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MPRE Review 2014

This program is a review of the ABA Model Rules of Professional Conduct for the Multistate Professional Responsibility Exam. It has been adapted from the Continuing Legal Education program I've presented hundreds of times for attorneys. Since they're not covered on the exam, we won't look at the modifications in particular states, and we won't look at the practical issues of how to apply these rules in the "real world". Instead, I'll present the material necessary for you to pass the test.

Rule 1.0: Terminology.

The first section of the rules contains definitions of many terms used elsewhere in the rules. I've incorporated these definitions into the discussion of the rules to which they apply. But when you get ready for the test, keep in mind that the following terms have definitions in Rule 1.0, and it's a good idea to read through Rule 1.0. In most cases, these terms are defined as you would expect, but you should take a look at the definitions.

"Belief" or "believes"
"Confirmed in writing"
"Firm" or "law firm"
"Fraud" or "fraudulent"
"Informed consent"
"Knowingly," "known," or "knows"
"Partner"
"Reasonable" or "reasonably"
"Reasonable belief" or "reasonably believes"
"Reasonably should know"
"Screened"
"Substantial"
"Tribunal"
"Writing" or "written". N.B. A writing includes any tangible or electronic record, including audio or video recording. "Signing" can include a "Sound, symbol, or process" adopted by a person with intent to sign.

Rule 1.1: Competence

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

ABA Comment: "Expertise in a particular field of law may be required in some circumstances", but a lawyer "may accept representation where the requisite level of competence can be achieved by reasonable preparation."

Rule 1.2: Scope of Representation and Allocation of Authority Between Client and Lawyer

A lawyer "shall abide by a client's decisions" and consult with the client as to how they will be pursued. The lawyer can take steps that are impliedly authorized to carry out those decisions. The rule specifies that the lawyer must abide by the client's decision whether or not to settle a case or how to plead in a criminal case. Since the client is the decisionmaker, this means that the representation "does not constitute an endorsement of the client's political, economic, social or moral views or activities."

However, a lawyer may counsel a client to engage in, or assist in "conduct that the lawyer knows is criminal or fraudulent". However, a lawyer may discuss the legal consequences of any proposed course of conduct and assist a client to make a good faith effort to determine the scope, meaning, or application of the law.

A lawyer may limit the scope of the representation if reasonable and if the client gives informed consent.

Rule 1.3: Diligence.

This rule states in its entirety, "A lawyer shall act with reasonable diligence and promptness in representing a client."

Rule 1.4: Communication

A lawyer must communicate with his client in the following situations:

1. Any time the client needs to consent to some action under the rules.

2. Tell the client how his or her objectives are going to be carried out.

3. Keep the client informed about the status of the matter.

4. Comply with reasonable requests for information.

5. Let the client know of any relevant limitations on the lawyer's conduct, if the lawyer knows that the client expects assistance that's not permitted..

ABA Comment: The client should have "sufficient information to participate intelligently in decisions. However, "not be expected to describe trial or negotiation strategy in detail."

Rule 1.5: Fees.

Fees and expenses must not be "unreasonable". The following factors are relevant to determine whether the fee is reasonable: Time and labor required, novelty and difficulty, whether the representation will prevent the lawyer from taking other employment, customary charge in the locality, amount involved and results obtained, time limitations, nature and length of relationship with the client, the lawyer's experience and reputation, and whether fixed or contingent.

These factors are not exclusive.

Fee and scope of representation shall be communicated to the client, preferably in writing before starting or within a reasonable time. This is not necessary for an existing client if it's at the same basis and rate as before. But any changes need to be communicated

Contingent fee agreements must be in writing and signed by the client. The contract must contain the following information:

1. Method by which fee determined
2. The percentage to go to the lawyer in the case of settlement, trial, or appeal
3. What expenses will be deducted
4. Whether the expenses are deducted before or after calculating the percentage
5. Must clearly identify the expenses the client is responsible for, whether or not they prevail.

After the contingent fee case is concluded, the lawyer must give a prompt statement showing the remittance to the client and how it was determined.

Contingency fees are not allowed in the following types of cases:

1. Family law cases

2. Criminal cases

Splitting fees between more than one attorney must be "in proportion to the services provided by each lawyer" or in cases in which both attorneys maintain responsibility for the case. The client must agree in writing, and this agreement must include the proportion that each lawyer will receive. Of course, the overall fee must be reasonable.

Rule 1.6: Confidentiality:

"A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated" elsewhere in the rule.

Note: For purposes of the test, please forget everything you know about the Attorney-Client privilege! The confidentiality under Rule 1.6 is much broader. There will be many situations that are <u>not</u> privileged, but the confidentiality of this rule still applies.

A lawyer **may** reveal information if he or she believes it's reasonably necessary to prevent "reasonably certain death or substantial bodily harm". A lawyer **may** also reveal the information to prevent, mitigate, or rectify substantial financial loss to someone, if it's reasonably certain, but only in cases of a crime or fraud about which the client has used the lawyer's services.

> Note: The preceding paragraph varies considerably from state to state. Many states replace the word "may" with "shall".

A lawyer may also reveal client confidences "to secure legal advice about the lawyer's conduct under these rules." and "to comply with other law or a court order". However, in the case of a court order, the ABA comment points out that even then, "the lawyer must consult with the client about the possibility of appeal".

