McCurdy, Lauren

From: Kevin Mohr [kemohr@charter.net]
Sent: Wednesday, August 12, 2009 9:22 PM
To: McCurdy, Lauren; Difuntorum, Randall; Lee, Mimi; Harry Sondheim
Cc: Anthonie Voogd; JoElla L. Julien; Robert L. Kehr; Jerome Sapiro; Kevin Mohr G
Subject: RRC - 1-100 [1-100] - III.A. - Revised E-mail Compilation & Definitions of "Screen"
Attachments: RRC - 1-100 [1-0-1] - E-mails, etc. - REV (08-24-09)-EXC_081209.pdf; RRC - 1-100 [1-0-1] - Screen Definitions - JS (08-10-09).pdf; RRC - 1-100 [1-0-1] - Screen Definitions - JS (08-10-09).doc

Greetings Lauren & Randy:

I've attached the following:

1. Revised E-mail compilation for 1.0.1 excerpt that includes Jerry's e-mail to the Drafters from Monday (page 32 of attached). In PDF. Please substitute it for the 1.0.1 compilation I sent you w/ the other materials earlier today.

2. A single page document, in Word & PDF, that includes Jerry's proposed definition of "screen." The proposed definition w/ the Model Rule definition and comparison to the Model Rule definition were attached to Jerry's e-mail. I think they should be included with the agenda materials.

I had inadvertently been left off the distribution of Jerry's e-mail, which is why it and the attachments were not included earlier.

Please let me know if you have any questions. Thanks,

Kevin

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Model Rule 1.0(k):

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

Proposed Sapiro Definition:

"Screened" means the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that prevent the flow of information about the matter between the personally disqualified lawyer and other lawyers or non-lawyers in the firm;[1] that include notice to lawyers and non-lawyer personnel within the firm that the isolated lawyer is prohibited from participating in the matter and is not to be given any information about the matter;[2] and that protect from disclosure to other lawyers and non-lawyers in the firm information that the isolated lawyer is obligated to protect under these Rules or other law.

Redline Version Showing Differences between Sapiro Definition & Model Rule:

"Screened" ~~denotes~~means, at a minimum, 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~~prevent the ~~circumstances~~flow of information about the matter between the personally disqualified lawyer and other lawyers or non-lawyers in the firm; that include notice to ~~protect~~lawyers and non-lawyer personnel within the firm that the isolated lawyer is prohibited from participating in the matter and is not to be given any information about the matter; and that protect from disclosure to other lawyers and non-lawyers in the firm information that the isolated lawyer is obligated to protect under these Rules or other law.[3]

[1] Adapted from Model Rule.
[2] Adapted from proposed New York rule 1.11.
[3] Adapted from Model Rule.

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August 6, 2009 KEM E-mail to Drafters, cc Chair & Staff:

Greetings Drafters & others;

I've attached the following to this e-mail, all in Word:

1. Model Rule 1.0 Terminology (2002), clean version.

2. Model Rule 1.0 Terminology (2002), annotated to reference variations in other jurisdictions. The referenced variations in other jurisdictions can all be found in item #3, below.

3. Chart of Variations of MR 1.0 in State Adoptions of the Rule.

4. Chart of Word & Terms, sorted in alphabetical order, that (i) we have used in our proposed Rules to date and defined or explained; (ii) appear in Model Rule 1.0 (2002); or (iii) have been added to their MR 1.0 counterpart by other jurisdictions.

5. Our approved proposed Rule 1.0.1 ("Law Firm"), which I recommend we renumber as 1.0.1(c) as in the Model Rule, at least for the time being. Both clean and redline versions.

Some Notes:

1. Again, here is my first e-mail sent on 7/29/09 on why we should, for the time being, number our terminology section 1.0.1:

> To avoid confusion, we should for the time being refer to the Terminology section as Rule 1.0.1. The Commission has already assigned the number 1.0 to the revision of current rule 1-100, titled "Purpose and Scope of the Rules of Professional Conduct." When approved, our proposed Rule 1.0 was intended as the counterpart to the Preamble & Scope sections of the Model Rules. The Commission voted 7-0-1 to make it Rule 1.0, after voting 6-2-0 on the concept of the "purpose and function" section of the rules being a rule. See 11/19/04 KEM Meeting Notes, III.A., at paragraphs 4,5. We've already assigned 1.0.1 to the definition of "law firm" with the idea that 1.0.1 would be the terminology section. See id. at paragraph 5.

2. There's a lot of material attached. It can't be avoided at this early stage of considering a terminology section. I'll explain each of the above documents so you can most quickly absorb the materials.

3. Item #1. Clean version of MR 1.0. This will probably your starting point for our terminology section (assuming the Commission votes to have a global terminology section). Before the Ethics 2000 draft was largely adopted by the ABA House of Delegates in 2001-2002, the Terminology section had appeared as an unnumbered section after the "Preamble" and "Scope" sections and before MR 1.1 (Competence). Since 2002, it has been a numbered Rule. As noted above, we have assigned 1.0 to our proposed revision of current rule 1-100, and tentatively had assigned 1.0.1 to our terminology section (if we had one).

4. Item #2. Annotated Version of MR 1.0. This should not be confused w/ Rule 1.0 from the ABA's Annotated Model Rules. This is an annotation I've created. In a footnote after each rule and comment paragraph, I have listed the state rules where you can review variations of the Model Rule definitions to determine whether other states' language might be more appropriate for California. ALL OF THESE REFERENCED VARIATIONS CAN BE FOUND IN ITEM #3, DESCRIBED BELOW. As you can see from a quick review of the footnotes of this document, most jurisdictions have adopted the MR definitions verbatim. However, more than a handful have revised the definitions for "law firm," "fraud," "informed consent," and "tribunal". There are also some significant language changes to the comments, even in states that have not varied the language of the black letter itself.

5. Item #3. This is probably the most important of the attached documents (and unfortunately, the longest).

> a. The chart itself is 43 pages long. Listed by state in alphabetical order are all the actual variations to the MR 1.0 definitions, as well as definitions that other states have added to their MR 1.0 counterpart.
>
> b. I recommend that you simply read through this top to bottom to get some sense of the language other states have chosen over the MR language, and whether to change. However, in some instances where California already has corresponding definitions

(e.g., "informed [written] consent," "writing"), we may want to carry forward the definition already found in our Rules or statutes.

c. The chart has 4 columns:

(1) Jurisdiction;

(2) Whether a state has adopted a comprehensive set of post-E2K Rules (e.g., Alabama, Georgia and Virginia do not appear to have conducted a comprehensive review of the Ethics 2000 changes)

(3) Whether a state has made changes to Rule 1.0. If yes, I've identified the degree of change as "slight," "moderate," or "substantial." Please take these w/ a grain of salt. I didn't put a lot of thought into them. My rating is based primarily on number of changes, not necessarily based on their significance. This is one of those small details we shouldn't worry about.

(4) Notes/Comments. This column contains the actual language of a state's adopted or proposed rule. I've also noted where a state has not completed its E2K review, or where its new rules have been adopted but not yet become effective. Please note that I've also inserted a link to the web page where you can find the jurisdictions full set of Rules or proposed Rules. In Word, you need to hold down "Ctrl" as you click the link and you will be taken to the web page.

d. In addition to the chart itself, I've attached after the chart clean and red-line versions of the states that have made the greatest number of revisions or additions to MR 1.0. New York leads, followed closely by Alaska (who would have thought?) and Wisconsin. You will also find Georgia, ND, Ohio, Oregon, and Washington. I've included the latter primarily because, although it made only a few changes to the rule itself (primarily in its definition of "fraud"), it added six comments to supplement the MR comments.

e. As to the numbering issue, note that two jurisdictions, Alaska and Massachusetts, have numbered their terminology rules as 9.1. Aside from those jurisdictions that have not yet completed their E2K review and therefore have carried forward the 1983 Model Rules unnumbered Terminology section, these are the only two jurisdictions that have not assigned the number "1.0" to their Terminology section.

f. For what it's worth, I have clean and redline versions of all the jurisdictions' counterparts to MR 1.0. As I've noted, all the revisions are included in this Chart. However, if for some reason you want the complete rule in one place and it is not attached to the chart, please contact me and I'll send it your way.

5. Item #4. This is an update of the chart I sent you all on 7/29/09 (I sent it to Tony, w/ copies to you on 7/30/09). The first draft of the chart contained only those Word & Terms that (i) we have used in our proposed Rules to date and defined or explained. In this draft, I also added the Words and Terms that (ii) appear in Model Rule 1.0 (2002); or (iii) have been added to their MR 1.0 counterpart by other jurisdictions.

a. Our proposed terms appear in plain font. In some instances, I've added a footnote that refers you to the same or similar term in other jurisdictions. The actual language for that term will be in Item #3. In addition, I've also included references to "related" terms

(e.g., for "communication," which we define in Rule 7.1, I've cross-referenced "computer-assisted communication" from NY and "electronic communication" from Oregon.

b. The Model Rule terms appear in bold font. I've also added the footnotes that refer you to variations to the Model Rule definition that have been adopted in other jurisdictions.

c. The additions from other jurisdictions are italicized.

6. Item #5. The only standalone definition we have completed is for "law firm," which we tentatively assigned as Rule 1.0.1. It varies from the Model Rule, primarily in Comment [2], which is our attempt to explain whether "of counsel" lawyers should be considered part of a firm. As noted above, see paragraph 4 re Item #2, law firm" is one of the most revised of the MR 1.0 definitions (though you should note that in some instances, the only difference is to include a reference to a governmental agency or organization).

As usual, please let me know if you have any questions.

August 7, 2009 Kehr E-mail to KEM:

Kevin: Is there any place where we have used "confirmed in writing"?

August 7, 2009 KEM E-mail to Kehr:

No, Bob. We've discussed it, for example, when we wrangled over 1.8.7, aggregate settlements, but instead we went w/ "informed written consent," as we have w/ all other rules where's it been an issue.

August 7, 2009 Kehr E-mail to KEM:

That was my recollection, but I'm still groggy and wanted to be certain. Thank you as always.

August 7, 2009 Kehr E-mail to KEM:

Your chart entitled "CHART MR 1 0 adoptions" lists Wisconsin Rule 1.0(e) as being different from the MR. This appears to be incorrect, which makes me think that you had intended to refer to another jurisdiction. Can you help on this?

To clarify, I am referring to the definition of fraud and fraudulent.

August 7, 2009 KEM E-mail to Kehr:

The Annotated Model Rule (the document in portrait format w/ footnotes after each paragraph and comment), does make that error at footnote 4. The reference should be to Wyoming Rule

1.0(e). I'd like to say Wisconsin, Wyoming, what's the difference, but I lived in Wisconsin for about 10 years. Oh well. Thanks for catching that.

I've attached a revised version of that document.

August 7, 2009 Kehr E-mail to KEM:

Thank you. I'll try to get back to this later.

August 8, 2009 Kehr E-mail #1 to Drafters (Voogd, Julien & Sapiro), cc Chair, Difuntorum, McCurdy & KEM:

Tony, JoElla, and Jerry: I set a deadline of noon for getting out a draft of this Rule, with the hope of giving you the opportunity to make your comments and of giving me the ability to address other agenda items with which I'm involved. My partial draft is attached. It is as far as I was able to get.

1. I have no comment on the MR definitions that I recommend keeping without change or that I've added. My footnotes should be self-explanatory, but I want to emphasize that my statement of drafters' recommendations state my views and my knowledge from Tony's earlier e-mail that he would keep all of the MR definitions. Please add your views as you think appropriate.

2. There were several variations of the definition of "fraud". I have carried them from Kevin's charts into the attachment so that everything will be on the same page. Before giving you my comments on them, I think we should have in mind where in the Rules "fraud" or a variant of it appear. They are in:

   Rule 1.2(d): "A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law."

   Rule 1.6(a)(2) – which is not applicable in California - "to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;"

   1.16 (b): "Except as stated in paragraph (c), a lawyer may withdraw from representing a client if: ... (2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;

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

4.1: "In the course of representing a client a lawyer shall not knowingly: ... (b) fail to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6."

8.4: "It is professional misconduct for a lawyer to: ... (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

Here are my comments on them ---

a. I disagree with North Carolina's substitution of "North Carolina" for "the applicable jurisdiction". This change seems to me to materially narrow the Rule. A lawyer should be subject to discipline under each of the five of these Rules that will apply in California for "fraud" however that might be defined under the applicable laws of any jurisdiction.

b. I don't know what N.Y. has in mind in inserting: "provided that it does not include conduct that, although characterized as fraudulent by statute or administrative rule, lacks an element of scienter, deceit, intent to mislead,". Subject to any comments from you, I can't picture how that insertion improves the Rule.

c. The other variations seem to me to be interesting restatements that don't materially alter the definition. Therefore, my conclusion is to go with the MR definition.

3. The other MR definition on which I hope to have your comments is "screened". B/c I was approaching my noon deadline, I didn't carry them into the attached draft. Here are the variations:

a. Alaska Rule 9.1(o) alters the MR by substituting "person" for "lawyer". This is interesting b/c it is correct that proper screening must include non-lawyer personnel. Thus, Alaska has: ""Screened" denotes the isolation of a ~~lawyer~~ person 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~~ person is obligated to protect under these Rules or other law."

b. Nebraska Rule 1.0(k) does essentially the same thing, substitution "support person" for the MR "lawyer" and the Alaska "person". I would appreciate your thoughts on the Alaska and Nebraska corrections of what appears to be a substantive error in the MR. Note that Alaska doesn't follow up on this with any correction of the corresponding Comment paragraph. However, Nebraska does by adding this sentence to Comment [8]: "The definition, as well as Comments [9] and [10] to this rule, also generally apply to the screening of support persons pursuant to Rule 1.9(e)(2)."

c. New Jersey Rule 1.0(l) misses the point picked up by Alaska and Nebraska but makes two other changes. First, it alters the MR "imposition" to: "adoption and enforcement". This does not seem to me to be materially different and don't recommend it. Second, it requires that the screening procedures be in writing. I would appreciate your comments on this addition, which seems to state what is implicit in the MR definition. The N.J. Rule reads in full: "Screened" denotes the isolation of a lawyer from any participation in a matter through the timely ~~imposition of procedures within~~adoption and enforcement by a law firm ~~that are~~of a written procedure pursuant to RPC 1.10(f) which is reasonably adequate under the circumstances to protect information that the isolated lawyer is obligated to protect under these Rules or other law.

d. New York Rule 1.0(t) also misses the point picked up by Alaska and Nebraska and makes two changes. First, its definition covers "screening" as well as "screened". This is a nit that we can pick up once we know what useages will appear in the California Rules. Second, it adds a reference to information that the firm is obligated to protect. Its Rule reads as follows: ""Screened" or "screening" 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 or the firm is obligated to protect under these Rules or other law." I would appreciate your comments on N.Y.'s second change. I don't immediately see its logic as the purpose of screening is to isolate information that the affected lawyer possesses, but perhaps I am missing something obvious.

e. North Carolina Rule 1.0(l) makes a single change: "'Screened' denotes the isolation of a lawyer from any participation in a professional 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." I don't see how the absence of "professional" could cause any confusion as screening applies only to lawyer-client relationship described in other Rules. Subject to any comments you might have, I don't recommend this change.

f. Finally, there is a threshold question about the definition of "screening": should we include details as to what "reasonably adequate" procedures must include rather than scattering them among other Rules?

August 8, 2009 Kehr E-mail #1 to Drafters (Voogd, Julien & Sapiro), cc Chair, Difuntorum, McCurdy & KEM:

I have a p.s. to my message of earlier today. Kevin's July 2009 meeting notes show that a decision was made to place the definition of screening in Rule 1.0.1, so that remains to be done. This was part of the discussion of Rule 1.11 at ¶10 in Kevin's notes.

August 10, 2009 Voogd E-mail to Drafters, cc Chair, Difuntorum, McCurdy & KEM:

Sorry for the delay in responding. I agree with your comments and conclusions. As for "reasonably adequate" screening procedures we might consider deleting "reasonably," i.e. a strict liability standard establishing the concept that if you are going to screen to advance lawyers' interests you must protect clients' interest.

August 10, 2009 KEM E-mail to Kehr, cc Drafters, Chair, Difuntorum, McCurdy & KEM:

I've attached a slightly revised draft 1.1 (8/8/09) of Rule 1.0.1. All I've done is complete your thought in footnote 4 and delete the reference to "written" in the definition of "informed written consent" and explain why in footnote 6. See my point #3, below.

I have a few observations on the definitions for which you've sought guidance from the drafters:

1. Fraud: As to the Rules where "fraud" or "fraudulent" are used, I would add that in our proposed rules, you will also find one or the other word in:

> Rule 1.5 [4-200] (definition of "unconscionability"): "A fee is unconscionable under this Rule if it is so exorbitant and wholly disproportionate to the services performed as to shock the conscience, or the lawyer, in negotiating or setting the fee, has engaged in fraudulent conduct or overreaching, ..."
>
> Rule 1.13 [3-600], cmt. [13]: ". . . If the lawyer's services are being used by an organization to further a crime or fraud by the organization, Rule 1.2.1 [1.2(d)] may also be applicable, in which event the lawyer may be required to withdraw from the representation under Rule 1.16(a)(1)."

2. Screened: I see that in your subsequent e-mail, you note that the Commission had agreed to put the definition of screening in a global section. However, further definition or description may be appropriate for certain rules (e.g., Harry observed that the vote to include "screen" in a global definition section was w/o prejudice to adding further definitions or comments in particular rules, e.g., in rule 1.11.

3. Informed written consent. You didn't ask about this, but I wanted to observe that in Rule 1.6, the reference is to "informed consent," not "informed written consent." There may be other rules that require only informed consent. I think we should follow the Model Rule lead and define "informed consent" in the black letter, but in a comment explain that informed written consent requires written disclosure. I'm not suggesting we use the MR definition; just use our definition of "informed written consent" but w/o the reference to "written":

> "Informed ~~written~~ consent" means the client's or former client's ~~written~~ agreement to the representation following ~~written~~ disclosure.

In addition, I realize that time was short so you were not able to address all the possible issues concerning a terminology section. I don't think we need to address them at the next meeting but I'd like to preserve for discussion the following thoughts I had when reviewing terminology rules/sections in the various jurisdictions.

4. I don't know whether the Commission will recommend adding other definitions, but we might consider a separate rule/section for definitions in addition to those in the Model Rule. See proposed Michigan Rule 1.0A.

> a. Alternatively, if we put all definitions in a single section, we should not follow what New York has done in terms of lettering -- i.e., intersperse new definitions in its rule and reletter all other definitions. Better to keep the Model Rule lettering for Model Rule definitions and reletter new definitions "(aa)," "(ab)," "(da)," "(fa)", etc. depending on where they land in the rule. This will make for easier cross-referencing in other rules and facilitate research in other jurisdictions as Professor has argued.

5. Even if we don't include a definition in the terminology, should we cross-reference where a particular definition can be found, similar to what NY did w/ its definition of "confidential information" and other states have done as to other rules:

> (d) "Confidential information" is defined in Rule 1.6.

a. Note that Oregon has actually provided a definition of "information relating to the representation of a client" in its terminology rule, i.e., a definition based on ABA Code of Professional Responsibility, DR 4-101(A). Oregon was one of the last four states, along w/ Iowa, Nebraska and New York, that adopted the Model Rules for the first time after Ethics 2000 had completed its task.

6. Definitions defined in other rules. Although we might consider cross-referencing in the black letter of proposed Rule 1.0.1 a definition or term which appears in another rule AND which is used in several rules (e.g., "confidential information relating to the representation of a client" in 1.6, "communication" in 7.1), most other definitions we have proposed in other rules are specific to those rules (e.g., "advance for fees" in the Comment to Rule 1.15, "adverse pecuniary interests" in the Rule 1.8.1, etc.) I have provided you a list of those rules. See Chart titled "Definitions Used in Drafts of Proposed Rules of Commission, the Model Rules & Other Jurisdictions" (the file is named "RRC - 1-100 [1-0-1] - Definitions - Sorted by Term - DFT2 (08-05-09).doc").

a. Rather than include such "unique" definitions in the blackletter of Rule 1.0.1, I think we should leave them in the specific rule to which they apply. However, we might consider a comment paragraph at the end of the Comment to Rule 1.0.1 that cross-references all such definitions.

b. Alternatively, we might consider a "table of definitions used in these rules" which does not include the definitions but simply the rule location where it can be found. We could insert it after Rule 1.0.1 & its comment, and before Rule 1.0.

As to specific definitions, again I realize the shortness of time to prepare this matter, but would liked to preserve for discussion the issue of whether we should include the following definitions in a global terminology section, either as a definition per se or cross-referenced in the blackletter:

7. "Client" (includes "prospective client" and "authorized representative").

8. "Confidential information relating to the representation of a client". For what it's worth, I prefer the NY approach to the Oregon approach, i.e., define "confidential information," etc., in Rule 1.6 and cross-referencing it in the black letter of Rule 1.0.1, rather than moving the definition into the black letter of Rule 1.0.1.

9. "Matter". I'm not sure "matter" is amenable to a global definition, but it does appear in several rules.

10. "Retainer" or "true retainer".

11. "Advance fee" or "advances for fee".

12. "Person"

13. "Primary responsibility" or "personally and substantially"

14. "public official" or "public officer"

15. "Substantially related"

Please let me know if you have any questions.

August 10, 2009 Kehr E-mail to Voogd, cc Drafters, Chair, Difuntorum, McCurdy & KEM:

Thank you, Tony. I will include your comments in the final version.

August 10, 2009 Kehr E-mail to KEM, cc Drafters, Chair, Difuntorum & McCurdy:

Thank you for all this. On your point 3, I want to consider whether "disclosure" is the right standard for obtaining informed consent under Rule 1.6, and how that might differ from a lawyer providing a reasonable explanation under Rule 1.4(b). Assuming that "informed consent" is used only in Rule 1.6, my nascent thought is that the consequences of revealing confidential information might be relatively obvious as compared to the often unexpected ripples that follow from accepting a representation in which a lawyer has a potential conflict of interest. If so, we might want to retain "disclosure" only for the conflict setting. And if we were to do that, perhaps we should have a cross-reference to Rule 1.4(b) in the Rule 1.6 Comment rather than having "informed consent" as a defined term. More on this later, perhaps this evening.

I wonder if any of the other drafters have any thoughts on this.

August 10, 2009 Sapiro E-mail to Drafters:

1. Attached are three versions of the definition of "screened." The first is from the Model Rule. The second is my redraft of it. The third is a redlined comparison of the two.

2. It seems to me that the definition of a screen should address three subjects. The first is preventing the flow of information about a matter between the tainted lawyer and the rest of the firm. The second is assuring that everyone in the firm knows about the tainted lawyer being off limits. The third is the preventing the flow of confidential information about the former client or the government from the tainted lawyer to the rest of the firm.

3. The Model Rule definition only addresses the last of these subjects. Because we did not include in Rule 1.11 the minimum parameters of a screen, I think we should address all three in the definition.

4. I also changed "denotes" to "means" because I think "denotes" is too wishy-washy. To me, it means "indicates" where in this rule we are supposed to be defining it.

5. I also added "at a minimum" because to me the rules should state the minimum standards, but a given case may require more to be an effective screen.

6. I also deleted "reasonably adequate" because to me this should be a strict standard. We are absolving lawyers of conflicts of interest. If the screen they set up does not isolate the tainted lawyer, discipline should result.

August 12, 2009 KEM E-mail to McCurdy & Difuntorum, cc Drafters, Chair & Lee:

I've attached the following for inclusion in the agenda materials for item III.A.:

1. Rule 1.0.1 [1-100], Draft 1.1 (8/8/09), redline, compared to Model Rule 1.0. In Word & PDF.

2. Rule 1.0.1 [Law Firm Definition], Post-PCD [#7.1] (6/16/07), compared to Model Rule 1.0(c). In Word.

3. E-mail compilation excerpt, which includes recent exchanges among the drafters. In PDF.

I've also attached following for your records, but do not believe they should be included in the agenda mailing because of their length:

4. Chart of Variations of MR 1.0 in State Adoptions of the Rule.

5. Chart of Words & Terms, sorted in alphabetical order, that (i) we have used in our proposed Rules to date and defined or explained; (ii) appear in Model Rule 1.0 (2002); or (iii) have been added to their MR 1.0 counterpart by other jurisdictions.

Comments for the Commission:

1. Please review the following e-mails, particularly the first Kehr e-mail, in the attached e-mail compilation for a quick read on the issues for the coming meeting:

August 8, 2009 Kehr E-mail #1 to Drafters (Voogd, Julien & Sapiro), cc Chair, Difuntorum, McCurdy & KEM: 27
August 8, 2009 Kehr E-mail #2 to Drafters (Voogd, Julien & Sapiro), cc Chair, Difuntorum, McCurdy & KEM: 29
August 10, 2009 Voogd E-mail to Drafters, cc Chair, Difuntorum, McCurdy & KEM: 29
August 10, 2009 KEM E-mail to Kehr, cc Drafters, Chair, Difuntorum, McCurdy & KEM: 29
August 10, 2009 Kehr E-mail to Voogd, cc Drafters, Chair, Difuntorum, McCurdy & KEM: 32
August 10, 2009 Kehr E-mail to KEM, cc Drafters, Chair, Difuntorum & McCurdy: 32

Please note that Tony has joined in nearly all of Bob's recommendations in the draft.

2. The Commission previously approved the definition of "law firm" as Rule 1.0.1 but it should probably be included in the terminology section. See Point #3.

3. To avoid confusion, we should for the time being refer to the Terminology section as Rule 1.0.1. The Commission has already assigned the number 1.0 to the revision of current rule 1-100, titled "Purpose and Scope of the Rules of Professional Conduct." When approved, our proposed Rule 1.0 was intended as the counterpart to the Preamble & Scope sections of the Model Rules. The Commission voted 7-0-1 to make it Rule 1.0, after voting 6-2-0 on the concept of the "purpose and function" section of the rules being a rule. See 11/19/04 KEM Meeting Notes, III.A., at paragraphs 4,5. We've already assigned 1.0.1 to the definition of "law firm" with the idea that 1.0.1 would be the terminology section. See id. at paragraph 5.

Please let me know if you have any questions.

McCurdy, Lauren

From: Kevin Mohr [kemohr@charter.net]
Sent: Wednesday, August 12, 2009 12:55 PM
To: McCurdy, Lauren; Difuntorum, Randall
Cc: Robert L. Kehr; JoElla L. Julien; Jerome Sapiro; Lee, Mimi; Kevin Mohr G
Subject: RRC - 1-100 [1.0.1] - III.A. - Terminology - 8/28-29/09 Meeting Materials
Attachments: RRC - 1-100 [1-0-1] - E-mails, etc. - REV (08-24-09)-EXC_081209.pdf; RRC - 1-0-1 [Law Firm] - Rule - Post PCD (061607) - Cf. to MR 1.0(c)2.doc; RRC - 1-100 [1-0-1] - Rule - DFT1.1 (08-08-09) - Cf. to MR1.0-KEM.doc; RRC - 1-100 [1-0-1] - Rule - DFT1.1 (08-08-09) - Cf. to MR1.0-KEM.pdf; RRC - 1-100 [1-0-1] - Definitions - Sorted by Term - DFT2 (08-05-09).doc; RRC - 1-100 [1-0-1] - CHART - MR 1.0 Adoptions - REV (08-04-09).doc

Greetings Lauren & Randy:

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August 10, 2009 Kehr E-mail to KEM, cc Drafters, Chair, Difuntorum & McCurdy: 32

Please note that Tony has joined in nearly all of Bob's recommendations in the draft.

2. The Commission previously approved the definition of "law firm" as Rule 1.0.1 but it should probably be included in the terminology section. See Point #3.

3. To avoid confusion, we should for the time being refer to the Terminology section as Rule 1.0.1. The Commission has already assigned the number 1.0 to the revision of current rule 1-100, titled "Purpose and Scope of the Rules of Professional Conduct." When approved, our proposed Rule 1.0 was intended as the counterpart to the Preamble & Scope sections of the Model Rules. The Commission voted 7-0-1 to make it Rule 1.0, after voting 6-2-0 on the concept of the "purpose and function" section of the rules being a rule. See 11/19/04 KEM Meeting Notes, III.A., at paragraphs 4,5. We've already assigned 1.0.1 to the definition of "law firm" with the idea that 1.0.1 would be the terminology section. See id. at paragraph 5.

Please let me know if you have any questions. Thanks,

Kevin

--
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Rule 1.0 Terminology

(a)[1] "Belief" or "believes" denotes that the person involved actually supposed the fact in question to be true. A person's belief may be inferred from circumstances.

(b)[2] ~~"Confirmed in writing," when used in reference to the informed consent of a person, denotes informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent. See paragraph (e) for the definition of "informed consent." If it is not feasible to obtain or transmit the writing at the time the person gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.~~

(b)[3] "Disclosure" means informing the client or former client of the relevant circumstances and of the actual and reasonably foreseeable adverse consequences to the client or former client."

(c)[4] "Firm" or "law firm" ~~denotes a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation or other organization.~~

(d)[5] "Fraud" or "fraudulent" denotes conduct that is fraudulent under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive.

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[1] Only four jurisdictions have altered the MR. D.C. has deleted this definition. Ga. has changed "actually supposed" to: "actually thought". N.Y. has changed "actually supposed" to: "actually believed". N.Dak. left the first sentence of the definition intact but changed the second sentence so that the phrase "may be inferred from the circumstances to: "may be inferred from the person's conduct in the circumstances." The drafters disagree with D.C. and recommend retaining the definition. The drafters further believe that the Georgia and N.Y. changes both are marginally better than the MR, but not enough to recommend. Finally, the drafters believe that the N. Dak. change at best is not substantive and do not support it. Thus, the drafters recommend retaining the MR definition.

[2] We have not used "confirmed in writing" in any of our definitions, opting in each case for "informed written consent". Our corresponding definition is found under "informed written consent".

[3] This is the rule 3-310(A)(1) definition, without any change. Any confusion caused by this language can be addressed in a corresponding Comment.

[4] See the attached proposed Rule 1.0.1, definition of "law firm," the only standalone definition the Commission has approved to date.

[5] There have been several substantive variations in other jurisdictions. They are: **Alaska** Rule 9.1(d): ""Fraud" or "fraudulent" denotes conduct ~~that is fraudulent under the substantive or procedural law~~(including acts of ~~the applicable jurisdiction and has~~ omission) performed with a purpose to deceive; it does not include negligent misrepresentation or negligent failure to apprise another of relevant information.";

New York Rule 1.0(i): ""Fraud" or "fraudulent" denotes conduct that is fraudulent under the substantive or procedural law of the applicable jurisdiction ~~and~~ or has a purpose to deceive, provided that it does not include conduct that, although characterized as fraudulent by statute or administrative rule, lacks an

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25 (e)[6] "Informed ~~written~~ consent" means the client's or former client's ~~written~~ agreement
26 to the representation following ~~written~~ disclosure ~~denotes the agreement by a person to~~

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element of scienter, deceit, intent to mislead, or knowing failure to correct misrepresentations that can be reasonably expected to induce detrimental reliance by another.";

North Carolina Rule 1.0(e) is identical to the MR except that It substitutes "North Carolina" for "the applicable jurisdiction";

North Dakota Rule 1.0(e): ""Fraud" or "fraudulent" denotes conduct ~~that is fraudulent under the substantive or procedural law of the applicable jurisdiction and has~~ having a purpose to deceive and not merely negligent misrepresentation or negligent failure to apprise another of relevant information.";

Ohio Rule 1.0(d):

> ""Fraud" or "fraudulent" denotes conduct that ~~is fraudulent under the substantive or procedural law of the applicable jurisdiction and~~ has ~~a purpose~~ an intent to deceive~~.~~ and is either of the following:
>
> > (1) an actual or implied misrepresentation of a material fact that is made either with knowledge of its falsity or with such utter disregard and recklessness about its falsity that knowledge may be inferred;
> >
> > (2) a knowing concealment of a material fact where there is a duty to disclose the material fact.

South Carolina Rule 1.0(f): ""Fraud" or "fraudulent" denotes conduct that is fraudulent under the substantive or procedural law of the applicable jurisdiction ~~and~~ or which has a purpose to deceive.";

Tennessee Rule 1.0(d): "~~(d) "Fraud" or "fraudulent" denotes conduct that is fraudulent under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive.~~(d) "Fraud" or "fraudulent" denotes an intentionally false or misleading statement of material fact, an intentional omission from a statement of fact of such additional information as would be necessary to make the statements made not materially misleading, and such other conduct by a person intended to deceive a person or tribunal with respect to a material issue in a proceeding or other matter.";

Washington Rule 1.0(d): ""Fraud" or "fraudulent" denotes conduct that has a purpose to deceive and is fraudulent under the substantive or procedural law of the applicable jurisdiction ~~and~~, except that it is not necessary that anyone has ~~a purpose~~ suffered damages or relied on the misrepresentation or failure to ~~deceive~~ inform."; and

Wyoming Rule 1.0(e): ""Fraud" or "fraudulent" denotes conduct that is fraudulent under the substantive or procedural law of the applicable jurisdiction ~~and has a purpose to deceive~~."

[6] Because some proposed rules, e.g., Rule 1.6, refer only to "informed consent," the Consultant has recommend deleting the reference to "written" in the current definition in rule 3-310(A)(2), but including in a comment to this Rule that "informed written consent" requires "written" disclosure. See 8/10/09 KEM E-mail to Drafters, #3.

Bob Kehr notes there are other possibilities:

> On your point 3, I want to consider whether "disclosure" is the right standard for obtaining informed consent under Rule 1.6, and how that might differ from a lawyer providing a reasonable explanation under Rule 1.4(b). Assuming that "informed consent" is used only in Rule 1.6, my nascent thought is that the consequences of revealing confidential information might be relatively obvious as compared to the often unexpected ripples that follow from accepting a representation in which a lawyer has a potential conflict of interest. If so, we might want to retain "disclosure" only for the conflict setting. And if we were to do that, perhaps we should have a cross-reference to Rule 1.4(b) in the Rule 1.6

~~a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct~~.

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

(g)[8] "Partner" denotes a member of a partnership, a shareholder in a law firm organized as a professional corporation, or a member of an association authorized to practice law.

(h)[9] "Reasonable" or "reasonably" when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer.

(i)[10] "Reasonable belief" or "reasonably believes" when used in reference to a lawyer denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.

(j)[11] "Reasonably should know" when used in reference to a lawyer denotes that a lawyer of reasonable prudence and competence would ascertain the matter in question.

Comment rather than having "informed consent" as a defined term. See 8/10/09 Kehr E-mail to KEM, cc Drafters.

[7] Oregon Rule 1.0(h): "... denotes actual knowledge of the fact in question, except that for purposes of determining a lawyer's knowledge of the existence of a conflict of interest, all facts which the lawyer knew, or by the exercise of reasonable care should have known, will be attributed to the lawyer. A person's knowledge may be inferred from circumstances.; and proposed Tenn. Rule 1.0(f): "... denotes actual ~~knowledge~~ awareness of the fact in question. A person's knowledge may be inferred from circumstances. The drafters do not see any reason to alter the definition of knowledge for conflicts purposes. They also don't believe that Tennessee's change from "knowledge" to "awareness" is needed, although it does avoid the use of the defined word in the definition. We recommend the use of the MR definition without change.

[8] There are two arguable imperfections in the MR definition of "Partner". Texas has altered the definition to include "an individual or corporate member of a partnership", and the MR definition omits Members of limited liability companies where they can practice law. Nevertheless, it is hard to see that either point will cause any confusion, and the drafters recommend the adoption of the MR definition.

[9] The only jurisdiction to alter this definition is N.Y., which keeps the MR sentence as its first sentence and adds a second sentence about conflicts of interest. The additional sentence is: "When used in the context of conflict of interest determinations, 'reasonable lawyer' denotes a lawyer acting from the perspective of a reasonably prudent and competent lawyer who is personally disinterested in commencing or continuing the representation." The drafters believe N.Y.'s addition has some purpose with MR 1.7 but not with California's and therefore recommend adoption of the MR definition.

[10] Although D.C. has deleted the Model Rule definition of "reasonable belief" or "reasonably believes" from its Rule 1.0, no other jurisdiction has modified the MR definition. The drafters recommend adoption of the MR definition.

[11] The only variation of this is in Texas, which has the following: " '~~Reasonably should~~ Should know' when used in reference to a lawyer denotes that a ~~lawyer of~~ reasonable ~~prudence and competence~~ lawyer

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

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

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

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

Comment[12]

Confirmed in Writing

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

Firm

[2] Whether two or more lawyers constitute a firm within paragraph (c) can depend on the specific facts. For example, two practitioners who share office space and occasionally consult or assist each other ordinarily would not be regarded as constituting a firm. However, if they present themselves to the public in a way that suggests that they are a firm or conduct themselves as a firm, they should be regarded as a firm for purposes of the Rules. The terms of any formal agreement between associated lawyers are relevant in determining whether they are a firm, as is the fact

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under the same or similar circumstances would ~~ascertain~~ know the matter in question." The drafters see no material benefit to this change and recommend the adoption of the MR definition.

[12] The drafters have not addressed the Comment, pending the Commission's decision on the Rule.

that they have mutual access to information concerning the clients they serve. Furthermore, it is relevant in doubtful cases to consider the underlying purpose of the Rule that is involved. A group of lawyers could be regarded as a firm for purposes of the Rule that the same lawyer should not represent opposing parties in litigation, while it might not be so regarded for purposes of the Rule that information acquired by one lawyer is attributed to another.

