DC BAR

DISTRICT OF COLUMBIA BAR

June 18, 2012

The Honorable Eric T. Washington
Chief Judge
District of Columbia Court of Appeals
Historic Courthouse
430 E Street, N.W.
Washington, D.C. 20001

RECEIVED
JUN 18 2012
DISTRICT OF COLUMBIA
COURT OF APPEALS

Re: Proposed Amendments to Selected Rules of the D.C. Rules of Professional Conduct

Dear Chief Judge Washington:

On behalf of the District of Columbia Bar, I am pleased to transmit to you for the Court's consideration proposed amendments to D.C. Rule of Professional Conduct 1.10 (Imputation Disqualification: General Rule), Rule 1.15 (Safekeeping of Property), and Rule 7.1 (Communications Concerning a Lawyer's Services); and a recommendation to adopt a new proposed Rule 8.6 (Disclosing Substantial Exculpatory Information about a Convicted Person). The proposed amendments are included in the enclosed report of the District of Columbia Bar's Rules of Professional Conduct Review Committee ("Rules Review Committee" or "committee"), entitled *Proposed Amendments to Selected Rules of the D.C. Rules of Professional Conduct*, March 2012 (Final Report) ("March 2012 Final Report"). Clean and red-lined versions of the proposed amendments are included as Exhibit D of the report.

On June 12, 2012, the Board of Governors voted unanimously to approve all of the proposed amendments discussed above. A summary of the proposed amendments and the work of the Rules Review Committee is set forth below.

Summary of the Proposed Amendments

Rule 1.10 (Imputed Disqualification: General Rule)

Amend Rule 1.10 and its comments to allow ethical screening (without client consent) of lawyers moving laterally between private employers with certain initial notice requirements to former clients.

Rule 7.1 (Communications Concerning a Lawyer's Services)

Amend Rule 7.1 and its comments to prohibit the payment of lawyer referral fees, but continue to allow payment of the usual and reasonable fees or dues charged by a lawyer referral service. The proposed changes restore the approach the District used prior to the 1991 adoption of a rule allowing the use of paid intermediaries or "runners," which was repealed in 2007.

Rule 1.15 (Safekeeping Property)

Adopt a new Comment [2] of Rule 1.15 to provide more detailed guidance to lawyers on financial record keeping for trust accounts. Delete Section 19(f) of Rule XI of the Rules Governing the Bar as largely duplicative of the obligations arising under Rule 1.15(a). The proposed comment provides guidance on financial record keeping that: (1) reflects the purpose of the "complete records" language of Rule 1.15 as interpreted and explained by the D.C. Court of Appeals in *In re Clower*, 831 A. 2d 1030 (D.C. 2003); and (2) encourages lawyers to consult the ABA model rules on Client Trust Records.

Proposed New Rule 8.6 (Disclosing Substantial Exculpatory Information about a Convicted Person)

Adopt a new Rule 8.6 to require all lawyers in the District of Columbia who possess information that raises a substantial question about the innocence of a convicted person to disclose that information to the prosecutor, to the court, to the convicted person's counsel, and to the convicted person, in the absence of other confidentiality obligations of the lawyer.

<u>Background</u>

On June 23, 2005, the D.C. Bar's Board of Governors submitted to the District of Columbia Court of Appeals extensive proposed amendments to the D.C. Rules.[1] The vast majority of these proposed changes were adopted and promulgated by order of the Court dated August 1, 2006, effective February 1, 2007. Subsequent to the February 1, 2007, amendments to the D.C. Rules, the Rules Review Committee[2] received specific requests for consideration and

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[1] These recommendations resulted from a thorough review of the D.C. Rules by the Rules Review Committee from 1998 through 2005 focusing primarily on changes to the American Bar Association Model Rules of Professional Conduct ("ABA Model Rules") as recommended by the ABA's Commission on the Evaluation of the Rules of Professional Conduct (also known as the ABA Ethics 2000 Commission) and the ABA Corporate Responsibility Task Force.

[2] In establishing the Rules Review Committee as a standing committee in 1994, the Board of Governors charged it with responsibility for the on-going review of the D.C. Rules of Professional Conduct. On its own initiative, or upon request by the Court, Board, Bar members, or the public, the committee examines a particular rule or rules and may make recommendations for changes to the Board of Governors. The committee also regularly reviews changes

clarification of certain provisions of D.C. Rules 1.15 and 7.1; and shortly thereafter began a review of those rules. In 2008 and 2010 the American Bar Association made significant amendments to ABA Model Rules 1.10 and 3.8; the Rules Review Committee also included a review of the parallel D.C. Rules in its study.

In September 2011, the Rules Review Committee concluded four years of study and review of D.C. Rule 1.10(b) (Imputation Disqualification: General Rule), Rule 1.15 (Safekeeping of Property), Rule 3.8 (Special Responsibilities of a Prosecutor),[3] and Rule 7.1 (Communications Concerning a Lawyer's Services). The committee's review, analysis, and recommendations about these rules were set forth in its *Final Draft Report: Proposed Amendments to Selected Rules of the D.C. Rules of Professional Conduct* ("September 2011 Final Draft Report").

A request for public comment on the September 2011 Final Draft Report was held from October 5, 2011, to November 18, 2011, and extended to December 13, 2011.[4] At the request of the Board on Professional Responsibility (the "BPR"), the committee extended the opportunity for the BPR to comment to January 13, 2012. The Rules Review Committee received a total of 13 comments, two from individual lawyers, 10 from law firms and one from the BPR. The full committee met on December 12, 2011, and again on March 12, 2012, to review and discuss the comments and to consider whether in light of specific comments, changes should be made to any of the committee's initial recommendations.

As explained in further detail in the March 2012 Final Report, the committee did not make any changes to its initial recommendations in light of the comments received. The committee submitted to the Board of Governors all of the recommendations of its September

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to the ABA Model Rules proposed and adopted by the American Bar Association. On recommendation of the committee, the Board may recommend changes to the D.C. Rules to the District of Columbia Court of Appeals.

[3] In February 2008, the ABA adopted revisions to Model Rule 3.8, specifically to Rules 3.8(g) and 3.8(h). The revisions, in substance, obligate *prosecutors* who know of new, credible, material evidence that creates a reasonable likelihood that a convicted defendant is innocent to disclose that evidence and, in some circumstances, to conduct an investigation and/or affirmatively seek to remedy the conviction, including, but not limited to seeking relief of the conviction from a court.

The Rules Review Committee is strongly of the view that such a limitation is inconsistent with the fundamental premise of the Model Rule 3.8 proposal. Preventing the incarceration of the innocent is a core value of the judicial system and the correction of a significant miscarriage of justice should be of interest to all attorneys, not just prosecutors. Recognizing the difficulties and challenges that arise from the operation of other equally important values (e.g., the confidentiality obligations of Rule 1.6), the committee members nonetheless concluded that full expression of the values inherent in the model rule proposal required extending a duty of disclosure to all members of the Bar in proposed new Rule 8.6.

[4] The committee conducted an initial request for public comment on Rule 1.10 from May 27, 2010, to August 26, 2010. The committee received 20 comments from Bar members and law firms.

2011 Final Draft Report on proposed amendments to D.C. Rules 1.10, 1.15, and 7.1. Unrelated to comments received, the committee submitted minor textual clarifying changes to proposed Rule 8.6 and added a Comment [7], to clarify the initial intent of the committee in proposing Rule 8.6.

Comment from the Board on Professional Responsibility on New Proposed Rule 8.6

The BPR submitted an extensive comment to new proposed Rule 8.6.[5] In sum, the BPR has expressed concerns about the scope of a rule that would require all D.C. Bar members to come forward with non-privileged (or otherwise confidential) exculpatory information about a convicted person, and requested that the committee refer the matter for further study. The Board of Governors, however, was firmly persuaded that preventing the incarceration of the innocent is a core value of the judicial system and the correction of a significant miscarriage of justice should be of interest to and the responsibility of *all* lawyers, not just prosecutors. Since the adoption of Model Rule 3.8(g) and (h) in 2008, only seven jurisdictions have adopted any version of these rules and all of those jurisdictions limit post-conviction disclosure duties to prosecutors.[6] Thus, in the proposal for a new Rule 8.6, the District of Columbia is in the unique position to lead the profession in this important area.

The BPR comment and the committee's response to the comment are included in their entirety in the March 2012 Final Report as Exhibits A and B, respectively.

On April 10, 2012, the Rules Review Committee's chair and vice chair, George Clark and Peggy Love, and committee member Paul Rosenzweig, chair of the Rule 8.6 subcommittee, presented the committee's March 2012 Final Report to the Board of Governors. The BPR was invited to attend and comment on the proposals before the Board.[7] On June 12, 2012, the Board considered the committee's proposed amendments, and comments from Deborah Jeffrey, BPR vice-chair, on new proposed Rule 8.6. The Board voted unanimously to approve all of the Rules Review Committee's proposed amendments to Rules 1.10, 1.15, 7.1, and for a new proposed Rule 8.6.[8]

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[5] The BPR had no comment about the proposed amendments to Rules 1.10, 7.1 and 1.15.

[6] The jurisdictions are: Colorado, Idaho, North Dakota, Tennessee, Washington and Wisconsin. Delaware has a limited "innocence" provision in Rule 3.8(d)(2). Significantly, prior to the adoption of Model Rules 3.8(g) and (h), no jurisdiction had an ethics rule addressing post-conviction obligations of lawyers, including prosecutors in possession of credible exculpatory evidence of innocence.

[7] The Executive Attorney of the BPR attended the Board of Governors meeting.

[8] One of the recommendations related to proposed amendment to Rule 1.15, is to delete District of Columbia Court of Appeals Rules Governing the Bar, Rule VI, Section (19)(f), as duplicative of (and arguably inconsistent with) the record keeping obligation set forth in D.C. Rule 1.15(a).

Timing of Implementation of the Amended Rules

The Bar respectfully asks that the Court delay the effective date of the changes to the Rules, if any, for at least four months after the date of the Court's adoption of the rules. The delay will allow the Bar to begin the process of notifying members about the rules changes; and implement a member education program similar to the ones conducted in 2010-11 in response to changes in the Rules Governing Interest on Lawyers' Trust Accounts (IOLTA) and in 2006-07 in response to the substantial changes to the Rules of Professional Conduct. Because the Bar has found it helpful for the education of our members, the Bar also respectfully asks that the Court publish any rules changes in a red-lined version, in addition to a clean version.

Please let us know if you or other members of the Court have any questions or require anything further from the Bar. You can contact me at (202) 824-3142 or by e-mail at dmottley@bannerwitcoff.com, or Tom Williamson, the incoming D.C. Bar president, at (202) 662-5438.

Respectfully yours,

Darrell G. Mottley

Darrell G. Mottley

Enclosure

cc: Board of Governors
Members, Rules of Professional Conduct Review Committee
Ray S. Bolze, Esq.
Katherine A. Mazzaferri, Esq.
Elizabeth J. Branda, Esq.
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District of Columbia Bar Rules of Professional Conduct Review Committee

Proposed Amendments to Selected Rules of the D.C. Rules of Professional Conduct

The views expressed herein are those of the Committee
and not those of the D.C. Bar or its Board of Governors.

March 2012 (FINAL REPORT)

Members
Of the District of Columbia Bar
Rules of Professional Conduct Review Committee

George R. Clark, Chair	Faith Mullen
Peggy Love, Vice Chair	Narda M. Newby
Geoffrey Bestor	Robert D. Okun
Alison Doyle	John T. Rich
Jerri U. Dunston	Paul Rosenzweig
Lauren A. Greenberg	Jonathan K. Tycko
Julia A. Leighton	Michael S. Sundermeyer
Peter W. Morgan	

Members of the Committee during its consideration of this report's recommendations in whole or in part included:

Joel L. Perrell……………………………………………..2007-2009
Susan D. Carle……………………………………………2005-2009
Stephen Csontos………………………………………….2003-2009
Hamilton P. Fox…………………………………………..2009-2011
Alan Goldberg….…………………………………………2007-2009
Albert W. Turnbull……………………………….………2003-2009

Daniel Schumack ....2000 – 2009
Vice Chair 2008-2009

Bridget Bailey-Lipscomb..2004 – 2010
Vice Chair 2009-2010

Eric L. Hirschhorn……………………………………………2004-2010
Chair 2007-2009

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I. INTRODUCTION

This report sets forth the final recommendations of the District of Columbia Bar Rules of Professional Conduct Review Committee ("Rules Review Committee" or "committee") on amendments to the District of Columbia Rules of Professional Conduct ("D.C. Rules"). Specifically, the report recommends amendments to Rules 1.10 (Imputed Disqualification: General Rule) and 7.1 (Communication Concerning a Lawyer's Services), amendments to the Comments of Rule 1.15 (Safekeeping Property), and the promulgation of new Rule 8.6 (Disclosing Substantial Exculpatory Information about a Convicted Person). As explained in more detail below, the impetus for amendments to Rule 1.10 and proposed Rule 8.6 resulted from amendments made to the American Bar Association's Model Rules 1.10 and 3.8 (Special Responsibilities of a Prosecutor) in 2009 and 2008, respectively. Proposed amendments to Rule 7.1 and to the Comments of Rule 1.15 resulted from inquiries and requests for clarification on issues unique to the language and format of the D.C. Rules.

In establishing the Rules Review Committee as a standing Bar committee in 1994, the Board of Governors charged it with responsibility for the on-going review of the D.C. Rules. On its own initiative, or upon request by the Board, by members of the Bar, or by the public, the Rules Review Committee examines a particular rule or rules and may make recommendations for changes to the Board of Governors. The Board, in turn, may then recommend changes to the District of Columbia Court of Appeals, which promulgates the D.C. Rules. The Rules Review Committee also regularly reviews changes made to the American Bar Association's Model Rules of Professional Conduct.[1]

From 1998 through 2005, the Rules Review Committee undertook an extensive review of the D.C. Rules focusing primarily on changes to the ABA Model Rules as recommended by the ABA's Commission on the Evaluation of the Rules of Professional Conduct (also known as the ABA Ethics 2000 Commission) and the ABA Corporate Responsibility Task Force. On June 23, 2005, the D.C. Bar's Board of Governors submitted to the District of Columbia Court of Appeals proposed amendments to the D.C. Rules. The vast majority of these proposed changes were adopted and promulgated by order of the Court dated August 1, 2006, effective February 1, 2007.

The changes considered herein resulted either from amendments to the ABA Model Rules or from requests to the Rules Review Committee for consideration/clarification that occurred after February 1, 2007.[2]

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[1] The ABA Model Rules provide national model standards of professional ethics, but are not binding upon any jurisdiction in the absence of formal adoption.

[2] During the early consideration of the committee's proposal on Rule 1.10, the committee requested comment from the Bar and the public on whether the District should adopt a rule permitting an individual lawyer moving between private sector jobs to be screened from matters in which the lawyer's new law firm or other organization is adverse to the lawyer's former client. The committee specifically asked commenters to opine on several possible variations of a draft screening rule. That initial "call for public comment" was published on the D.C. Bar's website from May 27, 2010, until August 26, 2010. A summary of those comments and the committee's response was part of the

The committee's initial review, analysis, and recommendations about these rules were set forth in its *Final Draft Report: Proposed Amendments to Selected Rules of the D.C. Rules of Professional Conduct* ("September 2011 Final Draft Report"). A request for public comment on the September 2011 Final Draft Report was published on the Bar's website on October 5, 2011. The comment period ended on November 18, 2011, and was extended to December 13, 2011. At the request of the Board on Professional Responsibility (the "BPR"), the committee extended the opportunity for the BPR to comment to January 13, 2012.

The committee received a total of 13 comments, two from individual lawyers, 10 from law firms and one from the BPR. The BPR's comment is produced in its entirely at Exhibit B. Summaries of the other comments received are included in this report under the analysis of each specific proposed rule to which the comments related. The full committee met on December 12, 2011, and again on March 12, 2012, to review and discuss the comments and to consider whether in light of any specific comment, changes should be made to any of the initial September 2011 recommendations.

For reasons set forth below, the Rules Review Committee reaffirms all of the initial recommendations of the September 2011 Final Draft Report on proposed amendments to D.C. Rules 1.10, 1.15, and 7.1. The committee's detailed response to the BPR's Comments on proposed Rule 8.6 is found in Exhibit A. After a careful review of the matter, the committee adhered to its initial views supporting the proposed Rule 8.6, while making some minor textual modifications and adding a clarifying comment to the language of proposed Rule 8.6 found in the September 2011 Final Draft Report. These minor revisions were not related to any of the comments that the committee received.

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committee's September 2011 Final Draft Report that was published in October 2011; the summary is also included in this report at Section III. D.

II. SUMMARY OF PROPOSED REVISIONS

The proposed revisions are as follows.

A. Rule 1.10 (Imputed Disqualification: General Rule)

Amend Rule 1.10 and its comments to allow ethical screening (without client consent) of lawyers moving laterally between private employers with certain initial notice requirements to former clients. The committee further recommends the addition of a new subparagraph (f) to address situations in which a law firm cannot provide required notifications without violating confidentiality obligations to an existing client.

B. Rule 7.1 (Communications Concerning a Lawyer's Services)

Amend Rule 7.1 and its comments to prohibit the payment of referral fees, but continue to allow payment of the usual and reasonable fees or dues charged by a lawyer referral service. These changes will restore the approach the District used prior to the 1991 adoption of a rule allowing the use of paid intermediaries or "runners," which was repealed in 2007.

C. Rule 1.15 (Safekeeping Property)

Adopt a new Comment [2] of Rule 1.15 to provide more detailed guidance to lawyers on financial record keeping for trust accounts. Delete Section 19(f) of Rule XI of the Rules Governing the Bar as largely duplicative of the obligations arising under Rule 1.15(a). The committee recommends that the guidance on financial record keeping: (1) reflect the purpose of the "complete records" language of Rule 1.15 as interpreted and explained by the D.C. Court of Appeals in *In re Clower*, 831 A. 2d 1030(D.C. 2003); and (2) encourage lawyers to consult the ABA model rules on Client Trust Records.

D. Proposed New Rule 8.6 (Disclosing Substantial Exculpatory Information about a Convicted Person)

Adopt a new Rule 8.6 to require all lawyers in the District of Columbia who possess information that raises a substantial question about the innocence of a convicted person to disclose that information to the prosecutor, to the court, to the convicted person's counsel, and to the convicted person, in the absence of other confidentiality obligations of the lawyer.

III. RULE 1.10 (IMPUTED DISQUALIFICATIONS: GENERAL RULE)

Shortly after adoption of amendments to Model Rule 1.10 by the American Bar Association in February 2009, the Rules Review Committee appointed a subcommittee to study whether the District should adopt similar amendments to D.C. Rule 1.10. Model Rule 1.10 allows a private law firm hiring a lawyer from another private firm to avoid imputation of that individual lawyer's conflicts to the entire new firm by establishing an ethical screen without client consent.[3]

The Rules Review Committee recommends that D.C. Rule 1.10 be amended to allow ethical screening of lawyers moving laterally between private employers with certain initial notice requirements to former clients.

A. Existing Conflict of Interest and Imputation Rules in the District of Columbia

An individual lawyer has a conflict of interest if the lawyer opposes a current client in any matter.[4] The lawyer also has a conflict if he or she opposes a former client in a matter that is the same as, or substantially related to, a matter in which the lawyer represented the former client.[5]

Moreover, as a general rule the conflict of interest of a single lawyer within a law firm, in-house corporate law department, legal services organization, or other nongovernment organization is imputed to all of the other lawyers in that organization.[6] This includes instances in which a lawyer joins such an organization from another private sector job and has acquired material information protected by the confidentiality provisions of D.C. Rule 1.6.[7] Screening without the informed consent of all affected clients does not overcome the imputation resulting from such a lateral move.[8]

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[3] "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, but does not include a government agency or other government entity. Rule 1.0(c); *See* Comment [1], Rule 1.10.

"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. D.C. Rule 1.0(*l*).

[4] *See* D.C. Rule 1.7. "Matter" is defined—broadly—in D.C. Rule 1.0(h).

[5] *See* D.C. Rule 1.9.

[6] D.C. Rule 1.10(a).

[7] D.C. Rule 1.10(b).

[8] D.C. Legal Ethics Committee Opinion 279 (1998).

There are, however, a number of exceptions to this general rule. In these situations, imputation can be avoided without the need for consent by the affected client or former client. These include instances in which:

- The conflicting interest is personal to the disqualified lawyer (e.g., a family connection) and is unlikely to affect adversely the representation by others in the firm, D.C. Rule 1.10(a)(1);

- The disqualified lawyer has come to the firm from government service (including service as a judge or judicial law clerk), the moving lawyer is screened in a timely manner from participation in the conflicting matter, and all relevant parties are notified of the screen, D.C. Rules 1.10(a)(2), 1.11;

- The disqualification is due to the individual lawyer's acquisition of confidential information of the adverse party under circumstances where that party never established an attorney-client relationship with the individual lawyer, and the disqualified lawyer is screened from the other lawyers in the organization, D.C. Rule 1.18(c)-(d);

- The disqualification is due to the individual lawyer's former service as a third-party neutral in an arbitration, mediation, or other alternative dispute resolution proceeding, D.C. Rules 1.10(a)(2), 1.12; or

- The disqualification results from the individual lawyer's participation in a program of temporary service to the Office of the District of Columbia Attorney General, D.C. Rule 1.10(h).

Approximately one-half of United States jurisdictions have some variation of a conflicts imputation rule that permits screening of lawyers moving laterally between private sector jobs without requiring client or former client consent. In some instances, those rules require that the disqualified lawyer played no substantial role or was not primarily responsible in the prior matter, or that the lawyer has no substantial material information relating to the prior matter.

B. ABA Model Rule 1.10

In February 2009, the ABA amended Model Rule 1.10 to permit screening in lieu of imputation—*without* the need for client or former client consent—of a lateral lawyer who has moved between private organizations. The amended model rule, whose text and comments appear as Exhibit C, permits such an arrangement only where:

- The individually disqualified lawyer is timely screened from participation in the matter and receives no part of the fee from the matter;

- The former client receives written notice of the conflict and the erection of an ethical screen, including a description of the screen, a statement of the organization's and the individually disqualified lawyer's compliance with the applicable Rules of Professional Conduct, a statement that review may be available before a tribunal, and the organization's undertaking to "respond promptly to any written inquiries or objections by the former client about the screening procedures," and

- The screened lawyer and the organization provide certifications of compliance "at reasonable intervals upon the former client's written request and upon termination of the screening procedures."

ABA Model Rule 1.10(a)(2).

C. Committee's Initial Request for Public Comment on Proposed Screening Rule ("August 2010 Comments")

To inform its consideration, the Rules Review Committee requested comment from the Bar and the public on whether the District should adopt a rule permitting an individual lawyer moving between private sector jobs to be screened from matters in which the lawyer's new law firm or other organization is adverse to the lawyer's former client. The committee specifically asked commenters who supported lateral screening whether the rule should be (1) the ABA Model Rule formulation; (2) the committee's own proposed discussion draft rule (which contained several possible variants on post hoc reporting);[9] or (3) another formulation.

The committee posted its call for public comment on the D.C. Bar's website beginning on May 27, 2010. The comment period ran until August 26, 2010. Notice of the call appeared in the June 2010 edition of *E-brief* and on page 17 of the July/August 2010 issue of the *Washington Lawyer*.

1. <u>The committee's discussion draft</u>

The committee's proposed discussion draft formulation adopted the first two of the Model Rule's conditions—screening of the individually disqualified lawyer and written notice to the former client that a screen is being established. It also included the Model Rule's third condition, which addresses post hoc reporting, as one of three possible options for the period following establishment of the screen:

- Option 1 of the committee's discussion draft substantially followed the Model Rule's third condition, requiring the screened lawyer and the new firm to report in writing, upon reasonable request (no more often than annually) of the former client, their compliance with the applicable rules and the screen.

- Option 2 would require reporting to the former client only when the new firm becomes aware of a material breach of the screen or related procedures.

[9] The committee's discussion draft formulations that were circulated during the August 2010 comment period appear on the Bar's website at www.dcbar.org/ethics under the Rules Review Committee Reports and Legislative History Link.

- Option 3, like the existing D.C. rule relating to government-to-private moves (D.C. Rule 1.11), contained no requirement for post hoc reporting but reminded lawyers (in proposed comment [24]) that supervisory lawyers in the firm can be held responsible, under certain circumstances, for violations of the rules by subordinate lawyers or by nonlawyer staff members. *See* D.C. Rules 5.1, 5.3.

In addition to seeking commenters' preferences about these three options, the committee invited comments on whether Option 1 and Option 2 *both* should be required—that is, reporting about compliance upon reasonable request by the former client *plus* reporting any material breach.

Also of interest to the committee was whether a workable standard could be formulated that would permit screening for a lawyer whose knowledge from the former representation is limited but not for a lawyer whose knowledge is so broad or significant that screening should not be relied upon to protect the former client's confidential information. This issue of "limited screening"-- whether to craft a rule that would permit nonconsensual lateral moves only for certain lawyers based upon the level of their exposure to a client or former client -- was discussed during the ABA's consideration of the issue but no such formulation was adopted as part of the new Model Rule and none was included in the committee discussion draft. But such restrictions are contained in one-half of the states that have adopted some form of nonconsensual screening.

2. Analysis of discussion draft

A brief analysis of the principal arguments in support of and opposed to lateral screening follows.[10] This summary was a part of the Rules Review Committee's call for public comment and reflects the initial findings and analysis of the lateral screening subcommittee.[11] The summary includes positions supported or urged by various members of the Rules Review Committee as noted below.

i. Support of expanding lateral screening

Those who support expanding lateral screening to cover moves between private sector jobs note that from a policy standpoint, lawyer mobility is viewed as desirable—for clients as well as for lawyers. Indeed, the D.C. Rules and the Model Rules state that restricting lawyers' right to practice "not only limits their professional autonomy but also limits the freedom of clients to choose a lawyer."[12] The District has permitted lateral screening for government attorneys moving to the private sector for nearly three decades,[13] as well as in the other

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[10] *See* n. 8.

[11] Many of the arguments presented are positions that were also espoused during debate on the floor of the ABA House of Delegates during its deliberations on this issue.

[12] D.C. Rule 5.6, comment [1]; *accord* Model Rule 5.6, comment [1].

[13] *See In re Revolving Door*, 445 A.2d 615 (D.C. 1982); *see also* D.C. Rule 1.11; D.C. Opinion 279 (1998).

circumstances discussed above. Moreover, as noted above, about half of American jurisdictions already permit some form of screening for lawyers moving between private sector jobs, and the change to the Model Rules may lead additional jurisdictions to adopt this concept.

Proponents contend that few, if any, problems have been reported despite the longtime existence of rules permitting screening as an alternative to imputation, and that the realities of modern law practice—with firms spread across the nation and the globe—justify the availability of the screening alternative. Although there is a special reason—encouraging public service—to allow screening for former government attorneys, the risks when such individuals are screened upon moving to the private sector are similar to those for moves between private sector positions.

Finally, proponents note that the benefits of permitting lateral screening are not limited to large law firms. Indeed, legal service organizations, which also are subject to the imputation provisions of D.C. Rule 1.10(a), frequently see movement of lawyers among them and confront the same limitations on mobility.

ii. Opposition to expanding lateral screening

Opponents of expanding lateral screening question whether screens work in practice, as well as whether the former client can be expected to have confidence that its secrets will be protected. Other objections are that the availability of screening might lead a firm to hire away an opposing firm's senior lawyer on a matter in an effort to impair the opposing party's ability to present its case. Still others believe that even if the migrating lawyer can protect the former client's confidential information, professionalism and client loyalty should prevent a lawyer from taking such information to another firm that is representing its arch-enemy in high stakes litigation against it.

A lack of remedies for violating such a screen also has been cited, although there is case law permitting injunctive relief where a lawyer or firm is said to have breached its duty to a client. *See, e.g., Maritrans GP, Inc. v. Pepper, Hamilton & Scheetz*, 529 Pa. 241, 602 A.2d 1277 (1992). Of course, that may require a mechanism for a client to learn of the breach.

D. Analysis of August 2010 Comments

The Rules Review Committee received 20 comments from Bar members and law firms.[14] On October 18, 2010, the full committee met to consider the comments. The comments universally expressed strong support of amending D.C. Rule 1.10 to permit ethical screening of lateral lawyers moving between private employers. Of the comments received, eight favored the committee's proposed discussion draft Option 3, which requires notice of the screen to a former client, but does not require on-going reporting or post-hoc certifications of a law firm's compliance with the implemented screen. Indeed, one comment otherwise supporting Option 3 and two additional comments prefer no notice requirement to former clients at all; as is the rule in Maryland and Illinois.

[14] The 20 comments received in response to the committee's call may be found on the Bar's website at www.dcbar.org/ethics under the Rules Review Committee Reports and Legislative History link.