Information can be revealed if it's necessary to detect and resolve conflicts of interest if a lawyer changes jobs or the firm's ownership changes. But **privileged** information can't be revealed, and this information can't be revealed if it prejudices the client.

Rule 1.7: Conflicts of Interest with current clients.

A lawyer may not represent a client if there is a concurrent conflict of interest. A concurrent conflict of interest is defined as one of the following:

1. representation is directly adverse to another client,
2. there is a "significant risk" that the representation of one or more clients may be "materially limited" by responsibilities to a client, former client, a third party, or a personal interest of the lawyer.

A client can consent to a conflict of interest. But all of the following tests need to be met:

1. The lawyer reasonably believes that he or she will be able to competently and diligently represent all of the clients involved.
2. It's not prohibited by law
3. It's not a case of two clients who are directly adverse to each other in the same litigation or other tribunal proceeding
4. Each affected client gives informed consent in writing.

Rule 1.8: More specific rules on conflicts of interest

The vast majority of conflict of interest problems arise out of the general rule, Rule 1.7. The rules themselves don't go into a lot of detail about the common problems involving conflicts of interest. The official ABA comments (and state comments) following the rule do provide some helpful guidance, and it is worthwhile to read through that section.

Rule 1.8 covers some specific situations, although many of these are quite uncommon. But since they are specific rules, they're likely to be on the test.

A lawyer may not enter into a transaction with a client in which he acquires an interest adverse to the client (such as a security interest), unless the transaction is fair and reasonable, the client is advised in writing to obtain outside advice, and the client gives written consent.

A lawyer may not use information about the representation of a client to the client's disadvantage, unless the client gives informed consent, or as otherwise allowed by the rules.

Gifts from clients (including testamentary gifts)

A lawyer may not solicit a substantial gift from a client (including testamentary gift). A lawyer may not prepare an instrument giving a gift to the lawyer or a relative. There is an exception if the lawyer (or other recipient) is related to the client. For purposes of this paragraph, "related" includes spouse, child, grandchild, parent, grandparent or other person with a close familial relationship. Note: State version of this rule tend to differ as to the details.

Until a case is concluded, a lawyer may not receive literary rights based upon the representation.

A lawyer may not provide financial assistance to a client in connection with litigation, except the following:

1. The lawyer may advance court costs and expenses of litigation, and repayment of those may be contingent on the outcome of the case.
2. The lawyer may pay the court costs and litigation expenses of an indigent client.

If a lawyer's fee is paid by someone other than the client, all of the following requirements must be met:

1. The client must give informed consent

2. It does not interfere with the lawyer's independence.

3. Confidential information is maintained properly.

If a lawyer is representing more than one party, then any aggregate settlement must be approved in writing by all of the clients. The lawyer must inform all of the clients about the existence and nature of all of the settlements.

A lawyer may not ask a client to prospectively waive malpractice claims (unless the client is independently represented when making that waiver). When settling a claim for past malpractice, the person must be informed in writing of the desirability of seeking outside legal advice (unless they are already represented). A lawyer may not ask a client to agree not to report the lawyer's conduct to disciplinary authorities.

A lawyer may not acquire a proprietary interest in a cause of action, except for the following:

1. An attorney's lien for his or her fee, if authorized by law.

2. A reasonable contingent fee in a civil case.

A lawyer may not have sexual relations with a client (unless the relationship predated the legal representation).

With the exception of the last paragraph, these prohibitions also apply to all lawyers in the same firm. (which is discussed in more detail in Rule 1.10).

Rule 1.9: Duties to former clients

A lawyer who has represented a former client may not represent another person in the same or substantially related matter without the informed written consent of the former client

If the firm in which a lawyer had represented a person, then the lawyer may not represent a person materially adverse to that person about whom the lawyer had acquired confidential information under Rule 1.6 or this rule. Note: As the ABA comments state, with respect to the former client of a former firm, "the Rule should not be so broadly cast as to preclude other persons from having reasonable choice of legal counsel."

A lawyer may not use information relating to the representation of a former client to the former client's disadvantage, unless as otherwise permitted by the rules (or when the information has become generally known).

A lawyer may not reveal information relating to a representation of a former client (other than would be permitted with respect to a current client).

Rule 1.10: Imputed Disqualification.

In general, if a lawyer in a firm is prohibited from representing a client under Rule 1.7 or 1.9, then the same prohibition extends to all lawyers in the firm.

There are two exceptions to this disqualification:

1. The other lawyers in the firm are not disqualified if the prohibition is based on a personal interest of the prohibited lawyer, and there is not a significant risk that the representation by the other lawyers would be materially limited.

2. If the lawyer is disqualified under Rule 1.9 (duties to former clients), then the other lawyers are not disqualified if all three of the following conditions are met:

    i. The personally disqualified lawyer performed only minor and isolated services in the earlier matter, and only with the former firm.

ii. That lawyer is screened from any participation in the new matter, and receives no fee from it.

iii. Written notice is given to the former client. If the former client requests it, the screened off lawyer or his firm must certify that screening procedures are in place. Notification must also be given when the screening ends.

In general, if a lawyer is no longer part of a firm, then the firm is not disqualified because the former member's having represented a client. However, the former firm might be disqualified in one of the following four situations:

1. The matter is the same or substantially related to the matter in which the formerly associated lawyer represented the client.

