjudicative proceeding, contract or negotiation, who is represented by counsel concerning the matter to which the communication relates.

[4] In the case of an organization, this Rule prohibits communications by a lawyer for another person or entity concerning the matter in representation with persons having a managerial responsibility on behalf of the organization, and with any other person whose act or omission in connection with that matter may be imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization. If an agent or employee of the organization is represented in the matter by his or her own counsel, the consent by that counsel to a communication will be sufficient for purposes of this Rule. Compare Rule 3.4(h) of these Rules.

[5] The prohibition on communications with a represented person only applies, however, in circumstances where the lawyer knows that the person is in fact represented in the matter to be discussed. This means that the lawyer has actual knowledge of the fact of the representation; but such actual knowledge may be inferred from the circumstances. See

Rule 1.0(f) of these Rules. Such an inference may arise in circumstances where there is substantial reason to believe that the person with whom communication is sought is represented in the matter to be discussed. Thus, a lawyer cannot evade the requirement of obtaining the consent of counsel by closing eyes to the obvious.

[6] In the event the person with whom the lawyer communicates is not known to be represented by counsel in the matter, the lawyer's communications are subject to Rule 4.3 of these Rules.

Rule 4.3. DEALING WITH UNREPRESENTED PERSON.

(a) In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.

(b) The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the lawyer's client.

COMMENTS:

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

[2] *The Rule distinguishes between situations involving unrepresented persons whose interests may be adverse to those of the lawyer's client and those in which the person's interests are not in conflict with the client's. In the former situation, the possibility that the lawyer will compromise the unrepresented person's interests is so great that the Rule prohibits the giving of any advice, apart from the advice to obtain counsel. Whether a lawyer is giving impermissible advice may depend on the experience and sophistication of the unrepresented person, as well as the setting in which the behavior and comments occur. This Rule does not prohibit a lawyer from negotiating the terms of a transaction or settling a dispute with an unrepresented person. So long as the lawyer has explained that the lawyer represents an adverse party and is not representing the person, the lawyer may inform the person of the terms on which the lawyer's client will enter into an agreement or settle a matter, prepare documents that require the person's signature and explain the lawyer's own view of the meaning of the document or the lawyer's view of the underlying legal obligations.*

Rule 4.4. RESPECT FOR RIGHTS OF THIRD PERSONS.

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

(b) A lawyer who receives a document and knows or reasonably should know that the document was inadvertently sent shall:

(1) not read the document further than reasonably necessary to determine its privileged or confidential nature within the meaning of Rule 1.6 of these Rules, and shall not disseminate the document or information about its contents to anyone other than a supervisory lawyer and/or disinterested lawyer consulted to secure legal advice about the receiving lawyer's compliance with this Rule;

(2) promptly notify the sending lawyer; and
 (3) either reach agreement with the sending lawyer with respect to the disposition of the material or refrain from using the materials until a definitive resolution of the proper disposition of the materials is obtained from a court.

COMMENTS:

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

[2] *Paragraph (b) recognizes that lawyers sometimes receive documents that were mistakenly sent or produced by opposing parties or their lawyers. If a lawyer knows or reasonably should know that such a document was sent inadvertently, then this Rule requires the lawyer to promptly notify the sender and then either reach agreement with the sending attorney as to the disposition of the document or seek a ruling from the court as to whether the attorney-client privilege or work product protection was waived by the disclosure. This Rule incorporates Formal Opinion No. 39, issued by Hawaii's Office of Disciplinary Counsel on April 26, 2001, as well as provisions suggested in "The Future of Inadvertent Disclosure: The Lingering Need to Revise Professional Conduct Rules," P. Schaefer, Vol. 69 Maryland Law Review 195, 258-259 (2010). For purposes of this Rule, "document" includes e-mail or other electronic modes of transmission subject to being read out or put into readable form.*

Rule 5.1. RESPONSIBILITIES OF PARTNERS, MANAGERS, AND SUPERVISORY LAWYERS.

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

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

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

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

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

COMMENTS:

[1] Paragraph (a) applies to lawyers who have managerial authority over the professional work of a firm. See Rule 1.0(d) of these Rules. This includes members of a partnership and the shareholders in a law firm organized as a professional corporation; lawyers having managerial authority in the law department of an enterprise or government agency; and lawyers who have intermediate managerial responsibilities in a firm. Paragraph (b) applies to lawyers who have supervisory authority over the work of other lawyers in a firm.

[2] Paragraph (a) requires lawyers with managerial authority within a firm to make reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance that all lawyers in the firm will conform to the Rules of Professional Conduct. Such policies and

procedures include those designed to detect and resolve conflicts of interest, identify dates by which actions must be taken in pending matters, account for client funds and property, and ensure that inexperienced lawyers are properly supervised.

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

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

[5] Paragraph (c)(2) defines the duty of a partner or other lawyer having comparable managing authority in a law firm, as well as a lawyer who has direct supervisory authority over performance of specific legal work by another lawyer. Whether a lawyer has such supervisory authority in particular circumstances is a question of fact. Partners and lawyers with comparable authority have at least indirect responsibility for all work being done by the firm, while a partner or manager in charge of a particular matter ordinarily also has supervisory responsibility for the work of other firm lawyers engaged in the matter.

Appropriate remedial action by a partner or managing lawyer would depend on the immediacy of that lawyer's involvement and the seriousness of the misconduct. A supervisor is required to intervene to prevent avoidable consequences of misconduct if the supervisor knows that the misconduct occurred. Thus, if a supervising lawyer knows that a subordinate misrepresented a matter to an opposing party in negotiation, the supervisor as well as the subordinate has a duty to correct the resulting misapprehension. A lawyer's knowledge of conduct referred to in (c)(2) means knowledge of the circumstances which render the conduct a violation.

