Schulte Roth&Zabel

Investment Management Alumni Roundtable Series

Ethical Issues Facing In-House Counsel

Tuesday, July 26, 2011

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David J. Efron is a partner in the New York office, where he practices in the areas of domestic and offshore hedge funds, including fund formations and restructurings. Additionally, he advises hedge fund managers on structure, compensation and various other matters relating to their management companies, and he structures seed capital and joint venture arrangements. David also represents hedge fund managers in connection with SEC regulatory issues and compliance-related matters.

A published author on subjects relating to investment management, he is a sought-after speaker for hedge fund industry conferences and seminars. Recently, he discussed "Crisis Management" at the UBS Premier Hedge Fund Client Conference, and presented at the Maples Investment Funds Forum. In addition, he is a frequent guest lecturer at New York-area law schools, and this spring he was a guest lecturer at New York Law School and Columbia Business School.

David has been recognized by *The Legal 500 U.S.* as "an extraordinarily capable attorney. He has a mastery of the pertinent matters, but he also brings a pragmatic approach." David received his B.A. from Vassar College, his J.D. from Syracuse University College of Law and an LL.M. in securities regulation, with distinction, from Georgetown University Law Center.

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Marcy Ressler Harris is a partner in the New York office where she concentrates her practice in the areas of securities enforcement and regulatory investigations and litigation for financial services industry clients, including hedge funds and funds of funds. Marcy also has an active litigation practice involving family disputes, will contests and other Surrogate's Court matters, contested guardianships and family office fraud. Since December 2008, she has been representing numerous former customers of Bernard L. Madoff Investment Securities against claims in the SIPA Bankruptcy case and in related proceedings, including Jeffry M. Picower, his estate, executor and affiliated parties. Previously, Marcy successfully defended several funds within the Sterling Stamos fund of funds group against clawback litigation brought by the receiver for the Bayou Group LLC and Bayou Superfund LLC. Marcy has represented numerous individuals and fund clients in SEC investigations related to insider trading, market manipulation, market timing, disclosure and valuation issues, securities fraud and other issues.

During her 25 years at the firm, Marcy has litigated in federal and state courts in New York and elsewhere, conducted trials, arbitrations and mediations, provided ongoing litigation and regulatory compliance counseling, and represented companies, officers, directors and board committees including in connection with activist litigations, failed corporate transactions, and internal investigations related to accounting fraud, conflicts of interest, insider trading and internet abuse.

Marcy is a member of the firm's ethics committee and lectures regularly on privilege issues. She recently co-authored "Comparison with Regulation FD," a chapter of *Insider Trading Law and Compliance Answer Book* (Practising Law Institute, forthcoming in 2011). She graduated *magna cum laude* from Yale University with a B.A. in history and received her J.D. from New York University School of Law.

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2. Outline

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In-House Ethics Issues

David J. Efron and Marcy R. Harris

I. Who is the client of an in-house lawyer?

A. The management company or the principals?

- While in most instances there's an alignment of interests between the management company (typically the employer of in-house counsel) and the principals, or between a corporate parent and its affiliates, in some cases there's not.
- Where it's not so clear that all parties' interests are aligned, in-house counsel has to think hard about how to handle matters.
- Whether a lawyer representing the partnership also represents individual partners usually is a question of fact.

