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Bits and Bytes™

Special Supplement

Welcome to *Bits and Bytes*™ our electronic newsletter published for the bench and bar as a public service by Joel R. Brandes Consulting Services, Inc., the ultimate source for litigation support and paralegal services for attorneys throughout the United States.

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Rules of Professional Conduct for Family Law Attorneys By Joel R. Brandes¹

The Rules of Professional Conduct² which replace the existing Disciplinary Rules, introduce a number of important ethics changes for New York lawyers. They are based on the American Bar Association Model Rules of Professional Conduct, which have generated a national body of ethics law.

Some of the rules impose new ethical obligations on New York lawyers. One rule obligates a lawyer to act with reasonable diligence and promptness³ in representing a client. Another rule requires a lawyer to keep the client reasonably informed about the status of the matter, and to promptly comply with a client's reasonable requests for information.⁴

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² 22 NYCRR Part 1200, effective April 1, 2009

³ 22 NYCRR Part 1200, Rule 1.3[a]

⁴ 22 NYCRR Part 1200, Rule 1.4[a][3], [4]

In some cases, the new rules liberalize a former New York rule. For example one rule sets forth a lawyer's duty and obligation to a "prospective client," including a client with whom the lawyer never enters into an attorney-client relationship. It expressly exempts from the benefit of the rule's protections potential clients who consult with a lawyer merely for the purpose of disqualifying the lawyer from representing an adverse party. Another rule allows attorneys to disclose confidential information to advance the best interests of the client when it is either reasonable under the circumstances or customary in the professional community

The adoption of these Rules are intended to ease ethical research and guidance by New York lawyers as well as out-of-state lawyers seeking to research and follow New York's rules.⁵ The Rules are in addition to the Disciplinary Rules contained in 22 NYCRR Parts 1210 (Statement of Clients Rights), 1215 (Written Letter of Engagement), 1230 (Fee Arbitration Rule) and 1400 (Procedure for Attorneys in Domestic Relations Matters), which have not been repealed. In this article we will discuss those rules that particularly effect New York Matrimonial and Family law attorneys.

The Preamble to the American Bar Association, Annotated Model Rules of Professional Conduct, Sixth Edition, 2007, specifies that the Rules of Professional Conduct are rules of reason and that 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. Other rules, generally cast in the term "may," are permissive and define areas under the Rules in which the lawyer has discretion to exercise professional judgment.

New York did not adopt the Comments, which appear in the American Bar Association, Annotated Model Rules of Professional Conduct. Many of the comments use the term "should." According to the annotated version of the rules Comments do not add obligations to the Rules but provide guidance for practicing in compliance with the Rules.⁶ The Comment accompanying each Rule explains and illustrates the meaning and purpose of the Rule. The Comments are intended as guides to interpretation, but the text of each

⁵ See NYSBA Annual Meeting, NEW CONDUCT RULES SET TO TAKE EFFECT, Adoption Brings Many Benefits, by A. Gail Prudenti, Presiding Justice Appellate Division, Second Department, 1/26/2009 N.Y.L.J. 11, (col. 1); NYSBA Annual Meeting, NEW CONDUCT RULES SET TO TAKE EFFECT, State Bar Efforts Were Crucial, by Henry J. Scudder, Presiding Justice Appellate Division, Fourth Department, 1/26/2009 N.Y.L.J. 11, (col. 1).

⁶ American Bar Association, Annotated Model Rules of Professional Conduct, Sixth Edition, 2007, 2007, Preamble

Rule is authoritative.⁷ 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. Whether a client-lawyer relationship exists for any specific purpose can depend on the circumstances and may be a question of fact.⁸

The Rules of Professional Conduct use terminology not previously part of New York's Disciplinary Rules. This new terminology is defined in Rule 1.0.

“Informed Consent”

Many of the Rules of Professional Conduct require the lawyer to obtain the “informed consent” of a client or other person before accepting or continuing representation or pursuing a course of conduct. The communication necessary to obtain “informed consent” varies according to the Rule involved and the circumstances giving rise to the need to obtain informed consent. The Comments to the Rules indicate that 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.⁹

⁷ American Bar Association, Annotated Model Rules of Professional Conduct, Sixth Edition, 2007, Preamble, Comment [21]

⁸ American Bar Association, Annotated Model Rules of Professional Conduct, 2007, Preamble, Comment [17]

⁹ See Comment [6] to Rule 1.1, ABA, Annotated Model Rules of Professional Conduct, Sixth Edition, 2007

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.¹⁰

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.¹¹

Rule 1.5 - Fees and Division of Fees - Illegal or Excessive Fees or Expenses

22 NYCRR Part 1200, Rule 1.5, entitled "fees and division of fees," prohibits a lawyer from charging an illegal or excessive legal fee or expense. It provides that a lawyer "shall not make an agreement for, charge, or collect an excessive or illegal fee or expense."¹² A fee is excessive when, after a review of the facts, a reasonable lawyer¹³

¹⁰ See Comment [1] to Rule 1.1, ABA, Annotated Model Rules of Professional Conduct, Sixth Edition, 2007

¹¹ See Comment [8] to Rule 1.1, ABA, Annotated Model Rules of Professional Conduct, Sixth Edition, 2007

¹² 22 NYCRR Part 1200, Rule 1.5 (a)

¹³ 22 NYCRR Part 1200, Rule 1.0 provides, in part:

(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.

(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.

would be left with a definite and firm conviction that the fee is excessive.¹⁴

22 NYCRR Part 1200, Rule 1.5 contains a list of factors to be considered when determining if a fee is excessive. The factors to be considered in determining whether a fee is excessive may include the following:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) the likelihood, if apparent or made known to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation and ability of the lawyer or lawyers performing the services; and

(8) whether the fee is fixed or contingent.

22 NYCRR Part 1200, Rule 1.5 requires that lawyer's charge fees that are reasonable under the circumstances. The factors specified in (1) through (8) are not exclusive. Nor will each factor be relevant in each instance. 22 NYCRR Part 1200, Rule 1.5 also requires that expenses for which the client will be charged must be reasonable. A lawyer may seek reimbursement for the cost of services performed in-house, such as copying, or for other expenses incurred in-house, such as telephone charges, either by charging a reasonable amount to which the client has agreed in advance or by charging an amount that reasonably reflects the cost incurred by the lawyer.¹⁵

A lawyer may require advance payment of a fee, but is obliged to return any

22 NYCRR Part 1200, Rule 1.0 (b) provides: "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.

¹⁴ 22 NYCRR Part 1200, Rule 1.5 (a)

¹⁵ See Comment [1] to Rule 1.5, ABA, Annotated Model Rules of Professional Conduct, Sixth Edition, 2007

unearned portion.¹⁶

An agreement may not be made whose terms might induce the lawyer improperly to curtail services for the client or perform them in a way contrary to the client's interest. For example, a lawyer should not enter into an agreement whereby services are to be provided only up to a stated amount when it is foreseeable that more extensive services probably will be required, unless the situation is adequately explained to the client. Otherwise, the client might have to bargain for further assistance in the midst of a proceeding or transaction. However, it is proper to define the extent of services in light of the client's ability to pay. A lawyer should not exploit a fee arrangement based primarily on hourly charges by using wasteful procedures.¹⁷

Rule 1.5 - Fees and Division of Fees - Illegal or Excessive Fees or Expenses - Special Rules for Lawyers in Domestic Relations Matters

22 NYCRR Part 1200, Rule 1.5 (d) specifies certain kinds of circumstances in which a lawyer is prohibited from charging a fee. Subdivisions (d) (4) and (5) of this rule apply only to domestic relations matters. "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, alimony, or to enforce or modify a judgment or order in connection with any such claim, action or proceeding¹⁸. The definition of "domestic relations matter" is identical to the one that appears in 22 NYCRR Part 1400.1¹⁹.

¹⁶ See Comment [4] to Rule 1.5, ABA, Annotated Model Rules of Professional Conduct, Sixth Edition, 2007

¹⁷ See Comment [5] to Rule 1.5, ABA, Annotated Model Rules of Professional Conduct, Sixth Edition, 2007

¹⁸ 22 NYCRR Part 1200, Rule 1.0 (g)

¹⁹ 22 NYCRR 1400.1 provides: "This Part shall apply to all attorneys who, on or after November 30, 1993, undertake to represent 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 claims, actions or proceedings. This Part shall not apply to attorneys representing clients without compensation paid by the client, except that where a client is other than a minor, the provisions of section 1400.2 of this Part shall apply to the extent they are not applicable to compensation."