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

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

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

Rule 5.2. RESPONSIBILITIES OF A SUBORDINATE LAWYER.

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

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

COMMENTS:

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

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

Rule 5.3. RESPONSIBILITIES REGARDING NONLAWYER ASSISTANTS.

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

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

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

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

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

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

COMMENTS:

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

[2] *Paragraph (a) requires lawyers with managerial authority within a firm to make reasonable efforts to establish internal*

policies and procedures designed to provide reasonable assurance that nonlawyers in the firm will act in a way compatible with the Rules of Professional Conduct. See Comment [2] to Rule 5.1. Paragraph (b) applies to lawyers who have supervisory authority over the work of a nonlawyer. Paragraph (c) specifies the circumstances in which a lawyer is responsible for conduct of a nonlawyer that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer.

Rule 5.4. PROFESSIONAL INDEPENDENCE OF A LAWYER.

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

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

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

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

(4) a lawyer may share court-awarded legal fees with a non-profit organization that employed, retained, or recommended employment of the lawyer in the matter; and

(5) a lawyer who undertakes to complete unfinished legal business of a deceased lawyer may pay to the estate of the deceased lawyer that proportion of the total compensation that fairly represents the services rendered by the deceased lawyer.

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

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

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

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

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

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

COMMENTS:

[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) of these Rules (lawyers 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 consent after consultation).*

[3] *Subsection (b) only applies if legal services are provided by the partnership to third persons or entities (i.e., other than to the partnership itself).*

Rule 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; or

(c) allow any person who has been suspended or disbarred and who maintains a presence in an office where the practice of law is conducted by the lawyer to have any contact with the clients of the lawyer either in person, by telephone, or in writing or to have any contact with persons who have legal dealings with the office either in person, by telephone, or in writing.

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 of these Rules. 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.

Paragraph (c) prohibits an attorney who employs or otherwise utilizes a lawyer who is suspended or disbarred, or who resigned in lieu of discipline, from allowing that lawyer to have any contact with the attorney's clients or others who have legal dealing with the attorney's office. In order to protect the public, strict prohibitions are

essential to prevent permissible paralegal activities from crossing the line to giving legal advice, taking fees, or misleading clients and others who deal with the attorney's office.

Rule 5.6. RESTRICTIONS ON RIGHT TO PRACTICE.

A lawyer shall not participate in offering or making:

(a) a partnership, shareholders, operating, employment, or other similar type of agreement that restricts the right of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement or as permitted by Rule 1.17 of these Rules; or

(b) an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a client controversy.

COMMENTS:

[1] *An agreement restricting the right of lawyers to practice after leaving a firm not only limits their professional autonomy but also limits the freedom of clients to choose a lawyer. Paragraph (a) prohibits such agreements except for restrictions incident to provisions concerning retirement benefits for service with the firm or as allowed by Rule 1.17 of these Rules concerning sale of a law firm.*

[2] *Paragraph (b) prohibits a lawyer from agreeing not to represent other persons in connection with settling a claim on behalf of a client.*

Rule 6.1. PRO BONO SERVICE.

A lawyer should aspire to provide at least 50 hours of pro bono services per year. In fulfilling this responsibility, the lawyer should:

(a) provide at least 25 hours of legal services without fee or expectation of fee to:

(1) persons of limited means; or

(2) charitable, religious, civic, community, governmental and educational organizations in matters that are designed primarily to address the needs of persons of limited means; and

(b) provide any additional services through:

(1) delivery of legal services at no fee or substantially reduced fee to individuals, groups or organizations seeking to secure or protect civil rights, civil liberties or public rights, or charitable, religious, civic, community, governmental and educational organizations in matters in furtherance of their organizational purposes, where the payment of standard legal fees would significantly deplete the organization's economic resources or would be otherwise inappropriate;

(2) delivery of legal services at a substantially reduced fee to persons of limited means; or

(3) participation in activities for improving the law, the legal system or the legal profession.

(c) In lieu of providing 50 hours of pro bono service, a lawyer may exercise his or her desire to provide pro bono services by contributing at least \$500 each year to the Hawai'i Justice Foundation, or an entity that provides legal services at no fee, or at a significantly reduced fee, to persons of limited means.

(d) In addition to performing pro bono services or contributing under subsection (c) each year, a lawyer should voluntarily contribute financial support to organizations that provide legal services to persons of limited means.

COMMENTS:

[1] *Every lawyer, regardless of professional prominence or professional work load, has a responsibility to provide legal services to those unable to pay, and personal involvement in the problems of the disadvantaged can be one of the most rewarding experiences in the life of a lawyer. This Rule urges all lawyers to provide a minimum of 50 hours of pro bono services annually. It is recognized that in some years a lawyer may render greater or fewer hours than the annual standard specified, but during the course of his or her legal career, each lawyer should render on average per year, the number of hours set forth in this Rule. Services can be performed in civil matters or in criminal or quasi-criminal matters for which there is no government obligation to provide funds for*

legal representation, such as post-conviction death penalty appeal cases.

[2] Paragraphs (a)(1) and (2) recognize the critical need for legal services that exists among persons of limited means by providing that at least 25 hours of the legal services rendered annually to the disadvantaged be furnished without fee or expectation of fee. Legal services under these paragraphs consist of a full range of activities, including individual and class representation, the provision of legal advice or information through nonprofit or court-annexed programs such as court self help centers and access to justice rooms that are designated primarily to serve persons of limited means, legislative lobbying, administrative rule making, and the provision of free training or mentoring to those who represent persons of limited means. The variety of these activities should facilitate participation by government attorneys, even when restrictions exist on their engaging in the outside practice of law.