1. <u>Comments in favor of the ABA Model Rule</u>

Nine commenters favored the ABA Model Rule. However, the principal reason cited for support of the Model Rule was to promote uniformity.[15] Although uniformity in the ethics rules has some value, particularly given the multijurisdictional practice of the majority of those submitting comments, the committee notes that 24 jurisdictions already had in place (and continue to maintain) different rules on permissive ethical screening for lateral lawyers *before* the amendments to ABA Model Rule 1.10 were adopted in 2009. Indeed, the committee is unaware of any jurisdiction that has adopted the exact language of existing ABA Model Rule 1.10(b)(3). Thus, as a practical matter, adopting the ABA Model Rule will not achieve the uniformity desired and expressed within those nine comments.

Several commenters also noted that the post-hoc certification requirements of the ABA Model Rule were largely the result of the compromise struck with those who fundamentally did not believe that screens were effective and who accordingly opposed the overall concept. The committee does not subscribe to this position. Indeed, the cornerstone of the committee's proposed discussion draft and position of all of the comments received is that screens are effective in protecting confidences and secrets of former clients and should be allowed.[16]

2. <u>Recommended provision similar to Rule 1.11(e)</u>

Significantly, five commenters noted that as with government lawyers moving to private practice, situations occasionally arise when lawyers are moving between private employers and a lawyer's or law firm's Rule 1.6 duty of confidentiality to a client would prohibit the required notification under the proposed lateral screening rule to a former client.[17] The ABA Model Rule does not provide a resolution for a lawyer or law firm faced with this situation. The comments recommend a provision in Rule 1.10 similar to that adopted in D.C. Rule 1.11(e).[18] The committee was persuaded that such a provision is desirable and provides a practical resolution to a foreseeable ethical dilemma. The proposed solution has proven workable in the District for many years and is internally consistent in addressing the same type of issue faced by government lawyers moving to private practice.

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[15] Several comments also stated that the ABA Model Rule fairly balanced competing interests.

[16] In addition to more than 30 years of permissive screening experience under D.C. Rule 1.11 (and other experience with permissive screens arising under D.C. Rules 1.12 and 1.18), several large firms stated that they regularly effectively employ screens based on the voluntary consent of former clients of moving lateral lawyers without incident. Arnold & Porter noted that it has put in place screens in over 700 matters.

[17] Such an instance might arise when the moving lawyer's new law firm is representing an opponent or potential opponent of the former firm, but the representation of the new firm is still secret.

[18] Rule 1.11(e) provides:

> If a client requests in writing that the fact and subject matter of a representation subject to paragraph (d) not be disclosed by submitting the signed statements referred to in paragraph (d), such statements shall be prepared concurrently with undertaking the representation and filed with Bar Counsel under seal. If at any time thereafter the fact and subject matter of the representation are disclosed to the public or become a part of the public record, the signed statements previously prepared shall be promptly submitted as required by paragraph (d).

3. "Limited Screening" rejected by the committee

Eleven commenters rejected outright the notion of "limited screening"-- that is permissive screening based on a lateral lawyer's degree of participation in a former matter. All of the comments are clear that such a standard creates too much risk and uncertainty for lawyers and law firms and invites tactical mischief on the part of opponents. The inability to define clearly when a lawyer's participation in a former client's matter will be deemed to be "significant" makes these types of screening rules virtually unworkable in practice. The committee agrees.

4. Language pertaining to tribunals

Although two commenters stated that the language pertaining to tribunals in proposed Comment [20] should be struck as unnecessary and serves only to invite mischief in litigation, the committee as a whole thinks it is not harmful to remind lawyers that tribunals have inherent power to consider facts and equities before them in any challenge to an otherwise ethically permissive screen.

5. Language pertaining to fee apportionment

Finally, three commenters asked the committee to consider further striking or amending the proposed language pertaining to fee apportionment in the rule and/or comments. Such language exists in Rule 1.11 and in the Model Rule and the committee is not persuaded that the prohibition causes a significant burden for either lawyers or law firms.

6. The committee is not unanimous in its recommendation

It should be noted that during the October 18, 2010, meeting, as was also true of all full committee meetings, several members of the committee remained opposed to non-consensual lateral screening and to amendment of the current D.C. Rule. Those committee members expressed concerns primarily about the effectiveness of screens in protecting confidential information (especially in small firm settings), about the appearance of impropriety, and about violations, real or perceived, of the duty of loyalty lawyers owe to former clients. Nevertheless, because the majority of the committee supported lateral screening (and in consideration of the comments received by the committee that unanimously supported lateral screening), all committee members worked together to draft clear and appropriate language to effectuate a lateral screening rule.

E. Final Recommendation

The Rules Review Committee recommends that D.C.'s Rule 1.10 be amended to allow ethical screening with certain initial notice requirements to former clients as set forth below (Option [3] of the committee's discussion draft with clarifying changes).[19] The committee

[19] On October 27, 2010, the Rules Review Committee voted electronically 8-6 (with one abstention) to recommend that D.C.'s Rule 1.10 be amended to allow ethical screening with certain initial notice requirements to former clients

further recommends that amended Rule 1.10 include a subparagraph (f) similar to Rule 1.11(e) to address situations in which a law firm cannot provide required notifications without harming an existing client.

F. Comments Received on the September 2011 Final Draft Report and the Response of the Committee

The committee received 10 comments from law firms strongly supporting the proposed amendments to Rule 1.10(b) and comments as set forth in the September 2011 Final Draft Report. One of the comments repeated an earlier suggestion of the same firm to amend specific language in the comment related to fee apportionment. The committee declined to adopt the suggestion for reasons set forth above in section III.D.(5) above.

G. Proposed Revisions to Rule 1.10

The committee's proposed amendments to Rule 1.10 are set forth beginning on page 15**.**

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as set forth in the proposed rule. As a point of information, the amendments to ABA Model Rule 1.10 to allow screening passed the ABA House of Delegates by a vote of 226 to 191.

District of Columbia Rules of Professional Conduct
Proposed Revisions to Rule 1.10 (Imputed Disqualification: General Rule)

[Unmarked text is the current D.C. rule; proposed additions: **bold and double underscoring**; proposed deletions: strike-through, as in ~~deleted~~.]

Rule 1.10—Imputed Disqualification: General Rule

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, unless:

(1) the prohibition of the individual lawyer's representation is based on an interest of the lawyer described in Rule 1.7(b)(4) and that interest does not present a significant risk of adversely affecting the representation of the client by the remaining lawyers in the firm; or

(2) the representation is permitted by Rules 1.11, 1.12, or 1.18**, or by paragraph (b) of this rule.**

(b)**(1) Except as provided in subparagraphs (2) and (3), when** ~~When~~ a lawyer becomes associated with a firm, the firm may not knowingly represent a person in a matter which is the same as, or substantially related to, a matter with respect to which the lawyer had previously represented a client whose interests are materially adverse to that person and about whom the lawyer has in fact acquired information protected by Rule 1.6 that is material to the matter.

(2) The firm is not disqualified **by this paragraph** if the lawyer participated in a previous representation or acquired information under the circumstances covered by Rule 1.6(h) or Rule 1.18.

(3) The firm is not disqualified by this paragraph if the prohibition is based upon Rule 1.9 and

(A) the disqualified lawyer is screened from the matter and is apportioned no part of the fee therefrom; and

(B) written notice is promptly given by the firm and the lawyer to any affected former client of the screened lawyer, such notice to include a description of the screening procedures employed and a statement of compliance with these Rules.

(c) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client who was represented by the formerly associated lawyer during the association and is not currently represented by the firm, unless:

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

(2) any lawyer remaining in the firm has information protected by Rule 1.6 that is material to the matter.

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

(e) A lawyer who, while affiliated with a firm, is made available to assist the Office of the Attorney General of the District of Columbia in providing legal services to that agency is not considered to be associated in a firm for purposes of paragraph (a), provided, however, that no such lawyer shall represent the Office of the Attorney General with respect to a matter in which the lawyer's firm appears on behalf of an adversary.

(f) If a client of the firm requests in writing that the fact and subject matter of a representation subject to paragraph (b) not be disclosed by submitting the written notice referred to in subparagraph (b)(3)(B), such notice shall be prepared concurrently with undertaking the representation and filed with Bar Counsel under seal. If at any time thereafter the fact and subject matter of the representation are disclosed to the public or become a part of the public record, the written notice previously prepared shall be promptly submitted as required by subparagraph (b)(3)(B).

Comment

Definition of "Firm"

[1] Whether two or more lawyers constitute a firm within this definition can depend on the specific facts. *See* Rule 1.0(c). For purposes of this rule, the term "firm" includes lawyers in a private firm and lawyers employed in the legal department of a corporation, legal services organization, or other organization, but does not include a government agency or other government entity. For example, two practitioners who share office space and occasionally consult or assist each other ordinarily would not be regarded as constituting a firm. However, if they present themselves to the public in a way suggesting that they are a firm or conduct themselves as a firm, they should be regarded as a firm for purposes of the Rules. 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 confidential 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.

[2] There is ordinarily no question that the members of the law department of an organization constitute a firm within the meaning of the Rules of Professional Conduct, but there can be

uncertainty as to the identity of the client. For example, it may not be clear whether the law department of a corporation represents a 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.

[3] Similar questions can also arise with respect to lawyers in legal aid organizations. Lawyers employed in the same unit of a legal service organization constitute a firm, but not necessarily those employed in separate units. As in the case of independent practitioners, whether the lawyers should be treated as associated with each other can depend on the particular Rule that is involved, and on the specific facts of the situation.

Principles of Imputed Disqualification

[4] The rule of imputed disqualification stated in paragraph (a) gives effect to the principle of loyalty to the client as it applies to lawyers who practice in a law firm. Such situations can be considered from the premise that a firm of lawyers is essentially one lawyer for purposes of the Rules governing loyalty to the client, or from the premise that each lawyer is vicariously bound by the obligation of loyalty owed by each lawyer with whom the lawyer is associated. Paragraph (a) operates only among the lawyers currently associated in a firm. When a lawyer moves from one firm to another, the situation is governed by paragraph (b) or (c).

[5] Where an individual lawyer is prohibited from engaging in certain transactions under Rule 1.8, paragraph (j) of that Rule, and not this Rule, governs whether that prohibition applies also to other lawyers in a firm with which that lawyer is associated. For issues involving prospective clients, see Rule 1.18.

[6] Where a lawyer has joined a private firm after having represented the government, the situation is governed by Rule 1.11.

Exception for Personal Interest of the Disqualified Lawyer

[7] The rule in paragraph (a) does not prohibit representation by the firm where neither questions of client loyalty nor protection of confidential information are presented. Where an individual lawyer could not effectively represent a given client because of an interest described in Rule 1.7(b)(4), but that lawyer will do no work on the matter and the disqualifying interest of the lawyer will not adversely affect the representation by others in the firm, the firm should not be disqualified. For example, a lawyer’s strong political beliefs may disqualify the lawyer from representing a client, but the firm should not be disqualified if the lawyer’s beliefs will not adversely affect the representation by others in the firm. Similarly, representation of a client by the firm would not be precluded merely because the client’s adversary is a person with whom one of the firm’s lawyers has longstanding personal or social ties or is represented by a lawyer in another firm who is closely related to one of the firm’s lawyers. *See* Rule 1.7, Comment [12] and Rule 1.8(h), Comment [7], respectively. Nor would representation by the firm be precluded merely because one of its lawyers is seeking possible employment with an opponent (*e.g.*, U.S. Attorney’s Office) or with a law firm representing the opponent of a firm client.

Lawyers Moving Between Firms

[8] When lawyers move between firms or when lawyers have been associated in a firm but then end their association, the fiction that the law firm is the same as a single lawyer is no longer wholly realistic. There are several competing considerations. First, the client previously represented must be reasonably assured that the principle of loyalty to the client is not compromised. Second, the rule of disqualification should not be so broadly cast as to preclude other persons from having reasonable choice of legal counsel. Third, the rule of disqualification should not unreasonably hamper lawyers from forming new associations and taking on new clients after having left a previous association, or unreasonably hamper the former firm from representing a client with interests adverse to those of a former client who was represented by a lawyer who has terminated an association with the firm. In this connection, it should be recognized that today many lawyers practice in firms, that many to some degree limit their practice to one field or another, and that many move from one association to another several times in their careers. If the concept of imputed disqualification were defined with unqualified rigor, the result would be radical curtailment of the opportunity of lawyers to move from one practice setting to another and of the opportunity of clients to change counsel.

[9] Reconciliation of these competing principles in the past has been attempted under two rubrics. One approach has been to seek *per se* rules of disqualification. For example, it has been held that a partner in a law firm is conclusively presumed to have access to all confidences concerning all clients of the firm. Under this analysis, if a lawyer has been a partner in one law firm and then becomes a partner in another law firm, there is a presumption that all confidences known by a partner in the first firm are known to all partners in the second firm. This presumption might properly be applied in some circumstances, especially where the client has been extensively represented, but may be unrealistic where the client was represented only for limited purposes. Furthermore, such a rigid rule exaggerates the difference between a partner and an associate in modern law firms.

[10] The other rubric formerly used for dealing with vicarious disqualification is the appearance of impropriety proscribed in Canon 9 of the Code of Professional Responsibility. Applying this rubric presents two problems. First, the appearance of impropriety can be taken to include any new client lawyer relationship that might make a former client feel anxious. If that meaning were adopted, disqualification would become little more than a question of subjective judgment by the former client. Second, since "impropriety" is undefined, the term "appearance of impropriety" is question-begging. It therefore has to be recognized that the problem of imputed disqualification cannot be properly resolved either by simple analogy to a lawyer practicing alone or by the very general concept of appearance of impropriety.

[11] A rule based on a functional analysis is more appropriate for determining the question of vicarious disqualification. Two functions are involved: preserving confidentiality and avoiding positions adverse to a client.

Confidentiality

[12] Preserving confidentiality is a question of access to information. Access to information, in

turn, is essentially a question of fact in particular circumstances, aided by inferences, deductions, or working presumptions that reasonably may be made about the way in which lawyers work together. A lawyer may have general access to files of all clients of a law firm and may regularly participate in discussions of their affairs; it should be inferred that such a lawyer in fact is privy to all information about all the firm's clients. In contrast, another lawyer may have access to the files of only a limited number of clients and participate in discussion of the affairs of no other clients; in the absence of information to the contrary, it should be inferred that such a lawyer in fact is privy to information about the clients actually served but not those of other clients.

[13] Application of paragraphs (b) and (c) depends on a situation's particular facts. In any such inquiry, the burden of proof should rest upon the firm whose disqualification is sought.

[14] The provisions of paragraphs (b) and (c) which refer to possession of protected information operate to disqualify the firm only when the lawyer involved has actual knowledge of information protected by Rule 1.6. Thus, if a lawyer while with one firm acquired no knowledge of information relating to a particular client of the firm, and that lawyer later joined another firm, neither the lawyer individually nor the second firm is disqualified from representing another client in the same or a substantially related matter even though the interests of the two clients conflict.

[15] Independent of the question of disqualification of a firm, a lawyer changing professional association has a continuing duty to preserve confidentiality of information about a client formerly represented. See Rule 1.6.

Adverse Positions

[16] The second aspect of loyalty to a client is the lawyer's obligation to decline subsequent representations involving positions adverse to a former client arising in the same or substantially related matters. This obligation requires abstention from adverse representations by the individual lawyer involved, and may also entail abstention of other lawyers through imputed disqualification. Hence, this aspect of the problem is governed by the principles of Rule 1.9. Thus, under paragraph (b), if a lawyer left one firm for another, the new affiliation would preclude the lawyer's new firm from continuing to represent clients with interests materially adverse to those of the lawyer's former clients in the same or substantially related matters. In this respect paragraph (b) is at odds with – and thus must be understood to reject – the dicta expressed in the "second" hypothetical in the second paragraph of footnote 5 of *Brown v. District of Columbia Board of Zoning Adjustment,* 486 A.2d 37, 42 n. 5 (D.C. 1984) (en banc), premised on *LaSalle National Bank v. County of Lake,* 703 F.2d 252, 257-59 (7th Cir. 1983). **An exception to paragraph (b) is provided by subparagraph (b)(3).**

[17] The concept of "former client" as used in paragraph (b) extends only to actual representation of the client by the newly affiliated lawyer while that lawyer was employed by the former firm. Thus, not all of the clients of the former firm during the newly affiliated lawyer's practice there are necessarily deemed former clients of the newly affiliated lawyer. Only those clients with whom the newly affiliated lawyer in fact personally had a lawyer client relationship are former clients within the terms of paragraph (b).

[18] ~~The last sentence of paragraph~~ **Subparagraph** (b)**(2)** limits the imputation rule in certain limited circumstances. Those circumstances involve situations in which any secrets or confidences obtained were received before the lawyer had become a member of the Bar, but during a time when such person was providing assistance to another lawyer. The typical situation is that of the part time or summer law clerk, or so called summer associate. Other types of assistance to a lawyer, such as working as a paralegal or legal assistant, could also fall within the scope of this sentence. The limitation on the imputation rule is similar to the provision dealing with judicial law clerks under Rule 1.11(b). Not applying the imputation rule reflects a policy choice that imputation in such circumstances could unduly impair the mobility of persons employed in such nonlawyer positions once they become members of the Bar. The personal disqualification of the former non-lawyer is not affected, and the lawyer who previously held the non-legal job may not be involved in any representation with respect to which the firm would have been disqualified ~~but for the last sentence of paragraph~~ **subparagraph** (b)**(2)**. Rule 1.6(h) provides that the former nonlawyer is subject to the requirements of Rule 1.6 (regarding protection of client confidences and secrets) just as if the person had been a member of the Bar when employed in the prior position.

[19] Under certain circumstances, paragraph (c) permits a law firm to represent a person with interests directly adverse to those of a client represented by a lawyer who formerly was associated with the firm. The Rule applies regardless of when the formerly associated lawyer represented the client. The firm, however, may not represent a person in a matter adverse to a current client of the firm, which would violate Rule 1.7. Moreover, the firm may not represent the person where the matter is the same as, or substantially related to, that in which the formerly associated lawyer represented the client and any other lawyer currently in the firm has material information protected by Rule 1.6.

[20] Subparagraph (b)(3) removes the imputation otherwise required by paragraphs 1.10(a) and (b), but does so without requiring informed consent by the former client of the lawyer changing firms. Instead, it requires that the procedures set out in subparagraphs (b)(3)(A) and (B) be followed. The term "screened" is defined in Rule 1.0(l) and explained in comments [4]-[6] to Rule 1.0. Lawyers should be aware, however, that even where subparagraph 1.10(b)(3) has been followed, tribunals in other jurisdictions may consider additional factors in ruling upon motions to disqualify lawyers from pending litigation. Establishing a screen under this rule does not constitute dropping an existing client in favor of another client. Cf. D.C. Legal Ethics Op. 272 (1997) (permitting lawyer to drop occasional client for whom lawyer is handling no current projects in order to accept conflicting representation).

[21] Subparagraph (b)(3)(A) does not prohibit the screened lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly related to the matter from which the screened lawyer is disqualified. See D.C. Legal Ethics Op. 279 (1998).

[22] The written notice required by subparagraph (b)(3)(B) generally should include a description of the screened lawyer's prior representation and an undertaking by the new

law firm to respond promptly to any written inquiries or objections by the former client regarding the screening procedures. The notice should be provided as soon as practicable after the need for screening becomes apparent. It also should include a statement by the screened lawyer and the new firm that the screened lawyer's former client's confidential information has not been disclosed or used in violation of the Rules. The notice is intended to enable the screened lawyer's former client to evaluate and comment upon the effectiveness of the screening procedures. Nothing in this rule is intended to restrict the firm and the screened lawyer's former client from agreeing to different screening procedures but those set out herein are sufficient to comply with the rule.

[23] Paragraph (f) makes it clear that a lawyer's duty, under Rule 1.6, to maintain client confidences and secrets may preclude the submission of any notice required by subparagraph (b)(3)(b). If a client requests in writing that the fact and subject matter of the representation not be disclosed, the screened lawyer and law firm must comply with that request. If a client makes such a request, the lawyer must abide by the client's wishes until such time as the fact and subject matter of the representation become public through some other means, such as a public filing. Filing a pleading that is publicly available or making an appearance in a proceeding before a tribunal that is open to the public constitutes a public filing for purposes of this rule. Once information concerning the representation is public, the notifications called for must be made promptly, and the lawyers involved may not honor a client's request not to make the notifications.

[24] Although paragraph (f) prohibits the lawyer from disclosing the fact and subject matter of the representation when the client has requested in writing that the information be kept confidential, the paragraph requires the screened lawyer and the screened lawyer's new firm to prepare the documents described in paragraph (f) as soon as the representation commences, to file the documents with Bar Counsel, and to preserve the documents for possible submission to the screened lawyer's former client if and when the client does consent to their submission or the information becomes public.

[25] The responsibilities of partners, managers, and supervisory lawyers prescribed by Rules 5.1 and 5.3 apply in respect of screening arrangements under Rule 1.10(b)(3).

Lawyers Assisting the Office of the Attorney General of the District of Columbia

[~~21~~ **26**] The Office of the Attorney General of the District of Columbia may experience periods of peak need for legal services which cannot be met by normal hiring programs, or may experience problems in dealing with a large backlog of matters requiring legal services. In such circumstances, the public interest is served by permitting private firms to provide the services of lawyers affiliated with such private firms on a temporary basis to assist the Office of the Attorney General. Such arrangements do not fit within the classical pattern of situations involving the general imputation rule of paragraph (a). Provided that safeguards are in place which preclude the improper disclosure of client confidences or secrets, and the improper use of one client's confidences or secrets on behalf of another client, the public interest benefits of such arrangements justify an exception to the general imputation rule, just as Comment [1] excludes from the definition of "firm" lawyers employed by a government agency or other government entity. Lawyers assigned to assist the Office of the Attorney General pursuant to such temporary programs are, by virtue of paragraph (e), treated as if they were employed as government employees and as if their affiliation with the private firm did not exist during the period of temporary service with the Office of the Attorney General. See Rule 1.11(h) with respect to the procedures to be followed by lawyers participating in such temporary programs and by the firms with which such lawyers are affiliated after the participating lawyers have ended their participation in such temporary programs.

[~~22~~ **28**] The term “made available to assist the Office of the Attorney General in providing legal services” in paragraph (e) contemplates the temporary cessation of practice with the firm during the period legal services are being made available to the Office of the Attorney General, so that during that period the lawyer’s activities which involve the practice of law are devoted fully to assisting the Office of the Attorney General.

[~~23~~ **29**] Rule 1.10(e) prohibits a lawyer who is assisting the Office of the Attorney General from representing that office in any matter in which the lawyer’s firm represents an adversary. Rule 1.10(e) does not, however, by its terms, prohibit lawyers assisting the Office of the Attorney General from participating in every matter in which the Attorney General is taking a position adverse to that of a current client of the firm with which the participating lawyer was affiliated prior to joining the program of assistance to the Office of the Attorney General. Such an unequivocal prohibition would be overly broad, difficult to administer in practice, and inconsistent with the purposes of Rule 1.10(e).

[~~24~~ **30**] The absence of such a per se prohibition in Rule 1.10(e) does not diminish the importance of a thoughtful and restrained approach to defining those matters in which it is appropriate for a participating lawyer to be involved. An appearance of impropriety in programs of this kind can undermine the public’s acceptance of the program and embarrass the Office of the Attorney General, the participating lawyer, that lawyer’s law firm and clients of that firm. For example, it would not be appropriate for a participant lawyer to engage in a representation adverse to a party who is known to be a major client of the participating lawyer’s firm, even though the subject matter of the representation of the Office of the Attorney General bears no substantial relationship to any representation of that party by the participating lawyer’s firm. Similarly, it would be inappropriate for a participating lawyer to be involved in a representation adverse to a party that the participating lawyer has been personally involved in representing while at the firm, even if the client is not a major client of the firm. The appropriate test is that of conservative good judgment; if any reasonable doubts concerning the unrestrained vigor of the participating lawyer’s representation on behalf of the Office of the Attorney General might be created, the lawyer should advise the appropriate officials of the Office of the Attorney General and decline to participate. Similarly, if participation on behalf of the Office of the Attorney General might reasonably give rise to a concern on the part of a participating lawyer’s firm or a client of the firm that its secrets or confidences (as defined by Rule 1.6) might be compromised, participation should be declined. It is not anticipated that situations suggesting the appropriateness of a refusal to participate will occur so frequently as to significantly impair the usefulness of the program of participation by lawyers from private firms.

[~~25~~ **31**] The primary responsibility for identifying situations in which representation by the participating lawyer might raise reasonable doubts as to the lawyer's zealous representation on behalf of the Office of the Attorney General must rest on the participating lawyer, who will generally be privy to nonpublic information bearing on the appropriateness of the lawyer's participation in a matter on behalf of the Office of the Attorney General. Recognizing that many representations by law firms are nonpublic matters, the existence and nature of which may not be disclosed consistent with Rule 1.6, it is not anticipated that law firms from which participating lawyers have been drawn would be asked to perform formal "conflicts checks" with respect to matters in which participating lawyers may be involved. However, consultations between participating lawyers and their law firms to identify potential areas of concern, provided that such consultations honor the requirements of Rule 1.6, are appropriate to protect the interests of all involved – the Office of the Attorney General, the participating lawyer, that lawyer's law firm and any clients whose interests are potentially implicated.

IV. RULE 7.1 (COMMUNICATIONS CONCERNING A LAWYER'S SERVICES)

After consideration of an issue referred to it by the D.C. Bar Legal Ethics Committee, the Rules Review Committee recommends the adoption of a rule clearly prohibiting the payment of referral fees, but continuing to allow payment of the usual and reasonable fees or dues charged by a lawyer referral service. Such a rule was in effect in the District prior to the 1991 adoption of a unique rule allowing the use of paid intermediaries or "runners." That rule existed only in the District of Columbia and was repealed in 2007. The way in which the runners' rule was repealed – through the Rule 7.1(b)(2) prohibition against giving "anything of value" to others "for recommending the lawyer's services through in-person contact" – leaves District of Columbia lawyers without clear guidance on the propriety or impropriety of the payment of referral fees in situations that do not involve "in-person solicitation." As discussed more fully below, the committee recommends a return to the approach the District of Columbia used on referral fees before 1991.

A. Inquiry from the Legal Ethics Committee

By letter dated November 18, 2008, the Chair of the Legal Ethics Committee asked the Rules Review Committee to consider the issue of referral fees. As the letter explained, the Legal Ethics Committee had received an inquiry that it believed could not be answered definitively under the current D.C. Rules:

> The Legal Ethics Committee has recently grappled with the question of whether a lawyer may pay a referral fee to another lawyer who refers a case. A subsidiary issue is whether two lawyers or law firms may enter into an exclusive agreement to refer certain kinds of cases to each other, *e.g.*, I will refer you all my plaintiffs' personal injury cases, and you will refer me all of your criminal cases. We are not concerned here with fee-splitting, by which I mean the referring and referred lawyers agree to divide the fee paid by the client. We believe Rule 1.5(e) adequately addresses that question. Rather our focus is on a payment by the referred lawyer from her (not the client's) funds to the referring lawyer as compensation or a reward for the referral.
>
> I think it is fair to say that the Committee believed that such referral fees or exclusive arrangements should be prohibited, but we did not believe that the Rules actually address the issue.

As the letter noted, referral fees in some circumstances could implicate conflict of interest principles under Rule 1.7(b)(4). However, that rule would not apply if the referrer were not acting as a lawyer or if the referred prospective client was never the referrer's client or prospective client. "Furthermore, even if Rule 1.7(b)(4) did apply, the 'conflict' could be waived pursuant to Rule 1.7(c). The Model Rules, which prohibit such referrals, do not provide for waivers."

The letter identified the recent amendment of Rule 7.1 as the principal source of the Legal Ethics Committee's inability to render an opinion:

> We think that the lacuna in our Rules with respect to referral fees and exclusivity arrangements probably has an historical basis. The Model Rules have for some time generally prohibited referral fees and exclusive agreements. Model Rule 7.2(b). When this jurisdiction adopted rules based on the Model Rules, there existed here a practice of lawyers employing "runners," and so D.C. Rule 7.1 permitted the payment of intermediaries to refer work to a lawyer, provided that the intermediaries conformed their behavior to certain requirements. See Pre-Feb. 1, 2007 Rule 7.1, Comment [6]. This practice proved to be subject to abuse, and the recent amendments to the Rules now prohibit it. Rule 7.1, Comment [5].
>
> The method by which the amended Rules eliminated the use of "runners" was to prohibit payments to intermediaries for recommending the lawyer "through in-person contact." Rule 7.1(b)(2). In-person contact includes contact by telephone, but not electronic mail (Comment [5]) or by other means. The problem that we see is that this language does not apply directly to referral fees or exclusivity agreements. Arguably a lawyer who meets with a prospective client and refers him to another lawyer is governed by Rule 7.1(b)(2). But a referring lawyer who does not contact a prospective client directly, *e.g.,* who responds to an e-mail, does not seem to be covered. Moreover, the rule is focused on an intermediary who contacts and solicits a client for a lawyer; it does not directly address a situation where a person, who is looking for representation, initiates a contact with a lawyer who refers him to another lawyer. Nor does it address exclusive referral agreements, as the Model Rules do. In short, the focus on "runners" seems to have overlooked the question whether referral fees not involving "runners" or exclusive referral arrangements should be permitted.