Rule 1.5 - Fees and Division of Fees - Illegal or Excessive Fees or Expenses - Nonrefundable Fee and Minimum Fee

A lawyer may not enter into an arrangement for, charge or collect a nonrefundable retainer fee.²⁰ However, a lawyer may enter into a retainer agreement with a client containing a reasonable minimum fee clause²¹, if it defines in plain language and sets forth the circumstances under which such fee may be incurred and how it will be calculated.²²

22 NYCRR Part 1200, Rule 1.5 (d) (4) is in accord with the former rule in New York which prohibited nonrefundable retainer fees.²³

Rule 1.5 - Fees and Division of Fees - Illegal or Excessive Fees or Expenses - Contingent Fee

In domestic relations matters²⁴ a lawyer may not enter into an arrangement for,

²⁰ 22 NYCRR Part 1200, Rule 1.5 (d) (4)

²¹ 22 NYCRR Part 1200, Rule 1.0 (q) provides: "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.

²² 22 NYCRR Part 1200, Rule 1.5 (d) (4)

²³ In re Cooperman (1993, 2d Dept) 187 AD2d 56, 591 NYS2d 855, app gr, stay gr 82 NY2d 745, 602 NYS2d 798, 622 NE2d 299, affd 83 NY2d 465, 611 NYS2d 465, 633 NE2d 1069, the Appellate Division determined that the use of a "non-refundable fee" retainer was unethical and violative of an attorney's obligation under the CPLR to refund any unearned fees upon discharge by his client. The continued use of these agreements, after repeated cautioning, warranted a two year suspension from practicing law. The Court of Appeals granted leave to appeal (In re Cooperman (1993) 82 NY2d 745, 605 NYS2d 798, 622 NE2d 299) and affirmed holding that special non-refundable retainer fee agreements are prohibited and unacceptable and may subject an attorney to professional discipline.

²⁴ 22 NYCRR Part 1200, Rule 1.0 (g) provides: "Domestic relations matter" denotes representation of a client in a claim, action or proceeding, or preliminary to the

charge or collect any fee if the payment or amount of the fee is contingent upon the securing of a divorce or of obtaining child custody or visitation or is in any way determined by reference to the amount of maintenance, support, equitable distribution, or property settlement.²⁵

Rule 1.5 provides that in domestic relations matters a lawyer may not enter into an arrangement for, charge or collect any fee if the payment or amount of the fee is contingent upon the securing of a divorce or of obtaining child custody or visitation or is in any way determined by reference to the amount of maintenance, support, equitable distribution, or property settlement.²⁶ This rule does not prohibit an attorney from entering into an agreement for a reasonable contingent fee for collection of an award of post-judgment balances due under support, alimony or other financial orders. The Comment to the ABA, Annotated Model Rules of Professional Conduct²⁷, specifies that this provision does not preclude a contract for a contingent fee for legal representation in connection with the recovery of post-judgment balances due under support, alimony or other financial orders because such contracts do not implicate the same policy concerns.

The former rule in New York was enunciated in 22 NYCRR 1200.11 [DR 2-106], which is identical to the ABA rule. It provided, in part, that : "C. A lawyer shall not enter into an agreement for, charge or collect: ...(2) Any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of maintenance, support, equitable distribution, or property settlement; ..." Although the former New York rule did not prohibit an attorney from entering into an agreement for a reasonable contingent fee for collection of an award of past due maintenance and a distributive award under a final judgment of divorce the Second Department held in an action by a law firm to collect a legal fee from a former client, that the better rule was that all contingency fees were prohibited in matrimonial matters.²⁸

It would appear that with New York's adoption of ABA Rule 1.5, without modifying it to add qualifying language prohibiting contingency fees, New York no longer prohibits contingency fees for the collection of past due alimony, maintenance, child support or

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, alimony, or to enforce or modify a judgment or order in connection with any such claim, action or proceeding.

²⁵ 22 NYCRR Part 1200, Rule 1.5 (d) (5)(i)

²⁶ 22 NYCRR Part 1200, Rule 1.5 (d) (5)(i)

²⁷ Comment [6] to Rule 1.5, ABA, Annotated Model Rules of Professional Conduct, Sixth Edition, 2007

²⁸ Ross v. DeLorenzo, 28 A.D.3d 631, 813 N.Y.S.2d 756 (2d Dep't 2006)

property settlement.

Rule 1.5 - Fees and Division of Fees - Illegal or Excessive Fees or Expenses - Requirement of Written Retainer

In domestic relations matters a lawyer may not enter into an arrangement for, charge or collect any fee if a written²⁹ retainer agreement has not been signed by the lawyer and client³⁰ setting forth in plain language the nature of the relationship and the details of the fee arrangement.³¹

In domestic relations matters, a lawyer must provide a prospective client with a statement of client's rights and responsibilities³² at the initial conference and prior to the signing of a written retainer agreement.³³

Rule 1.5 - Fees and Division of Fees - Illegal or Excessive Fees or Expenses - Security Interest, Confession of Judgment or Lien

In domestic relations matters a lawyer may not enter into an arrangement for, charge or collect any fee if the written retainer agreement includes a security interest, confession of judgment or other lien³⁴ without prior notice being provided to the client in a signed

²⁹ 22 NYCRR Part 1200, Rule 1.0 (x) provides: "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.

³⁰ See Law and the Family, New York, 2d Edition, Volume 2, Section § 3:120 Written letter of engagement [New] Part 1400

³¹ 22 NYCRR Part 1200, Rule 1.5 (d) (5)(ii)

³² See Law and the Family, New York, 2d Edition, Volume 2, § 3:105 Statement of Client's Rights [New] 1200.10, 1200.10-a, 1400.2

³³ 22 NYCRR Part 1200, Rule 1.5 (e)

³⁴ See Law and the Family, New York, 2d Edition, Volume 2, § 3:107 Measures to Secure Payment of Attorney's Fee [New] 1400.5

retainer agreement and approval from a tribunal³⁵ after notice to the adversary.³⁶

Rule 1.5 - Fees and Division of Fees - Illegal or Excessive Fees or Expenses - Prohibition of Foreclosure of Mortgage

In domestic relations matters a lawyer may not foreclose on a mortgage placed on the marital residence while the spouse who consents to the mortgage remains the titleholder and the residence remains the spouse's primary residence.³⁷

Formerly, and as consequence of legislation enacted in 2002 attorneys were prohibited from foreclosure of a matrimonial litigant's primary residence, when the mortgage being foreclosed was given to a lawyer to secure the payment of legal fees in a matrimonial action.³⁸

Rule 1.5 - Fees and Division of Fees - Illegal or Excessive Fees or Expenses - Arbitration of Fee Disputes

Where applicable, a lawyer must resolve fee disputes by arbitration at the election

³⁵ 22 NYCRR Part 1200, Rule 1.0 (w) provides: "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.

³⁶ 22 NYCRR Part 1200, Rule 1.5 (d) (5)(ii)

³⁷ 22 NYCRR Part 1200, Rule 1.5 (d) (5)(iii)

³⁸ The justification for the legislation was the fact that since November, 1993, court rules have required that a lawyer in a matrimonial action requesting a client to give a mortgage to secure payment of legal fees, must obtain prior court approval of such a mortgage. Some mortgages were obtained prior to the rule. The law prohibited the foreclosure of all such mortgages. It did not cancel any obligation to pay legal fees, but precludes enforcement by foreclosure or a foreclosure sale. Laws of 2002, c. 71, effective May 21, 2002 . The Act provides:

1. Notwithstanding any law, rule or regulation to the contrary, no foreclosure action, nor sale pursuant to an order of foreclosure, shall be permitted on the primary residence of a litigant in a matrimonial action pursuant to a mortgage or security interest given by such litigant to his or her attorney to secure payment of legal fees in connection with such matrimonial action. Nothing in this act shall affect the indebtedness secured by any such mortgage or security interest.
2. This act shall take effect immediately. See NY Legis 71 (2002).

of the client pursuant to a fee arbitration program³⁹ established by the Chief Administrator of the Courts and approved by the Administrative Board of the Courts.⁴⁰

Rule 1.5 - Fees and Division of Fees - Illegal or Excessive Fees or Expenses - Division of Fees

A lawyer may not divide a fee for legal services with another lawyer who is not associated in the same law firm⁴¹ unless the division is in proportion to the services performed by each lawyer or, by a writing given to the client, each lawyer assumes joint responsibility for the representation. In addition the client must agree to employment of the other lawyer after a full disclosure that a division of fees will be made, including the share each lawyer will receive, and the client's agreement must be confirmed in writing.⁴² The total fee may not be excessive.⁴³

This Rule does not prohibit payment to a lawyer formerly associated in a law firm

³⁹ See Law and the Family, New York, 2d Edition, Volume 2, § 3:109 Fee Arbitration under 22 NYCRR § 1400.7 [New]; § 3:111 Mandatory Fee Arbitration [New] Part 136; § 3:111.4 Part 137 of the Rules of the Chief Administrator— Attorney Fee Dispute Resolution [New]; § 3:111.5 — —Text of Rule [New]; § 3:113 Text of Fee Arbitration and Disciplinary Conduct Rules [New] Part 136, part 1400, 1200.3 [DR1-102 [Misconduct], (a)(7) Sexual Relations with Client, 1200.10-a [DR2-105(a)] Clients Statement of Rights and Responsibilities is Domestic Relations Matters, 1200.11 [DR2-106] Fee for Legal Services; § 3:113.50 Effect of failure to comply with arbitration rules upon attorney's right to collect fees [New]

⁴⁰ 22 NYCRR Part 1200, Rule 1.5 (f)

⁴¹ 22 NYCRR Part 1200, Rule 1.0 (h) provides: "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.