[3] Persons eligible for legal services under paragraphs (a)(1) and (2) are those who qualify for participation in programs funded by the Legal Services Corporation and those whose incomes and financial resources are slightly above the guidelines utilized by such programs but nevertheless, cannot afford counsel. Legal services can be rendered to individuals or to organizations such as homeless shelters, battered women's centers and food pantries that serve those of limited means. The term "governmental organizations" includes, but is not limited to, public protection programs and sections of the government or public sector agencies.

[4] Because service must be provided without fee or expectation of fee, the intent of the lawyer to render free legal services is essential for the work performed to fall within the meaning of paragraphs (a)(1) and (2). Accordingly, services rendered cannot be considered pro bono if an anticipated fee is uncollected, but the award of statutory attorneys' fees in a case originally accepted as pro bono would not disqualify such

services from inclusion under this section. Lawyers who do receive fees in such cases are encouraged to contribute an appropriate portion of such fees to organizations, programs, or projects that benefit persons of limited means.

[5] While it is possible for a lawyer to fulfill the annual responsibility to perform pro bono services exclusively through activities described in paragraphs (a) and (b), to the extent that any hours of service remained unfulfilled, a monetary contribution in accordance with paragraph (c) replaces services described by (a) and (b).

[6] Paragraph (b)(1) includes the provision of certain types of legal services to those whose incomes and financial resources place them above limited means. It also permits the pro bono attorney to accept a substantially reduced fee for services. Examples of the types of issues that may be addressed under this paragraph include First Amendment claims, Title VII claims and environmental protection claims. Additionally, a wide range of organizations may be represented, including social service, medical research, cultural and religious groups.

[7] Paragraph (b)(2) covers instances in which attorneys agree to and receive a modest fee for furnishing legal services to persons of limited means. Participation in judicare programs and acceptance of court appointments in which the fee is substantially below a lawyer's usual rate are encouraged under this section.

[8] Paragraph (b)(3) recognizes the value of lawyers engaging in activities that improve the law, the legal system or the legal profession. Serving on bar association committees, serving on boards of pro bono or legal services programs, taking part in Law Day activities, acting as a continuing legal education instructor, a mediator, or an arbitrator, and engaging in legislative lobbying to improve the law, the legal system or the profession are a few examples of the many activities that fall within this paragraph.

[9] Because the provision of pro bono services is a professional responsibility, it is the individual ethical commitment of each lawyer. Unlike the Model ABA Rule, paragraph (c) expressly allows a lawyer to exercise his or her desire to provide pro bono service through annual financial contributions to the Hawai'i Justice Foundation or other qualified entities for the support of organizations that provide free or significantly reduced fee legal services to persons of limited means. While the personal involvement of each lawyer in the provision of pro bono services is generally preferable, such personal involvement may not always be possible. The annual contribution alternative allows a lawyer to provide financial assistance to increase and improve the delivery of pro bono services when a lawyer cannot or decides not to provide pro bono services through the contribution of time. Also, there is no prohibition against a lawyer's contributing a combination of hours and financial support.

[10] Because the efforts of individual lawyers are not enough to meet the need for free legal services that exists among persons of limited means, there are organizations, programs, and projects that have been instituted to provide those services. Paragraph (d) encourages every lawyer to financially support organizations, programs, and projects that benefit persons of limited means, in addition to, and not as a substitute for, providing pro bono services, or making financial contributions annually to the

Hawai'i Justice Foundation or other qualified entities when pro bono service is not feasible.

[11] Law firms should act reasonably to enable and encourage all lawyers in the firm to provide the pro bono legal services called for by this Rule.

[12] The responsibility set forth in this Rule is not intended to be enforced through the disciplinary process.

(Amended November 14, 2013, effective January 1, 2014.)

Rule 6.2. ACCEPTING APPOINTMENTS.

A lawyer shall not seek to avoid appointment by a tribunal to represent a person except for good cause, such as:

(a) representing the client is likely to result in violation of the Rules of Professional Conduct or other law;

(b) representing the client is likely to result in an unreasonable financial burden on the lawyer; or

(c) the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client.

COMMENTS:

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

Appointed Counsel

[2] For good cause a lawyer may seek to decline an appointment to represent a person who cannot afford to retain counsel or whose cause is unpopular. Good cause exists if the lawyer could not handle the

matter competently, see Rule 1.1 of these Rules, or if undertaking the representation would result in an improper conflict of interest, for example, when the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client. Employment as a government lawyer may be good cause to avoid appointment by a tribunal. A lawyer may also seek to decline an appointment if acceptance would be unreasonably burdensome, for example, when it would impose a financial sacrifice so great as to be unjust.

[3] An appointed lawyer has the same obligations to the client as retained counsel, including the obligations of loyalty and confidentiality, and is subject to the same limitations on the client-lawyer relationship, such as the obligation to refrain from assisting the client in violation of the Rules.

Rule 6.3. MEMBERSHIP IN LEGAL SERVICES ORGANIZATION.

A lawyer may serve as a director, officer or member of a legal services organization, apart from the law firm in which the lawyer practices, notwithstanding that the organization serves persons having interests adverse to a client of the lawyer. The lawyer shall not knowingly participate in a decision or action of the organization:

(a) if participating in the decision or action would be incompatible with the lawyer's obligations to a client under Rule 1.7 of these Rules; or

(b) where the decision or action could have a material adverse effect on the representation of a client of the organization whose interests are adverse to a client of the lawyer.