B. D.C. Rules Approach to Referral Fees and Related Issues Compared to ABA Model Rule

Prior to 1991, the District of Columbia's Code of Professional Responsibility prohibited the giving of anything of value to others for recommending the lawyer's services. From 1991 until February of 2007, D.C. Rule 7.1(b)(5) allowed the use of paid intermediaries to make in-person solicitations of potential clients, provided that certain disclosures were made to clients about the consideration paid to the intermediary and the effect of such payment, if any, on the total fee to be charged to the client. Since early 2007, however, lawyers have been prohibited from giving "anything of value to a person (other than the lawyer's partner or employee) for recommending the lawyer's services through in-person contact." Rule 7.1(b)(2).

By contrast, the ABA's Model Code and later Model Rules have consistently prohibited the payment of referral fees. The Model Rules' current prohibition is in ABA Model Rule 7.2(b), which provides as follows:

> A lawyer shall not give anything of value to a person for recommending the lawyer's services except that a lawyer may
>
> > (1) pay the reasonable costs of advertisements or communications permitted by this Rule;
> >
> > (2) pay the usual charges of a legal service plan or a not-for-profit or qualified lawyer referral service. A qualified lawyer referral service is a lawyer referral service that has been approved by an appropriate regulatory authority;
> >
> > (3) pay for a law practice in accordance with Rule 1.17; and
> >
> > (4) refer clients to another lawyer or a nonlawyer professional pursuant to an agreement not otherwise prohibited under these Rules that provides for the other person to refer clients or customers to the lawyer, if
> >
> > > (i) the reciprocal referral agreement is not exclusive, and
> > >
> > > (ii) the client is informed of the existence and nature of the agreement.

The ABA added subsection (b)(4) in 2002.

The Model Rules treat referral fees separately from fee sharing. ABA Model Rule 1.5(e) addresses fee sharing between lawyers in different firms. Its provisions are similar to those of D.C. Rule 1.5(e), but not identical.[20] The Rules Review Committee does not recommend any revisions to the fee splitting restrictions in D.C. Rule 1.5(e).

1. <u>History of D.C. Rule 7.1</u>

Prior to 1991, DR 2-103(C) of the District of Columbia's Code of Professional Responsibility prohibited referral fees:

[20] D.C. Rule 1.5(e) provides that "[a] division of a fee between lawyers who are not in the same firm may be made only if:

> "(1) the division is in proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the representation;
>
> "(2) the client is advised, in writing, of the identity of the lawyers who will participate in the representation, of the contemplated division of responsibility, and of the effect of the association of lawyers outside the firm on the fee to be charged;
>
> "(3) the client gives informed consent to the arrangement; and
>
> "(4) the total fee is reasonable."

> A lawyer shall not compensate or give anything of value to a person or organization to recommend or secure his or her employment by a client, or as a reward for having made a recommendation resulting in his or her employment by a client, except that he or she may pay for public communications permitted by DR 2-101 [Publicity and Advertising] and the usual and reasonable fees or dues charged by a lawyer referral service.

Effective January 1, 1991, the District of Columbia adopted a unique Rule 7.1 but did not adopt ABA Model Rules 7.2, 7.3, or 7.4. As explained in the "Jordan Committee Report" recommending the rules that were eventually adopted:

> The Committee decided not to retain the prohibition in ABA proposed Rule 7.2(c) concerning the use of paid intermediaries to contact prospective clients. The first three subparagraphs of Rule 7.1(b)(1) deal with the circumstances in which overreaching is most likely to occur, and subparagraph (b)(4) forbids a lawyer to induce others (such as police officers or hospital personnel) to breach their own legal obligations. The Board of Governors agreed that the ABA's prohibition against paid intermediaries should not be retained, but added, in subparagraph (b)(5), certain disclosure requirements. A lawyer must take reasonable steps to ensure that a potential client is informed of any consideration paid by the lawyer to the intermediary and any effect of such consideration on the total fee to be charged the potential client. The use of paid intermediaries may assist lawyers in making their availability known to those who might not otherwise be able to secure the legal representation they desire.

Proposed Rules of Professional Conduct and Related Comments Showing the Language Proposed by the American Bar Association, Changes Recommended by the District of Columbia Bar Model Rules of Professional Conduct Committee, and Changes Recommended by the Board of Governors of the District of Columbia Bar, at 227-28 (Nov. 19, 1986).

As adopted and in force from 1991 through January of 2007, D.C. Rule 7.1 provided, in pertinent part, as follows:

> **Rule 7.1 Communications Concerning a Lawyer's Services**
>
> * * *
>
> (b) a lawyer shall not seek by in-person contact, or through an intermediary, employment (or employment of a partner or associate) by a non-lawyer who has not sought the lawyer's advice regarding employment of a lawyer, if:
>
> * * *

(4) the solicitation involves use of an intermediary and the lawyer knows or could reasonably ascertain that such conduct violates the intermediary’s contractual or other legal obligations; or

(5) the solicitation involves the use of an intermediary and the lawyer has not taken all reasonable steps to ensure that the potential client is informed of (a) the consideration, if any, paid or to be paid by the lawyer to the intermediary, and (b) the effect, if any, of the payment to the intermediary on the total fee to be charged.

(c) a lawyer shall not knowingly assist an organization that furnishes or pays for legal services to others to promote the use of the lawyer's services or those of the lawyer's partner or associate, or any other lawyer affiliated with the lawyer or the lawyer's firm, as a private practitioner, if the promotional activity involves the use of coercion, duress, compulsion, intimidation, threats, or vexatious or harassing conduct.

*   *   *

Rule 7.1(b)(5) – allowing the use of paid intermediaries – was unique to the District of Columbia.

Effective February 1, 2007, the District of Columbia Court of Appeals revised the rule to prohibit that practice. The revision was accomplished by deleting Rule 7.1(b)(5) and by inserting the following language at what became Rule 7.1(b)(2): “A lawyer shall not give anything of value to a person (other than the lawyer’s partner or employee) for recommending the lawyer’s services through in-person contact.”

C. Proposed Recommendation and Analysis

After consideration of the issues raised in the letter from the Legal Ethics Committee, the Rules Review Committee recommends adoption of the following substantive changes to D.C. Rule 7.1:

(b) ~~(1)~~ A lawyer shall not seek by in-person contact, employment (or employment of a partner or associate) by a nonlawyer who has not sought the lawyer’s advice regarding employment of a lawyer, if:

(1) ~~(A)~~ The solicitation involves use of a statement or claim that is false or misleading, within the meaning of paragraph (a);

(2) ~~(B)~~ The solicitation involves the use of coercion, duress or harassment; or

(3) ~~(C)~~ The potential client is apparently in a physical or mental condition which would make it unlikely that the potential client could exercise reasonable, considered judgment as to the selection of a lawyer.

~~(2) A lawyer shall not give anything of value to a person (other than the lawyer's partner or employee) for recommending the lawyer's services through in person contact.~~

(c) A lawyer shall not pay money or give anything of material value to a person (other than the lawyer's partner or employee) in exchange for recommending the lawyer's services except that a lawyer may:

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

(2) Pay the usual and reasonable fees or dues charged by a legal service plan or a lawyer referral service;

(3) Pay for a law practice in accordance with Rule 1.17; and

(4) Refer clients to another lawyer or nonlawyer professional pursuant to an agreement not otherwise prohibited under these Rules that provides for the other person to refer clients or customers to the lawyer, if:

(A) The reciprocal agreement is not exclusive, and

(B) The client is informed of the existence and nature of the agreement.

1. Proposed Rule 7.1 compared to the ABA Model Rule

Proposed new Rule 7.1(c) is based on Model Rule 7.2(b), but differs from the Model Rule in three respects. First, the ABA Model Rule prohibits the "giv[ing] anything of value" for a recommendation while the proposed D.C. rule prohibits only the "pay[ment] of money" or the "giv[ing] of anything of *material* value" for a referral. Ethics opinions in a number of jurisdictions have read the ABA Model Rule's language to its logical extreme, to prohibit even indirect benefits and de minimis gifts. *See ABA/BNA Lawyers' Manual on Professional Conduct* 81:706-707. By contrast, an ethics opinion from Arizona concluded that "[a]n attorney may give a de minimis gift to an attorney or a non-attorney after a client referral if the gift is an expression of thanks and not a *quid pro quo* payment." Arizona Ethics Opinion 02-01 (2002). In reaching that conclusion, the Arizona committee rejected the approach used in other jurisdictions:

> The Committee declines to read ER 7.1(j) as narrowly as other jurisdictions and seeks instead to interpret the rule in light of its purpose, to prohibit a lawyer from paying someone else to

> recommend his or her services. Annotated Model Rules of Professional Conduct (Fourth Edition), at page 511.
>
> The Committee does not believe ER 7.1(j) is implicated under the facts presented by the inquiring attorney, since the circumstances do not suggest that the proposed gifts are made to be payments to the recipients for having recommended the attorney. They are to be given after the referral, rather than before, and are intended as an expression of thanks, rather than as compensation. Finally, the gifts do not have a significant value. These facts lead the Committee to conclude that neither the inquiring attorney nor the recipients would view the gifts as payments for a referral, and that they therefore would not violate ER 7.1(j)….
>
> …A strict interpretation of ER 7.1(j) prohibiting a de minimis gift, where no quid pro quo is present, for referring a client to an attorney is an unrealistic and harsh view. Where the independent judgment of the attorney giving the gift is not affected or influenced, the intent of the rule is not to prohibit a de minimis gift as an expression of thanks and professional courtesy after the referral has been made.

The Rules Review Committee favors the interpretation given in the Arizona opinion, but could not be assured that Bar Counsel or the Court of Appeals would read the rule the same way if the ABA Model Rule language were used.[21] Accordingly, the Rules Review Committee recommends that the D.C. rule apply only to payments of money or the giving of anything of "material" value.

Second, the ABA Model Rule prohibits referral fee payments to anyone, while the Rules Review Committee's recommendation excludes "the lawyer's partner or employee" from the prohibition. Such an exclusion is consistent with the similar exclusion in existing D.C. Rule 7.1(b)(2). The committee believes it should be applied to the new rule as well.

Third, the proposed D.C. rule allows payments of the "usual and reasonable fees or dues charged by a legal service plan or a lawyer referral service." By contrast, the corresponding ABA Model rule allows payments only to legal service plans or "not-for-profit or qualified lawyer referral service[s]." Model Rule 7.2(b)(2).[22] Because the original DR 2-103(C) in the District's former Code of Professional Responsibility rejected the ABA approach by allowing

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[21] Comment [5] to Arizona Rule 7.2 now says, "Giving or receiving a de minimis gift that is not a quid pro quo for referring a particular client is permissible. California also allows gifts and gratuities to non-lawyers and lawyers, "provided that the gift or gratuity was not offered or given in consideration of any promise, agreement, or understanding that such a gift or gratuity would be forthcoming or that referrals would be made or encouraged in the future." *See* California Rules 1-320(B) & 2-200(B).

[22] "A qualified lawyer referral service is a lawyer referral service that has been approved by an appropriate regulatory authority." Model Rule 7.2(b)(2). The District of Columbia does not currently have a mechanism for approving lawyer referral services, and the Rules Review Committee does not recommend that one be established.

payments to any "lawyer referral service," the Rule Review Committee recommends a return to that language without any qualification on the nature of the "lawyer referral service." This will restore the approach that was used before the 1991 to 2007 period in which payments to intermediaries were allowed.

2. Proposed new subsection (c) of Rule 7.1

The remainder of the proposed new section 7.1(c) tracks the language of ABA Model Rule 7.2(b). Adoption of this rule has the additional benefit of making clear that referral fee regulations do not apply to payments for a law practice in accordance with D.C. Rule 1.17, which was adopted effective 2007.

The committee considered, and ultimately rejected, adding the new language as an additional numbered subsection of Rule 7.1(b). Rule 7.1(b) regulates in-person solicitations while the new rule is intended to apply to all referral fee arrangements, regardless of whether in-person solicitation is involved. Moreover, this language has its own separate, lettered designation within the corresponding ABA Model Rule 7.2(b). Accordingly, the committee recommends that the new language be added as a new Rule 7.1(c), rather than as a new subsection of Rule 7.1(b).

The committee recommends the deletion of subsection (b)(2) if proposed Rule 7.1(c) is adopted. Subsection (b)(2) applies only to (i) the giving of value (ii) for in-person solicitations. In-person solicitations generally are already regulated by the language in Rule 7.1(b)(1). The giving of value portion of the subsection would be incorporated into new Rule 7.1(c), thus rendering subsection (b)(2) superfluous and, potentially, a source of confusion or conflict with new Rule 7.1(c). The subsection's deletion would avoid any unintentional interference between 7.1(b)(2), which is unique to the District of Columbia, and the specific authorizations given by 7.1(c)(1) through (4), which are intended to be at least as broad as authorizations given to attorneys in other jurisdictions.

With the deletion of Rule 7.1(b)(2), Rule 7.1(b) would have only one subsection. The committee therefore recommends that existing Rule 7.1(b)(1) be renumbered as Rule 7.1(b).

3. Proposed new Comments [6] and [7]

The Rules Review Committee recommends the adoption of new Comments [6] and [7] to Rule 7.1 which would explain the rule and alert practitioners to other rules of professional conduct that may apply to referral fee situations. Proposed new Comment [7] is based on Comment [8] to ABA Model Rule 7.2,[23] which explains the rule's application to non-exclusive referral arrangements. The proposed new comments are as follows:

[23] Comment [8] to Model Rule 7.2 provides as follows:

> A lawyer also may agree to refer clients to another lawyer or a nonlawyer professional, in return for the undertaking of that person to refer clients or customers to the lawyer. Such reciprocal referral arrangements must not interfere with the lawyer's professional judgment as to making referrals or as to providing substantive legal services. See Rules 2.1 and 5.4(c). Except as provided in Rule 1.5(e), a lawyer who receives referrals from a lawyer or nonlawyer professional must not pay anything solely for the

[6] A lawyer is not permitted to pay money or give anything of material value to a person (other than the lawyer's partner or employee) in exchange for recommending the lawyer's services. Rule 7.1(c) does not address fee splitting between two or more firms representing the same client in the same project. Compare Rule 1.5(e). Lawyers must also be aware of their obligation to maintain their professional independence under Rule 5.4.

[7] A lawyer may agree to refer clients to another lawyer or a nonlawyer professional, in return for the undertaking of that person to refer clients or customers to the lawyer. Such reciprocal referral arrangements must not interfere with the lawyer's professional judgment as to making referrals or as to providing substantive legal services. See Rules 2.1 and 5.4(c). Except as provided in Rule 1.5(e), a lawyer who receives referrals from a lawyer or nonlawyer professional must not pay money or give anything of material value solely for the referral, but the lawyer does not violate paragraph (c) of this Rule by agreeing to refer clients to the other lawyer or nonlawyer professional, so long as the reciprocal referral agreement is not exclusive and the client is informed of the referral agreement. Conflicts of interest created by such arrangements are governed by Rule 1.7. Reciprocal referral agreements should not be of indefinite duration and should be reviewed periodically to determine whether they comply with these Rules. This Rule does not restrict referrals or divisions of revenues or net income among lawyers within firms comprised of multiple entities.

Next, the insertion of a new Rule 7.1(c) would necessitate that existing Rules 7.1(c), (d), and (e) be redesignated as Rules 7.1(d), (e), and (f), respectively.

Finally, Comment [36] to Rule 1.7 contains a citation to Rule 7.1(b) that would need to be changed to Rule 7.1(c). The proposed change to that comment is set forth in the note below.[24]

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referral, but the lawyer does not violate paragraph (b) of this Rule by agreeing to refer clients to the other lawyer or nonlawyer professional, so long as the reciprocal referral agreement is not exclusive and the client is informed of the referral agreement. Conflicts of interest created by such arrangements are governed by Rule 1.7. Reciprocal referral agreements should not be of indefinite duration and should be reviewed periodically to determine whether they comply with these Rules. This Rule does not restrict referrals or divisions of revenues or net income among lawyers within firms comprised of multiple entities.

[24] "[36] Lawyers, either alone or through firms, may have interests in enterprises that do not practice law but that, in some or all of their work, become involved with lawyers or their clients either by assisting the lawyer in providing legal services or by providing related services to the client. Examples of such enterprises are accounting firms, consultants, real estate brokerages, and the like. The existence of such interests raises several questions under this rule. First, a lawyer's recommendation, as part of legal advice, that the client obtain the services of an enterprise in which the lawyer has an interest implicates paragraph 1.7(b)(4). The lawyer should not make such a recommendation unless able to conclude that the lawyer's professional judgment on behalf of the client will not be adversely affected. Even then, the lawyer should not make such a recommendation without full disclosure to the client so that the client can make a fully informed choice. Such disclosure should include the nature and substance of the lawyer's or the firm's interest in the related enterprise, alternative sources for the non-legal services in question, and sufficient information so that the client understands that the related enterprise's services are not legal services and that the client's relationship to the related enterprise will not be that of a client to attorney. Second, such a related enterprise may refer a potential client to the lawyer; the lawyer should take steps to assure that the related

4. Referral fees in other jurisdictions

For the sake of completeness, it should be noted that some jurisdictions allow referral fees – or something quite similar to referral fees in certain cases – through use of a fee splitting rule that is inconsistent with the current approach in the District of Columbia and under the Model Rules. Fourteen states allow fee splitting between lawyers in different firms without the proportionality or assumption of responsibility that Model Rule 1.5(e) and D.C. Rule 1.5(e) require. Those states are Alabama, California, Connecticut, Delaware, Kansas, Maine, Massachusetts, Michigan, Nevada, New Hampshire, Oregon, Pennsylvania, Virginia,[25] and West Virginia.[26] Reduced to their essence, rules in those states allow referral fees to lawyers – but not to non-lawyers – provided that certain disclosures are made. In some states (Alabama, for example), the permissive rules are confined to contingent fee cases. West Virginia's rule allows referral fees through the use of a special definition of "services performed" and "joint responsibility" that effectively eliminates those requirements in contingent fee cases.[27] Because the District of Columbia's approach to fee splitting in Rule 1.5(e) is well understood and has not been the subject of requests for a revision, the Rules Review Committee does not recommend the changes to Rule 1.5 that would be required if the District were to adopt any of the 14 jurisdictions' approach to these issues.

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enterprise will inform the lawyer of all such referrals. The lawyer should not accept such a referral without full disclosure of the nature and substance of the lawyer's interest in the related enterprise. *See also* Rule 7.1(**c** ~~b~~). Third, the lawyer should be aware that the relationship of a related enterprise to its own customer may create a significant interest in the lawyer in the continuation of that relationship. The substantiality of such an interest may be enough to require the lawyer to decline a proffered client representation that would conflict with that interest; at least Rule 1.7(b)(4) and (c) may require the prospective client to be informed and to give informed consent before the representation could be undertaken. Fourth, a lawyer's interest in a related enterprise that may also serve the lawyer's clients creates a situation in which the lawyer must take unusual care to fashion the relationship among lawyer, client, and related enterprise to assure that the confidences and secrets are properly preserved pursuant to Rule 1.6 to the maximum extent possible. *See* Rule 5.3."

[25] *See* Virginia Legal Ethics Opinion 1739 (April 13, 2000) (*available at* http://www.vacle.org/opinions/1739.htm).

[26] Two other states, Illinois and Wisconsin, may be more permissive than the ABA as to referral fees to lawyers. However, both states require the referring lawyer to assume the same legal responsibility for the performance of the services in question as would a partner of the receiving lawyer.

[27] West Virginia Rule 1.5(e)(4) provides as follows:

> The requirements of "services performed" and "joint responsibility" shall be satisfied in contingent fee cases when: (1) a lawyer who is regularly engaged in the full time practice of law evaluates a case and forwards it to another lawyer who is more experienced in the area or field of law being referred; (2) the client is advised that the lawyer who is more experienced in the area or field of law being referred will be primarily responsible for the litigation and that there will be a division of fees; and, (3) the total fee charged the client is reasonable and in keeping with what is usually charged for such matters in the community.

D. Final Recommendation

For the reasons discussed above, the Rules Review Committee recommends adoption of the proposed modifications to Rule 7.1 and its comments. These changes would restore the approach that the District used prior to 1991. Such a resumption of the status quo ante is warranted in light of the District's repeal in 2007 of the rule that allowed the use of paid intermediaries.

E. Comments Received on the September 2011 Final Draft Report and the Response of the Committee

The committee received one suggestion from an individual lawyer to amend proposed Rule 7.1(c) to include the word "employer" in the language of the proposed Rule. As proposed by the committee, the rule in pertinent part provides that:

> (c) A lawyer shall not pay money or give anything of material value to a person (other than the lawyer's partner or employee) in exchange for recommending the lawyer's services except that a lawyer may…

The committee agreed with the sentiment of the comment, but determined that the word "partner" as defined by Rule 1.0(i) includes most, if not all, legal employers, and therefore was not necessary.[28]

F. Proposed Revisions to Rule 7.1

The committee's proposed amendments to Rule 7.1 are set forth beginning on page 35**.**

[28] (i) "Partner" denotes a member of a partnership, a shareholder in a law firm organized as a professional corporation or professional limited liability company, or a member of an association authorized to practice law. D.C. Rule 1.0(i).

District of Columbia Rules of Professional Conduct
Proposed Revisions to Rule 7.1 (Communications Concerning a Lawyer's Services)

[Unmarked text is the current D.C. Rule; proposed additions: **bold text and double underscoring;** proposed deletions: a strike-through, as in ~~deleted~~]:

Rule 7.1—Communications Concerning a Lawyer's Services

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

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

(2) Contains an assertion about the lawyer or the lawyer's services that cannot be substantiated.

(b) ~~(1)~~ A lawyer shall not seek by in-person contact, employment (or employment of a partner or associate) by a nonlawyer who has not sought the lawyer's advice regarding employment of a lawyer, if:

(1) ~~(A)~~ The solicitation involves use of a statement or claim that is false or misleading, within the meaning of paragraph (a);

(2) ~~(B)~~ The solicitation involves the use of coercion, duress or harassment; or

(3) ~~(C)~~ The potential client is apparently in a physical or mental condition which would make it unlikely that the potential client could exercise reasonable, considered judgment as to the selection of a lawyer.

~~(2) A lawyer shall not give anything of value to a person (other than the lawyer's partner or employee) for recommending the lawyer's services through in-person contact.~~

(c) A lawyer shall not pay money or give anything of material value to a person (other than the lawyer's partner or employee) in exchange for recommending the lawyer's services except that a lawyer may:

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

(2) Pay the usual and reasonable fees or dues charged by a legal service plan or a lawyer referral service;

(3) Pay for a law practice in accordance with Rule 1.17; and

(4) Refer clients to another lawyer or nonlawyer professional pursuant to an agreement not otherwise prohibited under these Rules that provides for the other person to refer clients or customers to the lawyer, if:

(A) The reciprocal agreement is not exclusive, and

(B) The client is informed of the existence and nature of the agreement.

(d) ~~(c)~~ A lawyer shall not knowingly assist an organization that furnishes or pays for legal services to others to promote the use of the lawyer's services or those of the lawyer's partner or associate, or any other lawyer affiliated with the lawyer or the lawyer's firm, as a private practitioner, if the promotional activity involves the use of coercion, duress, compulsion, intimidation, threats, or vexatious or harassing conduct.

(e) ~~(d)~~ No lawyer or any person acting on behalf of a lawyer shall solicit or invite or seek to solicit any person for purposes of representing that person for a fee paid by or on behalf of a client or under the Criminal Justice Act, D.C. Code Ann. §11-2601 (2001) *et seq.*, in any present or future case in the District of Columbia Courthouse, on the sidewalks on the north, south, and west sides of the courthouse, or within 50 feet of the building on the east side.

(f) ~~(e)~~ Any lawyer or person acting on behalf of a lawyer who solicits or invites or seeks to solicit any person incarcerated at the District of Columbia Jail, the Correctional Treatment Facility or any District of Columbia juvenile detention facility for the purpose of representing that person for a fee paid by or on behalf of that person or under the Criminal Justice Act, D.C. Code Ann. §11-2601 (2001) *et seq.,* in any then-pending criminal case in which that person is represented, must provide timely and adequate notice to the person's then-current lawyer prior to accepting any fee from or on behalf of the incarcerated person.

Comment

[1] This rule governs all communications about a lawyer's services, including advertising. It is especially important that statements about a lawyer or the lawyer's services be accurate, since many members of the public lack detailed knowledge of legal matters. Certain advertisements such as those that describe the amount of a damage award, the lawyer's record in obtaining favorable verdicts, or those containing client endorsements, unless suitably qualified, have a capacity to mislead by creating an unjustified expectation that similar results can be obtained for others. Advertisements comparing the lawyer's services with those of other lawyers are false or misleading if the claims made cannot be substantiated.

Advertising

[2] To assist the public in obtaining legal services, lawyers should be allowed to make known their services not only through reputation but also through organized information

campaigns in the form of advertising. Advertising involves an active quest for clients, contrary to the tradition that a lawyer should not seek clientele. However, the public's need to know about legal services can be fulfilled in part through advertising. This need is particularly acute in the case of persons of limited means who have not made extensive use of legal services. The interest in expanding public information about legal services ought to prevail over considerations of tradition.

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

[4] Questions of effectiveness and taste in advertising are matters of speculation and subjective judgment. Some jurisdictions have rules regulating the type and content of advertising by lawyers that go beyond prohibitions against false or misleading statements. Such regulations create unneeded barriers to the flow of information about lawyers' services to persons needing such services, and so this rule subjects advertising by lawyers only to the requirement that it not be false or misleading.

[5] There is no significant distinction between disseminating information and soliciting clients through mass media or through individual personal contact. In-person solicitation (which would include telephone contact but not electronic mail) can, however, create problems because of the particular circumstances in which the solicitation takes place. This rule prohibits in-person solicitation in circumstances or through means that are not conducive to intelligent, rational decisions. Such circumstances and means could be the harassment of early morning or late night telephone calls to a prospective client to solicit legal work, or repeated calls at any time of day, and solicitation of an accident victim or the victim's family shortly after the accident or while the victim is still in medical distress. A lawyer is no longer permitted to conduct in-person solicitation through the use of a paid intermediary, *i.e.*, a person who is neither the lawyer's partner (as defined in Rule 1.0(i)) nor employee (see Rule 5.3) and who is compensated for such services. This prohibition represents a change in Rule 7.1(b), which had previously authorized payments to intermediaries for recommending a lawyer. Experience under the former provision showed it to be unnecessary and subject to abuse. *See* Rules 5.3, 8.4(a), and 8.4(c) regarding a lawyer's responsibility for abusive or deceptive solicitation of a client by the lawyer's employee.

<u>[6] A lawyer is not permitted to pay money or give anything of material value to a person (other than the lawyer's partner or employee) in exchange for recommending the lawyer's services. Rule 7.1(c) does not address fee splitting between two or more firms representing the same client in the same project. Compare Rule 1.5(e). Lawyers must also be aware of their obligation to maintain their professional independence under Rule 5.4.</u>

[7] A lawyer may agree to refer clients to another lawyer or a nonlawyer professional, in return for the undertaking of that person to refer clients or customers to the lawyer. Such reciprocal referral arrangements must not interfere with the lawyer's professional judgment as to making referrals or as to providing substantive legal services. See Rules 2.1 and 5.4(c). Except as provided in Rule 1.5(e), a lawyer who receives referrals from a lawyer or nonlawyer professional must not pay money or give anything of material value solely for the referral, but the lawyer does not violate paragraph (c) of this Rule by agreeing to refer clients to the other lawyer or nonlawyer professional, so long as the reciprocal referral agreement is not exclusive and the client is informed of the referral agreement. Conflicts of interest created by such arrangements are governed by Rule 1.7. Reciprocal referral agreements should not be of indefinite duration and should be reviewed periodically to determine whether they comply with these Rules. This Rule does not restrict referrals or divisions of revenues or net income among lawyers within firms comprised of multiple entities.

Payments for Advertising

[8] ~~[6]~~ A lawyer is allowed to pay for advertising or marketing permitted by this rule. Likewise, a lawyer may participate in lawyer referral programs and pay the usual fees charged by such programs.

Solicitations in the Vicinity of the District of Columbia Courthouse

[9] ~~[7]~~ Paragraph **(e)** ~~(d)~~ is designed to prohibit unseemly solicitations of prospective clients in and around the District of Columbia Courthouse. The words "for a fee paid by or on behalf of a client or under the Criminal Justice Act" have been added to paragraph **(e)** ~~(d)~~ as it was originally promulgated by the District of Columbia Court of Appeals in 1982. The purpose of the addition is to permit solicitation in the District of Columbia Courthouse for the purposes of *pro bono* representation. For the purposes of this rule, *pro bono* representation, whether by individual lawyers or nonprofit organizations, is representation undertaken primarily for purposes other than a fee. That representation includes providing services free of charge for individuals who may be in need of legal assistance and may lack the financial means and sophistication necessary to have alternative sources of aid. Cases where fees are awarded under the Criminal Justice Act do not constitute *pro bono* representation for the purposes of this rule. However, the possibility that fees may be awarded under the Equal Access to Justice Act and Civil Rights Attorneys' Fees Awards Act of 1976, as amended, or other statutory attorney fee statutes, does not prevent representation from constituting *pro bono* representation.