⁴² 22 NYCRR Part 1200, Rule 1.0 (e) provides: "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.

⁴³ 22 NYCRR Part 1200, Rule 1.5 (g)

pursuant to a separation or retirement agreement.⁴⁴

This Rule is similar to the former Rule in New York⁴⁵, but adds the requirement that the writing contain the share that each lawyer will receive.

A division of fee is a single billing to a client covering the fee of two or more lawyers who are not in the same firm. A division of fee facilitates association of more than one lawyer in a matter in which neither alone could serve the client as well. Lawyers are permitted to divide a fee either on the basis of the proportion of services they render or if each lawyer assumes responsibility for the representation as a whole. In addition, the client must agree to the arrangement, including the share that each lawyer is to receive, and the agreement must be confirmed in writing. Joint responsibility for the representation entails financial and ethical responsibility for the representation as if the lawyers were associated in a partnership.⁴⁶

Rule 1.6, Confidentiality of Information

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

⁴⁴ 22 NYCRR Part 1200, Rule 1.5(h)

⁴⁵ DR 2-107, which became effective on September 1, 1990 provided: "A. A lawyer shall not divide a fee for legal services with another lawyer who is not a partner in or associate of the lawyer's firm or law office, unless: (1) The client consents to employment of the other lawyer after a full disclosure that a division of fees will be made. (2) The division is in proportion to the services performed by each lawyer or, by a writing given to the client, each lawyer assumes joint responsibility for the representation. (3) The total fee of the lawyers does not exceed reasonable compensation for all legal services they rendered to the client." Rule

⁴⁶ See Comment [7] to Rule 1.5, ABA, Annotated Model Rules of Professional Conduct, Sixth Edition, 2007

authorized or required by the Rules of Professional Conduct or other law.⁴⁷

22 NYCRR Part 1200, Rule 1.6 governs the disclosure by a lawyer of information relating to the representation of a client during the lawyer's representation of the client.⁴⁸

"Confidential information" is defined as information gained during or relating to the representation of a client, whatever its source, that is protected by the attorney-client privilege, likely to be embarrassing or detrimental to the client if disclosed, or information that the client has requested be kept confidential. "Confidential information" does not ordinarily include a lawyer's legal knowledge or legal research or information that is generally known in the local community or in the trade, field or profession to which the information relates.⁴⁹

A lawyer may not knowingly reveal "confidential information," or use such information to the disadvantage of a client or for the advantage of the lawyer or a third person, unless the disclosure is specifically permitted by Rule 1.6.⁵⁰ However, a lawyer may reveal or use confidential information to the extent that the lawyer reasonably believes necessary to defend the lawyer or the lawyer's employees and associates against an accusation of wrongful conduct.⁵¹ A lawyer may reveal or use confidential information to the extent that the lawyer reasonably believes necessary to establish or collect a fee.⁵²

22 NYCRR Part 1200, Rule 1.6 (a) prohibits a lawyer from revealing information relating to the representation of a client. This prohibition also applies to disclosures by a lawyer that do not in themselves reveal protected information but could reasonably lead to the discovery of such information by a third person. A lawyer's use of a hypothetical to discuss issues relating to the representation is permissible so long as there is no reasonable likelihood that the listener will be able to ascertain the identity of the client or the situation involved.⁵³

⁴⁷ See Comment [3] to Rule 1.6, ABA, Annotated Model Rules of Professional Conduct, Sixth Edition, 2007

⁴⁸ See Comment [1] to Rule 1.6, ABA, Annotated Model Rules of Professional Conduct, Sixth Edition, 2007

⁴⁹ 22 NYCRR Part 1200, Rule 1.6 (a)

⁵⁰ 22 NYCRR Part 1200, Rule 1.6 (a) (3)

⁵¹ 22 NYCRR Part 1200, Rule 1.6 (b) (5) (i)

⁵² 22 NYCRR Part 1200, Rule 1.6 (b) (5) (ii)

⁵³ See Comment [4] to Rule 1.6, ABA, Annotated Model Rules of Professional Conduct, Sixth Edition, 2007

The duty of confidentiality continues after the client-lawyer relationship has terminated.⁵⁴

Where a legal claim or disciplinary charge alleges complicity of the lawyer in a client's conduct or other misconduct of the lawyer involving representation of the client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense. The same is true with respect to a claim involving the conduct or representation of a former client. Such a charge can arise in a civil, criminal, disciplinary or other proceeding and can be based on a wrong allegedly committed by the lawyer against the client or on a wrong alleged by a third person, for example, a person claiming to have been defrauded by the lawyer and client acting together. The lawyer's right to respond arises when an assertion of such complicity has been made. A lawyer is not required to await the commencement of an action or proceeding that charges such complicity, so that the defense may be established by responding directly to a third party who has made such an assertion. The right to defend also applies where a proceeding has been commenced.⁵⁵

A lawyer entitled to a fee is permitted to prove the services rendered in an action to collect it. This aspect of the rule expresses the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary.⁵⁶

The Rule permits disclosure only to the extent the lawyer reasonably believes the disclosure is necessary to accomplish one of the purposes specified. Where practicable, the lawyer should first seek to persuade the client to take suitable action to obviate the need for disclosure. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to accomplish the purpose. If the disclosure will be made in connection with a judicial proceeding, the disclosure should be made in a manner that limits access to the information to the tribunal or other persons having a need to know it and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.⁵⁷

This rule permits but does not require the disclosure of information relating to a client's representation to accomplish the purposes specified in it. In exercising the discretion

⁵⁴ See Comment [18] to Rule 1.6, ABA, Annotated Model Rules of Professional Conduct, Sixth Edition, 2007

⁵⁵ See Comment [10] to Rule 1.6, ABA, Annotated Model Rules of Professional Conduct, Sixth Edition, 2007

⁵⁶ See Comment [11] to Rule 1.6, ABA, Annotated Model Rules of Professional Conduct, Sixth Edition, 2007

⁵⁷ See Comment [14] to Rule 1.6, ABA, Annotated Model Rules of Professional Conduct, Sixth Edition, 2007

conferred by this Rule, the lawyer may consider such factors as the nature of the lawyer's relationship with the client and with those who might be injured by the client, the lawyer's own involvement in the transaction and factors that may extenuate the conduct in question. A lawyer's decision not to disclose does not violate this Rule. Disclosure may be required, however, by other Rules.⁵⁸

Rule 1.6, Confidentiality of Information - Confidentiality of Communications

A lawyer must act competently to safeguard information relating to the representation of a client against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision.⁵⁹

When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances may warrant special precautions. Factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to the use of a means of communication that would otherwise be prohibited by this Rule.⁶⁰

Electronic communications, such as those made by phone (a landline or cell phone), by fax, or over the Internet, pose unique problems related to maintaining client confidences because of the ease with which they may be intercepted by unauthorized and unknown persons. Electronic documents pose the problem of "metadata," information "hidden" in a document that may reveal details about the document's preparation, prior drafts, and authorship. The lawyer's duty of confidentiality requires that when communicating through electronic means, just as with other means, the lawyer should be cognizant of the risks and, if necessary, take protective measures. Such measures may include obtaining a client's informed consent to use a particular means of communication, using encrypted e-mail,

⁵⁸ See Comment [15] to Rule 1.6, ABA, Annotated Model Rules of Professional Conduct, Sixth Edition, 2007

⁵⁹ See Comment [16] to Rule 1.6, ABA, Annotated Model Rules of Professional Conduct, Sixth Edition, 2007

⁶⁰ See Comment [17] to Rule 1.6, ABA, Annotated Model Rules of Professional Conduct, Sixth Edition, 2007

"scrubbing" a document of its metadata, or using a more secure means of communication.⁶¹