COMMENTS:

[1] Lawyers should be encouraged to support and participate in legal service organizations. A lawyer who is an officer or a member of such an organization does not thereby have a client-lawyer relationship with persons served by the organization. However, there is potential conflict between the interests of such persons and the

interests of the lawyer's clients. If the possibility of such conflict disqualified a lawyer from serving on the board of a legal services organization, the profession's involvement in such organizations would be severely curtailed.

[2] It may be necessary in appropriate cases to reassure a client of the organization that the representation will not be affected by conflicting loyalties of a member of the board. Established, written policies in this respect can enhance the credibility of such assurances.

Rule 6.4. LAW REFORM ACTIVITIES AFFECTING CLIENT INTERESTS.

A lawyer may serve as a director, officer, or member of an organization involved in reform of the law or its administration notwithstanding that the reform may affect the interests of a client of the lawyer. When the lawyer knows that the interests of a client may be materially benefitted by a decision in which the lawyer participates, the lawyer shall disclose that fact to the organization but need not identify the client.

COMMENT:

[1] Lawyers involved in organizations seeking law reform generally do not have a client-lawyer relationship with the organization. Otherwise, it might follow that a lawyer could not be involved in a bar association law reform program that might indirectly affect a client. For example, a lawyer specializing in antitrust litigation might be regarded as disqualified from participating in drafting revisions of Rules governing that subject. In determining the nature and scope of participation in such activities, a lawyer should be mindful of obligations to clients under other Rules, particularly Rule 1.7. A lawyer is professionally obligated to protect the integrity of the program by making an appropriate disclosure within the organization when the lawyer knows a private client might be materially benefitted. This Rule applies to lawyers who are also lobbyists and legislators.

Rule 6.5. NONPROFIT AND COURT-ANNEXED LIMITED LEGAL SERVICES PROGRAMS.

(a) A lawyer who, under the auspices of a program sponsored by a nonprofit organization or court, provides short-term limited legal services to a client without expectation by either the lawyer or the client that the lawyer will provide continuing representation in the matter:

(1) is subject to Rule 1.7 and 1.9(a) of these Rules only if the lawyer knows that the representation of the client involves a conflict of interest; and

(2) is subject to Rule 1.10 only if the lawyer knows that another lawyer associated with the lawyer in the law firm is disqualified by Rule 1.7 or 1.9(a) with respect to the matter.

(b) Except as provided in paragraph (a)(2), Rule 1.10 is inapplicable to a representation governed by this Rule.

COMMENTS:

[1] Legal services organizations, courts, and various nonprofit organizations have established programs through which lawyers provide short-term limited legal services—such as advice or the completion of legal forms—that will assist persons to address their legal problems without further representation by a lawyer. In these programs, such as legal-advice hotlines, advice-only clinics or pro se counseling programs, a client-lawyer relationship is established, but there is no expectation that the lawyer's representation of the client will continue beyond the limited consultation. Such programs are normally operated under circumstances in which it is not feasible for a lawyer to systematically screen for conflicts of interest as is generally required before undertaking a representation. See, e.g., Rules 1.7, 1.9 and 1.10 of these Rules.

[2] A lawyer who provides short-term limited legal services pursuant to this Rule must secure the client's consent, after consultation, to the limited scope of the representation. See Rule 1.2(c) of these Rules. If a short-term limited representation would not be reasonable under the

circumstances, the lawyer may offer advice to the client but must also advise the client of the need for further assistance of counsel. Except as provided in this Rule, the Rules of Professional Conduct, including Rules 1.6 and 1.9(c), are applicable to the limited representation.

[3] Because a lawyer who is representing a client in the circumstances addressed by this Rule ordinarily is not able to check systematically for conflicts of interest, paragraph (a) requires compliance with Rules 1.7 or 1.9(a) only if the lawyer knows that the representation presents a conflict of interest for the lawyer, and with Rule 1.10 only if the lawyer knows that another lawyer in the lawyer's firm is disqualified by Rules 1.7 or 1.9(a) in the matter.

[4] Because the limited nature of the services significantly reduces the risk of conflicts of interest with other matters being handled by the lawyer's firm, paragraph (b) provides that Rule 1.10 is inapplicable to a representation governed by this Rule except as provided by paragraph (a)(2). Paragraph (a)(2) requires the participating lawyer to comply with Rule 1.10 when the lawyer knows that the lawyer's firm is disqualified by Rules 1.7 or 1.9(a). By virtue of paragraph (b), however, a lawyer's participation in a short-term limited legal services program will not preclude the lawyer's firm from undertaking or continuing the representation of a client with interests adverse to a client being represented under the program's auspices. Nor will the personal disqualification of a lawyer participating in the program be imputed to other lawyers participating in the program.

[5] If, after commencing short-term limited representation in accordance with this Rule, a lawyer undertakes to represent the client in the matter on an ongoing basis, Rules 1.7, 1.9(a) and 1.10 become applicable.

Rule 7.1. COMMUNICATIONS CONCERNING A LAWYER'S SERVICES.

A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it:

(a) contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading;

(b) is likely to create an unjustified expectation about results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate the Rules of Professional Conduct or other law; or

(c) compares the lawyer's services with other lawyer's services, unless the comparison can be factually substantiated.

COMMENTS:

[1] *This Rule governs all communications about a lawyer's services, including advertising permitted by Rule 7.2 of these Rules. Whatever means are used to make known a lawyer's services, statements about them should be truthful.*

[2] *Truthful statements that are misleading are also prohibited by this Rule. A truthful statement is misleading if it omits a fact necessary to make the lawyer's communication considered as a whole not materially misleading. A truthful statement is also misleading if there is a substantial likelihood that it will lead a reasonable person to formulate a specific conclusion about the lawyer or the lawyer's services for which there is not 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 any 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) of these Rules for the prohibition against stating or implying an ability to influence a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law.*

Rule 7.2. ADVERTISING.

