

PROFESSIONAL  
RESPONSIBILITY  
STANDARDS,  
RULES & STATUTES

2014–2015 EDITION

Selected and Edited by  
JOHN S. DZIENKOWSKI

# PROFESSIONAL RESPONSIBILITY STANDARDS, RULES & STATUTES

2014–2015 Edition

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by

JOHN S. DZIENKOWSKI

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# PREFACE

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In recent years, the ABA, the states, and other entities have been active in the promulgation of standards, rules, and statutes that regulate lawyers' conduct. These sources of the law of professional responsibility have significantly affected the manner in which lawyers analyze problems in this area. Similarly, the existence of different formal sources of professional responsibility have altered the way in which lawyers and law students are taught about ethical problems. This pamphlet of Professional Responsibility Standards, Rules, and Statutes is designed to provide teachers and students with easy access to the important sources of professional responsibility.

Beginning with the 1995 edition of Professional Responsibility Standards Rules and Statutes, this book is now published in a full version and an abridged version. The full version will continue to include various sources of professional responsibility including standards for specialized areas of practice and standards for the organized regulation of the profession. The abridged edition will present the ABA versions of the codes governing lawyers and judges as well as several selected rules of procedure and evidence and selected rules from California and New York. The purpose of the two editions is to allow professors to choose which version best fits the class that they plan to teach. This preface will, however, cover materials in both versions.

The full version of Professional Responsibility Standards Rules and Statutes is organized into seven different parts: (1) Codes Regulating Lawyers' Conduct; (2) Code of Judicial Conduct; (3) Rules of Evidence and Procedure that Affect the Legal Profession; (4) Restatement (Third) of the Law Governing Lawyers; (5) Statutes that Affect the Legal Profession; (6) Standards for Specialized Areas of Practice; and (7) Standards for the Organized Regulation of Lawyers. The abridged edition includes the first three parts which focus on the ABA's pronouncements as well as the federal rules of evidence and procedure that influence the legal profession.

In February 2000, the ABA House of Delegates amended the Model Rules to reflect the revisions proposed by the Ethics 2000 Commission. In 2003, the ABA amended the Model Rules to reflect the work of the ABA Commission on Multijurisdictional Practice and the work of the Cheek Commission. In 2012 and 2013, the ABA House of Delegates has begun to amend the Model Rules in light of proposals made by the Ethics 20/20 Commission. Where appropriate, the annotations also contain the text of a prior draft of the Model Rules to illustrate a shift in the final ABA position. In light of the fact that the states have made significant modifications to the ABA's version of the Model Rules, it has become desirable to include a section on selected significant state modifications to the Model Rules. This supplement also contains a chart explaining the confidentiality rules adopted in the fifty states. This allows professors and students to examine how various states have chosen to modify specific provisions of the Model Rules. Both the full and abridged editions now contain the California and New York state materials.

Both the full and abridged versions include the ABA Model Code of Professional Conduct and the 1908 Canons, as well as the 2014 Code of Judicial Conduct. The unabridged version of this supplement will continue to reproduce the 2001 version of the Model Rules in the annotated format because many court opinions relied upon this language. The annotated version of the Model Rules allows students to compare the current version with the prior version, which appears in a footnote on the same page with the current version. The unabridged version of this supplement will continue to reproduce the 1990 Code of Judicial Conduct. The prior standards are included to facilitate study of the evolution of professional standards as well as cases and jurisdictions that rely on the prior rules.

The full edition contains the text of the sections in the Restatement of Law Governing Lawyers and selected Reporters Comments. This project plays a significant role in shaping the law of professional responsibility.

I welcome comments and suggestions on the materials contained in this edition. My E-mail address is [jsd@law.utexas.edu](mailto:jsd@law.utexas.edu).

The materials are current through May 2014, and this supplement will be updated annually to reflect new and amended statutes and rules.