Most ethics opinions caution lawyers to advise clients of the risk that calls on cellular phones may be intercepted.⁶² The American Bar Association Ethics Committee has concluded that a lawyer may communicate with a client via electronic mail without encryption, reasoning that the expectation of privacy for electronic mail is the same as that for ordinary telephone calls, and the unauthorized interception of an electronic message is illegal. Unusual circumstances involving extraordinarily sensitive information might warrant enhanced security measures like encryption, just as ordinary telephones and other normal means of communication would be deemed inadequate to protect confidentiality in some situations.⁶³

The American Bar Association Ethics Committee⁶⁴ suggests that a lawyer who is concerned about disclosing client information via metadata contained in electronic documents may be able to limit the likelihood of its transmission, such as by "scrubbing" the metadata from the document or sending the document in a paper, facsimile, or scanned format that does not contain metadata. The opinion also concludes that a lawyer who receives an electronic document is permitted to "review and use" the embedded information contained within it.⁶⁵

The New York State Bar Association Committee on Professional Ethics rendered an opinion with regard to e-mailing documents. The opinion of the Committee was that lawyers must exercise reasonable care to prevent the disclosure of confidences and secrets contained in "metadata" in documents they transmit electronically to opposing counsel or other third parties. Lawyers have a duty under DR 4-101 to use reasonable care when transmitting documents by e-mail to prevent the disclosure of metadata containing client

⁶¹ See Comment [17] to Rule 1.6, ABA, Annotated Model Rules of Professional Conduct, Sixth Edition, 2007.

⁶² See, e.g., N.Y. City Ethics Op. 94-11 (1994)

⁶³ ABA Formal Ethics Op. 99-413 (1999)

⁶⁴ ABA Formal Ethics Opinion 06-442 (2006)

⁶⁵ See N.Y. State Ethics Op. 782 (2004) (lawyer must exercise reasonable care when transmitting documents electronically to prevent disclosure of metadata containing client confidences and secrets); N.Y. State Ethics Op. 749 (2001) (lawyers may not use computer technology to surreptitiously examine and "get behind" data not visible in documents and e-mail messages sent by opposing parties or their counsel) which may have been overruled by the ABA Ethics opinion which interprets the model rules.

confidences or secrets.⁶⁶

Rule 1.8 Current Clients: Specific Conflict of Interest Rules - Financial Assistance By Lawyer

While representing a client in connection with contemplated or pending litigation, a lawyer may not advance or guarantee financial assistance to the client, except that a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter.⁶⁷

A lawyer representing an indigent or pro bono client may pay court costs and expenses of litigation on behalf of the client.⁶⁸

Lawyers may not subsidize lawsuits or administrative proceedings brought on behalf of their clients, including making or guaranteeing loans to their clients for living expenses, because to do so would encourage clients to pursue lawsuits that might not otherwise be brought and because such assistance gives lawyers too great a financial stake in the litigation. These dangers do not warrant a prohibition on a lawyer lending a client court costs and litigation expenses, including the expenses of medical examination and the costs of obtaining and presenting evidence, because these advances are virtually indistinguishable from contingent fees and help ensure access to the courts. Similarly, an exception allowing lawyers representing indigent clients to pay court costs and litigation expenses regardless of whether these funds will be repaid is warranted.⁶⁹

It has been the rule in New York that it was improper for an attorney to advance or loan money to a client not related to costs, fees or expenses. Where an attorney representing a matrimonial client in an enforcement proceeding advances money to a client so she can pay mortgage payments and automobile expenses, the advance violates the

⁶⁶ NYSBA, Committee on Professional Ethics, Opinion 782 – 12/8/04 (modified 4/15/04)

⁶⁷ 22 NYCRR Part 1200, Rule 1.8 (e) (1); 22 NYCRR Part 1200, Rule 1.0 (l) provides: "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.

⁶⁸ 22 NYCRR Part 1200, Rule 1.8 (e) (2)

⁶⁹ See Comment [10] to Rule 1.8, ABA, Annotated Model Rules of Professional Conduct, Sixth Edition, 2007

Code of Professional Responsibility.⁷⁰

In 2006 Judiciary Law 488(2) was amended to allow a lawyer to pay, on the lawyer's own account, court costs and expenses of litigation. It provides that the total paid to the lawyer from the proceeds of the legal action may include a separate amount equal to such costs and expenses. Such costs and expenses need not be repaid by the client if the matter proves unsuccessful.⁷¹ 22 NYCRR Part 1200, Rule 1.8 (e) appears to be almost identical to New York's existing rule.

Rule 1.8 Current Clients: Specific Conflict of Interest Rules -

Compensation From Third Persons For Representing a Client

A lawyer may not accept compensation for representing a client, or anything of value related to the lawyer's representation of the client, from one other than the client unless the client gives informed consent; there is no interference with the lawyer's independent professional judgment or with the client-lawyer relationship; and the client's confidential information is protected as required by 22 NYCRR Part 1200, Rule 1.6.⁷²

Matrimonial lawyers are frequently asked to represent a client under circumstances in which a third person will compensate the lawyer, in whole or in part. The third person is usually a relative or friend. Because third-party payers frequently have interests that differ from those of the client, including interests in minimizing the amount spent on the representation and in learning how the representation is progressing, lawyers are prohibited from accepting or continuing such representations unless the lawyer determines that there will be no interference with the lawyer's independent professional judgment and there is

⁷⁰ Waldman v Waldman, 118 App Div 2d 577, 499 NYS2d 184.(2 Dept 1986)

⁷¹ Laws of 2006, Ch. 635, Eff August 16, 2006.

DR 5-103(B)(2) provided that a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter. DR 5-103(B)(3) stated that in an action in which an attorney's fee is payable in whole or in part as a percentage of the recovery in the action, a lawyer may pay, on the lawyer's own account, court costs and expenses of litigation. In such cases, the total paid to the lawyer from the proceeds of the action may include an amount equal to the costs and expenses incurred.

⁷² 22 NYCRR Part 1200, Rule 1.8 (f)

informed consent from the client.⁷³

Sometimes, it will be sufficient for the lawyer to obtain the client's informed consent regarding the fact of the payment and the identity of the third-party payer. If, however, the fee arrangement creates a conflict of interest for the lawyer, then the lawyer must comply with Rule 1.7. The lawyer must also conform to the requirements of Rule 1.6 concerning confidentiality. Under Rule 1.7(a), a conflict of interest exists if there is significant risk that the lawyer's representation of the client will be materially limited by the lawyer's own interest in the fee arrangement or by the lawyer's responsibilities to the third-party payer (for example, when the third-party payer is a co-client). Under Rule 1.7(b), the lawyer may accept or continue the representation with the informed consent of each affected client, unless the conflict is nonconsentable under that paragraph. Under Rule 1.7(b), the informed consent must be confirmed in writing.⁷⁴

Rule 1.8 Current Clients: Specific Conflict of Interest Rules - Sexual Relations with Client

A lawyer may not in domestic relations matters⁷⁵, enter into sexual relations with a client during the course of the lawyer's representation of the client.⁷⁶ This rule does not apply to sexual relations between lawyers and their spouses or to ongoing consensual sexual relationships that predate the initiation of the client-lawyer relationship.⁷⁷

The relationship between lawyer and client is a fiduciary one in which the lawyer occupies the highest position of trust and confidence. The relationship is almost always unequal; thus, a sexual relationship between lawyer and client can involve unfair

⁷³ See Comment [11] to Rule 1.8, ABA, Annotated Model Rules of Professional Conduct, Sixth Edition, 2007 . See also 22 NYCRR Part 1200, Rule 5.4(c) (prohibiting interference with a lawyer's professional judgment by one who recommends, employs or pays the lawyer to render legal services for another)

⁷⁴ See Comment [12] to Rule 1.8, ABA, Annotated Model Rules of Professional Conduct, Sixth Edition, 2007

⁷⁵ 22 NYCRR Part 1200, Rule 1.0 (g) provides: "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, alimony, or to enforce or modify a judgment or order in connection with any such claim, action or proceeding.