2. One of the firm's remaining lawyers has certain confidential information.

3. The conflict has been waived, in the same manner as the waiver under Rule 1.7.

4. In the case of Government lawyers, a different rule (1.11) applies.

Rule 1.11: Special rules regarding former and current government officers and employees.

Rule 1.9(c) (use of information gained from a previous representation) **does** apply in the case of a former government attorney. Also, in general, such a lawyer may not represent a client in connection with a matter in which that lawyer participated personally, unless the government agency gives its written informed consent.

If one lawyer in a firm is disqualified under the previous paragraph, then the firm is also disqualified, unless both of the following conditions are met:

1. The disqualified lawyer is screened, and shares no portion of the fee.

3. Written notice is given to the government agency.

If a lawyer has gained confidential government information about a person during his government employment, then he may not represent a private client whose interests are adverse to that person, if the information could be used to that person's material disadvantage. In this case, the lawyer's firm may represent such a client, if the disqualified lawyer is screened and does not share in the fee.

Current government lawyers are bound by Rules 1.7 and 1.9. Such a lawyer may not participate in matters in which he participated outside of government, unless the agency gives its written informed consent.

Current government lawyers may not negotiate for employment with any person involved in a matter in which he is participating. (There is an exception for current judicial law clerks, subject to conditions.)

Rule 1.12: Former judges, arbitrators, mediators, and neutrals.

In general, a lawyer should not represent anyone in a matter in which he or she served as a judge, arbitrator, mediator, neutral, or judicial law clerk. A lawyer shall not negotiate for employment with such a person (with an exception for law clerks, subject to conditions.

If a lawyer is disqualified under this rule, then the rest of the lawyer's firm is also disqualified, unless the lawyer is screened and shares no part of the fee, and notice is given.

In general, a partisan arbitrator in a multi-member arbitration panel may subsequently represent that party in the same matter.

Rule 1.13: Organization as client.

A lawyer retained by an organization represents the organization. Therefore, if he becomes aware that some person within the organization is going to act in violation of a legal obligation to the organization, or violate a law that is likely to result in substantial injury to the organization, then the lawyer must act in the best interest of the organization. In general, he must refer the matter to higher authorities within the organization.

If the highest authority within the organization fails to address this a clear violation of law, and if the lawyer reasonably believes that this will cause substantial injury to the organization, then the lawyer may make limited disclosure, even if the disclosure would otherwise violate Rule 1.6. (This does not apply if the lawyer has been retained to investigate a possible violation of law or to defend a claim arising out of a violation.)

If the lawyer believes that he has been fired for being a "whistleblower", then he or she is required to bring this information to the attention of the organization's highest authority.

When dealing with officers, directors, employees, etc., the lawyer should explain that the organization is the client, if it is apparent that the organization's interests are adverse to those persons.

In general, the organization's lawyer may also represent officers, employees, etc. But see Rule 1.13(g) regarding required consent.

Rule 1.14: Client with Diminished Capacity

In general, a lawyer should, to the extent reasonably possible, maintain a normal client-lawyer relationship. Diminished capacity may be the result of minority, mental impairment, or some other reason.

If the lawyer reasonably believes that a client with diminished capacity is at the risk of "substantial physical, financial, or other harm", then the lawyer **may** take reasonably necessary protective action. This can include consulting with others who have the ability to take action. If appropriate, the lawyer may seek to have appointed a guardian ad litem, conservator, or guardian.

The client's confidential information is still protected by Rule 1.6. However, the lawyer is impliedly authorized to reveal information, if necessary to take such protective action. However, note that the lawyer is not **required** to take action under this rule. He or she is merely **authorized** to take action. Therefore, care should be taken to ensure that confidential information is not released to the client's detriment. As the ABA comment notes, "at the very least, the lawyer should determine whether it is likely that the person or entity consulted with will act adversely to the client's interests before discussing matters related to the client."

Rule 1.15: Safekeeping a Client's property.

The rules require lawyers to deposit funds belonging to clients or other third parties to be deposited into a trust account if they are held in connection with a representation. The account shall be in the state where the lawyer's office is located, and records shall be maintained for [five years] after the end of the representation [brackets in original].

The only funds belonging to the lawyer which can be held in such accounts are reasonable amounts to cover service charges, and funds belonging jointly to the lawyer and client.

Fees belonging to the attorney must be withdrawn from the trust account within a reasonable time after being earned. A written accounting must be made for any such withdrawals.

A lawyer must promptly notify a client or third person upon receiving such funds, securities, or other properties.

Property belonging to clients or third parties must be identified and appropriately safeguarded.
Complete records must be kept of all such property.

Property must be paid or delivered promptly if requested by the person entitled to receive it.

Generally, all advance fees must be deposited into the trust account and withdrawn as earned, unless subject to a written agreement under Rule 1.5.

If the lawyer is in possession of property in which two persons (possibly including the lawyer himself or herself) claim an interest, that property shall be kept separate until the dispute is resolved. The property not in dispute must be promptly distributed.

Note: Most state versions of this rule go into greater detail, and/or reference additional requirements such as the following:

http://www.mncourts.gov/lprb/rulesapp1.html (Minnesota)

http://www.iowacourtsonline.org/wfdata/frame11315-1608/TrustOutline.pdf (Iowa)

Rule 1.16: Declining or terminating representation.