Solicitations of Inmates

[10] ~~[8]~~ Paragraph **(f)** ~~(e)~~ is designed to address the vulnerability of incarcerated persons to lawyers seeking fee-paying representations. It applies only to situations where the incarcerated person has not initiated contact with the lawyer. In such situations, the lawyer may have contact with the individual but may not accept a fee unless and until timely notice is provided to current counsel for such incarcerated person.

V. RULE 1.15 (SAFEKEEPING PROPERTY)

In 2009, the Office of Bar Counsel asked the Rules Review Committee to consider amending the rules and requirements on record keeping for lawyer trust accounts and also asked the committee to address the issue of trust funds held by lawyers when the client disappears. At the time of the request, the ABA was considering adoption of a model rule for Client Trust Account Records to replace the then-existing model rule on Financial Record Keeping that was adopted in 1993. D.C. Rule 1.15 governs a lawyer's fiduciary and record keeping obligations for funds and other property of clients held by the lawyer. Section 19(f) of Rule XI of the District of Columbia Court of Appeals Rules Governing the Bar also sets forth certain requirements for attorney record keeping. The committee appointed a subcommittee to look into these issues and consider whether any changes to Rule 1.15 were in order.[29]

The Rules Review Committee recommends that Comment [2] of Rule 1.15 be amended to provide more detailed guidance to lawyers on financial record keeping. The committee also recommends that Section 19(f) of Rule XI of the Court of Appeals Rules Governing the Bar be deleted as largely duplicative of the obligations arising under Rule 1.15(a). Specifically, the committee recommends that the guidance on financial record keeping (1) reflect the purpose of the "complete records" language of Rule 1.15 as interpreted and explained by the District of Columbia Court of Appeals in *In re Clower*, 831 A.2d 1030 (D.C. 2003); and (2) encourage lawyers to consult the ABA model rules on Client Trust Account Records.

A. Summary of Existing Rules on Lawyer Trust Account Record Keeping

D.C. Rule 1.15(a) currently provides,

> (a) A lawyer shall hold property of clients or third persons that is in the lawyer's possession in connection with a representation separate from the lawyer's own property. Funds of clients or third persons that are in the lawyer's possession (trust funds) shall be kept in one or more trust accounts maintained in accordance with paragraph (b). Other property shall be identified as such and appropriately safeguarded. *Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of five years after termination of the representation*. (Emphasis added).

Comment [1] to Rule 1.15 provides direction about how and where the lawyer should safeguard client property, but does not otherwise clarify what the language "complete records of such account funds or other property" found in Rule 1.15(a) means.

A related rule exists in the District of Columbia Court of Appeals Rules Governing the Bar. Specifically, Rule XI (Disciplinary Proceedings) contains the following provision in Section 19(f) (Miscellaneous Matters):

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[29] As an initial matter, the Rules Review Committee asked the Legal Ethics Committee to issue a formal opinion addressing lawyers' ethical possession of trust money of clients' who cannot be located. Formal D.C. Legal Ethics Opinion 359 (May 2011) provides guidance on this question.

> *Required records.* Every attorney subject to the disciplinary jurisdiction of this Court shall maintain complete records of the handling, maintenance, and disposition of all funds, securities, and other properties belonging to another person, or to a corporation, association, partnership, or other entity, at any time in the attorney's possession, from the time of receipt to the time of final distribution, and shall preserve such records for a period of five years after final distribution of such funds, securities, or other properties or any portion thereof.

It appears that this provision is largely duplicative of Rule 1.15(a), although arguably inconsistent in its determination of when the five-year retention period starts to run.

B. The Committee's Analysis

The Rules Review Committee examined a number of rules on financial record keeping from other jurisdictions as well as the ABA model rules. Unlike the District of Columbia, some jurisdictions have ethics rules or other substantive law containing very detailed requirements for attorney trust account record keeping and some prohibit outright certain cash and ATM transactions for trust accounts.

1. <u>ABA Model Rule</u>

On August 9, 2010, the ABA adopted a Model Rule for Client Trust Account Records that replaced its former Model Rule on Financial Record Keeping adopted in 1993. Significantly, the ABA model rules on financial record keeping reside outside of the ABA Model Rules of Professional Conduct, although Comment [1] to ABA Model Rule 1.15 states in relevant part that, "…[a] lawyer should maintain on a current basis books and records in accordance with generally accepted accounting practice and comply with any recordkeeping rules established by law or court order. See, e.g., Model Rules for Client Trust Account Records." The ABA model rule on Client Trust Account Records also contains considerable detail about exactly what records (*e.g.*, "receipt and disbursement journals") lawyers must keep.

2. <u>In re Clower</u>

As noted above, D.C. Rule 1.15(a) requires that lawyers keep "[c]omplete records of [client] account funds or other property. . . ." In *In re Clower*, the D.C. Court of Appeals, quoting the Board on Professional Responsibility, said the following:

> The Rules of Professional Conduct should be interpreted with reference to their purposes. The purpose of maintaining "complete records" is so that the documentary record itself tells the full story of how the attorney handled client or third-party funds and whether the attorney complied with his fiduciary obligation that client or third-party funds not be misappropriated or commingled. Financial records are complete only when documents sufficient to demonstrate an attorney's compliance with his ethical duties are maintained. The reason for requiring complete records is so that any audit of the attorney's handling of client funds by

Bar Counsel can be completed even if the attorney or the client, or both, are not available.

831 A.2d at 1034.

3. Committee analysis

As an initial matter, the Rules Review Committee strongly agrees that a rule prohibiting an attorney from withdrawing cash (whether by check or ATM transaction) from an attorney trust account is not recommended. While some attorney misconduct may well result from a permissive rule, there are clearly some clients of some lawyers who transact business in cash whether by preference or necessity (e.g., caused by homelessness, immigration status, etc…), and the committee thinks it unwise to make legal representation of such clients impossible or needlessly difficult for lawyers when the solution to the problem presented by cash and ATM withdrawals can be addressed in other ways. Because the primary concern in allowing cash/ATM transactions is the lack of evidence that money was legitimately withdrawn either for return to the client or in furtherance of a client's representation, the committee thinks that issue is more properly resolved by lawyers keeping complete records as is already required by Rule 1.15(a). Such records could include statements and/or receipts, preferably signed by clients, in the receipt or distribution of any cash into and/or out of an attorney's trust account.

The committee has a number of concerns with any proposal to adopt detailed requirements for record keeping similar to the ABA Model Rule on Client Trust Account Records within the D.C. Rules of Professional Conduct. Failure to comply with an obligation or prohibition imposed by an ethics rule is a basis for invoking the disciplinary process.[30] Although the committee agrees fully that lawyers should be made aware of and encouraged to follow the recommendations set forth in the ABA financial records keeping model rules, the committee is loath to create detailed and rigid requirements within the ethics rules, that could serve primarily as a trap for the unwary and that also could be needlessly administratively burdensome, in some instances, particularly for solo or small firm practitioners.

C. Final Recommendation

The committee believes that the addition of a Comment to Rule 1.15 that contains the central quote from *In re Clower* as well as a reference to the 2010 ABA Model Rule on Client Trust Account Records as a source of practical guidance for preferred record keeping methods, would be most helpful in assuring compliance by lawyers with their ethical obligations to keep "complete records" pursuant to Rule 1.15. The committee accordingly recommends the addition of the following to Rule 1.15 as new Comment [2]. (The existing Comments [2] through [9] will be renumbered as Comments [3] through [10].)

As noted above, Section 19(f) of Rule XI of the District of Columbia Court of Appeals Rules Governing the Bar is largely duplicative of Rule 1.15.[31] The committee thinks that

[30] See Scope [2].

[31] The committee notes that Section 19(f) requires that records be kept for five years from the final distribution of client funds, securities, or property even though the matter itself may not be final at the time of the distribution. In

lawyers should not have to look further than Rule 1.15 to determine their ethical obligations on record keeping. Rule 1.15 provides the authority for subjecting lawyers to discipline for deficiencies in record-keeping. In addition, apart from the obvious question of whether Rule 1.15 and Rule XI Section 19(f) mean the same thing, the committee is concerned that lawyers might be unaware that the miscellaneous matters section of a rule governing disciplinary proceedings contains a substantive provision on record keeping. Accordingly, the Rules Review Committee recommends that Rule XI be amended to eliminate Section 19(f).

D. Comments Received on the September 2011 Final Draft Report and the Response of the Committee

The committee did not receive any comments related to proposed amendments to Rule 1.15.

E. Committee's Proposed Revision to Rule 1.15

The committee's proposed amendment to Rule 1.15 is set forth on page 44.

Rule 1.15, by contrast, the five-year period runs from the termination of representation. The latter rule is the preferred rule.

District of Columbia Rules of Professional Conduct
Proposed Revisions to Comment [2] of Rule 1.15 (Safekeeping Property)

[2] Paragraph (a) of Rule 1.15 requires lawyers to keep "[c]omplete records of [client] funds and property. . . ." The D.C. Court of Appeals addressed the meaning of "complete records" in *In re Clower*, 831 A.2d 1030, 1034 (D.C. 2003): "The Rules of Professional Conduct should be interpreted with reference to their purposes. The purpose of maintaining 'complete records' is so that the documentary record itself tells the full story of how the attorney handled client or third-party funds and whether the attorney complied with his fiduciary obligation that client or third-party funds not be misappropriated or commingled. Financial records are complete only when documents sufficient to demonstrate an attorney's compliance with his ethical duties are maintained. The reason for requiring complete records is so that any audit of the attorney's handling of client funds by Bar Counsel can be completed even if the attorney or the client, or both, are not available." Rule 1.15 requires that lawyers maintain records such that ownership or any other question about client funds can be answered without assistance from the lawyer or the lawyer's clients. The precise records that achieve this result obviously can vary, but lawyers may wish to look for guidance on records from the 2010 ABA Model Rules For Client Trust Account Records.

VI. PROPOSED NEW RULE 8.6 (DISCLOSING SUBSTANTIAL EXCULPATORY INFORMATION ABOUT A CONVICTED PERSON)

At its February 2008 mid-year meeting, the American Bar Association adopted revisions to Model Rule 3.8, specifically to Rules 3.8(g) and 3.8(h). The revisions, in substance, obligate prosecutors who know of new, credible, material evidence that creates a reasonable likelihood that a convicted defendant is innocent to disclose that evidence and, in some circumstances, to conduct an investigation and/or affirmatively seek to remedy the conviction, including, but not limited to seeking relief of the conviction from a court. In January 2010, the Rules Review Committee appointed a subcommittee to consider the revised Model Rules and to examine whether the committee should recommend similar revisions to the D.C. Rules of Professional Conduct.

The Rules Review Committee recommends that the Bar consider an amendment to Rule 8, specifically the adoption of a new Rule 8.6, requiring *all* attorneys who are in possession of information that raises a substantial question about the innocence of a convicted person to disclose that information to a court, to the prosecutor, to the convicted person's counsel, and to the convicted person, or (where the identity of those entities is not readily ascertainable) to the appropriate professional authorities.

A. History of ABA Model Rules 3.8(g) and (h)

In February 2008, the ABA adopted Model Rules 3.8(g) and 3.8(h) dealing with prosecutorial obligations and post-conviction evidence. Specifically, Model Rule 3.8(g) provides:

> When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall:
>
> (1) promptly disclose that evidence to an appropriate court or authority, and
>
> (2) if the conviction was obtained in the prosecutor's jurisdiction,
>
> (i) promptly disclose that evidence to the defendant unless a court authorizes delay, and
>
> (ii) undertake further investigation, or make reasonable efforts to cause an investigation, to determine whether the defendant was convicted of an offense that the defendant did not commit.

Model Rule 3.8(h) states that, "[w]hen 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."

By way of background, the central report recommending adoption of the ABA Model Rules 3.8(g) and 3.8(h) by the ABA Criminal Justice Section (February 2008) cites to a November 4, 2006, recommendation of the New York State Bar Association ("NYSBA") as the foundation for its recommendation to adopt ABA Model Rules 3.8(g) and 3.8(h). At the time of the ABA adoption of Model Rules 3.8(g) and 3.8(h), no other jurisdiction had adopted the proposed model rule. Although the NYSBA made a similar recommendation as part of its January 2007 proposed New York Rules of Professional Conduct, the New York Appellate Divisions failed to adopt either amendment (without comment) when the courts promulgated the final New York Rules of Professional Conduct, effective April 1, 2009.

B. Rule 3.8 in Other Jurisdictions

In addition to consulting with the NYSBA, the Rules Review Committee also contacted and considered the work of the three jurisdictions that at that time had also considered amendments to their jurisdictions' ethics rules in light of the adoption of Model Rules 3.8(g) and 3.8(h). The Rules Review Committee's counterpart in the North Carolina Bar studied the ABA amendments, but decided not to make a recommendation to the bar's governing board for any rule change. The Delaware Supreme Court adopted Delaware Rule 3.8(d)(2), effective September 21, 2009, which is consistent with ABA Model Rule 3.8(g), but did not adopt ABA Model Rule 3.8(h) in any form. With slight variations, the State of Wisconsin adopted a version of both Model Rules 3.8(g) and 3.8(h). The Wisconsin Comment to Rule 3.8 explains the differences as follows:

> The Wisconsin Supreme Court Rule differs from the Model Rule …Wisconsin prosecutors have long embraced the notion that the duty to do justice requires both holding offenders accountable and protecting the innocent. New Rule 20:3.8(g) and (h) reinforces this notion. The Wisconsin rule differs slightly from the new A.B.A. rule to recognize limits in the investigative resources of Wisconsin prosecutors.
>
> This rule was not designed to address significant changes in the law that might affect the incarceration status of a number of prisoners, such as where a statute is declared unconstitutional.

C. Committee Analysis

In addition to the examination of the legislative history of ABA Model Rules 3.8 (g) and (h) and that of the above-mentioned jurisdictions, the Rules Review Committee highlights the two considerations that were of greatest significance to the committee. The first consideration is whether an amendment is necessary at all. Some states have adopted the view that existing rules (particularly Rule 8.4) already address situations where the duty outlined in proposed Rule 8.6 might arise and that codification of a new rule would cause greater confusion and uncertainty than is appropriate. However, the Rules Review Committee agrees that Rule 8.4 is ambiguous and that the normative and pedagogic effects of adopting the proposed Rule were significant.

The second consideration is to whom the obligation belongs. As adopted, Model Rule 3.8 applies the duties it outlines only to prosecutors. The Rules Review Committee is strongly of the view that such a limitation is inconsistent with the fundamental premise of the Model Rule proposal. Preventing the incarceration of the innocent is a core value of the judicial system and the correction of a significant miscarriage of justice should be of interest to all attorneys, not just prosecutors. Recognizing the difficulties and challenges that arise from the operation of other equally important values (e.g., the confidentiality obligations of Rule 1.6) the committee members nonetheless concluded that full expression of the values inherent in the model rule proposal required extending a duty of disclosure to all members of the Bar.

D. Final Recommendation

The Committee recommends a proposed new Rule 8.6 to apply to all lawyers in the District of Columbia who, in the absence of other confidentiality obligations, "know of information that raises a substantial question about the innocence of a convicted person" as set forth in the proposed text and comments below.

E. Comments Received on the September 2011 Final Draft Report and the Response of the Committee

1. The Response of the Committee to the Comment on Confidential Disclosures

The committee received one comment from an individual lawyer recommending that proposed new Rule 8.6 more explicitly state that it does not apply when an attorney obtains information "via representation of another." The committee strongly believes that the language of proposed Rule 8.6(b) clearly addresses this concern. Proposed Rule 8.6(b) states that, "[t]he Rule does not require disclosure of information otherwise protected by Rule 1.6 or other law."

Rule 1.6(a) prohibits a lawyer from knowingly using or revealing client confidences and secrets. Rule 1.6(b) defines confidences and secrets broadly as follows,

> (b) "Confidence" refers to information protected by the attorney-client privilege under applicable law, and "secret" refers *to other information gained in the professional relationship* that the client has requested be held inviolate, or the disclosure of which would be embarrassing, or would be likely to be detrimental, to the client. (emphasis added).

Information gained by a lawyer "via the representation of another" will virtually always constitute a "secret" under Rule 1.6. Additionally, this very same language addresses the same concern that may arise under Rule 8.3(a) governing a lawyer's mandatory duty to report the unethical conduct of another lawyer. Rule 8.3(c) also states that "the Rule does not does not require disclosure of information otherwise protected by Rule 1.6 or other law."

2. The Response of the Committee to the BPR Comments

The committee received two comments opposed to proposed Rule 8.6. One comment was from a law firm, and an extensive comment by the BPR was received on January 13, 2012.[32]

[32] The comments from the law firm raised concerns about expanding the obligation to report exculpatory evidence beyond prosecutors and about generally requiring lawyers outside of the criminal justice system to ascertain when information may "rais[e] a substantial question about the innocence of a convicted person." These concerns were also raised by the BPR. The committee thoroughly considered and specifically responded to these concerns in its response to the BPR's comment found at Exhibit A.

The Rule 3.8/8.6 subcommittee thoroughly considered the comments of the BPR and delivered a supplemental report to the full committee.[33]

At a meeting on March 12, 2012, the Rules Review Committee met to consider the subcommittee's supplemental report and recommendations. After a careful review of the matter, the committee adhered to its initial views while making some minor textual modifications to the draft Rule 8.6 proposal that were not related to any of the comments that were received.

Specifically, the committee voted to amend the language of proposed Rule 8.6(a) to clarify that a lawyer need only make a report to the Office of Bar Counsel if "none of the individual or entities listed in subsection 8.6(a)(1)-(4) can be readily ascertained." Although this was the original intent of the committee's proposal in the September 2011 Final Draft Report, the language as drafted could have been interpreted to require a report to Bar Counsel even if only one of the entities listed in Rule in 8.6(a)(1)-(4) could not be readily ascertained, which was not the intended scope of the rule.

The committee also voted to include the addition of a clarifying Comment [7] to the rule which explains that nothing in the rule is intended to discourage the disclosure of information that raises a substantial question about the innocence of an accused prior to trial and conviction.

The full committee adopted the response and recommendations of the subcommittee on March 12, 2012. The *Final Recommendation of the Rules of Professional Conduct Review Committee on Proposed New Rule 8.6—Including Response to the Comments of the Board on Professional Responsibility* is included as Exhibit A to this report. The BPR's comments on proposed Rule 8.6 are included at Exhibit B.

F. Committee's Proposed Text of New Rule 8.6 and Comments

The committee's proposed text of new Rule 8.6 and comments are set forth beginning on page 49**.**

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[33] The Rule 3.8/8.6 subcommittee is chaired by Paul Rosenzweig. Subcommittee members include Jerri Dunston, Professional Responsibility Advisory Office, United States Department of Justice; Julia Leighton, Public Defender Service; and Robert Okun, United States Attorney's Office for the District of Columbia.

District of Columbia Rules of Professional Conduct
Proposed D.C. Rule 8.6 (Disclosing Substantial Exculpatory Information about a Convicted Person)

Rule 8.6--- (Disclosing Substantial Exculpatory Information about a Convicted Person)

(a) A lawyer who knows of information that raises a substantial question about the innocence of a convicted person shall disclose that information to the following individuals and entities whose identity and location can be readily ascertained:

(1) the court where the person's conviction was obtained; and

(2) the chief prosecutor in the jurisdiction where the conviction was obtained; and

(3) the person's attorney of record; and

(4) the convicted person.

If the identity and location of none of the individuals and entities listed above in subsection 8.6(a)(1)-(4) can be readily ascertained, then the lawyer shall disclose that information to the appropriate professional authority.

(b) This Rule does not require disclosure of information otherwise protected by Rule 1.6 or other law.

Comment

[1] Rectifying the conviction and preventing the incarceration of an innocent person are core values of the judicial system and matters of vital concern to the legal profession. Because of the importance of these principles, this Rule applies to all members of the Bar and requires each member of the Bar to disclose substantial exculpatory information about a convicted person when such a disclosure is not prohibited by the attorney's other legal or ethical obligations.

[2] A disclosure that is otherwise mandated by this Rule is not required where it would involve violation of Rule 1.6. However, a lawyer should encourage a client to consent to disclosure where such disclosure would not substantially prejudice the client's interest. Information that is a client confidence or secret under Rule 1.6 is "otherwise protected by Rule 1.6" within the meaning of Rule 8.6(b). Rule 1.6(c), (d), and (e) describe circumstances in which a lawyer may reveal information otherwise protected by Rule 1.6. In such circumstances, a lawyer may, but is not required to, make disclosures otherwise required by this rule.

[3] Not every piece of information raising a question about the convicted person's innocence need be disclosed. Rather, this rule limits the disclosure requirement to information that is sufficient to cause an objective observer to believe there is substantial question about the correctness of the conviction. The term "substantial" refers to the degree of concern the

particular information triggers about the correctness of the conviction, and not the quantum of information of which the lawyer is aware.

[4] An attorney’s independent judgment, made in good faith, that the information is not of such a nature as to trigger the obligation of Rule 8.6, though subsequently determined to have been erroneous, does not constitute a violation of this Rule.

[5] When a lawyer cannot readily ascertain the identity of any individual or entity to whom disclosure is required (the court where the conviction was obtained, the chief prosecutor of the jurisdiction where the conviction was obtained, the attorney of record, or the convicted person), then disclosure to appropriate professional authorities is required. In most instances, that authority will be the Office of Bar Counsel in the District of Columbia, or the equivalent office in the jurisdiction where the underlying crime occurred or where the attorney principally practices.

[6] A disclosure made to a convicted person pursuant to Rule 8.6(a)(4) is authorized by law and does not violate Rule 4.2(a) of these Rules.

[7] Nothing in this Rule is intended to discourage the disclosure of information that raises a substantial question about the innocence of an accused prior to trial and conviction. Accordingly, the same information an attorney has already disclosed to the defense attorney of record pre-conviction need not be disclosed again post-conviction in order to comply with this Rule.

EXHIBIT A

Final Recommendation of the Rules of Professional Conduct Review Committee
On Proposed Rule 8.6 – Including Response to the Comments
of the Board on Professional Responsibility

March 20, 2012

Introduction

In January 2010, the Rules of Professional Conduct Review Committee of the District of Columbia Bar ("Rules Review Committee" or "committee") created a subcommittee[1] to consider revisions to the District of Columbia's Rules of Professional Conduct in light of the American Bar Association's (ABA) modifications to Model Rule 3.8 of the Rules of Professional Conduct.[2] The Rule 3.8 Subcommittee submitted a report in September 2010 (incorporated herein by reference) which, broadly speaking, recommended that the Rules Review Committee recommend to the Board of Governors of the Bar and the District of Columbia Court of Appeals that it consider an amendment to Rule 8, requiring all attorneys who are in possession of information that raises a substantial question about the innocence of a convicted person to disclose that information to a court, to the convicted person's counsel, and to the convicted person, or (where the identity of those entities is not readily ascertainable) to the appropriate professional authorities.[3]

The Rules Review Committee considered the subcommittee's report and approved the recommendation, making some modifications to the text of the proposal new rule (notionally titled new Rule 8.6). Subsequently, proposed Rule 8.6 was opened for public comment and review. The comments received on January 13, 2012, from the District of Columbia Board on Professional Responsibility ("BPR") were substantial in nature. In sum, the BPR "respectfully request[ed] that the Committee refer this matter for further study" and defer consideration of the

[1] The Rule 3.8/8.6 subcommittee is chaired by Paul Rosenzweig. Subcommittee members include Jerri Dunston, Professional Responsibility Advisory Office, United States Department of Justice; Julia Leighton, Public Defender Service; and Robert Okun, United States Attorney's Office for the District of Columbia.

[2] Specifically, the ABA added new subparts (g) and (h) to Model Rule 3.8, imposing a special duty upon prosecutors to disclose new, credible, and material exculpatory evidence acquired post-conviction and to seek to remedy the conviction if the evidence of innocence of a convicted person is clear and convincing.

[3] In particular the subcommittee considered whether an amendment to the Rules was necessary at all. Some jurisdictions have adopted the view that existing rules (particularly Rule 8.4) already address situations where the duty outlined in proposed Rule 8.6 might arise and that a new rule would cause greater confusion and uncertainty than is appropriate. In the end, we concluded that Rule 8.4 was ambiguous and that the normative and pedagogic effects of adopting the proposed new Rule were significant.

proposed amendment. In particular the BPR was concerned "about the unprecedented scope of [the] rule" as it applied to all lawyers. See Comments of the BPR to the D.C. Rules Review Comm. at 6 (dated January 13, 2012) (hereinafter "BPR Comments"). The Rules Review Committee asked the subcommittee to resume its consideration of the proposed new Rule 8.6 in light of the BPR's comments.

In January and February 2012 the subcommittee met telephonically and reviewed the BPR's submission. After careful consideration of the matter, the subcommittee remained firmly of the view that Rule 8.6 is sound both as a matter of theory and as a matter of practice. The subcommittee renewed its recommendation to the Rules Review Committee that the draft Rule 8.6 as previously adopted be submitted to the Board of Governors.

At a meeting on March 12, 2012, the Rules Review Committee met to consider the subcommittee's supplemental report. After a careful review of the matter, the committee decided to adhere to its initial views, while making some minor textual modifications to the draft Rule 8.6 proposal, including the addition of a clarifying comment to the rule which explains that nothing in the rule is intended to discourage the disclosure of information that raises a substantial question about the innocence of an accused prior to trial and conviction.

The Discussion section of this Final Report contains a detailed response to the comments of the Board on Professional Responsibility. The appendix contains the version of Rule 8.6 approved by the committee that we recommend for submission to the Board of Governors.

Discussion

The BPR's comments begin by outlining the existing state of the law and then summarizing the proposal made by the ABA for a revision to Rule 3.8. We have no real dispute with this recitation and turn, therefore, directly to addressing the "Particular Concerns" that animated the BPR's response. We address each of the BPR's concerns in turn.

1. Proposed Rule 8.6 would mark a significant expansion of the disclosure obligation

The BPR questions the philosophical basis for having a disclosure obligation imposed upon all members, particularly members who are not prosecutors. See BPR Comments at 2-3. These comments reflect a fundamental premise of the BPR's submission that undergirds most of its specific comments – a belief that obligations of the sort under consideration are more properly imposed only on prosecutors, rather than on members of the Bar at large.

As adopted by the ABA, Model Rule 3.8(g) and (h) apply the duties they outline only to prosecutors. The members of the subcommittee were of the view that such a limitation was inconsistent with the fundamental premise of the Model Rule proposal. Preventing the incarceration of the innocent is a core value of the judicial system and the correction of a significant miscarriage of justice should be of interest to all attorneys, not just prosecutors. Recognizing the difficulties and challenges that arise from the operation of other equally important values (e.g. the confidentiality obligations of Rule 1.6), the subcommittee members nonetheless concluded that full expression of the values inherent in the Model Rule proposal required extending a duty of disclosure to all members of the Bar.

More particularly, the obligations imposed on prosecutors are, generally, ones relating to aspects of the process that are uniquely within the prosecutor's purview. Thus, the prosecutor has evidentiary disclosure obligations and limitations on what he or she may discuss publicly. But, notably, those obligations are all tied to ensuring that the prosecutor does not take advantage of his or her position of authority and greater knowledge. By contrast, obligations that reflect core societal values – such as the prohibition on making a misrepresentation to the Court (e.g. D.C. Rule 3.3(a)(1)) or the prohibition on using peremptory challenges in a discriminatory manner (D.C. Rule 3.4(g)) are applied to all members of the Bar.

Nor is the expansion of duties to all members of the Bar relating to information or conduct occurring outside the confines of the courtroom all that unusual. In this jurisdiction, for example, members of the Bar are obliged to report serious ethics violations of which they are have knowledge to Bar authorities (D.C. Rule 8.3(a)) and in their professional employment decisions, they may not act in a discriminatory manner (D.C. Rule 9.1).

In our view, it is axiomatic that all "[m]embers of the bar are officers of the court." Theard v. United States, 354 U.S. 278, 281 (1957); Newman v. United States, 382 F.2d 479, 481 (D.C. Cir. 1967); United States v. Foster, 226 A.2d 164, 166 (D.C. 1967). As such officers and representatives of the court, we believe that all members of the Bar should be expected to conduct themselves in a manner that promotes confidence in the administration of justice, including the administration of criminal justice. Reasonable minds clearly may differ about how far such obligations should reach, but with respect, the BPR's defense of the status quo is unpersuasive. Put bluntly, we do not understand how the BPR can defend the proposition that a member of the Bar in possession of information about the serious ethics violations of a colleague has a disclosure obligation but one in possession of non-confidential and non-secret exculpatory information indicative of the innocence of a convicted individual does not.[4]

[4] At least one member of the subcommittee (Rosenzweig) is sufficiently strongly of the view that the obligation is fundamental that, were the full committee to determine to apply the obligation only to prosecutors through Rule 3.8, he would dissent from such a decision. As discussed below, other members of the subcommittee might also dissent from a decision recommending adoption of Model Rule 3.8(g) and (h) as drafted for a variety of other reasons.