⁷⁶ 22 NYCRR Part 1200, Rule 1.8 (j)(1)(iii)

⁷⁷ 22 NYCRR Part 1200, Rule 1.8 (j)(2)

exploitation of the lawyer's fiduciary role, in violation of the lawyer's basic ethical obligation not to use the trust of the client to the client's disadvantage. In addition, such a relationship presents a significant danger that, because of the lawyer's emotional involvement, the lawyer will be unable to represent the client without impairment of the exercise of independent professional judgment. Moreover, a blurred line between the professional and personal relationships may make it difficult to predict to what extent client confidences will be protected by the attorney-client evidentiary privilege, since client confidences are protected by privilege only when they are imparted in the context of the client-lawyer relationship. Because of the significant danger of harm to client interests and because the client's own emotional involvement renders it unlikely that the client could give adequate informed consent, this Rule prohibits the lawyer from having sexual relations with a client regardless of whether the relationship is consensual and regardless of the absence of prejudice to the client.⁷⁸

Sexual relationships that predate the client-lawyer relationship are not prohibited. Issues relating to the exploitation of the fiduciary relationship and client dependency are diminished when the sexual relationship existed prior to the commencement of the client-lawyer relationship. However, before proceeding with the representation in these circumstances, the lawyer should consider whether the lawyer's ability to represent the client will be materially limited by the relationship.⁷⁹

Rule 2.4. Lawyer Serving as Third-party Neutral

A lawyer serves as a "third-party neutral" when the lawyer assists 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 arbitrator, a mediator or in such other capacity as will enable the lawyer to assist the parties to resolve the matter.⁸⁰

A lawyer serving as a third-party neutral must inform unrepresented parties that the lawyer is not representing them. When the lawyer knows or reasonably should know that a party does not understand the lawyer's role in the matter, the lawyer must explain the difference between the lawyer's role as a third-party neutral and a lawyer's role as

⁷⁸ See Comment [17] to Rule 1.8, ABA, Annotated Model Rules of Professional Conduct, Sixth Edition, 2007

⁷⁹ See Comment [18] to Rule 1.8, ABA, Annotated Model Rules of Professional Conduct, Sixth Edition, 2007 . See Rule 1.7(a)(2)

⁸⁰ 22 NYCRR Part 1200, Rule 2.4(a)

one who represents a client.⁸¹

Unlike nonlawyers who serve as third-party neutrals, lawyers serving in this role may experience unique problems as a result of differences between the role of a third-party neutral and a lawyer's service as a client representative. The potential for confusion is significant when the parties are unrepresented in the process. Thus, a lawyer-neutral is required to inform unrepresented parties that the lawyer is not representing them. For some parties, particularly parties who frequently use dispute-resolution processes, this information will be sufficient. For others, particularly those who are using the process for the first time, more information will be required. Where appropriate, the lawyer should inform unrepresented parties of the important differences between the lawyer's role as third-party neutral and a lawyer's role as a client representative, including the inapplicability of the attorney-client evidentiary privilege. The extent of disclosure required will depend on the particular parties involved and the subject matter of the proceeding, as well as the particular features of the dispute-resolution process selected.⁸²

A lawyer who serves as a third-party neutral subsequently may be asked to serve as a lawyer representing a client in the same matter. The conflicts of interest that arise for both the individual lawyer and the lawyer's law firm are addressed in 22 NYCRR Part 1200, Rule 1.12.⁸³

Rule 1.12, Specific Conflicts of Interest for Former Judges, Arbitrators, or Other Third-party Neutrals

Unless all parties to the proceeding give informed consent⁸⁴, confirmed in writing⁸⁵,

⁸¹ 22 NYCRR Part 1200, Rule 2.4 (b)

⁸² See Comment [3] to Rule 2.4 ABA, Annotated Model Rules of Professional Conduct, Sixth Edition, 2007

⁸³ See Comment [4] to Rule 2.4 ABA, Annotated Model Rules of Professional Conduct, Sixth Edition, 2007

⁸⁴ 22 NYCRR Part 1200, Rule 1.0 (j) provides: "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.

⁸⁵ 22 NYCRR Part 1200, Rule 1.0 (e) provides: "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

a lawyer may not represent anyone in connection with a matter in which the lawyer participated personally and substantially as a mediator or other third-party neutral.⁸⁶

A lawyer may not negotiate for employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially as a mediator or other third-party neutral.⁸⁷

When a lawyer is disqualified from representation under this Rule, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless the firm acts promptly and reasonably to notify, as appropriate, lawyers and nonlawyer personnel within the firm that the personally disqualified lawyer is prohibited from participating in the representation of the current client; implement effective screening procedures to prevent the flow of information about the matter between the personally disqualified lawyer and the others in the firm; the disqualified lawyer is apportioned no part of the fee therefrom; written notice is promptly given to the parties and any appropriate tribunal to enable it to ascertain compliance with the provisions of this Rule; and there are no other circumstances in the particular representation that create an appearance of impropriety.⁸⁸

Like former judges, lawyers who have served as arbitrators, mediators or other third-party neutrals may be asked to represent a client in a matter in which the lawyer participated personally and substantially. This Rule forbids such representation unless all of the parties to the proceedings give their informed consent, confirmed in writing. Other law or codes of ethics governing third-party neutrals may impose more stringent standards of personal or imputed disqualification.⁸⁹

Although lawyers who serve as third-party neutrals do not have information concerning the parties that is protected under Rule 1.6, they typically owe the parties an obligation of confidentiality under law or codes of ethics governing third-party neutrals. Thus, conflicts of the personally disqualified lawyer will be imputed to other lawyers in a law firm unless the

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.

⁸⁶ 22 NYCRR Part 1200, Rule 1.12 (a)

⁸⁷ 22 NYCRR Part 1200, Rule 1.12 (b)

⁸⁸ 22 NYCRR Part 1200, Rule 1.12 (c)

⁸⁹ See Comment [2] to Rule 1.12 ABA, Annotated Model Rules of Professional Conduct, Sixth Edition, 2007

conditions of this paragraph are met.⁹⁰

Rule 3.5 Maintaining and Preserving the Impartiality of Tribunals and Jurors

A lawyer may not in an adversary proceeding communicate or cause another person to do so on the lawyer's behalf, as to the merits of the matter with a judge or official of a tribunal or an employee thereof before whom the matter is pending⁹¹, except (i) in the course of official proceedings in the matter; (ii) in writing⁹², if the lawyer promptly delivers a copy of the writing to counsel for other parties and to a party who is not represented by a lawyer; (iii) orally, upon adequate notice to counsel for the other parties and to any party who is not represented by a lawyer; or (iv) as otherwise authorized by law, or by Part 100 of the Rules of the Chief Administrator of the Courts.⁹³

Rule 3.7, Lawyer as Witness

A lawyer may not act as advocate before a tribunal in a matter in which the lawyer is likely to be a witness on a significant issue of fact unless: (1) the testimony relates solely to an uncontested issue; (2) the testimony relates solely to the nature and value of legal services rendered in the matter; 3) disqualification of the lawyer would work substantial hardship on the client; (4) the testimony will relate solely to a matter of formality, and there is no reason to believe that substantial evidence will be offered in opposition to the testimony; or (5) the testimony is authorized by the tribunal⁹⁴.

A lawyer may not act as advocate before a tribunal in a matter if another lawyer in the lawyer's firm is likely to be called as a witness on a significant issue other than on behalf of the client, and it is apparent that the testimony may be prejudicial to the client; or the lawyer

⁹⁰ See Comment [3] to Rule 1.12 ABA, Annotated Model Rules of Professional Conduct, Sixth Edition, 2007

⁹¹ 22 NYCRR Part 1200, Rule 3.5 (a) (2)

⁹² 22 NYCRR Part 1200, Rule 1.0 (x) provides: "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.

⁹³ 22 NYCRR Part 1200, Rule 3.5 (a) (2)

⁹⁴ 22 NYCRR Part 1200, Rule 3.7 (a)

is precluded from doing so by Rule 1.7 or Rule 1.9.⁹⁵

A lawyer is prohibited from simultaneously serving as advocate and necessary witness except in those circumstances specified in paragraphs (1) through (3) above. Paragraph (1) recognizes that if the testimony will be uncontested, the ambiguities in the dual role are purely theoretical. Paragraph (2) recognizes that where the testimony concerns the extent and value of legal services rendered in the action in which the testimony is offered, permitting the lawyers to testify avoids the need for a second trial with new counsel to resolve that issue. Moreover, in such a situation the judge has firsthand knowledge of the matter in issue; hence, there is less dependence on the adversary process to test the credibility of the testimony.⁹⁶

Apart from these two exceptions, paragraph (3) recognizes that a balancing is required between the interests of the client and those of the tribunal and the opposing party. Whether the tribunal is likely to be misled or the opposing party is likely to suffer prejudice depends on the nature of the case, the importance and probable tenor of the lawyer's testimony, and the probability that the lawyer's testimony will conflict with that of other witnesses. Even if there is risk of such prejudice, in determining whether the lawyer should be disqualified, due regard must be given to the effect of disqualification on the lawyer's client. It is relevant that one or both parties could reasonably foresee that the lawyer would probably be a witness. The conflict of interest principles stated in Rules 1.7, 1.9 and 1.10 have no application to this aspect of the problem.⁹⁷