B. Insider trading:

- As an example, where the senior managing member of the management company is believed to be engaged in insider trading, his conduct can put the entire firm at risk.
- If he turns to you as in-house counsel for legal advice, what do you say?
  - Bottom line: "You need your own lawyer. I can't represent you on this. I represent the firm. And your interests and the firm's may not be aligned."
    - How do you get there?
      - » Rule 1.13 of the New York Rules of Professional Conduct provides:
        - A lawyer employed by an organization represents the organization and not any of its directors, officers, shareholders or other constituents.
    - Can in-house counsel sit back, relax and wait to be asked for legal advice from the head of firm?
      - » When the in-house lawyer suspects that the head of the firm may be violating the law and placing the firm at substantial risk, the in-house lawyer must take the initiative and say to the head of the firm, in words or substance:
        - "I want to remind you that I am the lawyer for the firm, and only for the firm."
        - "I am not your personal lawyer."
        - "My job is to represent and protect the interests of the firm."
        - "If your interests clash with the interests of the firm, as I believe they do here, then I have to side with the firm and protect the firm."
        - "I cannot give you legal advice in this situation, but if you need legal advice for yourself, you should get your own lawyer."
    - Anything else in-house counsel should say to the head of the firm?
      - » Rule 1.13 provides that in-house counsel must:
        - Ask the offender to reconsider his actions;
        - Advise that a separate legal opinion on the issue should be sought;

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- Refer the matter to the higher/highest authority in the organization;
- If the highest authority insists on the action or refuses to act, in clear violation of law and in a manner likely to result in substantial injury to the firm, then you as in-house lawyer may resign in accordance with Rule 1.16 and may reveal confidential information only if permitted by Rule 1.6.

» All this must be done in a way likely to minimize disruption to the firm and the risk of revealing information relating to the representation to persons outside the firm (Rule 1.13(b)).

C. What steps should you as in-house counsel take to investigate? Are they privileged?

- Having in-house counsel investigate an internal legal problem carries certain risks:
  - That a court will find that the investigation was for a business reason, not a legal reason, and the notes and results are not privileged;
  - That employees interviewed during the internal investigation will think that in-house counsel represents them individually, as well as the firm.
    - This risk raises a conflict of interest and, for example, could limit the firm's ability to self-report to a regulator, to its detriment.
- To avoid these risks, particularly for legally sensitive issues, it is best to have outside counsel conduct the investigation, and give clear *Upjohn* warnings, so there is no question who counsel represents. *Upjohn* warnings, to be provided at the start of each interview, include the following:
  - "Hi, I'm _____, a lawyer at SRZ."
  - "SRZ has been hired by XYZ Management Company and its affiliates, and represents the firm and its affiliates."
  - "SRZ doesn't represent you."
  - "I'm going to be asking you questions today on behalf of the firm and its affiliates related to X, and I want you to answer my questions completely and truthfully."
  - "We will treat our conversation today as privileged."
  - "But the privilege belongs to the firm."
  - "The firm can decide on its own to waive the privilege in the future."
  - "Do you understand what I've just told you?"
  - "If so, then let's get started with your interview."

D. Are there ever situations where in-house counsel will be deemed to represent an individual employee?

- Where an employee communicates with in-house counsel expecting that the lawyer will hold the information in confidence, the confidence can be maintained only where the employee can demonstrate all of the following factors:
  - She approached counsel for the purpose of seeking legal advice;
  - She made clear she was seeking legal advice in her individual capacity, rather than in her capacity as an employee;
  - Counsel saw fit to communicate with her in her individual capacity, rather than in her capacity as an employee;
  - Her communications with counsel were confidential; and

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— The substance of their communications did not concern matters within the general affairs of the company.

- *See In the Matter of Bevill, Bresler & Schulman Asset Mgmt. Corp.*, 805 F.2d 120, 123 (3d Cir. 1986).

E. Are there situations where in-house counsel will be deemed to represent multiple clients — e.g., the management company, the general partner, other affiliated entities?

- In the ordinary situation, where there is little risk of a conflict, no problem.
- But if there is an actual conflict among the clients, or if counsel can anticipate a conflict arising, New York Rules of Prof. Conduct 1.7(b) states:
  - — Counsel needs written consent and waiver from each client to represent all the clients concurrently.
  - — Consent and waiver on behalf of the firm must be given by someone who is not also going to be individually represented.

II. Does the attorney-client privilege apply to in-house lawyers?

A. Yes, but … it's harder to establish the privilege for in-house lawyers, and less certain that the privilege claim will be upheld.