[3] With respect to the law department of an organization, including the government, there is ordinarily no question that the members of the department constitute a firm within the meaning of the Rules of Professional Conduct. There can be uncertainty, however, as to the identity of the client. For example, it may not be clear whether the law department of a corporation represents a subsidiary or an affiliated corporation, as well as the corporation by which the members of the department are directly employed. A similar question can arise concerning an unincorporated association and its local affiliates.

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

Fraud

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

Informed Consent

[6] Many of the Rules of Professional Conduct require the lawyer to obtain the informed consent of a client or other person (e.g., a former client or, under certain circumstances, a prospective client) before accepting or continuing representation or pursuing a course of conduct. See, e.g., Rules 1.2(c), 1.6(a) and 1.7(b). The communication necessary to obtain such consent will vary according to the Rule involved and the circumstances giving rise to the need to obtain informed consent. The lawyer must make reasonable efforts to ensure that the client or other person possesses information reasonably adequate to make an informed decision. Ordinarily, this will require communication that includes a disclosure of the facts and circumstances giving rise to the situation, any explanation reasonably necessary to inform the client or other person of the material advantages and disadvantages of the proposed course of conduct and a discussion of the client’s or other person’s options and alternatives. In some circumstances it may be appropriate for a lawyer to advise a client or other person to seek the advice of other counsel. A lawyer need not inform a client or other

person of facts or implications already known to the client or other person; nevertheless, a lawyer who does not personally inform the client or other person assumes the risk that the client or other person is inadequately informed and the consent is invalid. In determining whether the information and explanation provided are reasonably adequate, relevant factors include whether the client or other person is experienced in legal matters generally and in making decisions of the type involved, and whether the client or other person is independently represented by other counsel in giving the consent. Normally, such persons need less information and explanation than others, and generally a client or other person who is independently represented by other counsel in giving the consent should be assumed to have given informed consent.

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

Screened

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

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

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

Rule 1.0.1 Terminology

Law Firm Definition

~~(c) "Firm" or "law~~"Law firm" ~~denotes~~means a ~~lawyer or lawyers in a private firm,~~ law partnership~~,~~; a professional law corporation~~,~~; a sole proprietorship or ~~other~~an association ~~authorized to~~ engaged in the practice of law; or lawyers employed in a legal services organization or in the legal department, division or office of a corporation, a government entity or other organization.

Comment

[~~2]~~ 1] A sole proprietorship is a law firm for purposes of these Rules. Whether two or more lawyers constitute a law firm ~~within paragraph (c)~~ can depend on the specific facts. For example, two practitioners who share office space and occasionally consult or assist each other ordinarily would not be regarded as constituting a firm. However, if they present themselves to the public in a way that suggests that they are a firm or conduct themselves as a firm, they ~~should~~may be regarded as a law firm for purposes of ~~the~~these Rules. The terms of any formal agreement between associated lawyers are relevant in determining whether they are a firm, as is the fact that they have mutual access to information concerning the clients they serve. Furthermore, it is relevant in doubtful cases to consider the underlying purpose of the ~~Rule~~ 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] Whether a lawyer who is denominated as "of counsel" should be deemed a member of law firm can also depend on the specific facts. The term "of counsel" implies that the lawyer so designated has a relationship with the firm, other than as a partner or associate, or officer or shareholder, that is close, personal, continuous, and regular. Thus, to the extent the relationship between a law firm and a lawyer is sufficiently "close, personal, regular and continuous," such that the lawyer is held out to the public as "of counsel" for the law firm, the relationship of the firm and "of counsel" lawyer will be considered a single firm for purposes of disqualification. See, e.g., *People ex rel Department of Corporations v. Speedee Oil Change Systems, Inc.* (1999) 20 Cal.4th 1135 [86 Cal.Rptr.2d 816]. On the other hand, even when a lawyer has associated as "of counsel" with another lawyer and is providing extensive legal services on a matter, they will not necessarily be considered the same firm for purposes of dividing fees under Rule 1.5.1 [2-200] where, for example, they both continue to maintain independent law practices with separate identities, separate addresses of record with the State Bar, and separate clients, expenses, and liabilities. See, e.g., *Chambers v. Kay* (2002) 29 Cal.4th 142 [126 Cal.Rptr.2d 536].

[3] With respect to the law department of an organization, including the government, there is ordinarily no question that the members of the department constitute a law firm

within the meaning of ~~the Rules of Professional Conduct~~ these Rules. There can be uncertainty, however, as to the identity of the client. For example, it may not be clear whether the law department of a corporation represents a subsidiary or an affiliate~~d~~ corporation, as well as the corporation by which the members of the department are directly employed. A similar question can arise concerning an unincorporated association and its local affiliates.

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

[5] This Rule is not intended to authorize any person or entity to engage in the practice of law in this state except as otherwise permitted by law.

Proposed Rule 1.0 – State Adoptions			
1. State	**2. Adopted MR 1.0 (E2K)**	**3. Any Changes?**	**4. Notes/Comments**
Alabama	No	No	Alabama has not yet completed its E2K Review. Rule. Alabama Rule 1.0 is identical to the 1983 version of MR 1.0, except that it adds a definition of "non-lawyer assistant": "Nonlawyer assistant" denotes any nonlawyer employee, full or part-time, of a lawyer or law firm. http://www.sunethics.com/al_rpc_index.htm Comment. As with the 1983 version of the Model Rules, Alabama has no comment to its terminology section.
Alaska	Yes	Yes -- substantial	Rule. Alaska has added or modified several new definitions to the 2002 version of the Model Rule, and retained one definition ("consult") from the 1983 version of the Model Rules as follows: • Added Alaska Rule 9.1(b) provides: (b) "Client" denotes a person, a public officer or agency, or a corporation, association, organization, or other entity, either public or private, who receives professional legal services from a lawyer. • Added Alaska Rule 9.1(d) retains the definition of "consult" from the 1983 version of the MR's and provides: (d) "Consult" or "consultation" denotes communication of information reasonably sufficient to permit the client to understand the significance of the matter in question. • MR 1.0(c) modifed: (~~c~~e) "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~~. It also denotes lawyers employed in a legal services organization or in the legal department of a corporation or other organization. See COMMENT, Rule 1.10. • MR 1.0(d) modified: (~~d~~f) "Fraud" or "fraudulent" denotes conduct ~~that is fraudulent under the substantive or procedural law~~(including acts of ~~the applicable jurisdiction and has~~omission) performed with a purpose to deceive; it does not include negligent misrepresentation or negligent failure to apprise another of relevant information. • MR 1.0(e) modified: (~~e~~g) "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has ~~communicated adequate information and explanation about~~adequately explained the material risks of, and the reasonably available alternatives to, the proposed course of conduct. • Added Alaska Rule 9.1(i), which provides: (i) "Matter" includes any judicial or other proceeding, any application, or request for a ruling or other determination, and any contract, claim, controversy, investigation, charge, accusation, arrest, negotiation, or

Proposed Rule 1.0 – State Adoptions			
1. State	**2. Adopted MR 1.0 (E2K)**	**3. Any Changes?**	**4. Notes/Comments**
			other particular transaction or dealings involving a specific party or parties. • Added Alaska Rule 9.1(k), which provides: (k) "Person" denotes a government officer or agency, corporation, company, partnership, firm, association, organization, business trust, or society, as well as a natural person. • MR 1.0(k) modified: (~~k~~o) "Screened" denotes the isolation of a ~~lawyer~~person 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~~person is obligated to protect under these Rules or other law. • Added Alaska Rule 1.0(q), which provides: (q) "Substantially related" matters for purposes of the rules governing a lawyer's duties to former, current, and prospective clients denotes matters: (1) that involve the same transaction or the same underlying legal dispute, or (2) where there is a substantial risk that confidential factual information obtained in the prior matter would materially advance a client's position in the subsequent matter. In assessing the risk under subsection (2), a court or disciplinary body may rely on the nature of the services that the lawyer provided to the earlier client, the type of information that would ordinarily be learned by a lawyer providing such services, and whether this information would predictably be used to the detriment of the earlier client by a zealous, conflict-free advocate. However, matters will not be deemed "substantially related" under paragraph (2) if the confidential information imparted to the lawyer has since been disclosed to the public or to other adverse parties. • MR 1.0(n) modified: (~~n~~s) "Writing" or "written" denotes a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photostating, photography, audio or ~~videorecording~~video recording, and e-mail. A "signed" writing includes an electronic sound, symbol, or process attached to or logically associated with a writing ~~and~~, if it is executed or adopted by a person with the intent to sign the writing. **NOTE**: Alaska has renumbered its terminology section 9.1 and moved it to the end of its rules. The official posting at the Alaska Courts website is at: http://www.state.ak.us/courts/prof.htm **NOTE**: The revised Alaska Rules of Professional Conduct (eff. 4/15/09), are available in PDF at this link: http://www.state.ak.us/courts/sco/sco1680.pdf

Proposed Rule 1.0 – State Adoptions			
1. State	**2. Adopted MR 1.0 (E2K)**	**3. Any Changes?**	**4. Notes/Comments**
			Comment. Alaska's comment is identical to MR 1.0 (2002). **NOTE**: See Clean & Redline versions of the Alaska Rule starting at page 44 of this Chart.
Arizona	Yes	Yes – Slight	Rule. Arizona adopted the 2002 version of MR 1.0 nearly verbatim, except as follows: • Modified MR 1.0(c) as follows: (c) "Firm" or "law firm" denotes a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship or other association~~ authorized to practice law~~; or lawyers employed in a legal services organization or the legal department of a corporation or other organization. Whether government lawyers should be treated as a firm depends on the particular Rule involved and the specific facts of the situation. • Modified MR 1.0(m) as follows: (m) "Tribunal" denotes a court, an arbitrator in ~~a binding~~an arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity. A legislative body, administrative agency or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a ~~binding~~ legal judgment directly affecting a party's interests in a particular matter. http://www.myazbar.org/ethics/rules.cfm Comment. Except as noted, the comment to Arizona Rule 1.0 is nearly identical to the comment to the 2002 version of MR 1.0: • Added reference to Rules 1.7(b) and 1.8(a) in the first sentence of Comment [6]: [6] Many of the Rules of Professional Conduct require the lawyer to obtain the informed consent of a client or other person (e.g., a former client or, under certain circumstances, a prospective client) before accepting or continuing representation or pursuing a course of conduct. See~~, e.g., Rules~~ ERs 1.2(c), 1.6(a)~~ and~~, 1.7(b), 1.8(a), and 1.9(b). • Added a reference to Rule 1.5(e)(2) at the end of Comment [7]: See, e.g., ~~Rules~~ERs 1.5(e)(2), 1.8(a) and (g). For a definition of "signed," see paragraph (n).
Arkansas	Yes	No	Rule. The black letter is identical to the 2002 version of MR 1.0. http://courts.state.ar.us/rules/current_ark_prof_conduct/index.cfm Comment. Identical to the 2002 MR comment.
California			
Colorado	Yes	Yes –	Rule. Black letter is identical to the 2002 version of MR 1.0.

Proposed Rule 1.0 – State Adoptions			
1. State	**2. Adopted MR 1.0 (E2K)**	**3. Any Changes?**	**4. Notes/Comments**
		Slight	http://www.cobar.org/index.cfm/ID/384/CETH/Colorado-Rules-of-Professional-Conduct/ Comment. Comment to Colorado Rule 1.10 is identical to MR 1.0 (2002), except that it adds new Comment [7A]: [7A] In considering the prior Colorado Rules of Professional Conduct, the Colorado Supreme Court has stated, "with one important exception [involving knowing misappropriation of property] we have considered a reckless state of mind, constituting scienter, as equivalent to "knowing" for disciplinary purposes." *In the Matter of Egbune*, 971 P.2d 1065, 1069 (Colo.1999). See also *People v. Rader*, 822 P.2d 950 (Colo. 1992); *People v. Small,* 962 P.2d 258, 260 (Colo. 1998). For purposes of applying the ABA *Standards for Imposing Lawyer Sanctions*, and in determining whether conduct is fraudulent, the Court will continue to apply the *Egbune* line of cases. However, where a Rule of Professional Conduct specifically requires the mental state of "knowledge," recklessness will not be sufficient to establish a violation of that Rule and to that extent, the *Egbune* line of cases will not be followed.
Connecticut	Yes	Yes – Slight	Rule. Identical to the 2002 version of MR 1.0, except that it adds new paragraph (b) and reletters the succeeding paragraphs accordingly: (b) "Client" or "person" as used in these Rules includes an authorized representative unless otherwise stated. http://www.jud.ct.gov/Publications/PracticeBook/PB1.pdf OR http://www.jud.ct.gov/Publications/PracticeBook/PB1_links.html Comment. Identical to the 2002 version of MR 1.10, except that Connecticut refers to "subsections" rather than "paragraphs," does not number the comment paragraphs, and has revised the second sentence of MR 1.0, cmt. [9] as follows: The personally disqualified lawyer ~~should~~shall acknowledge in writing to the client the obligation not to communicate with any of the other lawyers in the firm with respect to the matter.
Delaware	Yes	No	Rule. Black letter is identical to the 2002 version of MR 1.0. http://courts.delaware.gov/Rules/?FinalDLRPCclean.pdf Comment. Comment to Delaware Rule 1.0 is identical to the comment to MR 1.10 (2002).
District of Columbia	No	Yes -- Moderate	Rule. D.C. has made a number of changes to the 2002 version of MR 1.0: • Has substituted the definition of "consult" from the 1983 version of the MR for MR 1.0(b) of the 2002 version, as D.C. has not adopted the Model Rule's "informed consent, confirmed in writing" standard for conflicts: ~~(b) "Confirmed in writing," when used in reference to the informed consent of a person, denotes informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent. See paragraph (e) for the definition of "informed consent." If it is not~~

Proposed Rule 1.0 – State Adoptions			
1. State	**2. Adopted MR 1.0 (E2K)**	**3. Any Changes?**	**4. Notes/Comments**
			~~feasible to obtain or transmit the writing at the time the person gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.~~(b) "Consult" or "consultation" denotes communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question. • Has modified 1.0(c) as follows: (c) "Firm" or "law firm" denotes a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation or other organization, but does not include a government agency or other government entity. *See* Comment, Rule 1.10. • Has added paragraph (g) defining "law clerk": (g) "Law clerk" denotes a person, typically a recent law school graduate, who acts, typically for a limited period, as confidential assistant to a judge or judges of a court; to an administrative law judge or a similar administrative hearing officer; or to the head of a governmental agency or to a member of a governmental commission, either of which has authority to adjudicate or to promulgate rules or regulations of general application. • Has added paragraph (h) defining "matter": (h) "Matter" means any litigation, administrative proceeding, lobbying activity, application, claim, investigation, arrest, charge or accusation, the drafting of a contract, a negotiation, estate or family relations practice issue, or any other representation, except as expressly limited in a particular rule. • Has modified MR 1.0(g) as follows: (~~g~~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. • Has deleted MR 1.0(i), which defines "reasonable belief" or "reasonably believes". http://www.dcbar.org/new_rules/rules.cfm Comment. Deletes Comments [1] to [4] of MR 1.0 ("confirmed in writing" and "firm"). See first & second bullet points, above. Adopts for the most part MR 1.0, cmts. [5]-[10], renumbers them [1]-[6], and makes the following changes: • Adds the following sentence to Comment [2] (MR 1.0, cmt. [6]): In all circumstances, the client's consent must be not only informed but also uncoerced by the lawyer or by any other person acting on the lawyer's behalf.

Proposed Rule 1.0 – State Adoptions			
1. State	**2. Adopted MR 1.0 (E2K)**	**3. Any Changes?**	**4. Notes/Comments**
			• Revises Comment [3] (MR 1.0, cmt. [7]), as follows: [~~7~~3] Obtaining informed consent will usually require an affirmative response by the client or other person. In general, a lawyer may not assume consent from a client's or other person's silence. Consent may be inferred, however, from the conduct of a client or other person who has reasonably adequate information about the matter. A number of Rules require that a person's consent be ~~confirmed~~ in writing. *See* Rules ~~1.7(b) and 1.9(a). For a definition of "writing" and "confirmed in writing," see paragraphs (n) and (b). Other Rules require that a client's consent be obtained in a writing signed by the client. See, e.g., Rules~~ 1.8(a)(3) and 1.8(g). For a definition of "~~signed~~writing," *see* ~~paragraph~~Rule 1.0(~~no~~). • Deletes the reference to Rule 1.10 in Comment [4] (MR 1.0, cmt. [8]). • Adds the following sentence at the end of Comment [5] (MR 1.0, cmt. [8]): For a further explanation of screening, *see* D.C. Bar Legal Ethics Committee Opinion 279.
Florida	Yes	Yes – Moderate	Rule. Based on the 2002 version of MR 1.10, but with a number of changes, as described below. Moreover, the Rule is not numbered, nor are the Comments to the Rule. Finally, Florida does not separately letter each paragraph of its terminology section. In short, Florida has retained the "style" of the 1983 version of the Model Rules, which also did not letter its definitions nor number its individual comments. • Adds definition of "consult" from the 1983 version of the MR's: "Consult" or "consultation" denotes communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question. • Modifies MR 1.0(c) as follows: ~~(c)~~ "Firm" or "law firm" denotes a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship, or other association authorized to practice law; or lawyers employed in ~~a legal services organization or~~ the legal department of a corporation or other organization. • Modifies MR 1.0(d) as follows: ~~(d)~~ "Fraud" or "fraudulent" denotes conduct ~~that is fraudulent under the substantive or procedural law of the applicable jurisdiction and has~~having a purpose to deceive and not merely negligent misrepresentation or failure to apprise another of relevant information. • Adds a definition of "lawyer" after the definition of "knowingly": "Lawyer" denotes a person who is a member of The Florida Bar or otherwise authorized to practice in any court of the State of Florida. http://www.sunethics.com/rpc_index.htm Comment. The Florida Comment largely tracks the 2002 version of MR 1.0, except for changes to conform to the

Proposed Rule 1.0 – State Adoptions			
1. State	**2. Adopted MR 1.0 (E2K)**	**3. Any Changes?**	**4. Notes/Comments**
			Florida style, some revised cross-references to conform to the Florida rule numbering convention, and the following changes: • MR 1.0, cmt. [5] is revised as follows: ~~[5]~~ When used in these ~~Rules~~rules, the terms "fraud" or "fraudulent" refer to conduct that ~~is characterized as such under the substantive or procedural law of the applicable jurisdiction and~~ has a purpose to deceive. This does not include merely negligent misrepresentation or negligent failure to apprise another of relevant information. For purposes of these ~~Rules~~rules, it is not necessary that anyone has suffered damages or relied on the misrepresentation or failure to inform. • In Comment [10], the word "practicable" is substituted for "practical."
Georgia	No	Yes -- Substantial	Georgia has not yet completed its post-E2K review. Rule. Georgia Rule 1.10 is based on the 1983 version of MR 1.0, but with a number of modifications and additions as described below: • Has revised MR 1.0(a) as follows: "Belief" or "believes" denotes that the person involved actually ~~supposed~~thought the fact in question to be true. A person's belief may be inferred from circumstances. • Has added the following definition of "domestic lawyer" in relation to MJP rules: "Domestic Lawyer" denotes a person authorized to practice law by the duly constituted and authorized governmental body of any State or Territory of the United States or the District of Columbia but not authorized by the Supreme Court of Georgia or its rules to practice law in the State of Georgia. • Has added the following definition of "foreign lawyer" in relation to MJP rules: "Foreign Lawyer" denotes a person authorized to practice law by the duly constituted and authorized governmental body of any foreign nation but not authorized by the Supreme Court of Georgia or its Rules to practice law in the State of Georgia. • Has added a definition of "lawyer": "Lawyer," denotes a person authorized by the Supreme Court of Georgia or its Rules to practice law in the State of Georgia including persons admitted to practice in this state pro hac vice. • Has added a definition of "nonlawyer": "Nonlawyer" denotes a person not authorized to practice law by either the: (a) Supreme Court of Georgia or its Rules (including pro hac vice admission), or

Proposed Rule 1.0 – State Adoptions			
1. State	**2. Adopted MR 1.0 (E2K)**	**3. Any Changes?**	**4. Notes/Comments**
			(b) duly constituted and authorized governmental body of any other State or Territory of the United States, or the District of Columbia, or (c) duly constituted and authorized governmental body of any foreign nation. • Has revised the definition of "substantial" as follows: "Substantial" when used in reference to degree or extent denotes a material matter of clear and weighty importance, or may refer to things of more than trifling value. • Has revised MR 1.0(m) as follows: ~~(m)~~ "Tribunal" denotes a court, an arbitrator in ~~a binding~~an arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity. A legislative body, administrative agency or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a ~~binding~~ legal judgment directly affecting a party's interests in a particular matter. • Has not adopted the following definitions found in the 2002 version of the Model Rules: "confirmed in writing," "informed consent," "screened," and "writing". http://gabar.org/handbook/part_iv_after_january_1_2001_-_georgia_rules_of_professional_conduct/ OR http://www.gabar.org/handbook/rules_index/ Note also that the foregoing address has links to relevant ethics opinions. Comment: Georgia does not have any comment to its terminology section (similar to the 1983 Model Rules). NOTE: Georgia did not adopt the Model Rules until 1999, so it is not certain the Georgia Rules will undergo an expansive review. **NOTE**: See Clean & Redline versions of the Georgia Terminology section starting at page 52 of this Chart.

Proposed Rule 1.0 – State Adoptions			
1. State	**2. Adopted MR 1.0 (E2K)**	**3. Any Changes?**	**4. Notes/Comments**
Hawai'i	No	Yes -- Slight	Hawaii has not yet completed its post-E2K review. Rule. Hawaii's Terminology section is unnumbered and identical to the 1983 version of MR 1.0, but adds a new definition of "Qualified legal assistance organization": [11] "Qualified legal assistance organization" means a legal aid, public defender, or military assistance office; or a bona fide organization that recommends, furnishes, or pays for legal services to its members or beneficiaries, provided the office, service, or organization receives no profit from the rendition of legal services, is not designed to procure financial benefit or legal work for a lawyer as a private practitioner, does not infringe the individual member's freedom as a client to challenge the approved counsel or to select outside counsel at the client's expense, is not in violation of any applicable law. http://www.state.hi.us/jud/ctrules/hrpcond.htm Comment: Hawaii does not have any comment to its terminology section (similar to the 1983 Model Rules).
Idaho	Yes	No	Rule & Comment. Black letter and comment are identical to the 2002 version of MR 1.0. http://isb.idaho.gov/general/rules/irpc.html
Illinois	Yes	No	Illinois recently adopted post-E2K rules, effective January 1, 2010. Rule. Newly adopted Illinois Rule 1.0 is identical to MR 1.0. http://www.state.il.us/court/SupremeCourt/Rules/Art_VIII/default_NEW.asp [Link to new Rules] http://www.state.il.us/court/supremecourt/rules/art_viii/artviii.htm [Link for rules that expire on 12/31/09] Comment. The comment to Ill. Rule 1.0 is nearly identical to MR 1.0, the only revisions resulting from the fact that Illinois requires informed consent to be confirmed in writing only with respect to its fee-splitting provision, Illinois Rule 1.5(e). • MR 1.0, cmt. [1] is revised as follows: [1] If it is not feasible to obtain or transmit a written confirmation, if required, at the time the client gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter. If a lawyer has obtained a client's informed consent, and written confirmation is required, the lawyer may act in reliance on that consent so long as it is confirmed in writing within a reasonable time thereafter. • MR 1.0, cmt. [7] is revised as follows: [7] Obtaining informed consent will usually require an affirmative response by the client or other person. In general, a lawyer may not assume consent from a client's or other person's silence. Consent may be inferred, however, from the conduct of a client or other person who has reasonably adequate information about the matter. ~~A number of Rules require~~Rule 1.5(e) requires that a person's consent be confirmed in writing~~. See Rules 1.7(b) and 1.9(a)~~. For a definition of "writing" and "confirmed in writing," see paragraphs

Proposed Rule 1.0 – State Adoptions			
1. State	**2. Adopted MR 1.0 (E2K)**	**3. Any Changes?**	**4. Notes/Comments**
			(n) and (b). Other Rules require that a client's consent be obtained in a writing signed by the client. See~~, e.g.,~~ Rules 1.5(c), 1.8(a) and (g). For a definition of "signed," see paragraph (n).
Indiana	Yes	Yes – Slight	Rule. The black letter tracks the 2002 version of MR 1.0 except: • MR 1.0(b) is modified as follows: (b) "Confirmed in writing," when used in reference to the informed consent of a person, denotes informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent. See paragraph (n) for the definition of "writing." See paragraph (e) for the definition of "informed consent." If it is not feasible to obtain or transmit the writing at the time the person gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter. • MR 1.0(m) is modified as follows: ~~(m) "Tribunal" denotes a court, an arbitrator in a binding arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity. A legislative body, administrative agency or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a binding legal judgment directly affecting a party's interests in a particular matter.~~(m) "Tribunal" denotes a court, an arbitrator, or any other neutral body or neutral individual making a decision, based on evidence presented and the law applicable to that evidence, which decision is binding on the parties involved. http://www.in.gov/judiciary/rules/prof_conduct/index.html Comment. The comment to Indiana Rule 1.0 is identical to the comment to the 2002 version of MR 1.0.
Iowa	Yes	No	Rule. The black letter is identical to the 2002 version of MR 1.0. http://www.judicial.state.ia.us/Professional_Regulation/Rules_of_Professional_Conduct/ Comment. The Comment is identical to the Comment to MR 1.0, except that several additional rules are cross-referenced after the fourth sentence in Comment [7] [Rules 1.11(a), 1.12(a) and 1.18(d)].
Kansas	Yes	Yes – Slight	Rule. The black letter is identical to the 2002 version of MR 1.0, except that Kansas has added the definition of "consult" from the 1983 MR terminology section: (c) "Consult" or "Consultation" denotes communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question. http://www.kscourts.org/rules/Rule-List.asp?r1=Rules+Relating+to+Discipline+of+Attorneys Comment. Kansas has adopted the comment to MR 1.0 (2002) verbatim.

Proposed Rule 1.0 – State Adoptions			
1. State	**2. Adopted MR 1.0 (E2K)**	**3. Any Changes?**	**4. Notes/Comments**
Kentucky	Yes	Yes – Slight	Rule. Identical to the 2002 version of MR 1.10, except: • Paragraph (b) refers to "an informed consent" instead of "informed consent". • Paragraph (m) is revised as follows: (m) "Tribunal" denotes a court, an arbitrator in a binding arbitration proceeding or a legislative body, administrative agency, disciplinary or admissions entity created by the Supreme Court, or other body acting in an adjudicative capacity. A legislative body, administrative agency or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a binding legal judgment directly affecting a party's interests in a particular matter. http://courts.ky.gov/NR/rdonlyres/AA868FA5-6B4B-4C20-A06C-D5C4FC0D1596/0/RevisedSCRuleseffective7152009.pdf OR http://www.kybar.org/Default.aspx?tabid=237 (Old Rules w/ link to new rules, effective 7/15/09) Comment: The Comment to Kentucky Rule 1.10 is identical to the 2002 version of MR 1.10, except that Comment [8] substitutes "when" for "where".
Louisiana	Yes	No	Rule. Black letter is identical to the 2002 version of MR 1.10. http://www.ladb.org/Publications/ropc.pdf OR http://www.law.cornell.edu/ethics/la/code/ Comment. Louisiana has not adopted the Model Rule comments.
Maine	Yes	Yes – Moderate	NOTE: Maine, which w/ California, was one of two states that had adopted neither the ABA Model Code or the ABA Model Rules, recently adopted the Model Rules, as revised, effective 8/1/09. The link below to the Maine Supreme Judicial Court's order adopting the new rules may not be operative. However, it still worked on 8/3/09. The link on the Maine Board of Overseers website still takes you to the old Maine Code of Professional Responsibility, which was repealed effective July 31, 2009). Rule. Maine's black letter contains a number of revisions, mostly stylistic (e.g., consistently substitutes the word "means" for "denotes," and substitutes the phrase "when referring to" for "when used in relation to"). Otherwise, Maine Rule 1.0 tracks the 2002 version of MR 1.0, except that there are two substantive or clarifying changes, as follows (of particular interest are the revisions to MR 1.0(e) ["informed consent"]: • MR 1.0(c) is revised: (c) "Firm" or "law firm" ~~denotes~~means a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; ~~or~~ lawyers employed by the government to represent the government or a governmental entity; or lawyers in a legal services

Proposed Rule 1.0 – State Adoptions			
1. State	**2. Adopted MR 1.0 (E2K)**	**3. Any Changes?**	**4. Notes/Comments**
			organization or the legal department of a corporation or other organization. • MR 1.0(e) is revised: (e) "Informed consent" ~~denotes the agreement by~~means a ~~person~~person's agreement to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct. Whether a client has given informed consent to representation shall be determined in light of the mental capacity of the client to give consent, the explanation of the advantages and risks involved provided by the lawyer seeking consent, the circumstances under which the explanation was provided and the consent obtained, the experience of the client in legal matters generally, and any other circumstances bearing on whether the client has made a reasoned and deliberate choice. See: http://www.courts.state.me.us/rules_forms_fees/rules/MRProfCond6-4-09.pdf [Link to Supreme Court order] Comment: The Maine comments is identical to the 2002 version of MR 1.0.
Maryland	Yes	Yes – Slight	Rule. Maryland Rule 1.0 largely tracks the 2002 version of MR 1.10, but: • Retains the 1983 Model Rule definition of "consult": (c) "Consult" or "consultation" denotes communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question. • Modifies MR 1.0(c) as follows: (~~c~~d) "Firm" or "law firm" denotes: (1) an association of a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship or other association ~~authorized to~~formed for the practice of law; or ~~lawyers employed in~~ (2) a legal services organization or the legal department of a corporation, government or other organization. • Adds paragraph (h), "law firm," which simply cross-references " 'law firm' 1.0(d)". • Substitutes the word "decision" for "judgment" in Rule 1.0(o), its definition of "tribunal" ("…by a party or parties, will render a binding legal ~~judgment~~decision directly affecting a party's interests in a particular matter.") http://www.law.cornell.edu/ethics/md/code/ OR http://www.courts.state.md.us/attygrievance/rules.html

Proposed Rule 1.0 – State Adoptions			
1. State	**2. Adopted MR 1.0 (E2K)**	**3. Any Changes?**	**4. Notes/Comments**
			Comment. Maryland has not adopted the comment to the 2002 version of MR 1.0.
Massachusetts	No	Yes – Moderate	Massachusetts has not yet finished its review of E2K. Rule. Based on the 1983 version of the Model Rule "terminology section," Massachusetts largely tracks the Model Rule but has numbered the Model Rule's unnumbered terminology section as Mass. Rule 9.1, lettered each of the paragraphs, and added or revised a number of the definitions: • Added a definition of "bar association": (a) "Bar association" includes an association of specialists in particular services, fields, and areas of law. • Revised the definition of "firm": (d) "Firm" or "law firm" denotes a lawyer or lawyers in a private firm, lawyers employed in the legal department of a corporation or other organization, and lawyers employed in a legal services organization. ~~See Comment~~The term includes a partnership, ~~Rule 1.10~~including a limited liability partnership, a corporation, a limited liability company, or an association treated as a corporation, authorized by law to practice law for profit. • Added a clarification of the word "person": (h) "Person" includes a corporation, an association, a trust, a partnership, and any other organization or legal entity. • Added a definition of "qualified legal assistance program": (i) "Qualified legal assistance organization" means a legal aid, public defender, or military assistance office; or a bona fide organization that recommends, furnishes or pays for legal services to its members or beneficiaries, provided the office, service, or organization receives no profit from the rendition of legal services, is not designed to procure financial benefit or legal work for a lawyer as a private practitioner, does not infringe the individual member's freedom as a client to challenge the approved counsel or to select outside counsel at the client's expense, and is not in violation of any applicable law. • Added a clarification of the word "state": (m) "State" includes the District of Columbia, Puerto Rico, and federal territories or possessions. • Added an abbreviated definition of "tribunal" (the 1983 version of the Model Rules, on which the Mass. Rule is based, did not include a definition of "tribunal"): "Tribunal" includes a court or other adjudicatory body. See: http://www.mass.gov/obcbbo/rpcnet.htm

Proposed Rule 1.0 – State Adoptions			
1. State	**2. Adopted MR 1.0 (E2K)**	**3. Any Changes?**	**4. Notes/Comments**
			Comment: Massachusetts added the following comment to the 1983 version of the Model Rules (which did not include any comments): [1] See Comments 1-3 to Rule 1.10 for further information on the definition of "firm." [2] In addition to the terms defined in this rule, there are two other important concepts whose meaning is discussed at some length at other places in these rules. The terms "assist" and "assisting" appear in Rules 1.2(d), 3.3(a)(2) and 4.1(b). Comment 3 to Rule 4.1 sets forth the meaning of these terms with respect to conduct proscribed in Rules 1.2(d) and 4.1(b), and Comment 2A to Rule 3.3 sets forth the special meaning of those terms in the context of a lawyer's appearance before a tribunal. The term "confidential information" is also used in the rules to describe the information that lawyers shall not reveal unless required or permitted under these rules. As Comment 5, 5A and 5B to Rule 1.6 indicate, confidential information includes "virtually" all information relating to the representation whatever its scope. It therefore includes information described as confidences and secrets under the prior Massachusetts Disciplinary Rules without the limitation in the prior rules that the information be "embarrassing" or "detrimental" to the client. As pointed out in Comment 5A, however, a lawyer may learn some information in the course of representation that is so widely known that it ought not be considered confidential. [3] The final category of qualified legal assistance organization requires that the organization "receives no profit from the rendition of legal services." That condition refers to the entire legal services operation of the organization; it does not prohibit the receipt of a court-awarded fee that would result in a 'profit" from that particular lawsuit. Corresponding ABA Model Rule. The definitions are largely taken from the "Terminology" of the ABA Model Rules which is not a numbered rule.
Michigan	No	Yes – Moderate	*Proposed* Michigan Rule 1.0 largely tracks the 2002 version of MR 1.0 but makes the following changes or additions: • Modifies MR 1.0(c): (c) "Firm" or "law firm" denotes a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship or other association ~~authorized to~~engaged in the practice of law; or lawyers employed in a legal services organization or the legal department of a corporation or other organization. • Modifies MR 1.0(e): (e) "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated ~~adequate~~ information and explanation reasonably adequate under the circumstances about the material risks of and reasonably available alternatives to the proposed course of conduct. • Modifies MR 1.0(g):

Proposed Rule 1.0 – State Adoptions			
1. State	**2. Adopted MR 1.0 (E2K)**	**3. Any Changes?**	**4. Notes/Comments**
			(g) "Partner" denotes a member of a partnership, a shareholder in a law firm organized as a professional corporation, or a member of ~~an association authorized to~~a professional limited liability company or similar organization engaged in the practice of law. • Adds two definitions in proposed new Rule 1.0.1, titled "Additional Terminology": (a) "Adjudicative officer" includes such officials as judges, judges pro tempore, referees, special masters, hearing officers and other parajudicial officers, and also lawyers who serve in such capacities on a part-time basis. (b) "Person" means a natural person or entity recognized as such by law. Staff Comment: These two additional terms were added by the State Bar Ethics Committee for extra clarity. In Michigan, adjudicative officers and parajudicial officers have many titles, so a definition of these officers is helpful. Also, the definition of "person" clarifies that it includes corporate entities. These added definitions were placed in a separate rule so as to not unduly modify the ABA Model Rules' numbering system. *Proposed* Comment. The proposed Comment is identical to the comment to the 2002 version of MR 1.0. **NOTE**: A link for the proposed Rules is available on the following page under "Ethics Rules": http://www.michbar.org/opinions/ethicsopinions.cfm *Current* Michigan Rules are available here: http://coa.courts.mi.gov/rules/documents/5MichiganRulesOfProfessionalConduct.pdf OR http://www.michbar.org/generalinfo/pdfs/mrpc.pdf OR http://www.law.cornell.edu/ethics/mi/code/ NOTE: The report of the Michigan E2K Committee was filed w/ the Michigan Supreme Court in 2004 but that court has not yet taken action on it.

Proposed Rule 1.0 – State Adoptions			
1. State	**2. Adopted MR 1.0 (E2K)**	**3. Any Changes?**	**4. Notes/Comments**
Minnesota	Yes	Yes – Slight	Rule. The black letter of Minnesota Rule 1.0 is identical to the 2002 version of MR 1.0, but has retained the 1983 version's definition of "consult": (c) "Consult" or "consultation" denotes communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question. http://www.courts.state.mn.us/lprb/05mrpc.html Comment. The comment is identical to the 2002 version of MR 1.0, except that it modifies the first sentence of Comment [3] as follows: [3] With respect to the law department of an organization~~, including the government,~~ there is ordinarily no question that the members of the department constitute a firm within the meaning of the Rules of Professional Conduct.
Mississippi	No	No	Mississippi has not completed E2K review. Rule. Mississippi Rule is identical to the 1983 version of MR 1.0. http://www.mslawyer.com/mssc/profcond.html Comment. Mississippi has not adopted the comments to MR 1.0 (either the 1983 or 2002 version).
Missouri	Yes	Yes – Slight	Rule & Comment. The black letter is identical to the 2002 version of MR 1.0, except: • It modifies MR 1.0(m) ("Tribunal") by substituting the word "decision" for "judgment" ("…by a party or parties, will render a binding legal ~~judgment~~decision directly affecting a party's interests in a particular matter.") http://www.courts.mo.gov/page.asp?id=707 Comment. The Missouri comment is identical to the comment to the 2002 version of MR 1.0, but it adds new comment [8] to the "Informed Consent" section of the comment: [8] The prior version of the Rules used the phrase "consent after consultation" rather than "informed consent." "Consultation" is a term that is not well understood and does not sufficiently indicate the extent to which clients must be given adequate information and explanation in order to make reasonably informed decisions. The term "informed consent" is more likely to convey to lawyers what is required under the Rules. No change in substance is intended.