Because the tribunal is not likely to be misled when a lawyer acts as advocate in a trial in which another lawyer in the lawyer's firm will testify as a necessary witness, a lawyer is permitted to do so except in situations involving a conflict of interest.⁹⁸

In determining if it is permissible to act as advocate in a trial in which the lawyer will be a necessary witness, the lawyer must also consider that the dual role may give rise to a conflict of interest that will require compliance with Rules 1.7 or 1.9. For example, if there is likely to be substantial conflict between the testimony of the client and that of the lawyer the representation involves a conflict of interest that requires compliance with Rule 1.7. This would be true even though the lawyer might not be prohibited from simultaneously serving as advocate and witness because the lawyer's disqualification would work a substantial

⁹⁵ 22 NYCRR Part 1200, Rule 3.7 (b)

⁹⁶ See Comment [3] to Rule 3.7 ABA, Annotated Model Rules of Professional Conduct, Sixth Edition, 2007

⁹⁷ See Comment [4] to Rule 3.7 ABA, Annotated Model Rules of Professional Conduct, Sixth Edition, 2007

⁹⁸ See Comment [5] to Rule 3.7 ABA, Annotated Model Rules of Professional Conduct, Sixth Edition, 2007

hardship on the client. Similarly, a lawyer who might be permitted to simultaneously serve as an advocate and a witness by paragraph (3) might be precluded from doing so by Rule 1.9. The problem can arise whether the lawyer is called as a witness on behalf of the client or is called by the opposing party. Determining whether or not such a conflict exists is primarily the responsibility of the lawyer involved. If there is a conflict of interest, the lawyer must secure the client's informed consent, confirmed in writing. In some cases, the lawyer will be precluded from seeking the client's consent.⁹⁹

A lawyer is not disqualified from serving as an advocate because a lawyer with whom the lawyer is associated in a firm is precluded from doing so. If, however, the testifying lawyer would also be disqualified by Rule 1.7 or Rule 1.9 from representing the client in the matter, other lawyers in the firm will be precluded from representing the client by Rule 1.10 unless the client gives informed consent under Rule 1.7.¹⁰⁰

Rule 4.4, Respect for Rights of Third Persons

A lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent must promptly notify the sender.¹⁰¹

This paragraph recognizes that lawyers sometimes receive documents that were mistakenly sent or produced by opposing parties or their lawyers. If a lawyer knows or reasonably should know that such a document was sent inadvertently, then this Rule requires the lawyer to promptly notify the sender in order to permit that person to take protective measures. Whether the lawyer is required to take additional steps, such as returning the original document, is a matter of law beyond the scope of these Rules, as is the question of whether the privileged status of a document has been waived. Similarly, this Rule does not address the legal duties of a lawyer who receives a document that the lawyer knows or reasonably should know may have been wrongfully obtained by the sending person. For purposes of this Rule, "document" includes e-mail or other electronic modes of transmission subject to being read or put into readable form.¹⁰²

⁹⁹ See Comment [6] to Rule 3.7 ABA, Annotated Model Rules of Professional Conduct, Sixth Edition, 2007

¹⁰⁰ See Comment [7] to Rule 3.7 ABA, Annotated Model Rules of Professional Conduct, Sixth Edition, 2007

¹⁰¹ 22 NYCRR Part 1200, Rule 4.4 (2)(b)

¹⁰² See Comment [2] to Rule 4.4 ABA, Annotated Model Rules of Professional Conduct, Sixth Edition, 2007

Some lawyers may choose to return a document unread, for example, when the lawyer learns before receiving the document that it was inadvertently sent to the wrong address. Where a lawyer is not required by applicable law to do so, the decision to voluntarily return such a document is a matter of professional judgment ordinarily reserved to the lawyer.¹⁰³

Rule 5.4, Professional Independence of a Lawyer

Unless authorized by law, a lawyer may not permit a person who recommends, employs or pays the lawyer to render legal service for another to direct or regulate the lawyer's professional judgment in rendering such legal services or to cause the lawyer to compromise the lawyer's duty to maintain the confidential information of the client under 22 NYCRR Part 1200, Rule 1.6.¹⁰⁴

This Rule expresses traditional limitations on permitting a third party to direct or regulate the lawyer's professional judgment in rendering legal services to another.¹⁰⁵ 22 NYCRR Part 1200, Rule 5.4(c) prohibits a lawyer from allowing "a person who recommends, employs, or pays the lawyer" to interfere with the lawyer's exercise of independent professional judgment on behalf of a client. It complements 22 NYCRR Part 1200, Rule 1.8(f)(2), which prohibits a lawyer from accepting payment from a third party if it would interfere with the lawyer's independent professional judgment.

Rule 7.1, Advertising

Every advertisement other than those appearing in a radio, television or billboard advertisement, in a directory, newspaper, magazine or other periodical (and any web sites related thereto), or made in person pursuant to 22 NYCRR Part 1200, Rule 7.3(a)(1), must be labeled "Attorney Advertising" on the first page, or on the home page in the case of a web site. If the communication is in the form of a self-mailing brochure or postcard, the words "Attorney Advertising" must appear therein. In the case of electronic mail, the subject

¹⁰³ See Comment [3] to Rule 4.4 ABA, Annotated Model Rules of Professional Conduct, Sixth Edition, 2007. See Rules 1.2 and 1.4.

¹⁰⁴ 22 NYCRR Part 1200, Rule 5.4 (c)

¹⁰⁵ See also 22 NYCRR Part 1200, Rule 1.8(f) (lawyer may accept compensation from a third party as long as there is no interference with the lawyer's independent professional judgment and the client gives informed consent).

line must contain the notation "ATTORNEY ADVERTISING."¹⁰⁶

A lawyer or law firm may not utilize: (1) a pop-up or pop-under advertisement in connection with computer-accessed communications¹⁰⁷, other than on the lawyer or law firm's own web site or other internet presence; or (2) meta tags or other hidden computer codes that, if displayed, would violate the Rules.¹⁰⁸

All advertisements must include the name, principal law office address and telephone number of the lawyer or law firm whose services are being offered.¹⁰⁹

Any words or statements required by 22 NYCRR Part 1200, Rule 7.1 to appear in an advertisement must be clearly legible and capable of being read by the average person, if written, and intelligible if spoken aloud. In the case of a web site, the required words or statements must appear on the home page.¹¹⁰

The presiding justices of the Appellate Divisions promulgated rules regarding attorney advertising effective on February 1, 2007.¹¹¹ Rule 7.1 is similar to those rules.

Rule 7.3, Solicitation and Recommendation of Professional Employment

22 NYCRR Part 1200, Rule 7.3 (c) prohibits solicitation directed to a recipient in New York state unless certain conditions are met.

For purposes of 22 NYCRR Part 1200, Rule 7.3, "solicitation" means any

¹⁰⁶ 22 NYCRR Part 1200, Rule 7.1 (f)

¹⁰⁷ 22 NYCRR Part 1200, Rule 1.0 (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.

¹⁰⁸ 22 NYCRR Part 1200, Rule 7.1 (g)

¹⁰⁹ 22 NYCRR Part 1200, Rule 7.1 (h)

¹¹⁰ 22 NYCRR Part 1200, Rule 7.1 (i)

¹¹¹ See former 22 NYCRR 1200.1 (k); former 22 NYCRR 1200.6; and former 22 NYCRR 1200.

advertisement initiated by or on behalf of a lawyer or law firm that is directed to, or targeted at, a specific recipient or group of recipients, or their family members or legal representatives, the primary purpose of which is the retention of the lawyer or law firm, and a significant motive for which is pecuniary gain. It does not include a proposal or other writing prepared and delivered in response to a specific request of a prospective client.¹¹²

The provisions of Rule 7.3 (c) do not apply to (i) a solicitation directed or disseminated to a close friend, relative, or former or existing client; (ii) a web site maintained by the lawyer or law firm, unless the web site is designed for and directed to or targeted at a prospective client affected by an identifiable actual event or occurrence or by an identifiable prospective defendant; or (iii) professional cards or other announcements the distribution of which is authorized by Rule 7.5(a).¹¹³

The presiding justices of the Appellate Divisions promulgated rules regarding solicitation, effective on February 1, 2007.¹¹⁴ Rule 7.3 is similar to those rules.