A lawyer **shall not** represent a client, and **shall** withdraw from representing a client in any of the following situations:

1. The representation will result in violation of the rules or of other law

2. The lawyer's physical or mental condition materially impairs the lawyer's ability
3. The lawyer is discharged.

A lawyer **may** withdraw from representing a client* in any of the following situations:

1. There will be no material adverse effect on the client's interests.

2. The client persists in a course of action involving the lawyer's services, and the lawyer reasonably believes this is criminal or fraudulent.

3. The client has used the lawyer's services to perpetrate a crime or fraud.

4. The client insists on taking some action that the lawyer finds repugnant or with which the lawyer fundamentally disagrees.

5. The client fails to substantially fulfill an obligation (e.g. pay) for the lawyer's services, and sufficient warning has been given.

6. Continued representation would be an unreasonable financial burden for the lawyer, or the client has made it

unreasonably difficult.

7. "other good cause for withdrawal exists".

*--Even though a lawyer may be permitted to withdraw under one of these circumstances, the lawyer must comply with any law requiring notice or permission by the court.

When ordered by the court, the lawyer must continue representing the client, notwithstanding good cause for terminating the representation.

If a lawyer does terminate a representation, the lawyer must take reasonable steps to protect the client's interests.

The lawyer may retain papers relating to the client "to the extent permitted by other law."

Rule 1.17: Sale of law practice.

A lawyer may sell or purchase a law practice, including the firm's goodwill, if the following conditions are met:

1. The seller ceases to practice law in that geographic area* and/or that area of the practice of law.

2. The entire practice, or area of practice, is sold to one or more lawyers or law firms.

3. The seller gives a specific written notice to each client. That notice must say that the client has the right to retain another lawyer to take possession of the file. It must also state that consent will be presumed if objection is not received in 90 days.

4. Client fees may not increase due to the sale.

- - Most states have adopted the "geographic area" terminology, but the ABA model rules have the option for a state to substitute the words "in the jurisdiction".

If notice can't be given to a client, then the representation can be transferred only by court order. The seller may give the court information in camera to the extent necessary to obtain such an order.

Rule 1.18: Duties to a prospective client.

A "prospective client" is a person who discusses with a lawyer the possibility of forming an attorney-client relationship.

In general, information revealed in such discussions cannot be used or revealed. (There is an exception only if Rule 1.9 permits revealing it with respect to a former client.)

If the lawyer has learned information that "could be significantly harmful" in those discussions, then the lawyer shall not represent a client with interests that are materially adverse. This prohibition extends to other lawyers in the firm.

There are two exceptions to this rule:

1. The lawyer may represent the client if both the client and the prospective client have given written informed consent.

2. If the lawyer took reasonable measures to avoid exposure to the information, then other lawyers in his or her firm may represent the client. Notice must be given to the prospective client.

Rule 2.1: Advisor.

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In giving advice, the lawyer **may** also look to considerations besides the law, such as moral, economic, social, and political factors.

Note: there is no "Rule 2.2" , since it was repealed from the ABA model rules. A few states still have this old rule, and in some states, the following rule has been re-numbered.

Rule 2.3: Evaluation for use by 3rd persons.

A lawyer may evaluate a matter affecting a client for use by someone else, if the lawyer reasonably believes that doing so is otherwise compatible with the relationship with the client.

If the evaluation will adversely affect the client's interests, then the lawyer must first obtain the client's informed consent.

Except as authorized in connection with the evaluation, confidential information remains protected by Rule 1.6.

Rule 2.4: Lawyer serving as 3rd-party neutral.

If a lawyer is serving as a third-party neutral (for example, arbitrator or mediator), the lawyer must inform unrepresented parties that he or she is not representing them. If the party does not understand the lawyer's role, then the lawyer must explain the difference between a third-party neutral and a lawyer representing a client.

Rule 3.1: Meritorious claims and contentions.

A lawyer shall not do any of the following in representing a client:

1. Knowingly advance a claim or defense that is unwarranted, unless it can be supported by a good faith argument for an extension, modification, or reversal of existing law.

2. Knowingly advance a factual position unless there is a non-frivolous basis.

3. File a suit, conduct a defense, or delay a trial if the lawyer knows (or it is obvious) that doing so would serve merely to harass or maliciously injure another person.

Exception: The lawyer for a defendant in a criminal case (or a case that could result in incarceration) may defend as to require that every element of the case be established.

Rule 3.2 Expediting litigation:

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

Rule 3.3: Candor toward the tribunal.

A lawyer shall not do any of the following:

1. Make a false statement of fact or law to a tribunal, or fail to correct a prior false statement.

2. Fail to disclose adverse legal authority if:
    a. it is from the controlling jurisdiction

b. it is known to the lawyer
c. it is directly adverse to the client's position
d. it is not disclosed by opposing counsel.

3. Offer evidence known to be false. If a lawyer has offered material evidence and he or she comes to know of its falsity, the lawyer shall take reasonable remedial measures. This might include disclosure to the tribunal. (If a lawyer knows evidence to be false, then he or she may refuse to offer that evidence, except in the case of a criminal defendant's testimony.)

If a lawyer in an adjudicative proceeding knows that a person has engaged or will engage in criminal or fraudulent conduct, then the lawyer must take reasonable remedial measures. If necessary, this can include disclosure to the tribunal.

These duties continue until "the conclusion of the proceeding".