Proposed Rule 1.0 – State Adoptions			
1. State	**2. Adopted MR 1.0 (E2K)**	**3. Any Changes?**	**4. Notes/Comments**
Montana	Yes	Yes – Slight	Rule. Montana Rule 1.0 is nearly identical to the 2002 version of MR 1.0, except: • It adds new paragraph (b): (b) "Bona fide" denotes in or with good faith; honestly, openly, and sincerely; without deceit or fraud. • Retains the 1983 Model Rules version definition of "consult": (c) "Consult" or "consultation" denotes communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question. • Revises MR 1.0(g) as follows: (~~g~~i) "Partner" denotes a member of a law partnership, a shareholder in a law firm organized as a professional corporation, or a member of an association authorized to practice law. • Revises MR 1.0(n) as follows: (~~n~~p) "Writing" or "written" denotes a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photostating, photography, audio or videorecording and e-mail. A "signed" writing includes the electronic equivalent of a signature, such as an electronic sound, symbol or process, which is attached to ~~or logically associated with~~ a writing and executed or adopted by a person with the intent to sign the writing. http://www.montanabar.org/associations/7121/files/rpc.pdf Comment. Montana has not adopted the comments to MR 1.10.
Nebraska	Yes	Yes – Slight	Rule. Nebraska Rule 1.0 is nearly identical to the 2002 version of MR 1.0, except: • It has modified MR 1.0(k) as follows: (k) "Screened" denotes the isolation of a lawyer or support person 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 or support person is obligated to protect under these Rules or other law. http://www.supremecourt.ne.gov/rules/html/Ch3/art5/ Comment: Nebraska has adopted the comment to the 2002 version of MR 1.0 verbatim, except that is has added the following sentence to MR 1.0, cmt. [8]: The definition, as well as Comments [9] and [10] to this rule, also generally apply to the screening of support persons pursuant to Rule 1.9(e)(2).

Proposed Rule 1.0 – State Adoptions			
1. State	**2. Adopted MR 1.0 (E2K)**	**3. Any Changes?**	**4. Notes/Comments**
Nevada	Yes	Yes – Slight	Rule. Nevada Rule 1.0 is identical to the 2002 version of MR 1.0, except:[1] • It adds the following introductory paragraph: As used in these Rules, the following terms shall have the meanings ascribed: • It adds new paragraph (o): (o) "Organization" when used in reference to "organization as client" denotes any constituent of the organization, whether inside or outside counsel, who supervises, directs, or regularly consults with the lawyer concerning the organization's legal matters unless otherwise defined in the Rule. http://www.leg.state.nv.us/courtrules/RPC.html Comment. Nevada has not adopted the comments to the Model Rules.

[1] **NOTE**: Nevada has also adopted a unique Rule 1.0A, which is similar to our proposed Rule 1.0 and provides:

Rule 1.0A. Guidelines for Interpreting the Nevada Rules of Professional Conduct. The preamble and comments to the ABA Model Rules of Professional Conduct are not enacted by this Rule but may be consulted for guidance in interpreting and applying the Nevada Rules of Professional Conduct, unless there is a conflict between the Nevada Rules and the preamble or comments. The following guidelines for interpreting and applying the Nevada Rules of Professional Conduct are hereby adopted:

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

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

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

Proposed Rule 1.0 – State Adoptions			
1. State	**2. Adopted MR 1.0 (E2K)**	**3. Any Changes?**	**4. Notes/Comments**
New Hampshire	Yes	No	Rule. Has adopted the 2002 version of MR 1.0 verbatim. http://www.courts.state.nh.us/rules/pcon/ Comment. New Hampshire also includes the Model Rule comment verbatim, except it removes the cross-reference to Rule 1.10 in Comment [8] because its version of Rule 1.0 does not permit screening.
New Jersey	No	Yes – Moderate	Rule. New Jersey Rule 1.0 tracks the 2002 version of MR 1.0, except: • Deletes the last sentence of MR 1.0(b): (b) "Confirmed in writing," when used in reference to the informed consent of a person, denotes informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent. See paragraph (e) for the definition of "informed consent." ~~If it is not feasible to obtain or transmit the writing at the time the person gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.~~ • Adds new paragraph (h), related to conflicts and screening: (h) "Primary responsibility" denotes actual participation in the management and direction of the matter at the policy-making level or responsibility at the operational level as manifested by the continuous day-to-day responsibility for litigation or transaction decisions. • Modifies MR 1.0(k) as follows: (~~k~~l) "Screened" denotes the isolation of a lawyer from any participation in a matter through the timely ~~imposition of procedures within~~adoption and enforcement by a law firm ~~that are~~of a written procedure pursuant to RPC 1.10(f) which is reasonably adequate under the circumstances to protect information that the isolated lawyer is obligated to protect under these Rules or other law. • Modifies MR 1.0(m) ("Tribunal") by substituting "an arbitration" for "a binding arbitration". http://www.judiciary.state.nj.us/rules/apprpc.htm

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

Proposed Rule 1.0 – State Adoptions			
1. State	**2. Adopted MR 1.0 (E2K)**	**3. Any Changes?**	**4. Notes/Comments**
			Comment. New Jersey has not adopted the Model Rule comments.
New Mexico	Yes	No	Rule. Is substantively identical the 2002 version of MR 1.0. The only changes are found in the cross-references to accommodate New Mexico's unique numbering system (e.g., Rule 1.10 is 16-110 and lettering of rule paragraphs is all caps instead of lower case). http://www.nmdisboard.org/Conwaygreene.htm http://www.conwaygreene.com/ NOTE: The web site on which New Mexico's Rules are maintained is very difficult to navigate. The first link above provides specific instructions for finding a given rule on the web site (second link). NOTE: The foregoing web site does not appear to have updated all of New Mexico's Rules of Professional Conduct. For a copy of the Supreme Court order adopting the new rules, effective 11/2008, w/ a red-line version of the Rules attached, see: http://nmsupremecourt.nmcourts.gov/rules/rulemaking/Consolidated%20Amendents%20to%20the%20Rules%20of%20Professional%20Conduct%20(Approved%209-17-08).pdf Comment. The comment to Rule 1.0 is identical to the comment to the 2002 version of MR 1.0, except w/ the same changes to cross-references to accommodate New Mexico's unique numbering system.
New York	Yes	Yes – Substantial	Rule. The black letter diverges substantially from both the 1983 and 2002 versions of MR 1.0. **NOTE**: See Clean & Redline versions of the New York Rule starting at page 56 of this Chart. http://www.nysba.org/Content/NavigationMenu/ForAttorneys/ProfessionalStandardsforAttorneys/Professional_Standar.htm Summary of Changes to the 2002 version of MR 1.0: • Adds definition of "advertisement": (a) "Advertisement" means any public or private communication made by or on behalf of a lawyer or law firm about that lawyer or law firm's services, the primary purpose of which is for the retention of the lawyer or law firm. It does not include communications to existing clients or other lawyers. • Modifies MR 1.0(a): (~~a~~b) "Belief" or "believes" denotes that the person involved actually ~~supposed~~believes the fact in question to be true. A person's belief may be inferred from circumstances. • Adds definition of "computer-accessed communication": (c) "Computer-accessed communication" means any communication made by or on behalf of a lawyer or law firm that is disseminated through the use of a computer or related electronic device, including, but not limited to, web sites, weblogs, search engines, electronic mail, banner advertisements, pop-up and pop-

Proposed Rule 1.0 – State Adoptions			
1. State	**2. Adopted MR 1.0 (E2K)**	**3. Any Changes?**	**4. Notes/Comments**
			under advertisements, chat rooms, list servers, instant messaging, or other internet presences, and any attachments or links related thereto. • Notes that "confidential information" is defined in Rule 1.6. • Modifies MR 1.0(b): (~~b~~e) "Confirmed in writing~~,~~" ~~when used in reference to the informed consent of a person,~~ denotes ~~informed consent that is given in~~(i) a writing ~~by~~from the person ~~or~~to the lawyer confirming that the person has given consent, (ii) a writing that ~~a~~the lawyer promptly transmits to the person confirming ~~an oral informed consent. See paragraph (e) for~~ the ~~definition of "informed~~person's oral consent, or (iii) a statement by the person made on the record of any proceeding before a tribunal.~~"~~ If it is not feasible to obtain or transmit the writing at the time the person gives ~~informed~~oral consent, then the lawyer must obtain or transmit it within a reasonable time thereafter. • Adds definition of "differing interests": (f) "Differing interests" include every interest that will adversely affect either the judgment or the loyalty of a lawyer to a client, whether it be a conflicting, inconsistent, diverse, or other interest. • Adds definition of "domestic relations matter": (g) "Domestic relations matter" denotes representation of a client in a claim, action or proceeding, or preliminary to the filing of a claim, action or proceeding, in either Supreme Court or Family Court, or in any court of appellate jurisdiction, for divorce, separation, annulment, custody, visitation, maintenance, child support or alimony, or to enforce or modify a judgment or order in connection with any such claim, action or proceeding. • Modifies MR 1.0(c): (~~c~~h) "Firm" or "law firm" ~~denotes~~includes, but is not limited to, a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a qualified legal ~~services~~assistance organization, a government law office, or the legal department of a corporation or other organization. • Modifies MR 1.0(d): (~~d~~i) "Fraud" or "fraudulent" denotes conduct that is fraudulent under the substantive or procedural law of the applicable jurisdiction ~~and~~or has a purpose to deceive, provided that it does not include conduct that, although characterized as fraudulent by statute or administrative rule, lacks an element of scienter, deceit, intent to mislead, or knowing failure to correct misrepresentations that can be reasonably expected to induce detrimental reliance by another. • Modifies MR 1.0(e):

Proposed Rule 1.0 – State Adoptions			
1. State	**2. Adopted MR 1.0 (E2K)**	**3. Any Changes?**	**4. Notes/Comments**
			(~~e~~j) "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated ~~adequate~~ information adequate for the person to make an informed decision, and ~~explanation about~~after the lawyer has adequately explained to the person the material risks of ~~and reasonably available alternatives to~~ the proposed course of conduct and reasonably available alternatives. • Adds definition of "matter": (l) "Matter" includes any litigation, judicial or administrative proceeding, case, claim, application, request for a ruling or other determination, contract, controversy, investigation, charge, accusation, arrest, negotiation, arbitration, mediation or any other representation involving a specific party or parties. • Adds definitions of "person," "professional legal corporation," and "qualified legal assistance organization": (n) "Person" includes an individual, a corporation, an association, a trust, a partnership, and any other organization or entity. (o) "Professional legal corporation" means a corporation, or an association treated as a corporation, authorized by law to practice law for profit. (p) "Qualified legal assistance organization" means an office or organization of one of the four types listed in Rule 7.2(b)(1)-(4) that meets all of the requirements thereof. • Modifies MR 1.0(h): (~~h~~g) "Reasonable" or "reasonably," when used in relation to conduct by a lawyer, denotes the conduct of a reasonably prudent and competent lawyer. When used in the context of conflict of interest determinations, "reasonable lawyer" denotes a lawyer acting from the perspective of a reasonably prudent and competent lawyer who is personally disinterested in commencing or continuing the representation. • Modifies MR 1.0(k): (~~k~~t) "Screened" or "screening" 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 or the firm is obligated to protect under these Rules or other law. • Deletes MR 1.0(l) [definition of "substantial"] • Adds definitions for "sexual relations" and "state": (u) "Sexual relations" denotes sexual intercourse or the touching of an intimate part of the lawyer or another person for the purpose of sexual arousal, sexual gratification or sexual abuse. (v) "State" includes the District of Columbia, Puerto Rico, and other federal territories and possessions.

Proposed Rule 1.0 – State Adoptions			
1. State	**2. Adopted MR 1.0 (E2K)**	**3. Any Changes?**	**4. Notes/Comments**
			• Modifies MR 1.0(m): (~~m~~w) "Tribunal" denotes a court, an arbitrator in ~~a binding~~an arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity. A legislative body, administrative agency or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a ~~binding~~ legal judgment directly affecting a party's interests in a particular matter. Comment: New York has also modified the comment extensively: • Modified Comment [1]: [1] Some Rules require that a person's oral consent be "confirmed in writing." E.g., Rules 1.5(g)(2) (client's consent to division of fees with lawyer in another firm must be confirmed in writing), 1.7(b)(4) (client's informed consent to conflict of interest must be confirmed in writing) and 1.9(a) (former client's informed consent to conflict of interest must be confirmed in writing). The definition of "confirmed in writing" provides three distinct methods of confirming a person's consent: (i) a writing from the person to the lawyer, (ii) a writing from the lawyer to the person, or (iii) consent by the person on the record in any proceeding before a tribunal. The confirming writing need not recite the information that the lawyer communicated to the person in order to obtain the person's consent. For the definition of "informed consent" see Rule 1.0(j). If it is not feasible for the lawyer to obtain or transmit a written confirmation at the time the client gives ~~informed~~oral consent, then the lawyer must obtain or transmit ~~it~~the confirming writing within a reasonable time thereafter. If a lawyer has obtained a client's informed oral consent, the lawyer may act in reliance on that consent so long as it is confirmed in writing within a reasonable time thereafter. • Modified the last sentence of Comment [2]: For example, 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.~~ determining whether a conflict of interest exists but not for application of the advertising rules. • Has added the following sentence to Comment [3]: Whether lawyers in a government agency or department constitute a firm may depend upon the issue involved or be governed by other law. • Has modified the last sentence of Comment [5] re "fraud": For purposes of these Rules, it is not necessary that anyone has suffered damages or relied on the misrepresentation or failure to inform, so long as the necessary scienter is present and the conduct in question could be reasonably expected to induce detrimental reliance.

Proposed Rule 1.0 – State Adoptions			
1. State	**2. Adopted MR 1.0 (E2K)**	**3. Any Changes?**	**4. Notes/Comments**
			• Has added the following sentence at the end of Comment [6] re "informed consent": Other considerations may apply in representing impaired clients. See Rule 1.14. • Has modified Comment [8] re screening: [8] ~~This~~ The definition of "screened" or "screening" applies to situations where screening of a personally disqualified lawyer is permitted to remove imputation of a conflict of interest under ~~Rules 1.10,~~Rule 1.11, 1.12 or 1.18. See those Rules for the particular requirements of establishing effective screening. • Has substantially modified Comment [9] re screening, addressing specifics of screening requirements in the respective screening rules: [9] The purpose of screening is to ~~assure the affected parties~~ensure that confidential information known by the personally disqualified lawyer remains protected. The personally disqualified lawyer should acknowledge the obligation not to communicate with any of the other lawyers in the firm with respect to the matter. Similarly, other lawyers in the firm who are working on the matter should promptly be informed that the screening is in place and that they may not communicate with the personally disqualified lawyer with respect to the matter. Additional screening measures that are appropriate for the particular matter will depend on the circumstances. ~~To implement, reinforce and remind all affected lawyers of the presence of the screening, it may be appropriate for the firm to undertake such procedures as a written undertaking by the screened lawyer to avoid~~In any ~~communication with other firm personnel and any contact with any firm files or other materials relating~~event, procedures should be adequate to ~~the matter, written notice and instructions to all other firm personnel forbidding any communication with the screened lawyer relating to the matter, denial of access by the screened lawyer to firm files or other materials relating to the matter and periodic reminders of the screen to the screened lawyer and all other firm personnel~~protect confidential information. • Has substituted "practicable" for "practical" in Comment [10].
North Carolina	Yes	Yes – Moderate	Rule. The black letter largely tracks the 2002 version of MR 1.0, except: • Paragraph (b) is added: (b) "Confidential information" denotes information described in Rule 1.6. • MR 1.0(c) is modified: (~~c~~d) "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, government entity, or other organization. • MR 1.0(d) is modified: (~~d~~e) "Fraud" or "fraudulent" denotes conduct that is fraudulent under the substantive or procedural law of

Proposed Rule 1.0 – State Adoptions			
1. State	**2. Adopted MR 1.0 (E2K)**	**3. Any Changes?**	**4. Notes/Comments**
			~~the applicable jurisdiction~~North Carolina and has a purpose to deceive. • MR 1.0(e) is modified: (~~e~~f) "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation ~~about the material risks of and reasonably available alternatives~~appropriate to the ~~proposed course of conduct~~circumstances. • MR 1.0(k) is modified: (~~k~~l) "Screened" denotes the isolation of a lawyer from any participation in a professional 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. • The word "may" is substituted for "will" in the second sentence of MR 1.0(m) ["Tribunal"] http://www.ncbar.gov/rules/rpcsearch.asp Comment. North Carolina has adopted the comment to the 2002 version of MR 1.10 verbatim, except it has substituted "North Carolina" for "the applicable jurisdiction" in Comment [5].
North Dakota	Yes	Yes – Substantial	Rule. North Dakota Rule 1.10 is based on the 2002 version of MR 1.0, except: • MR 1.0(a) is modified: (a) "Belief" or "believes" denotes that the person involved actually supposed the fact in question to be true. A person's belief may be inferred from the person's conduct in the circumstances. • A definition of "consent in writing" is substituted for MR 1.0(b) ["confirmed in writing"]: (b) "~~Confirmed~~Consent in writing~~,~~", when used ~~in~~with reference to the ~~informed~~ consent of a person, denotes ~~informed~~ consent that is given in writing by the person or ~~a writing that a lawyer~~oral consent promptly ~~transmits~~confirmed in writing to the ~~person confirming an oral informed consent. See paragraph (e) for the definition of "informed consent." If it is not feasible to obtain or transmit the writing at the time the person gives informed consent, then~~client by the lawyer~~ must obtain or transmit it within a reasonable time thereafter~~. • The definition of "consult" is retained from the 1983 version of the Model Rules: (c) "Consult" or "consultation" denotes communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question. • MR 1.0(d) is modified: (~~d~~e) "Fraud" or "fraudulent" denotes conduct ~~that is fraudulent under the substantive or procedural law of the applicable jurisdiction and has~~having a purpose to deceive and not merely negligent

Proposed Rule 1.0 – State Adoptions			
1. State	**2. Adopted MR 1.0 (E2K)**	**3. Any Changes?**	**4. Notes/Comments**
			misrepresentation or negligent failure to apprise another of relevant information. • MR 1.0(e) [“informed consent”] is deleted. • A definition of “jurisdiction” is added: (f) "Jurisdiction" means this state, another state of the United States, the District of Columbia, Puerto Rico, or a territory or possession of the United States. • Definitions of “legal assistant,” “matter,” and “notice of dishonor” are added: (h) "Legal Assistant" (or paralegal) means a person who assists lawyers in the delivery of legal services, and who through formal education, training, or experience, has knowledge and expertise regarding the legal system and substantive and procedural law which qualifies the person to do work of a legal nature under the direct supervision of a licensed lawyer. (i) "Matter", for purposes of Rules 1.7 through 1.12, includes any judicial or other proceeding, application, request for a ruling or other determination, contract claim, controversy, investigation, charge, accusation, arrest, or other transaction. (j) "Notice of dishonor" refers to the notice that an eligible financial institution is required to give, under the laws of this jurisdiction, upon presentation of an instrument that the institution dishonors. • A definition of “properly payable” is added: (l) "Properly payable" refers to an instrument that, if presented in the normal course of business, is in a form requiring payment under the laws of this jurisdiction. http://www.court.state.nd.us/Rules/Conduct/frameset.htm Comment. North Dakota has revised the 2002 comment to MR 1.0: • MR 1.0, cmt. [1] is revised to conform to the change in the Rule: [1] ~~If~~ Where it is ~~not feasible to obtain or transmit~~required by these Rules, a ~~written confirmation~~client's consent must be given in writing at the time consent is given or oral consent by the client ~~gives informed consent, then~~must be promptly confirmed in writing to the client by the lawyer ~~must obtain or transmit it within a reasonable time thereafter~~. If a lawyer has obtained a client's ~~informed~~oral consent, the lawyer may act in reliance on that oral consent so long as it is promptly confirmed in writing ~~within a reasonable time thereafter~~. • MR 1.0, cmt. [5] re fraud, is revised: [5] When used in these Rules, the terms "fraud" or "fraudulent" ~~refer to conduct that is characterized as such under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive. This does~~do not include merely negligent misrepresentation or negligent failure to apprise another of

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1. State	**2. Adopted MR 1.0 (E2K)**	**3. Any Changes?**	**4. Notes/Comments**
			relevant information. For purposes of these Rules, it is not necessary that anyone has suffered damages or relied on the misrepresentation or failure to inform in order for the misrepresentation or failure to inform to constitute fraud. • MR 1.0, cmts. [6] and [7] re "informed consent," have been deleted. • MR 1.0, cmt. [10] re screening, has been deleted. **NOTE**: See Clean & Redline versions of the North Dakota Rule starting at page 66 of this Chart.
Ohio	Yes	Yes – Substantial	Rule. Ohio Rule 1.0 is based on the 2002 version of MR 1.10, but makes some significant changes: • MR 1.0(c) is modified: (c) "Firm" or "law firm" denotes a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship, or other association authorized to practice law; or lawyers employed in a private or public legal aid or public defender organization, a legal services organization, or the legal department of a corporation or other organization. • MR 1.0(d) is modified: (d) "Fraud" or "fraudulent" denotes conduct that ~~is fraudulent under the substantive or procedural law of the applicable jurisdiction and~~ has ~~a purpose~~an intent to deceive~~.~~ and is either of the following: (1) an actual or implied misrepresentation of a material fact that is made either with knowledge of its falsity or with such utter disregard and recklessness about its falsity that knowledge may be inferred; (2) a knowing concealment of a material fact where there is a duty to disclose the material fact. • A definition of "illegal" is added: (e) "Illegal" denotes criminal conduct or a violation of an applicable statute or administrative regulation. • MR 1.0(l) is modified: (~~l~~m) "Substantial" when used in reference to degree or extent denotes a ~~material~~ matter of ~~clear and weighty~~real importance or great consequence. • A definition of "substantially related matter" is added: (n) "Substantially related matter" denotes one that involves the same transaction or legal dispute or one in which there is a substantial risk that confidential factual information that would normally have been obtained in the prior representation of a client would materially advance the position of another client in a subsequent matter. http://www.toledobar.org/files/public/profConductRules.pdf

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1. State	**2. Adopted MR 1.0 (E2K)**	**3. Any Changes?**	**4. Notes/Comments**
			Comment: Ohio's comment largely tracks the comment to the 2002 version of MR 1.10, except: • MR 1.0, cmt. [2] re firm, is modified: [2] Whether two or more lawyers constitute a firm within ~~paragraph~~division (c) can depend on the specific facts. For example, a lawyer in an of-counsel relationship with a law firm will be treated as part of that firm. On the other hand, two practitioners who share office space and occasionally consult or assist each other ordinarily would not be regarded as constituting a firm~~. However, if they present themselves to the public in a way that suggests that they are a firm or conduct themselves as a firm, they should be regarded as a firm~~ for purposes of ~~the Rules~~fee division in Rule 1.5(e). The terms of any ~~formal~~ agreement between associated lawyers are relevant in determining whether they are a firm, as is the fact that they have mutual access to information concerning the clients they serve. Furthermore, it is relevant in doubtful cases to consider the underlying purpose of the ~~Rule~~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.~~ • The phrase, "including the government," is deleted from MR 1.0, cmt. [3]. • New Comment [4A] is added: [4A] Government agencies are not included in the definition of "firm" because there are significant differences between a government agency and a group of lawyers associated to serve nongovernmental clients. Of course, all lawyers who practice law in a government agency are subject to these rules. Moreover, some of these rules expressly impose upon lawyers associated in a government agency the same or analogous duties to those required of lawyers associated in a firm. See Rules 3.6(d), 3.7(c), 5.1(c), and 5.3. Identifying the governmental client of a lawyer in a government agency is beyond the scope of these rules. • MR 1.0, cmt. [5] re fraud, is modified: [5] ~~When used in these Rules, the~~ The terms "fraud" or "fraudulent" ~~refer to conduct that is characterized as such under~~incorporate the ~~substantive or procedural law~~primary elements of ~~the applicable jurisdiction and has a purpose to deceive~~common law fraud. ~~This does~~The terms do not include ~~merely~~ negligent misrepresentation or negligent failure to apprise another of relevant information. For purposes of these ~~Rules~~rules, it is not necessary that anyone has suffered damages or relied on the misrepresentation or failure to inform. Under division (d)(2), the duty to disclose a material fact may arise under these rules or other Ohio law. • New Comment [11], re "substantial" and "substantially related matter," is added: [11] The definition of "substantial" does not extend to "substantially" as used in Rules 1.9, 1.10, 1.11, 1.12, 1.16, 1.18, and 7.4. The definition of "substantially related matter" is taken from Rule 1.9, Comment [3]

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1. State	**2. Adopted MR 1.0 (E2K)**	**3. Any Changes?**	**4. Notes/Comments**
			and defines the term for purposes of Rules 1.9, 1.10, and 1.18. "Personally and substantially," as used in Rule 1.11, originated in 18 U.S.C. Sec. 207. Rule 1.12, Comment [1] defines "personally and substantially" for former adjudicative officers. **NOTE**: See Clean & Redline versions of the Ohio Rule starting at page 73 of this Chart.
Oklahoma	Yes	No	Rule. Oklahoma Rule is identical to the 2002 version of MR 1.0. http://www.oscn.net/applications/oscn/index.asp?ftdb=STOKRUPR&level=1 Comment. The comment is identical to the 2002 version of the comment to MR 1.0.
Oregon	Yes	Yes – Substantial	Rule. Largely tracks the 2002 version of MR 1.10, but with a number of changes or additions: • A definition of "electronic communication" is added: (c) "Electronic communication" includes but is not limited to messages sent to newsgroups, listservs and bulletin boards; messages sent via electronic mail; and real time interactive communications such as conversations in internet chat groups and conference areas and video conferencing. • MR 1.0(c) is modified: (~~e~~d) "Firm" or "law firm" denotes a lawyer or lawyers, including "Of Counsel" lawyers, in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a private or public legal aid or public defender organization, a legal services organization or the legal department of a corporation or other public or private organization. Any other lawyer, including an office sharer or a lawyer working for or with a firm on a limited basis, is not a member of a firm absent indicia sufficient to establish a de facto law firm among the lawyers involved. • A definition of "information relating to the representation" is added: (f) "Information relating to the representation of a client" denotes both information protected by the attorney-client privilege under applicable law, and other information gained in a current or former 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. • MR 1.0(e) is modified: (~~e~~g) "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct. When informed consent is required by these Rules to be confirmed in writing or to be given in a writing signed by the client, the lawyer shall give and the writing shall reflect a recommendation that the client seek independent legal advice to determine if consent should be given.

Proposed Rule 1.0 – State Adoptions			
1. State	**2. Adopted MR 1.0 (E2K)**	**3. Any Changes?**	**4. Notes/Comments**
			• MR 1.0(f) is modified: (~~f~~h) "Knowingly," "known," or "knows" denotes actual knowledge of the fact in question, except that for purposes of determining a lawyer's knowledge of the existence of a conflict of interest, all facts which the lawyer knew, or by the exercise of reasonable care should have known, will be attributed to the lawyer. A person's knowledge may be inferred from circumstances. • A definition of "matter" is added: (i) "Matter" includes any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties; and any other matter covered by the conflict of interest rules of a government agency. http://www.osbar.org/_docs/rulesregs/orpc.pdf Comment. Oregon has not adopted the comments to the Model Rules. **NOTE**: See Clean & Redline versions of the Oregon Rule starting at page 81 of this Chart.
Pennsylvania	Yes	Yes	Rule. The black letter is based on the 2002 version of MR 1.0, but makes the following changes: • MR 1.0(a), first sentence, is modified: (b) "Confirmed in writing," when used in reference to the informed consent of a person, denotes an informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent. • MR 1.0(e) is modified: (e) "Informed consent" denotes the ~~agreement~~consent by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct. • MR 1.0(g) is modified: (g) "Partner" denotes an equity owner in a ~~member~~law firm, whether in the capacity of a partner in a partnership, a shareholder in a ~~law firm organized as a~~ professional corporation, ~~or~~a member in a limited liability company, a beneficiary of a business trust, a member of an association authorized to practice law, or otherwise. http://www.padisciplinaryboard.org/documents/Pa%20RPC.pdf Comment: Pennsylvania has adopted the comment to the 2002 version of MR 1.0 with the following revisions: • MR 1.0, cmt. [1] re "confirmed in writing," second sentence, is modified:

Proposed Rule 1.0 – State Adoptions			
1. State	**2. Adopted MR 1.0 (E2K)**	**3. Any Changes?**	**4. Notes/Comments**
			If a lawyer has obtained a client's informed consent, the lawyer may act in reliance on that agreement of consent so long as it is confirmed in writing within a reasonable time thereafter. • MR 1.0, cmt. [2] re firm, is modified: [2] ~~Whether two or more lawyers constitute a firm within paragraph (c) can depend on the specific facts. For example, two practitioners who share office space and occasionally consult or assist each other ordinarily would not be regarded as constituting a firm. However, if they present themselves to the public in a way that suggests that they are a firm or conduct themselves as a firm, they should be regarded as a firm for purposes of the Rules.~~ The terms of any formal agreement between associated lawyers are relevant in determining whether they are a firm, as is the fact that they have mutual access to information concerning the clients they serve. Furthermore, it is relevant in doubtful cases to consider the underlying purpose of the Rule that is involved. A group of lawyers could be regarded as a firm for purposes of ~~the Rule~~a rule that the same lawyer should not represent opposing parties in litigation, e.g., Rules 1.7(a), 1.10(a), while it might not be so regarded for purposes of ~~the Rule~~a rule that information acquired by one lawyer is attributed to another, e.g., Rule 1.10(b). • MR 1.0, cmt. [6], adds a number of cross-references to rules requiring informed consent: [6] Many of the Rules of Professional Conduct require the lawyer to obtain the informed consent of a client or other person (e.g., a former client or, under certain circumstances, a prospective client) before accepting or continuing representation or pursuing a course of conduct. See, e.g., Rules 1.2(c), 1.6(a) ~~and~~, 1.7(b), 1.8(a)(3), (b), (f) and (g), 1.9(a) and (b), 1.10 (d), 1.11(a)(2) and (d)(2)(i), 1.12(a) and 1.18(d)(1). * * * • MR 1.0, cmt. [7] re "informed consent," is modified: [7] Obtaining informed consent will usually require an affirmative response by the client or other person. In general, a lawyer may not assume consent from a client's or other person's silence. Consent may be inferred, however, from the conduct of a client or other person who has reasonably adequate information about the matter. ~~A number of Rules require that a person's consent be confirmed in writing. See Rules 1.7(b) and 1.9~~Rule 1.8 (a)~~. For a definition of "writing" and "confirmed in writing," see paragraphs (n) and (b). Other Rules require~~ requires that a client's consent be obtained in a writing signed by the client~~. See, e.g., Rules 1.8(a) and (g)~~. For a definition of "signed," see paragraph (n). The term informed consent in Rule 1.0 and the guidance provided in the Comment should be understood in the context of legal ethics and is not intended to incorporate jurisprudence of medical malpractice law.
Rhode Island	Yes	Yes – Moderate	Rule. Identical to the 2002 version of MR 1.0. http://www.courts.ri.gov/supreme/pdf-files/Rules_Of_Professional_Conduct.pdf Comment. Largely tracks the comments to the 2002 version of MR 1.10, except:

Proposed Rule 1.0 – State Adoptions			
1. State	**2. Adopted MR 1.0 (E2K)**	**3. Any Changes?**	**4. Notes/Comments**
			• MR 1.0, cmt. [2] re "firm," is modified: [2] Whether two or more lawyers constitute a firm within paragraph (c) can depend on the specific facts. For example, two practitioners who share office space and occasionally consult or assist each other ordinarily would not be regarded as ~~constituting a firm. However, if they present themselves to the public in a way that~~ suggests that they are a firm or conduct themselves as a firm, they should be regarded as a firm for purposes of the Rules. Further, any two or more lawyers who, by signs, letterhead, or any form of advertising, list their names in succession will likely be regarded as a firm for the purposes of these Rules, notwithstanding disclaimers such as "an association of independent attorneys." The terms of any formal agreement between associated lawyers are relevant in determining whether they are a firm, as is the fact that they have mutual access to information concerning the clients they serve. Furthermore, it is relevant in doubtful cases to consider the underlying purpose of the Rule that is involved. A group of lawyers could be regarded as a firm for purposes of the Rule that the same lawyer should not represent opposing parties in litigation, while it might not be so regarded for purposes of the Rule that information acquired by one lawyer is attributed to another. • MR 1.0, cmt. [4] re "firm," is modified: [4] Similar questions can also arise with respect to lawyers in legal aid and legal services organizations. ~~Depending upon~~Lawyers employed in the ~~structure~~same unit of ~~the~~a legal service organization~~, the entire organization or different components of it may~~ constitute a firm ~~or firms for purposes~~, but not necessarily those employed in separate units. As in the case of ~~these Rules~~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.
South Carolina	Yes	Yes – Moderate	Rule. Largely tracks the 2002 version of MR 1.0, except: • Retains the definition of "consult" from the 1983 version of Terminology: (c) "Consult" or "consultation" denotes communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question. • Adds a definition of "depository institution": (d) "Depository institution" means any bank, credit union or savings and loan association authorized by federal or state laws to do business in South Carolina and insured by the Federal Deposit Insurance Corporation, the National Credit Union Share Insurance Fund, or any successor insurance corporation(s) established by federal or state law. • MR 1.0(c) is modified: (~~c~~e) "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

Proposed Rule 1.0 – State Adoptions			
1. State	**2. Adopted MR 1.0 (E2K)**	**3. Any Changes?**	**4. Notes/Comments**
			organization ~~or~~; lawyers employed in the legal department of a corporation, government, or other organization; and lawyers associated with an enterprise who represent clients within the scope of that association. • MR 1.0(d) is modified: (~~d~~f) "Fraud" or "fraudulent" denotes conduct that is fraudulent under the substantive or procedural law of the applicable jurisdiction ~~and~~or which has a purpose to deceive. • MR 1.0(e) is modified: (~~e~~g) "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated reasonably adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct. http://www.judicial.state.sc.us/courtReg/ [Scroll down to Rules of Professional Conduct] Comment. Largely tracks the comment to the 2002 version of MR 1.0, except: • MR 1.0, cmt. [5] re "fraud," first sentence, is modified to conform to language change in black letter: [5] When used in these Rules, the terms "fraud" or "fraudulent" refer to conduct that is characterized as such under the substantive or procedural law of the applicable jurisdiction ~~and~~or conduct which has a purpose to deceive. • In MR 1.0, cmt. [6] re "informed consent," adds a cross-reference to 1.18(d) at the end of first sentence. • In MR 1.0, cmt. [7] re "informed consent," adds a cross-reference to 1.18(d) at the end of second sentence. • MR 1.0, cmt. [8], is modified: [8] This definition applies to situations where screening of a personally disqualified lawyer is permitted to remove imputation of a conflict of interest under Rules 1.8(l),[2] 1.10(e), 1.11, 1.12 or 1.18.
South Dakota	Yes	No	Rule & Comment. Black letter is Identical to the 2002 version of MR 1.0. http://www.sdbar.org/Rules/rules.shtm Comment. Comment is Identical to the comment to the 2002 version of MR 1.0.

[2] S.Ct. Rule 1.8(l) has no counterpart in the Model Rule, and provides:

(l) In any adversarial proceeding, a lawyer shall not serve as both an advocate and an advisor to the hearing officer, trial judge or trier of fact. A lawyer serving as an advocate in a particular matter shall not directly or indirectly engage in an ex parte communication with the hearing officer, trial judge or trier of fact concerning the proceeding.