- For the attorney-client privilege to apply, the in-house lawyer must be:
  - — Acting in a professional capacity as a lawyer.
  - — Consulted for or dispensing legal advice to a client.
  - — In confidence.
- Because an in-house lawyer often acts as business adviser, consigliere, friend and lawyer, and often participates in management decisions — it can be harder to demonstrate that a particular communication with an in-house lawyer is strictly a communication for the purpose of seeking or providing legal advice, and is privileged.
  - — In the face of a challenge, for instance, notes prepared by in-house counsel attending a business meeting are unlikely to be deemed privileged.
- Likewise, it may be harder to show that in-house counsel is truly independent.
  - — To manifest your intent to establish an attorney-client privilege:
    - Label your documents "Attorney-Client Privileged";
    - Keep them in password-protected files;
    - Specify that the main purpose of the document you are creating is to provide legal advice, and that the communication reflects your professional skills and judgments as an attorney;
    - Make sure your conversations are not on speakerphones and not overheard by third parties; and
    - In all ways, manifest your intent to treat the communication at issue as a privileged communication.
- If you want certainty that the privilege will apply, have outside counsel handle the matter.

B. Attorney-client privilege outside the United States:

- In Europe, communications between in-house lawyers and corporate employees generally are not privileged, due to the view that in-house lawyers, as employees, are:
  - — Loyal to their companies, and

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  - Do not offer independent legal advice.
- But the attorney-client privilege does apply between European companies and their outside counsel.
  - So escalate legally sensitive issue directly to outside counsel immediately.
- In Hong Kong and Singapore, it is not clear the attorney-client privilege extends either to in-house counsel or foreign counsel.
- In China, the attorney-client privilege is applied inconsistently, if at all, and in-house counsel are deemed to be employees, not attorneys, so it is unlikely their conversations would be privileged.
- Absent certainty, it is best to escalate sensitive legal issues to outside counsel in those jurisdictions as soon as the issue arises.

III. Does the attorney-client privilege apply to the compliance function? When?

A. The SEC sees the CCO as its designee, as the SEC's eyes and ears on location.

B. This makes it hard to claim privilege over compliance-related documents and communications.

- Compliance duties: If you're performing legal work or rendering legal advice, then the documents created are likely to be deemed privileged.
  - Under this test, most compliance work is not privileged.
  - Even if it's done by a lawyer or supervised by a lawyer.
  - It's only arguably privileged when it calls for legal advice or the skills of a lawyer.
- Assume compliance work is not privileged.
- Train compliance personnel to escalate sensitive legal issues to counsel, seek legal advice from in-house or outside counsel as soon as a legally sensitive issue is identified.
  - Which issues? Issues that reflect on manager integrity, among others.
  - Have outside counsel investigate, analyze and remediate sensitive issues, then report to in-house counsel, not the CCO.
  - Conducting an investigation in-house poses a risk that the privilege won't apply, and that documents created during the investigation will be subject to discovery or production to a regulator or private plaintiff.
- Because there is no privilege for routine compliance work or for compliance audits performed by outside vendors, a firm needs to separate routine inquiries from potential hot spots early on.
  - Seek advice from outside counsel to identify potential problems, and address those separately via outside counsel.
  - If you hire a remediation consultant, don't share the full results of your investigation report with him. Prepare a new report that identifies only those issues you want him to review.
- Even with outside counsel, representation issues during internal investigations can give rise to conflicts.
  - *U.S. v . Nicholas*, 606 F. Supp. 2d 1109 (C.D. Cal.), *rev'd sub nom. U.S. v. Ruehle*, 583 F.3d 600 (9th Cir. 2009): Irell & Manella investigated Broadcom Corp. and its CFO, William J. Ruehle, in connection with stock options backdating, and represented Broadcom and Ruehle, and other officers and directors, in civil suits related to the alleged backdating. At Broadcom's direction, Irell & Manella shared the substance of its interview with Ruehle with Broadcom's outside auditors and,

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later, with the Department of Justice investigators, leading to an indictment of Ruehle.