The duties set forth in this rule take precedence over Rule 1.6. Therefore, under this rule, a lawyer might be **required** to disclose otherwise confidential information.

In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts necessary to make an informed decision, whether or not those facts are adverse.

Rule 3.4 Fairness to opposing party and counsel.

A lawyer shall not do any of the following:

1. Unlawfully obstruct another party's access to evidence, or unlawfully alter, destroy or conceal documents or other items having potential evidentiary value. A lawyer may not counsel or assist another person in doing so.

2. Falsify evidence, or counsel or assist a witness to testify falsely, or offer a witness an inducement that is prohibited by law.

3. Knowingly disobey obligations under court rules, except for an open refusal based upon an assertion that no such obligation exists.

4. Make frivolous discovery requests or fail to diligently comply with proper discovery requests.

5. Allude at trial to matters that the lawyer does not believe are relevant or supported by evidence, or assert personal knowledge unless actually testifying, or state personal opinions.

6. Request that someone other than a client not voluntarily give information to another party. There is an exception to this rule if both of the following conditions are met:

a. The person is a relative, employee, or agent of a client, and

b. The lawyer believes that the person's interests will not be adversely affected.

Rule 3.5: Impartiality and decorum of the tribunal

1. Seek to influence a judge, juror, prospective juror, or other official by means prohibited by law.

2. Communicate ex parte by any of those persons during a proceeding, other than as permitted by law or court order.

3. Communicate with a juror after discharge from the jury in any of the following cases:

a. the communication is prohibited by law or court order;

b. the juror has made known to the lawyer a desire not to communicate; or

c. the communication involves misrepresentation, coercion, duress or harassment; or

1. Before the trial, a lawyer shall not communicate with anyone the lawyer knows to be a member of the venire.

2. During the trial, a lawyer connected with the case may not communicate with any member of the jury. Even a lawyer who is not connected with the case is prohibited from communicating with a juror concerning the case.

3. After the jury has been discharged, a lawyer shall not ask questions or make comments to a juror that are "calculated merely to harass or embarrass the juror" or influence the juror's actions in future cases.

5. Engage in conduct intended to disrupt a tribunal.

Note: Many states, including Minnesota, have adopted more specific requirements as part of this rule.

Rule 3.6 Trial publicity.

If a lawyer participates in the investigation or litigation of a matter, then he or she shall not make an extrajudicial statement if the lawyer knows or reasonably should know that it will be publicly disseminated, and there will be a substantial likelihood of prejudicing the matter.

However, the following communications are permissible:

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

(2) information contained in a public record;

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

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

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

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

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

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

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

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

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

A lawyer may also 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.

Note: The text of this rule varies somewhat in some states, including Minnesota.

The prohibition under this rule applies to other lawyers associated in a firm or government agency.

Rule 3.7 Lawyer as witness.

If it is likely that a lawyer will be a necessary witness, then he or she shall not act as an advocate. There are the following exceptions:

1. The testimony relates to an uncontested issue.

2. The testimony relates to the nature and value of legal services rendered in the case.

3. There would be a substantial hardship to the client

It is permissible for a lawyer to be an advocate, even though an attorney in his or her firm will be a witness. However, he or she might be precluded because of confidential information, under Rules 1.7 or 1.9.

Rule 3.8 Special responsibilities of a prosecutor

A prosecutor may not prosecute a criminal case if he or she knows that the case is not supported by probable cause.

The prosecutor must make reasonable efforts to assure that the accused has been advised of his right to obtain counsel and the procedure for obtaining counsel.

The prosecutor shall "not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing".

The prosecutor must timely disclose mitigating evidence.

In general, a prosecutor should not subpoena a lawyer in a grand jury proceeding regarding the lawyer's past or present client. However, there is a limited exception if all of the following are true:

1. The information is not privileged
2. The information is essential
3. There is no feasible alternative

If the prosecutor knows of new, credible, material evidence which creates the reasonable likelihood that a convicted defendant did not commit the crime, he or she must promptly disclose the information to the court or other appropriate authority.

If that conviction took place in the prosecutor's own jurisdiction, then he must also do the following:

1. Promptly disclose the information to the defendant (unless the court authorizes delay), and
2. Undertake investigation promptly to determine if defendant was convicted of an offense which he or she did not commit.

When a prosecutor knows of clear and convincing evidence establishing that a defendant in the prosecutor's jurisdiction was convicted of an offense that the defendant did not commit, the prosecutor shall seek to remedy the conviction.

Rule 3.9 Advocate in nonadjudicative proceedings

A lawyer representing a client before a legislative body or administrative agency shall disclose that the appearance is on behalf of a client. Most of rules 3.3, 3.4, and 3.5 apply to such a representation.

Rule 4.1 Truthfulness in statements to others

In the course of representing a client, a lawyer may not make a false statement of material fact or law to a third party.

A lawyer shall not fail to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act (unless the information is confidential under Rule 1.6). (The Minnesota rule does not contain this provision.)

Rule 4.2 Communication with person represented by counsel

In representing a client, a lawyer shall not communicate about the subject with a person the lawyer knows to be represented by another lawyer. There is an exception if the other lawyer consents, or if authorized by law or court order.

Rule 4.3 Dealing with unrepresented person

In dealing on behalf of a client with a person who is not represented by counsel, if the person misunderstands the lawyer's role, the lawyer has an affirmative duty to correct the misunderstanding.