2. Understanding the disclosure obligation

The BPR expresses some concern that the operative standard of proposed Rule 8.6, that a member's duty to disclose exculpatory information about a person post-conviction arises when he or she "knows" of information that "raises a substantial question about the innocence of a convicted person[,]" is "unique and not well-defined." BPR Comments at 4. Moreover, the BPR states that the relationship between proposed Rule 8.6 and current D.C. Rule 3.8(e)[5] is unclear; questions whether the disclosure obligation under proposed Rule 8.6 would extend to impeachment information about important government witnesses within the meaning of Giglio v. United States, 405 U.S. 150 (1972); wonders whether members who are not familiar with criminal law will understand when the obligation to disclose is triggered under the proposed Rule; and expresses concern that members may have to undertake "considerable efforts" to locate persons to whom the information must be reported. See BPR Comments at 4. We believe that many of these concerns of the BPR arise out of confusion about the meaning and reach of current D.C. Rule 3.8(e) and substantive law, and can be addressed by close examination of the proposed Rule and a comparable provision—D.C. Rule 8.3(a).

a. D.C. Rule 3.8 is not intended to impose obligations upon prosecutors greater than those imposed under substantive law

As an initial matter, it is important to understand that the District of Columbia Court of Appeals has made it clear that Rule 3.8 is not intended to impose obligations upon prosecutors greater than those imposed under substantive law. See D.C. Rules of Prof'l Conduct R. 3.8 cmt. [1] (2007) ("This rule is intended to be a distillation of some, but not all, of the professional obligations imposed on prosecutors by applicable law. The rule, however, is not intended either to restrict or to expand the obligations of prosecutors derived from the United States Constitution, federal or District of Columbia statutes, and court rules of procedure."). Accord Boyd v. United States, 908 A.2d 39 (D.C. 2006) (rejecting defendant's argument that Rule 3.8 imposes obligations to disclose exculpatory information greater than the Constitution). That limitation has particular relevance in the context of proposed Rule 8.6 because it is unsettled as a matter of substantive law whether prosecutors (or indeed any persons) have an obligation to disclose exculpatory information after conviction and sentencing, what would trigger such a disclosure obligation, and what types of information would be considered exculpatory post-conviction.

[5] D.C. Rules of Prof'l Conduct R. 3.8(e) (2007) provides in relevant part:

> The prosecutor in a criminal case shall not . . . [i]ntentionally fail to disclose to the defense, upon request and at a time when use by the defense is reasonably feasible, any evidence or information that the prosecutor knows or reasonably should know tends to negate the guilt of the accused or mitigate the offense[.]"

The Rules Review Committee is not aware of any state or federal cases in the District of Columbia imposing such a duty of disclosure post-conviction as a matter of constitutional law. Thus, to the extent that the BPR suggests that due process standards of Giglio or, by implication, Brady v. Maryland, 373 U.S. 83 (1963), should or would apply in the post-conviction setting, that suggestion goes beyond current law. The subcommittee did not discuss changing Comment [1] to Rule 3.8 or revising any requirements relating to pre-trial disclosure. Instead we focused on a post-conviction requirement that would not alter the pre-trial disclosure requirements of prosecutors.[6]

b. The model for proposed new Rule 8.6 is current Rule 8.3(a)

Next, it is important to understand that the inspiration for proposed Rule 8.6 is not D.C. Rule 3.8(e); and, thus, comparison of the proposed Rule with D.C. Rule 3.8(e) is not particularly helpful. Rather, the inspiration for the proposed Rule is current D.C. Rule 8.3(a) which, since it was adopted by this jurisdiction in 1991, has provided:

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

D.C. Rules of Prof'l Conduct R. 8.3(a) (2007). The Rule is virtually identical to ABA Model Rule 8.3(a)[7] which has been in existence since 1983. The Rules Review Committee is not aware of any state or federal cases in this jurisdiction that construe the terms of Rule 8.3(a). However, there are three Legal Ethics Committee opinions in the District of Columbia that examine the operative terms of the Rule --terms the Rules Review Committee used in drafting proposed Rule 8.6.

In Opinion 239, the Legal Ethics Committee opined that a former associate at a law firm had no duty to report her belief that attorneys in her former firm may have destroyed documents that would support a client's defense to the firm's case to recover fees, particularly when she was not certain that the documents had in fact been destroyed. The Legal Ethics Committee opined that the duty to report under Rule 8.3(a) would only be triggered when a lawyer actually knows

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[6] One member of the subcommittee (Leighton) is of the view that Comment [1] is ripe for revisiting in light of the principles animating the new ABA Model Rule provisions in 3.8(g) and 3.8(h). Two others (Dunston and Okun) disagree with that view.

[7] The Model Rule does not contain a comma after the word "trustworthiness." Forty-one (41) jurisdictions, including the District of Columbia, have adopted Model Rule 8.3(a) virtually verbatim. Five (5) other jurisdictions have adopted a similar rule.

of another lawyer's violation of the rules—i.e., "only where there is 'specific knowledge' of a 'clear violation' of the ethics rules; 'mere suspicions' of misconduct or unethical behavior need not be reported."[8] D.C. Bar Legal Ethics Comm. Op. 239 (1993) at 2.

In Opinion 246, the Legal Ethics Committee opined that the inquirer had not provided it with sufficient information to determine whether she had a duty to report another lawyer who formerly represented a client that she subsequently represented in a legal malpractice claim based upon that former representation. While it did not reach an ultimate conclusion about whether such a duty to report was triggered, the Legal Ethics Committee established helpful guidance to use in the analysis of whether there is a duty to report.

Of particular interest here, the Committee opined that a lawyer would "know"[9] of another's misconduct if "she has a clear belief that misconduct has occurred, and possesses actual knowledge of the pertinent facts." D.C. Bar Legal Ethics Comm. Op. 246 (1994) at 2. The reporting lawyer then must satisfy herself that the conduct about which she knows rises to the level of a violation of the rules of professional conduct, i.e., the reporting lawyer "must believe that the other lawyer engaged in conduct clearly violative" of the rules. Id. at 3. And, the rule violation must raise a "substantial question" about the lawyer's fitness to practice. "Whether a particular violation of the disciplinary rules meets the 'substantial question' test must be determined on a case-by-case basis, using a 'measure of judgment' rather than a clear litmus test." Id. at 4. Determining whether a substantial question about another lawyer's fitness has been raised "is and should be a solemn and unenviable task." Id.[10]

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[8] Interpreting the language of proposed Rule 8.6 using a similar analysis, the duty to report would not be triggered unless there is "specific knowledge" of a convicted person's "clear" innocence. Despite the BPR's concern that a member who does not practice criminal law will not appreciate the significance of potentially exonerating information in his or her possession, see Board's Comments at 4, the Rules Review Committee does not believe an attorney with such knowledge and such unfamiliarity with criminal law would have sufficient knowledge of the convicted person's innocence to trigger a duty to report under the proposed Rule unless the knowledge is blatant and obvious, e.g., credible confession to the crime by a third person to the lawyer. Furthermore, as noted in Comment [4] to the proposed Rule, "[a]n attorney's independent judgment, made in good faith, that the information is not of such a nature as to trigger the obligation of Rule 8.6, though subsequently determined to have been erroneous, does not constitute a violation of this Rule."

[9] D.C. Rules of Prof'l Conduct R. 1.0(f) (2007) (defines "[k]nowingly," "known," or "knows" as "denot[ing] actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances").

[10] In providing guidance on a "substantial question" about a convicted person's innocence, Comment [3] to proposed Rule 8.6 provides:

> Not every piece of information raising a question about the convicted person's innocence need be disclosed. Rather, this rule limits the disclosure requirement to information that is sufficient to cause an objective observer to believe there is substantial question about the correctness of the conviction. The term

Finally, in Opinion 270, the Legal Ethics Committee opined that a subordinate lawyer hired through a temporary employment agency had a duty to report the employing lawyer when the employing lawyer told her that he would routinely draft letters purportedly to third persons on a client's behalf and send them to the client, but would never actually send the letters to the intended recipient even though he represented to the client that they had been sent. The committee specifically opined that the inquirer had actual knowledge of the employing attorney's deceit "through the admissions of the employing lawyer made directly to her." D.C. Legal Ethics Comm. Op. 270 (1997) at 3. The Committee noted:

> [W]e do not interpret the requirement of 'actual knowledge' in Rule 8.3 to require direct observation of the underlying facts that constitute a violation. One of the purposes of Rule 8.3 is to require that lawyers report misconduct when the victim is not in a position to discover it. Rule 8.3 does not require that a lawyer report every hunch about wrongdoing. But neither should it require a lawyer to conduct an independent investigation. The frank and unambiguous admission by the employing lawyer that he had sent multiple fictitious letters to this client in connection with this litigation is sufficient.

Id. The Committee found that the employing lawyer's alleged deceit and misrepresentation to his client raised a "substantial question" as to his fitness because it "destroyed the heart of the lawyer-client relationship." Id. at 1.

c. Cases and ethics opinions from other jurisdictions provide additional guidance to Bar members about their duty to report under proposed Rule 8.6

In addition to these three ethics opinions from the District of Columbia, there are cases and ethics opinions from other jurisdictions that have adopted and applied the reporting rule during its almost thirty-year existence, which also may assist members in construing proposed Rule 8.6. See, e.g., Skolnick v. Altheimer & Gray, 730 N.E.2d 4 (Ill. 2000) (knowledge based upon reasonable inference from documents); In re Riehlmann, 891 So. 2d 1239 (La. 2005) (substantial question discussed; court arguably discusses standard lower than actual knowledge, but even if actual knowledge standard used, knowledge based upon confession of wrongdoing by former prosecutor who allegedly suppressed exculpatory information would be sufficient); Attorney U v. Miss. Bar, 678 So.2d 963 (Miss. 1996) (court arguably discusses standard lower than actual knowledge, but even if actual knowledge standard used, unsworn, uncorroborated statement denied by alleged malefactor's attorney did not trigger knowledge); Williamson v. N.C. Bar, 266 S.E.2d 391 (N.C. Ct. App. 1980) (discussing

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"substantial" refers to the degree of concern the particular information triggers about the correctness of the conviction, and not the quantum of information of which the lawyer is aware.

knowledge); Ariz. Ethics Op. 87-26 (1987) (same); Neb. Ethics Advisory Op. For Lawyers, No. 89-4 (1989) (same); Ass'n of the Bar of the City of New York Comm. on Prof'l and Judicial Ethics, Formal Op. 1990-3 (1990) (discussing substantial question and knowledge; absolute certainty not required, but mere suspicion not enough).

The Rules Review Committee believes that cases and bar opinions like these from the District of Columbia and other jurisdictions would provide substantial guidance to members seeking to determine whether they have sufficient knowledge of information that raises a substantial question about the innocence of a convicted person to trigger their duty to report under proposed Rule 8.6. To the extent that the BPR is concerned that when a member's duty to report under the proposed Rule is triggered, the member may be required to undertake "considerable" efforts to locate the persons or others to whom disclosure should be made, see BPR Comments at 4, the Rules Review Committee is confident that the proposed Rule would not be construed to impose such a duty.

Specifically, proposed Rule 8.6(a) provides, "If the lawyer cannot readily ascertain the identity and location of the court, the chief prosecutor, the attorney of record, or the convicted person, then the lawyer shall disclose that information to the appropriate professional authority." The term "readily" is not defined in the Rules; however, it is defined in the dictionary as meaning "without much difficulty: easily[.]" Merriam-Webster's Collegiate Dictionary, Tenth Edition 972 (John M. Morse ex. ed., Merriam-Webster, Inc. 1999). Given this definition, we do not believe that members would be required or would reasonably fear being required to undertake "considerable" efforts to locate persons, but would, instead, notify Bar Counsel about the exculpatory information if the identity and/or location of the persons to be notified could not be determined easily.

3. Territorial reach and choice of law

The BPR argues that under proposed Rule 8.6 it is not clear whether the proposed Rule would apply to criminal convictions that result from proceedings outside the District of Columbia, jurisdictions that do not require disclosure by non-prosecutors. See BPR Comments at 4. Rule 8.5(b) prescribes that the ethics rules of a tribunal govern matters before that tribunal, but other matters are subject to the rules of the jurisdiction in which the lawyer principally practices. Post-conviction, however, no case may be pending. A lawyer who is not involved in a criminal case may have some difficulty ascertaining where and whether the matter is before a tribunal, which rules apply and whether he or she must report potentially exculpatory information. The BPR argues that it seems anomalous to require D.C. Bar members to report information to courts in jurisdictions that do not require their own bar members to report such information.

The BPR's critique does not do full justice to the proposal. Two circumstances must be met before a lawyer licensed in the District of Columbia is required to disclose information in a jurisdiction that does not also require disclose of information pertaining to a convicted person's actual innocence.

First, there cannot be a pending case.[11] If there is a pending case, the rules of the jurisdiction with the pending case apply. Rule 8.5(b)(1). Second, the lawyer must be licensed only in the District of Columbia Rule (8.5(b)(2)(i)) or the District of Columbia must be the lawyer's principal place of practice. Rule 8.5 (b)(2)(ii). Lawyers who principally practice in a jurisdiction other than the District of Columbia will apply the rules of that jurisdiction.

Only lawyers who principally practice in the District of Columbia are required to disclose information "that raises a substantial question about the innocence of a convicted person" in jurisdictions that have not considered this issue or do not appreciate the values inherent in this proposed Rule. This fact does not change the Committee's view of the importance of the value expressed by this Rule and its willingness to impose this requirement on lawyers principally practicing in the District of Columbia.

Finally, the Rules Review Committee notes that the BPR's critique about the uncertainty of the choice of law provisions is equally true of virtually every other Rule that is unique to the District of Columbia. Thus, for example, it would be equally true were the ABA's Model Rule 3.8(g) to be adopted, save only that prosecutors would be the only class of lawyers who are subject to the ambiguity. As such, the critique goes more to the scope of Rule 8.5(b) generally than it does to any aspect of proposed Rule 8.6.[12]

[11] The critique also suggests that it might be difficult for a lawyer to determine if a matter is pending. Though we acknowledge the possibility, this seems unlikely in an increasingly digital world. Moreover, to the extent that an attorney is unaware of the pendency of a case and abides by the dictates of proposed Rule 8.6, no ethical violation ensues.

[12] Finally, we note that proposed Rule 8.6 will not be the only instance in which obligations unique to the District are imposed on members of the Bar. At least two other such provisions exist, both of seemingly less significance than the specter of an innocent incarcerated. <u>Compare</u> ABA Model Rule 4.4(b) (lawyer inadvertently receiving privileged documents need only notify the sender) with D.C. Rule 4.4(b) (requiring receiving lawyer to notify the sending party and abide by the instructions of the sending party and prohibiting review of materials); <u>compare</u> ABA Model Rule 1.5 (expressing preference for a written retainer agreement, but not requiring a writing) <u>with</u> D.C. Rule 1.5(b) (specifying circumstances where the scope of the representation, the basis of the fee, and the expenses for which a client will be responsible must be set forth in writing).

4. Public interest served by imposing duty on all lawyers

The BPR expresses concern that the relationship between proposed Rule 8.6 and Rule 3.8(e) is "problematic" because it is unclear whether the "tends to negate guilt" standard in Rule 3.8(e) is different from the "raises a substantial question as to" innocence standard in proposed Rule 8.6. See BPR Comments at 4-5. The BPR also questions whether, like Rule 3.8(e), proposed Rule 8.6 is only violated by a prosecutor's intentional failure to disclose. BPR Comments at 5. As mentioned above, however, for a variety of reasons, the Rules Review Committee does not believe that comparisons between Rule 3.8(e) and the proposed Rule 8.6 are helpful or particularly availing.

The BPR also suggests that a disclosure duty is more appropriately imposed upon prosecutors, rather than all members, because prosecutors are "most likely to obtain post-conviction exculpatory information and are in the best position to act on it." BPR Comments at 5. However, the Rules Review Committee notes that criminal defense attorneys and other attorneys may also be likely to obtain such exculpatory (or inculpatory) information. See, e.g., In re Riehlmann, 891 So.2d 1239 (La. 2005) (former prosecutor diagnosed with terminal illness confessed to friend who was a criminal defense attorney that he had suppressed exculpatory blood evidence in capital case); N.Y. State Bar Ass'n Comm. on Prof'l Ethics Op. No. 479 (1978) (criminal defense lawyer may not disclose client's confession to the commission of other uncharged murders but, if moving body parts of the victims was a crime, that conduct would violate the rules of professional conduct); Story of Alton Logan, reported by CBS 60 Minutes, 26 Year Secret Kept Innocent Man in Prison (Feb. 11, 2009) available at http://www.cbsnews.com/stories/2008/03/06/60minutes/main3914719.shtml (where two criminal defense attorneys were told by their client that he had committed murders for which Alton Logan had been convicted and was still serving a sentence decades later); Story of Lee Wayne Hunt reported by the New York Times, When Law Prevents Righting a Wrong (May 4, 2008) available at http://www.nytimes.com/2008/05/04/weekinreview/04liptak.html (similar). Cf. Attorney Grievance Comm'n of Maryland v. Sheinbein, 812 A.2d 981, 996 (Md. 2002) (attorney encouraged and aided his son, who was believed to have engaged in murder, in absconding to another country to evade investigation; conduct constituted common law crime of obstructing or hindering a police officer and also constituted conduct prejudicial to the administration of justice). When an attorney who is not a prosecutor does not disclose that an incarcerated person is innocent, that non-disclosure may raise public concerns in a way that is similar to public concerns raised based upon a prosecutor's non-disclosure. The Rules Review Committee is attempting to address both concerns in its proposed Rule.

5. Timing of disclosures

The BPR suggests that the proposed Rule focuses on disclosure of information relating to convicted persons, to the exclusion of those who have been accused but not yet convicted. See BPR Comments at 5. Exculpatory information, however, is (according to the BPR) likely to be more valuable to a defendant before or during trial, rather than after conviction, when procedural opportunities may be limited. Thus the BPR suggests that it seems just as important to our system of justice that a person not be wrongfully accused as it is that a person not be wrongfully convicted.

The subcommittee agrees that pre-trial disclosure is important. However, addressing pre-trial disclosure was beyond the mandate given to the subcommittee. The subcommittee was tasked solely with determining whether to adopt, reject or modify the ABA's 2008 amendments to Model Rule 3.8, which dealt only with post-conviction duties of disclosure.

In addition, the scope of pre-trial disclosure obligations is already covered by a host of substantive statutory and Constitutional provisions, which our current set of rules of professional conduct incorporate and to which they specifically defer. See Rule 3.8(e). Thus, in this jurisdiction Rule 3.8 "is not intended either to restrict or to expand the obligations of prosecutors derived from the United States Constitution, federal or District of Columbia statutes, and court rules of procedure." Id. Comment [1]. Moreover, it is really no answer to an effort to improve post-trial disclosure mechanisms to argue that improving pre-trial disclosure is also necessary.

In the end, as explained earlier, the subcommittee recognizes that changes to the pretrial disclosure rules of Rule 3.8 are likely to generate substantial disagreement. We have therefore chosen to address only the narrow question before us.

6. Impact on the disciplinary system

The BPR also argues that, although difficult to enforce, the proposed Rule is likely to increase the already substantial volume of baseless complaints filed with Bar Counsel by inmates seeking to use the resources of the disciplinary system to investigate or relitigate their claims and, in turn, the burden on defense counsel in answering the charges. See BPR Comments at 5-6. According to the BPR, any such complaints would likely be inadequate on their face, but if an inmate can provide some basis to believe that exculpatory information was provided to one or more attorneys who failed to disclose it, Bar Counsel would be obliged to make an inquiry.

Even if the additional investigatory demands are modest, the BPR argues that the protection of the public is better served by focusing Bar Counsel's limited resources on the large number of meritorious disciplinary complaints it is required to address under the current rules. With respect to the burden on defense counsel, a D.C. Bar member who receives an information request from Bar Counsel is obligated by Rule 8.1 (b) to respond. Even a modest response may require time and effort, reconstruction of events in the distant past, review of files, consultation with a former client (as strongly suggested by Comment [2] to Proposed Rule 8.6) and perhaps retention of counsel. Bar Counsel must then evaluate the response and, even if the allegation is ultimately deemed to be unsupported, must write to the complainant explaining that conclusion.

While the BPR's concerns are theoretically sound, they are not grounded in empirical inquiry. By contrast, the Rules Review Committee consulted informally with the Office of Bar Counsel prior to the adoption of proposed Rule 8.6 and no concern was expressed about over-burdening the office. But more to the point, if an inmate knows about exculpatory evidence and can identify the source of the evidence, the inmate's overarching goal will be to relitigate the conviction and not to sanction a potentially offending lawyer. To that end, the inmate is much more likely to contact the court, the inmate's former defense lawyer or an innocence project for assistance. In those rare instances where an inmate files a complaint with the disciplinary system, we expect that the inmate would contact Bar Counsel following an exoneration or following litigation surrounding an effort to secure exoneration, when the merits of any such claim will be much easier to ascertain.

7. <u>Collateral Consequences</u>

Noting that courts cite to the rules of professional conduct to establish the appropriate standard of care in some tort cases, the BPR expresses concern that "creating an affirmative *duty* on the part of all lawyers to come forward with exculpatory information might ultimately result in tort liability to a non-client who should have been exonerated[.]" BPR Comments at 6 (emphasis in original).

The Rules Review Committee believes that the BPR's concerns are unfounded. We have not been able to locate any cases where courts have used the rules of professional conduct as a basis for a non-client third-party beneficiary to impose tort liability upon a lawyer. Rather, the only cases where the courts look to the rules to impose such tort liability is when the tort claimant is or was the lawyer's client and the breach concerns a failure by the lawyer to comply with a rule of professional conduct imposing an ethical duty on the lawyer to the client. For example, in <u>Griva v. Davison</u>, 637 A.2d 830 (D.C. 1994), a partner in a company sued other partners and the law firm that represented the partnership, claiming a breach of fiduciary duties and citing to attorney conflict of interest rules. In analyzing the case, the court opined on the general issue of the relationship between the Rules and a lawyer's fiduciary duties to a client:

> [A] violation of the Code of Professional Responsibility or of the Rules of Professional Conduct can constitute a breach of the attorney's common law fiduciary <u>duty to the client</u>.

Id. at 847 (emphasis added). See also, Gov't of Rwanda v. Rwanda Working Group, 227 F. Supp. 2d 45 (D.D.C. 2002), aff'd in part and rev'd in part on other grounds, 409 F.3d 368 (D.C. Cir. 2005) (conversion and breach of fiduciary duty by lawyer who violated duty of loyalty to the client under Rule 1.7); Bode & Grenier v. Knight, No. 08–1323 (RWR), 2011 WL 5114829 (D.D.C. Sept. 20, 2011) (where court noted that violation of Rule 1.6 could constitute a violation of a lawyer's fiduciary duty of loyalty to a client). Cf. United States v. Scanlon, 753 F. Supp. 2d 23 (D.D.C. 2010), aff'd, 666 F.3d 796 (D.C. Cir. 2011) (criminal case where court found breach of fiduciary duty by a lawyer who had scammed his clients in violation of Rule 1.7 because the lawyer had financial interests adverse to those of his client).

Indeed, existing case law in the District of Columbia suggests that any non-client third-party beneficiary who seeks to impose a fiduciary duty on a lawyer likely would fail regardless of whether he or she sought to invoke the rules of professional conduct. See, e.g., Hopkins v. Akins, 637 A.2d 424 (D.C. 1993), where, in a general discussion of a fiduciary and third–party beneficiary claims against the fiduciary's attorney, the Court of Appeals noted:

> The fiduciary's attorney, as his legal adviser, is faced with the same task of disposition of conflicts. . . . While the fiduciary in the performance of this service may be exposed to the potential of malpractice (and hence is subject to surcharge when his administration is completed), the attorney by definition represents only one party: the fiduciary. It would be very dangerous to conclude that the attorney, through performance of his service to the administrator . . . , subjects himself to claims of negligence from the beneficiaries. The beneficiaries are entitled to even-handed and fair administration by the fiduciary. They are not owed a duty directly by the fiduciary's attorney.

Id. at 428. Accordingly, the Rules Review Committee does not believe that proposed Rule 8.6, if adopted, would result in tort liability for members who fail to comply with their obligations under the Rule.

Conclusion

In sum, although the BPR's comments are a thoughtful expression of its views, in the end the Rules Review Committee remains persuaded that proposed Rule 8.6 is an appropriate addition to the Rules of Professional Conduct – one that will give vital expression to the fundamental values of innocence that have animated our criminal justice system since the time of Blackstone.

Appendix -- Proposed D.C. Rule 8.6

Disclosing Substantial Exculpatory Information about a Convicted Person

(a) A lawyer who knows of information that raises a substantial question about the innocence of a convicted person shall disclose that information to the following individuals and entities whose identity and location can be readily ascertained:

(1) the court where the person's conviction was obtained; and

(2) the chief prosecutor in the jurisdiction where the conviction was obtained; and

(3) the person's attorney of record; and

(4) the convicted person.

If the identity and location of none of the individuals and entities listed above in subsection 8.6(a)(1)-(4) can be readily ascertained, then the lawyer shall disclose that information to the appropriate professional authority.

(b) This Rule does not require disclosure of information otherwise protected by Rule 1.6 or other law.

Comment

[1] Rectifying the conviction and preventing the incarceration of an innocent person are core values of the judicial system and matters of vital concern to the legal profession. Because of the importance of these principles, this Rule applies to all members of the Bar and requires each member of the Bar to disclose substantial exculpatory information about a convicted person when such a disclosure is not prohibited by the attorney's other legal or ethical obligations.

[2] A disclosure that is otherwise mandated by this Rule is not required where it would involve violation of Rule 1.6. However, a lawyer should encourage a client to consent to disclosure where such disclosure would not substantially prejudice the client's interest. Information that is a client confidence or secret under Rule 1.6 is "otherwise protected by Rule 1.6" within the meaning of Rule 8.6(b). Rule 1.6(c), (d), and (e) describe circumstances in which a lawyer may reveal information otherwise protected by Rule 1.6. In such circumstances, a lawyer may, but is not required to, make disclosures otherwise required by this rule.

[3] Not every piece of information raising a question about the convicted person's innocence need be disclosed. Rather, this rule limits the disclosure requirement to information that is sufficient to cause an objective observer to believe there is substantial question about the

correctness of the conviction. The term “substantial” refers to the degree of concern the particular information triggers about the correctness of the conviction, and not the quantum of information of which the lawyer is aware.

[4] An attorney’s independent judgment, made in good faith, that the information is not of such a nature as to trigger the obligation of Rule 8.6, though subsequently determined to have been erroneous, does not constitute a violation of this Rule.

[5] When a lawyer cannot readily ascertain the identity of any individual or entity to whom disclosure is required (the court where the conviction was obtained, the chief prosecutor of the jurisdiction where the conviction was obtained, the attorney of record, or the convicted person), then disclosure to appropriate professional authorities is required. In most instances, that authority will be the Office of Bar Counsel in the District of Columbia, or the equivalent office in the jurisdiction where the underlying crime occurred or where the attorney principally practices.

[6] A disclosure made to a convicted person pursuant to Rule 8.6(a)(4) is authorized by law and does not violate Rule 4.2(a) of these Rules.

[7] Nothing in this Rule is intended to discourage the disclosure of information that raises a substantial question about the innocence of an accused prior to trial and conviction. Accordingly, the same information an attorney has already disclosed to the defense attorney of record pre-conviction need not be disclosed again post-conviction in order to comply with this Rule.

EXHIBIT B

BOARD ON PROFESSIONAL RESPONSIBILITY

January 13, 2012

George R. Clark, Esquire
Chair, District of Columbia Bar Rules
of Professional Conduct Review Committee
1101 K Street, N.W., Suite 200
Washington, D.C. 20005

Re: Comments on Proposed New Rule 8.6 of the District of Columbia Rules of Professional Conduct

Dear George:

On behalf of the Board on Professional Responsibility, I submit herewith comments on the September 2011 final draft report on proposed amendments to selected rules of the District of Columbia Rules of Professional Conduct. The Board has no comment with regard to the proposed amendments to Rules 1.10, 7.1, and 1.13 and thus limits its comments to the proposed new Rule 8.6.

The Board hopes that our comments are of assistance to the Committee in making its recommendations to the Board of Governors.

We would be pleased to respond to any questions concerning the Board's comments.

With best regards,

Deborah J. Jeffrey by EJB

Deborah J. Jeffrey
Vice Chair & Chair, Rules Committee

cc: Wallace E. Shipp, Jr., Esquire
Bar Counsel

Darrell G. Mottley, Esquire
President
District of Columbia Bar

Ray S. Bolze, Esquire
Chair
District of Columbia Board on Professional Responsibility

COMMENTS OF THE BOARD ON PROFESSIONAL RESPONSIBILITY ON PROPOSED NEW RULE 8.6 OF THE DISTRICT OF COLUMBIA RULES OF PROFESSIONAL CONDUCT

The District of Columbia Bar Rules of Professional Conduct Review Committee ("Rules Review Committee") has proposed a new Rule 8.6 (Disclosing Substantial Exculpatory Information about a Convicted Person). The proposed rule would impose upon all members of the District of Columbia Bar an affirmative obligation to disclose information in their possession that raises a substantial question about the innocence of a convicted person, subject to the confidentiality obligations of Rule 1.6 or other law. The Board on Professional Responsibility has carefully reviewed Proposed Rule 8.6 and believes that the Rules Review Committee has engaged in a laudable attempt to remedy the injustice done to those wrongly convicted. For the reasons set forth below, however, the Board recommends that the Committee defer action on this rule in favor of further study.