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1. State	**2. Adopted MR 1.0 (E2K)**	**3. Any Changes?**	**4. Notes/Comments**
Tennessee	Yes	Yes – Moderate	Tennessee's Proposed Rules were filed w/ the Tenn. S.Ct. on 5/13/09. See: http://www.tba.org/ethics/index.html http://www.tba.org/ethics/amends_051309/2009_rules_petition_ExhibitA_cleandraft.pdf [CLEAN] http://www.tba.org/ethics/amends_051309/2009_rules_petition_ExhibitB_comparetocurrent.pdf [RED - Cf. to Current Tenn. Rules] http://www.tba.org/ethics/amends_051309/2009_rules_petition_ExhibitC_comparetoaba.pdf [RED - Cf. to Model Rules] *Proposed* Rule. Tenn. Proposed Rule 1.0 largely tracks the 2002 version of MR 1.0, except: • MR 1.0(c) is modified: (c) "Firm" or "law firm" denotes a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation, government agency, or other organization. • MR 1.0(d) is modified: ~~(d) "Fraud" or "fraudulent" denotes conduct that is fraudulent under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive.~~(d) "Fraud" or "fraudulent" denotes an intentionally false or misleading statement of material fact, an intentional omission from a statement of fact of such additional information as would be necessary to make the statements made not materially misleading, and such other conduct by a person intended to deceive a person or tribunal with respect to a material issue in a proceeding or other matter. • MR 1.0(f) is modified: (f) "Knowingly," "known," or "knows" denotes actual ~~knowledge~~awareness of the fact in question. A person's knowledge may be inferred from circumstances. • MR 1.0(g) is modified: (g) "Partner" denotes a ~~member of~~partner in a law firm organized as a partnership or professional limited liability partnership, a shareholder in a law firm organized as a professional corporation, ~~or~~ a member ~~of an association authorized to practice~~in a law firm organized as a professional limited liability company, or a sole practitioner who employs other lawyers or nonlawyers in connection with his or her practice. • MR 1.0(l) is modified: (l) "Substantial" or "substantially when used in reference to degree or extent denotes a material matter

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1. State	**2. Adopted MR 1.0 (E2K)**	**3. Any Changes?**	**4. Notes/Comments**
			of clear and weighty importance. • New paragraph (o) is added: (o) "Material" or "materially" denotes something that a reasonable person would consider important in assessing or determining how to act in a matter. *Proposed* Comment. The comment in the proposed rule is based on the comment to the 2002 version of MR1.10, with several revisions. • In MR 1.0, cmt. [3] re "firm," "a governmental agency" is substituted for "the government" in the first sentence. • MR 1.0, cmt. [5] re "fraud," has been deleted. • In MR 1.0, cmt. [9] re "screening," the following sentence is added at the end: Although this Rule does not require that the personally disqualified lawyer be prohibited from sharing in any fee generated by the representation in question, such a prohibition can be considered in determining the effectiveness of the screening procedures employed by the firm. For example, a screened lawyer is not prohibited from receiving a salary or partnership share established by prior independent agreement. *Current* Rule & Comment. *Current* Tenn. Rule 1.0 is identical to the 1983 version of the Terminology section, which had no comment.
Texas	No	No – Substantial	Texas has not completed its E2K review. Rule. The Texas Terminology section, which is not numbered, is based on the Terminology section to the 1983 version of the Model Rules, except: • Definitions of "adjudicatory official" and "adjudicatory proceeding" are added. "Adjudicatory Official" denotes a person who serves on a Tribunal. "Adjudicatory Proceeding" denotes the consideration of a matter by a Tribunal. • The definition of "consult" is modified: "Consult" or "~~consultation~~Consultation" denotes communication of information and advice reasonably sufficient to permit the client to appreciate the significance of the matter in question. • The definition of "firm" is modified: "Firm" or "~~law~~Law firm" denotes a lawyer or lawyers in a private firm~~,~~; or a lawyer or lawyers employed in the legal department of a corporation~~ or other organization and lawyers employed in a~~, legal services organization~~. See Comment~~, ~~Rule 1.10~~or other organization, or in a unit of government.

Proposed Rule 1.0 – State Adoptions			
1. State	**2. Adopted MR 1.0 (E2K)**	**3. Any Changes?**	**4. Notes/Comments**
			• A definition of "fitness" is added: "Fitness" denotes those qualities of physical, mental and psychological health that enable a person to discharge a lawyer's responsibilities to clients in conformity with the Texas Disciplinary Rules of Professional Conduct. Normally a lack of fitness is indicated most clearly by a persistent inability to discharge, or unreliability in carrying out, significant obligations. • The definition of "partner" is modified: "Partner" denotes ~~a~~an individual or corporate member of a partnership ~~and~~or a shareholder in a law firm organized as a professional corporation. • A definition of "person" is added: "Person" includes a legal entity as well as an individual. • The definition of "reasonably should know" has been changed to "should know" and modified: "~~Reasonably should~~Should know" when used in reference to a lawyer denotes that a ~~lawyer of~~ reasonable ~~prudence and competence~~lawyer under the same or similar circumstances would ~~ascertain~~know the matter in question. • The definition of "substantial" is modified: "Substantial" when used in reference to degree or extent denotes a ~~material~~ matter of ~~clear and weighty importance~~meaningful significance or involvement. • A definition of "Tribunal," which differs from the 2002 version of MR 1.0(m), has been added: "Tribunal" denotes any governmental body or official or any other person engaged in a process of resolving a particular dispute or controversy. "Tribunal" includes such institutions as courts and administrative agencies when engaging in adjudicatory or licensing activities as defined by applicable law or rules of practice or procedure, as well as judges, magistrates, special masters, referees, arbitrators, mediators, hearing officers and comparable persons empowered to resolve or to recommend a resolution of a particular matter; but it does not include jurors, prospective jurors, legislative bodies or their committees, members or staffs, nor does it include other governmental bodies when acting in a legislative or rule-making capacity. See http://www.law.uh.edu/Libraries/ethics/TRPC/index.html OR http://www.law.cornell.edu/ethics/tx/code/ OR http://www.txethics.org/reference_rules.asp?view=conduct Comment: Similar to Terminology in the 1983 Model Rules, there is no comment to the Texas Terminology section.

Proposed Rule 1.0 – State Adoptions			
1. State	**2. Adopted MR 1.0 (E2K)**	**3. Any Changes?**	**4. Notes/Comments**
Utah	Yes	Yes – Slight	Rule. Identical to the 2002 version of MR 1.0, except: • The definition of "consult" from the 1983 Model Rules is retained: (c) "Consult" or "consultation" denotes communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question. http://www.utcourts.gov/resources/rules/ucja/ [Scroll down to Rules of Professional Conduct: **Chapter 13**] Comment. Identical to the comment to the 2002 version of MR 1.0.
Vermont	Yes	Yes – Moderate	The Vermont Supreme Court has recently (6/17/09) adopted new, post-E2K rules, effective 9/1/09. See: http://www.vermontjudiciary.org/LC/Statutes%20and%20Rules/PROMULGATED-JUN1709-VRPC.pdf Rule. Vermont Rule 1.0 largely tracks the 2002 version of MR 1.0, except: • MR 1.0(c) is modified: (c) "Firm" or "law firm" denotes a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship or other entity or association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation or other organization. • MR 1.0(g) is modified: (g) "Partner" denotes a member of a partnership and, a shareholder in a law firm organized as a professional corporation, or a member of ~~an~~any other entity or association authorized to practice law. • MR 1.0(m) is modified: (m) "Tribunal" denotes a court and all ancillary court proceedings such as depositions and hearings before a referee or master, an arbitrator in a binding arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity. A legislative body, administrative agency or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a binding legal judgment directly affecting a party's interests in a particular matter. Comment. The comment to Vermont Rule 1.0 largely tracks the comment to the 2002 version of MR 1.0, except • MR 1.0, cmt. [4] re "Firm," is modified: [4] Similar questions can also arise with respect to lawyers in legal aid and legal services organizations, including public defenders. Depending upon the structure of the organization, the entire organization or different components of it may constitute a firm or firms for purposes of these ~~Rules~~rules. • MR 1.0, cmt. [6], re "informed consent," is modified by adding the following to the Comment:

Proposed Rule 1.0 – State Adoptions			
1. State	**2. Adopted MR 1.0 (E2K)**	**3. Any Changes?**	**4. Notes/Comments**
			Of course, the information and explanation adequate to establish informed consent by a non-client may be confidential information of a client that is protected by Rule 1.6. In such a case, the consent of the non-client cannot be obtained unless the affected client gives informed consent to disclosure of the necessary information and explanation, or the nature of that information and explanation can be conveyed to the non-client in a way that protects the client's confidential information. ALI, Restatement Third: The Law Governing Lawyers, § 122, comment c(i). Cf. Rule 1.9, Comment [3]. For the current rules that expire 8/31/09, see: http://www.vermontjudiciary.org/LC/Shared%20Documents/PRB-All-Rules.pdf
Virginia	Yes	Yes – Moderate	Ethics 2000. Virginia has not yet completed its E2K review. Note that Virginia did not move from the ABA Model Code of Professional Responsibility to the Model Rule format until 1999 and it does not appear to be engaged in a full top-to-bottom review of its rules. *Current* Rule. The black letter of current Virginia Rule 1.0 largely tracks the 1983 version of MR 1.0, except: • The definition of "firm" is modified: "Firm" or "law firm" denotes a ~~lawyer~~professional entity, public or ~~lawyers in a~~ private ~~firm~~, ~~lawyers employed in the~~organized to deliver legal services, or a legal department of a corporation or other ~~organization and lawyers employed in a legal services~~ organization. See Comment, Rule 1.10. • The definition of "partner" is modified: "Partner" denotes a member of a partnership ~~and~~or a shareholder ~~in a law firm organized as~~or member of a professional entity, public or private, organized to deliver legal services, or a legal department of a corporation or other organization. • A definition of "should" is added: "Should" when used in reference to a lawyer's action denotes an aspirational rather than a mandatory standard. See http://www.vsb.org/docs/2008-09_rules-pc.pdf *Current* Comment. As with the 1983 version of the MR Terminology section, there is no comment in Virginia. Proposed Changes. Nor further changes are contemplated at this time. Go to the following web site for links to Virginia's piecemeal proposals to revise their Model Rules: http://www.vsb.org/site/regulation/proposed-rule-changes/
Washington	Yes	Yes – Moderate	Rule. The black letter of Washington Rule 1.0 is nearly identical to the 2002 version of MR 1.0, except: • MR 1.0(d) is modified:

Proposed Rule 1.0 – State Adoptions			
1. State	**2. Adopted MR 1.0 (E2K)**	**3. Any Changes?**	**4. Notes/Comments**
			(d) "Fraud" or "fraudulent" denotes conduct that has a purpose to deceive and is fraudulent under the substantive or procedural law of the applicable jurisdiction~~ and~~, except that it is not necessary that anyone has ~~a purpose~~suffered damages or relied on the misrepresentation or failure to ~~deceive~~inform. http://www.courts.wa.gov/court_rules/?fa=court_rules.list&group=ga&set=RPC Comment. The Wash. Rule comment is based on the comments to the 2002 version of MR 1.0, but has made a number of minor changes and has added several comments to supplement the MR comments: • MR 1.0, cmt. [3], first sentence, is modified: With respect to the law department of an organization~~, including the government~~, there is ordinarily no question that the members of the department constitute a firm within the meaning of the Rules of Professional Conduct. • MR 1.0, cmt. [7] is modified: [7] Obtaining informed consent will usually require an affirmative response by the client or other person. In general, a lawyer may not assume consent from a client's or other person's silence. Consent may be inferred, however, from the conduct of a client or other person who has reasonably adequate information about the matter. A number of Rules require that a person's consent be confirmed in writing. See Rules 1.7(b) and 1.9(a). For a definition of "writing" and "confirmed in writing," see paragraphs (n) and (b). ~~Other Rules require~~Rule 1.8(a) requires that a client's consent be obtained in a writing signed by the client. See~~, e.g., Rules 1.8~~ also Rule 1.5(c)(1) (requiring that a~~) and (g~~ contingent fee agreement be "in a writing signed by the client"). For a definition of "signed," see paragraph (n). • MR 1.0, cmt. [8] is modified: [8] This definition applies to situations where screening of a personally disqualified lawyer is permitted to remove imputation of a conflict of interest under Rules 1.10, 1.11, 1.12~~ or~~, 1.18, or 6.5. • Washington has also added the following comments to supplement the respective comments in the Model Rule: **Additional Washington Comments (11 – 16)** Confirmed in Writing [11] Informed consent requires that the writing be articulated in a manner that can be easily understood by the client. Firm [12] Although the definition of "firm" or "law firm" in Rule 1.0(c) differs from the definition set forth in the Terminology section of Washington's former Rules of Professional Conduct, there is no intent to change

Proposed Rule 1.0 – State Adoptions			
1. State	**2. Adopted MR 1.0 (E2K)**	**3. Any Changes?**	**4. Notes/Comments**
			the scope of the definition or to alter existing Washington law on the application of the Rules of Professional Conduct to lawyers in a government office. Fraud [13] Model Rule 1.0(d) was modified to clarify that the terms "fraud" and "fraudulent" in the Rules of Professional Conduct do not include an element of damage or reliance. Informed Consent [14] In order for the communication to the client to be adequate it must be accomplished in a manner that can be easily understood by the client. Screened [15] See Rules 1.10 and 6.5 for specific screening requirements under the circumstances covered by those Rules. Other [16] For the scope of the phrase "information relating to the representation of a client," which is not defined in Rule 1.0, see Comment [19] to Rule 1.6. **NOTE**: See Clean & Redline versions of the Washington Rule starting at page 85 of this Chart.
West Virginia	No	No	West Virginia has not completed its E2K review. Current Rule & Comment. According to the Cornell website, West Virginia has not adopted either the Preamble & Scope, or the Terminology section of either version of the Model Rules. NOTE: Unfortunately, the W.Va. web site has been down for maintenance for the last several months so I am not able to confirm that. See: http://www.law.cornell.edu/ethics/wv/code/WV_CODE.HTM NOTE: Although there is a website for the West Virginia Bar Association, it does not contain a link to the Rules of Professional Conduct. See: http://www.wvbarassociation.org/index.asp Proposed Rule & Comment. West Virginia proposes adopting the 2002 version of MR 1.0 verbatim. http://www.state.wv.us/WVSCA/rules/ABA.pdf
Wisconsin	Yes	Yes – Substantial	Rule. Based on the 2002 version of MR 1.10, which it largely tracks, but includes numerous additional terms: • A definition of “advanced fee” is added:

Proposed Rule 1.0 – State Adoptions			
1. State	**2. Adopted MR 1.0 (E2K)**	**3. Any Changes?**	**4. Notes/Comments**
			(ag) "Advanced fee" denotes an amount paid to a lawyer in contemplation of future services, which will be earned at an agreed−upon basis, whether hourly, flat, or another basis. Any amount paid to a lawyer in contemplation of future services whether on an hourly, flat or other basis, is an advanced fee regardless of whether that fee is characterized as an "advanced fee," "minimum fee," "nonrefundable fee," or any other characterization. Advanced fees are subject to the requirements of SCR 20:1.5, SCR 20:1.15 (b) (4) or (4m), SCR 20:1.15 (e) (4) h., SCR 20:1.15 (g), and SCR 20:1.16(d). • The 1983 Model Rules' definition of "consult" is retained: (b) "Consult" or "consultation" denotes communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question. • MR 1.0(c) is modified: (~~c~~d) "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, including a government entity. • A definition of "flat fee" is added: (dm) "Flat fee" denotes a fixed amount paid to a lawyer for specific, agreed−upon services, or for a fixed, agreed−upon stage in a representation, regardless of the time required of the lawyer to perform the service or reach the agreed−upon stage in the representation. A flat fee, sometimes referred to as "unit billing," is not an advance against the lawyer's hourly rate and may not be billed against at an hourly rate. Flat fees become the property of the lawyer upon receipt and are subject to the requirements of SCR 20:1.5, SCR 20:1.15 (b) (4) or (4m), SCR 20:1.15 (e) (4) h., SCR 20:1.15 (g), and SCR 20:1.16 (d). • A definition of "misrepresentation" is added: (h) "Misrepresentation" denotes communication of an untruth, either knowingly or with reckless disregard, whether by statement or omission, which if accepted would lead another to believe a condition exists that does not actually exist. • A definition of "prosecutor" is added: (j) A "prosecutor" includes a government attorney or special prosecutor (i) in a criminal case, delinquency action, or proceeding that could result in a deprivation of liberty or (ii) acting in connection with the protection of a child or a termination of parental rights proceeding or (iii) acting as a municipal prosecutor. • A definition of "retainer" is added: (mm) "Retainer" denotes an amount paid specifically and solely to secure the availability of a lawyer to perform services on behalf of a client, whether designated a "retainer," "general retainer," "engagement retainer," "reservation fee," "availability fee," or any other characterization. This amount does not

Proposed Rule 1.0 – State Adoptions			
1. State	**2. Adopted MR 1.0 (E2K)**	**3. Any Changes?**	**4. Notes/Comments**
			constitute payment for any specific legal services, whether past, present, or future and may not be billed against for fees or costs at any point. A retainer becomes the property of the lawyer upon receipt, but is subject to the requirements of SCR 20:1.5 and SCR 20:1.16(d). http://www.legis.state.wi.us/rsb/scr/5200.pdf Comment. The entire ABA Comment is included verbatim in the official rules. The Wisconsin E2K Committee added a comment on "flat fee" but the Supreme Court declined to adopt it. The official rules include the following note: Editor's Note: Section 7 of Supreme Court Order No. 06−04 states: "The following Comment to SCR 20:1.0(dm) is not adopted, but will be published and may be consulted for guidance in interpreting and applying the Wisconsin Rules of Professional Conduct:" Wisconsin Comment. The definition of flat fee specifies that flat fees "become the property of the lawyer upon receipt." Notwithstanding, the lawyer must either deposit the advanced flat fee in trust until earned, or comply with the alternative in SCR 20:1.15 (b) (4m), alternative protection for advanced fees. In addition, as specified in the definition, flat fees are subject to the requirements of all rules to which advanced fees are subject. **NOTE**: See Clean & Redline versions of the Wisconsin Rule starting at page 95 of this Chart.
Wyoming	Yes	Yes – Slight	Rule. Based on the 2002 version of MR 1.0, but makes the following additions or modifications: • New paragraph (b) is added: (b) "Confidential information" is information provided by the client or relating to the client which is not otherwise available to the public. • MR 1.0(b) is modified: (~~b~~c) "Confirmed in writing~~,~~" when used in reference to the informed ~~consent~~decision of a person, denotes an informed ~~consent~~decision that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming ~~an~~the oral informed ~~consent~~decision. See paragraph (~~e~~f) for the definition of "informed ~~consent~~decision." If it is not feasible to obtain or transmit the writing at the time the person ~~gives~~makes an informed ~~consent~~decision, then the lawyer must obtain or transmit it within a reasonable time thereafter. • MR 1.0(d) is modified: (~~d~~e) "Fraud" or "fraudulent" denotes conduct that is fraudulent under the substantive or procedural law of the applicable jurisdiction~~ and has a purpose to deceive~~. • MR 1.0(e) is modified: (~~e~~f) "Informed ~~consent~~decision" denotes the ~~agreement~~decision by a person to a proposed course of conduct after

Proposed Rule 1.0 – State Adoptions			
1. State	**2. Adopted MR 1.0 (E2K)**	**3. Any Changes?**	**4. Notes/Comments**
			the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct. http://www.courts.state.wy.us/CourtRules_Entities.aspx?RulesPage=AttorneysConduct.xml Comment. Wyoming's comment is identical to the comment to the 2002 version of MR 1.0, except: • Revisions are made to MR 1.0, cmts. [1], [5] and [6] to reflect Wyoming's change of "informed consent" to "informed decision." • MR 1.0, cmt. [5], "fraud," is deleted: ~~[5] When used in these Rules, the terms "fraud" or "fraudulent" refer to conduct that is characterized as such under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive. This does not include merely negligent misrepresentation or negligent failure to apprise another of relevant information. For purposes of these Rules, it is not necessary that anyone has suffered damages or relied on the misrepresentation or failure to inform.~~

Alaska Rule 9.1 (2009) – Clean

Alaska Rule 9.1 Definitions.

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

(b) "Client" denotes a person, a public officer or agency, or a corporation, association, organization, or other entity, either public or private, who receives professional legal services from a lawyer.

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

(d) "Consult" or "consultation" denotes communication of information reasonably sufficient to permit the client to understand the significance of the matter in question.

(e) "Firm" or "law firm" denotes a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship, or other association authorized to practice law. It also denotes lawyers employed in a legal services organization or in the legal department of a corporation or other organization. See COMMENT, Rule 1.10.

(f) "Fraud" or "fraudulent" denotes conduct (including acts of omission) performed with a purpose to deceive; it does not include negligent misrepresentation or negligent failure to apprise another of relevant information.

(g) "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has adequately explained the material risks of, and the reasonably available alternatives to, the proposed course of conduct.

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

(i) "Matter" includes any judicial or other proceeding, any application, or request for a ruling or other determination, and any contract, claim, controversy, investigation, charge, accusation, arrest, negotiation, or other particular transaction or dealings involving a specific party or parties.

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

(k) "Person" denotes a government officer or agency, corporation, company, partnership, firm, association, organization, business trust, or society, as well as a natural person.

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

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

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

(o) “Screened” denotes the isolation of a person 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 person is obligated to protect under these Rules or other law.

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

(q) “Substantially related” matters for purposes of the rules governing a lawyer’s duties to former, current, and prospective clients denotes matters:

(1) that involve the same transaction or the same underlying legal dispute, or

(2) where there is a substantial risk that confidential factual information obtained in the prior matter would materially advance a client’s position in the subsequent matter. In assessing the risk under subsection (2), a court or disciplinary body may rely on the nature of the services that the lawyer provided to the earlier client, the type of information that would ordinarily be learned by a lawyer providing such services, and whether this information would predictably be used to the detriment of the earlier client by a zealous, conflict-free advocate. However, matters will not be deemed “substantially related” under paragraph (2) if the confidential information imparted to the lawyer has since been disclosed to the public or to other adverse parties.

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

(s) “Writing” or “written” denotes a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photostating, photography, audio or video recording, and e-mail. A “signed” writing includes an electronic sound, symbol, or process attached to or logically associated with a writing, if it is executed or adopted by a person with the intent to sign the writing.

ALASKA COMMENT

The section entitled “Terminology” in the ABA Model Rules has been replaced with Rule 9.1.

COMMENT

Confirmed in Writing

[1] If it is not feasible to obtain or transmit a written confirmation at the time the client gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.

If a lawyer has obtained a client's informed consent, the lawyer may act in reliance on that consent so long as it is confirmed in writing within a reasonable time thereafter.

Firm

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

[3] With respect to the law department of an organization, including the government, there is ordinarily no question that the members of the department constitute a firm within the meaning of the Rules of Professional Conduct. There can be uncertainty, however, as to the identity of the client. For example, it may not be clear whether the law department of a corporation represents a subsidiary or an affiliated corporation, as well as the corporation by which the members of the department are directly employed. A similar question can arise concerning an unincorporated association and its local affiliates.

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

Fraud

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

Informed Consent

[6] Many of the Rules of Professional Conduct require the lawyer to obtain the informed consent of a client or other person (e.g., a former client or, under certain circumstances, a prospective client) before accepting or continuing representation or pursuing a course of conduct. See, e.g., Rules 1.2(c), 1.6(a) and 1.7(b). The communication necessary to obtain such consent will vary according to the Rule involved and the circumstances giving rise to the need to obtain informed consent. The lawyer must make reasonable efforts to ensure that the client or other person possesses information reasonably adequate to make an informed decision. Ordinarily, this will require communication that includes a disclosure of the facts and circumstances giving rise to the situation, any explanation reasonably necessary to inform the client or other person of the material advantages and disadvantages of the proposed course of

conduct and a discussion of the client's or other person's options and alternatives. In some circumstances it may be appropriate for a lawyer to advise a client or other person to seek the advice of other counsel. A lawyer need not inform a client or other person of facts or implications already known to the client or other person; nevertheless, a lawyer who does not personally inform the client or other person assumes the risk that the client or other person is inadequately informed and the consent is invalid. In determining whether the information and explanation provided are reasonably adequate, relevant factors include whether the client or other person is experienced in legal matters generally and in making decisions of the type involved, and whether the client or other person is independently represented by other counsel in giving the consent. Normally, such persons need less information and explanation than others, and generally a client or other person who is independently represented by other counsel in giving the consent should be assumed to have given informed consent.

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

Screened

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

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

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

Alaska Rule 9.1 (2009) – Redline Comparison to MR 1.0 (2002)

Alaska Rule ~~1.0 Terminology~~9.1 Definitions.

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

(b) "Client" denotes a person, a public officer or agency, or a corporation, association, organization, or other entity, either public or private, who receives professional legal services from a lawyer.

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

(d) "Consult" or "consultation" denotes communication of information reasonably sufficient to permit the client to understand the significance of the matter in question.

(~~c~~e) "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~~. It also denotes lawyers employed in a legal services organization or in the legal department of a corporation or other organization. See COMMENT, Rule 1.10.

(~~d~~f) "Fraud" or "fraudulent" denotes conduct ~~that is fraudulent under the substantive or procedural law~~(including acts of ~~the applicable jurisdiction and has~~omission) performed with a purpose to deceive; it does not include negligent misrepresentation or negligent failure to apprise another of relevant information.

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

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

(i) "Matter" includes any judicial or other proceeding, any application, or request for a ruling or other determination, and any contract, claim, controversy, investigation, charge, accusation, arrest, negotiation, or other particular transaction or dealings involving a specific party or parties.

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

(k) "Person" denotes a government officer or agency, corporation, company, partnership, firm, association, organization, business trust, or society, as well as a natural person.

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

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

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

(~~k~~o) "Screened" denotes the isolation of a ~~lawyer~~person 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~~person is obligated to protect under these Rules or other law.

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

(q) "Substantially related" matters for purposes of the rules governing a lawyer's duties to former, current, and prospective clients denotes matters:

(1) that involve the same transaction or the same underlying legal dispute, or

(2) where there is a substantial risk that confidential factual information obtained in the prior matter would materially advance a client's position in the subsequent matter. In assessing the risk under subsection (2), a court or disciplinary body may rely on the nature of the services that the lawyer provided to the earlier client, the type of information that would ordinarily be learned by a lawyer providing such services, and whether this information would predictably be used to the detriment of the earlier client by a zealous, conflict-free advocate. However, matters will not be deemed "substantially related" under paragraph (2) if the confidential information imparted to the lawyer has since been disclosed to the public or to other adverse parties.

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

(~~n~~s) "Writing" or "written" denotes a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photostating, photography, audio or ~~videorecording~~video recording, and e-mail. A "signed" writing includes an electronic sound, symbol, or process attached to or logically associated with a writing ~~and~~, if it is executed or adopted by a person with the intent to sign the writing.

~~**Comment**~~ALASKA COMMENT

The section entitled "Terminology" in the ABA Model Rules has been replaced with Rule 9.1.

COMMENT

Confirmed in Writing

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

Firm

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

[3] With respect to the law department of an organization, including the government, there is ordinarily no question that the members of the department constitute a firm within the meaning of the Rules of Professional Conduct. There can be uncertainty, however, as to the identity of the client. For example, it may not be clear whether the law department of a corporation represents a subsidiary or an affiliated corporation, as well as the corporation by which the members of the department are directly employed. A similar question can arise concerning an unincorporated association and its local affiliates.

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

Fraud

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

Informed Consent

[6] Many of the Rules of Professional Conduct require the lawyer to obtain the informed consent of a client or other person (e.g., a former client or, under certain circumstances, a prospective client) before accepting or continuing representation or pursuing a course of conduct. See, e.g., Rules 1.2(c), 1.6(a) and 1.7(b). The communication necessary to obtain such consent will vary according to the Rule involved and the circumstances giving rise to the need to obtain informed consent. The lawyer must make reasonable efforts to ensure that the client or other person possesses information reasonably adequate to make an informed

decision. Ordinarily, this will require communication that includes a disclosure of the facts and circumstances giving rise to the situation, any explanation reasonably necessary to inform the client or other person of the material advantages and disadvantages of the proposed course of conduct and a discussion of the client's or other person's options and alternatives. In some circumstances it may be appropriate for a lawyer to advise a client or other person to seek the advice of other counsel. A lawyer need not inform a client or other person of facts or implications already known to the client or other person; nevertheless, a lawyer who does not personally inform the client or other person assumes the risk that the client or other person is inadequately informed and the consent is invalid. In determining whether the information and explanation provided are reasonably adequate, relevant factors include whether the client or other person is experienced in legal matters generally and in making decisions of the type involved, and whether the client or other person is independently represented by other counsel in giving the consent. Normally, such persons need less information and explanation than others, and generally a client or other person who is independently represented by other counsel in giving the consent should be assumed to have given informed consent.

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

Screened

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

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

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

Georgia Terminology Section (2009) – Clean

Georgia Terminology Section

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

"Consult" or "consultation" denotes communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question.

"Domestic Lawyer" denotes a person authorized to practice law by the duly constituted and authorized governmental body of any State or Territory of the United States or the District of Columbia but not authorized by the Supreme Court of Georgia or its rules to practice law in the State of Georgia.

"Firm" or "law firm" denotes a lawyer or lawyers in a private firm, lawyers employed in the legal department of a corporation or other organization and lawyers employed in a legal services organization. See Comment, Rule 1.10: Imputed Disqualification.

"Foreign Lawyer" denotes a person authorized to practice law by the duly constituted and authorized governmental body of any foreign nation but not authorized by the Supreme Court of Georgia or its Rules to practice law in the State of Georgia.

"Fraud" or "fraudulent" denotes conduct having a purpose to deceive and not merely negligent misrepresentation or failure to apprise another of relevant information.

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

"Lawyer," denotes a person authorized by the Supreme Court of Georgia or its Rules to practice law in the State of Georgia including persons admitted to practice in this state pro hac vice.

"Nonlawyer" denotes a person not authorized to practice law by either the:

(a) Supreme Court of Georgia or its Rules (including pro hac vice admission), or

(b) duly constituted and authorized governmental body of any other State or Territory of the United States, or the District of Columbia, or

(c) duly constituted and authorized governmental body of any foreign nation.

"Partner" denotes a member of a partnership and a shareholder in a law firm organized as a professional corporation.

"Reasonable" or "reasonably" when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer.

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

"Reasonably should know" when used in reference to a lawyer denotes that a lawyer of reasonable prudence and competence would ascertain the matter in question.

"Substantial" when used in reference to degree or extent denotes a material matter of clear and weighty importance, or may refer to things of more than trifling value.

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

Georgia Terminology Section – Redline Comparison to 1983 MR Terminology Section

Georgia Terminology Section

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

"Consult" or "consultation" denotes communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question.

"Domestic Lawyer" denotes a person authorized to practice law by the duly constituted and authorized governmental body of any State or Territory of the United States or the District of Columbia but not authorized by the Supreme Court of Georgia or its rules to practice law in the State of Georgia.

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(a) Supreme Court of Georgia or its Rules (including pro hac vice admission), or

(b) duly constituted and authorized governmental body of any other State or Territory of the United States, or the District of Columbia, or

(c) duly constituted and authorized governmental body of any foreign nation.

"Partner" denotes a member of a partnership and a shareholder in a law firm organized as a professional corporation.

"Reasonable" or "reasonably" when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer.

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"Reasonably should know" when used in reference to a lawyer denotes that a lawyer of reasonable prudence and competence would ascertain the matter in question.

"Substantial" when used in reference to degree or extent denotes a material matter of clear and weighty importance, or may refer to things of more than trifling value.

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

New York Rule 1.0 – Clean

New York Rule 1.0: Terminology

(a) “Advertisement” means any public or private communication made by or on behalf of a lawyer or law firm about that lawyer or law firm’s services, the primary purpose of which is for the retention of the lawyer or law firm. It does not include communications to existing clients or other lawyers.

(b) “Belief” or “believes” denotes that the person involved actually believes the fact in question to be true. A person’s belief may be inferred from circumstances.

(c) “Computer-accessed communication” means any communication made by or on behalf of a lawyer or law firm that is disseminated through the use of a computer or related electronic device, including, but not limited to, web sites, weblogs, search engines, electronic mail, banner advertisements, pop-up and pop-under advertisements, chat rooms, list servers, instant messaging, or other internet presences, and any attachments or links related thereto.

(d) “Confidential information” is defined in Rule 1.6.

(e) “Confirmed in writing” denotes (i) a writing from the person to the lawyer confirming that the person has given consent, (ii) a writing that the lawyer promptly transmits to the person confirming the person’s oral consent, or (iii) a statement by the person made on the record of any proceeding before a tribunal. If it is not feasible to obtain or transmit the writing at the time the person gives oral consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.

(f) “Differing interests” include every interest that will adversely affect either the judgment or the loyalty of a lawyer to a client, whether it be a conflicting, inconsistent, diverse, or other interest.

(g) “Domestic relations matter” denotes representation of a client in a claim, action or proceeding, or preliminary to the filing of a claim, action or proceeding, in either Supreme Court or Family Court, or in any court of appellate jurisdiction, for divorce, separation, annulment, custody, visitation, maintenance, child support or alimony, or to enforce or modify a judgment or order in connection with any such claim, action or proceeding.

(h) “Firm” or “law firm” includes, but is not limited to, a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a qualified legal assistance organization, a government law office, or the legal department of a corporation or other organization.

(i) “Fraud” or “fraudulent” denotes conduct that is fraudulent under the substantive or procedural law of the applicable jurisdiction or has a purpose to deceive, provided that it does not include conduct that, although characterized as fraudulent by statute or administrative rule, lacks an element of scienter, deceit, intent to mislead, or knowing failure to correct misrepresentations that can be reasonably expected to induce detrimental reliance by another.

(j) “Informed consent” denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated information adequate for the person to make an informed decision, and after the lawyer has adequately explained to the person the material risks of the proposed course of conduct and reasonably available alternatives.

(k) “Knowingly,” “known,” “know,” or “knows” denotes actual knowledge of the fact in question. A person’s knowledge may be inferred from circumstances.

(l) “Matter” includes any litigation, judicial or administrative proceeding, case, claim, application, request for a ruling or other determination, contract, controversy, investigation, charge, accusation, arrest, negotiation, arbitration, mediation or any other representation involving a specific party or parties.

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

(n) “Person” includes an individual, a corporation, an association, a trust, a partnership, and any other organization or entity.

(o) “Professional legal corporation” means a corporation, or an association treated as a corporation, authorized by law to practice law for profit.

(p) “Qualified legal assistance organization” means an office or organization of one of the four types listed in Rule 7.2(b)(1)-(4) that meets all of the requirements thereof.

(q) “Reasonable” or “reasonably,” when used in relation to conduct by a lawyer, denotes the conduct of a reasonably prudent and competent lawyer. When used in the context of conflict of interest determinations, “reasonable lawyer” denotes a lawyer acting from the perspective of a reasonably prudent and competent lawyer who is personally disinterested in commencing or continuing the representation.

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

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

(t) “Screened” or “screening” 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 or the firm is obligated to protect under these Rules or other law.

(u) “Sexual relations” denotes sexual intercourse or the touching of an intimate part of the lawyer or another person for the purpose of sexual arousal, sexual gratification or sexual abuse.

(v) “State” includes the District of Columbia, Puerto Rico, and other federal territories and possessions.

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

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

Comment

Confirmed in Writing

[1] Some Rules require that a person’s oral consent be “confirmed in writing.” E.g., Rules 1.5(g)(2) (client’s consent to division of fees with lawyer in another firm must be confirmed in writing), 1.7(b)(4) (client’s informed consent to conflict of interest must be confirmed in writing) and 1.9(a) (former client’s informed consent to conflict of interest must be confirmed in writing). The definition of “confirmed in writing” provides three distinct methods of confirming a person’s consent: (i) a writing from the person to the lawyer, (ii) a writing from the lawyer to the person, or (iii) consent by the person on the record in any proceeding before a tribunal. The confirming writing need not recite the information that the lawyer communicated to the person in order to obtain the person’s consent. For the definition of “informed consent” see Rule 1.0(j). If it is not feasible for the lawyer to obtain or transmit a written confirmation at the time the client gives oral consent, then the lawyer must obtain or transmit the confirming writing within a reasonable time thereafter. If a lawyer has obtained a client’s informed oral consent, the lawyer may act in reliance on that consent so long as it is confirmed in writing within a reasonable time thereafter.

Firm

[2] Whether two or more lawyers constitute a firm within paragraph (h) will depend on the specific facts. For example, two practitioners who share office space and occasionally consult or assist each other ordinarily would not be regarded as constituting a firm. However, if they present themselves to the public in a way that suggests that they are a firm or conduct themselves as a firm, they should be regarded as a firm for purposes of the Rules. The terms of any formal agreement between associated lawyers are relevant in determining whether they are a firm, as is the fact that they have mutual access to information concerning the clients they serve. Furthermore, it is relevant in doubtful cases to consider the underlying purpose of the Rule that is 6
involved. For example, a group of lawyers could be regarded as a firm for purposes of determining whether a conflict of interest exists but not for application of the advertising rules.

[3] With respect to the law department of an organization, there is ordinarily no question that the members of the department constitute a firm within the meaning of the Rules of Professional Conduct. There can be uncertainty, however, as to the identity of the client. For example, it may not be clear whether the law department of a corporation represents a 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. Whether lawyers in a government agency or department constitute a firm may depend upon the issue involved or be governed by other law.

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

Fraud

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

Informed Consent

[6] Many of the Rules of Professional Conduct require the lawyer to obtain the informed consent of a client or other person (e.g., a former client or, under certain circumstances, a prospective client) before accepting or continuing representation or pursuing a course of conduct. E.g., Rules 1.2(c), 1.6(a) and 1.7(b). The communication necessary to obtain such consent will vary according to the Rule involved and the circumstances giving rise to the need to obtain informed consent. The lawyer must make reasonable efforts to ensure that the client or other person possesses information reasonably adequate to make an informed decision. Ordinarily, this will require communication that includes a disclosure of the facts and circumstances giving rise to the situation, any explanation reasonably necessary to inform the client or other person of the material advantages and disadvantages of the proposed course of conduct, and a discussion of the client’s or other person’s options and alternatives. In some circumstances it may be appropriate for a lawyer to advise a client or other person to seek the advice of other counsel. A lawyer need not inform a client or other person of facts or implications already known to the client or other person; nevertheless, a lawyer who does not personally inform the client or other person assumes the risk that the client or other person is inadequately informed and the consent is invalid. In determining whether the information and explanation provided are reasonably adequate, relevant factors include whether the client or other person is experienced in legal matters generally and in making decisions of the type involved, and whether the client or other person is independently represented by other counsel in giving the consent. Normally, such persons need less information and explanation than others, and generally a client or other person who is independently represented by other counsel in giving the consent should be assumed to have given informed consent. Other considerations may apply in representing impaired clients. See Rule 1.14.