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

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

(1) pay the reasonable costs of advertisements or communications permitted by this Rule;

(2) pay the usual charges of a not-for-profit lawyer referral service or qualified legal assistance organization, which charges, in addition to any referral fee, may include a fee calculated as a percentage of legal fees earned by the lawyer to whom the service or organization has referred a matter, provided that any such percentage fee shall be used only to pay the reasonable operating expenses of the service or organization and to fund public service activities of the service or organization, including the delivery of pro bono legal services; and

(3) pay for the purchase of a law practice in accordance with Rule 1.17 of these Rules.

(c) Any communication made pursuant to this Rule shall include the name of at least one lawyer responsible for its content.

COMMENTS:

[1] *To assist the public in obtaining legal services, lawyers should be allowed to*

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

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

[3] *Questions of effectiveness and taste in advertising are matters of speculation and subjective judgment. Some jurisdictions have had extensive prohibitions against television advertising, against advertising going beyond specified facts about a lawyer, or against "undignified" advertising. Television is now one of the most powerful media for getting information to the public, particularly persons of low and moderate income; prohibiting television advertising, therefore, would impede the flow of information about legal services to many sectors of the public. Limiting the information that may be advertised has a similar effect and assumes that the bar can accurately forecast the kind of information that the public would regard as relevant. Similarly, electronic media, such as the*

Internet, can be an important source of information about legal services, and lawful communication by electronic mail is permitted by this Rule. But see Rule 7.3(a) of these Rules for the prohibition against the solicitation of a prospective client through a real-time electronic exchange that is not initiated by the prospective client.

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

Paying Others to Recommend a Lawyer

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

[6] *A lawyer may pay the usual charges of a prepaid legal services plan, not-for-profit lawyer referral service, or qualified legal assistance organization. A prepaid legal service plan is a group legal service plan in which the cost of the services are prepaid by the group member or by some other person or organization on the member's behalf. It is a plan by which legal services are rendered to individual members of a group identifiable in terms of some common interest and must otherwise satisfy the requirements of Hawai'i Revised Statutes Chapter 488. A lawyer may also share legal fees with a not-for-profit lawyer referral service that recommended employment of the*

lawyer in the matter, as permitted by Rule 5.4(a)(4) of these Rules. See Rule 1.0(h) (Terminology) section for the definition of “Qualified legal assistance organization.”

[7] A lawyer who accepts assignments or referrals from a legal service plan or referrals from a lawyer referral service must act reasonably to assure that the activities of the plan or service are compatible with the lawyer’s professional obligations. See Rule 5.3 of these Rules. Legal service plans and lawyer referral services may communicate with prospective clients, but such communication must be in conformity with these Rules. Thus, advertising must not be false or misleading, as would be the case if the communications of a group advertising program or a group legal services plan would mislead prospective clients to think that it was a lawyer referral service sponsored by a state agency or bar association. Nor could the lawyer allow in-person telephonic, or real-time contacts that would violate Rule 7.3 of these Rules.

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

comply with these Rules. This Rule does not restrict referrals or divisions of revenues or net income among lawyers within firms comprised of multiple entities.

Rule 7.3. DIRECT CONTACT WITH PROSPECTIVE CLIENTS.

(a) A lawyer shall not by in-person, live telephone or real-time electronic contact solicit professional employment when a significant motive for the lawyer’s doing so is the lawyer’s pecuniary gain, unless the person contacted has a family, close personal, or prior professional relationship with the lawyer.

(b) A lawyer shall not solicit professional employment by written, recorded or electronic communication or by in-person, telephone or real-time electronic contact even when not otherwise prohibited by paragraph (a), if:

(1) the target of the solicitation has made known to the lawyer a desire not to be solicited by the lawyer; or

(2) the solicitation involves coercion, duress or harassment.

(c) Every written, recorded or electronic communication from a lawyer soliciting professional employment from anyone known to be in need of legal services in a particular matter shall include the words “Advertising Material” on the outside envelope, if any, and at the beginning and ending of any recorded or electronic communication, unless the recipient of the communication is a person specified in paragraph (a).

(d) Notwithstanding the prohibitions in paragraph (a), a lawyer may participate with a prepaid or group legal service plan operated by an organization not owned or directed by the lawyer that uses in-person or telephone contact to solicit memberships or subscriptions for the plan from persons who are not known to need legal services in a particular matter covered by the plan.

(e) A lawyer shall not solicit professional employment from a prospective client on the lawyer’s behalf or on behalf of anyone associated with the lawyer if:

(1) the communication concerns an action for personal injury or wrongful death involving the person to whom the communication is addressed or a relative of that person, unless the personal injury or

wrongful death occurred more than 30 days prior to the sending of the communication; or

(2) the lawyer knows or should know that the physical, emotional, or mental state of the person makes it unlikely that the person would exercise reasonable judgment in employing a lawyer.