JOHN S. DZIENKOWSKI

Austin, Texas  
May 2014

# TABLE OF CONTENTS

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	Page
<b>PART ONE: CODES AND STANDARDS REGULATING LAWYERS' CONDUCT</b>	
2014 American Bar Association Model Rules of Professional Conduct -----	3
Index to ABA Model Rules-----	97
A Chart Comparing the Language of the State Confidentiality Rules -----	103
Selected Significant State Modifications to the ABA Model Rules-----	112
Other Selected State Standards, Rules, and Statutes -----	183
California Rules of Professional Conduct -----	185
California Rules on Multijurisdictional Practice-----	219
California Business & Professions Code (Selected Sections) -----	229
New York Rules of Professional Conduct (2013) -----	271
American Bar Association Model Code of Professional Responsibility -----	313
Index to ABA Model Code-----	387
American Bar Association Canons of Professional Ethics-----	397
Selected Standards on Professionalism and Courtesy-----	409
ABA Report of Commission on Professionalism (1986) -----	409
ABA Lawyer's Creed of Professionalism (1988) -----	413
ABA Lawyer's Pledge of Professionalism (1988) -----	415
ABA Aspirational Goals on Lawyer Advertising (1988) -----	416
The Texas Lawyer's Creed—A Mandate for Professionalism (1989)-----	418
<b>PART TWO: CODES OF JUDICIAL CONDUCT</b>	
American Bar Association Model Code of Judicial Conduct (2014) -----	423
ABA Model Code of Judicial Conduct (2014)-----	425
Rules of Judicial Conduct and Disability -----	509
<b>PART THREE: RULES OF EVIDENCE AND PROCEDURE THAT AFFECT THE LEGAL PROFESSION</b>	
Selected Rules of Evidence and Procedure -----	553
Federal Rules of Evidence for United States Courts and Magistrates -----	553
Appendix of Deleted Rules of Evidence-----	558
Federal Rules of Civil Procedure -----	559
Federal Rules of Criminal Procedure-----	578
Federal Rules of Appellate Procedure-----	579
Rules of the United States Supreme Court-----	580

**PART FOUR: RESTATEMENT (THIRD) OF  
LAW GOVERNING LAWYERS**

Restatement (Third) of Law Governing Lawyers (2000) .....	585
Parallel Tables of Restatement Third Section Numbers and of Annual Meeting Draft Section Numbers.....	793

**PART FIVE: STATUTES THAT AFFECT THE LEGAL PROFESSION**

Selected Federal Statutes .....	799
Suitability, Security, and Conduct, 5 U.S.C.A. ch. 73 .....	800
Bribery and Graft, 18 U.S.C.A. ch. 11.....	803
Contempts, 18 U.S.C.A. ch. 21 .....	823
Fugitives From Justice, 18 U.S.C.A. ch. 49.....	824
Mail Fraud, 18 U.S.C.A. ch. 63.....	824
Obstruction of Justice, 18 U.S.C.A. ch. 73 .....	825
Public Officers and Employees, 18 U.S.C.A. ch. 93 .....	834
Criminal Procedure—General Provisions, 18 U.S.C.A. ch. 201 .....	834
District Courts, 28 U.S.C.A. ch. 5 .....	842
Complaints Against Judges and Judicial Discipline, 28 U.S.C.A. ch. 16 .....	842
Judges—Resignation—Retirement, 28 U.S.C.A. ch. 17.....	844
Courts and Judges, 28 U.S.C.A. ch. 21.....	845
The Attorney General, 28 U.S.C.A. ch. 31 .....	846

**PART SIX: STANDARDS FOR SPECIALIZED AREAS OF PRACTICE**

American Bar Association Standards Relating to the Administration of Criminal Justice.....	851
The Prosecution Function.....	853
The Defense Function.....	865
Prosecutorial Investigations .....	879
Circular 230 Regulating Practice Before the Treasury.....	907
Standards of Professional Conduct for Attorneys Appearing and Practicing Before the Securities and Exchange Commission in the Representation of An Issuer .....	949
Selected Standards for Professionalism and Courtesy in Litigation .....	957
Professionalism Standards in the Northern District of Texas .....	957
ABA Guidelines for Conduct (1998) .....	959
ABA Ethical Guidelines for Settlement Negotiations.....	963

**PART SEVEN: STANDARDS FOR THE ORGANIZED  
REGULATION OF LAWYERS**

ABA Recommendations for the Evaluation of Disciplinary Enforcement.....	975
ABA Model Rules for Lawyer Disciplinary Enforcement .....	981