— The District Court found that Irell & Manella lawyers violated their ethical duties to Ruehle by failing to get Ruehle's written consent to their concurrent representation of Ruehle and Broadcom, disclosing the substance of Ruehle's interview without his consent, and questioning him for the benefit of Broadcom.

— The 9th Circuit reversed, finding that federal common law, rather than California law, should have been applied to define the scope of the attorney-client relationship, and that Ruehle should have known that his statements during the interview would be shared with the company's outside auditors. Thus, it was unreasonable for Ruehle to believe his interview with Irell & Manella was confidential and privileged.

IV. Screening of in-house attorneys:

A. Admissions to the bar:

- Must a lawyer admitted in New York who works for a hedge fund in Connecticut be admitted to the Connecticut bar?
- No, under § 2-15A of the Connecticut Superior Court Practice Book, provided that:
  - The in-house lawyer meets the Connecticut requirements of an "authorized house counsel," which is an attorney who:
    - Is in good standing in all jurisdictions to which she is admitted,
    - Has been recommended to the Connecticut bar examining committee by two lawyers who each have been licensed to practice in Connecticut for at least five years, and
    - Agrees to abide by the rules of the Connecticut bar; and
  - The in-house lawyer is employed by a "qualified organization," which is an entity:
    - That is not itself engaged in the practice of law outside of the entity, and
    - Does not charge a fee for legal advice; and
  - The in-house lawyer confines her legal activities in Connecticut only to:
    - Giving legal advice to the directors, officers, employees, trustees and agents of the business;
    - Negotiating and documenting all matters for the organization; and
    - Representing the organization, provided the in-house lawyer does not make any appearance in any administrative tribunal or court in Connecticut, unless specially admitted.
  - The in-house lawyer meets other requirements of Connecticut:
    - Agrees in a sworn statement to comply with the Connecticut Rules of Professional Conduct for Attorneys;
    - Agrees to notify Connecticut if she is subject to any pending disciplinary hearing; and
    - Pays a filing fee to the bar examining committee, and an annual Client Security Fund fee and registers annually with the statewide grievance committee.
  - The in-house lawyer must notify the Connecticut bar examining committee within 30 days if no longer working at a Connecticut firm as an Authorized House Counsel.
    - Failure to do so will be a basis for disciplinary action.

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- Must a lawyer admitted in Connecticut who works for a hedge fund in New York be admitted to the New York bar?
- No, NYCCR § 522, provides that:
  - The in-house lawyer meets the New York definition of "in-house counsel," which is an attorney who:
    - Is employed full time in New York by a non-governmental entity that is not itself engaged in the practice of law outside its organization.
  - In its discretion, the court may register as an in-house lawyer any person who:
    - Has been admitted to practice in the highest court in any other state or territory, or D.C.;
    - Is currently admitted to the bar as an active member in good standing in at least one other jurisdiction; and
    - Possesses the good moral character and general fitness needed for a member of the New York bar.
  - The in-house lawyer must also file with the Clerk of the Appellate Division of the department where she resides or will be working:
    - A certificate of good standing from each jurisdiction where licensed;
    - A letter from the grievance committee of each jurisdiction certifying if charges have been filed against the lawyer and, if so, the substance and disposition;
    - An affidavit agreeing to adhere to the New York Rules of Professional Conduct; and
    - An affidavit from her employer confirming the lawyer's job and duties.
  - The in-house lawyer also must register with the Office of Court Administration and comply with biennial registration requirements, including CLE requirements.
  - NB: An in-house counsel not admitted in New York may not provide personal or individual legal services to any customers, shareholders, owners, partners, officers, employees or agents of her employer.
- Under the Connecticut and New York lawyer admissions rules, there is no reciprocity between Connecticut and New York, and no waiving in.
- The Connecticut procedure that allows out-of-state attorneys to gain admission to the Connecticut bar does not apply to New York lawyers no matter how long they have practiced in New York, and the New York procedure that allows out-of-state attorneys to gain admission to the New York bar does not apply to Connecticut lawyers, no matter how long they have practiced in Connecticut.
- Neither New York nor Connecticut has reciprocity with New Jersey.
  - But both Connecticut and New York lawyers can waive into Mississippi and North Dakota and a few other states.