Rule 7.5, Professional Notices, Letterheads, and Signs - Internet Web Sites

A lawyer or law firm may use internet web sites, professional cards, professional announcement cards, office signs, letterheads or similar professional notices or devices, provided the same do not violate any statute or court rule and are in accordance with 22 NYCRR Part 1200, Rule 7.1, including the following:

(1) a professional card of a lawyer identifying the lawyer by name and as a lawyer, and giving addresses, telephone numbers, the name of the law firm, and any information permitted under Rule 7.1(b)¹¹⁵ or Rule 7.4.¹¹⁶ A professional card of a law

¹¹² 22 NYCRR Part 1200, Rule 7.3 (b)

¹¹³ 22 NYCRR Part 1200, Rule 7.3 (c) (5)

¹¹⁴ See former 22 NYCRR 1200.1 (k); former 22 NYCRR 1200.6; and former 22 NYCRR 1200.

¹¹⁵ 22 NYCRR Part 1200, Rule 7.1(b) provides:

Subject to the provisions of paragraph (a), an advertisement may include information as to:

(1) legal and nonlegal education, degrees and other scholastic distinctions, dates of admission to any bar; areas of the law in which the lawyer or law firm practices, as authorized by these Rules; public offices and teaching positions held; publications of law related matters authored by the lawyer; memberships in bar associations or other professional societies or organizations, including offices and

committee assignments therein; foreign language fluency; and bona fide professional ratings;

(2) names of clients regularly represented, provided that the client has given prior written consent;

(3) bank references; credit arrangements accepted; prepaid or group legal services programs in which the lawyer or law firm participates; nonlegal services provided by the lawyer or law firm or by an entity owned and controlled by the lawyer or law firm; the existence of contractual relationships between the lawyer or law firm and a nonlegal professional or nonlegal professional service firm, to the extent permitted by Rule 5.8, and the nature and extent of services available through those contractual relationships; and

(4) legal fees for initial consultation; contingent fee rates in civil matters when accompanied by a statement disclosing the information required by paragraph (p); range of fees for legal and nonlegal services, provided that there be available to the public free of charge a written statement clearly describing the scope of each advertised service; hourly rates; and fixed fees for specified legal and nonlegal services.

¹¹⁶ 22 NYCRR Part 1200, Rule 7.4 provides:

(a) A lawyer or law firm may publicly identify one or more areas of law in which the lawyer or the law firm practices, or may state that the practice of the lawyer or law firm is limited to one or more areas of law, provided that the lawyer or law firm shall not state that the lawyer or law firm is a specialist or specializes in a particular field of law, except as provided in Rule 7.4(c).

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

(c) A lawyer may state that the lawyer has been recognized or certified as a specialist only as follows:

(1) A lawyer who is certified as a specialist in a particular area of law or law practice by a private organization approved for that purpose by the American Bar Association may state the fact of certification if, in conjunction therewith, the certifying organization is identified and the following statement is prominently made: "The [name of the private certifying organization] is not affiliated with any governmental authority. Certification is not a requirement for the practice of law in the State of New York and does not necessarily indicate greater competence than other attorneys experienced in this field of law;"

(2) A lawyer who is certified as a specialist in a particular area of law or law practice by the authority having jurisdiction over specialization under the laws of another state or territory may state the fact of certification if, in conjunction therewith, the certifying state or territory is identified and the following statement is prominently made: "Certification granted by the [identify state or territory] is not

firm may also give the names of members and associates;

(2) a professional announcement card stating new or changed associations or addresses, change of firm name, or similar matters pertaining to the professional offices of a lawyer or law firm or any nonlegal business conducted by the lawyer or law firm pursuant to Rule 5.7. It may state biographical data, the names of members of the firm and associates, and the names and dates of predecessor firms in a continuing line of succession. It may state the nature of the legal practice if permitted under Rule 7.4;

(3) a sign in or near the office and in the building directory identifying the law office and any nonlegal business conducted by the lawyer or law firm pursuant to Rule 5.7. The sign may state the nature of the legal practice if permitted under Rule 7.4; or

(4) a letterhead identifying the lawyer by name and as a lawyer, and giving addresses, telephone numbers, the name of the law firm, associates and any information permitted under Rule 7.1(b) or Rule 7.4. A letterhead of a law firm may also give the names of members and associates, and names and dates relating to deceased and retired members. A lawyer or law firm may be designated "Of Counsel" on a letterhead if there is a continuing relationship with a lawyer or law firm, other than as a partner or associate. A lawyer or law firm may be designated as "General Counsel" or by similar professional reference on stationery of a client if the lawyer or the firm devotes a substantial amount of professional time in the representation of that client. The letterhead of a law firm may give the names and dates of predecessor firms in a continuing line of succession.¹¹⁷

Rule 7.5, Professional Notices, Letterheads, and Signs - Domain Name

A lawyer or law firm may utilize a domain name for an internet web site that does not include the name of the lawyer or law firm provided:(1) all pages of the web site clearly and conspicuously include the actual name of the lawyer or law firm; (2) the lawyer or law firm in no way attempts to engage in the practice of law using the domain name; (3) the domain name does not imply an ability to obtain results in a matter; and (4) the domain name does not otherwise violate 22 NYCRR Part 1200.¹¹⁸

A lawyer or law firm may utilize a telephone number which contains a domain

recognized by any governmental authority within the State of New York. Certification is not a requirement for the practice of law in the State of New York and does not necessarily indicate greater competence than other attorneys experienced in this field of law."

¹¹⁷ 22 NYCRR Part 1200, Rule 7.5 (a)

¹¹⁸ 22 NYCRR Part 1200, Rule 7.5 (e)

name, nickname, moniker or motto that does not otherwise violate 22 NYCRR Part 1200.

The presiding justices of the Appellate Divisions promulgated rules regarding professional notices, letterheads and signs, effective on February 1, 2007.¹²⁰ Rule 7.5 is similar to those rules.

Rule 1.18, Duties to Prospective Clients

A person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a "prospective client."¹²¹ However, a person who communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client lawyer relationship is not a "prospective client" within the meaning of paragraph (a). Neither is a person who communicates with a lawyer for the purpose of disqualifying the lawyer from handling a materially adverse representation on the same or a substantially related matter.¹²²

Even when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client may not use or reveal information learned in the consultation, except as 22 NYCRR Part 1220, Rule 1.9 would permit with respect to information of a former client.¹²³

A lawyer subject to this Rule may not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in 22 NYCRR Part 1200, Rule 1.18 (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in 22 NYCRR Part 1200, Rule 1.18 (d).¹²⁴

¹¹⁹ 22 NYCRR Part 1200, Rule 7.5 (f)

¹²⁰ See former 22 NYCRR 1200.1 (k); former 22 NYCRR 1200.6; and former 22 NYCRR 1200.

¹²¹ 22 NYCRR Part 1200, Rule 1.18 (a)

¹²² 22 NYCRR Part 1200, Rule 1.18 (e)

¹²³ 22 NYCRR Part 1200, Rule 1.18 (b)

¹²⁴ 22 NYCRR Part 1200, Rule 1.18 (c)

When the lawyer has received information from the prospective client that could be significantly harmful to that person in the matter (disqualifying information as defined in 22 NYCRR Part 1200, Rule 1.18 (c), representation is permissible if: (1) both the affected client and the prospective client have given informed consent¹²⁵, confirmed in writing¹²⁶; or (2) the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; and (i) the firm acts promptly and reasonably to notify, as appropriate, lawyers and nonlawyer personnel within the firm that the personally disqualified lawyer is prohibited from participating in the representation of the current client; (ii) the firm implements effective screening procedures¹²⁷ to prevent the flow of information about the matter between the disqualified lawyer and the others in the firm; (iii) the disqualified lawyer is apportioned no part of the fee therefrom; and (iv) written notice is promptly given to the prospective client; and (3) a reasonable lawyer would conclude that the law firm will be able to provide competent and diligent representation in the matter.¹²⁸

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 free (and sometimes required) to proceed no further. Hence, prospective clients should receive some but not all of the protection afforded

¹²⁵ 22 NYCRR Part 1200, Rule 1.0 (j) provides: "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.

¹²⁶ 22 NYCRR Part 1200, Rule 1.0 (e) provides: "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.

¹²⁷ 22 NYCRR Part 1200, Rule 1.0 (t) provides: "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.