## TABLE OF CONTENTS

vii

ABA Standards for Imposing Lawyer Sanctions .....	1031
ABA Model Rules for Mediation of Client-Lawyer Disputes (1998) .....	1061
ABA Model Court Rule on Insurance Disclosure .....	1067
ABA Model Rules for Fee Arbitration .....	1069
ABA Model Rules for Client Trust Account Records .....	1085
ABA Model Rule on Pro Hac Vice Admission .....	1089
ABA Model Rule on Admission by Motion .....	1095
ABA Model Rule on Practice Pending Admission .....	1097
ABA Model Rule for the Licensing and Practice of Foreign Legal Consultants .....	1101
ABA Model Rule on Temporary Practice by Foreign Lawyers .....	1105
ABA Model Court Rule on Provision of Legal Services Following Determination of a Major Disaster .....	1107
 <b>PART EIGHT: PRIOR VERSIONS OF THE ABA MODEL RULES AND THE ABA CODE OF JUDICIAL CONDUCT</b>	
2001 Version of the American Bar Association Model Rules of Professional Conduct .....	1113
1990 Version of the ABA Model Code of Judicial Conduct .....	1201



# PART ONE

## CODES AND STANDARDS REGULATING LAWYERS' CONDUCT

### *Table of Contents*

	<b>Page</b>
2014 ABA Model Rules of Professional Conduct .....	3
Index to ABA Model Rules .....	97
A Chart Comparing the Language of the State Confidentiality Rules .....	103
Selected Significant State Modifications to the ABA Model Rules .....	112
Other Selected State Standards, Rules, and Statutes .....	183
California Rules of Professional Conduct.....	185
California Rules on Multijurisdictional Practice .....	219
California Business and Professions Code (Selected Sections) .....	229
New York Rules of Professional Conduct (2013) .....	271
ABA Model Code of Professional Responsibility .....	313
Index to ABA Model Code .....	387
ABA Canons of Professional Ethics .....	397
Selected Standards on Professionalism and Courtesy .....	409
ABA Report of Commission on Professionalism (1986) .....	409
ABA Lawyer's Creed of Professionalism (1988).....	413
ABA Lawyer's Pledge of Professionalism (1988) .....	415
ABA Aspirational Goals on Lawyer Advertising (1988).....	416
The Texas Lawyer's Creed—A Mandate for Professionalism (1988) .....	418

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### Introduction

One of the traditional characteristics of a profession is the attempt to achieve self regulation. Throughout history, professions have enacted codes of conduct to assert control over their members. Various groups within the legal profession have similarly sought to exercise a degree of self regulation by enacting codes of conduct. This part includes several codes and standards which have attempted to regulate the conduct of all lawyers in their practice of law.

The first three codes contained in this section were promulgated by the American Bar Association (ABA), a national voluntary organization of lawyers. The ABA has assumed the primary responsibility for promulgating national ethical standards for the legal profession. In 1908, the ABA enacted 32 Canons of Professional Ethics. In 1969, it replaced the Canons with the Model Code of Professional Responsibility. In 1983, the Model Code was replaced with the Model Rules of Professional Conduct. The 1983 version was amended many times by the ABA House of Delegates until the year 2001. That version of the Model Rules is reproduced in the full version of this supplement in part eight.

In 1997, the ABA established an Ethics 2000 Committee to revise the Model Rules in light of developments in law and practice. The ABA House of Delegates adopted a series of revisions in February 2002 to reflect the Ethics 2000 project. In August 2002, the ABA adopted further changes to the Model Rules to reflect the work of the committee on multijurisdictional practice of law. In August 2003, the ABA amended Model Rules 1.6 and 1.13 to reflect the profession's concern for lawyer involvement in financial frauds.

In 2009, the ABA formed the Ethics 20/20 Commission that was charged with modernizing the Model Rules in light of changes in the legal professions around the world. The 20/20 Commission held many hearings and produced several working papers. However, in the end, the Commission produced only two rounds of relatively minor changes that the ABA House of Delegates adopted in

## CODES AND STANDARDS REGULATING LAWYERS' CONDUCT

2012 and 2013. Thus, the Ethics 2000 revision of the Model Rules adopted in 2002 and 2003 remains the basis for the current ABA code.