The lawyer shall not give legal advice (other than the advice to secure counsel, if the lawyer believes the interests are

likely to be in conflict.)

A lawyer shall not state or imply that he or she is disinterested.

Rule 4.4 Respect for rights of 3rd persons.

In representing a client, a lawyer shall not use means that have no purpose other than to embarrass, delay, or burden third parties. A lawyer must not use methods of obtaining evidence that violate a third person's rights.

If a lawyer accidentally receives a document and reasonably knows that it was inadvertently sent, then the lawyer shall promptly notify the sender.

Rule 5.1: Responsibilities of partners, managers, and supervisory lawyers

A partner in a law firm, or another lawyer with comparable managerial authority, shall make reasonable efforts to ensure that there are measures reasonably assuring that all lawyers conform to the rules.

A lawyer with direct supervisory authority has a similar duty.

A lawyer is responsible for another lawyer's violation in either of the following two circumstances:

1. The lawyer orders or ratifies the conduct.

2. The lawyer has managerial or supervisory authority and knows of the conduct in time to mitigate it, but fails to do so.

Rule 5.2 Responsibilities of a subordinate lawyer

A lawyer is bound by the rules, even though he or she acted at the direction of another person.

However, it is not a violation if the lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question.

Rule 5.3 Responsibilities regarding nonlawyer assistants

Lawyers with managerial authority, such as partners, shall make reasonable efforts to ensure that non-lawyers employed or retained are compatible with the lawyer's professional obligations.

This duty also applies to persons with direct supervisory authority.

Lawyers are responsible for violations by such persons in the following circumstances:

1. The lawyer orders or ratifies the conduct.

2. The lawyer is a partner or comparable manager, and knew of the conduct in time to mitigate it, but failed to do so.

Rule 5.4 Professional independence of a lawyer

A lawyer shall not share fees with a nonlawyer. There are, however, four exceptions to this rule:

1. Certain payments to a lawyer's estate after his or her death.
2. Purchase of the practice of a deceased, disabled, or disappeared lawyer.
3. Certain retirement or compensation plans for non-lawyer employees
4. Court-awarded legal fees may be shared with certain non-profit organizations.

A lawyer may not form a partnership with a non-lawyer if one of the activities of the partnership is the practice of law.

A lawyer may not have his services directed or regulated by a person who recommends, pays, or employs him or her.

A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if a nonlawyer is involved in any of the following ways:

1. A nonlawyer owns any interest in the firm, (with the exception of 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 holds the position of corporate director or officer or similar position

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

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Rule 5.5: Unauthorized practice of law; multijurisdictional practice of law.

A lawyer shall not practice law in a jurisdiction if it violates the regulation of the legal profession in that jurisdiction or assist another person in doing so. However, a lawyer admitted in his or her home state does not violate this rule by conduct in another state, if the same conduct would be permitted by an out-of state lawyer by the following rules:

A lawyer admitted in another U.S. jurisdiction (who is not disbarred or suspended in any jurisdiction*) may provide any of the following types of services on a temporary basis:

1. Services in association with a lawyer who is admitted in the state, who actively participates in the matter.

2. Services that are reasonably related to a pending or potential proceeding (even if the proceeding is in this state), if the lawyer or the person the lawyer is assisting reasonably expects to be authorized by law or order to appear.

3. Reasonably related to a pending or potential arbitration, mediation, etc., (even if it is in this state), if both of the following conditions are met:

   a. The services must be reasonably related to the lawyer's practice where he is admitted.

   b. The services are not ones where the forum requires pro hac vice admission.

4. Arise out of or are reasonably related to the lawyer's practice where he is admitted. However, this provision applies only to matters that are not within the preceding paragraphs (2: proceedings before a tribunal, or 3: arbitration, mediation, etc.)

A lawyer from another jurisdiction, including outside the United States, (if not disbarred or suspended anywhere*) may provide legal services in the state if authorized by federal law, or some other law.

In addition, a lawyer from another jurisdiction (if not disbarred or suspended anywhere*) may provide services to the lawyer's employer or its organizational affiliates; as long as they are not services for which the forum requires pro hac vice admission. If those services are performed by a foreign lawyer and require advice on the law of this or another jurisdiction or of the United States, such advice shall be based upon the advice of a lawyer who is duly licensed and authorized by the jurisdiction to provide such advice.

For either of these actions by a non-U.S. lawyer, the foreign lawyer must be a member in good standing of a recognized legal profession in a foreign jurisdiction, the members of which are admitted to practice as lawyers or counselors at law or the equivalent, and are subject to effective regulation and discipline by a duly constituted professional body or a public authority.

Even if one of these exceptions applies, a lawyer not admitted in a state shall not do either of the following:

1. Unless otherwise authorized, establish an office or systematic presence in the state to practice law.

2. Hold out to the public or represent that he is admitted to practice in the state.

Rule 5.6 Restrictions on right to practice

A lawyer may not participate in any kind of business arrangement that restricts his or her right to practice law after terminating the relationship. There is an exception for agreements concerning retirement benefits.

A lawyer may not participate in an agreement that restricts his or her right to practice as part of the settlement of a client's case.

Rule 5.7: Responsibilities regarding law-related services.

A "law-related service" is a service that might reasonably be performed with and substantially related to the provision of legal services. However, it is the type of service that can be performed by a nonlawyer and not be prohibited as the unauthorized practice of law.