B. Lateral screening of in-house lawyers:

- Bar admissions:
  - Even if in-house counsel does not appear in court or before any administrative bodies, a firm must take steps to confirm that in-house counsel is qualified to practice law and is a member in good standing in some jurisdiction.
  - Otherwise, the attorney-client privilege will not apply to the oral or written communications of such "counsel."

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- *Gucci v. Guess*, 09 Civ. 4373, 2010 WL 2720079 (SDNY June 29, 2010).

- Conflicts screening:
  - Because the New York Rules of Professional Conduct define a "firm" to include "the legal department of a corporation or other organization," (Rule 1.0(h)), the conflicts screening requirements of Rule 1.10 of the New York Rules of Professional Conduct apply equally to in-house legal departments.
  - Thus, firms must screen in-house counsel for conflicts to make sure that their work as in-house counsel is not directly adverse to their prior work at or on behalf of another firm.

C. Non-competes for in-house lawyers:

- Professional ethics rules are designed to ensure that clients are able to be represented by lawyers of their own choosing.
- As a result, contracts that impinge on a client's right to hire the lawyer of his choosing typically are unethical and unenforceable.
- Since a non-compete clause that limits a lawyer's ability to practice law for a period of time would impinge on a client's right to hire that lawyer, an in-house lawyer generally cannot enter into a contract that contains a non-compete.
  - For the same reason, it is ethically prohibited for an in-house general counsel to prepare an employment agreement for an assistant counsel that contains a non-compete clause with respect to the lawyer's practice of law following his employment by his existing firm.
  - But the rules allow for a safe harbor if the lawyer is not being prevented from "practicing law" following his employment.
- See generally:
  - Rule 5.6(a) of the New York Rules of Professional Conduct.
  - Rule 5.6(1) of the Connecticut Rules of Professional Conduct.
  - Connecticut Eth. Op. 02-05, 2002 WL 570602 (Conn. Bar Assn.), Feb. 26, 2002.
  - New Jersey Advisory Committee on Professional Ethics, Op. 708 (July 3, 2006).

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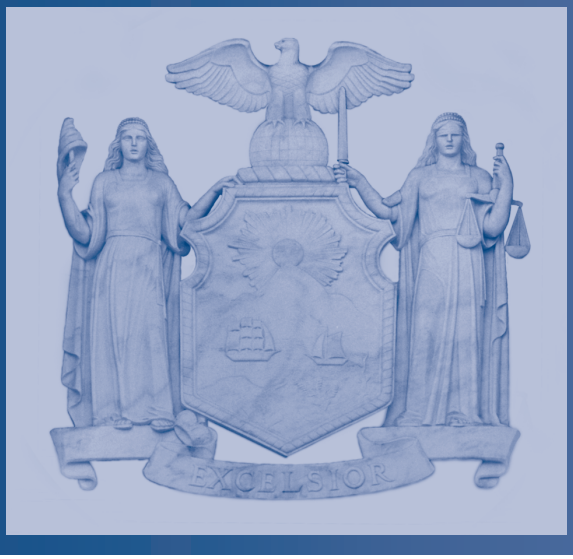
3. Part 1200 — New York Rules of Professional Conduct