A. A Lawyer's Current Disclosure Obligations

Rule 3.8(e) requires that prosecutors in criminal cases disclose to the defense -- in certain circumstances -- any information that "tends to negate the guilt of the accused or to mitigate the offense." The official Comments adopted by the D.C. Court of Appeals (the "Court") explain that this obligation arises from the prosecutor's special duty to ensure the administration of justice:

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

Comment [1] to Rule 3.8. The obligation to disclose exculpatory evidence thus depends on the prosecutor's role as a public servant, a constitutional duty explained in *Brady v. Maryland*, 373 U.S. 83 (1963). D.C. Comment [1] also specifies that this Rule is not intended to restrict or expand prosecutors' obligations beyond those in the Constitution or federal or D.C. law or procedural rules.[1] Only intentional failure to disclose violates the D.C. ethics rule. D.C. Rule 3.8(e).

B. Alternate Approaches to Post-Conviction Exculpatory Evidence

In 2008, the ABA amended Model Rule 3.8 to require that prosecutors (1) disclose newly discovered evidence that creates a reasonable likelihood that a convicted person did not commit the offense; and (2) seek to rectify a conviction when they learn of clear and convincing evidence exonerating a convicted person. ABA Model Rules 3.8(g) and (h). The ABA report recommending these post-conviction duties expressly tied them to the special role of criminal prosecutors:

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[1] This limitation does not appear in the Comments to ABA Model Rule 3.8(d), the corresponding Model Rule provision.

> The obligation to avoid and rectify convictions of innocent people, to which the proposed provisions give expression, is the most fundamental professional obligation of criminal prosecutors. The inclusion of these provisions in the rules of professional conduct . . . will express the vital importance that the profession places on this obligation.

ABA Report to the House of Delegates, No. 105B (Feb. 2008).

In its Proposed Rule 8.6, the Rules Review Committee has proposed a different approach -- one which would impose upon all attorneys an obligation to disclose post-conviction exculpatory evidence without regard to whether they participated in or had any connection to the prosecution which resulted in the conviction. Proposed Rule 8.6 (Disclosing Substantially Exculpatory Information about a Convicted Person) states as follows:

> (a) A lawyer who knows of information that raises a substantial question about the innocence of a convicted person shall disclose that information to:
>
> (1) the court where the person's conviction was obtained; and
> (2) the chief prosecutor in the jurisdiction where the conviction was obtained; and
> (3) the person's attorney of record; and
> (4) the convicted person.
>
> (b) The Rule does not require disclosure of information otherwise protected by Rule 1.6 or other law.

No other jurisdiction has taken a similar approach or adopted a comparable rule that would require all attorneys, and not simply prosecutors, to come forward with post-conviction potentially exculpatory evidence. Thus, Proposed Rule 8.6 would create a new obligation for lawyers who are members of the District of Columbia Bar – wherever they practice.

C. Particular Concerns

At the heart of our system of justice is that only the guilty should be punished and that the innocent should neither be incarcerated nor suffer the humiliation and ostracism that can accompany a finding of guilt of a criminal offense. There is no question that citizens generally, and lawyers (absent privilege issues), should report information to the authorities that may tend to prove the innocence of a convicted person. Historically, however, the issue of the disclosure of exculpatory information by non-prosecutors has been considered a moral one, not one that is codified in statutes or in our ethical rules.

Before taking steps to enforce that moral obligation through the disciplinary process, the Board requests that the Rules Review Committee consider the following issues:

1. Proposed Rule 8.6 would mark a significant expansion of the disclosure obligations. In the past, lawyers who are strangers to a conviction have had the same moral obligation as other members of the public in connection with the reporting of wrongdoing or criminal activity. Requiring these lawyers to take affirmative steps to disclose information about convicted persons extends the Rules of Professional Conduct well beyond their current reach. The Board is concerned about the imposition of such a new duty, unique to members of the D.C. Bar.

The Rules Review Committee report explains that the Committee rejected the ABA's approach imposing this post-conviction obligation solely on prosecutors because "[p]reventing the incarceration of the innocent is a core value of the judicial system and the correction of a significant miscarriage of justice should be of interest to all attorneys, not just prosecutors." Rules Review Committee Report at 44. Although the Board believes that this sentiment is widely shared, within the ABA and throughout the United States, no other jurisdiction has felt it necessary to implement it by imposing an affirmative disclosure obligation on lawyers otherwise uninvolved in a matter.

Moreover, the proposed rule would expand the duty of disclosure in a manner which is inconsistent with the Court's ethics rules. The existing rules recognize a variety of situations in which the need to come forward is sufficiently compelling that a lawyer may choose to do so even where confidential information is involved. However, none of these rules mandates that the lawyer do so. Thus, for example, Rule 1.6 permits disclosure even of privileged information in the event of threats of serious bodily harm or death, obstruction of justice or, in some circumstances, to prevent or rectify serious financial harm. But, however compelling it may be to prevent the murder of an innocent person, nothing in the ethics rules requires a lawyer to come forward to do so, even if no privileged information is involved. Likewise, nothing in the rules enforces the moral obligation of a lawyer with non-privileged information to report child abuse, elder abuse or a violent crime in progress. It is difficult to say that situations involving threats of impending grave physical harm are any less compelling than a wrongful deprivation of liberty.

Extending to all lawyers the duty to come forward with exculpatory information following a conviction also disregards the origin of that obligation. The Court has been explicit that the duty to disclose exculpatory information falls on prosecutors because they bear obligations for the administration of justice, imposed by the Constitution and statute, and not shared by other lawyers. We believe that greater justification should be required in order to depart from this principle and impose a disclosure obligation on lawyers who may well be strangers to the underlying criminal matter.

Finally, while the goal of the proposed rule is to minimize the possibility that individuals will be imprisoned improperly, the Rules Review Committee report does not provide a basis to believe that Proposed Rule 8.6 would result in the exoneration of more wrongfully convicted persons than would adoption of ABA Model Rule 3.8(g) and (h), applicable to prosecutors only. Indeed, the number of non-prosecutors who would ultimately be required to make disclosures is likely to be small, because information covered by Rule 1.6 is exempt from disclosure.[2]

[2] Rule 1.6 protects from disclosure "confidences," defined as information that is protected by the attorney-client privilege, and "secrets," defined as information gained in the course of the professional relationship, the disclosure of which would be detrimental or embarrassing to a client or which a client has requested be held in confidence.

Attorneys whose clients are involved in the criminal justice system and are most likely to obtain exculpatory information would not be covered by Proposed Rule 8.6 because their information is almost certainly subject to Rule 1.6. In effect, Proposed Rule 8.6 would not apply to information that a lawyer obtains in his or her professional capacity but would apply, for example, to information that the lawyer overhears. Anomalously, the obligation to come forward will necessarily fall on those lawyers least likely to have reliable information and least able to evaluate its exculpatory value.

2. **Understanding the disclosure obligation.** The disclosure obligation is triggered when a lawyer learns of "information that raises a substantial question about the innocence of a convicted person." This standard is unique in the Rules and is not well-defined. By contrast, Rule 3.8 requires prosecutors to disclose information that "tends to negate the guilt of the accused or to mitigate the offense." It is unclear whether Rule 8.6's proposed standard is higher, lower, or the same as the standard in Rule 3.8.[3] It is also unclear whether the obligation would extend to *Giglio* information, that is, information that could be used to impeach a witness whose testimony is potentially dispositive. *See Giglio v. U.S.*, 405 U.S. 150 (1972) (due process requires prosecutor to disclose material information that bears on the credibility of a witness whose testimony is potentially dispositive of guilt or innocence).

Attorneys who do not practice criminal law may not understand the significance of potentially exonerating information. We have concerns about whether lawyers with no ties to the case, and possibly unfamiliar with criminal law, will appreciate whether the information in their possession actually creates a substantial question about a convicted person's innocence, a standard that is itself inherently ambiguous. Similarly, an attorney uninvolved in the matter may not be in a position to know whether an individual has in fact been convicted and may be required to undertake considerable efforts to locate the persons to whom the information must be reported. While most ethics rules contain elements of ambiguity or uncertainty, we are concerned about a disciplinary rule that seems to presume specialized knowledge on the part of the average practitioner.

3. **Territorial reach and choice of law.** It is not clear whether the proposed rule would apply to criminal convictions that result from proceedings outside the District of Columbia, jurisdictions that do not require disclosure by non-prosecutors. Rule 8.5(b) prescribes that the ethics rules of a tribunal govern matters before that tribunal, but other matters are subject to the rules of the jurisdiction in which the lawyer principally practices. Post-conviction, however, no case may be pending. A lawyer who is not involved in a criminal case may have some difficulty ascertaining where and whether the matter is before a tribunal, which rules apply and whether he or she must report potentially exculpatory information. It seems anomalous to require D.C. Bar members to report information to courts in jurisdictions that do not require their own bar members to report such information.

4. **Relationship between Proposed Rule 8.6 and current Rule 3.8(e).** The relationship between Proposed Rule 8.6 and current Rule 3.8(e) is problematic. Under Rule

[3] For comparison, ABA Model Rule 3.8 requires disclosure of information that is "material" to the question of a defendant's innocence.

3.8(e), prosecutors cannot intentionally fail to disclose information (if requested by the defense) that tends to negate the guilt of the accused. Prosecutors currently have no explicit obligation under the Rules to disclose exculpatory information that they learn subsequent to a person's conviction. Under Proposed Rule 8.6, prosecutors would be required to disclose post-conviction exculpatory information that they discover, but apparently only in those circumstances where there is a "substantial question" about the innocence of the convicted person. It is unclear whether, in using that language in Proposed Rule 8.6, the Rules Review Committee intended that the standard applicable to prosecutors should change from the "tends to negate" the guilt of the accused pre-conviction to "a substantial question" about the innocence of a convicted person once the individual is found guilty – or whether these standards were intended to be equivalent. Similarly, under Proposed Rule 8.6, there is no requirement that a prosecutor's failure to disclose be "intentional" as under Rule 3.8(e).[4] The Board believes it is important for prosecutors to have a clear understanding of the interplay between the rules and the circumstances under which they are required to disclose potentially exculpatory information concerning a person who has been convicted.

To an experienced reader of the disciplinary rules, we believe that it will be clear that the duties set forth in Proposed Rule 8.6 would supplement those of Rule 3.8 when it comes to post-conviction disclosures by prosecutors. However, placing the post-conviction obligation in a new Rule 8.6 risks that it will be overlooked by prosecutors, who are accustomed to looking to Rule 3.8 to set forth their disclosure obligations. Because prosecutors are most likely to obtain post-conviction exculpatory information and are in the best position to act on it, guidance about their ethical obligations should be readily apparent to them.

5. **Timing of disclosures.** The proposed rule focuses on disclosure of information relating to convicted persons, to the exclusion of those who have been accused but not yet convicted. Exculpatory information, however, is likely to be more valuable to a defendant before or during trial, rather than after conviction, when procedural opportunities may be limited. It seems just as important to our system of justice that a person not be wrongfully accused as it is that a person not be wrongfully convicted.

6. **Impact on the disciplinary system.** Though difficult to enforce[5], the proposed rule is likely to increase the already substantial volume of baseless complaints filed

[4] The element of intentional failure to disclose distinguishes D.C. Rule 3.8(e) from the Model Rule, which contains no such limitation. The proposed rule lacks that scienter requirement. We have difficulty understanding why an obligation on all lawyers to come forward with information exculpating a convicted person should be more robust than a prosecutor's constitutionally based duty to disclose such information before trial.

[5] The qualified and subjective elements in the proposed rule will make meaningful enforcement difficult, if not impossible. By definition, the information must raise substantial, *i.e.*, great, concern about the correctness of the conviction. But even then, a lawyer who makes a good faith judgment that no disclosure is required has not violated the rule. Comment [4] to Proposed Rule 8.6. Notably, the District of Columbia has never successfully prosecuted a lawyer for violating Rule 8.3's parallel requirement to report attorney misconduct. Because of the difficulty of enforcement, as to non-prosecutors, Proposed Rule 8.6 is essentially inspirational and aspirational, an approach that the District of Columbia abandoned in 1991, when it replaced the Code of Professional Responsibility with the Rules of Professional Conduct. *See* Rules Review Committee Report at 44 ("the normative and pedagogic effects of adopting the proposed Rule were significant").

with Bar Counsel by inmates seeking to use the resources of the disciplinary system to investigate or relitigate their claims and, in turn, the burden on defense counsel in answering the charges. Many such complaints would likely be inadequate on their face, but if an inmate can provide some basis to believe that exculpatory information was provided to one or more attorneys who failed to disclose it, Bar Counsel would be obliged to make inquiry. Even if the additional investigatory demands are modest, we believe that the protection of the public is better served by focusing Bar Counsel's limited resources on the large number of meritorious disciplinary complaints it is required to address under the current rules. With respect to the burden on defense counsel, a D.C. Bar member who receives an information request from Bar Counsel is obligated by Rule 8.1(b) to respond. Even a modest response may require time and effort, reconstruction of events in the distant past, review of files, consultation with a former client (as strongly suggested by Comment [2] to Proposed Rule 8.6) and perhaps retention of counsel. Bar Counsel must then evaluate the response and, even if the allegation is ultimately unsupported, must write to the complainant explaining that conclusion.

Moreover, the proposed rule contemplates that a lawyer in possession of exculpatory information can deliver that information to Bar Counsel if the lawyer cannot otherwise ascertain to whom it should be reported. Proposed Rule 8.6(a) and Comment [5] thereto. The rule does not specify the action to be taken by Bar Counsel, but presumably that Office would need to devote some resources to identifying the individual to whom the information pertains.

7. **Collateral Consequences.** The Board has some concern that creating an affirmative *duty* on the part of all lawyers to come forward with exculpatory information might ultimately result in tort liability to a non-client who should have been exonerated; prosecutors would of course be immune from such liability. *Imbler v. Pachtman*, 424 U.S. 409 (1976). D.C. courts have often cited the Rules of Professional Conduct to establish the standard of care in other areas, and that evidence of a violation is admissible (though not necessarily dispositive) to prove liability.[6] Even a lawyer who defends such a claim successfully will have to retain counsel and may be required to spend months if not years defending against the claim.

The Board respectfully requests that the Committee refer this matter for further study, perhaps as part of a comprehensive review of Rule 3.8. It may be advisable to consider the Model Rules' approach of expanding the scope of prosecutors' duties so that they will be required to disclose exculpatory information that comes to their attention after a conviction. The Board, however, is concerned about the proposed rule as drafted, and in particular has concerns about the unprecedented scope of a rule that would require all lawyers to come forward with non-privileged exculpatory information about a convicted person.

We thank you for your consideration of our comments.

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[6] *See, e.g., Griva v. Davison*, 637 A.2d 830, 846-47 (D.C. 1994) (despite language in the Rules' *Scope* section that a Rule violation does not necessarily give rise to a cause of action, "case law confirms that a violation of the Code of Professional Responsibility or of the Rules of Professional Misconduct can constitute a breach of the attorney's common law fiduciary duty"), *citing Avianca v. Corriea*, 705 F.Supp. 666, 679 (D.D.C. 1989).

EXHIBIT C

Exhibit C

ABA Model Rules of Professional Conduct

Client-Lawyer Relationship
Rule 1.10 Imputation Of Conflicts Of Interest: General Rule

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

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

(2) the prohibition is based upon Rule 1.9(a) or (b) and arises out of the disqualified lawyer’s association with a prior firm, and

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

(ii) written notice is promptly given to any affected former client to enable the former client to ascertain compliance with the provisions of this Rule, which shall include a description of the screening procedures employed; a statement of the firm's and of the screened lawyer's compliance with these Rules; a statement that review may be available before a tribunal; and an agreement by the firm to respond promptly to any written inquiries or objections by the former client about the screening procedures; and

(iii) certifications of compliance with these Rules and with the screening procedures are provided to the former client by the screened lawyer and by a partner of the firm, at reasonable intervals upon the former client's written request and upon termination of the screening procedures.

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

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

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

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

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

<u>Comment</u>

Definition of "Firm"

[1] For purposes of the Rules of Professional Conduct, the term "firm" denotes 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. See Rule 1.0(c). Whether to or more lawyers constitute a firm within this definition can depend upon the specific facts. See Rule 1.10,

Principles of Imputed Disqualification

[2] The rule of imputed disqualification stated in paragraph (a) gives effect to the principle of loyalty to the client as it applies to lawyers who practice in a law firm. Such situations can be considered from the premise that a firm of lawyers is essentially one lawyer for purposes of the rules governing loyalty to the client, or from the premise that each lawyer is vicariously bound by the obligation of loyalty owed by each lawyer with whom the lawyer is associated. Paragraph (a)(1) operates only among the lawyers currently associated in a firm. When a lawyer moves from one firm to another, the situation is governed by Rules 1.9(b) and 1.10(a)(2) and 1.10 (b).

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

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

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

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

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

[7] Rule 1.10(a)(2) similarly removes the imputation otherwise required by Rule 1.10(a), but unlike section (c), it does so without requiring that there be informed consent by the former client. Instead, it requires that the procedures laid out in sections (a)(2)(i)-(iii) be followed. A description of effective screening mechanisms appears in Rule 1.0(k). Lawyers should be aware, however, that, even where screening mechanisms have been adopted, tribunals may consider additional factors in ruling upon motions to disqualify a lawyer from pending litigation.

[8] Paragraph (a)(2)(i) does not prohibit the screened lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly related to the matter in which the lawyer is disqualified.

[9] The notice required by paragraph (a)(2)(ii) generally should include a description of the screened lawyer's prior representation and be given as soon as practicable after the need for screening becomes apparent. It also should include a statement by the screened lawyer and the firm that the client's material confidential information has not been disclosed or used in violation of the Rules. The notice is intended to enable the former client to evaluate and comment upon the effectiveness of the screening procedures.

[10] The certifications required by paragraph (a)(2)(iii) give the former client assurance that the client's material confidential information has not been disclosed or used inappropriately, either prior to timely implementation of a screen or thereafter. If compliance cannot be certified, the certificate must describe the failure to comply.

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

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

EXHIBIT D

DISTRICT OF COLUMBIA BAR RULES OF PROFESSIONAL CONDUCT REVIEW COMMITTEE

PROPOSED AMENDMENTS TO SELECTED RULES OF THE D.C. RULES OF PROFESSIONAL CONDUCT

Clean and Red-lined Versions

(As submitted to the D.C. Bar Board of Governors)
(March 2012)

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District of Columbia Rules of Professional Conduct
Proposed Revisions to Rule 1.10 (Imputed Disqualification: General Rule)

Rule 1.10—Imputed Disqualification: General Rule

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, unless:

> (1) the prohibition of the individual lawyer's representation is based on an interest of the lawyer described in Rule 1.7(b)(4) and that interest does not present a significant risk of adversely affecting the representation of the client by the remaining lawyers in the firm; or
>
> (2) the representation is permitted by Rules 1.11, 1.12, or 1.18, or by paragraph (b) of this rule.

(b) (1) Except as provided in subparagraphs (2) and (3), when a lawyer becomes associated with a firm, the firm may not knowingly represent a person in a matter which is the same as, or substantially related to, a matter with respect to which the lawyer had previously represented a client whose interests are materially adverse to that person and about whom the lawyer has in fact acquired information protected by Rule 1.6 that is material to the matter.

> (2) The firm is not disqualified by this paragraph if the lawyer participated in a previous representation or acquired information under the circumstances covered by Rule 1.6(h) or Rule 1.18.
>
> (3) The firm is not disqualified by this paragraph if the prohibition is based upon Rule 1.9 and
>
> > (A) the disqualified lawyer is screened from the matter and is apportioned no part of the fee therefrom; and
> >
> > (B) written notice is promptly given by the firm and the lawyer to any affected former client of the screened lawyer, such notice to include a description of the screening procedures employed and a statement of compliance with these Rules.

(c) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client who was represented by the formerly associated lawyer during the association and is not currently represented by the firm, unless:

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

(2) any lawyer remaining in the firm has information protected by Rule 1.6 that is material to the matter.

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

(e) A lawyer who, while affiliated with a firm, is made available to assist the Office of the Attorney General of the District of Columbia in providing legal services to that agency is not considered to be associated in a firm for purposes of paragraph (a), provided, however, that no such lawyer shall represent the Office of the Attorney General with respect to a matter in which the lawyer's firm appears on behalf of an adversary.

(f) If a client of the firm requests in writing that the fact and subject matter of a representation subject to paragraph (b) not be disclosed by submitting the written notice referred to in subparagraph (b)(3)(B), such notice shall be prepared concurrently with undertaking the representation and filed with Bar Counsel under seal. If at any time thereafter the fact and subject matter of the representation are disclosed to the public or become a part of the public record, the written notice previously prepared shall be promptly submitted as required by subparagraph (b)(3)(B).

Comment

Definition of "Firm"

[1] Whether two or more lawyers constitute a firm within this definition can depend on the specific facts. *See* Rule 1.0(c). For purposes of this rule, the term "firm" includes lawyers in a private firm and lawyers employed in the legal department of a corporation, legal services organization, or other organization, but does not include a government agency or other government entity. For example, two practitioners who share office space and occasionally consult or assist each other ordinarily would not be regarded as constituting a firm. However, if they present themselves to the public in a way suggesting that they are a firm or conduct themselves as a firm, they should be regarded as a firm for purposes of the Rules. 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 confidential 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.

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

[3] Similar questions can also arise with respect to lawyers in legal aid organizations. Lawyers employed in the same unit of a legal service organization constitute a firm, but not necessarily those employed in separate units. As in the case of independent practitioners, whether the lawyers should be treated as associated with each other can depend on the particular Rule that is involved, and on the specific facts of the situation.

Principles of Imputed Disqualification

[4] The rule of imputed disqualification stated in paragraph (a) gives effect to the principle of loyalty to the client as it applies to lawyers who practice in a law firm. Such situations can be considered from the premise that a firm of lawyers is essentially one lawyer for purposes of the Rules governing loyalty to the client, or from the premise that each lawyer is vicariously bound by the obligation of loyalty owed by each lawyer with whom the lawyer is associated. Paragraph (a) operates only among the lawyers currently associated in a firm. When a lawyer moves from one firm to another, the situation is governed by paragraph (b) or (c).

[5] Where an individual lawyer is prohibited from engaging in certain transactions under Rule 1.8, paragraph (j) of that Rule, and not this Rule, governs whether that prohibition applies also to other lawyers in a firm with which that lawyer is associated. For issues involving prospective clients, see Rule 1.18.

[6] Where a lawyer has joined a private firm after having represented the government, the situation is governed by Rule 1.11.

Exception for Personal Interest of the Disqualified Lawyer

[7] The rule in paragraph (a) does not prohibit representation by the firm where neither questions of client loyalty nor protection of confidential information are presented. Where an individual lawyer could not effectively represent a given client because of an interest described in Rule 1.7(b)(4), but that lawyer will do no work on the matter and the disqualifying interest of the lawyer will not adversely affect the representation by others in the firm, the firm should not be disqualified. For example, a lawyer's strong political beliefs may disqualify the lawyer from representing a client, but the firm should not be disqualified if the lawyer's beliefs will not adversely affect the representation by others in the firm. Similarly, representation of a client by the firm would not be precluded merely because the client's adversary is a person with whom one of the firm's lawyers has longstanding personal or social ties or is represented by a lawyer in another firm who is closely related to one of the firm's lawyers. *See* Rule 1.7, Comment [12] and Rule 1.8(h), Comment [7], respectively. Nor would representation by the firm be precluded merely because one of its lawyers is seeking possible employment with an opponent (*e.g.*, U.S. Attorney's Office) or with a law firm representing the opponent of a firm client.

Lawyers Moving Between Firms

[8] When lawyers move between firms or when lawyers have been associated in a firm but then end their association, the fiction that the law firm is the same as a single lawyer is no longer wholly realistic. There are several competing considerations. First, the client previously represented must be reasonably assured that the principle of loyalty to the client is not compromised. Second, the rule of disqualification should not be so broadly cast as to preclude other persons from having reasonable choice of legal counsel. Third, the rule of disqualification should not unreasonably hamper lawyers from forming new associations and taking on new clients after having left a previous association, or unreasonably hamper the former firm from representing a client with interests adverse to those of a former client who was represented by a lawyer who has terminated an association with the firm. In this connection, it should be recognized that today many lawyers practice in firms, that many to some degree limit their practice to one field or another, and that many move from one association to another several times in their careers. If the concept of imputed disqualification were defined with unqualified rigor, the result would be radical curtailment of the opportunity of lawyers to move from one practice setting to another and of the opportunity of clients to change counsel.

[9] Reconciliation of these competing principles in the past has been attempted under two rubrics. One approach has been to seek *per se* rules of disqualification. For example, it has been held that a partner in a law firm is conclusively presumed to have access to all confidences concerning all clients of the firm. Under this analysis, if a lawyer has been a partner in one law firm and then becomes a partner in another law firm, there is a presumption that all confidences known by a partner in the first firm are known to all partners in the second firm. This presumption might properly be applied in some circumstances, especially where the client has been extensively represented, but may be unrealistic where the client was represented only for limited purposes. Furthermore, such a rigid rule exaggerates the difference between a partner and an associate in modern law firms.

[10] The other rubric formerly used for dealing with vicarious disqualification is the appearance of impropriety proscribed in Canon 9 of the Code of Professional Responsibility. Applying this rubric presents two problems. First, the appearance of impropriety can be taken to include any new client lawyer relationship that might make a former client feel anxious. If that meaning were adopted, disqualification would become little more than a question of subjective judgment by the former client. Second, since "impropriety" is undefined, the term "appearance of impropriety" is question-begging. It therefore has to be recognized that the problem of imputed disqualification cannot be properly resolved either by simple analogy to a lawyer practicing alone or by the very general concept of appearance of impropriety.

[11] A rule based on a functional analysis is more appropriate for determining the question of vicarious disqualification. Two functions are involved: preserving confidentiality and avoiding positions adverse to a client.

Confidentiality

[12] Preserving confidentiality is a question of access to information. Access to information, in

turn, is essentially a question of fact in particular circumstances, aided by inferences, deductions, or working presumptions that reasonably may be made about the way in which lawyers work together. A lawyer may have general access to files of all clients of a law firm and may regularly participate in discussions of their affairs; it should be inferred that such a lawyer in fact is privy to all information about all the firm's clients. In contrast, another lawyer may have access to the files of only a limited number of clients and participate in discussion of the affairs of no other clients; in the absence of information to the contrary, it should be inferred that such a lawyer in fact is privy to information about the clients actually served but not those of other clients.

[13] Application of paragraphs (b) and (c) depends on a situation's particular facts. In any such inquiry, the burden of proof should rest upon the firm whose disqualification is sought.

[14] The provisions of paragraphs (b) and (c) which refer to possession of protected information operate to disqualify the firm only when the lawyer involved has actual knowledge of information protected by Rule 1.6. Thus, if a lawyer while with one firm acquired no knowledge of information relating to a particular client of the firm, and that lawyer later joined another firm, neither the lawyer individually nor the second firm is disqualified from representing another client in the same or a substantially related matter even though the interests of the two clients conflict.

[15] Independent of the question of disqualification of a firm, a lawyer changing professional association has a continuing duty to preserve confidentiality of information about a client formerly represented. See Rule 1.6.

Adverse Positions

[16] The second aspect of loyalty to a client is the lawyer's obligation to decline subsequent representations involving positions adverse to a former client arising in the same or substantially related matters. This obligation requires abstention from adverse representations by the individual lawyer involved, and may also entail abstention of other lawyers through imputed disqualification. Hence, this aspect of the problem is governed by the principles of Rule 1.9. Thus, under paragraph (b), if a lawyer left one firm for another, the new affiliation would preclude the lawyer's new firm from continuing to represent clients with interests materially adverse to those of the lawyer's former clients in the same or substantially related matters. In this respect paragraph (b) is at odds with – and thus must be understood to reject – the dicta expressed in the "second" hypothetical in the second paragraph of footnote 5 of *Brown v. District of Columbia Board of Zoning Adjustment*, 486 A.2d 37, 42 n. 5 (D.C. 1984) (en banc), premised on *LaSalle National Bank v. County of Lake*, 703 F.2d 252, 257-59 (7th Cir. 1983). An exception to paragraph (b) is provided by subparagraph (b)(3).

[17] The concept of "former client" as used in paragraph (b) extends only to actual representation of the client by the newly affiliated lawyer while that lawyer was employed by the former firm. Thus, not all of the clients of the former firm during the newly affiliated lawyer's practice there are necessarily deemed former clients of the newly affiliated lawyer. Only those clients with whom the newly affiliated lawyer in fact personally had a lawyer client relationship are former clients within the terms of paragraph (b).