COMMENTS:

[1] *There is an inherent potential for abuse in direct contact by a lawyer with a prospective client known to need legal services, whether such contact be made in person or through the use of e-mail, social media, instant messaging, text messaging, or live telephone contact. These forms of contact between a lawyer and a prospective client subject the layperson to the private importuning of the trained advocate in a direct interpersonal encounter. The prospective client, who may already feel overwhelmed by the circumstances giving rise to the need for legal services, may find it difficult fully to evaluate all available alternatives with reasoned judgment and appropriate self-interest in the face of the lawyer's presence and insistence upon being retained immediately. The situation is fraught with the possibility of undue influence, intimidation, and over-reaching.*

[2] *This potential for abuse inherent in direct solicitation of prospective clients justifies its prohibition, particularly since lawyer advertising and written and recorded communication permitted under Rule 7.2 of these Rules offer alternative means of conveying necessary information to those who may be in need of legal services. Advertising and written and recorded communications which may be mailed or autodialed make it possible for a prospective client to be informed about the need for legal services, and about the qualifications of available lawyers and law firms, without subjecting the prospective client to direct, personal persuasion that may overwhelm the client's judgment.*

[3] *The use of general advertising and written, recorded, or electronic communications to transmit information from lawyer to prospective client, rather than any form of direct contact, will help to assure that the information flows cleanly as well as freely. The contents of advertisements and communications permitted under Rule 7.2 of these Rules are permanently recorded so that they cannot be disputed and may be shared with others who know the lawyer. This potential for informal review is itself likely to help guard against statements and claims that might constitute false and misleading communications, in violation of Rule 7.1 of these Rules. The contents of direct conversations between a lawyer and a prospective client can be disputed and may not be subject to similar third-party scrutiny. Consequently, they are much more likely to approach (and occasionally cross) the dividing line between accurate representations and those that are false and misleading.*

[4] *There is far less likelihood that a lawyer would engage in abusive practices against an individual with whom the lawyer has a prior personal or professional relationship or where the lawyer is motivated by considerations other than the lawyer's pecuniary gain. Consequently, the general prohibition in Rule 7.3(a) and the requirements of Rule 7.3(c) are not applicable in those situations.*

[5] *But even permitted forms of solicitation can be abused. Thus, any solicitation which contains information which is false or misleading within the meaning of Rule 7.1 of these Rules, which involves coercion, duress or harassment within the meaning of Rule 7.3(b)(2), or which involves contact with a prospective client who has made known to the lawyer a desire not to be solicited by the lawyer within the meaning of Rule 7.3(b)(1) is prohibited. Moreover, if after sending a letter or other communication to a client as permitted by Rule 7.2 of these Rules the lawyer receives no response, any further*

effort to communicate with the prospective client may violate the provisions of Rule 7.3(b).

[6] This Rule is not intended to prohibit a lawyer from contacting representatives of organizations or groups that may be interested in establishing a group or prepaid legal plan for their members, insureds, beneficiaries or other third parties for the purpose of informing such entities of the availability of and details concerning the plan or arrangement which the lawyer or lawyer's firm is willing to offer. This form of communication is not directed to a prospective client. Rather, it is usually addressed to an individual acting in a fiduciary capacity seeking a supplier of legal services for others who may, if they choose, become prospective clients of the lawyer. Under these circumstances, the activity which the lawyer undertakes in communicating with such representatives and the type of information transmitted to the individual are functionally similar and serve the same purpose as advertising permitted under Rule 7.2 of these Rules.

[7] The requirement in Rule 7.3(c) of these Rules that certain communications be marked "Advertising Material" does not apply to communications sent in response to requests of potential clients or their spokespersons or sponsors. General announcements by lawyers, including changes in personnel or office location, do not constitute communications soliciting professional employment from a client known to be in need of legal services within the meaning of this Rule.

[8] Paragraph (d) of this Rule would permit an attorney to participate with an organization which uses personal contact to solicit members for its group or prepaid legal service plan, provided that the personal contact is not undertaken by any lawyer who would be a provider of legal services through the plan. The organization referred to in paragraph (d) must not be owned by or directed (whether as manager or otherwise) by any lawyer or law firm that

participates in the plan. For example, paragraph (d) would not permit a lawyer to create an organization controlled directly or indirectly by the lawyer and use the organization for the in-person, telephone, or other form of direct, electronic solicitation of legal employment of the lawyer through memberships in the plan or otherwise. The communication permitted by these organizations also must not be directed to a person known to need legal services in a particular matter, but is to be designed to inform potential plan members generally of another means of affordable legal services. Lawyers who participate in a legal service plan must reasonably assure that the plan sponsors are in compliance with Rules 7.1, 7.2, 7.3(b), and 7.3(e) of these Rules. See Rule 8.4(a) of these Rules.

Rule 7.4. COMMUNICATION OF FIELDS OF PRACTICE AND CERTIFICATION.

(a) A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law.

(b) A lawyer admitted to engage in patent practice before the United States Patent and Trademark Office may use the designation "Patent Attorney" or a substantially similar designation.

(c) A lawyer engaged in Admiralty practice may use the designation "Admiralty," "Proctor in Admiralty," or a substantially similar designation.

(d) A lawyer may communicate the fact that the lawyer is certified as a specialist in a field of law by a named organization, provided that the communication

(1) is not false or misleading within the meaning of Rule 7.1 of these Rules,

(2) clearly states the name of the certifying organization, and;

(3) is accompanied by a statement that "The Supreme Court of Hawai'i grants Hawai'i certification only to lawyers in good standing who have successfully completed a specialty program accredited by the American Bar Association."

COMMENTS:

[1] This Rule permits a lawyer to indicate areas of practice in

communications about the lawyer's services. If a lawyer practices only in certain fields, or will not accept matters in a specified field or fields, the lawyer is permitted to so indicate. Language indicating that a lawyer "concentrates in," "practices primarily in," "emphasizes," or "limits practice to" certain law areas is permitted. In addition, a lawyer is generally permitted to state that the lawyer is a "specialist," practices a "specialty," or "specializes in" particular fields, but such communications are subject to the "false and misleading" standard applied in Rule 7.1 of these Rules to communications concerning a lawyer's services. However, a lawyer may not communicate that the lawyer is recognized or certified as a specialist in a particular field of law, except as provided by this Rule and by Rule 1.13 of the Rules of the Supreme Court of the State of Hawai'i.