NEW YORK STATE UNIFIED COURT SYSTEM

PART 1200 –
RULES OF PROFESSIONAL CONDUCT

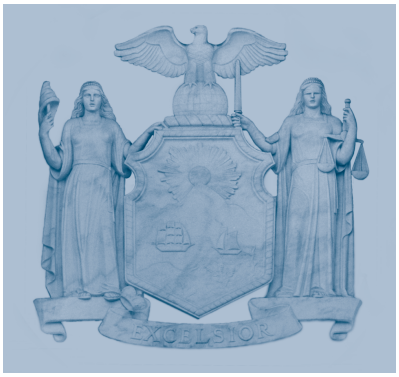


APRIL 1, 2009

NEW YORK STATE UNIFIED COURT SYSTEM

PART 1200 –

RULES OF PROFESSIONAL CONDUCT



APRIL 1, 2009

These Rules of Professional Conduct were promulgated as joint rules of the Appellate Divisions of the Supreme Court, effective April 1, 2009. They supersede the former Part 1200 (Disciplinary Rules of the Code of Professional Responsibility).

The New York State Bar Association has issued a Preamble, Scope and Comments to accompany these Rules. They are not enacted with this Part, and where a conflict exists between a Rule and the Preamble, Scope or a Comment, the Rule controls.

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PART 1200 - RULES OF PROFESSIONAL CONDUCT

RULE 1.0: TERMINOLOGY

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

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

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

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

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

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

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

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

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

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

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

(l) "Matter" includes any litigation, judicial or administrative proceeding, case, claim, application, request for a ruling or other determination, contract, controversy, investigation, charge, accusation, ar-

rest, negotiation, arbitration, mediation or any other representation involving a specific party or parties.

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

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

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

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

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

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

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

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

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

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

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

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

RULE 1.1: COMPETENCE

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

(b) A lawyer shall not handle a legal matter that the lawyer knows or should know that the lawyer is not competent to handle, without associating with a lawyer who is competent to handle it.

(c) lawyer shall not intentionally:

(1) fail to seek the objectives of the client through reasonably available means permitted by law and these Rules; or

(2) prejudice or damage the client during the course of the representation except as permitted or required by these Rules.

RULE 1.2:

Scope of Representation and Allocation of Authority Between Client and Lawyer

(a) Subject to the provisions herein, a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

(b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.

(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances, the client gives informed consent and where necessary notice is provided to the tribunal and/or opposing counsel.

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is illegal or fraudulent, except that the lawyer may discuss the legal consequences of any proposed course of conduct with a client.

(e) A lawyer may exercise professional judgment to waive or fail to assert a right or position of the client, or accede to reasonable requests of opposing counsel, when doing so does not prejudice the rights of the client.

(f) A lawyer may refuse to aid or participate in conduct that the lawyer believes to be unlawful, even though there is some support for an argument that the conduct is legal.

(g) A lawyer does not violate this Rule by being punctual in fulfilling all professional commitments, by avoiding offensive tactics, and by treating with courtesy and consideration all persons involved in the legal process.

RULE 1.3:

Diligence

(a) A lawyer shall act with reasonable diligence and promptness in representing a client.

(b) A lawyer shall not neglect a legal matter entrusted to the lawyer.

(c) A lawyer shall not intentionally fail to carry out a contract of employment entered into with a client for professional services, but the lawyer may withdraw as permitted under these Rules.

RULE 1.4:

Communication

(a) A lawyer shall:

(1) promptly inform the client of:

(i) any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(j), is required by these Rules;

(ii) any information required by court rule or other law to be communicated to a client; and

(iii) material developments in the matter including settlement or plea offers.

(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;

(3) keep the client reasonably informed about the status of the matter;

(4) promptly comply with a client's reasonable requests for information; and

(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by these Rules or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

RULE 1.5:
Fees and Division of Fees

(a) A lawyer shall not make an agreement for, charge, or collect an excessive or illegal fee or expense. A fee is excessive when, after a review of the facts, a reasonable lawyer would be left with a definite and firm conviction that the 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.