Although the ABA's codes of conduct have been influential in shaping the law of professional responsibility, they only have force as a body of rules with its voluntary members. However, the various states and the federal courts have looked to the ABA versions as a basis for regulating lawyers within the jurisdiction. Thus, the ABA's codes have been used as the basis for state and federal codes. With the Model Code, many states adopted the ABA version without many significant changes. However, with the ABA's promulgation of the Model Rules, the states have been less deferential. Many states have made significant modifications to the ABA version. Thus, this part includes a section on significant state modifications to the Model Rules.

A final series of documents in this part reflect a recent trend on the part of the ABA and the states to focus on lawyer professionalism as a basis for regulating lawyers' conduct. The origin of this movement was a study on professionalism commissioned by the ABA. The results of the study identified several reasons for the decline in lawyer professionalism and offered several suggestions to address this problem. The ABA Creed of Professionalism and the ABA Pledge of Professionalism illustrate attempts to implement the suggestions of the Commission on Professionalism. The Texas Creed on Professionalism provides a similar example of a state effort to address this problem. The ABA's Aspirational Goals on Lawyer Advertising provide a more concrete example of urging standards of professionalism in the communication of advertising to the general public.

# 2014 AMERICAN BAR ASSOCIATION MODEL RULES OF PROFESSIONAL CONDUCT

Annotated to Include Amendments Since February 2014

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## CONTENTS

Preamble: A Lawyer's Responsibilities  
Scope

### CLIENT-LAWYER RELATIONSHIP

#### Rules

- 1.0 Terminology
- 1.1 Competence
- 1.2 Scope of Representation and Allocation of Authority Between Client and Lawyer
- 1.3 Diligence
- 1.4 Communication
- 1.5 Fees
- 1.6 Confidentiality of Information
- 1.7 Conflict of Interest: Current Clients
- 1.8 Conflict of Interest: Current Clients: Specific Rules
- 1.9 Duties to Former Clients
- 1.10 Imputation of Conflicts of Interest: General Rule
- 1.11 Special Conflicts of Interest for Former and Current Government Officers and Employees
- 1.12 Former Judge, Arbitrator, Mediator, or Other Third-Party Neutral
- 1.13 Organization as Client
- 1.14 Client with Diminished Capacity
- 1.15 Safekeeping Property
- 1.16 Declining or Terminating Representation
- 1.17 Sale of Law Practice
- 1.18 Duties to Prospective Client

### COUNSELOR

- 2.1 Advisor
- 2.2 Deleted
- 2.3 Evaluation for Use by Third Persons
- 2.4 Lawyer Serving as Third-Party Neutral

### ADVOCATE

- 3.1 Meritorious Claims and Contentions
- 3.2 Expediting Litigation
- 3.3 Candor Toward the Tribunal
- 3.4 Fairness to Opposing Party and Counsel
- 3.5 Impartiality and Decorum of the Tribunal
- 3.6 Trial Publicity
- 3.7 Lawyer as Witness
- 3.8 Special Responsibilities of a Prosecutor

## 2014 ABA MODEL RULES

### 3.9 Advocate in Nonadjudicative Proceedings

#### TRANSACTIONS WITH PERSONS OTHER THAN CLIENTS

- 4.1 Truthfulness in Statements to Others
- 4.2 Communication With Person Represented by Counsel
- 4.3 Dealing With Unrepresented Persons
- 4.4 Respect for Rights of Third Persons

#### LAW FIRMS AND ASSOCIATIONS

- 5.1 Responsibilities of Partners, Managers, and Supervisory Lawyers
- 5.2 Responsibilities of a Subordinate Lawyer
- 5.3 Responsibilities Regarding Nonlawyer Assistants
- 5.4 Professional Independence of a Lawyer
- 5.5 Unauthorized Practice of Law; Multijurisdictional Practice of Law
- 5.6 Restrictions on Right to Practice
- 5.7 Responsibilities Regarding Law-Related Services