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

Screened or Screening

[8] The definition of “screened” or “screening” applies to situations where screening of a personally disqualified lawyer is permitted to remove imputation of a conflict of interest under Rule 1.11, 1.12 or 1.18. See those Rules for the particular requirements of establishing effective screening.

[9] The purpose of screening is to ensure that confidential information known by the personally disqualified lawyer remains protected. The personally disqualified lawyer should acknowledge the obligation not to communicate with any of the other lawyers in the firm with respect to the matter. Similarly, other lawyers in the firm who are working on the matter should promptly be informed that the screening is in place and that they may not communicate with the personally disqualified lawyer with respect to the matter. Additional screening measures that are appropriate for the particular matter will depend on the circumstances. In any event, procedures should be adequate to protect confidential information.

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

New York Rule 1.0 (2009) – Redline Comparison to MR 1.0 (2002)

New York Rule 1.0: Terminology

(a) "Advertisement" means any public or private communication made by or on behalf of a lawyer or law firm about that lawyer or law firm's services, the primary purpose of which is for the retention of the lawyer or law firm. It does not include communications to existing clients or other lawyers.

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

(c) "Computer-accessed communication" means any communication made by or on behalf of a lawyer or law firm that is disseminated through the use of a computer or related electronic device, including, but not limited to, web sites, weblogs, search engines, electronic mail, banner advertisements, pop-up and pop-under advertisements, chat rooms, list servers, instant messaging, or other internet presences, and any attachments or links related thereto.

(d) "Confidential information" is defined in Rule 1.6.

(~~b~~e) "Confirmed in writing~~,~~" ~~when used in reference to the informed consent of a person,~~ denotes ~~informed consent that is given in~~(i) a writing ~~by~~from the person ~~or~~to the lawyer confirming that the person has given consent, (ii) a writing that ~~a~~the lawyer promptly transmits to the person confirming ~~an oral informed consent. See paragraph (e) for~~ the ~~definition of "informed~~person's oral consent, or (iii) a statement by the person made on the record of any proceeding before a tribunal.~~"~~ If it is not feasible to obtain or transmit the writing at the time the person gives ~~informed~~oral consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.

(f) "Differing interests" include every interest that will adversely affect either the judgment or the loyalty of a lawyer to a client, whether it be a conflicting, inconsistent, diverse, or other interest.

(g) "Domestic relations matter" denotes representation of a client in a claim, action or proceeding, or preliminary to the filing of a claim, action or proceeding, in either Supreme Court or Family Court, or in any court of appellate jurisdiction, for divorce, separation, annulment, custody, visitation, maintenance, child support or alimony, or to enforce or modify a judgment or order in connection with any such claim, action or proceeding.

(~~c~~h) "Firm" or "law firm" ~~denotes~~includes, but is not limited to, a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a qualified legal ~~services~~assistance organization, a government law office, or the legal department of a corporation or other organization.

(~~d~~i) "Fraud" or "fraudulent" denotes conduct that is fraudulent under the substantive or procedural law of the applicable jurisdiction ~~and~~or has a purpose to deceive, provided that it does not include conduct that, although characterized as fraudulent by statute or administrative rule, lacks an element of scienter, deceit, intent to mislead, or knowing failure to correct misrepresentations that can be reasonably expected to induce detrimental reliance by another.

(~~e~~j) "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated ~~adequate~~ information adequate for the person to make an

informed decision, and ~~explanation about~~after the lawyer has adequately explained to the person the material risks of ~~and reasonably available alternatives to~~ the proposed course of conduct and reasonably available alternatives.

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

(l) "Matter" includes any litigation, judicial or administrative proceeding, case, claim, application, request for a ruling or other determination, contract, controversy, investigation, charge, accusation, arrest, negotiation, arbitration, mediation or any other representation involving a specific party or parties.

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

(n) "Person" includes an individual, a corporation, an association, a trust, a partnership, and any other organization or entity.

(o) "Professional legal corporation" means a corporation, or an association treated as a corporation, authorized by law to practice law for profit.

(p) "Qualified legal assistance organization" means an office or organization of one of the four types listed in Rule 7.2(b)(1)-(4) that meets all of the requirements thereof.

(~~h~~q) "Reasonable" or "reasonably," when used in relation to conduct by a lawyer, denotes the conduct of a reasonably prudent and competent lawyer. When used in the context of conflict of interest determinations, "reasonable lawyer" denotes a lawyer acting from the perspective of a reasonably prudent and competent lawyer who is personally disinterested in commencing or continuing the representation.

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

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

(~~k~~t) "Screened" or "screening" 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 or the firm is obligated to protect under these Rules or other law.

~~(l) "Substantial" when used in reference to degree or extent denotes a material matter of clear and weighty importance.~~
(u) "Sexual relations" denotes sexual intercourse or the touching of an intimate part of the lawyer or another person for the purpose of sexual arousal, sexual gratification or sexual abuse.

(v) "State" includes the District of Columbia, Puerto Rico, and other federal territories and possessions.

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

(~~n~~x) "Writing" or "written" denotes a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, ~~photostating~~photocopying, photography, audio or ~~videorecording~~video recording and ~~e-mail~~email. A "signed" writing includes an electronic sound, symbol or process attached to or logically associated with a writing and executed or adopted by a person with the intent to sign the writing.

Comment

Confirmed in Writing

[1] Some Rules require that a person's oral consent be "confirmed in writing." E.g., Rules 1.5(g)(2) (client's consent to division of fees with lawyer in another firm must be confirmed in writing), 1.7(b)(4) (client's informed consent to conflict of interest must be confirmed in writing) and 1.9(a) (former client's informed consent to conflict of interest must be confirmed in writing). The definition of "confirmed in writing" provides three distinct methods of confirming a person's consent: (i) a writing from the person to the lawyer, (ii) a writing from the lawyer to the person, or (iii) consent by the person on the record in any proceeding before a tribunal. The confirming writing need not recite the information that the lawyer communicated to the person in order to obtain the person's consent. For the definition of "informed consent" see Rule 1.0(j). If it is not feasible for the lawyer to obtain or transmit a written confirmation at the time the client gives ~~informed~~oral consent, then the lawyer must obtain or transmit ~~it~~the confirming writing within a reasonable time thereafter. If a lawyer has obtained a client's informed oral consent, the lawyer may act in reliance on that consent so long as it is confirmed in writing within a reasonable time thereafter.

Firm

[2] Whether two or more lawyers constitute a firm within paragraph (~~c~~h) ~~can~~will depend on the specific facts. For example, two practitioners who share office space and occasionally consult or assist each other ordinarily would not be regarded as constituting a firm. However, if they present themselves to the public in a way that suggests that they are a firm or conduct themselves as a firm, they should be regarded as a firm for purposes of the Rules. The terms of any formal agreement between associated lawyers are relevant in determining whether they are a firm, as is the fact that they have mutual access to information concerning the clients they serve. Furthermore, it is relevant in doubtful cases to consider the underlying purpose of the Rule that is involved. For example, 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.~~ determining whether a conflict of interest exists but not for application of the advertising rules.

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

represents a 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. Whether lawyers in a government agency or department constitute a firm may depend upon the issue involved or be governed by other law.

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

Fraud

[5] When used in these Rules, the terms "fraud" ~~or~~and "fraudulent" refer to conduct that is characterized as such under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive. This does not include merely negligent misrepresentation or negligent failure to apprise another of relevant information. For purposes of these Rules, it is not necessary that anyone has suffered damages or relied on the misrepresentation or failure to inform, so long as the necessary scienter is present and the conduct in question could be reasonably expected to induce detrimental reliance.

Informed Consent

[6] Many of the Rules of Professional Conduct require the lawyer to obtain the informed consent of a client or other person (e.g., a former client or, under certain circumstances, a prospective client) before accepting or continuing representation or pursuing a course of conduct. ~~See, e~~E.g., Rules 1.2(c), 1.6(a) and 1.7(b). The communication necessary to obtain such consent will vary according to the Rule involved and the circumstances giving rise to the need to obtain informed consent. The lawyer must make reasonable efforts to ensure that the client or other person possesses information reasonably adequate to make an informed decision. Ordinarily, this will require communication that includes a disclosure of the facts and circumstances giving rise to the situation, any explanation reasonably necessary to inform the client or other person of the material advantages and disadvantages of the proposed course of conduct, and a discussion of the client's or other person's options and alternatives. In some circumstances it may be appropriate for a lawyer to advise a client or other person to seek the advice of other counsel. A lawyer need not inform a client or other person of facts or implications already known to the client or other person; nevertheless, a lawyer who does not personally inform the client or other person assumes the risk that the client or other person is inadequately informed and the consent is invalid. In determining whether the information and explanation provided are reasonably adequate, relevant factors include whether the client or other person is experienced in legal matters generally and in making decisions of the type involved, and whether the client or other person is independently represented by other counsel in giving the consent. Normally, such persons need less information and explanation than others, and generally a client or other person who is independently represented by other counsel in giving the consent should be assumed to have given informed consent. Other considerations may apply in representing impaired clients. See Rule 1.14.

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

respectively. Other Rules require that a client's consent be obtained in a writing signed by the client. ~~See, e~~E.g., Rules 1.8(a) and (g). For ~~a definition~~the meaning of "signed," see paragraph (~~n~~x).

Screened or Screening

[8] ~~This~~ The definition of "screened" or "screening" applies to situations where screening of a personally disqualified lawyer is permitted to remove imputation of a conflict of interest under ~~Rules 1.10,~~Rule 1.11, 1.12 or 1.18. See those Rules for the particular requirements of establishing effective screening.

[9] The purpose of screening is to ~~assure the affected parties~~ensure that confidential information known by the personally disqualified lawyer remains protected. The personally disqualified lawyer should acknowledge the obligation not to communicate with any of the other lawyers in the firm with respect to the matter. Similarly, other lawyers in the firm who are working on the matter should promptly be informed that the screening is in place and that they may not communicate with the personally disqualified lawyer with respect to the matter. Additional screening measures that are appropriate for the particular matter will depend on the circumstances. ~~To implement, reinforce and remind all affected lawyers of the presence of the screening, it may be appropriate for the firm to undertake such procedures as a written undertaking by the screened lawyer to avoid~~In any ~~communication with other firm personnel and any contact with any firm files or other materials relating~~event, procedures should be adequate to ~~the matter, written notice and instructions to all other firm personnel forbidding any communication with the screened lawyer relating to the matter, denial of access by the screened lawyer to firm files or other materials relating to the matter and periodic reminders of the screen to the screened lawyer and all other firm personnel~~protect confidential information.

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

North Dakota Rule 1.0 (2009) – Clean

North Dakota Rule 1.0 - Terms

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

(b) "Consent in writing", when used with reference to the consent of a person, denotes consent that is given in writing by the person or oral consent promptly confirmed in writing to the client by the lawyer.

(c) "Consult" or "consultation" denotes communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question.

(d) "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.

(e) "Fraud" or "fraudulent" denotes conduct having a purpose to deceive and not merely negligent misrepresentation or negligent failure to apprise another of relevant information.

(f) "Jurisdiction" means this state, another state of the United States, the District of Columbia, Puerto Rico, or a territory or possession of the United States.

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

(h) "Legal Assistant" (or paralegal) means a person who assists lawyers in the delivery of legal services, and who through formal education, training, or experience, has knowledge and expertise regarding the legal system and substantive and procedural law which qualifies the person to do work of a legal nature under the direct supervision of a licensed lawyer.

(i) "Matter", for purposes of Rules 1.7 through 1.12, includes any judicial or other proceeding, application, request for a ruling or other determination, contract claim, controversy, investigation, charge, accusation, arrest, or other transaction.

(j) "Notice of dishonor" refers to the notice that an eligible financial institution is required to give, under the laws of this jurisdiction, upon presentation of an instrument that the institution dishonors.

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

(l) "Properly payable" refers to an instrument that, if presented in the normal course of business, is in a form requiring payment under the laws of this jurisdiction.

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

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

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

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

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

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

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

Comment

Consent in Writing

[1] Where it is required by these Rules, a client's consent must be given in writing at the time consent is given or oral consent by the client must be promptly confirmed in writing to the client by the lawyer. If a lawyer has obtained a client's oral consent, the lawyer may act in reliance on that oral consent so long as it is promptly confirmed in writing.

Firm

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

[3] With respect to the law department of an organization, including the government, there is ordinarily no question that the members of the department constitute a firm within the meaning of these Rules. There can be uncertainty, however, as to the identity of the client. For example, it may not be clear whether the law department of a corporation represents a subsidiary or an affiliated corporation, as well as the corporation by which the members of the department are directly employed. A similar question can arise concerning an unincorporated association and its local affiliates.

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

Fraud

[5] When used in these Rules, the terms "fraud" or "fraudulent" do not include merely negligent misrepresentation or negligent failure to apprise another of relevant information. For purposes of these Rules, it is not necessary that anyone has suffered damages or relied on the misrepresentation or failure to inform in order for the misrepresentation or failure to inform to constitute fraud.

Screened

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

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

Reference: N.D.C.C. 41-03-60; Minutes of the Professional Conduct Subcommittee of the Attorney Standards Committee on 01/10/86 and 01/31/86; Minutes of the Joint Committee on Attorney Standards Meetings of 06/13/95, 09/15/95, 12/01/95, 06/11/96, 09/24/04, 03/18/05, 06/14/05, 09/09/05, 06/10/08, 09/19/08, 11/07/08, 12/01/08.

North Dakota Rule 1.0 (2009) – Redline Comparison to MR 1.0 (2002)

North Dakota Rule 1.0 ~~Terminology~~- Terms

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

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

(c) "Consult" or "consultation" denotes communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question.

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

(~~d~~e) "Fraud" or "fraudulent" denotes conduct ~~that is fraudulent under the substantive or procedural law of the applicable jurisdiction and has~~having a purpose to deceive and not merely negligent misrepresentation or negligent failure to apprise another of relevant information.

~~(e) "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.~~
(f) "Jurisdiction" means this state, another state of the United States, the District of Columbia, Puerto Rico, or a territory or possession of the United States.

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

(h) "Legal Assistant" (or paralegal) means a person who assists lawyers in the delivery of legal services, and who through formal education, training, or experience, has knowledge and expertise regarding the legal system and substantive and procedural law which qualifies the person to do work of a legal nature under the direct supervision of a licensed lawyer.

(i) "Matter", for purposes of Rules 1.7 through 1.12, includes any judicial or other proceeding, application, request for a ruling or other determination, contract claim, controversy, investigation, charge, accusation, arrest, or other transaction.

(j) "Notice of dishonor" refers to the notice that an eligible financial institution is required to give, under the laws of this jurisdiction, upon presentation of an instrument that the institution dishonors.

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

(l) "Properly payable" refers to an instrument that, if presented in the normal course of business, is in a form requiring payment under the laws of this jurisdiction.

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

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

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

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

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

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

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

Comment

~~**Confirmed**~~Consent in Writing

[1] ~~If~~ Where it is ~~not feasible to obtain or transmit~~required by these Rules, a ~~written confirmation~~client's consent must be given in writing at the time consent is given or oral consent by the client ~~gives informed consent, then~~must be promptly confirmed in writing to the client by the lawyer ~~must obtain or transmit it within a reasonable time thereafter~~. If a lawyer has obtained a client's ~~informed~~oral consent, the lawyer may act in reliance on that oral consent so long as it is promptly confirmed in writing ~~within a reasonable time thereafter~~.

Firm

[2] Whether two or more lawyers constitute a firm within paragraph (~~c~~d) can depend on the specific facts. For example, two practitioners who share office space and occasionally consult or

assist each other ordinarily would not be regarded as constituting a firm. However, if they present themselves to the public in a way that suggests that they are a firm or conduct themselves as a firm, they should be regarded as a firm for purposes of the Rules. The terms of any formal agreement between associated lawyers are relevant in determining whether they are a firm, as is the fact that they have mutual access to information concerning the clients they serve. Furthermore, it is relevant in doubtful cases to consider the underlying purpose of the Rule that is involved. A group of lawyers could be regarded as a firm for purposes of the Rule that the same lawyer should not represent opposing parties in litigation, while ~~it~~the same group of lawyers might not be ~~so~~ regarded as a firm for purposes of the ~~Rule~~rule that information acquired by one lawyer is attributed to another.

[3] With respect to the law department of an organization, including the government, there is ordinarily no question that the members of the department constitute a firm within the meaning of ~~the~~these Rules~~ of Professional Conduct~~. There can be uncertainty, however, as to the identity of the client. For example, it may not be clear whether the law department of a corporation represents a subsidiary or an affiliated corporation, as well as the corporation by which the members of the department are directly employed. A similar question can arise concerning an unincorporated association and its local affiliates.

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

Fraud

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

~~**Informed Consent**~~

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

~~other person is experienced in legal matters generally and in making decisions of the type involved, and whether the client or other person is independently represented by other counsel in giving the consent. Normally, such persons need less information and explanation than others, and generally a client or other person who is independently represented by other counsel in giving the consent should be assumed to have given informed consent.~~

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

Screened

[~~8~~6] This definition applies to situations where screening of a personally disqualified lawyer is permitted to remove imputation of a conflict of interest under Rules ~~1.10,~~ 1.11, 1.12 ~~or~~, and 1.18.

[~~9~~7] The purpose of screening is to assure the affected parties that confidential information known by the personally disqualified lawyer remains protected. The personally disqualified lawyer should acknowledge the obligation not to communicate with any of the other lawyers in the firm with respect to the matter. Similarly, other lawyers in the firm who are working on the matter should be informed that the screening is in place and that they may not communicate with the personally disqualified lawyer with respect to the matter. Additional screening measures that are appropriate for the particular matter will depend on the circumstances. To implement, reinforce and remind all affected lawyers of the presence of the screening, it may be appropriate for the firm to undertake such procedures as a written undertaking by the screened lawyer to avoid any communication with other firm personnel and any contact with any firm files or other materials relating to the matter, written notice and instructions to all other firm personnel forbidding any communication with the screened lawyer relating to the matter, denial of access by the screened lawyer to firm files or other materials relating to the matter and periodic reminders of the screen to the screened lawyer and all other firm personnel.

~~[10] In order to be effective, screening measures must be implemented as soon as practical after a lawyer or law firm knows or reasonably should know that there is a need for screening.~~
Reference: N.D.C.C. 41-03-60; Minutes of the Professional Conduct Subcommittee of the Attorney Standards Committee on 01/10/86 and 01/31/86; Minutes of the Joint Committee on Attorney Standards Meetings of 06/13/95, 09/15/95, 12/01/95, 06/11/96, 09/24/04, 03/18/05, 06/14/05, 09/09/05, 06/10/08, 09/19/08, 11/07/08, 12/01/08.

Ohio Rule 1.0 (2009) – Clean

Ohio Rule 1.0: Terminology

As used in these rules:

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

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

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

(d) “Fraud” or “fraudulent” denotes conduct that has an intent to deceive and is either of the following:

(1) an actual or implied misrepresentation of a material fact that is made either with knowledge of its falsity or with such utter disregard and recklessness about its falsity that knowledge may be inferred;

(2) a knowing concealment of a material fact where there is a duty to disclose the material fact.

(e) “Illegal” denotes criminal conduct or a violation of an applicable statute or administrative regulation.

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

(g) “Knowingly,” “known,” or “knows” denotes actual knowledge of the fact in question. A person’s knowledge may be inferred from circumstances.

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

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

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

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

(l) “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.

(m) “Substantial” when used in reference to degree or extent denotes a matter of real importance or great consequence.

(n) “Substantially related matter” denotes one that involves the same transaction or legal dispute or one in which there is a substantial risk that confidential factual information that would normally have been obtained in the prior representation of a client would materially advance the position of another client in a subsequent matter.

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

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

Comment

Confirmed in Writing

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

Firm

[2] Whether two or more lawyers constitute a firm within division (c) can depend on the specific facts. For example, a lawyer in an of-counsel relationship with a law firm will be treated as part of that firm. On the other hand, two practitioners who share office space and occasionally consult or assist each other ordinarily would not be regarded as constituting a firm for purposes of fee division in Rule 1.5(e). The terms of any agreement between associated lawyers are relevant in determining whether they are a firm, as is the fact that they have mutual access to information concerning the clients they serve. Furthermore, it is relevant in doubtful cases to consider the underlying purpose of the rule that is involved.

[3] With respect to the law department of an organization, there is ordinarily no question that the members of the department constitute a firm within the meaning of the Ohio Rules of Professional Conduct. There can be uncertainty, however, as to the identity of the client. For

example, it may not be clear whether the law department of a corporation represents a subsidiary or an affiliated corporation, as well as the corporation by which the members of the department are directly employed. A similar question can arise concerning an unincorporated association and its local affiliates.

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

[4A] Government agencies are not included in the definition of “firm” because there are significant differences between a government agency and a group of lawyers associated to serve nongovernmental clients. Of course, all lawyers who practice law in a government agency are subject to these rules. Moreover, some of these rules expressly impose upon lawyers associated in a government agency the same or analogous duties to those required of lawyers associated in a firm. See Rules 3.6(d), 3.7(c), 5.1(c), and 5.3. Identifying the governmental client of a lawyer in a government agency is beyond the scope of these rules.

Fraud

[5] The terms “fraud” or “fraudulent” incorporate the primary elements of common law fraud. The terms do not include negligent misrepresentation or negligent failure to apprise another of relevant information. For purposes of these rules, it is not necessary that anyone has suffered damages or relied on the misrepresentation or failure to inform. Under division (d)(2), the duty to disclose a material fact may arise under these rules or other Ohio law.

Informed Consent

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

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

Screened

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

[9] The purpose of screening is to assure the affected parties that confidential information known by the personally disqualified lawyer remains protected. The personally disqualified lawyer should acknowledge the obligation not to communicate with any of the other lawyers in the firm with respect to the matter. Similarly, other lawyers in the firm who are working on the matter should be informed that the screening is in place and that they may not communicate with the personally disqualified lawyer with respect to the matter. Additional screening measures that are appropriate for the particular matter will depend on the circumstances. To implement, reinforce, and remind all affected lawyers of the presence of the screening, it may be appropriate for the firm to undertake such procedures as a written undertaking by the screened lawyer to avoid any communication with other firm personnel and any contact with any firm files or other materials relating to the matter, written notice and instructions to all other firm personnel forbidding any communication with the screened lawyer relating to the matter, denial of access by the screened lawyer to firm files or other materials 8
relating to the matter, and periodic reminders of the screen to the screened lawyer and all other firm personnel.

[10] In order to be effective, screening measures must be implemented as soon as practical after a lawyer or law firm knows or reasonably should know that there is a need for screening.
Substantial and "Substantially Related Matter"

[11] The definition of "substantial" does not extend to "substantially" as used in Rules 1.9, 1.10, 1.11, 1.12, 1.16, 1.18, and 7.4. The definition of "substantially related matter" is taken from Rule 1.9, Comment [3] and defines the term for purposes of Rules 1.9, 1.10, and 1.18. "Personally and substantially," as used in Rule 1.11, originated in 18 U.S.C. Sec. 207. Rule 1.12, Comment [1] defines "personally and substantially" for former adjudicative officers.

Ohio Rule 1.0 (2009) – Redline Comparison to MR 1.0 (2002)

Ohio Rule 1.0: Terminology

As used in these rules:

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

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

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

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

(1) an actual or implied misrepresentation of a material fact that is made either with knowledge of its falsity or with such utter disregard and recklessness about its falsity that knowledge may be inferred;

(2) a knowing concealment of a material fact where there is a duty to disclose the material fact.

(e) "Illegal" denotes criminal conduct or a violation of an applicable statute or administrative regulation.

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

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

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

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

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

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

(~~k~~l) "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~~rules or other law.

(~~l~~m) "Substantial" when used in reference to degree or extent denotes a ~~material~~ matter of ~~clear and weighty~~real importance or great consequence.

(n) "Substantially related matter" denotes one that involves the same transaction or legal dispute or one in which there is a substantial risk that confidential factual information that would normally have been obtained in the prior representation of a client would materially advance the position of another client in a subsequent matter.

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

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

Comment

Confirmed in Writing

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

Firm

[2] Whether two or more lawyers constitute a firm within ~~paragraph~~division (c) can depend on the specific facts. For example, a lawyer in an of-counsel relationship with a law firm will be treated as part of that firm. On the other hand, two practitioners who share office space and occasionally consult or assist each other ordinarily would not be regarded as constituting a firm~~. However, if they present themselves to the public in a way that suggests that they are a firm or conduct themselves as a firm, they should be regarded as a firm~~ for purposes of ~~the Rules~~fee division in Rule 1.5(e). The terms of any ~~formal~~ agreement between associated lawyers are relevant in determining whether they are a firm, as is the fact that they have mutual access to information concerning the clients they serve. Furthermore, it is relevant in doubtful cases to consider the underlying purpose of the ~~Rule~~rule that is involved.~~ A group of lawyers could be regarded as a firm for purposes of the Rule that the same lawyer should not represent opposing~~

~~parties in litigation, while it might not be so regarded for purposes of the Rule that information acquired by one lawyer is attributed to another.~~

[3] With respect to the law department of an organization~~, including the government~~, there is ordinarily no question that the members of the department constitute a firm within the meaning of the Ohio Rules of Professional Conduct. There can be uncertainty, however, as to the identity of the client. For example, it may not be clear whether the law department of a corporation represents a subsidiary or an affiliated corporation, as well as the corporation by which the members of the department are directly employed. A similar question can arise concerning an unincorporated association and its local affiliates.

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

[4A] Government agencies are not included in the definition of "firm" because there are significant differences between a government agency and a group of lawyers associated to serve nongovernmental clients. Of course, all lawyers who practice law in a government agency are subject to these rules. Moreover, some of these rules expressly impose upon lawyers associated in a government agency the same or analogous duties to those required of lawyers associated in a firm. See Rules 3.6(d), 3.7(c), 5.1(c), and 5.3. Identifying the governmental client of a lawyer in a government agency is beyond the scope of these rules.

Fraud

[5] ~~When used in these Rules, the~~ The terms "fraud" or "fraudulent" ~~refer to conduct that is characterized as such under~~incorporate the ~~substantive or procedural law~~primary elements of ~~the applicable jurisdiction and has a purpose to deceive~~common law fraud. ~~This does~~The terms do not include ~~merely~~ negligent misrepresentation or negligent failure to apprise another of relevant information. For purposes of these ~~Rules~~rules, it is not necessary that anyone has suffered damages or relied on the misrepresentation or failure to inform. Under division (d)(2), the duty to disclose a material fact may arise under these rules or other Ohio law.

Informed Consent

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

explanation provided are reasonably adequate, relevant factors include whether the client or other person is experienced in legal matters generally and in making decisions of the type involved, and whether the client or other person is independently represented by other counsel in giving the consent. Normally, such persons need less information and explanation than others, and generally a client or other person who is independently represented by other counsel in giving the consent should be assumed to have given informed consent.

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

Screened

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

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

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

Substantial and "Substantially Related Matter"

[11] The definition of "substantial" does not extend to "substantially" as used in Rules 1.9, 1.10, 1.11, 1.12, 1.16, 1.18, and 7.4. The definition of "substantially related matter" is taken from Rule 1.9, Comment [3] and defines the term for purposes of Rules 1.9, 1.10, and 1.18. "Personally and substantially," as used in Rule 1.11, originated in 18 U.S.C. Sec. 207. Rule 1.12, Comment [1] defines "personally and substantially" for former adjudicative officers.

Oregon Rule 1.0 (2002) – Clean

Oregon Rule 1.0 Terminology

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

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

(c) "Electronic communication" includes but is not limited to messages sent to newsgroups, listservs and bulletin boards; messages sent via electronic mail; and real time interactive communications such as conversations in internet chat groups and conference areas and video conferencing.

(d) "Firm" or "law firm" denotes a lawyer or lawyers, including “Of Counsel” lawyers, in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a private or public legal aid or public defender organization, a legal services organization or the legal department of a corporation or other public or private organization. Any other lawyer, including an office sharer or a lawyer working for or with a firm on a limited basis, is not a member of a firm absent indicia sufficient to establish a de facto law firm among the lawyers involved.

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

(f) “Information relating to the representation of a client” denotes both information protected by the attorney-client privilege under applicable law, and other information gained in a current or former 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.

(g) "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct. When informed consent is required by these Rules to be confirmed in writing or to be given in a writing signed by the client, the lawyer shall give and the writing shall reflect a recommendation that the client seek independent legal advice to determine if consent should be given.

(h) "Knowingly," "known," or "knows" denotes actual knowledge of the fact in question, except that for purposes of determining a lawyer's knowledge of the existence of a conflict of interest, all facts which the lawyer knew, or by the exercise of reasonable care should have known, will be attributed to the lawyer. A person's knowledge may be inferred from circumstances.

(i) "Matter" includes any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other

particular matter involving a specific party or parties; and any other matter covered by the conflict of interest rules of a government agency.

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

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

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

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

(n) “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.

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

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

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

Oregon Rule 1.0 (2009) – Redline comparison to MR 1.0 (2002)

Oregon Rule 1.0 Terminology

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

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

(c) "Electronic communication" includes but is not limited to messages sent to newsgroups, listservs and bulletin boards; messages sent via electronic mail; and real time interactive communications such as conversations in internet chat groups and conference areas and video conferencing.

(~~c~~d) "Firm" or "law firm" denotes a lawyer or lawyers, including "Of Counsel" lawyers, in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a private or public legal aid or public defender organization, a legal services organization or the legal department of a corporation or other public or private organization. Any other lawyer, including an office sharer or a lawyer working for or with a firm on a limited basis, is not a member of a firm absent indicia sufficient to establish a de facto law firm among the lawyers involved.

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

(f) "Information relating to the representation of a client" denotes both information protected by the attorney-client privilege under applicable law, and other information gained in a current or former 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.

(~~e~~g) "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct. When informed consent is required by these Rules to be confirmed in writing or to be given in a writing signed by the client, the lawyer shall give and the writing shall reflect a recommendation that the client seek independent legal advice to determine if consent should be given.

(~~f~~h) "Knowingly," "known," or "knows" denotes actual knowledge of the fact in question, except that for purposes of determining a lawyer's knowledge of the existence of a conflict of interest, all facts which the lawyer knew, or by the exercise of reasonable care should have known, will be attributed to the lawyer. A person's knowledge may be inferred from circumstances.

(i) "Matter" includes any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other

particular matter involving a specific party or parties; and any other matter covered by the conflict of interest rules of a government agency.

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

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

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

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

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

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

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

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

Washington Rule 1.0 (2002) – Clean

Washington Rule 1.0 Terminology

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

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

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

(d) "Fraud" or "fraudulent" denotes conduct that has a purpose to deceive and is fraudulent under the substantive or procedural law of the applicable jurisdiction, except that it is not necessary that anyone has suffered damages or relied on the misrepresentation or failure to inform.

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

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

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

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

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

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

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

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

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

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

Comment

Confirmed in Writing

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

See also Washington Comment [11].

Firm

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

[3] [Washington revision] With respect to the law department of an organization, there is ordinarily no question that the members of the department constitute a firm within the meaning of the Rules of Professional Conduct. There can be uncertainty, however, as to the identity of the client. For example, it may not be clear whether the law department of a corporation represents a subsidiary or an affiliated corporation, as well as the corporation by which the members of the department are directly employed. A similar question can arise concerning an unincorporated association and its local affiliates.

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

See also Washington Comment [12].

Fraud

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

See also Washington Comment [13].

Informed Consent

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

[7] [Washington revision] Obtaining informed consent will usually require an affirmative response by the client or other person. In general, a lawyer may not assume consent from a client's or other person's silence. Consent may be inferred, however, from the conduct of a client or other person who has reasonably adequate information about the matter. A number of Rules require that a person's consent be confirmed in writing. See Rules 1.7(b) and 1.9(a). For a definition of "writing" and "confirmed in writing," see paragraphs (n) and (b). Rule 1.8(a) requires that a client's consent be obtained in a writing signed by the client. See also Rule 1.5(c)(1) (requiring that a contingent fee agreement be "in a writing signed by the client"). For a definition of "signed," see paragraph (n).

See also Washington Comment [14].

Screened

[8] [Washington revision] This definition applies to situations where screening of a personally disqualified lawyer is permitted to remove imputation of a conflict of interest under Rules 1.10, 1.11, 1.12, 1.18, or 6.5.

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

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

See also Washington Comment [15].

Additional Washington Comments (11 – 16)

Confirmed in Writing

[11] Informed consent requires that the writing be articulated in a manner that can be easily understood by the client.

Firm

[12] Although the definition of "firm" or "law firm" in Rule 1.0(c) differs from the definition set forth in the Terminology section of Washington's former Rules of Professional Conduct, there is no intent to change the scope of the definition or to alter existing Washington law on the application of the Rules of Professional Conduct to lawyers in a government office.

Fraud

[13] Model Rule 1.0(d) was modified to clarify that the terms "fraud" and "fraudulent" in the Rules of Professional Conduct do not include an element of damage or reliance.

Informed Consent

[14] In order for the communication to the client to be adequate it must be accomplished in a manner that can be easily understood by the client.

Screened

[15] See Rules 1.10 and 6.5 for specific screening requirements under the circumstances covered by those Rules.

Other

[16] For the scope of the phrase "information relating to the representation of a client," which is not defined in Rule 1.0, see Comment [19] to Rule 1.6.

Washington Rule (2002) – Redline Comparison to MR 1.0 (2002)

Washington Rule 1.0 Terminology

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

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

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

(d) "Fraud" or "fraudulent" denotes conduct that has a purpose to deceive and is fraudulent under the substantive or procedural law of the applicable jurisdiction~~ and~~, except that it is not necessary that anyone has ~~a purpose~~suffered damages or relied on the misrepresentation or failure to ~~deceive~~inform.

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

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

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

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

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

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

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

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

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

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

Comment

Confirmed in Writing

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

See also Washington Comment [11].

Firm

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

[3] [Washington revision] With respect to the law department of an organization~~, including the government~~, there is ordinarily no question that the members of the department constitute a firm within the meaning of the Rules of Professional Conduct. There can be uncertainty, however, as to the identity of the client. For example, it may not be clear whether the law department of a corporation represents a subsidiary or an affiliated corporation, as well as the corporation by which the members of the department are directly employed. A similar question can arise concerning an unincorporated association and its local affiliates.

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

See also Washington Comment [12].

Fraud

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

See also Washington Comment [13].

Informed Consent

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

[7] [Washington revision] Obtaining informed consent will usually require an affirmative response by the client or other person. In general, a lawyer may not assume consent from a client's or other person's silence. Consent may be inferred, however, from the conduct of a client or other person who has reasonably adequate information about the matter. A number of Rules require that a person's consent be confirmed in writing. See Rules 1.7(b) and 1.9(a). For a definition of "writing" and "confirmed in writing," see paragraphs (n) and (b). ~~Other Rules require~~Rule 1.8(a) requires that a client's consent be obtained in a writing signed by the client. See~~, e.g., Rules 1.8~~ also Rule 1.5(c)(1) (requiring that a~~) and (g~~ contingent fee agreement be "in a writing signed by the client"). For a definition of "signed," see paragraph (n).

See also Washington Comment [14].

Screened

[8] [Washington revision] This definition applies to situations where screening of a personally disqualified lawyer is permitted to remove imputation of a conflict of interest under Rules 1.10, 1.11, 1.12 ~~or~~, 1.18, or 6.5.

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

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

See also Washington Comment [15].

Additional Washington Comments (11 – 16)

Confirmed in Writing

[11] Informed consent requires that the writing be articulated in a manner that can be easily understood by the client.

Firm

[12] Although the definition of "firm" or "law firm" in Rule 1.0(c) differs from the definition set forth in the Terminology section of Washington's former Rules of Professional Conduct, there is no intent to change the scope of the definition or to alter existing Washington law on the application of the Rules of Professional Conduct to lawyers in a government office.

Fraud

[13] Model Rule 1.0(d) was modified to clarify that the terms "fraud" and "fraudulent" in the Rules of Professional Conduct do not include an element of damage or reliance.

Informed Consent

[14] In order for the communication to the client to be adequate it must be accomplished in a manner that can be easily understood by the client.

Screened

[15] See Rules 1.10 and 6.5 for specific screening requirements under the circumstances covered by those Rules.

Other

[16] For the scope of the phrase "information relating to the representation of a client," which is not defined in Rule 1.0, see Comment [19] to Rule 1.6.

Wisconsin Rule 1.0 (2002) – Clean

Wisconsin SCR 20:1.0 Terminology.

(ag) “Advanced fee” denotes an amount paid to a lawyer in contemplation of future services, which will be earned at an agreed−upon basis, whether hourly, flat, or another basis. Any amount paid to a lawyer in contemplation of future services whether on an hourly, flat or other basis, is an advanced fee regardless of whether that fee is characterized as an “advanced fee,” “minimum fee,” “nonrefundable fee,” or any other characterization. Advanced fees are subject to the requirements of SCR 20:1.5, SCR 20:1.15 (b) (4) or (4m), SCR 20:1.15 (e) (4) h., SCR 20:1.15 (g), and SCR 20:1.16(d).

(ar) “Belief” or “believes” denotes that the person involved actually supposed the fact in question to be true. A person’s belief may be inferred from circumstances.

(b) “Consult” or “consultation” denotes communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question.

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

(d) “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, including a government entity.