[18] Subparagraph (b)(2) limits the imputation rule in certain limited circumstances. Those circumstances involve situations in which any secrets or confidences obtained were received before the lawyer had become a member of the Bar, but during a time when such person was providing assistance to another lawyer. The typical situation is that of the part time or summer law clerk, or so called summer associate. Other types of assistance to a lawyer, such as working as a paralegal or legal assistant, could also fall within the scope of this sentence. The limitation on the imputation rule is similar to the provision dealing with judicial law clerks under Rule 1.11(b). Not applying the imputation rule reflects a policy choice that imputation in such circumstances could unduly impair the mobility of persons employed in such nonlawyer positions once they become members of the Bar. The personal disqualification of the former non-lawyer is not affected, and the lawyer who previously held the non-legal job may not be involved in any representation with respect to which the firm would have been disqualified subparagraph (b)(2). Rule 1.6(h) provides that the former nonlawyer is subject to the requirements of Rule 1.6 (regarding protection of client confidences and secrets) just as if the person had been a member of the Bar when employed in the prior position.

[19] Under certain circumstances, paragraph (c) permits a law firm to represent a person with interests directly adverse to those of a client represented by a lawyer who formerly was associated with the firm. The Rule applies regardless of when the formerly associated lawyer represented the client. The firm, however, may not represent a person in a matter adverse to a current client of the firm, which would violate Rule 1.7. Moreover, the firm may not represent the person where the matter is the same as, or substantially related to, that in which the formerly associated lawyer represented the client and any other lawyer currently in the firm has material information protected by Rule 1.6.

[20] Subparagraph (b)(3) removes the imputation otherwise required by paragraphs 1.10(a) and (b), but does so without requiring informed consent by the former client of the lawyer changing firms. Instead, it requires that the procedures set out in subparagraphs (b)(3)(A) and (B) be followed. The term "screened" is defined in Rule 1.0(l) and explained in comments [4]-[6] to Rule 1.0. Lawyers should be aware, however, that even where subparagraph 1.10(b)(3) has been followed, tribunals in other jurisdictions may consider additional factors in ruling upon motions to disqualify lawyers from pending litigation. Establishing a screen under this rule does not constitute dropping an existing client in favor of another client. Cf. D.C. Legal Ethics Op. 272 (1997) (permitting lawyer to drop occasional client for whom lawyer is handling no current projects in order to accept conflicting representation).

[21] Subparagraph (b)(3)(A) does not prohibit the screened lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly related to the matter from which the screened lawyer is disqualified. See D.C. Legal Ethics Op. 279 (1998).

[22] The written notice required by subparagraph (b)(3)(B) generally should include a description of the screened lawyer's prior representation and an undertaking by the new law firm to respond promptly to any written inquiries or objections by the former client regarding the screening procedures. The notice should be provided as soon as practicable after the need for

screening becomes apparent. It also should include a statement by the screened lawyer and the new firm that the screened lawyer's former client's confidential information has not been disclosed or used in violation of the Rules. The notice is intended to enable the screened lawyer's former client to evaluate and comment upon the effectiveness of the screening procedures. Nothing in this rule is intended to restrict the firm and the screened lawyer's former client from agreeing to different screening procedures but those set out herein are sufficient to comply with the rule.

[23] Paragraph (f) makes it clear that a lawyer's duty, under Rule 1.6, to maintain client confidences and secrets may preclude the submission of any notice required by subparagraph (b)(3)(b). If a client requests in writing that the fact and subject matter of the representation not be disclosed, the screened lawyer and law firm must comply with that request. If a client makes such a request, the lawyer must abide by the client's wishes until such time as the fact and subject matter of the representation become public through some other means, such as a public filing. Filing a pleading that is publicly available or making an appearance in a proceeding before a tribunal that is open to the public constitutes a public filing for purposes of this rule. Once information concerning the representation is public, the notifications called for must be made promptly, and the lawyers involved may not honor a client's request not to make the notifications.

[24] Although paragraph (f) prohibits the lawyer from disclosing the fact and subject matter of the representation when the client has requested in writing that the information be kept confidential, the paragraph requires the screened lawyer and the screened lawyer's new firm to prepare the documents described in paragraph (f) as soon as the representation commences, to file the documents with Bar Counsel, and to preserve the documents for possible submission to the screened lawyer's former client if and when the client does consent to their submission or the information becomes public.

[25] The responsibilities of partners, managers, and supervisory lawyers prescribed by Rules 5.1 and 5.3 apply in respect of screening arrangements under Rule 1.10(b)(3).

Lawyers Assisting the Office of the Attorney General of the District of Columbia

[26] The Office of the Attorney General of the District of Columbia may experience periods of peak need for legal services which cannot be met by normal hiring programs, or may experience problems in dealing with a large backlog of matters requiring legal services. In such circumstances, the public interest is served by permitting private firms to provide the services of lawyers affiliated with such private firms on a temporary basis to assist the Office of the Attorney General. Such arrangements do not fit within the classical pattern of situations involving the general imputation rule of paragraph (a). Provided that safeguards are in place which preclude the improper disclosure of client confidences or secrets, and the improper use of one client's confidences or secrets on behalf of another client, the public interest benefits of such arrangements justify an exception to the general imputation rule, just as Comment [1] excludes from the definition of "firm" lawyers employed by a government agency or other government entity. Lawyers assigned to assist the Office of the Attorney General pursuant to such temporary programs are, by virtue of paragraph (e), treated as if they were employed as government

employees and as if their affiliation with the private firm did not exist during the period of temporary service with the Office of the Attorney General. See Rule 1.11(h) with respect to the procedures to be followed by lawyers participating in such temporary programs and by the firms with which such lawyers are affiliated after the participating lawyers have ended their participation in such temporary programs.

[27] The term “made available to assist the Office of the Attorney General in providing legal services” in paragraph (e) contemplates the temporary cessation of practice with the firm during the period legal services are being made available to the Office of the Attorney General, so that during that period the lawyer’s activities which involve the practice of law are devoted fully to assisting the Office of the Attorney General.

[28] Rule 1.10(e) prohibits a lawyer who is assisting the Office of the Attorney General from representing that office in any matter in which the lawyer’s firm represents an adversary. Rule 1.10(e) does not, however, by its terms, prohibit lawyers assisting the Office of the Attorney General from participating in every matter in which the Attorney General is taking a position adverse to that of a current client of the firm with which the participating lawyer was affiliated prior to joining the program of assistance to the Office of the Attorney General. Such an unequivocal prohibition would be overly broad, difficult to administer in practice, and inconsistent with the purposes of Rule 1.10(e).

[29] The absence of such a per se prohibition in Rule 1.10(e) does not diminish the importance of a thoughtful and restrained approach to defining those matters in which it is appropriate for a participating lawyer to be involved. An appearance of impropriety in programs of this kind can undermine the public’s acceptance of the program and embarrass the Office of the Attorney General, the participating lawyer, that lawyer’s law firm and clients of that firm. For example, it would not be appropriate for a participant lawyer to engage in a representation adverse to a party who is known to be a major client of the participating lawyer’s firm, even though the subject matter of the representation of the Office of the Attorney General bears no substantial relationship to any representation of that party by the participating lawyer’s firm. Similarly, it would be inappropriate for a participating lawyer to be involved in a representation adverse to a party that the participating lawyer has been personally involved in representing while at the firm, even if the client is not a major client of the firm. The appropriate test is that of conservative good judgment; if any reasonable doubts concerning the unrestrained vigor of the participating lawyer’s representation on behalf of the Office of the Attorney General might be created, the lawyer should advise the appropriate officials of the Office of the Attorney General and decline to participate. Similarly, if participation on behalf of the Office of the Attorney General might reasonably give rise to a concern on the part of a participating lawyer’s firm or a client of the firm that its secrets or confidences (as defined by Rule 1.6) might be compromised, participation should be declined. It is not anticipated that situations suggesting the appropriateness of a refusal to participate will occur so frequently as to significantly impair the usefulness of the program of participation by lawyers from private firms.

[30] The primary responsibility for identifying situations in which representation by the participating lawyer might raise reasonable doubts as to the lawyer’s zealous representation on behalf of the Office of the Attorney General must rest on the participating lawyer, who will

generally be privy to nonpublic information bearing on the appropriateness of the lawyer's participation in a matter on behalf of the Office of the Attorney General. Recognizing that many representations by law firms are nonpublic matters, the existence and nature of which may not be disclosed consistent with Rule 1.6, it is not anticipated that law firms from which participating lawyers have been drawn would be asked to perform formal "conflicts checks" with respect to matters in which participating lawyers may be involved. However, consultations between participating lawyers and their law firms to identify potential areas of concern, provided that such consultations honor the requirements of Rule 1.6, are appropriate to protect the interests of all involved – the Office of the Attorney General, the participating lawyer, that lawyer's law firm and any clients whose interests are potentially implicated.

District of Columbia Rules of Professional Conduct
Proposed Revisions to Rule 1.10 (Imputed Disqualification: General Rule)

[Unmarked text is the current D.C. rule; proposed additions: **bold and double underscoring**; proposed deletions: strike-through, as in ~~deleted~~.]

Rule 1.10—Imputed Disqualification: General Rule

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, unless:

> (1) the prohibition of the individual lawyer's representation is based on an interest of the lawyer described in Rule 1.7(b)(4) and that interest does not present a significant risk of adversely affecting the representation of the client by the remaining lawyers in the firm; or
>
> (2) the representation is permitted by Rules 1.11, 1.12, or 1.18**, or by paragraph (b) of this rule.**

(b)**(1) Except as provided in subparagraphs (2) and (3), when** ~~When~~ a lawyer becomes associated with a firm, the firm may not knowingly represent a person in a matter which is the same as, or substantially related to, a matter with respect to which the lawyer had previously represented a client whose interests are materially adverse to that person and about whom the lawyer has in fact acquired information protected by Rule 1.6 that is material to the matter.

> **(2)** The firm is not disqualified **by this paragraph** if the lawyer participated in a previous representation or acquired information under the circumstances covered by Rule 1.6(h) or Rule 1.18.
>
> **(3) The firm is not disqualified by this paragraph if the prohibition is based upon Rule 1.9 and**
>
> > **(A) the disqualified lawyer is screened from the matter and is apportioned no part of the fee therefrom; and**
> >
> > **(B) written notice is promptly given by the firm and the lawyer to any affected former client of the screened lawyer, such notice to include a description of the screening procedures employed and a statement of compliance with these Rules.**

(c) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client who was represented by the formerly associated lawyer during the association and is not currently represented by the firm, unless:

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

(2) any lawyer remaining in the firm has information protected by Rule 1.6 that is material to the matter.

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

(e) A lawyer who, while affiliated with a firm, is made available to assist the Office of the Attorney General of the District of Columbia in providing legal services to that agency is not considered to be associated in a firm for purposes of paragraph (a), provided, however, that no such lawyer shall represent the Office of the Attorney General with respect to a matter in which the lawyer's firm appears on behalf of an adversary.

(f) If a client of the firm requests in writing that the fact and subject matter of a representation subject to paragraph (b) not be disclosed by submitting the written notice referred to in subparagraph (b)(3)(B), such notice shall be prepared concurrently with undertaking the representation and filed with Bar Counsel under seal. If at any time thereafter the fact and subject matter of the representation are disclosed to the public or become a part of the public record, the written notice previously prepared shall be promptly submitted as required by subparagraph (b)(3)(B).

Comment

Definition of "Firm"

[1] Whether two or more lawyers constitute a firm within this definition can depend on the specific facts. *See* Rule 1.0(c). For purposes of this rule, the term "firm" includes lawyers in a private firm and lawyers employed in the legal department of a corporation, legal services organization, or other organization, but does not include a government agency or other government entity. For example, two practitioners who share office space and occasionally consult or assist each other ordinarily would not be regarded as constituting a firm. However, if they present themselves to the public in a way suggesting that they are a firm or conduct themselves as a firm, they should be regarded as a firm for purposes of the Rules. 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 confidential 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.

[2] There is ordinarily no question that the members of the law department of an organization constitute a firm within the meaning of the Rules of Professional Conduct, but there can be

uncertainty as to the identity of the client. For example, it may not be clear whether the law department of a corporation represents a 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.

[3] Similar questions can also arise with respect to lawyers in legal aid organizations. Lawyers employed in the same unit of a legal service organization constitute a firm, but not necessarily those employed in separate units. As in the case of independent practitioners, whether the lawyers should be treated as associated with each other can depend on the particular Rule that is involved, and on the specific facts of the situation.

Principles of Imputed Disqualification

[4] The rule of imputed disqualification stated in paragraph (a) gives effect to the principle of loyalty to the client as it applies to lawyers who practice in a law firm. Such situations can be considered from the premise that a firm of lawyers is essentially one lawyer for purposes of the Rules governing loyalty to the client, or from the premise that each lawyer is vicariously bound by the obligation of loyalty owed by each lawyer with whom the lawyer is associated. Paragraph (a) operates only among the lawyers currently associated in a firm. When a lawyer moves from one firm to another, the situation is governed by paragraph (b) or (c).

[5] Where an individual lawyer is prohibited from engaging in certain transactions under Rule 1.8, paragraph (j) of that Rule, and not this Rule, governs whether that prohibition applies also to other lawyers in a firm with which that lawyer is associated. For issues involving prospective clients, see Rule 1.18.

[6] Where a lawyer has joined a private firm after having represented the government, the situation is governed by Rule 1.11.

Exception for Personal Interest of the Disqualified Lawyer

[7] The rule in paragraph (a) does not prohibit representation by the firm where neither questions of client loyalty nor protection of confidential information are presented. Where an individual lawyer could not effectively represent a given client because of an interest described in Rule 1.7(b)(4), but that lawyer will do no work on the matter and the disqualifying interest of the lawyer will not adversely affect the representation by others in the firm, the firm should not be disqualified. For example, a lawyer's strong political beliefs may disqualify the lawyer from representing a client, but the firm should not be disqualified if the lawyer's beliefs will not adversely affect the representation by others in the firm. Similarly, representation of a client by the firm would not be precluded merely because the client's adversary is a person with whom one of the firm's lawyers has longstanding personal or social ties or is represented by a lawyer in another firm who is closely related to one of the firm's lawyers. *See* Rule 1.7, Comment [12] and Rule 1.8(h), Comment [7], respectively. Nor would representation by the firm be precluded merely because one of its lawyers is seeking possible employment with an opponent (*e.g.*, U.S. Attorney's Office) or with a law firm representing the opponent of a firm client.

Lawyers Moving Between Firms

[8] When lawyers move between firms or when lawyers have been associated in a firm but then end their association, the fiction that the law firm is the same as a single lawyer is no longer wholly realistic. There are several competing considerations. First, the client previously represented must be reasonably assured that the principle of loyalty to the client is not compromised. Second, the rule of disqualification should not be so broadly cast as to preclude other persons from having reasonable choice of legal counsel. Third, the rule of disqualification should not unreasonably hamper lawyers from forming new associations and taking on new clients after having left a previous association, or unreasonably hamper the former firm from representing a client with interests adverse to those of a former client who was represented by a lawyer who has terminated an association with the firm. In this connection, it should be recognized that today many lawyers practice in firms, that many to some degree limit their practice to one field or another, and that many move from one association to another several times in their careers. If the concept of imputed disqualification were defined with unqualified rigor, the result would be radical curtailment of the opportunity of lawyers to move from one practice setting to another and of the opportunity of clients to change counsel.

[9] Reconciliation of these competing principles in the past has been attempted under two rubrics. One approach has been to seek *per se* rules of disqualification. For example, it has been held that a partner in a law firm is conclusively presumed to have access to all confidences concerning all clients of the firm. Under this analysis, if a lawyer has been a partner in one law firm and then becomes a partner in another law firm, there is a presumption that all confidences known by a partner in the first firm are known to all partners in the second firm. This presumption might properly be applied in some circumstances, especially where the client has been extensively represented, but may be unrealistic where the client was represented only for limited purposes. Furthermore, such a rigid rule exaggerates the difference between a partner and an associate in modern law firms.

[10] The other rubric formerly used for dealing with vicarious disqualification is the appearance of impropriety proscribed in Canon 9 of the Code of Professional Responsibility. Applying this rubric presents two problems. First, the appearance of impropriety can be taken to include any new client lawyer relationship that might make a former client feel anxious. If that meaning were adopted, disqualification would become little more than a question of subjective judgment by the former client. Second, since “impropriety” is undefined, the term “appearance of impropriety” is question-begging. It therefore has to be recognized that the problem of imputed disqualification cannot be properly resolved either by simple analogy to a lawyer practicing alone or by the very general concept of appearance of impropriety.

[11] A rule based on a functional analysis is more appropriate for determining the question of vicarious disqualification. Two functions are involved: preserving confidentiality and avoiding positions adverse to a client.

Confidentiality

[12] Preserving confidentiality is a question of access to information. Access to information, in

turn, is essentially a question of fact in particular circumstances, aided by inferences, deductions, or working presumptions that reasonably may be made about the way in which lawyers work together. A lawyer may have general access to files of all clients of a law firm and may regularly participate in discussions of their affairs; it should be inferred that such a lawyer in fact is privy to all information about all the firm's clients. In contrast, another lawyer may have access to the files of only a limited number of clients and participate in discussion of the affairs of no other clients; in the absence of information to the contrary, it should be inferred that such a lawyer in fact is privy to information about the clients actually served but not those of other clients.

[13] Application of paragraphs (b) and (c) depends on a situation's particular facts. In any such inquiry, the burden of proof should rest upon the firm whose disqualification is sought.

[14] The provisions of paragraphs (b) and (c) which refer to possession of protected information operate to disqualify the firm only when the lawyer involved has actual knowledge of information protected by Rule 1.6. Thus, if a lawyer while with one firm acquired no knowledge of information relating to a particular client of the firm, and that lawyer later joined another firm, neither the lawyer individually nor the second firm is disqualified from representing another client in the same or a substantially related matter even though the interests of the two clients conflict.

[15] Independent of the question of disqualification of a firm, a lawyer changing professional association has a continuing duty to preserve confidentiality of information about a client formerly represented. See Rule 1.6.

Adverse Positions

[16] The second aspect of loyalty to a client is the lawyer's obligation to decline subsequent representations involving positions adverse to a former client arising in the same or substantially related matters. This obligation requires abstention from adverse representations by the individual lawyer involved, and may also entail abstention of other lawyers through imputed disqualification. Hence, this aspect of the problem is governed by the principles of Rule 1.9. Thus, under paragraph (b), if a lawyer left one firm for another, the new affiliation would preclude the lawyer's new firm from continuing to represent clients with interests materially adverse to those of the lawyer's former clients in the same or substantially related matters. In this respect paragraph (b) is at odds with – and thus must be understood to reject – the dicta expressed in the "second" hypothetical in the second paragraph of footnote 5 of *Brown v. District of Columbia Board of Zoning Adjustment,* 486 A.2d 37, 42 n. 5 (D.C. 1984) (en banc), premised on *LaSalle National Bank v. County of Lake,* 703 F.2d 252, 257-59 (7th Cir. 1983). <u>**An exception to paragraph (b) is provided by subparagraph (b)(3).**</u>

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[18] ~~The last sentence of paragraph~~ **Subparagraph** (b)**(2)** limits the imputation rule in certain limited circumstances. Those circumstances involve situations in which any secrets or confidences obtained were received before the lawyer had become a member of the Bar, but during a time when such person was providing assistance to another lawyer. The typical situation is that of the part time or summer law clerk, or so called summer associate. Other types of assistance to a lawyer, such as working as a paralegal or legal assistant, could also fall within the scope of this sentence. The limitation on the imputation rule is similar to the provision dealing with judicial law clerks under Rule 1.11(b). Not applying the imputation rule reflects a policy choice that imputation in such circumstances could unduly impair the mobility of persons employed in such nonlawyer positions once they become members of the Bar. The personal disqualification of the former non-lawyer is not affected, and the lawyer who previously held the non-legal job may not be involved in any representation with respect to which the firm would have been disqualified ~~but for the last sentence of paragraph~~ **subparagraph** (b)**(2)**. Rule 1.6(h) provides that the former nonlawyer is subject to the requirements of Rule 1.6 (regarding protection of client confidences and secrets) just as if the person had been a member of the Bar when employed in the prior position.

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[~~23~~ **29**] Rule 1.10(e) prohibits a lawyer who is assisting the Office of the Attorney General from representing that office in any matter in which the lawyer’s firm represents an adversary. Rule 1.10(e) does not, however, by its terms, prohibit lawyers assisting the Office of the Attorney General from participating in every matter in which the Attorney General is taking a position adverse to that of a current client of the firm with which the participating lawyer was affiliated prior to joining the program of assistance to the Office of the Attorney General. Such an unequivocal prohibition would be overly broad, difficult to administer in practice, and inconsistent with the purposes of Rule 1.10(e).

[~~24~~ **30**] The absence of such a per se prohibition in Rule 1.10(e) does not diminish the importance of a thoughtful and restrained approach to defining those matters in which it is appropriate for a participating lawyer to be involved. An appearance of impropriety in programs of this kind can undermine the public’s acceptance of the program and embarrass the Office of the Attorney General, the participating lawyer, that lawyer’s law firm and clients of that firm. For example, it would not be appropriate for a participant lawyer to engage in a representation adverse to a party who is known to be a major client of the participating lawyer’s firm, even though the subject matter of the representation of the Office of the Attorney General bears no substantial relationship to any representation of that party by the participating lawyer’s firm. Similarly, it would be inappropriate for a participating lawyer to be involved in a representation adverse to a party that the participating lawyer has been personally involved in representing while at the firm, even if the client is not a major client of the firm. The appropriate test is that of conservative good judgment; if any reasonable doubts concerning the unrestrained vigor of the participating lawyer’s representation on behalf of the Office of the Attorney General might be created, the lawyer should advise the appropriate officials of the Office of the Attorney General and decline to participate. Similarly, if participation on behalf of the Office of the Attorney General might reasonably give rise to a concern on the part of a participating lawyer’s firm or a client of the firm that its secrets or confidences (as defined by Rule 1.6) might be compromised, participation should be declined. It is not anticipated that situations suggesting the appropriateness of a refusal to participate will occur so frequently as to significantly impair the usefulness of the program of participation by lawyers from private firms.

[~~25~~ **31**] The primary responsibility for identifying situations in which representation by the participating lawyer might raise reasonable doubts as to the lawyer's zealous representation on behalf of the Office of the Attorney General must rest on the participating lawyer, who will generally be privy to nonpublic information bearing on the appropriateness of the lawyer's participation in a matter on behalf of the Office of the Attorney General. Recognizing that many representations by law firms are nonpublic matters, the existence and nature of which may not be disclosed consistent with Rule 1.6, it is not anticipated that law firms from which participating lawyers have been drawn would be asked to perform formal "conflicts checks" with respect to matters in which participating lawyers may be involved. However, consultations between participating lawyers and their law firms to identify potential areas of concern, provided that such consultations honor the requirements of Rule 1.6, are appropriate to protect the interests of all involved – the Office of the Attorney General, the participating lawyer, that lawyer's law firm and any clients whose interests are potentially implicated.

District of Columbia Rules of Professional Conduct
Proposed Revisions to Rule 1.15 (Safekeeping of Property: General Rule)

Rule 1.15—Safekeeping Property

(a) A lawyer shall hold property of clients or third persons that is in the lawyer's possession in connection with a representation separate from the lawyer's own property. Funds of clients or third persons that are in the lawyer's possession (trust funds) shall be kept in one or more trust accounts maintained in accordance with paragraph (b). Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of five years after termination of the representation.

(b) All trust funds shall be deposited with an "approved depository" as that term is defined in Rule XI of the Rules Governing the District of Columbia Bar. Trust funds that are nominal in amount or expected to be held for a short period of time, and as such would not be expected to earn income for a client or third-party in excess of the costs incurred to secure such income, shall be held at an approved depository and in compliance with the District of Columbia's Interest on Lawyers Trust Account (DC IOLTA) program. The title on each DC IOLTA account shall include the name of the lawyer or law firm that controls the account, as well as "DC IOLTA Account" or "IOLTA Account." The title on all other trust accounts shall include the name of the lawyer or law firm that controls the account, as well as "Trust Account" or "Escrow Account." The requirements of this paragraph (b) shall not apply when a lawyer is otherwise compliant with the contrary mandates of a tribunal; or when the lawyer is participating in, and compliant with, the trust accounting rules and the IOLTA program of the jurisdiction in which the lawyer is licensed and principally practices.

(c) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property, subject to Rule 1.6.

(d) When in the course of representation a lawyer is in possession of property in which interests are claimed by the lawyer and another person, or by two or more persons to each of whom the lawyer may have an obligation, the property shall be kept separate by the lawyer until there is an accounting and severance of interests in the property. If a dispute arises concerning the respective interests among persons claiming an interest in such property, the undisputed portion shall be distributed and the portion in dispute shall be kept separate by the lawyer until the dispute is resolved. Any funds in dispute shall be deposited in a separate account meeting the requirements of paragraph (a) and (b).

(e) Advances of unearned fees and unincurred costs shall be treated as property of the client pursuant to paragraph (a) until earned or incurred unless the client gives informed consent to a different arrangement. Regardless of whether such consent is provided, Rule 1.16(d) applies to require the return to the client of any unearned portion of advanced legal fees and unincurred costs at the termination of the lawyer’s services in accordance with Rule 1.16(d).

(f) Nothing in this rule shall prohibit a lawyer from placing a small amount of the lawyer’s funds into a trust account for the sole purpose of defraying bank charges that may be made against that account.

Comment

[1] A lawyer should hold property of others with the care required of a professional fiduciary. Securities should be kept in a safe deposit box, except when some other form of safekeeping is warranted by special circumstances. All property that is the property of clients or third persons should be kept separate from the lawyer’s business and personal property and, if monies, in one or more trust accounts maintained with financial institutions meeting the requirements of this rule. This rule, among other things, sets forth the longstanding prohibitions of the misappropriation of entrusted funds and the commingling of entrusted funds with the lawyer’s property. This rule also requires that a lawyer safeguard “other property” of clients, which may include client files. For guidance concerning the disposition of closed client files, *see* D.C. Bar Legal Ethics Committee Opinion No. 283.

[2] Paragraph (a) of Rule 1.15 requires lawyers to keep "[c]omplete records of [client] funds and property. . . ." The D.C. Court of Appeals addressed the meaning of "complete records" in *In re Clower*, 831 A.2d 1030, 1034 (D.C. 2003): "The Rules of Professional Conduct should be interpreted with reference to their purposes. The purpose of maintaining 'complete records' is so that the documentary record itself tells the full story of how the attorney handled client or third-party funds and whether the attorney complied with his fiduciary obligation that client or third-party funds not be misappropriated or commingled. Financial records are complete only when documents sufficient to demonstrate an attorney's compliance with his ethical duties are maintained. The reason for requiring complete records is so that any audit of the attorney's handling of client funds by Bar Counsel can be completed even if the attorney or the client, or both, are not available." Rule 1.15 requires that lawyers maintain records such that ownership or any other question about client funds can be answered without assistance from the lawyer or the lawyer's clients. The precise records that achieve this result obviously can vary, but lawyers may wish to look for guidance on records from the 2010 ABA Model Rules For Client Trust Account Records.

[3] Paragraph (a) concerns trust funds arising from “a representation.” The obligations of a lawyer under this rule are independent of those arising from activity other than rendering legal services. For example, a lawyer who serves as an escrow agent is governed by the applicable law relating to fiduciaries even though the lawyer does not render legal services in the transaction. Separate trust accounts may be warranted when administering estate monies or acting in similar fiduciary capacities.

[4] Paragraph (b) mandates where trust deposits shall be held and further mandates participation in the District of Columbia's IOLTA program. This paragraph is intended to reach every lawyer who is admitted in this jurisdiction regardless of where the lawyer practices, unless a stated exception applies. Thus, a lawyer should follow the contrary mandates of a tribunal regarding deposits that are subject to that tribunal's oversight. Similarly, if the lawyer principally practices in a foreign jurisdiction in which the lawyer is also licensed, and the lawyer maintains trust accounts compliant with that foreign jurisdiction's trust accounting rules, the lawyer may deposit trust funds to an approved depository or to a banking institution acceptable to that foreign jurisdiction. Finally, a lawyer is not obligated to participate in the District of Columbia IOLTA program if the lawyer is participating in, and compliant with, the IOLTA program in the jurisdiction in which the lawyer is licensed and principally practices. IOLTA programs are known by different names or acronyms in some jurisdictions; this rule and its exceptions apply to all such programs, however named. This rule anticipates that a law firm with lawyers admitted to practice in the District of Columbia may be obligated to maintain accounts compliant with the IOLTA rules of other jurisdictions where firm lawyers principally practice. A lawyer who is not participating in the IOLTA program of the jurisdiction in which the lawyer principally practices because the lawyer has exercised a right to opt out of, or not to opt into, the jurisdiction's IOLTA program, or because the jurisdiction does not have an IOLTA program, shall not thereby be excused from participating in the District of Columbia's IOLTA program. To the extent paragraph (b) does not resolve a multi-jurisdictional conflict, see Rule 8.5. Nothing in this rule is intended to limit the power of any tribunal to direct a lawyer in connection with a pending matter, including a lawyer who is admitted *pro hac vice*, to hold trust funds as may be directed by that tribunal. For a list of approved depositories and additional information regarding DC IOLTA program compliance, see Rule XI, Section 20, of the Rules Governing the District of Columbia Bar, and the D.C. Bar Foundation's website www.dcbarfoundation.org.