(b) A lawyer shall communicate to a client the scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible. This information shall be communicated to the client before or within a reasonable time after commencement of the representation and shall be in writing where required by statute or court rule. This provision shall not apply when the lawyer will charge a regularly represented client on the same basis or rate and perform services that are of the same general kind as previously rendered to and paid for by the client. Any changes in the scope of the representation or the basis or rate of the fee or expenses shall also be communicated to the client.

(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. Promptly after a lawyer has been employed in a contingent fee matter, the lawyer shall provide the client with a writing stating the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal; litigation and other expenses to be deducted from the recovery; and whether such expenses are to be deducted before or, if not prohibited by statute or court rule, after the contingent fee is calculated. The writing must clearly notify the client of any expenses for which the client will be liable regardless of whether the client is the prevailing party. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a writing stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

(d) A lawyer shall not enter into an arrangement for, charge or collect:

(1) a contingent fee for representing a defendant in a criminal matter;

(2) a fee prohibited by law or rule of court;

(3) fee based on fraudulent billing;

(4) a nonrefundable retainer fee; provided that a lawyer may enter into a retainer agreement with a client containing a reasonable minimum fee clause if it defines in plain language and sets forth the circumstances under which such fee may be incurred and how it will be calculated; or

(5) any fee in a domestic relations matter if:

(i) 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;

(ii) a written retainer agreement has not been signed by the lawyer and client setting forth in plain language the nature of the relationship and the details of the fee arrangement; or

(iii) the written retainer agreement includes a security interest, confession of judgment or other lien without prior notice being provided to the client in a signed retainer agreement and approval from a tribunal after notice to the adversary. A lawyer shall 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.

(e) In domestic relations matters, a lawyer shall provide a prospective client with a statement of client's rights and responsibilities at the initial conference and prior to the signing of a written retainer agreement.

(f) Where applicable, a lawyer shall resolve fee disputes by arbitration at the election of the client pursuant to a fee arbitration program established by the Chief Administrator of the Courts and approved by the Administrative Board of the Courts.

(g) A lawyer shall not divide a fee for legal services with another lawyer who is not associated in the same law firm unless:

(1) 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;

(2) the client agrees 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 is confirmed in writing; and

(3) the total fee is not excessive.

(h) Rule 1.5(g) does not prohibit payment to a lawyer formerly associated in a law firm pursuant to a separation or retirement agreement.

RULE 1.6: CONFIDENTIALITY OF INFORMATION

(a) A lawyer shall not knowingly reveal confidential information, as defined in this Rule, or use such information to the disadvantage of a client or for the advantage of the lawyer or a third person, unless:

(1) the client gives informed consent, as defined in Rule 1.0(j);

(2) the disclosure is impliedly authorized to advance the best interests of the client and is either reasonable under the circumstances or customary in the professional community; or

(3) the disclosure is permitted by paragraph (b).

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

(b) A lawyer may reveal or use confidential information to the extent that the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm;

(2) to prevent the client from committing a crime;

(3) to withdraw a written or oral opinion or representation previously given by the lawyer and reasonably believed by the lawyer still to be relied upon by a third person, where the lawyer has discovered that the opinion or representa-

tion was based on materially inaccurate information or is being used to further a crime or fraud;

(4) to secure legal advice about compliance with these Rules or other law by the lawyer, another lawyer associated with the lawyer's firm or the law firm;

(5) (i) to defend the lawyer or the lawyer's employees and associates against an accusation of wrongful conduct; or

(ii) to establish or collect a fee; or

(6) when permitted or required under these Rules or to comply with other law or court order.

(c) A lawyer shall exercise reasonable care to prevent the lawyer's employees, associates, and others whose services are utilized by the lawyer from disclosing or using confidential information of a client, except that a lawyer may reveal the information permitted to be disclosed by paragraph (b) through an employee.