(dm) “Flat fee” denotes a fixed amount paid to a lawyer for specific, agreed−upon services, or for a fixed, agreed−upon stage in a representation, regardless of the time required of the lawyer to perform the service or reach the agreed−upon stage in the representation. A flat fee, sometimes referred to as “unit billing,” is not an advance against the lawyer’s hourly rate and may not be billed against at an hourly rate. Flat fees become the property of the lawyer upon receipt and are subject to the requirements of SCR 20:1.5, SCR 20:1.15 (b) (4) or (4m), SCR 20:1.15 (e) (4) h., SCR 20:1.15 (g), and SCR 20:1.16 (d).

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(g) “Knowingly,” “known,” or “knows” denotes actual knowledge of the fact in question. A person’s knowledge may be inferred from circumstances.

(h) “Misrepresentation” denotes communication of an untruth, either knowingly or with reckless disregard, whether by statement or omission, which if accepted would lead another to believe a condition exists that does not actually exist.

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

(j) A “prosecutor” includes a government attorney or special prosecutor (i) in a criminal case, delinquency action, or proceeding that could result in a deprivation of liberty or (ii) acting in connection with the protection of a child or a termination of parental rights proceeding or (iii) acting as a municipal prosecutor.

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

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

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

(mm) “Retainer” denotes an amount paid specifically and solely to secure the availability of a lawyer to perform services on behalf of a client, whether designated a “retainer,” “general retainer,” “engagement retainer,” “reservation fee,” “availability fee,” or any other characterization. This amount does not constitute payment for any specific legal services, whether past, present, or future and may not be billed against for fees or costs at any point. A retainer becomes the property of the lawyer upon receipt, but is subject to the requirements of SCR 20:1.5 and SCR 20:1.16(d).

(n) “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.

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

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

(q) “Writing” or “written” denotes a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, Photostating, photography, audio or video recording and e−mail. A “signed” writing includes an electronic sound, symbol or process attached to or logically associated with a writing and executed or adopted by a person with the intent to sign the writing.

History: Sup. Ct. Order No. 04−07, 2007 WI 4, 293 Wis. 2d xv; Sup. Ct. Order No. 06−04, 2007 WI 48, 297 Wis. 2d xv.

Case Note: Suppression of evidence is not a remedy available for an ethical violation. State v. Maloney, 2004 WI App 141, 275 Wis. 2d 557, 685 N.W.2d 620, 03−2180.

NOTE: The above annotation cites to SCR 20 as it existed prior to the adoption of Sup. Ct. Order No. 04−07.

Wisconsin's New Rules of Professional Conduct for Attorneys. Pierce & Dietrich. Wis. Law. Feb. 2007.

Ethics: Obtaining informed Consent. Dietrich. Wis. Law. Sept. 2007. Wisconsin Committee Comment: The Committee has added definitions of "consult," "misrepresentation," and "prosecutor" that are not part of the Model Rule. In the definition of "firm," the phrase "including a government entity" is added to make the coverage more explicit. Because the provisions of the rule are renumbered to preserve the alphabetical arrangement, caution should be used when referring to the

ABA Comment.

Confirmed in Writing.

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

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

[3] With respect to the law department of an organization, including the government, there is ordinarily no question that the members of the department constitute a firm within the meaning of the Rules of Professional Conduct. There can be uncertainty, however, as to the identity of the client. For example, it may not be clear whether the law department of a corporation represents a subsidiary or an affiliated corporation, as well as the corporation by which the members of the department are directly employed. A similar question can arise concerning an unincorporated association and its local affiliates.

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

Fraud.

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

Informed Consent.

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

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

Screened.

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

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

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

Editor's Note: Section 7 of Supreme Court Order No. 06−04 states: "The following Comment to SCR 20:1.0(dm) is not adopted, but will be published and may be consulted for guidance in interpreting and applying the Wisconsin Rules of Professional Conduct:"

Wisconsin Comment. The definition of flat fee specifies that flat fees "become the property of the lawyer upon receipt." Notwithstanding, the lawyer must either deposit the advanced flat fee in trust until earned, or comply with the alternative in SCR 20:1.15 (b) (4m), alternative protection for advanced fees. In addition, as specified in the definition, flat fees are subject to the requirements of all rules to which advanced fees are subject.

Wisconsin Rule 1.0 (2002) – Redline Comparison to MR 1.0 (2002)

~~Rule~~Wisconsin SCR 20:1.0 Terminology.

(ag) "Advanced fee" denotes an amount paid to a lawyer in contemplation of future services, which will be earned at an agreed−upon basis, whether hourly, flat, or another basis. Any amount paid to a lawyer in contemplation of future services whether on an hourly, flat or other basis, is an advanced fee regardless of whether that fee is characterized as an "advanced fee," "minimum fee," "nonrefundable fee," or any other characterization. Advanced fees are subject to the requirements of SCR 20:1.5, SCR 20:1.15 (b) (4) or (4m), SCR 20:1.15 (e) (4) h., SCR 20:1.15 (g), and SCR 20:1.16(d).

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

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

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

(~~c~~d) "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, including a government entity.

(dm) "Flat fee" denotes a fixed amount paid to a lawyer for specific, agreed−upon services, or for a fixed, agreed−upon stage in a representation, regardless of the time required of the lawyer to perform the service or reach the agreed−upon stage in the representation. A flat fee, sometimes referred to as "unit billing," is not an advance against the lawyer's hourly rate and may not be billed against at an hourly rate. Flat fees become the property of the lawyer upon receipt and are subject to the requirements of SCR 20:1.5, SCR 20:1.15 (b) (4) or (4m), SCR 20:1.15 (e) (4) h., SCR 20:1.15 (g), and SCR 20:1.16 (d).

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

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

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

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(mm) “Retainer” denotes an amount paid specifically and solely to secure the availability of a lawyer to perform services on behalf of a client, whether designated a “retainer,” “general retainer,” “engagement retainer,” “reservation fee,” “availability fee,” or any other characterization. This amount does not constitute payment for any specific legal services, whether past, present, or future and may not be billed against for fees or costs at any point. A retainer becomes the property of the lawyer upon receipt, but is subject to the requirements of SCR 20:1.5 and SCR 20:1.16(d).

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Comment.

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

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

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

Informed Consent.

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

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

Screened.

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

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

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

Editor's Note: Section 7 of Supreme Court Order No. 06−04 states: "The following Comment to SCR 20:1.0(dm) is not adopted, but will be published and may be consulted for guidance in interpreting and applying the Wisconsin Rules of Professional Conduct:"

Wisconsin Comment. The definition of flat fee specifies that flat fees "become the property of the lawyer upon receipt." Notwithstanding, the lawyer must either deposit the advanced flat fee in trust until earned, or comply with the alternative in SCR 20:1.15 (b) (4m), alternative protection for advanced fees. In addition, as specified in the definition, flat fees are subject to the requirements of all rules to which advanced fees are subject.

Defined Word/Term[1]	Rule Location	Definition/"Explanation" of Word/Term	Notes
"adjudicative officer"[2]	Rule 1.12, Comment [1]	The term "adjudicative officer" includes such officials as judges pro tempore, referees, special masters, hearing officers and other parajudicial officers, and also lawyers who serve as part-time judges.	
"administrative charges"	Rule 3.10(b) [5-100]	(b) As used in paragraph (a) of this Rule, the term "administrative charges" means the filing or lodging of a complaint with a federal, state, or local governmental entity which may order or recommend the loss or suspension of a license, or may impose or recommend the imposition of a fine, pecuniary sanction, or other sanction of a quasi-criminal nature but does not include filing charges with an administrative entity required by law as a condition precedent to maintaining a civil action.	
"admission to practice law"	Rule 8.1 [1-200] & Comment [2]	(c) As used in this Rule, "admission to practice law" includes admission or readmission to membership in the State Bar; reinstatement to active membership in the State Bar; an application for permission to appear pro hac vice; and any similar provision relating to admission or certification to practice law in California or elsewhere. * * * [2] The examples in paragraph (c) are illustrative. As used in paragraph (c), "similar provision relating to admission or certification" includes, but is not limited to, an application by an out-of-state attorney for admission to practice law under Business and Professions Code section 6062; an application to appear as counsel pro hac vice under Rule of Court 9.40; an application by military counsel to represent a member of the military in a particular cause under Rule of Court 9.41; an application to register as a certified law student under Rule of	

[1] **NOTE**: Words or terms appearing in plain font are terms found in Commission drafts of proposed rules. Words or terms appearing in bold font are terms found in the Terminology Rule of the Model Rules, Rule 1.0. Words or terms in italics are terms that other jurisdictions have defined in their terminology rule or section.

[2] See also definition of "adjudicative officer" in Michigan Rule 1.0.1(a) in accompanying chart dated 8/4/09.

Defined Word/Term[1]	Rule Location	Definition/"Explanation" of Word/Term	Notes
		Court 9.42; proceedings for certification as a Registered Legal Services attorney under Rule of Court 9.45 and related State Bar Rules; certification as a Registered In-house Counsel under Rule of Court 9.46 and related State Bar Rules; certification as an Out-of-State Attorney Arbitration Counsel under Rule of Court 9.43, Code of Civil Procedure section 1282.4, and related State Bar Rules; and certification as a Registered Foreign Legal Consultant under Rule of Court 9.44 and related State Bar Rules.	
"advance for fees"[3]	Rule 1.15, Comment [5]	[5] As used in this Rule, "advance for fees" means a payment or retainer intended by the client to be funds paid in advance for some or all of the services that the lawyer is expected to perform on the client's behalf.	
"adverse pecuniary interests"	Rule 1.8.1 [3-300] & Comment [7]	[7] An ownership, possessory, security or other pecuniary interest adverse to a client arises when a lawyer acquires an interest in a client's property that is or may become detrimental to the client, even when the lawyer's intent is to aid the client. Hawk v. State Bar (1988) 45 Cal.3d 589 [247 Cal.Rptr. 599]. An adverse pecuniary interest arises, for example, when the lawyer's personal financial interest conflicts with the client's interest in the property; when a lawyer obtains an interest in a cause of action or subject matter of litigation or other matter the lawyer is conducting for the client; or when the interest can be used to summarily extinguish the client's interest in the client's property. (See Fletcher v. Davis (2004) 33 Cal.4th 61 [14 Cal.Rptr.3d 58].) An adverse pecuniary interest also arises when a lawyer acquires an interest in an obligation owed to a client or acquires an interest in an entity indebted to a client. (See Rodgers v. State Bar (1989) 48 Cal.3d 300 [256 Cal.Rptr. 381]; Kapelus v. State Bar (1987) 44 Cal.3d 179 [242 Cal.Rptr. 196].)	
"advertisement"	*New York Rule 1.0(a)*	*(a) "Advertisement" means any public or private communication made by or on behalf of a lawyer or law firm*	

[3] See also definition in Wisconsin Rule 1.0(ag) in accompanying chart dated 8/4/09.

Defined Word/Term[1]	Rule Location	Definition/"Explanation" of Word/Term	Notes
		about that lawyer or law firm's services, the primary purpose of which is for the retention of the lawyer or law firm. It does not include communications to existing clients or other lawyers.	
"aggregate settlement"	Rule 1.8.7 [3-310(D)] & Comment [1]	[1] This Rule addresses the conflict issues that arise for a lawyer when the lawyer's clients enter into an aggregate settlement. An aggregate settlement occurs when two or more clients who are represented by the same lawyer resolve their claims, defenses or pleas together, whether in a single matter or in different matters. This can occur in a civil or criminal matter, and it includes a civil settlement made before potential criminal charges are filed. An aggregate settlement in criminal matters often is referred to as a "package deal". This Rule adds an obligation to those the lawyer has under Rule 1.7(b) concerning a lawyer's duties when representing multiple clients in a single matter. It also adds an obligation to those the lawyer has under Rule [1.2(a)] to abide by each client's decision whether to make, accept, or reject an offer of settlement in a civil matter or to enter a guilty or nolo contendere plea in a criminal case. This Rule applies whether or not litigation is pending. However, it does not apply to class action settlements that are subject to court approval.	
"approved depositories for trust accounts"[4]	Rule 1.15(b) [4-100]	(b) Approved depositories for trust accounts. All trust accounts under this Rule shall be in depositories approved by the California Supreme Court in the State of California, except that a trust account may be established elsewhere as expressly ordered by a tribunal. All IOLTA trust accounts as defined in Business and Professions Code section 6211 shall be in depositories that are in compliance with the requirements of Business and Professions Code section 6212.	
"bank charges"	Rule 1.15, Comment [6]	[6] As used in this Rule, "bank charges" include any administrative or service charges charged to a trust account by an approved depository for trust accounts but does not include merchant account charges, chargebacks, or offsets charged in	

[4] See also definition of "approved depository" in South Carolina Rule 1.0(d) in accompanying chart dated 8/4/09.

Defined Word/Term[1]	Rule Location	Definition/"Explanation" of Word/Term	Notes
		connection with a merchant account that is attached to a trust account.	
"Belief" or "believes"[5]	MR 1.0(a)	(a) "Belief" or "believes" denotes that the person involved actually supposed the fact in question to be true. A person's belief may be inferred from circumstances.	
"bona fide"	*Montana Rule 1.0(b)*	*(b) "Bona fide" denotes in or with good faith; honestly, openly, and sincerely; without deceit or fraud.*	
"business transaction with a client"	Rule 1.8.1 [3-300] & Comments [3] – [6].	[3] This Rule applies even when the transaction is not related to the subject matter of the representation, as when a lawyer drafting a will for a client agrees to make a loan to a client to pay expenses that are not related to the representation. This Rule also applies when a lawyer sells to a client goods or non-legal services that are related to the practice of law, such as insurance, brokerage or investment products or. [4] Not all business transactions with a client are within the scope of this Rule. This Rule does not apply to standard commercial transactions for products or services that a lawyer acquires from a client on the same terms that the client generally markets them to others, where the lawyer has no advantage in dealing with the client, and the requirements of the Rule are unnecessary and impractical. Examples of such products and services include banking and brokerage services, medical services, products manufactured or distributed by the client, and utilities' services. The Rule also does not apply to similar types of standard commercial transactions for goods or services offered by a lawyer when the lawyer has no advantage in dealing with the clients, such as when a client purchases a meal at a restaurant owned by the lawyer or when the client pays for parking in a parking lot owned by the lawyer. (See State Bar Formal Opn. 1995-141.) This Rule also ordinarily would not apply where the lawyer and client each	

[5] For variations of the Model Rule definition of "belief or believes," see Georgia Terminology section; New York Rule 1.0(b); and North Dakota Rule 1.0(a), all in accompanying chart dated 8/4/09.

Defined Word/Term[1]	Rule Location	Definition/"Explanation" of Word/Term	Notes
		make an investment on terms offered to the general public or a significant portion thereof as when, for example, a lawyer invests in a limited partnership syndicated by a third party, and the lawyer's client makes the same investment on the same terms. When a lawyer and a client each invest in the same business on the same terms offered to the public or a significant portion thereof, and the lawyer does not advise, influence or solicit the client with respect to the transaction, the lawyer does not enter into the transaction "with" the client for purposes of this Rule. [5] This Rule is not intended to apply to an agreement by which a lawyer is retained by a client or to the modification of such an agreement, unless the agreement or modification confers on the lawyer an ownership, possessory, security, or other pecuniary interest adverse to the client, such as when the lawyer obtains an interest in the client's property to secure the amount of the lawyer's past due or future fees. An agreement by which a lawyer is retained by a client and modifications to such agreements are governed, in part, by Rule 1.5 [Rule 4-200]. An agreement to advance to or deposit with a lawyer a sum to be applied to fees or costs incurred in the future is not an ownership, possessory, security, or other pecuniary interest adverse to the client for purposes of this Rule. This Rule is not intended to apply to an agreement with a client for a contingent fee in a civil case. [6] In general, the negotiation of an agreement by which a lawyer is retained by a client is an arms-length transaction. Setzer v. Robinson (1962) 57 Cal.2d 213 [18 Cal.Rptr. 524]. However, even when this Rule does not apply to the negotiation of the agreement by which a lawyer is retained by a client, other fiduciary principles might apply. Once a lawyer-client relationship has been established, the lawyer owes fiduciary duties to the client that apply to the modification of the agreement. Lawyers should consult case law and ethics opinions to ascertain their professional responsibilities with respect to modifications to an agreement by which a client retains a lawyer's services. (See, e.g., Ramirez v. Sturdevant	

Defined Word/Term[1]	Rule Location	Definition/"Explanation" of Word/Term	Notes
		(1994) 21 Cal.App.4th 904, 913 [26 Cal.Rptr.2d 554]; Berk v. Twentynine Palms Ranchos, Inc. (1962) 201 Cal.App.2d 625 [20 Cal.Rptr. 144]; Carlson, Collins, Gordon & Bold v. Banducci (1967) 257 Cal.App.2d 212 [64 Cal.Rptr. 915].)	
"candidate for judicial office"	Rule 2.4.2(b) [1-700]	(b) For purposes of this Rule, "candidate for judicial office" means a lawyer seeking judicial office by election or appointment. The determination of when a lawyer is a candidate for judicial office by election is defined in the terminology section of the California Code of Judicial Ethics. A lawyer commences to become a candidate for judicial office by appointment at the time of first submission of an application or personal data questionnaire to the appointing authority. A lawyer's duty to comply with paragraph (a) shall end when the lawyer announces withdrawal of the lawyer's candidacy or when the results of the election are final, whichever occurs first, or when the lawyer advises the appointing authority of the withdrawal of the lawyer's application.	
"civil dispute"	Rule 3.10(c) [5-100]	(c) As used in this Rule, the term "civil dispute" means a controversy or potential controversy over the rights and duties of two or more parties under civil law, whether or not an action has been commenced, and includes an administrative proceeding of a quasi-civil nature pending before a federal, state, or local governmental entity.	
"client"[6]	Rule 1.4(c) [3-510] & Comment [3]	(c) A lawyer shall promptly communicate to the lawyer's client: (1) all terms and conditions of any offer made to the client in a criminal matter; and (2) all amounts, terms, and conditions of any written offer of settlement made to the client in all other matters. * * *	

[6] See also Alaska Rule 9.1(b) in accompanying chart dated 8/4/09.

Defined Word/Term[1]	Rule Location	Definition/"Explanation" of Word/Term	Notes
		[3] As used in paragraph (c), "client" includes a person who possesses the authority to accept an offer of settlement or plea, or, in a class action, all the named representatives of the class.	
"client"[7]	Rule 1.15, Comment [3]	[3] As used in this Rule "client" means a prospective, current, or former client for whom not all legal services have been completed, or as to whom not all funds or property have been distributed in accordance with this Rule.	
"communication"[8]	Rule 7.1(a) [1-400]	(a) For purposes of Rules 7.1 through 7.5, "communication" means any message or offer made by or on behalf of a lawyer concerning the availability for professional employment of a lawyer or a lawyer's law firm directed to any former, present, or prospective client, including but not limited to the following: (1) Any use of firm name, trade name, fictitious name, or other professional designation of such lawyer or law firm; or (2) Any stationery, letterhead, business card, sign, brochure, domain name, Internet web page or web site, e-mail, other material sent or posted by electronic transmission, or other writing describing such lawyer or law firm; or (3) Any advertisement (regardless of medium) of such lawyer or law firm directed to the general public or any substantial portion thereof; or (4) Any unsolicited correspondence, electronic transmission, or other writing from a lawyer or law firm directed to any person or entity.	

[7] See footnote 6.

[8] See also "computer-assisted communication" and "electronic communication"

Defined Word/Term[1]	Rule Location	Definition/"Explanation" of Word/Term	Notes
"competence"[9]	Rule 1.1(b) [3-110] & Comment [2]	(b) For purposes of this Rule, "competence" in any legal service shall mean to apply the 1) diligence, 2) learning and skill, and 3) mental, emotional, and physical ability reasonably necessary for the performance of such service. * * * [2] Competence under paragraph (b) includes the obligation to act with reasonable diligence on behalf of a client. This includes pursuing a matter on behalf of a client by taking lawful and ethical measures required to advance the client's cause or objectives. A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy on the client's behalf. A lawyer is not bound, however, to press for every advantage that might be realized for a client. For example, a lawyer may exercise professional discretion in determining the means by which a matter should be pursued. See Rules [1.2] and 1.4. The lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect.	
"computer-assisted communication"[10]	*New York Rule 1.0(c)*	*(c) "Computer-accessed communication" means any communication made by or on behalf of a lawyer or law firm that is disseminated through the use of a computer or related electronic device, including, but not limited to, web sites, weblogs, search engines, electronic mail, banner advertisements, pop-up and pop-under advertisements, chat rooms, list servers, instant messaging, or other internet presences, and any attachments or links related thereto.*	
"confidential government information"	Rule 1.11(c) [3-310]	(c) Except as law may otherwise expressly permit, a lawyer having information that the lawyer knows is confidential government information about a person acquired when the lawyer was a public officer or employee, may not represent a private client whose interests are adverse to that person in a	

[9] See also "fitness".

[10] See also "communication" and "electronic communication".

Defined Word/Term[1]	Rule Location	Definition/"Explanation" of Word/Term	Notes
		matter in which the information could be used to the material disadvantage of that person. ***As used in this Rule, the term "confidential government information" means information that has been obtained under governmental authority, that , at the time this Rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose, and that is not otherwise available to the public***. A firm with which that lawyer is associated may undertake or continue representation in the matter only if the disqualified lawyer is timely and effectively screened from any participation in the matter and is apportioned no part of the fee therefrom in accordance with the provisions of paragraph (b). (Emphasis added).	
"confidential information relating to the representation"[11]	Rule 1.6(a) [3-100] & Comments [3] – [3C]	(a) A lawyer shall not reveal information protected from disclosure by Business and Professions Code section 6068(e)(1) unless the client gives informed consent or the disclosure is permitted by paragraph (b). The information protected from disclosure by section 6068(e)(1) is referred to as "confidential information relating to the representation" in this Rule. * * * [3] [ALT-C2] *Confidential Information Relating to the Representation*. As used in this Rule, "confidential information relating to the representation" consists of information gained in connection with the representation of a client, whatever its source, that is (a) protected by the lawyer-client privilege, (b) likely to be embarrassing or detrimental to the client if disclosed, or (c) information that the client has requested be kept confidential. Therefore, the lawyer's duty of confidentiality is broader than lawyer-client privilege. (See In the Matter of Johnson (Rev. Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179; Goldstein v. Lees (1975) 46 Cal.App.3d 614, 621 [120 Cal. Rptr. 253].).	

[11] See also N.Y. Rule 1.0(d); N.C. Rule 1.0(b); Oregon Rule 1.0(f); and Wyoming Rule 1.0(b), all in accompanying chart dated 8/4/09. New York and North Carolina simply cross-reference Rule 1.6 in the respective paragraphs of their Rule 1.0.

Defined Word/Term[1]	Rule Location	Definition/"Explanation" of Word/Term	Notes
		[3A] *Lawyer-Client Privilege*. The protection against compelled disclosure or compelled production that is afforded lawyer-client communications under the privilege is typically asserted in judicial and other proceedings in which a lawyer or client might be called as a witness or otherwise compelled to produce evidence. Because the lawyer-client privilege functions to limit the amount of evidence available to a tribunal, its protection is somewhat limited in scope. [3B] *Duty of Confidentiality*. A lawyer's duty of confidentiality, on the other hand, is not so limited as the lawyer-client privilege. The duty protects the relationship of trust between a lawyer and client by preventing the lawyer from revealing the client's confidential information, regardless of its source and even when not confronted with compulsion. As a result, any information the lawyer has learned during the representation, even if not relevant to the matter for which the lawyer was retained, is protected under the duty so long as the lawyer acquired the information by virtue of being in the lawyer-client relationship. Information relating to the representation is not concerned only with information that a lawyer might learn after a lawyer-client relationship has been established. Information that a lawyer acquired about a client before the relationship was established, but which is relevant to the matter for which the lawyer is retained, is protected under the duty regardless of its source. The duty also applies to information a lawyer acquires during a lawyer-client consultation, whether from the client or the client's representative, even if a lawyer-client relationship does not result from the consultation. (See Rule 1.18.) Thus, a lawyer may not reveal information relating to the representation except with the consent of the client or an authorized representative of the client, or as authorized by these Rules or the State Bar Act. See comment [M9]. [3C] *Lawyer Work Product*. Confidential information relating to the representation and contained in lawyer work product is protected under this Rule. However, "confidential information relating to the representation" does not ordinarily include (i) a	

Defined Word/Term[1]	Rule Location	Definition/"Explanation" of Word/Term	Notes
		lawyer's legal knowledge or legal research or (ii) information that is generally known in the local community or in the trade, field or profession to which the information relates.	
"Confirmed in writing"[12]	MR 1.0(b)	(b) "Confirmed in writing," when used in reference to the informed consent of a person, denotes informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent. See paragraph (e) for the definition of "informed consent." If it is not feasible to obtain or transmit the writing at the time the person gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.	
"consult" or "consultation"[13]		*"Consult" or "consultation" denotes communication of information reasonably sufficient to permit the client to understand the significance of the matter in question.*	
"costs"	Rule 1.8.5(a)(3) [4-210] & Comment [3]	(a) A lawyer shall not directly or indirectly pay or agree to pay, guarantee, or represent that the lawyer or lawyer's law firm will pay the personal or business expenses of a prospective or existing client, except that a lawyer may: * * * (3) advance the costs of prosecuting or defending a claim or action, or of otherwise protecting or promoting the client's interests, the repayment of which may be contingent on the outcome of the matter. "Costs" within the meaning of this paragraph (a)(3) are limited to all reasonable expenses of litigation, including court costs, and reasonable expenses in preparing for litigation or in providing	

[12] For variations in the Model Rule definition of "confirmed in writing," see Indiana Rule 1.0(b); New Jersey Rule 1.0(b); New York Rule 1.0(e); North Dakota Rule 1.0(b) ("consent in writing"); Penn. Rule 1.0(b); and Wyoming Rule 1.0(c), all in accompanying chart dated 8/4/09.

[13] This definition is found in the 1983 version of the Model Rules, Terminology section. Ethics 2000 deleted it when it adopted in its conflicts rules the clause, "the client gives informed consent, confirmed in writing." In the 1983 version of the Model Rules, the clause used was "the client consents after consultation." A good explanation for the change is found in Missouri Rule 1.0, cmt. [8]. Nevertheless, many jurisdictions have retained it: Alaska, D.C., Florida, Kansas, Maryland, Minnesota, Montana, North Dakota, South Carolina, Texas, Utah, Wisconsin.

Defined Word/Term[1]	Rule Location	Definition/"Explanation" of Word/Term	Notes
		other legal services to the client; * * * [3] "Costs", as defined in paragraph (a)(3) are not limited to those that are taxable or recoverable under any applicable statute or rule of court.	
"differing interests"	*New York Rule 1.0(f)*	*(f) "Differing interests" include every interest that will adversely affect either the judgment or the loyalty of a lawyer to a client, whether it be a conflicting, inconsistent, diverse, or other interest.*	
"diligence"	Rule 1.1 [3-110] & Comment [2]	See "competence," Rule 1.1	
"directly adverse"	Rule 1.7(a) [3-310] & Comments [5] – [7]	(a) Representation directly adverse to current client. A lawyer shall not accept or continue representation of a client in a matter in which the lawyer's representation of that client will be directly adverse to another client the lawyer currently represents in another matter, without informed written consent from each client. * * * [5] Paragraph (a) applies only to engagements in which the lawyer's work in a matter is directly adverse to a current client in any matter. The term "direct adversity" reflects a balancing of competing interests. The primary interest is to prohibit a lawyer from taking actions "adverse" to his or her client and thus inconsistent with the client's reasonable expectation that the lawyer will be loyal to the client. The word "direct" limits the scope of the rule to take into account the public policy favoring the right to select counsel of one's choice and the reality that the conflicts rules, if construed overly broadly, could become unworkable. As a consequence of this balancing and the variety of situations in which the issue can arise, there is no single definition of when a lawyer's actions are directly adverse to a current client for purposes of this Rule. [6] Generally speaking, a lawyer's work on a matter will	

Defined Word/Term[1]	Rule Location	Definition/"Explanation" of Word/Term	Notes
		not be directly adverse to a person if that person is not a party to the matter, even if the non-party's interests could be affected adversely by the outcome of the matter . However, in some situations, a lawyer's work could be directly adverse to a non-party if that non-party is an identifiable target of a litigation or non-litigation representation, or a competitor for a particular transaction (as would occur, for example, if one client were in competition with another of the lawyer's clients on other matters to purchase or lease an asset or to acquire an exclusive license). Similarly, direct adversity can arise when a lawyer cross-examines a non-party witness who is the lawyer's client in another matter, if the examination is likely to harm or embarrass the witness. (See Hernandez v. Paicius (2003) 109 Cal.App.4th 452, 463-469 [134 Cal.Rptr.2d 756, 764-767].) [7] Not all representations that might be harmful to the interests of a client create direct adversity governed by paragraph (a). The following are among the instances that ordinarily would not constitute direct adversity: (1) the representation of business competitors in different matters, even if a positive outcome for one might strengthen its competitive position against the other; (2) a representation adverse to a non-client where another client of the lawyer is interested in the financial welfare or the profitability of the non-client, as might occur, e.g., if a client is the landlord of, or a lender to, the non-client; (3) working for an outcome in litigation that would establish precedent economically harmful to another current client who is not a party to the litigation; (4) representing clients having antagonistic positions on the same legal question that has arisen in different cases, unless doing so would interfere with the lawyer's ability to represent either client competently, as might occur, e.g., if the lawyer were advocating inconsistent positions in front of the same tribunal; and (5) representing two clients who have a dispute with one another if the lawyer's work for each client concerns matters other than the dispute.	

Defined Word/Term[1]	Rule Location	Definition/"Explanation" of Word/Term	Notes
"disclosure to the client"[14]	Rule 1.8.1 [3-300] & Comments [8] – [11]	[8] Paragraph (a) requires that full disclosure be transmitted to the client in writing in a manner that reasonably can be understood by the client. Whether the disclosure reasonably can be understood by the client is based on what is objectively reasonable under the circumstances. [9] The requirement for full disclosure in writing in paragraph (a) requires a lawyer to provide the client with the same advice regarding the transaction or acquisition that the lawyer would provide to the client in a transaction with a third party. Beery v. State Bar (1987) 43 Cal.3d 802 [239 Cal.Rptr. 121]. It requires a lawyer to inform the client of all of the terms and all relevant facts of the transaction or acquisition, including the nature and extent of the lawyer's role and compensation in connection the transaction or acquisition. It also requires the lawyer to fully inform the client of the risks of the transaction or acquisition and facts that might discourage the client from engaging in the transaction or acquisition. (See Rodgers v. State Bar (1989) 48 Cal.3d 300 [256 Cal.Rptr. 381]; Clancy v. State Bar (1969) 71 Cal.2d 140 [77 Cal.Rptr. 657]; Brockway v. State Bar (1991) 53 Cal.3d 51 [278 Cal.Rptr. 836].) Except in a disciplinary proceeding, the burden is always on the lawyer to show that the transaction or acquisition and its terms were fair and just and that the client was fully advised. Felton v. Le Breton (1891) 92 Cal. 457, 469 [28 P. 490, 494]. [10] The risk to a client is heightened when the client expects the lawyer to represent the client in the transaction or acquisition itself. Under this Rule, the lawyer must disclose the risks associated with the lawyer's dual role as both legal adviser and participant in the transaction or acquisition, such as the risk that the lawyer will structure the transaction or acquisition or give legal advice in a way that favors the lawyer's interests at the expense of the client. Because the lawyer has an interest in the transaction or acquisition, the lawyer must also comply with Rule 1.7(d). In some cases, the	

[14] See also MR 1.0(f) definition of "informed consent."

Defined Word/Term[1]	Rule Location	Definition/"Explanation" of Word/Term	Notes
		lawyer's interest may be such that Rule 1.7 will preclude the lawyer from representing the client in the transaction or acquisition. [11] There are additional considerations when the lawyer-client relationship will continue after the transaction or acquisition. For example, if the lawyer and the client enter into a transaction to form or acquire a business, the client might expect the lawyer to represent the business or the client with respect to the business after the transaction is completed. When the lawyer knows or reasonably should know that the client expects the lawyer to represent the business or the client with respect to the business or interest after the transaction or acquisition is completed, the lawyer must act in either of two ways. Before entering into the transaction or making the acquisition, the lawyer must either (i) inform the client that the lawyer will not represent the business, or the client with respect to the business or interest, and must then act accordingly; or (ii) disclose in writing the risks associated with the lawyer's dual role as both legal adviser and participant in the business or owner of the interest. The client consent requirement in paragraph (c) includes a requirement that the client consent to the risks to the lawyer's representation of the client, which the lawyer has disclosed to the client as required by this Rule. A lawyer must also comply with the requirements of Rule 1.7(d) when the lawyer has an interest in the subject matter of the representation as a result of the transaction or acquisition. [12] Even when the lawyer does not represent the client in the transaction or acquisition, there may be circumstances when the lawyer's interest in the transaction or acquisition may interfere with the lawyer's independent professional judgment or faithful representation of the client in another matter. When the lawyer's interest in the transaction or acquisition may interfere with the lawyer's independent professional judgment or faithful representation of the client, the lawyer must also disclose in writing the potential adverse effect on the lawyer-client relationship that may result from the lawyer's interest in	

Defined Word/Term[1]	Rule Location	Definition/"Explanation" of Word/Term	Notes
		the transaction or acquisition and must obtain the client's consent under paragraph (c). A lawyer must also comply with the requirements of Rule 1.7(d) when the lawyer has an interest in the subject matter of the representation as a result of the transaction or acquisition.	
"Disclosure"[15]	Rule 1.7 [3-310]	(1) "Disclosure" means informing the client or former client of the relevant circumstances and of the actual and reasonably foreseeable adverse consequences of those circumstances to the client or former client;	
"domestic lawyer"	*Georgia Terminology section*	*"Domestic Lawyer" denotes a person authorized to practice law by the duly constituted and authorized governmental body of any State or Territory of the United States or the District of Columbia but not authorized by the Supreme Court of Georgia or its rules to practice law in the State of Georgia.*	
"electronic communication"[16]	*Oregon Rule 1.0(d)*	*(c) "Electronic communication" includes but is not limited to messages sent to newsgroups, listservs and bulletin boards; messages sent via electronic mail; and real time interactive communications such as conversations in internet chat groups and conference areas and video conferencing.*	
"Employ"	Rule 5.3.1(a)(1) [1-311]	(1) "Employ" means to engage the services of another, including employees, agents, independent contractors and consultants, regardless of whether any compensation is paid;	
"entrusted funds"	Rule 1.15, Comment [4]	[4] As used in this Rule "entrusted funds" means funds that have been put into the care of a lawyer, by or on behalf of a client or other person in connection with the performance of a legal service or representation, that are held for the benefit of the client or other person, regardless of whether the funds are deposited or held in a trust account. Entrusted funds do not include (i) an advance for fees unless there is an agreement between the lawyer and the client or other person that the	

[15] See also MR 1.0(e) definition of "informed consent."

[16] See also "communication," "computer-assisted communication".

Defined Word/Term[1]	Rule Location	Definition/"Explanation" of Word/Term	Notes
		advance for fees will be held in trust; (ii) funds belonging wholly to a lawyer or law firm; (iii) payments for undisputed past-due fees; or (iv) undisputed reimbursement by a client or other person for costs advanced by a lawyer or law firm.	
"firm" or "law firm"[17]	MR 1.0(c).	(c) "Firm" or "law firm" denotes a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation or other organization.	
"fitness"[18]	*Texas Terminology section*	*"Fitness" denotes those qualities of physical, mental and psychological health that enable a person to discharge a lawyer's responsibilities to clients in conformity with the Texas Disciplinary Rules of Professional Conduct. Normally a lack of fitness is indicated most clearly by a persistent inability to discharge, or unreliability in carrying out, significant obligations.*	
"flat fee"[19]	Rule 1.5(f)(2) [4-200]	(2) a lawyer may charge a flat fee for specified legal services, which constitutes complete payment for those services and is paid in whole or in part in advance of the lawyer providing the services. If agreed to in advance in a writing signed by the client, a flat fee is the lawyer's property on receipt. The written fee agreement shall, in a manner that can easily be understood by the client, include the following: (i) the scope of the services to be provided; (ii) the total amount of the fee and the terms of payment; (iii) that the fee is the lawyer's property	

[17] See also "law firm," below. For variations of the Model Rule definition of "firm or law firm," see Alaska Rule 9.1(e); Arizona Rule 1.0(c); D.C. Rule 1.0(c); Florida Terminology section; Maine Rule 1.0(c); Maryland Rule 1.0(d); Mass. Rule 9.1(d); Michigan Rule 1.0(c); New York Rule 1.0(h); N.C. Rule 1.0(d); Ohio Rule 1.0(c); Oregon Rule 1.0(d); S.C. Rule 1.0(c); Tenn. Rule 1.0(c); Texas Terminology section; Vermont Rule 1.0(c); Virginia Terminology section; and Wisconsin Rule 1.0(d), all in accompanying chart dated 8/4/09.

[18] See also "competence".

[19] See also Wisconsin Rule 1.0(dm) in accompanying chart dated 8/4/09.