[2] Recognition of specialization in patent matters is a matter of long-established policy of the Patent and Trademark Office, as reflected in paragraph (b). Paragraph (c) recognizes that designation of admiralty practice has a long historical tradition associated with maritime commerce and the federal courts.

[3] The Rule requires, inter alia, that a lawyer clearly state the name of the certifying organization and that the Supreme Court of Hawai'i certifies only those who have completed ABA accredited certification procedures. Otherwise, the consumer may be misled as to the significance of the lawyer's status as a certified specialist. Since lawyer advertising through public media and written or recorded communications invites the greatest danger of misleading consumers, the limitations of the certification process must be clearly stated in advertising that communicates the certification.

Rule 7.5. FIRM NAMES AND LETTERHEADS.

(a) A lawyer shall not use a firm name, letterhead or other professional designation that violates Rule 7.1. A trade name may be used by a lawyer in private practice if it does not imply a connection with a government agency or with a public or charitable legal services organization and is not otherwise in violation of Rule 7.1 of these Rules.

(b) A law firm may use as, or continue to include in, its name the name or names of one or more deceased or retired partners of the firm in a continuing line of succession; provided that where none of the names comprising a firm name is the name of a current partner who is on the list of active attorneys maintained by the Hawai'i State Bar, there shall be at least one supervisor, manager, partner, or shareholder of the firm who is on the list of active attorneys maintained by the bar.

(c) A law firm with offices in more than one jurisdiction may use the same name or other professional designation in each jurisdiction, but identification of the lawyers in an office of the firm shall indicate the jurisdictional limitations on those not licensed to practice in the jurisdiction where the office is located.

(d) The name of the lawyer holding a public office shall not be used in the name of a law firm, or in communications on its behalf, during any substantial period in which the lawyer is not actively and regularly practicing with the firm.

(e) Lawyers may state or imply that they practice in a partnership or other organization only when that is the fact.

COMMENTS:

[1] A firm may be designated by the names of all or some of its members, by the names of deceased members where there has been a continuing succession in the firm's identity or by a trade name such as the "ABC Legal Clinic." A lawyer or law firm may also be designated by a distinctive website address or comparable professional designation. Although the United States Supreme Court has held that legislation may prohibit the use of trade names in professional practice, use of such names in law practice is acceptable so long as it is not

misleading. If a private firm uses a trade name that includes a geographical name such as "Springfield Legal Clinic," an express disclaimer that it is not a public legal aid agency may be required to avoid a misleading implication. It may be observed that any firm name including the name of a deceased partner is, strictly speaking, a trade name. The use of such names to designate law firms has proven a useful means of identification. However, it is misleading to use the name of a lawyer not associated with the firm or a predecessor of the firm or the name of a nonlawyer. See Rule 6(b) of the Rules of the Supreme Court of the State of Hawai'i, governing the naming of Lawyers' Professional Business Organizations.

[2] With regard to paragraph (e), lawyers sharing office facilities, but who are not in fact associated with each other in a law firm, may not denominate themselves as, for example, "Smith and Jones," for that title suggests that they are practicing law together in a firm.

Rule 8.1. BAR ADMISSION AND DISCIPLINARY MATTERS.

An applicant for admission to the bar, or a lawyer in connection with a bar admission application or in connection with a disciplinary matter, shall not:

(a) knowingly make a false statement of material fact; or

(b) fail to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter, or knowingly fail to respond to a lawful demand for information from an admissions or disciplinary authority, except that this Rule does not require disclosure of information otherwise protected by Rule 1.6 of these Rules.

COMMENTS:

[1] The duty imposed by this Rule extends to persons seeking admission to the bar as well as to lawyers. Hence, if a person makes a material false statement in connection with an application for admission, it may be the basis for subsequent disciplinary action if the person is admitted,

and in any event may be relevant in a subsequent admission application. The duty imposed by this Rule applies to a lawyer's own admission or discipline as well as that of others. Thus, it is a separate professional offense for a lawyer to knowingly make a misrepresentation or omission in connection with a disciplinary investigation of the lawyer's own conduct. This Rule also requires 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 the Hawai'i State Constitution. A person relying on such a provision in response to a question, however, should do so openly and not use the right of nondisclosure as a justification for failure to comply with this Rule.

[3] A lawyer representing an applicant for admission to the bar, or representing a lawyer who is the subject of a disciplinary inquiry or proceeding, is governed by the Rules applicable to the client-lawyer relationship, including Rule 1.6 and, in some cases, Rule 3.3 of these Rules.

Rule 8.2. JUDICIAL AND LEGAL OFFICIALS.

(a) A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer, or public legal officer, or of a candidate for election or appointment to judicial or legal office.

(b) A lawyer who is a candidate for judicial office shall comply with the applicable provisions of the Code of Judicial Conduct.

COMMENTS

[1] Assessments by lawyers are relied on in evaluating the professional or personal fitness of persons being considered for election or appointment to judicial office and to public legal offices, such as

attorney general, prosecuting attorney, and public defender. Expressing honest and candid opinions on such matters contributes to improving the administration of justice. Conversely, false statements by a lawyer can unfairly undermine public confidence in the administration of justice.

[2] When a lawyer seeks judicial office, the lawyer should be bound by applicable limitations on political activity.

[3] To maintain the fair and independent administration of justice, lawyers are encouraged to continue traditional efforts to defend judges and courts unjustly criticized.

Rule 8.3. REPORTING PROFESSIONAL MISCONDUCT.

(a) A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects, shall inform the appropriate professional authority.

(b) A lawyer having knowledge that a judge has committed a violation of applicable Rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the appropriate authority.