[5] The exception to Rule 1.15(b) requires a lawyer to make a good faith determination of the jurisdiction in which the lawyer principally practices. The phrase "principally practices" refers to the conduct of an individual lawyer, not to the principal place of practice of his or her law firm (which might yield a different result for a lawyer with partners). For purposes of this rule, an individual lawyer principally practices in the jurisdiction where the lawyer is licensed and generates the clear majority of his or her income. If there is no such jurisdiction, then a lawyer should identify the physical location of the office where the lawyer devotes the largest portion of his or her time. In any event, the initial good faith determination of where the lawyer principally practices should be changed only if the lawyer's circumstances change significantly and the change is expected to continue indefinitely.

[6] The determination, under paragraph (b), whether trust funds are not expected to earn income in excess of costs, rests in the sound judgment of the lawyer. The lawyer should review trust practices at reasonable intervals to determine whether circumstances require further action with respect to the funds of any client or third party. Because paragraph (b) is a lawyer-specific obligation, this rule anticipates that a law firm may be obligated to maintain accounts compliant with the IOLTA rules of other jurisdictions, to the extent the lawyers in that firm do not all principally practice in the District of Columbia.

[7] Paragraphs (c) and (d) recognize that lawyers often receive funds from third parties

from which the lawyer's fee will be paid. The lawyer is not required to remit to the client funds that the lawyer reasonably believes represent fees owed. However, a lawyer may not hold funds to coerce a client into accepting the lawyer's contention. The disputed portion of the funds should be kept in trust and the lawyer should suggest means for prompt resolution of the dispute, such as arbitration. The undisputed portion of the funds should be promptly distributed.

[8] Third parties, such as a client's creditors, may have just claims against funds or other property in a lawyer's custody. A lawyer may have a duty under applicable law to protect such third-party claims against wrongful interference by the client, and accordingly may refuse to surrender the property to the client. However, a lawyer should not unilaterally assume to arbitrate a dispute between the client and the third party. *See* D.C. Bar Legal Ethics Committee Opinion 293.

[9] Paragraph (e) permits advances against unearned fees and unincurred costs to be treated as either the property of the client or the property of the lawyer, but absent informed consent by the client to a different arrangement, the rule's default position is that such advances be treated as the property of the client, subject to the restrictions provided in paragraph (a). In any case, at the termination of an engagement, advances against fees that have not been incurred must be returned to the client as provided in Rule 1.16(d). For the definition of "informed consent," see Rule 1.0(e).

[10] With respect to property that constitutes evidence, such as the instruments or proceeds of crime, *see* Rule 3.4(a).

District of Columbia Rules of Professional Conduct
Proposed Revisions to Rule 1.15 (Safekeeping Property)

[Unmarked text is the current D.C. rule; proposed additions: **bold and double underscoring**; proposed deletions: strike-through, as in ~~deleted~~.]

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Comment

[1] A lawyer should hold property of others with the care required of a professional fiduciary. Securities should be kept in a safe deposit box, except when some other form of safekeeping is warranted by special circumstances. All property that is the property of clients or third persons should be kept separate from the lawyer's business and personal property and, if monies, in one or more trust accounts maintained with financial institutions meeting the requirements of this rule. This rule, among other things, sets forth the longstanding prohibitions of the misappropriation of entrusted funds and the commingling of entrusted funds with the lawyer's property. This rule also requires that a lawyer safeguard "other property" of clients, which may include client files. For guidance concerning the disposition of closed client files, *see* D.C. Bar Legal Ethics Committee Opinion No. 283.

[2] Paragraph (a) of Rule 1.15 requires lawyers to keep "[c]omplete records of [client] funds and property. . . ." The D.C. Court of Appeals addressed the meaning of "complete records" in In re Clower, 831 A.2d 1030, 1034 (D.C. 2003): "The Rules of Professional Conduct should be interpreted with reference to their purposes. The purpose of maintaining 'complete records' is so that the documentary record itself tells the full story of how the attorney handled client or third-party funds and whether the attorney complied with his fiduciary obligation that client or third-party funds not be misappropriated or commingled. Financial records are complete only when documents sufficient to demonstrate an attorney's compliance with his ethical duties are maintained. The reason for requiring complete records is so that any audit of the attorney's handling of client funds by Bar Counsel can be completed even if the attorney or the client, or both, are not available." Rule 1.15 requires that lawyers maintain records such that ownership or any other question about client funds can be answered without assistance from the lawyer or the lawyer's clients. The precise records that achieve this result obviously can vary, but lawyers may wish to look for guidance on records from the 2010 ABA Model Rules For Client Trust Account Records.

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[~~3~~ **4]** Paragraph (b) mandates where trust deposits shall be held and further mandates participation in the District of Columbia's IOLTA program. This paragraph is intended to reach every lawyer who is admitted in this jurisdiction regardless of where the lawyer practices, unless a stated exception applies. Thus, a lawyer should follow the contrary mandates of a tribunal regarding deposits that are subject to that tribunal's oversight. Similarly, if the lawyer principally practices in a foreign jurisdiction in which the lawyer is also licensed, and the lawyer maintains trust accounts compliant with that foreign jurisdiction's trust accounting rules, the lawyer may deposit trust funds to an approved depository or to a banking institution acceptable to that foreign jurisdiction. Finally, a lawyer is not obligated to participate in the District of Columbia IOLTA program if the lawyer is participating in, and compliant with, the IOLTA program in the jurisdiction in which the lawyer is licensed and principally practices. IOLTA programs are known by different names or acronyms in some jurisdictions; this rule and its exceptions apply to all such programs, however named. This rule anticipates that a law firm with lawyers admitted to practice in the District of Columbia may be obligated to maintain accounts compliant with the IOLTA rules of other jurisdictions where firm lawyers principally practice. A lawyer who is not participating in the IOLTA program of the jurisdiction in which the lawyer principally practices because the lawyer has exercised a right to opt out of, or not to opt into, the jurisdiction's IOLTA program, or because the jurisdiction does not have an IOLTA program, shall not thereby be excused from participating in the District of Columbia's IOLTA program. To the extent paragraph (b) does not resolve a multi-jurisdictional conflict, see Rule 8.5. Nothing in this rule is intended to limit the power of any tribunal to direct a lawyer in connection with a pending matter, including a lawyer who is admitted *pro hac vice*, to hold trust funds as may be directed by that tribunal. For a list of approved depositories and additional information regarding DC IOLTA program compliance, see Rule XI, Section 20, of the Rules Governing the District of Columbia Bar, and the D.C. Bar Foundation's website www.dcbarfoundation.org.

[~~4~~ **5]** The exception to Rule 1.15(b) requires a lawyer to make a good faith determination of the jurisdiction in which the lawyer principally practices. The phrase "principally practices" refers to the conduct of an individual lawyer, not to the principal place of practice of his or her law firm (which might yield a different result for a lawyer with partners). For purposes of this rule, an individual lawyer principally practices in the jurisdiction where the lawyer is licensed and generates the clear majority of his or her income. If there is no such jurisdiction, then a lawyer should identify the physical location of the office where the lawyer devotes the largest portion of his or her time. In any event, the initial good faith determination of where the lawyer principally practices should be changed only if the lawyer's circumstances change significantly and the change is expected to continue indefinitely.

[~~5~~ **6]** The determination, under paragraph (b), whether trust funds are not expected to earn income in excess of costs, rests in the sound judgment of the lawyer. The lawyer should review trust practices at reasonable intervals to determine whether circumstances require further action with respect to the funds of any client or third party. Because paragraph (b) is a lawyer-specific obligation, this rule anticipates that a law firm may be obligated to maintain accounts compliant with the IOLTA rules of other jurisdictions, to the extent the lawyers in that firm do not all principally practice in the District of Columbia.

[~~6~~ **7]** Paragraphs (c) and (d) recognize that lawyers often receive funds from third parties from which the lawyer's fee will be paid. The lawyer is not required to remit to the client funds that the lawyer reasonably believes represent fees owed. However, a lawyer may not hold funds to coerce a client into accepting the lawyer's contention. The disputed portion of the funds should be kept in trust and the lawyer should suggest means for prompt resolution of the dispute, such as arbitration. The undisputed portion of the funds should be promptly distributed.

[~~7~~ **8]** Third parties, such as a client's creditors, may have just claims against funds or other property in a lawyer's custody. A lawyer may have a duty under applicable law to protect such third-party claims against wrongful interference by the client, and accordingly may refuse to surrender the property to the client. However, a lawyer should not unilaterally assume to arbitrate a dispute between the client and the third party. *See* D.C. Bar Legal Ethics Committee Opinion 293.

[~~8~~ **9]** Paragraph (e) permits advances against unearned fees and unincurred costs to be treated as either the property of the client or the property of the lawyer, but absent informed consent by the client to a different arrangement, the rule's default position is that such advances be treated as the property of the client, subject to the restrictions provided in paragraph (a). In any case, at the termination of an engagement, advances against fees that have not been incurred must be returned to the client as provided in Rule 1.16(d). For the definition of "informed consent," see Rule 1.0(e).

[~~9~~ **10]** With respect to property that constitutes evidence, such as the instruments or proceeds of crime, *see* Rule 3.4(a).

District of Columbia Rules of Professional Conduct
Proposed Revisions to Rule 7.1 (Communications Concerning a Lawyer's Services)

Rule 7.1—Communications Concerning a Lawyer's Services

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

> (1) Contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading; or
>
> (2) Contains an assertion about the lawyer or the lawyer's services that cannot be substantiated.

(b) A lawyer shall not seek by in-person contact, employment (or employment of a partner or associate) by a nonlawyer who has not sought the lawyer's advice regarding employment of a lawyer, if:

> (1) The solicitation involves use of a statement or claim that is false or misleading, within the meaning of paragraph (a);
>
> (2) The solicitation involves the use of coercion, duress or harassment; or
>
> (3) The potential client is apparently in a physical or mental condition which would make it unlikely that the potential client could exercise reasonable, considered judgment as to the selection of a lawyer.

(c) A lawyer shall not pay money or give anything of material value to a person (other than the lawyer's partner or employee) in exchange for recommending the lawyer's services except that a lawyer may:

> (1) Pay the reasonable costs of advertisements or communications permitted by this Rule;
>
> (2) Pay the usual and reasonable fees or dues charged by a legal service plan or a lawyer referral service;
>
> (3) Pay for a law practice in accordance with Rule 1.17; and
>
> (4) Refer clients to another lawyer or nonlawyer professional pursuant to an agreement not otherwise prohibited under these Rules that provides for the other person to refer clients or customers to the lawyer, if:
>
> > (A) The reciprocal agreement is not exclusive, and
> >
> > (B) The client is informed of the existence and nature of the agreement.

(d) A lawyer shall not knowingly assist an organization that furnishes or pays for legal services to others to promote the use of the lawyer's services or those of the lawyer's partner or associate, or any other lawyer affiliated with the lawyer or the lawyer's firm, as a private practitioner, if the promotional activity involves the use of coercion, duress, compulsion, intimidation, threats, or vexatious or harassing conduct.

(e) No lawyer or any person acting on behalf of a lawyer shall solicit or invite or seek to solicit any person for purposes of representing that person for a fee paid by or on behalf of a client or under the Criminal Justice Act, D.C. Code Ann. §11-2601 (2001) *et seq.*, in any present or future case in the District of Columbia Courthouse, on the sidewalks on the north, south, and west sides of the courthouse, or within 50 feet of the building on the east side.

(f) Any lawyer or person acting on behalf of a lawyer who solicits or invites or seeks to solicit any person incarcerated at the District of Columbia Jail, the Correctional Treatment Facility or any District of Columbia juvenile detention facility for the purpose of representing that person for a fee paid by or on behalf of that person or under the Criminal Justice Act, D.C. Code Ann. §11-2601 (2001) *et seq.*, in any then-pending criminal case in which that person is represented, must provide timely and adequate notice to the person's then-current lawyer prior to accepting any fee from or on behalf of the incarcerated person.

Comment

[1] This rule governs all communications about a lawyer's services, including advertising. It is especially important that statements about a lawyer or the lawyer's services be accurate, since many members of the public lack detailed knowledge of legal matters. Certain advertisements such as those that describe the amount of a damage award, the lawyer's record in obtaining favorable verdicts, or those containing client endorsements, unless suitably qualified, have a capacity to mislead by creating an unjustified expectation that similar results can be obtained for others. Advertisements comparing the lawyer's services with those of other lawyers are false or misleading if the claims made cannot be substantiated.

Advertising

[2] To assist the public in obtaining legal services, lawyers should be allowed to make known their services not only through reputation but also through organized information campaigns in the form of advertising. Advertising involves an active quest for clients, contrary to the tradition that a lawyer should not seek clientele. However, the public's need to know about legal services can be fulfilled in part through advertising. This need is particularly acute in the case of persons of limited means who have not made extensive use of legal services. The interest in expanding public information about legal services ought to prevail over considerations of tradition.

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

[4] Questions of effectiveness and taste in advertising are matters of speculation and subjective judgment. Some jurisdictions have rules regulating the type and content of advertising by lawyers that go beyond prohibitions against false or misleading statements. Such regulations create unneeded barriers to the flow of information about lawyers' services to persons needing such services, and so this rule subjects advertising by lawyers only to the requirement that it not be false or misleading.

[5] There is no significant distinction between disseminating information and soliciting clients through mass media or through individual personal contact. In-person solicitation (which would include telephone contact but not electronic mail) can, however, create problems because of the particular circumstances in which the solicitation takes place. This rule prohibits in-person solicitation in circumstances or through means that are not conducive to intelligent, rational decisions. Such circumstances and means could be the harassment of early morning or late night telephone calls to a prospective client to solicit legal work, or repeated calls at any time of day, and solicitation of an accident victim or the victim's family shortly after the accident or while the victim is still in medical distress. A lawyer is no longer permitted to conduct in-person solicitation through the use of a paid intermediary, *i.e.*, a person who is neither the lawyer's partner (as defined in Rule 1.0(i)) nor employee (see Rule 5.3) and who is compensated for such services. This prohibition represents a change in Rule 7.1(b), which had previously authorized payments to intermediaries for recommending a lawyer. Experience under the former provision showed it to be unnecessary and subject to abuse. *See* Rules 5.3, 8.4(a), and 8.4(c) regarding a lawyer's responsibility for abusive or deceptive solicitation of a client by the lawyer's employee.

[6] A lawyer is not permitted to pay money or give anything of material value to a person (other than the lawyer's partner or employee) in exchange for recommending the lawyer's services. Rule 7.1(c) does not address fee splitting between two or more firms representing the same client in the same project. Compare Rule 1.5(e). Lawyers must also be aware of their obligation to maintain their professional independence under Rule 5.4.

[7] A lawyer may agree to refer clients to another lawyer or a nonlawyer professional, in return for the undertaking of that person to refer clients or customers to the lawyer. Such reciprocal referral arrangements must not interfere with the lawyer's professional judgment as to making referrals or as to providing substantive legal services. See Rules 2.1 and 5.4(c). Except as provided in Rule 1.5(e), a lawyer who receives referrals from a lawyer or nonlawyer professional must not pay money or give anything of material value solely for the referral, but the lawyer does not violate paragraph (c) of this Rule by agreeing to refer clients to the other lawyer or nonlawyer professional, so long as the reciprocal referral agreement is not exclusive and the client is informed of the referral agreement. Conflicts of interest created by such arrangements are governed by Rule 1.7. Reciprocal referral agreements should not be of indefinite duration and should be reviewed periodically to determine whether they comply with these Rules. This Rule does not restrict referrals or divisions of revenues or net income among lawyers within firms comprised of multiple entities.

Payments for Advertising

[8] A lawyer is allowed to pay for advertising or marketing permitted by this rule. Likewise, a lawyer may participate in lawyer referral programs and pay the usual fees charged by such programs.

Solicitations in the Vicinity of the District of Columbia Courthouse

[9] Paragraph (e) is designed to prohibit unseemly solicitations of prospective clients in and around the District of Columbia Courthouse. The words "for a fee paid by or on behalf of a client or under the Criminal Justice Act" have been added to paragraph (e) as it was originally promulgated by the District of Columbia Court of Appeals in 1982. The purpose of the addition is to permit solicitation in the District of Columbia Courthouse for the purposes of *pro bono* representation. For the purposes of this rule, *pro bono* representation, whether by individual lawyers or nonprofit organizations, is representation undertaken primarily for purposes other than a fee. That representation includes providing services free of charge for individuals who may be in need of legal assistance and may lack the financial means and sophistication necessary to have alternative sources of aid. Cases where fees are awarded under the Criminal Justice Act do not constitute *pro bono* representation for the purposes of this rule. However, the possibility that fees may be awarded under the Equal Access to Justice Act and Civil Rights Attorneys' Fees Awards Act of 1976, as amended, or other statutory attorney fee statutes, does not prevent representation from constituting *pro bono* representation.

Solicitations of Inmates

[10] Paragraph (f) is designed to address the vulnerability of incarcerated persons to lawyers seeking fee-paying representations. It applies only to situations where the incarcerated person has not initiated contact with the lawyer. In such situations, the lawyer may have contact with the individual but may not accept a fee unless and until timely notice is provided to current counsel for such incarcerated person.

District of Columbia Rules of Professional Conduct
Proposed Revisions to Rule 7.1 (Communications Concerning a Lawyer's Services)

[Unmarked text is the current D.C. Rule; proposed additions: **bold text and double underscoring;** proposed deletions: a strike-through, as in ~~deleted~~]:

Rule 7.1—Communications Concerning a Lawyer's Services

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

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

(2) Contains an assertion about the lawyer or the lawyer's services that cannot be substantiated.

(b) ~~(1)~~ A lawyer shall not seek by in-person contact, employment (or employment of a partner or associate) by a nonlawyer who has not sought the lawyer's advice regarding employment of a lawyer, if:

(1) ~~(A)~~ The solicitation involves use of a statement or claim that is false or misleading, within the meaning of paragraph (a);

(2) ~~(B)~~ The solicitation involves the use of coercion, duress or harassment; or

(3) ~~(C)~~ The potential client is apparently in a physical or mental condition which would make it unlikely that the potential client could exercise reasonable, considered judgment as to the selection of a lawyer.

~~(2) A lawyer shall not give anything of value to a person (other than the lawyer's partner or employee) for recommending the lawyer's services through in-person contact.~~

(c) A lawyer shall not pay money or give anything of material value to a person (other than the lawyer's partner or employee) in exchange for recommending the lawyer's services except that a lawyer may:

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

(2) Pay the usual and reasonable fees or dues charged by a legal service plan or a lawyer referral service;

(3) Pay for a law practice in accordance with Rule 1.17; and

(4) Refer clients to another lawyer or nonlawyer professional pursuant to an agreement not otherwise prohibited under these Rules that provides for the other person to refer clients or customers to the lawyer, if:

<u>(A) The reciprocal agreement is not exclusive, and</u>

<u>(B) The client is informed of the existence and nature of the agreement.</u>

<u>(d)</u> ~~(c)~~ A lawyer shall not knowingly assist an organization that furnishes or pays for legal services to others to promote the use of the lawyer's services or those of the lawyer's partner or associate, or any other lawyer affiliated with the lawyer or the lawyer's firm, as a private practitioner, if the promotional activity involves the use of coercion, duress, compulsion, intimidation, threats, or vexatious or harassing conduct.

<u>(e)</u> ~~(d)~~ No lawyer or any person acting on behalf of a lawyer shall solicit or invite or seek to solicit any person for purposes of representing that person for a fee paid by or on behalf of a client or under the Criminal Justice Act, D.C. Code Ann. §11-2601 (2001) *et seq.*, in any present or future case in the District of Columbia Courthouse, on the sidewalks on the north, south, and west sides of the courthouse, or within 50 feet of the building on the east side.

<u>(f)</u> ~~(e)~~ Any lawyer or person acting on behalf of a lawyer who solicits or invites or seeks to solicit any person incarcerated at the District of Columbia Jail, the Correctional Treatment Facility or any District of Columbia juvenile detention facility for the purpose of representing that person for a fee paid by or on behalf of that person or under the Criminal Justice Act, D.C. Code Ann. §11-2601 (2001) *et seq.*, in any then-pending criminal case in which that person is represented, must provide timely and adequate notice to the person's then-current lawyer prior to accepting any fee from or on behalf of the incarcerated person.

Comment

[1] This rule governs all communications about a lawyer's services, including advertising. It is especially important that statements about a lawyer or the lawyer's services be accurate, since many members of the public lack detailed knowledge of legal matters. Certain advertisements such as those that describe the amount of a damage award, the lawyer's record in obtaining favorable verdicts, or those containing client endorsements, unless suitably qualified, have a capacity to mislead by creating an unjustified expectation that similar results can be obtained for others. Advertisements comparing the lawyer's services with those of other lawyers are false or misleading if the claims made cannot be substantiated.

Advertising

[2] To assist the public in obtaining legal services, lawyers should be allowed to make known their services not only through reputation but also through organized information campaigns in the form of advertising. Advertising involves an active quest for clients, contrary to the tradition that a lawyer should not seek clientele. However, the public's need to know about legal services can be fulfilled in part through advertising. This need is particularly acute in the case of persons of limited means who have not made extensive use of legal services. The interest in expanding public information about legal services ought to prevail over considerations of tradition.

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

[4] Questions of effectiveness and taste in advertising are matters of speculation and subjective judgment. Some jurisdictions have rules regulating the type and content of advertising by lawyers that go beyond prohibitions against false or misleading statements. Such regulations create unneeded barriers to the flow of information about lawyers' services to persons needing such services, and so this rule subjects advertising by lawyers only to the requirement that it not be false or misleading.

[5] There is no significant distinction between disseminating information and soliciting clients through mass media or through individual personal contact. In-person solicitation (which would include telephone contact but not electronic mail) can, however, create problems because of the particular circumstances in which the solicitation takes place. This rule prohibits in-person solicitation in circumstances or through means that are not conducive to intelligent, rational decisions. Such circumstances and means could be the harassment of early morning or late night telephone calls to a prospective client to solicit legal work, or repeated calls at any time of day, and solicitation of an accident victim or the victim's family shortly after the accident or while the victim is still in medical distress. A lawyer is no longer permitted to conduct in-person solicitation through the use of a paid intermediary, *i.e.*, a person who is neither the lawyer's partner (as defined in Rule 1.0(i)) nor employee (see Rule 5.3) and who is compensated for such services. This prohibition represents a change in Rule 7.1(b), which had previously authorized payments to intermediaries for recommending a lawyer. Experience under the former provision showed it to be unnecessary and subject to abuse. *See* Rules 5.3, 8.4(a), and 8.4(c) regarding a lawyer's responsibility for abusive or deceptive solicitation of a client by the lawyer's employee.

[6] A lawyer is not permitted to pay money or give anything of material value to a person (other than the lawyer's partner or employee) in exchange for recommending the lawyer's services. Rule 7.1(c) does not address fee splitting between two or more firms representing the same client in the same project. Compare Rule 1.5(e). Lawyers must also be aware of their obligation to maintain their professional independence under Rule 5.4.

[7] A lawyer may agree to refer clients to another lawyer or a nonlawyer professional, in return for the undertaking of that person to refer clients or customers to the lawyer. Such reciprocal referral arrangements must not interfere with the lawyer's professional judgment as to making referrals or as to providing substantive legal services. See Rules 2.1 and 5.4(c). Except as provided in Rule 1.5(e), a lawyer who receives referrals from a lawyer or nonlawyer professional must not pay money or give anything of material value solely for the referral, but the lawyer does not violate paragraph (c) of this Rule by agreeing to refer clients to the other lawyer or nonlawyer professional, so long as the reciprocal referral agreement is not exclusive and the client is informed of the referral agreement. Conflicts of interest created by such arrangements are governed by Rule 1.7.

Reciprocal referral agreements should not be of indefinite duration and should be reviewed periodically to determine whether they comply with these Rules. This Rule does not restrict referrals or divisions of revenues or net income among lawyers within firms comprised of multiple entities.

Payments for Advertising

[8] ~~[6]~~ A lawyer is allowed to pay for advertising or marketing permitted by this rule. Likewise, a lawyer may participate in lawyer referral programs and pay the usual fees charged by such programs.

Solicitations in the Vicinity of the District of Columbia Courthouse

[9] ~~[7]~~ Paragraph **(e)** ~~(d)~~ is designed to prohibit unseemly solicitations of prospective clients in and around the District of Columbia Courthouse. The words "for a fee paid by or on behalf of a client or under the Criminal Justice Act" have been added to paragraph **(e)** ~~(d)~~ as it was originally promulgated by the District of Columbia Court of Appeals in 1982. The purpose of the addition is to permit solicitation in the District of Columbia Courthouse for the purposes of *pro bono* representation. For the purposes of this rule, *pro bono* representation, whether by individual lawyers or nonprofit organizations, is representation undertaken primarily for purposes other than a fee. That representation includes providing services free of charge for individuals who may be in need of legal assistance and may lack the financial means and sophistication necessary to have alternative sources of aid. Cases where fees are awarded under the Criminal Justice Act do not constitute *pro bono* representation for the purposes of this rule. However, the possibility that fees may be awarded under the Equal Access to Justice Act and Civil Rights Attorneys' Fees Awards Act of 1976, as amended, or other statutory attorney fee statutes, does not prevent representation from constituting *pro bono* representation.

Solicitations of Inmates

[10] ~~[8]~~ Paragraph **(f)** ~~(e)~~ is designed to address the vulnerability of incarcerated persons to lawyers seeking fee-paying representations. It applies only to situations where the incarcerated person has not initiated contact with the lawyer. In such situations, the lawyer may have contact with the individual but may not accept a fee unless and until timely notice is provided to current counsel for such incarcerated person.

District of Columbia Rules of Professional Conduct
Proposed New Rule 8.6
(Disclosing Substantial Exculpatory Information about a Convicted Person)

Rule 8.6 – Disclosing Substantial Exculpatory Information about a Convicted Person

(a) A lawyer who knows of information that raises a substantial question about the innocence of a convicted person shall disclose that information to the following individuals and entities whose identity and location can be readily ascertained:

(1) the court where the person's conviction was obtained; and
(2) the chief prosecutor in the jurisdiction where the conviction was obtained; and
(3) the person's attorney of record; and
(4) the convicted person.

If the identity and location of none of the individuals and entities listed above in subsection 8.6(a)(1)-(4) can be readily ascertained, then the lawyer shall disclose that information to the appropriate professional authority.

(b) This Rule does not require disclosure of information otherwise protected by Rule 1.6 or other law.

Comment

[1] Rectifying the conviction and preventing the incarceration of an innocent person are core values of the judicial system and matters of vital concern to the legal profession. Because of the importance of these principles, this Rule applies to all members of the Bar and requires each member of the Bar to disclose substantial exculpatory information about a convicted person when such a disclosure is not prohibited by the attorney's other legal or ethical obligations.

[2] A disclosure that is otherwise mandated by this Rule is not required where it would involve violation of Rule 1.6. However, a lawyer should encourage a client to consent to disclosure where such disclosure would not substantially prejudice the client's interest. Information that is a client confidence or secret under Rule 1.6 is "otherwise protected by Rule 1.6" within the meaning of Rule 8.6(b). Rule 1.6(c), (d), and (e) describe circumstances in which a lawyer may reveal information otherwise protected by Rule 1.6. In such circumstances, a lawyer may, but is not required to, make disclosures otherwise required by this rule.

[3] Not every piece of information raising a question about the convicted person's innocence need be disclosed. Rather, this rule limits the disclosure requirement to information that is sufficient to cause an objective observer to believe there is substantial question about the correctness of the conviction. The term "substantial" refers to the degree of concern the particular information triggers about the correctness of the conviction, and not the quantum of information of which the lawyer is aware.

[4] An attorney's independent judgment, made in good faith, that the information is not of such a nature as to trigger the obligation of Rule 8.6, though subsequently determined to have been erroneous, does not constitute a violation of this Rule.

[5] When a lawyer cannot readily ascertain the identity of any individual or entity to whom disclosure is required (the court where the conviction was obtained, the chief prosecutor of the jurisdiction where the conviction was obtained, the attorney of record, or the convicted person), then disclosure to appropriate professional authorities is required. In most instances, that authority will be the Office of Bar Counsel in the District of Columbia, or the equivalent office in the jurisdiction where the underlying crime occurred or where the attorney principally practices.

[6] A disclosure made to a convicted person pursuant to Rule 8.6(a)(4) is authorized by law and does not violate Rule 4.2(a) of these Rules.

[7] Nothing in this Rule is intended to discourage the disclosure of information that raises a substantial question about the innocence of an accused prior to trial and conviction. Accordingly, the same information an attorney has already disclosed to the defense attorney of record pre-conviction need not be disclosed again post-conviction in order to comply with this Rule.

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[Proposed additions: **bold text and double underscoring]**

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