Defined Word/Term[1]	Rule Location	Definition/"Explanation" of Word/Term	Notes
		immediately on receipt; (iv) that the fee agreement does not alter the client's right to terminate the client-lawyer relationship; and (v) that the client may be entitled to a refund of a portion of the fee if the agreed-upon legal services have not been completed.	
"foreign lawyer"	*Georgia Terminology section*	*"Foreign Lawyer" denotes a person authorized to practice law by the duly constituted and authorized governmental body of any foreign nation but not authorized by the Supreme Court of Georgia or its Rules to practice law in the State of Georgia.*	
"fraud" or "fraudulent"[20]	MR 1.0(d)	(d) "Fraud" or "fraudulent" denotes conduct that is fraudulent under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive.	
"in connection with the performance of a legal service or representation"	Rule 1.15, Comment [2]	[2] As used in this Rule "in connection with the performance of a legal service or representation" means that there is a relationship between the actions of a lawyer in his or her capacity as a lawyer and the receipt or holding of funds from a client or other person. The provisions of this Rule are also applicable when a lawyer serves a client both as a lawyer and as one who renders nonlegal services. (Kelly v. State Bar (1991) 53 Cal.3d 509, 517 [280 Cal.Rptr. 298].) Although lawyers who provide fiduciary services that are not related to the performance of a legal service or representation may be required to handle funds in a fiduciary manner (e.g., when serving as an executor, escrow agent for parties to an escrow who are not clients, or as a trustee for a non-client), this Rule does not govern those activities. Because the latter fiduciary accounts are governed by other law, funds should be maintained in separate fiduciary accounts and not in a trust account established under this Rule. However, the failure to discharge fiduciary duties in relation to the provision of such	

[20] See also "misrepresentation".

For variations in other jurisdictions of the MR definition of "fraud," see Alaska Rule 9.1(d); New York Rule 1.0(i); North Carolina Rule 1.0(e); North Dakota Rule 1.0(e); Ohio Rule 1.0(d); South Carolina Rule 1.0(f); Tennessee Rule 1.0(d); Washington Rule 1.0(d); and Wisconsin Rule 1.0(e), all in the accompanying chart dated 8/4/09.

Defined Word/Term[1]	Rule Location	Definition/"Explanation" of Word/Term	Notes
		services may result in discipline for other violations. (See, e.g., Business and Professions Code section 6106.)	
"informed consent" [21]	MR 1.0(e)	(e) "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.	
"Informed written consent"[22]	Rule 1.7 [3-310]	(2) "Informed written consent" means the client's or former client's written agreement to the representation following written disclosure;	
"Involuntarily inactive member"	Rule 5.3.1(a)(3) [1-311]	(3) "Involuntarily inactive member" means a member who is ineligible to practice law as a result of action taken pursuant to Business and Professions Code sections 6007, 6203(d)(1), or California Rule of Court 958(d); and	
"judge" or "judicial officer"[23]	Rule 3.5(c) [5-300]	(c) As used in this Rule, "judge" and "judicial officer" shall include law clerks, research attorneys, other court personnel who participate in the decisionmaking process, and neutral arbitrators.	
"jurisdiction"[24]	*North Dakota Rule 1.0(f)*	*(f) "Jurisdiction" means this state, another state of the United States, the District of Columbia, Puerto Rico, or a territory or possession of the United States.*	
"juror"	Rule 3.5(l) [5-300]	(l) For the purposes of this Rule, "juror" means any empaneled, discharged, removed, or excused juror.	

[21] For variations of the MR's "informed consent" definition, see Alaska Rule 1.0(g); Maine Rule 1.0(e); proposed Michigan Rule 1.0(e); Missouri Rule 1.0, cmt. [8]; NY Rule 1.0(j); North Carolina 1.0(f); Oregon Rule 1.0(g); Penn. Rule 1.0(e); South Carolina Rule 1.0(g); and Wyoming Rule 1.0(f), all in accompanying chart dated 8/4/09.

[22] See also Model Rule 1.0(e).

[23] See also "adjudicative officer," above.

[24] See also "state".

Defined Word/Term[1]	Rule Location	Definition/"Explanation" of Word/Term	Notes
"knowingly," "known," or "knows"[25]	MR 1.0(f)	(f) "Knowingly," "known," or "knows" denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.	
"knowingly permit"[26]	Rule 8.4.1(a)(1) [2-400]	(1) "knowingly permit" means a failure to advocate corrective action where the managerial or supervisory lawyer knows of a discriminatory policy or practice that results in the unlawful discrimination prohibited in paragraph (b);	
"law clerk"	*D.C. Rule 1.0(g)*	*(g) "Law clerk" denotes a person, typically a recent law school graduate, who acts, typically for a limited period, as confidential assistant to a judge or judges of a court; to an administrative law judge or a similar administrative hearing officer; or to the head of a governmental agency or to a member of a governmental commission, either of which has authority to adjudicate or to promulgate rules or regulations of general application.*	
"law firm"[27]	Rule 1.0.1 & Comments See also MR 1.10, Comment [1].	"Law firm" means a law partnership; a professional law corporation; a sole proprietorship or an association engaged in the practice of law; or lawyers employed in a legal services organization or in the legal department, division or office of a corporation, a government entity or other organization. * * * [1] A sole proprietorship is a law firm for purposes of these Rules. Whether two or more lawyers constitute a law firm can depend on the specific facts. For example, two practitioners who share office space and occasionally consult or assist each other ordinarily would not be regarded as constituting a firm. However, if they present themselves to the	

[25] For variations of MR 1.0(f), see Oregon Rule 1.0(h); and proposed Tenn. Rule 1.0(f), both in accompanying chart dated 8/4/09.

[26] See also MR 1.0(f) for definition of "knowingly," known," or "knows".

[27] See also MR 1.0(c) for a definition of "firm" or "law firm," above. There are numerous variations of the term "firm" in other jurisdictions, including: Alaska, D.C., Florida, Maine, Maryland, Massachusetts, Michigan, New York, North Carolina, Ohio, Oregon, South Carolina, Tennessee, Texas, Vermont, Virginia, and Wisconsin.

Defined Word/Term[1]	Rule Location	Definition/"Explanation" of Word/Term	Notes
		public in a way that suggests that they are a firm or conduct themselves as a firm, they may be regarded as a law firm for purposes of these Rules. The terms of any formal agreement between associated lawyers are relevant in determining whether they are a firm, as is the fact that they have mutual access to information concerning the clients they serve. Furthermore, it is relevant in doubtful cases to consider the underlying purpose of the rule that is involved. [2] Whether a lawyer who is denominated as "of counsel" should be deemed a member of law firm can also depend on the specific facts. The term "of counsel" implies that the lawyer so designated has a relationship with the firm, other than as a partner or associate, or officer or shareholder, that is close, personal, continuous, and regular. Thus, to the extent the relationship between a law firm and a lawyer is sufficiently "close, personal, regular and continuous," such that the lawyer is held out to the public as "of counsel" for the law firm, the relationship of the firm and "of counsel" lawyer will be considered a single firm for purposes of disqualification. See, e.g., People ex rel Department of Corporations v. Speedee Oil Change Systems, Inc. (1999) 20 Cal.4th 1135 [86 Cal.Rptr.2d 816]. On the other hand, even when a lawyer has associated as "of counsel" with another lawyer and is providing extensive legal services on a matter, they will not necessarily be considered the same firm for purposes of dividing fees under Rule 1.5.1 [2-200] where, for example, they both continue to maintain independent law practices with separate identities, separate addresses of record with the State Bar, and separate clients, expenses, and liabilities. See, e.g., Chambers v. Kay (2002) 29 Cal.4th 142 [126 Cal.Rptr.2d 536]. [3] With respect to the law department of an organization, including the government, there is ordinarily no question that the members of the department constitute a law firm within the meaning of these Rules. There can be uncertainty, however, as to the identity of the client. For example, it may not be clear whether the law department of a corporation represents a subsidiary or an affiliate corporation, as well as the corporation	

Defined Word/Term[1]	Rule Location	Definition/"Explanation" of Word/Term	Notes
		by which the members of the department are directly employed. A similar question can arise concerning an unincorporated association and its local affiliates. [4] Similar questions can also arise with respect to lawyers in legal aid and legal services organizations. Depending upon the structure of the organization, the entire organization or different components of it may constitute a firm or firms for purposes of these Rules. [5] This Rule is not intended to authorize any person or entity to engage in the practice of law in this state except as otherwise permitted by law.	
"Law-related Services"	Rule 5.7(a) & Comment [2]	(a) "Law-Related Services". As used in this Rule, the term "law-related services" means services that a lawyer reasonably would be expected to perform in conjunction with or as part of the practice of law, even if the services might lawfully have been performed by non-lawyers. * * * [2] Paragraph (a) defines "law-related" services based on the reasonable belief of the recipient of the services. That belief can be based on what the lawyer says or fails to say about the nature of the services being provided. This belief also can be based on the nature of the services, that is, if they call upon the lawyer to give legal advice or counsel, to examine the law, or to pass upon the legal effect of any act, document, or law. Examples of law-related services include serving as the agent for a client in the sale of an airplane (Kelly v. State Bar (1991) 53 Cal.3d 509, 514-17), acting as the Executor of a Will (Layton v. State Bar (1990) 50 Cal.3d 889, 904), providing real estate title and brokerage services (Crawford v. State Bar (1960) 54 Cal.2d 659, 668), providing debt collection services (Alkow v. State Bar (1952) 38 Cal.2d 257, 263), and providing tax preparation services (Libarian v. State Bar (1944) 25 Cal.2d 314, 317-18).	

Defined Word/Term[1]	Rule Location	Definition/"Explanation" of Word/Term	Notes
"lawyer"[28]	*Fla. Terminology section*	*"Lawyer" denotes a person who is a member of The Florida Bar or otherwise authorized to practice in any court of the State of Florida.*	
"legal assistant"[29]	*North Dakota Rule 1.0(h).*	*(h) "Legal Assistant" (or paralegal) means a person who assists lawyers in the delivery of legal services, and who through formal education, training, or experience, has knowledge and expertise regarding the legal system and substantive and procedural law which qualifies the person to do work of a legal nature under the direct supervision of a licensed lawyer.*	
"maintain a normal client-lawyer relationship with the client"	Rule 1.14(a) & Comment [2]	As used in paragraph (a) of this Rule, the lawyer's obligation to "maintain a normal client-lawyer relationship with the client" may require the lawyer to use a manner and means of communication adapted to the client's ability to comprehend and deliberate.	
"managing agent"	Rule 4.2 [2-100], Comment [12]	[12] As used in paragraph (b)(1) "managing agent" means an employee, member, agent or other constituent of a represented organization with general powers to exercise discretion and judgment with respect to the matter on behalf of the organization. A constituent's official title or rank within an organization is not necessarily determinative of his or her authority.	
"matter"[30]	Rule 4.2(a) [2-100]	(a) In representing a client, a lawyer shall not communicate directly or indirectly about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer	See Comment [4], which provides: [4] As used in paragraph (a), "the subject of the representation," "matter," and "person" are not limited

[28] Georgia also provides a definition of "lawyer": "Lawyer," denotes a person authorized by the Supreme Court of Georgia or its Rules to practice law in the State of Georgia including persons admitted to practice in this state pro hac vice.

See also "domestic lawyer" and "foreign lawyer," above.

[29] See also "nonlawyer assistant".

[30] For other definitions of "matter," see Alaska Rule 9.1(i); D.C. Rule 1.0(h); New York Rule 1.0(l); North Dakota Rule 1.0(i); and Oregon Rule 1.0(i), all in accompanying chart dated 8/4/09.

Defined Word/Term[1]	Rule Location	Definition/"Explanation" of Word/Term	Notes
		has the consent of the other lawyer.	to a litigation context. This Rule applies to communications with any person, whether or not a party to a formal adjudicative proceeding, contract or negotiation, who is represented by counsel concerning the matter to which the communication relates.
"matter"[31]	Rule 1.9 [3-310], Comment [2]	MR 1.9, cmt. [2],[32] provides: [2] The scope of a "matter" for purposes of this Rule depends on the facts of a particular situation or transaction. The lawyer's involvement in a matter can also be a question of degree. When a lawyer has been directly involved in a specific transaction, subsequent representation of other clients with materially adverse interests in that transaction clearly is prohibited. On the other hand, a lawyer who recurrently handled a type of problem for a former client is not precluded from later representing another client in a factually distinct problem of that type even though the subsequent representation involves a position adverse to the prior client. Similar considerations can apply to the reassignment of military lawyers between defense and prosecution functions within the same military jurisdictions. The underlying question is whether the lawyer was so involved in the matter that the subsequent representation can be justly regarded as a changing of sides in the matter in question.	
"matter"[33]	Rule 1.11(f)	(f) As used in this Rule, the term "matter" includes: (1) any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation,	

[31] See footnote 30.

[32] Consultant's Note: I've included the Comment to the MR because the RRC still has that rule under debate.

[33] See footnote 30.

Defined Word/Term[1]	Rule Location	Definition/"Explanation" of Word/Term	Notes
		arrest or other particular matter involving a specific party or parties, and (2) any other matter covered by the conflict of interest rules of the appropriate government agency.	
"Member"	Rule 5.3.1(a)(2) [1-311]	(2) "Member" means a member of the State Bar of California.	
"misrepresentation"[34]	*Wisconsin Rule 1.0(h)*	*(h) "Misrepresentation" denotes communication of an untruth, either knowingly or with reckless disregard, whether by statement or omission, which if accepted would lead another to believe a condition exists that does not actually exist.*	
"moral turpitude"	Rule 8.4(b) [1-120X]	No definition	RRC made a conscious decision not to define in the rule.
"nonlawyer assistant"[35]	*Alabama Terminology section*	*"Nonlawyer assistant" denotes any nonlawyer employee, full or part-time, of a lawyer or law firm.*	
"other lawyers possessing comparable managerial authority in a law firm"	Rule 5.1(a), (c) Rule 5.3(a), (c)	No definition	Model Rules also do not define. Intended primarily to address the fact that in government law offices and corporate law departments there will be lawyers who have responsibilities similar to partners in private law firms.
"other misconduct warranting discipline"	Rule 8.4(b) [1-120X] & Comment [4]	[4] Regarding paragraph (b), a lawyer may be disciplined for criminal acts as set forth in Article 6 of the State Bar Act, (Business & Professions Code, sections 6101 et seq.), or if the criminal act constitutes "other misconduct warranting discipline" as defined by California Supreme Court case law. (See e.g., In re Kelley (1990) 52 Cal.3d 487 [276 Cal.Rptr. 375]; In re Rohan (1978) 21 Cal.3d 195, 203 [145 Cal.Rptr. 855] [wilful failure to file a federal income tax return]; In re	

[34] See also "fraud" or "fraudulent".

[35] See also "legal assistant".

Defined Word/Term[1]	Rule Location	Definition/"Explanation" of Word/Term	Notes
		Morales (1983) 35 Cal.3d 1 [196 Cal.Rptr. 353] [twenty-seven counts of failure to pay payroll taxes and unemployment insurance contributions as employer].)	
"partner"[36]	MR 1.0(g)	(g) "Partner" denotes a member of a partnership, a shareholder in a law firm organized as a professional corporation, or a member of an association authorized to practice law.	
"person"[37]	Rule 4.2(b) [2-100]	(b) For purposes of this Rule, a "person" includes: (1) A current officer, director, partner, or managing agent of a corporation, partnership, association, or other represented organization; or (2) A current employee, member, agent or other constituent of a represented organization if the subject matter of the communication is any act or omission of the employee, member, agent or other constituent in connection with the matter, which may be binding upon or imputed to the organization for purposes of civil or criminal liability, or if the statement of such person may constitute an admission on the part of the organization.	
"person who is related by blood or marriage"	Rule 1.8.3(b) [4-400]	(b) For purposes of this Rule, related persons include "a person who is related by blood or marriage" as that term is defined in Cal. Probate Code, section 21350(b).	
"personally and substantially"[38]	Rule 1.12, Comment [1]	[1] This Rule generally parallels Rule 1.11. "Personally and substantially" is intended to include the receipt or acquisition of confidential information that is material to the matter. The term "personally and substantially" signifies that a	

[36] For variations of the MR definition of "partner," see D.C. Rule 1.0(i); Michigan Rule 1.0(g); Montana Rule 1.0(g); Pennsylvania Rule 1.0(g); Tenn. Rule 1.0(g); Texas Rule 1.0(g); Vermont Rule 1.0(g); Virginia Rule 1.0(g);

[37] For variations on the definition of "person," see Alaska Rule 9.1(k); Connecticut Rule 1.0(b), Massachusetts Rule 9.1(k); Michigan Rule 1.0.1(b); New York Rule 1.0(n); and Texas Terminology section, all in accompanying chart dated 8/4/09.

[38] See also "primary responsibility"; Ohio Rule 1.0, cmt. [11].

Defined Word/Term[1]	Rule Location	Definition/"Explanation" of Word/Term	Notes
		judge who was a member of a multimember court, and thereafter left judicial office to practice law, is not prohibited from representing a client in a matter pending in the court, but in which the former judge did not participate, or acquire confidential information. So also the fact that a former judge exercised administrative responsibility in a court does not prevent the former judge from acting as a lawyer in a matter where the judge had previously exercised remote or incidental administrative responsibility that did not affect the merits, such as uncontested procedural duties typically performed by a presiding or supervising judge or justice. Compare the Comment to Rule 1.11. The term "adjudicative officer" includes such officials as judges pro tempore, referees, special masters, hearing officers and other parajudicial officers, and also lawyers who serve as part-time judges.	
"practice law" or "practice of law"	Rule 5.4(a) Rule 5.5(a) & Comment [2] Rule 5.6(a)	No definition. *But see* proposed Rule 5.5, Comment [2]: [2] Paragraph (b) prohibits lawyers from practicing law in California unless admitted to practice in this state or otherwise entitled to practice law in this state by court rule or other law. (See California Business and Professions Code, sections 6125 and 6126. See also California Rules of Court, rules 9.45 [registered legal services attorneys], 9.46 [registered in-house counsel], 9.47 [attorneys practicing law temporarily in California as part of litigation], 9.48 [non-litigating attorneys temporarily in California to provide legal services], 9.40 [counsel pro hac vice], rule 9.41 [appearance by military counsel], 9.42 [certified law students], rule 9.43 [out-of-state attorney arbitration counsel program] and rule 9.44 [registered foreign legal consultant].) A lawyer does not violate paragraph (b) to the extent the lawyer is engaged in activities authorized by any other applicable exception. (See, e.g., 28 U.S.C. sections 515-519, 530C(c)(1); 35 U.S.C. section 32(b)(2)(D) and *Sperry v. Florida ex rel. Florida Bar* (1963) 373 U.S. 379 [83 S.Ct. 1322]; *Augustine v. Dept. of Veteran Affairs* (Fed. Cir. 2005) 429 F.3d 1334.)	

Defined Word/Term[1]	Rule Location	Definition/"Explanation" of Word/Term	Notes
"primary responsibility"[39]	*New Jersey Rule 1.)(h)*	*(h) "Primary responsibility" denotes actual participation in the management and direction of the matter at the policy-making level or responsibility at the operational level as manifested by the continuous day-to-day responsibility for litigation or transaction decisions.*	
"professional legal corporation"	*New York Rule 1.0(o)*	*(o) "Professional legal corporation" means a corporation, or an association treated as a corporation, authorized by law to practice law for profit.*	
"property"	Rule 1.15, Comment [1]	[1] As used in this Rule, "property" means (a) a tangible or intangible asset, other than funds, in which a client or other person claims any ownership interest or right of possession or enjoyment. Property does not include a client's file except for anything in it that has pecuniary value (e.g., a negotiable instrument) or intrinsic value (e.g., a will or trust). Regarding the client's file, see Rule 1.16(e). All references in this Rule to "a client or other person" mean a client or other person for whose benefit the lawyer holds funds or property.	
"prosecutor"[40]	Rule 3.8 [5-110], Comment [1A]	[1A] The term "prosecutor" in this Rule includes the office of the prosecutor and all lawyers affiliated with the prosecutor's office who are responsible for the prosecution function.	
"prospective client"	Rule 1.18(a) & Comment [1]	(a) A person who, directly or through an authorized representative, consults a lawyer for the purpose of retaining the lawyer or securing legal service or advice from the lawyer in the lawyer's professional capacity, is a prospective client. * * * [1] Prospective clients, like clients, may disclose information to a lawyer, place documents or other property in the lawyer's custody, or rely on the lawyer's advice. A lawyer's discussions with a prospective client usually are limited in time and depth and leave both the prospective client and the lawyer	

[39] See also "personally and substantially".

[40] See also Wisconsin Rule 1.0(j), in accompanying chart dated 8/4/09.

Defined Word/Term[1]	Rule Location	Definition/"Explanation" of Word/Term	Notes
		free, and sometimes required, to proceed no further. Hence, prospective clients are entitled to some but not all of the protection afforded clients. ***As used in this Rule, prospective client includes an authorized representative of the client.***	
"public official"	Rule 4.2(g) [2-100]	(g) As used in this Rule, "public official" means a public officer of the United States government, or of a state, or of a county, township, city, political subdivision, or other governmental organization, with the equivalent authority and responsibilities as the non-public organizational constituents described in paragraph (b)(1).	
"quasi-judicial"	Rule 2.4.1, Comment [1]	No definition. Comment [1] provides: "[1] This Rule is intended to permit the State Bar to discipline lawyers who violate applicable portions of the Code of Judicial Ethics while acting in a judicial or quasi-judicial capacity pursuant to an order or appointment by a court."	A question was raised during a meeting what this meant but we moved on w/o drafting a definition. Probably best to let it lie.
"qualified legal assistance organization"[41]	*Hawaii Terminology section*	*"Qualified legal assistance organization" means a legal aid, public defender, or military assistance office; or a bona fide organization that recommends, furnishes, or pays for legal services to its members or beneficiaries, provided the office, service, or organization receives no profit from the rendition of legal services, is not designed to procure financial benefit or legal work for a lawyer as a private practitioner, does not infringe the individual member's freedom as a client to challenge the approved counsel or to select outside counsel at the client's expense, is not in violation of any applicable law.*	
"reasonable" or "reasonably"[42]	MR 1.0(h)	(h) "Reasonable" or "reasonably" when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer.	
"reasonable belief" or	MR 1.0(i)	(i) "Reasonable belief" or "reasonably believes" when used in reference to a lawyer denotes that the lawyer believes the	

[41] See also Mass. Rule 9.1(l) and New York Rule 1.0(p).

[42] For a variation of MR 1.0(h) in other jurisdictions, see New York Rule 1.0(i), in accompanying chart dated 8/4/09.

Defined Word/Term[1]	Rule Location	Definition/"Explanation" of Word/Term	Notes
"reasonably believes"[43]		matter in question and that the circumstances are such that the belief is reasonable.	
"reasonable resolution of an arguable question of professional duty"	Rule 5.2	No definition	Model Rules also do not define.
"reasonable steps to avoid reasonably foreseeable prejudice to the rights of the client"	Rule 1.16 [3-700], Comment [8]	[8] Paragraph (d) requires the lawyer to take "reasonable steps to avoid reasonably foreseeable prejudice to the rights of the client." These steps will vary according to the circumstances. Absent special circumstances, "reasonable steps" do not include providing additional services to the client once the successor counsel has been employed and the lawyer has satisfied paragraph (e). The lawyer must satisfy paragraph (d) even if the lawyer has been unfairly discharged by the client	
"reasonably should know"[44]	MR 1.0(j)	(j) "Reasonably should know" when used in reference to a lawyer denotes that a lawyer of reasonable prudence and competence would ascertain the matter in question.	
"represented organization"	Rule 4.2 [2-100], Comment [11]	[11] "Represented organization" as used in paragraph (b) includes all forms of governmental and private organizations, such as cities, counties, corporations, partnerships, limited liability companies, and unincorporated associations.	
"Resigned member"	Rule 5.3.1(a)(4) [1-311]	(4) "Resigned member" means a member who has resigned from the State Bar while disciplinary charges are pending.	
"screened"[45]	MR 1.0(k)	(k) "Screened" denotes the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under	

[43] Although D.C. has deleted the Model Rule definition of "reasonable belief" or "reasonably believes" from its Rule 1.0, no other jurisdiction has modified the MR definition.

[44] For a variation of the Model Rule definition of "reasonably should know," see Texas Terminology section, in accompanying chart dated 8/4/09.

[45] For variations of the Model Rule definition of "screened," see Alaska Rule 9.1(o); Nebraska Rule 1.0(k); New Jersey Rule 1.0(l); New York Rule 1.0(t); and North Carolina Rule 1.0(l), all in accompanying chart dated 8/4/09.

Defined Word/Term[1]	Rule Location	Definition/"Explanation" of Word/Term	Notes
		the circumstances to protect information that the isolated lawyer is obligated to protect under these Rules or other law.	
"sexual relations"[46]	Rule 1.8.10(b) [3-120]	(b) For purposes of this Rule, "sexual relations" means sexual intercourse or the touching of an intimate part of another person for the purpose of sexual arousal, gratification, or abuse.	
"share legal fees directly or indirectly with a person who is not a lawyer or with an organization that is not authorized to practice law"	Rule 5.4 & Comment [1A]	[1A] The prohibition against sharing fees "directly or indirectly" in paragraph (a) does not prohibit a lawyer or law firm from paying a bonus to or otherwise compensating a non-lawyer employee from general revenues received for legal services, provided the arrangement does not interfere with the independence of professional judgment of the lawyer or lawyers in the firm and does not violate any other rule of professional conduct. However, a non-lawyer employee's bonus or other form of compensation may not be based on a percentage or share of fees in specific cases or legal matters.	
"significant development relating to the representation"	Rule 1.4 [3-500] & Comment [1]	[1] Whether a particular development is significant will generally depend upon the surrounding facts and circumstances. For example, a change in lawyer personnel might be a significant development depending on whether responsibility for overseeing the client's work is being changed, whether the new attorney will be performing a significant portion or aspect of the work, and whether staffing is being changed from what was promised to the client. Other examples of significant developments may include the receipt of a demand for further discovery or a threat of sanctions, a change in an abstract of judgment or re-calculation of custody credits, and the loss or theft of information concerning the client's identity or information concerning the matter for which representation is being provided. Depending upon the circumstances, a lawyer may also be obligated pursuant to paragraphs (a)(2) or (a)(3) to communicate with the client concerning the opportunity to engage in alternative dispute	

[46] See also New York Rule 1.0(u), in accompanying chart dated 8/4/09.

Defined Word/Term[1]	Rule Location	Definition/"Explanation" of Word/Term	Notes
		resolution processes. Conversely, examples of developments or circumstances that generally are not significant include the payment of a motion fee and the application for or granting of an extension of time for a time period that does not materially prejudice the client's interest.	
"significantly diminished capacity such that the client is unable to make adequately considered decisions in connection with a representation"	Rule 1.14(b) & Comment [3]	[3] As used in paragraph (b), "significantly diminished capacity such that the client is unable to make adequately considered decisions in connection with a representation" shall mean that the client is materially impaired in his or her capacity to understand and appreciate the rights and duties affected by the decision and the significant risks, consequences and reasonable alternatives involved in the decision, as described in Probate Code section 812, by virtue of a deficit in mental function of the types described in Probate Code section 811. However, the reference herein to relevant portions of the Probate Code is intended only to provide guidance to a lawyer who seeks to take protective action pursuant to paragraph (b) and does not require the lawyer to seek a legal determination that the client meets the standards of incapacity under Probate Code section 811 et seq. In determining the extent of the client's diminished capacity, the lawyer should consider and balance such factors as: the client's ability to articulate his or her reasons for a decision, variability of state of mind and ability to appreciate consequences of a decision; the substantive fairness of a decision; and the consistency of a decision with the known long-term commitments and values of the client. In appropriate circumstances, the lawyer may seek guidance from an appropriate diagnostician, but a lawyer who seeks such guidance must advise the diagnostician of the confidential nature and circumstances of the consultation.	
"state"[47]	*Mass. Rule 9.1(m)*	*(m) "State" includes the District of Columbia, Puerto Rico, and federal territories or possessions.*	

[47] See also "jurisdiction". See also New York Rule 1.0(v).

Defined Word/Term[1]	Rule Location	Definition/"Explanation" of Word/Term	Notes
"substantial"[48]	MR 1.0(l)	(l) "Substantial" when used in reference to degree or extent denotes a material matter of clear and weighty importance.	
"substantially related"[49]	Rule 1.9 [3-310], Comment [3]	MR 1.9, cmt. [3],[50] provides: [3] Matters are "substantially related" for purposes of this Rule if they involve the same transaction or legal dispute or if there otherwise is a substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter. For example, a lawyer who has represented a businessperson and learned extensive private financial information about that person may not then represent that person's spouse in seeking a divorce. Similarly, a lawyer who has previously represented a client in securing environmental permits to build a shopping center would be precluded from representing neighbors seeking to oppose rezoning of the property on the basis of environmental considerations; however, the lawyer would not be precluded, on the grounds of substantial relationship, from defending a tenant of the completed shopping center in resisting eviction for nonpayment of rent. Information that has been disclosed to the public or to other parties adverse to the former client ordinarily will not be disqualifying. Information acquired in a prior representation may have been rendered obsolete by the passage of time, a circumstance that may be relevant in determining whether two representations are substantially related. In the case of an organizational client, general knowledge of the client's policies and practices ordinarily will not preclude a subsequent representation; on the other hand, knowledge of specific facts gained in a prior representation	

[48] For variations of the Model Rule definition of "substantial" in other jurisdictions, see Georgia Terminology section; Ohio Rule 1.0(m) & Cmt. [11]; Tennessee Rule 1.0(l); and Texas Terminology section, all in accompanying chart dated 8/4/09.

Note that New York has deleted the definition in its Rule 1.0.

[49] See also Alaska Rule 9.1(q); and Ohio Rule 1.0(n).

[50] See footnote 32. See also the Comment proposed by Stan Lamport and discussed during the May 2009 meeting.

Defined Word/Term[1]	Rule Location	Definition/"Explanation" of Word/Term	Notes
		that are relevant to the matter in question ordinarily will preclude such a representation. A former client is not required to reveal the confidential information learned by the lawyer in order to establish a substantial risk that the lawyer has confidential information to use in the subsequent matter. A conclusion about the possession of such information may be based on the nature of the services the lawyer provided the former client and information that would in ordinary practice be learned by a lawyer providing such services.	
"the subject of the representation"	Rule 4.2(a) [2-100]	(a) In representing a client, a lawyer shall not communicate directly or indirectly about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer.	See Comment [4], which provides: [4] As used in paragraph (a), "the subject of the representation," "matter," and "person" are not limited to a litigation context. This Rule applies to communications with any person, whether or not a party to a formal adjudicative proceeding, contract or negotiation, who is represented by counsel concerning the matter to which the communication relates.
"third party neutral"	Rule 2.4(a)	(a) A lawyer serves as a third-party neutral when the lawyer is engaged to assist impartially two or more persons who are not clients of the lawyer to reach a resolution of a dispute, or other matter, that has arisen between them. Service as a third-party neutral may include service as an a neutral arbitrator, a mediator or in such other capacity as will enable the lawyer to assist the parties to resolve the matter.	
"threat" or "threaten"	Rule 3.10(a) [5-100]	No definition.	The Commission expressly decided not to include a definition of "threat" or "threaten"

Defined Word/Term[1]	Rule Location	Definition/"Explanation" of Word/Term	Notes
"tribunal"[51]	MR 1.0(m)	(m) "Tribunal" denotes a court, an arbitrator in a binding arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity. A legislative body, administrative agency or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a binding legal judgment directly affecting a party's interests in a particular matter.	
"true retainer"[52]	Rule 1.5(f)(1) [4-200]	(1) a lawyer may charge a retainer, which is a fee that a client pays to a lawyer to ensure the lawyer's availability to the client during a specified period or on a specified matter, in addition to and apart from any compensation for legal services performed. A retainer must be agreed to in a writing signed by the client. Unless otherwise agreed, a retainer is the lawyer's property on receipt.	
"unconscionable fee"	Rule 1.5(b) [4-200]	(b) A fee is unconscionable under this Rule if it is so exorbitant and wholly disproportionate to the services performed as to shock the conscience, or the lawyer, in negotiating or setting the fee, has engaged in fraudulent conduct or overreaching, so that the fee charged, under the circumstances, constitutes an improper appropriation of the client's funds. Unconscionability of a fee shall be determined on the basis of all the facts and circumstances existing at the time the agreement is entered into except where the parties contemplate that the fee will be affected by later events.	
"unlawfully" and "unlawful"	Rule 8.4.1(a)(2) [2-400]	(2) "unlawfully" and "unlawful" shall be determined by reference to applicable state or federal statutes prohibiting discrimination on the basis of race, national origin, sex, gender, sexual orientation, religion, age or disability, and as	

[51] For variations in the Model Rule definition of "tribunal," see Arizona Rule 1.0(m); Georgia Terminology section; Indiana Rule 1.0(m); Kentucky Rule 1.0(m); Maryland Rule 1.0(o); Missouri Rule 1.0(m); New Jersey Rule 1.0(m); New York Rule 1.0(w); North Carolina Rule 1.0(n); Texas Terminology section (substantially different); Vermont Rule 1.0(m), all in accompanying chart dated 8/4/09.

[52] See also Wisconsin Rule 1.0(mm), in accompanying chart dated 8/4/09.

Defined Word/Term[1]	Rule Location	Definition/"Explanation" of Word/Term	Notes
		interpreted by case law or administrative regulations.	
"writing" or "written"[53]	MR 1.0(n)	(n) "Writing" or "written" denotes a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photostating, photography, audio or videorecording and e-mail. A "signed" writing includes an electronic sound, symbol or process attached to or logically associated with a writing and executed or adopted by a person with the intent to sign the writing.	
"writing"[54]	Rule 7.1, Comment [4]	[4] As used in paragraph (a), "writing" means any writing as defined in the Evidence Code.	
"writing"[55]	Rule 1.16 [3-700], Comment [10]	[10] A lawyer's duty under paragraph (e)(1) to release "writings" to the client includes all writings as defined in Evidence Code section 250. A lawyer must comply with paragraph (e)(1) without regard to whether the client has complied with an obligation to pay the lawyer's fees and costs. Paragraph (e)(1) is not intended to prohibit a lawyer from making, at the lawyer's own expense, and retaining copies of papers released to the client, or to prohibit a claim for the recovery of the lawyer's expense in any subsequent legal proceeding. Paragraph (e)(1) also does not affirmatively grant to the lawyer a right to retain copies of client papers or to recover the cost of copying them; these are issues that might be determined by contract, court order, or rule of law.	
"Written"	Rule 1.7 [3-310]	(3) "Written" means any writing as defined in Evidence Code section 250.	

[53] For variations of the "'writing' of 'written'" definition in other jurisdictions, see Alaska Rule 9.1(s); and Montana Rule 1.0(p), both in accompanying chart dated 8/4/09.

[54] See also MR 1.0(n) for a definition of "writing" or "written".

[55] See footnote 54.

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March 23, 2009 Julien E-mail to KEM:

How do you propose we attack the terminology section? Is there anyway easy way of culling out of the rules we have written so far all of the terms which need defining? Have they been set aside so that we can define them?

As you may know, I have been worried about this since the beginning and now here we are. Harry has asked me to work on that section, and I think I am overwhelmed with this task. Please help if you can.

July 29, 2009 Kehr E-mail to Voogd, cc Drafters (Julien, Sapiro), Chair, Difuntorum & KEM:

I see that Rule 1.0 has been added to the agenda. I very much would appreciate your getting your initial draft out as early as you can. Lead time will be important to me as I seem to be on the drafting team for six of the 12 agenda items.

July 30, 2009 KEM E-mail #1 to Drafters, cc Chair & Staff:

To avoid confusion, we should for the time being refer to the Terminology section as Rule 1.0.1. The Commission has already assigned the number 1.0 to the revision of current rule 1-100, titled "Purpose and Scope of the Rules of Professional Conduct." When approved, our proposed Rule 1.0 was intended as the counterpart to the Preamble & Scope sections of the Model Rules. The Commission voted 7-0-1 to make it Rule 1.0, after voting 6-2-0 on the concept of the "purpose and function" section of the rules being a rule. See 11/19/04 KEM Meeting Notes, III.A., at paragraphs 4,5. We've already assigned 1.0.1 to the definition of "law firm" with the idea that 1.0.1 would be the terminology section. See id. at paragraph 5.

I'm working on updating a chart I've been keeping of definitions we've included in our Rules. I should be able to get it to you all by later this afternoon or evening. As you will see, in most instances, the definitions are specific to the Rules in which they've been inserted, so they might not be susceptible to inclusion in a global terminology section.

July 30, 2009 E-mail #2 to Drafters, cc Chair & Staff:

To follow up on my earlier e-mail, below, I've attached the following:

1. Model Rule 1.0 (2002), in Word.

2. Chart of Definitions (and/or explanations) of words/terms that we have used in specific rules, sorted by term (Column 1). In Word.

3. Chart of Definitions (and/or explanations) of words/terms that we have used in specific rules, sorted by rule number (Column 2). In Word.

Comments:

1. I think the attached are self-explanatory. As I mentioned in the earlier e-mail, most of the definitions in the charts are specific to the rules which they are found and not susceptible to being placed in a global definition section. However, in some instances, we might be able to move some definitions (e.g., "writing" or "written" is defined in several rules and probably can be placed in the terminology section as in the Model Rule.

2. I've inserted the Model Rule in some instances where we have not yet decided on language, e.g., Rule 1.9.

3. There may be other definitions that will come to mind as you review the attached charts. These are the ones I've been trying to keep track of during the process.

4. One last point. During our discussion of Rule 8.5 at the last meeting, Jerry raised the issue whether the SEC should be treated as a "tribunal" for purposes of our Rules. The definition in MR 1.0(m) appears to cover that territory.

Please let me know if you have any questions.

July 31, 2009 Voogd E-mail to Sondheim, cc Kehr, Difuntorum, McCurdy & KEM:

Just noted the change. As previously advised, I will not be at the August meeting as I am taking a ship cruise. Moreover, I will have little time for the preparation. Any chance it can be deferred?