¹²⁸ 22 NYCRR Part 1200, Rule 1.18 (d)

clients.¹²⁹

Not all persons who communicate information to a lawyer are entitled to protection under this Rule. A person who communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship, is not a "prospective client" within the meaning of paragraph (a).¹³⁰

It is often necessary for a prospective client to reveal information to the lawyer during an initial consultation prior to the decision about formation of a client-lawyer relationship. The lawyer often must learn such information to determine whether there is a conflict of interest with an existing client and whether the matter is one that the lawyer is willing to undertake. The lawyer is prohibited from using or revealing that information, except as permitted by Rule 1.9, even if the client or lawyer decides not to proceed with the representation. The duty exists regardless of how brief the initial conference may be.¹³¹

In order to avoid acquiring disqualifying information from a prospective client, a lawyer considering whether or not to undertake a new matter should limit the initial interview to only such information as reasonably appears necessary for that purpose. Where the information indicates that a conflict of interest or other reason for non-representation exists, the lawyer should so inform the prospective client or decline the representation. If the prospective client wishes to retain the lawyer, and if consent is possible under Rule 1.7, then consent from all affected present or former clients must be obtained before accepting the representation.¹³²

A lawyer may condition conversations with a prospective client on the person's informed consent that no information disclosed during the consultation will prohibit the lawyer from representing a different client in the matter. If the agreement expressly so provides, the prospective client may also consent to the lawyer's subsequent use of information received from the prospective client.¹³³

¹²⁹ See Comment [1] to Rule 1.18 ABA, Annotated Model Rules of Professional Conduct, Sixth Edition, 2007

¹³⁰ See Comment [2] to Rule 1.18 ABA, Annotated Model Rules of Professional Conduct, Sixth Edition, 2007

¹³¹ See Comment [3] to Rule 1.18 ABA, Annotated Model Rules of Professional Conduct, Sixth Edition, 2007

¹³² See Comment [4] to Rule 1.18 ABA, Annotated Model Rules of Professional Conduct, Sixth Edition, 2007

¹³³ See Comment [5] to Rule 1.18 ABA, Annotated Model Rules of Professional Conduct, Sixth Edition, 2007

Even in the absence of an agreement, the lawyer is not prohibited from representing a client with interests adverse to those of the prospective client in the same or a substantially related matter unless the lawyer has received from the prospective client information that could be significantly harmful if used in the matter.¹³⁴

Under paragraph (c), the prohibition in this Rule is imputed to other lawyers as provided in Rule 1.10, but, under paragraph (d)(1), imputation may be avoided if the lawyer obtains the informed consent, confirmed in writing, of both the prospective and affected clients. In the alternative, imputation may be avoided if the conditions of paragraph (d)(2) are met and all disqualified lawyers are timely screened and written notice is promptly given to the prospective client.¹³⁵ Paragraph (d)(2)(i) does not prohibit the screened lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly related to the matter in which the lawyer is disqualified.¹³⁶

Notice, including a general description of the subject matter about which the lawyer was consulted, and of the screening procedures employed, generally should be given as soon as practicable after the need for screening becomes apparent.¹³⁷

Rule 1.9, Duties to Former Clients

A lawyer who has formerly represented a client in a matter may not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the

¹³⁴ See Comment [6] to Rule 1.18 ABA, Annotated Model Rules of Professional Conduct, Sixth Edition, 2007

¹³⁵ See Rule 1.0(k) (requirements for screening procedures)

¹³⁶ See Comment [7] to Rule 1.18 ABA, Annotated Model Rules of Professional Conduct, Sixth Edition, 2007

¹³⁷ See Comment [8] to Rule 1.18 ABA, Annotated Model Rules of Professional Conduct, Sixth Edition, 2007

former client gives informed consent,¹³⁸ confirmed in writing.¹³⁹

Unless the former client gives informed consent, confirmed in writing, a lawyer may not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client: (1) whose interests are materially adverse to that person; and (2) about whom the lawyer had acquired information protected by Rules 1.6 and paragraph (c) that is material to the matter.¹⁴⁰

A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter: (1) use confidential information of the former client protected by Rule 1.6 to the disadvantage of the former client, except as these Rules would permit or require with respect to a current client or when the information has become generally known; or (2) reveal confidential information of the former client protected by Rule 1.6 except as these Rules would permit or require with respect to a current client.¹⁴¹

After termination of a client-lawyer relationship, a lawyer has certain continuing duties with respect to confidentiality and conflicts of interest and, thus, may not represent another client except in conformity with this Rule. Under this Rule, for example, a lawyer could not properly seek to rescind on behalf of a new client a contract drafted on behalf of the former client. So also a lawyer who has prosecuted an accused person could not properly represent the accused in a subsequent civil action against the government concerning the same transaction. Nor could a lawyer who has represented multiple clients in a matter represent one of the clients against the others in the same or a substantially related matter after a dispute arose among the clients in that matter, unless all affected clients give informed consent.¹⁴²

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

¹³⁸ 22 NYCRR Part 1200, Rule 1.0 (j) provides: "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.

¹³⁹ 22 NYCRR Part 1200, Rule 1.9 (a)

¹⁴⁰ 22 NYCRR Part 1200, Rule 1.9 (b)

¹⁴¹ 22 NYCRR Part 1200, Rule 1.9 (c)

¹⁴² See Comment [1] to Rule 1.9 ABA, Annotated Model Rules of Professional Conduct, Sixth Edition, 2007

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.¹⁴³

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.¹⁴⁴

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.¹⁴⁵

When lawyers have been associated within a firm but then end their association, the question of whether a lawyer should undertake representation is more complicated. There are several competing considerations. First, the client previously represented by the former firm must be reasonably assured that the principle of loyalty to the client is not compromised. Second, the rule should not be so broadly cast as to preclude other persons from having reasonable choice of legal counsel. Third, the rule should not unreasonably hamper lawyers from forming new associations and taking on new clients after having left a previous association. In this connection, it should be recognized that today many lawyers practice in firms, that many lawyers to some degree limit their practice to one field or another, and that many move from one association to another several times in their careers. If the concept of imputation were applied with unqualified rigor, the result would be radical curtailment of the opportunity of lawyers to move from one

¹⁴³ See Comment [2] to Rule 1.9 ABA, Annotated Model Rules of Professional Conduct, Sixth Edition, 2007

¹⁴⁴ See Comment [3] to Rule 1.9 ABA, Annotated Model Rules of Professional Conduct, Sixth Edition, 2007

¹⁴⁵ See Comment [3] to Rule 1.9 ABA, Annotated Model Rules of Professional Conduct, Sixth Edition, 2007

practice setting to another and of the opportunity of clients to change counsel.¹⁴⁶

Paragraph (b) operates to disqualify the lawyer only when the lawyer involved has actual knowledge of information protected by Rules 1.6 and 1.9(c). Thus, if a lawyer while with one firm acquired no knowledge or information relating to a particular client of the firm, and that lawyer later joined another firm, neither the lawyer individually nor the second firm is disqualified from representing another client in the same or a related matter even though the interests of the two clients conflict.¹⁴⁷

Application of paragraph (b) depends on a situation's particular facts, aided by inferences, deductions or working presumptions that reasonably may be made about the way in which lawyers work together. A lawyer may have general access to files of all clients of a law firm and may regularly participate in discussions of their affairs; it should be inferred that such a lawyer in fact is privy to all information about all the firm's clients. In contrast, another lawyer may have access to the files of only a limited number of clients and participate in discussions of the affairs of no other clients; in the absence of information to the contrary, it should be inferred that such a lawyer in fact is privy to information about the clients actually served but not those of other clients. In such an inquiry, the burden of proof should rest upon the firm whose disqualification is sought.¹⁴⁸

Independent of the question of disqualification of a firm, a lawyer changing professional association has a continuing duty to preserve confidentiality of information about a client formerly represented. See Rules 1.6 and 1.9(c).¹⁴⁹

Paragraph (c) provides that information acquired by the lawyer in the course of representing a client may not subsequently be used or revealed by the lawyer to the disadvantage of the client. However, the fact that a lawyer has once served a client does not preclude the lawyer from using generally known information about that client when later representing another client.¹⁵⁰

¹⁴⁶ See Comment [4] to Rule 1.9 ABA, Annotated Model Rules of Professional Conduct, Sixth Edition, 2007

¹⁴⁷ See Comment [5] to Rule 1.9 ABA, Annotated Model Rules of Professional Conduct, Sixth Edition, 2007

¹⁴⁸ See Comment [6] to Rule 1.9 ABA, Annotated Model Rules of Professional Conduct, Sixth Edition, 2007

¹⁴⁹ See Comment [7] to Rule 1.9 ABA, Annotated Model Rules of Professional Conduct, Sixth Edition, 2007

¹⁵⁰ See Comment [8] to Rule 1.9 ABA, Annotated Model Rules of Professional Conduct, Sixth Edition, 2007

The provisions of this Rule are for the protection of former clients and can be waived if the client gives informed consent, which consent must be confirmed in writing under paragraphs (a) and (b).¹⁵¹

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¹⁵¹ See Comment [9] to Rule 1.9 ABA, Annotated Model Rules of Professional Conduct, Sixth Edition, 2007