#### PUBLIC SERVICE

- 6.1 Voluntary Pro Bono Publico Service
- 6.2 Accepting Appointments
- 6.3 Membership in Legal Services Organizations
- 6.4 Law Reform Activities Affecting Client Interests
- 6.5 Non-profit and Court-Annexed Limited Legal-Service Programs

#### INFORMATION ABOUT LEGAL SERVICES

- 7.1 Communications Concerning a Lawyer's Services
- 7.2 Advertising
- 7.3 Solicitation of Clients
- 7.4 Communication of Fields of Practice and Specialization
- 7.5 Firm Names and Letterheads
- 7.6 Political Contributions to Obtain Government Legal Engagements or Appointments by Judges

#### MAINTAINING THE INTEGRITY OF THE PROFESSION

- 8.1 Bar Admission and Disciplinary Matters
  - 8.2 Judicial and Legal Officials
  - 8.3 Reporting Professional Misconduct
  - 8.4 Misconduct
  - 8.5 Disciplinary Authority: Choice of Law
- Index to Model Rules

---

### 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

## 2014 ABA MODEL RULES

client but consistent with requirements of honest dealings with others. 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, e.g., Rules 1.12 and 2.4. In addition, there are Rules that apply to lawyers who are not active in the practice of law or to practicing lawyers even when they are acting in a nonprofessional capacity. For example, a lawyer who commits fraud in the conduct of a business is subject to discipline for engaging in conduct involving dishonesty, fraud, deceit or misrepresentation. See Rule 8.4.

[4] In all professional functions a lawyer should be competent, prompt 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 client and at the same time assume that justice is being done. So also, a lawyer can be sure that preserving client confidences ordinarily serves the public interest because people are more likely to seek legal advice, and thereby heed their legal obligations, when they know their communications will be private.

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

[10] The legal profession is largely self-governing. Although other professions also have been granted powers of self-government, the legal profession is unique in this respect because of the close relationship between the profession and the processes of government and law enforcement. This

## 2014 ABA MODEL RULES

connection is manifested in the fact that ultimate authority over the legal profession is vested largely in the courts.

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

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

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

### SCOPE

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

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

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

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

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

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

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

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

## CLIENT-LAWYER RELATIONSHIP

### Rule 1.0 Terminology

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

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

(c) "Firm" or "law firm" denotes a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation or other organization.

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

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

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

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



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

(i) “Reasonable belief” or “reasonably believes” when used in reference to a lawyer denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.

(j) “Reasonably should know” when used in reference to a lawyer denotes that a lawyer of reasonable prudence and competence would ascertain the matter in question.

(k) “Screened” denotes the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer is obligated to protect under these Rules or other law.

(l) “Substantial” when used in reference to degree or extent denotes a material matter of clear and weighty importance.

(m) “Tribunal” denotes a court, an arbitrator in a binding arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity. A legislative body, administrative agency or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a binding legal judgment directly affecting a party’s interests in a particular matter.

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

#### COMMENT

##### Confirmed in Writing

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

##### Firm

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

[3] With respect to the law department of an organization, including the government, there is ordinarily no question that the members of the department constitute a firm within the meaning of the Rules of Professional Conduct. There can be uncertainty, however, as to the identity of the client. For example, it may not be clear whether the law department of a corporation represents a

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\* In August 2012, the ABA House of Delegates amended this provision to change the word “e-mail” to “electronic communications.”



subsidiary or an affiliated corporation, as well as the corporation by which the members of the department are directly employed. A similar question can arise concerning an unincorporated association and its local affiliates.

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

### **Fraud**

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

### **Informed Consent**

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

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

### **Screened**

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

\*[9] The purpose of screening is to assure the affected parties that confidential information known by the personally disqualified lawyer remains protected. The personally disqualified lawyer should acknowledge the obligation not to communicate with any of the other lawyers in the firm with respect to the matter. Similarly, other lawyers in the firm who are working on the matter should be informed that the screening is in place and that they may not communicate with the personally disqualified lawyer with respect to the matter. Additional screening measures that are appropriate for the particular matter will depend on the circumstances. To implement, reinforce and remind all affected lawyers of the presence of the screening, it may be appropriate for the firm to

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\* In August 2012, the ABA House of Delegates amended this comment to change the word “materials” to the phrase “information, including information in electronic form.”