A lawyer providing such services is subject to the Rules of Professional Conduct in either of the following situations:

1. They are not distinct from the lawyer's provision of legal services to clients

2. If the lawyer fails to take reasonable measures to assure the person obtaining the services knows that they are not legal services, and that the protections of the lawyer-client relationship do not apply.

(Note: This rule has not been adopted in all states, including Wisconsin)

Rule 6.1 Voluntary pro bono publico service

"Every lawyer has a professional responsibility to provide legal services to those unable to pay." A lawyer "should aspire" to render at least 50 hours of pro bono service per year. This obligation can be fulfilled in the following ways:

A substantial majority of those fifty hours shall be without fee or expectation of fee to the following:

1. persons of limited means
2. charitable, religious, civic, government, etc., organizations, in matters that are designed primarily to help persons of limited means.

In addition, a lawyer should provide services for no fee or substantially reduced fee, to secure or protect civil rights or civil liberties, public rights. Or, a lawyer should provide services to charitable, religious, civic, etc., organizations in furtherance of those organizations' purposes, when standard fees would significantly deplete the organization's resources or would otherwise be inappropriate.

A lawyer should deliver legal services at a substantially reduced fee to persons of limited means.

A lawyer should participate in activities for improving the law, legal system, or legal profession.

In addition, a lawyer should voluntarily contribute financially to organizations that provide legal services to persons of

limited means.

Rule 6.2 Accepting appointments

A lawyer shall "not seek to avoid appointment" by a tribunal, except for good cause. Examples of good cause include:

1. Representing the person is likely to result in a rule violation.

2. It would be an unreasonable financial burden.

3. The person's cause is so repugnant that it will likely impair the lawyer's ability to represent the person.

Rule 6.3 Membership in legal services organization

A lawyer may serve as a director, officer, or member of a legal services organization, even though the organization serves persons with interests adverse to one of his or her clients. However, the lawyer should not knowingly participate in any decision or action of the organization in either of the following cases:

1. Doing so would be a conflict of interest under Rule 1.7.

2. The decision could have a material adverse effect on the organization's representation of such a client.

Rule 6.4 Law reform activities affecting client interests

A lawyer is permitted to serve as a director, officer, or member of an organization involved in the reform of the law or its administration. This is true even though the reform may affect the interests of one of his or her clients. But if the lawyer knows that a client's interests may be materially benefited by a decision in which the lawyer participates, the lawyer must disclose this fact. However, the lawyer need not identify the client.

Rule 6.5 Nonprofit and court-annexed limited legal services programs

The following rules apply to a lawyer who participates in a program sponsored by a nonprofit organization or court which provides short-term legal services to clients, where neither the lawyer nor the client expect that the lawyer will provide continuing representation in the matter. (Wisconsin adds language to make clear that this also applies to programs sponsored by bar associations or accredited law schools.)

The lawyer is subject to Rules 1.7 (conflicts of interest) and 1.9(a) (conflicts of interest with former clients), only if the lawyer knows that the representation involves a conflict of interest.

The lawyer is subject to Rule 1.10 (imputed conflict of interest of firm) only if he knows that another lawyer in his or her firm would be disqualified. Otherwise, Rule 1.10 applies.

Rule 7.1 Communications concerning a lawyer's services

A lawyer is prohibited from making false or misleading communication about the himself or herself, or about his or her services. This includes communications that contain a material misrepresentation of fact or law, or if it omits a fact necessary to make the statement not materially misleading.

Rule 7.2 Advertising

A lawyer may advertise. Advertising is subject to Rules 7.1 and 7.3. The following rules also apply:

A lawyer may not give anything of value to someone to recommend his services, with the following exceptions:

1. Pay the reasonable cost of permitted advertisements or communications.

2. Pay the usual charges for a legal service plan or a lawyer referral service. (The lawyer referral service must approved by the appropriate regulatory authority.)

3. Pay for a law practice under Rule 1.17.

4. Refer clients to another lawyer or other professional under an agreement that the other person will refer clients to the lawyer. However, such an agreement must be otherwise permitted by the rules, and the following conditions must apply:

    a. The reciprocal referral agreement is not exclusive
    b. The client is informed of the existence and nature of the agreement.

Any communications made under this rule must include the name of at least one lawyer or law firm who is responsible for its content.

Rule 7.3: Direct contact with prospective clients

A lawyer shall not solicit professional employment from prospective client in person or by live telephone contact, if a significant motive is the lawyer's pecuniary gain. There are two exceptions to this rule:

1. The person contacted is a lawyer, or

2. The person contacted is family, has a close personal relationship, or has a prior professional relationship.

In addition, a lawyer shall not solicit professional employment in any manner (written, recorded, electronic, in-person or telephone) if either of the following are true:

1. The prospective client has made known a desire not to be solicited, or

2. The solicitation involves coercion, duress, or harassment.

Any written, recorded, or electronic communication soliciting professional employment from someone known to be in need of services in a particular matter must conspicuously include the words "Advertising Material" on any outside envelope, and at the beginning and end of the communication. There are the same two exceptions as in the first rule:

1. The person contacted is a lawyer, or

2. The person contacted is family, has a close personal relationship, or has a prior professional relationship.

Note: Some states require that such advertisements be sent to an office of the state supreme court, but this requirement is not part of the model rule.