July 31, 2009 Sondheim E-mail to Difuntorum, cc Voogd, McCurdy & KEM:

Can this be deferred to Sept. or should Tony attempt to get someone else from the drafting team to temporarily be the lead drafter for the August meeting?

July 31, 2009 Sondheim E-mail to Difuntorum, cc McCurdy & KEM:

One additional thought regarding 1.0.1. One of the rules assigned to Bob is 5.7 for which there is no RPC counterpart. Would it make any sense to defer this rule to Sept. and ask Bob if he would be willing to be the temporary lead drafter for 1.0.1?

July 31, 2009 Difuntorum E-mail to Sondheim, cc McCurdy & KEM:

Bob has noted in his emails that he has a number of responsibilities as lead and co-drafter for the August meeting. To alleviate his burden, I recommend giving the option to Bob so that he can decide which rule he would like to keep on the agenda and complete. Rule 1.0.1 is on the agenda because you wanted to prioritize consideration of definitions that relate to the RPCs. Rule 5.7 is on the agenda because there are already prior materials (that led to the Commission's rejection of a rule) that might be susceptible to quick work to bring it to completion. Kevin has already provided the prior materials to Bob and Bob seems to have already begun working on the rule (see messages below exchanged between Bob and Kevin). So, in short, I recommend empowering Bob by letting him decide which rule he prefers to work on for the August meeting.

July 31, 2009 KEM E-mail to Sondheim & Difuntorum, cc McCurdy:

I was in San Diego or traveling there from the afternoon on yesterday and so was unable to respond to this e-mail thread. Here are my thoughts.

First, let's find out whether we are going to have a Rule 5.7 or not. That would require Bob to prepare a revised rule which, I believe, he has already begun. Therefore, I would ask Bob to go ahead and prepare the Rule 5.7 materials rather than give him a choice to prepare 5.7 or 1.0.1. The vote not to pursue a MR 5.7 counterpart was close last time (6-5-0) and it's likely the Commission will choose to pursue it now. However, let's have the Commission make the decision in August and perhaps we can wrap it up at the September meeting. I don't foresee the debate over a terminology section going so quickly.

Second, although I don't see the terminology debate going as quickly as that for 5.7, I also don't see an advantage from moving up our consideration of such a rule by two weeks. Starting in September, or even October, would be timely. This is a section we will not be able to put to sleep finally until we have drafted all the other rules. We can advance it, but it will necessarily be in the last batch. If we do consider it at the August meeting, then I think all we need to do is poll the members whether they favor a global terminology. I think the Commission members have decided by now whether they think such a section is necessary. Frankly, they could review MR 1.0 and the materials attached to the second e-mail I sent the drafters on Thursday to make that determination. A simple cover memo stating that the only issue for the August meeting is whether or not to have a terminology section, and a request that the members review the chart(s) I prepared to see if there are other definitions we should be including in the terminology section, providing the Commission votes to pursue it.

Third, we need to find out from Tony whether he would be able to have the terminology section prepared for the September meeting. My reading of his e-mail is that he would not have time to prep a report between now and August and it's not clear when he'll return from the cruise or whether he would have time after his return to prepare a report for the September meeting (there's only two weeks between meetings). We should calendar it for the September meeting, but it should be more than just the materials I prepared. There should be some recommendations on what to adopt, not just whether to adopt.

Fourth, if Tony can't prepare a report for the September meeting, then rather than impose further on Bob, I would assign Dom as lead drafter. She's effectively been taken off of Rule 1.2 by our change of submission date for the August meeting. I anticipate Rule 1.2 will, at worst, be designated for a 10-day ballot at the August meeting, That would leave Dom as lead drafter on only 3.5, 6.1 and 6.2 in the rolling agenda. Rule 3.5 has been through public comment and largely tracks the Model Rule, so creating the comparison charts should not be onerous. Rule 6.2 is straightforward and likely can be resolved as we resolved 6.3 and 6.4 (w/ virtually no debate Paul's proposed drafts, w/ minor changes to the MR's, were deemed approved.) Rule 6.1, pro bono, is the only rule that might present a problem, but the MR pretty much parallels the BOG resolution on pro bono, so the only issue is probably whether there should be a pro bono rule in the California Rules or whether we should continue w/ the BOG resolution. I also think that Dom can bring to the terminology discussion her experience as a bar prosecutor and terms and provisions that might have caused problems in the past. Dom returns on 8/9, so will have time to prepare the rule for consideration at the September meeting.

Please let me know if you have any questions.

August 1, 2009 Sondheim E-mail to Kehr, cc Difuntorum, McCurdy & KEM:

We have run into a glitch regarding the definitions rule 1.0.1 because Tony will be on a cruise and not at the August meeting and has also indicated that he does not have enough time to work on this rule for August. As you can see from the exchange of e-mails set forth below between myself and Randy, one possibility would be to place 5.7 on the Sept. agenda if you would be willing to become the temporary lead for 1.0.1. Your call. If you decide on 5.7, we will place 1.0.1 on the Sept. agenda and delete it from the Aug. agenda since I think this is a rule for which the ABA definitions should not automatically become the agenda material.

August 1, 2009 Kehr E-mail to Sondheim, cc Difuntorum, McCurdy & KEM:

I've been trying to work ahead of the calendar b/c of other commitments, principally knee surgery scheduled for this Wednesday. I'm assured that this won't interfere with our dinner on the 14th, but it will squeeze my productive time. I have some things that must be taken care of before the operation, and I will be out of the office Wednesday through Friday. I'm not able at the moment to accomplish nearly as much as I would like b/c of the pain meds I'm on, but in trying to work ahead I've nearly finished a report on Rule 5.7. Jerry is the only remaining 5.7 co-drafter, and I expect to have my draft out to him on Monday.

My next priority after completing the initial draft of the 5.7 report will be to complete the Rule 1.9 redraft. I would estimate that I'm about 20% or so done with that.

My situation makes it hard to make any promise, but I think there is a fair chance that I will be able to do at least part of 1.0.1 even if I can't get to all of it. It would be helpful if Kevin could put together a comparison chart. I seem to remember that there has been some tinkering with the definitions in at least a few jurisdictions, and I definitely won't have time to dig into that myself.

My vote therefore is to leave the calendar as it is, and I'll do my best.

August 2, 2009 KEM E-mail to Kehr, cc Sondheim, Difuntorum & McCurdy:

I'm working on a chart of state variations for Rule 1.0 along w/ other matters. I should complete it by Wednesday (or Thursday at the latest). From what I've reviewed so far, there is not that much variation. However, there are some definitions in other jurisdictions (e.g., "person" and "client") that have been flagged during our meetings that might prove worthy of a global definition.

Please let me know if you have any questions.

August 2, 2009 Kehr E-mail to KEM, cc Sondheim, Difuntorum & McCurdy:

Thank you, but please don't rush. If I get to this at all it won't be before next weekend.

August 2, 2009 Sondheim E-mail to Kehr, cc Difuntorum, McCurdy & KEM:

I appreciate your willingness to always pinch hit when necessary. Hope all goes well with your surgery.

I am sending Tony an e-mail asking him to assist you if he has any time before he leaves on his vacation and also to get a commitment from him that he will pick up from wherever you leave off (to the extent you can do something on 1.0.1) in time for the Sept. meeting.

August 2, 2009 Sondheim E-mail to Voogd, cc Kehr & KEM:

One of your co-drafters (Bob Kehr) for this rule has indicated he will try to get a start on the rule for our August meeting. To the extent that you have time before your forthcoming vacation, could you contact Bob to ascertain if there is anything you can do to assist him before you leave. Also, to the extent that Bob is unable to complete the drafting of this rule, will you be able to do so for our Sept. meeting?

August 3, 2009 Voogd E-mail to Sondheim, cc Kehr & KEM:

The answer to both questions is yes.

August 3, 2009 KEM E-mail to Voogd, cc Sondheim, Kehr, Difuntorum & McCurdy:

I'm in the process of compiling a chart of state variations on MR 1.0 (Terminology). As I noted earlier to Bob & Harry, some of the definitions other states have added are ones that we've debated during our meetings (e.g., definitions of "person," "client," and "organization.") I should have it done by Wednesday, but at the latest I'll have it to you and the drafters by Thursday. Please let me know if you have any questions.

August 6, 2009 KEM E-mail to Drafters, cc Chair & Staff:

Greetings Drafters & others;

I've attached the following to this e-mail, all in Word:

1. Model Rule 1.0 Terminology (2002), clean version.

2. Model Rule 1.0 Terminology (2002), annotated to reference variations in other jurisdictions. The referenced variations in other jurisdictions can all be found in item #3, below.

3. Chart of Variations of MR 1.0 in State Adoptions of the Rule.

4. Chart of Word & Terms, sorted in alphabetical order, that (i) we have used in our proposed Rules to date and defined or explained; (ii) appear in Model Rule 1.0 (2002); or (iii) have been added to their MR 1.0 counterpart by other jurisdictions.

5. Our approved proposed Rule 1.0.1 ("Law Firm"), which I recommend we renumber as 1.0.1(c) as in the Model Rule, at least for the time being. Both clean and redline versions.

Some Notes:

1. Again, here is my first e-mail sent on 7/29/09 on why we should, for the time being, number our terminology section 1.0.1:

> To avoid confusion, we should for the time being refer to the Terminology section as Rule 1.0.1. The Commission has already assigned the number 1.0 to the revision of current rule 1-100, titled "Purpose and Scope of the Rules of Professional Conduct." When approved, our proposed Rule 1.0 was intended as the counterpart to the Preamble & Scope sections of the Model Rules. The Commission voted 7-0-1 to make it Rule 1.0, after voting 6-2-0 on the concept of the "purpose and function" section of the rules being a rule. See 11/19/04 KEM Meeting Notes, III.A., at paragraphs 4,5. We've already assigned 1.0.1 to the definition of "law firm" with the idea that 1.0.1 would be the terminology section. See id. at paragraph 5.

2. There's a lot of material attached. It can't be avoided at this early stage of considering a terminology section. I'll explain each of the above documents so you can most quickly absorb the materials.

3. Item #1. Clean version of MR 1.0. This will probably your starting point for our terminology section (assuming the Commission votes to have a global terminology section). Before the Ethics 2000 draft was largely adopted by the ABA House of Delegates in 2001-2002, the Terminology section had appeared as an unnumbered section after the "Preamble" and "Scope" sections and before MR 1.1 (Competence). Since 2002, it has been a numbered Rule. As noted above, we have assigned 1.0 to our proposed revision of current rule 1-100, and tentatively had assigned 1.0.1 to our terminology section (if we had one).

4. Item #2. Annotated Version of MR 1.0. This should not be confused w/ Rule 1.0 from the ABA's Annotated Model Rules. This is an annotation I've created. In a footnote after each rule and comment paragraph, I have listed the state rules where you can review variations of the Model Rule definitions to determine whether other states' language might be more appropriate for California. ALL OF THESE REFERENCED VARIATIONS CAN BE FOUND IN ITEM #3, DESCRIBED BELOW. As you can see from a quick review of the footnotes of this document, most jurisdictions have adopted the MR definitions verbatim. However, more than a handful have revised the definitions for "law firm," "fraud," "informed consent," and "tribunal". There are also some significant language changes to the comments, even in states that have not varied the language of the black letter itself.

5. Item #3. This is probably the most important of the attached documents (and unfortunately, the longest).

> a. The chart itself is 43 pages long. Listed by state in alphabetical order are all the actual variations to the MR 1.0 definitions, as well as definitions that other states have added to their MR 1.0 counterpart.
>
> b. I recommend that you simply read through this top to bottom to get some sense of the language other states have chosen over the MR language, and whether to change. However, in some instances where California already has corresponding definitions

(e.g., "informed [written] consent," "writing"), we may want to carry forward the definition already found in our Rules or statutes.

c. The chart has 4 columns:

(1) Jurisdiction;

(2) Whether a state has adopted a comprehensive set of post-E2K Rules (e.g., Alabama, Georgia and Virginia do not appear to have conducted a comprehensive review of the Ethics 2000 changes)

(3) Whether a state has made changes to Rule 1.0. If yes, I've identified the degree of change as "slight," "moderate," or "substantial." Please take these w/ a grain of salt. I didn't put a lot of thought into them. My rating is based primarily on number of changes, not necessarily based on their significance. This is one of those small details we shouldn't worry about.

(4) Notes/Comments. This column contains the actual language of a state's adopted or proposed rule. I've also noted where a state has not completed its E2K review, or where its new rules have been adopted but not yet become effective. Please note that I've also inserted a link to the web page where you can find the jurisdictions full set of Rules or proposed Rules. In Word, you need to hold down "Ctrl" as you click the link and you will be taken to the web page.

d. In addition to the chart itself, I've attached after the chart clean and red-line versions of the states that have made the greatest number of revisions or additions to MR 1.0. New York leads, followed closely by Alaska (who would have thought?) and Wisconsin. You will also find Georgia, ND, Ohio, Oregon, and Washington. I've included the latter primarily because, although it made only a few changes to the rule itself (primarily in its definition of "fraud"), it added six comments to supplement the MR comments.

e. As to the numbering issue, note that two jurisdictions, Alaska and Massachusetts, have numbered their terminology rules as 9.1. Aside from those jurisdictions that have not yet completed their E2K review and therefore have carried forward the 1983 Model Rules unnumbered Terminology section, these are the only two jurisdictions that have not assigned the number "1.0" to their Terminology section.

f. For what it's worth, I have clean and redline versions of all the jurisdictions' counterparts to MR 1.0. As I've noted, all the revisions are included in this Chart. However, if for some reason you want the complete rule in one place and it is not attached to the chart, please contact me and I'll send it your way.

5. Item #4. This is an update of the chart I sent you all on 7/29/09 (I sent it to Tony, w/ copies to you on 7/30/09). The first draft of the chart contained only those Word & Terms that (i) we have used in our proposed Rules to date and defined or explained. In this draft, I also added the Words and Terms that (ii) appear in Model Rule 1.0 (2002); or (iii) have been added to their MR 1.0 counterpart by other jurisdictions.

a. Our proposed terms appear in plain font. In some instances, I've added a footnote that refers you to the same or similar term in other jurisdictions. The actual language for that term will be in Item #3. In addition, I've also included references to "related" terms

(e.g., for "communication," which we define in Rule 7.1, I've cross-referenced "computer-assisted communication" from NY and "electronic communication" from Oregon.

b. The Model Rule terms appear in bold font. I've also added the footnotes that refer you to variations to the Model Rule definition that have been adopted in other jurisdictions.

c. The additions from other jurisdictions are italicized.

6. Item #5. The only standalone definition we have completed is for "law firm," which we tentatively assigned as Rule 1.0.1. It varies from the Model Rule, primarily in Comment [2], which is our attempt to explain whether "of counsel" lawyers should be considered part of a firm. As noted above, see paragraph 4 re Item #2, law firm" is one of the most revised of the MR 1.0 definitions (though you should note that in some instances, the only difference is to include a reference to a governmental agency or organization).

As usual, please let me know if you have any questions.

August 7, 2009 Kehr E-mail to KEM:

Kevin: Is there any place where we have used "confirmed in writing"?

August 7, 2009 KEM E-mail to Kehr:

No, Bob. We've discussed it, for example, when we wrangled over 1.8.7, aggregate settlements, but instead we went w/ "informed written consent," as we have w/ all other rules where's it been an issue.

August 7, 2009 Kehr E-mail to KEM:

That was my recollection, but I'm still groggy and wanted to be certain. Thank you as always.

August 7, 2009 Kehr E-mail to KEM:

Your chart entitled "CHART MR 1 0 adoptions" lists Wisconsin Rule 1.0(e) as being different from the MR. This appears to be incorrect, which makes me think that you had intended to refer to another jurisdiction. Can you help on this?

To clarify, I am referring to the definition of fraud and fraudulent.

August 7, 2009 KEM E-mail to Kehr:

The Annotated Model Rule (the document in portrait format w/ footnotes after each paragraph and comment), does make that error at footnote 4. The reference should be to Wyoming Rule

1.0(e). I'd like to say Wisconsin, Wyoming, what's the difference, but I lived in Wisconsin for about 10 years. Oh well. Thanks for catching that.

I've attached a revised version of that document.

August 7, 2009 Kehr E-mail to KEM:

Thank you. I'll try to get back to this later.

August 8, 2009 Kehr E-mail #1 to Drafters (Voogd, Julien & Sapiro), cc Chair, Difuntorum, McCurdy & KEM:

Tony, JoElla, and Jerry: I set a deadline of noon for getting out a draft of this Rule, with the hope of giving you the opportunity to make your comments and of giving me the ability to address other agenda items with which I'm involved. My partial draft is attached. It is as far as I was able to get.

1. I have no comment on the MR definitions that I recommend keeping without change or that I've added. My footnotes should be self-explanatory, but I want to emphasize that my statement of drafters' recommendations state my views and my knowledge from Tony's earlier e-mail that he would keep all of the MR definitions. Please add your views as you think appropriate.

2. There were several variations of the definition of "fraud". I have carried them from Kevin's charts into the attachment so that everything will be on the same page. Before giving you my comments on them, I think we should have in mind where in the Rules "fraud" or a variant of it appear. They are in:

   Rule 1.2(d): "A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law."

   Rule 1.6(a)(2) – which is not applicable in California - "to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;"

   1.16 (b): "Except as stated in paragraph (c), a lawyer may withdraw from representing a client if: ... (2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;

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

4.1: "In the course of representing a client a lawyer shall not knowingly: ... (b) fail to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6."

8.4: "It is professional misconduct for a lawyer to: ... (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

Here are my comments on them ---

a. I disagree with North Carolina's substitution of "North Carolina" for "the applicable jurisdiction". This change seems to me to materially narrow the Rule. A lawyer should be subject to discipline under each of the five of these Rules that will apply in California for "fraud" however that might be defined under the applicable laws of any jurisdiction.

b. I don't know what N.Y. has in mind in inserting: "provided that it does not include conduct that, although characterized as fraudulent by statute or administrative rule, lacks an element of scienter, deceit, intent to mislead,". Subject to any comments from you, I can't picture how that insertion improves the Rule.

c. The other variations seem to me to be interesting restatements that don't materially alter the definition. Therefore, my conclusion is to go with the MR definition.

3. The other MR definition on which I hope to have your comments is "screened". B/c I was approaching my noon deadline, I didn't carry them into the attached draft. Here are the variations:

a. Alaska Rule 9.1(o) alters the MR by substituting "person" for "lawyer". This is interesting b/c it is correct that proper screening must include non-lawyer personnel. Thus, Alaska has: ""Screened" denotes the isolation of a ~~lawyer~~ person 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~~ person is obligated to protect under these Rules or other law."

b. Nebraska Rule 1.0(k) does essentially the same thing, substitution "support person" for the MR "lawyer" and the Alaska "person". I would appreciate your thoughts on the Alaska and Nebraska corrections of what appears to be a substantive error in the MR. Note that Alaska doesn't follow up on this with any correction of the corresponding Comment paragraph. However, Nebraska does by adding this sentence to Comment [8]: "The definition, as well as Comments [9] and [10] to this rule, also generally apply to the screening of support persons pursuant to Rule 1.9(e)(2)."

c. New Jersey Rule 1.0(l) misses the point picked up by Alaska and Nebraska but makes two other changes. First, it alters the MR "imposition" to: "adoption and enforcement". This does not seem to me to be materially different and don't recommend it. Second, it requires that the screening procedures be in writing. I would appreciate your comments on this addition, which seems to state what is implicit in the MR definition. The N.J. Rule reads in full: "Screened" denotes the isolation of a lawyer from any participation in a matter through the timely ~~imposition of procedures within~~adoption and enforcement by a law firm ~~that are~~of a written procedure pursuant to RPC 1.10(f) which is reasonably adequate under the circumstances to protect information that the isolated lawyer is obligated to protect under these Rules or other law.

d. New York Rule 1.0(t) also misses the point picked up by Alaska and Nebraska and makes two changes. First, its definition covers "screening" as well as "screened". This is a nit that we can pick up once we know what useages will appear in the California Rules. Second, it adds a reference to information that the firm is obligated to protect. Its Rule reads as follows: ""Screened" or "screening" 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 or the firm is obligated to protect under these Rules or other law." I would appreciate your comments on N.Y.'s second change. I don't immediately see its logic as the purpose of screening is to isolate information that the affected lawyer possesses, but perhaps I am missing something obvious.

e. North Carolina Rule 1.0(l) makes a single change: "'Screened' denotes the isolation of a lawyer from any participation in a professional 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." I don't see how the absence of "professional" could cause any confusion as screening applies only to lawyer-client relationship described in other Rules. Subject to any comments you might have, I don't recommend this change.

f. Finally, there is a threshold question about the definition of "screening": should we include details as to what "reasonably adequate" procedures must include rather than scattering them among other Rules?

August 8, 2009 Kehr E-mail #1 to Drafters (Voogd, Julien & Sapiro), cc Chair, Difuntorum, McCurdy & KEM:

I have a p.s. to my message of earlier today. Kevin's July 2009 meeting notes show that a decision was made to place the definition of screening in Rule 1.0.1, so that remains to be done. This was part of the discussion of Rule 1.11 at ¶10 in Kevin's notes.

August 10, 2009 Voogd E-mail to Drafters, cc Chair, Difuntorum, McCurdy & KEM:

Sorry for the delay in responding. I agree with your comments and conclusions. As for "reasonably adequate" screening procedures we might consider deleting "reasonably," i.e. a strict liability standard establishing the concept that if you are going to screen to advance lawyers' interests you must protect clients' interest.

August 10, 2009 KEM E-mail to Kehr, cc Drafters, Chair, Difuntorum, McCurdy & KEM:

I've attached a slightly revised draft 1.1 (8/8/09) of Rule 1.0.1. All I've done is complete your thought in footnote 4 and delete the reference to "written" in the definition of "informed written consent" and explain why in footnote 6. See my point #3, below.

I have a few observations on the definitions for which you've sought guidance from the drafters:

1. Fraud: As to the Rules where "fraud" or "fraudulent" are used, I would add that in our proposed rules, you will also find one or the other word in:

> Rule 1.5 [4-200] (definition of "unconscionability"): "A fee is unconscionable under this Rule if it is so exorbitant and wholly disproportionate to the services performed as to shock the conscience, or the lawyer, in negotiating or setting the fee, has engaged in fraudulent conduct or overreaching, ..."
>
> Rule 1.13 [3-600], cmt. [13]: ". . . If the lawyer's services are being used by an organization to further a crime or fraud by the organization, Rule 1.2.1 [1.2(d)] may also be applicable, in which event the lawyer may be required to withdraw from the representation under Rule 1.16(a)(1)."

2. Screened: I see that in your subsequent e-mail, you note that the Commission had agreed to put the definition of screening in a global section. However, further definition or description may be appropriate for certain rules (e.g., Harry observed that the vote to include "screen" in a global definition section was w/o prejudice to adding further definitions or comments in particular rules, e.g., in rule 1.11.

3. Informed written consent. You didn't ask about this, but I wanted to observe that in Rule 1.6, the reference is to "informed consent," not "informed written consent." There may be other rules that require only informed consent. I think we should follow the Model Rule lead and define "informed consent" in the black letter, but in a comment explain that informed written consent requires written disclosure. I'm not suggesting we use the MR definition; just use our definition of "informed written consent" but w/o the reference to "written":

> "Informed ~~written~~ consent" means the client's or former client's ~~written~~ agreement to the representation following ~~written~~ disclosure.

In addition, I realize that time was short so you were not able to address all the possible issues concerning a terminology section. I don't think we need to address them at the next meeting but I'd like to preserve for discussion the following thoughts I had when reviewing terminology rules/sections in the various jurisdictions.

4. I don't know whether the Commission will recommend adding other definitions, but we might consider a separate rule/section for definitions in addition to those in the Model Rule. See proposed Michigan Rule 1.0A.

> a. Alternatively, if we put all definitions in a single section, we should not follow what New York has done in terms of lettering -- i.e., intersperse new definitions in its rule and reletter all other definitions. Better to keep the Model Rule lettering for Model Rule definitions and reletter new definitions "(aa)," "(ab)," "(da)," "(fa)", etc. depending on where they land in the rule. This will make for easier cross-referencing in other rules and facilitate research in other jurisdictions as Professor has argued.

5. Even if we don't include a definition in the terminology, should we cross-reference where a particular definition can be found, similar to what NY did w/ its definition of "confidential information" and other states have done as to other rules:

> (d) "Confidential information" is defined in Rule 1.6.

a. Note that Oregon has actually provided a definition of "information relating to the representation of a client" in its terminology rule, i.e., a definition based on ABA Code of Professional Responsibility, DR 4-101(A). Oregon was one of the last four states, along w/ Iowa, Nebraska and New York, that adopted the Model Rules for the first time after Ethics 2000 had completed its task.

6. Definitions defined in other rules. Although we might consider cross-referencing in the black letter of proposed Rule 1.0.1 a definition or term which appears in another rule AND which is used in several rules (e.g., "confidential information relating to the representation of a client" in 1.6, "communication" in 7.1), most other definitions we have proposed in other rules are specific to those rules (e.g., "advance for fees" in the Comment to Rule 1.15, "adverse pecuniary interests" in the Rule 1.8.1, etc.) I have provided you a list of those rules. See Chart titled "Definitions Used in Drafts of Proposed Rules of Commission, the Model Rules & Other Jurisdictions" (the file is named "RRC - 1-100 [1-0-1] - Definitions - Sorted by Term - DFT2 (08-05-09).doc").

a. Rather than include such "unique" definitions in the blackletter of Rule 1.0.1, I think we should leave them in the specific rule to which they apply. However, we might consider a comment paragraph at the end of the Comment to Rule 1.0.1 that cross-references all such definitions.

b. Alternatively, we might consider a "table of definitions used in these rules" which does not include the definitions but simply the rule location where it can be found. We could insert it after Rule 1.0.1 & its comment, and before Rule 1.0.

As to specific definitions, again I realize the shortness of time to prepare this matter, but would liked to preserve for discussion the issue of whether we should include the following definitions in a global terminology section, either as a definition per se or cross-referenced in the blackletter:

7. "Client" (includes "prospective client" and "authorized representative").

8. "Confidential information relating to the representation of a client". For what it's worth, I prefer the NY approach to the Oregon approach, i.e., define "confidential information," etc., in Rule 1.6 and cross-referencing it in the black letter of Rule 1.0.1, rather than moving the definition into the black letter of Rule 1.0.1.

9. "Matter". I'm not sure "matter" is amenable to a global definition, but it does appear in several rules.

10. "Retainer" or "true retainer".

11. "Advance fee" or "advances for fee".

12. "Person"

13. "Primary responsibility" or "personally and substantially"

14. "public official" or "public officer"

15. "Substantially related"

Please let me know if you have any questions.

August 10, 2009 Kehr E-mail to Voogd, cc Drafters, Chair, Difuntorum, McCurdy & KEM:

Thank you, Tony. I will include your comments in the final version.

August 10, 2009 Kehr E-mail to KEM, cc Drafters, Chair, Difuntorum & McCurdy:

Thank you for all this. On your point 3, I want to consider whether "disclosure" is the right standard for obtaining informed consent under Rule 1.6, and how that might differ from a lawyer providing a reasonable explanation under Rule 1.4(b). Assuming that "informed consent" is used only in Rule 1.6, my nascent thought is that the consequences of revealing confidential information might be relatively obvious as compared to the often unexpected ripples that follow from accepting a representation in which a lawyer has a potential conflict of interest. If so, we might want to retain "disclosure" only for the conflict setting. And if we were to do that, perhaps we should have a cross-reference to Rule 1.4(b) in the Rule 1.6 Comment rather than having "informed consent" as a defined term. More on this later, perhaps this evening.

I wonder if any of the other drafters have any thoughts on this.

August 10, 2009 Sapiro E-mail to Drafters:

1. Attached are three versions of the definition of "screened." The first is from the Model Rule. The second is my redraft of it. The third is a redlined comparison of the two.

2. It seems to me that the definition of a screen should address three subjects. The first is preventing the flow of information about a matter between the tainted lawyer and the rest of the firm. The second is assuring that everyone in the firm knows about the tainted lawyer being off limits. The third is the preventing the flow of confidential information about the former client or the government from the tainted lawyer to the rest of the firm.

3. The Model Rule definition only addresses the last of these subjects. Because we did not include in Rule 1.11 the minimum parameters of a screen, I think we should address all three in the definition.

4. I also changed "denotes" to "means" because I think "denotes" is too wishy-washy. To me, it means "indicates" where in this rule we are supposed to be defining it.

5. I also added "at a minimum" because to me the rules should state the minimum standards, but a given case may require more to be an effective screen.

6. I also deleted "reasonably adequate" because to me this should be a strict standard. We are absolving lawyers of conflicts of interest. If the screen they set up does not isolate the tainted lawyer, discipline should result.

Jerry Sapiro's Proposed Screening Definition:

Model Rule 1.0(k):

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

Proposed Sapiro Definition:

"Screened" means the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that prevent the flow of information about the matter between the personally disqualified lawyer and other lawyers or non-lawyers in the firm;[1] that include notice to lawyers and non-lawyer personnel within the firm that the isolated lawyer is prohibited from participating in the matter and is not to be given any information about the matter;[2] and that protect from disclosure to other lawyers and non-lawyers in the firm information that the isolated lawyer is obligated to protect under these Rules or other law.

Redline Version Showing Differences between Sapiro Definition & Model Rule:

"Screened" ~~denotes~~means, at a minimum, 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~~prevent the ~~circumstances~~flow of information about the matter between the personally disqualified lawyer and other lawyers or non-lawyers in the firm; that include notice to ~~protect~~lawyers and non-lawyer personnel within the firm that the isolated lawyer is prohibited from participating in the matter and is not to be given any information about the matter; and that protect from disclosure to other lawyers and non-lawyers in the firm information that the isolated lawyer is obligated to protect under these Rules or other law.[3]

August 12, 2009 KEM E-mail to McCurdy & Difuntorum, cc Drafters, Chair & Lee:

I've attached the following for inclusion in the agenda materials for item III.A.:

1. Rule 1.0.1 [1-100], Draft 1.1 (8/8/09), redline, compared to Model Rule 1.0. In Word & PDF.

2. Rule 1.0.1 [Law Firm Definition], Post-PCD [#7.1] (6/16/07), compared to Model Rule 1.0(c). In Word.

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[1] Adapted from Model Rule.
[2] Adapted from proposed New York rule 1.11.
[3] Adapted from Model Rule.

3. E-mail compilation excerpt, which includes recent exchanges among the drafters. In PDF.

I've also attached following for your records, but do not believe they should be included in the agenda mailing because of their length:

4. Chart of Variations of MR 1.0 in State Adoptions of the Rule.

5. Chart of Words & Terms, sorted in alphabetical order, that (i) we have used in our proposed Rules to date and defined or explained; (ii) appear in Model Rule 1.0 (2002); or (iii) have been added to their MR 1.0 counterpart by other jurisdictions.

Comments for the Commission:

1. Please review the following e-mails, particularly the first Kehr e-mail, in the attached e-mail compilation for a quick read on the issues for the coming meeting:

August 8, 2009 Kehr E-mail #1 to Drafters (Voogd, Julien & Sapiro), cc Chair, Difuntorum, McCurdy & KEM: 27
August 8, 2009 Kehr E-mail #2 to Drafters (Voogd, Julien & Sapiro), cc Chair, Difuntorum, McCurdy & KEM: 29
August 10, 2009 Voogd E-mail to Drafters, cc Chair, Difuntorum, McCurdy & KEM: 29
August 10, 2009 KEM E-mail to Kehr, cc Drafters, Chair, Difuntorum, McCurdy & KEM: 29
August 10, 2009 Kehr E-mail to Voogd, cc Drafters, Chair, Difuntorum, McCurdy & KEM: 32
August 10, 2009 Kehr E-mail to KEM, cc Drafters, Chair, Difuntorum & McCurdy: 32

Please note that Tony has joined in nearly all of Bob's recommendations in the draft.

2. The Commission previously approved the definition of "law firm" as Rule 1.0.1 but it should probably be included in the terminology section. See Point #3.

3. To avoid confusion, we should for the time being refer to the Terminology section as Rule 1.0.1. The Commission has already assigned the number 1.0 to the revision of current rule 1-100, titled "Purpose and Scope of the Rules of Professional Conduct." When approved, our proposed Rule 1.0 was intended as the counterpart to the Preamble & Scope sections of the Model Rules. The Commission voted 7-0-1 to make it Rule 1.0, after voting 6-2-0 on the concept of the "purpose and function" section of the rules being a rule. See 11/19/04 KEM Meeting Notes, III.A., at paragraphs 4,5. We've already assigned 1.0.1 to the definition of "law firm" with the idea that 1.0.1 would be the terminology section. See id. at paragraph 5.

Please let me know if you have any questions.

August 12, 2009 KEM E-mail #2 to McCurdy & Difuntorum, cc Drafters, Chair & Lee:

I've attached the following:

1. Revised E-mail compilation for 1.0.1 excerpt that includes Jerry's e-mail to the Drafters from Monday (page 32 of attached). In PDF. Please substitute it for the 1.0.1 compilation I sent you w/ the other materials earlier today.

2. A single page document, in Word & PDF, that includes Jerry's proposed definition of "screen." The proposed definition w/ the Model Rule definition and comparison to the Model Rule definition were attached to Jerry's e-mail. I think they should be included with the agenda materials.

I had inadvertently been left off the distribution of Jerry's e-mail, which is why it and the attachments were not included earlier.

Please let me know if you have any questions.

August 15, 2009 Kehr E-mail to KEM re "informed consent":

Kevin: is paragraph (a)(1) of Rule 1.4 correct in saying that there are Rules that require a lawyer to obtain the client's "informed consent", or have we in each location changed this to: "informed written consent"?

August 15, 2009 KEM E-mail to Kehr re "informed consent":

At least for Rule 1.6, it is "informed consent," no requirement of written.

August 15, 2009 Kehr E-mail to KEM re "informed consent," cc Drafters, Chair, Difuntorum & McCurdy:

Your reply led me to open your revision of my Rule 1.0.1 draft, and I'm afraid I don't agree with what you've done in removing the proposed definition of "informed written consent". First, if "informed consent" is used only in Rule 1.6, your definition is incorrect b/c it refers only to acceptance of a representation, which has nothing to do with Rule 1.6; it is particular to conflicts situations where we have used "informed written consent". Second, because a lawyer can be subject to discipline in a number of situations for failing to obtain "informed written consent", I believe the definition the term "informed written consent" should be in the Rule, and not in the Comment as you have suggested in fn. 6 to Draft 1.1. Third, even if one might imagine that the term doesn't have to be defined in a Rule for a lawyer to be subject to discipline, the term is used many times in the conflict Rules, and I believe it therefore needs to be included in Rule 1.0.1 and not hidden in the Comment. Fourth, if the Commission were to include definitions of both terms, I don't agree with the use of "disclosure" with respect to Rule 1.6, this for reasons I first suggested in what is fn. 6.

I think we need to know whether "informed consent" is used anywhere other than in Rule 1.6. Depending on the answer to that question, I will raise these points at the meeting.

And by the way, I have no further comment on Rule 1.4 and vote to approve it.

August 15, 2009 KEM E-mail to Kehr re "informed consent," cc Drafters, Chair, Difuntorum & McCurdy:

There are at least three proposed rules in which "informed consent" (not "written") appears: 1.6(a), 1.2(c) and 1.5(c)(11). There may be others. I haven't done a comprehensive search. Also, if we go to the MR language in 1.11(d)(2)(i) ("unless the appropriate government agency gives its informed consent"), which I think may still be an open issue, we'll have another. Moreover, although we inserted "informed written consent" in 1.8.7, there was strong opposition to doing so, and we may revisit that issue.

I'd be wary of having two definitions, one for "informed consent" and another for "informed written consent," and that's the direction we might be headed. Might the better course be to use the MR definition for "informed consent" and for each of the conflicts rules, explain in a comment (as we have done for Rule 1.8.7) the specific kinds of disclosure required to obtain the informed written consent of the client? The problem as you identify below seems to arise more from our retaining the California definition in 3-310(A) as the global definition.

I agree we don't need to resolve this by e-mail. The meeting will be time enough.

McCurdy, Lauren

From: McCurdy, Lauren
Sent: Tuesday, August 25, 2009 9:47 AM
To: Audrey Hollins (E-mail); avoogd@stanfordalumni.org; CommissionerJ2@gmail.com; Ellen Peck (E-mail); hbsondheim@verizon.net; ignazio.ruvolo@jud.ca.gov; Jerome Sapiro Jr. (E-mail); kemohr@charter.net; Kevin Mohr (Home#1) (E-mail); Kevin Mohr (Work) (E-mail); Kurt Melchior (E-mail); Lauren McCurdy; Lee, Mimi; linda.foy@jud.ca.gov; Mark L. Tuft (E-mail); martinez@lbbslaw.com; Paul W. Vapnek (E-mail); Randall Difuntorum (E-mail); rlkehr@kscllp.com; snyderlaw@charter.net; Stan Lamport (E-mail); Yen, Mary
Subject: Message from the Chair Concerning Agenda item IIIA -- 1.0.1

Commission Members,

In addition to the 15 definitions defined in other rules (Agenda materials, pp.15-16) I want to add: consult

Agenda materials, page 24: Should the definition of "writing" or "written" utilize Evid. Code section 250 as was done in 7.1, comment 4 and 1.16, comment 10?

Cheers,
Harry