(c) This Rule does not require disclosure of information otherwise protected by Rule 1.6 of these Rules or information gained by a lawyer or judge while participating in the Attorneys and Judges Assistance Program.

(d) A lawyer shall not:

(1) negotiate, attempt to settle, or settle any legal matter by threatening to file or refrain from filing a disciplinary complaint against a lawyer; or

(2) offer, agree to, attempt, negotiate, enter into, or acquiesce in the formation of any agreement limiting the ability of the lawyer or any other person to:

(i) file a disciplinary complaint against any lawyer; or

(ii) cooperate with a disciplinary proceeding or investigation.

COMMENTS:

[1] Self-regulation of the legal profession requires that members of the profession initiate disciplinary investigation when they know of a violation of the Rules of Professional Conduct. Lawyers have a similar obligation with respect to judicial misconduct. An apparently isolated violation may indicate a pattern of misconduct that only a disciplinary investigation can uncover. Reporting a violation is especially important where the victim is unlikely to discover the offense.

[2] A report about misconduct is not required where it would involve violation of Rule 1.6 of these Rules. However, a lawyer should encourage a client to consent to disclosure where prosecution would not substantially prejudice the client's interests.

[3] If a lawyer were obliged to report every violation of the Rules, the failure to report any violation would itself be a professional offense. Such a requirement existed in many jurisdictions but proved to be unenforceable. This Rule limits the reporting obligation to those offenses that a self-regulating profession must vigorously endeavor to prevent. A measure of judgment is, therefore, required in complying with the provisions of this Rule. The term "substantial" refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware. A report should be made to the bar disciplinary agency unless some other agency, such as a peer review agency, is more appropriate in the circumstances. Similar considerations apply to the reporting of judicial misconduct.

[4] The duty to report professional misconduct does not apply to a lawyer retained to represent a lawyer whose professional conduct is in question. Such a situation is governed by the rules applicable to the client-lawyer relationship.

[5] Information about a lawyer's or judge's misconduct or fitness may be received by a lawyer in the course of that lawyer's participation in the Attorneys and

Judges Assistance Program. In that circumstance, providing for an exception to the reporting requirement of paragraphs (a) and (b) of this Rule encourages lawyers and judges to seek treatment through such a program. Conversely, without such an exception, lawyers and judges may hesitate to seek assistance from these programs, which may then result in additional harm to their professional careers and additional injury to the welfare of clients and the public. These Rules do not otherwise address the confidentiality of information received by a lawyer or judge participating in the Attorneys and Judges Assistance Program; such an obligation, however, may be imposed by the rules of the program or other law.

Rule 8.4. MISCONDUCT.

It is professional misconduct for a lawyer to:

- (a) attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
- (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects;
- (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
- (d) Reserved;
- (e) state or imply an ability to influence improperly a government agency or official; or
- (f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law; or
- (g) fail to cooperate during the course of an ethics investigation or disciplinary proceeding.

COMMENTS:

[1] *Lawyers violate Rule 8.4(a) of these Rules, and are subject to discipline, when they attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or violate the Rules through the acts of another, as when they request or instruct an agent to do so on the lawyer's behalf. Paragraph (a), however, does not prohibit a lawyer from advising a*

client concerning action the client is legally entitled to take.

[2] *Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. This is true whether or not the illegal conduct results in a criminal conviction. However, some kinds of offense carry no such implication. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, breach of trust, or serious interference with the administration of justice are in that category. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.*

[3] *A lawyer may refuse to comply with an obligation imposed by law upon a good faith belief that no valid obligation exists. The provisions of Rule 1.2(d) of these Rules concerning a good faith challenge to the validity, scope, meaning, or application of the law apply to challenges of legal regulation of the practice of law.*

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

[5] *An attorney who is the subject of an ethics investigation or disciplinary proceeding has an ethical duty to timely cooperate with that investigation or proceeding. Examples of failure to cooperate are described in Rule 2.12A(a) of the Rules of the Supreme Court of the State of Hawai'i.*

**Rule 8.5. DISCIPLINARY AUTHORITY;
CHOICE OF LAW.**

(a) **Disciplinary Authority.** A lawyer admitted to practice in the State of Hawai'i is subject to the disciplinary authority of the Hawai'i Supreme Court and the Hawai'i Disciplinary Board ("Board"), regardless of where the conduct occurs. A lawyer not admitted to the State of Hawai'i but otherwise authorized to practice in the State is also subject to the disciplinary authority of the Hawai'i Supreme Court and the Board if the lawyer provides or offers to provide any legal services in the State of Hawai'i. A lawyer may be subject to the disciplinary authority of both the State of Hawai'i and another jurisdiction of the same conduct.

[4] *This Rule also applies to lawyers practicing in this jurisdiction on a pro hac vice basis.*

(Amended October 21, 2013, effective January 1, 2014.)

COMMENTS:

[1] *In modern practice lawyers frequently act outside the territorial limits of the jurisdiction in which they are licensed to practice, either in another state or outside the United States. In doing so, they remain subject to the governing authority of the jurisdiction in which they are licensed to practice. If their activity in another jurisdiction is substantial and continuous, it may constitute practice of law in that jurisdiction. See Rule 5.5 of these Rules.*

[2] *If the rules of professional conduct in the two jurisdictions differ, principles of conflict of laws may apply. Similar problems can arise when a lawyer is licensed to practice in more than one jurisdiction.*

[3] *Where the lawyer is licensed to practice law in two jurisdictions which impose conflicting obligations, applicable rules of choice of law may govern the situation. A related problem arises with respect to practice before a federal tribunal, where the general authority of the states to regulate practice within their borders may conflict with the authority of federal tribunals to regulate practice before them.*