This rule does not prohibit a lawyer from participating in a prepaid or group legal service plan (not owned or directed by the lawyer) that uses in-person or telephone contact to solicit membership, if the persons are not known to need particular legal services.

Rule 7.4: Communication of fields of practice

A lawyer may communicate whether or not he or she practices in a particular field of law.

A lawyer admitted to engage in patent practice before the U.S. Patent and Trademark Office may use the designation "patent attorney" or similar.

A lawyer engaged in admiralty practice may use the designation "admiralty", "proctor in admiralty", or similar.

A lawyer shall not state or imply that he or she is certified as a specialist in a particular field unless both of the following are true:

1. The name of any certifying organization is clearly identified.

2. The lawyer must really have been certified as a specialist by an organization that has been approved by an appropriate state authority or that has been accredited by the American Bar Association. (Note: State versions of this rule usually contain a similar requirement, but the wording often varies.)

Rule 7.5 Firm names and letterheads

Firm names, letterheads, and other professional designations must comply with Rule 7.1 (e.g., no false or misleading information). A trade name may be used by a lawyer, but it is subject to the following requirements:

1. It may not imply a connection with a government agency

2. It may not imply a connection with a public or charitable legal services organization

3. It must not violate Rule 7.1

Note: The use of a geographic name could imply connection to a government agency, and a word such as “clinic” might imply a connection to a charitable organization.

A firm with offices in more than one jurisdiction may use the same name in each jurisdiction. However, the identification of lawyers in an office shall indicate the jurisdictional limitations.

The name of a lawyer holding public office shall not be used during any substantial period in which the lawyer is not actively and regularly practicing with the firm.

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

Rule 7.6 Political contributions to obtain government legal engagements or appointments by judges.

A lawyer or law firm shall not accept a government legal engagement or an appointment by a judge if he or she makes a political contribution or solicits contributions for the purpose of being considered.

(Minnesota has not adopted this rule.)

Rule 8.1 Bar admission and disciplinary matters

The following applies to an applicant for admission to the bar, or to a lawyer in connection with a bar admission application or with a disciplinary matter. Such a person shall not:

1. knowingly make a false statement of material fact, or

2. fail to disclose a fact necessary to correct a misapprehension that the person knows has arisen.

3. Knowingly fail to respond to a lawful demand for information.

However, this rule does not require disclosure of information that is otherwise confidential because of Rule 1.6.

Rule 8.2 Judicial and legal officials

A lawyer shall not knowingly or recklessly make a false statement concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer, or candidate for judicial or legal office.

A lawyer who is a candidate for judicial office shall comply with the code of judicial conduct.

Rule 8.3: Reporting professional misconduct.

A lawyer who knows that another lawyer has violated these Rules shall inform the appropriate authority.

A lawyer who knows that a judge has violated the applicable rules of judicial conduct shall inform the appropriate authority.

This rule does not require disclosure of information that is confidential under Rule 1.6. It does not require disclosure of information gained while participating in an approved lawyers assistance program

Rule 8.4: Misconduct

The following are professional misconduct under the model rules:

1. Violate the rules of professional conduct, knowingly assist or induce a violation, or do so through another's acts.

2. Commit a criminal act that reflects adversely on honesty, trustworthiness, or fitness as a lawyer.

3. Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.

4. Engage in conduct that is prejudicial to the administration of justice

5. State or imply an ability to improperly influence a government agency or official or achieve results that violate these Rules or other law.

6. Knowingly assist a judicial officer in conduct that violates the rules of judicial conduct or other law

(Note: Most states add a few additional items to this list.).

Rule 8.5 Disciplinary authority; choice of law

Disciplinary Authority

A lawyer admitted to the bar in the state is subject to the disciplinary authority of the state regardless of where the conduct occurs.

A lawyer not admitted in the state is subject to the state's disciplinary authority if he or she offers to provide any legal services in the state.

A lawyer may be subject to disciplinary authority in more than one state for the same conduct.

Choice of Law

For conduct before a tribunal, the law of the jurisdiction where the tribunal sits shall apply (unless that court's rules provide otherwise.

For other conduct, if the lawyer is admitted only in one state, then the rules shall be the rules of that state.

If the lawyer is admitted in more than one state, then the rules of the jurisdiction where he or she principally practices shall apply. However, if the conduct has its predominant effect in another jurisdiction, then the rules of that jurisdiction will apply.

About the Author

Richard P. Clem is a provider of Continuing Legal Education (CLE) programs for attorneys, and specializes in programs on legal ethics and the elimination of bias in the legal profession. He has presented live CLE programs in Minnesota, Iowa, Wisconsin, Nebraska, Indiana, and Texas, and also presents teleconference programs for attorneys throughout the United States.

Clem has been in private practice in the Twin Cities for over 25 years. His reported cases include: Asociacion Nacional de Pescadores a Pequena Escala o Artesanales de Colombia v. Dow Quimica de Colombia, 988 F.2d 559, rehearing denied, 5 F.3d 530 (5th Cir. 1993), cert. denied, 510 U.S. 1041 (1994); LaMott v. Apple Valley Health Care Center, 465 N.W.2d 585 (Minn. Ct. App. 1991); Abo el Ela v. State,468 N.W.2d 580 (Minn. Ct. App. 1991).

Clem has a B.A. in history from the University of Minnesota, and a J.D., cum laude, from Hamline University School of Law in St. Paul, Minnesota.

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