RULE 1.7:
Conflict of Interest: Current Clients

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if a reasonable lawyer would conclude that either:

(1) the representation will involve the lawyer in representing differing interests; or

(2) there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property or other personal interests.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.

RULE 1.8:
Current Clients: Specific Conflict of Interest Rules

(a) A lawyer shall not enter into a business transaction with a client if they have differing interests therein and if the client expects the lawyer to exercise professional judgment therein for the protection of the client, unless:

(1) the transaction is fair and reasonable to the client and the terms of the transaction are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;

(2) the client is advised in writing of the desirability of seeking, and is given a reasonable opportunity to seek, the advice of independent legal counsel on the transaction; and

(3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

(b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules.

(c) A lawyer shall not:

(1) solicit any gift from a client, including a testamentary gift, for the benefit of the lawyer or a person related to the lawyer; or

(2) prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer

any gift, unless the lawyer or other recipient of the gift is related to the client and a reasonable lawyer would conclude that the transaction is fair and reasonable.

For purposes of this paragraph, related persons include a spouse, child, grandchild, parent, grandparent or other relative or individual with whom the lawyer or the client maintains a close, familial relationship.

(d) Prior to conclusion of all aspects of the matter giving rise to the representation or proposed representation of the client or prospective client, a lawyer shall not negotiate or enter into any arrangement or understanding with:

(1) a client or a prospective client by which the lawyer acquires an interest in literary or media rights with respect to the subject matter of the representation or proposed representation; or

(2) any person by which the lawyer transfers or assigns any interest in literary or media rights with respect to the subject matter of the representation of a client or prospective client.

(e) While representing a client in connection with contemplated or pending litigation, a lawyer shall not advance or guarantee financial assistance to the client, except that:

(1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter;

(2) a lawyer representing an indigent or pro bono client may pay court costs and expenses of litigation on behalf of the client; and

(3) a lawyer, 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, may pay on the lawyer's own account court costs and expenses of litigation. In such case, the fee paid to the lawyer from the proceeds of the action may include an amount equal to such costs and expenses incurred.

(f) A lawyer shall 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:

(1) the client gives informed consent;

(2) there is no interference with the lawyer's independent professional judgment or with the client-lawyer relationship; and

(3) the client's confidential information is protected as required by Rule 1.6.

(g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, absent court approval, unless each client gives informed consent in a writing signed by the client. The lawyer's disclosure shall include the existence and nature of all the claims involved and of the participation of each person in the settlement.

(h) A lawyer shall not:

(1) make an agreement prospectively limiting the lawyer's liability to a client for malpractice; or

(2) settle a claim or potential claim for such liability with an unrepresented client or former client unless that person is advised in writing of the desirability of seeking, and is given a reasonable opportunity to seek, the advice of independent legal counsel in connection therewith.

(i) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:

(1) acquire a lien authorized by law to secure the lawyer's fee or expenses; and

(2) contract with a client for a reasonable contingent fee in a civil matter subject to Rule 1.5(d) or other law or court rule.

(j) (1) A lawyer shall not:

(i) as a condition of entering into or continuing any professional representation by the lawyer or the lawyer's firm, require or demand sexual relations with any person;

(ii) employ coercion, intimidation or undue influence in entering into sexual relations incident to any professional representation by the lawyer or the lawyer's firm; or

(iii) in domestic relations matters, enter into sexual relations with a client during the course of the lawyer's representation of the client.

(2) Rule 1.8(j)(1) shall 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.

(k) Where a lawyer in a firm has sexual relations with a client but does not participate in the representation of that client, the lawyers in the firm shall not be subject to discipline under this Rule solely because of the occurrence of such sexual relations.

RULE 1.9: Duties to Former Clients

(a) A lawyer who has formerly represented a client in a matter shall 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 former client gives informed consent, confirmed in writing.

(b) Unless the former client gives informed consent, confirmed in writing, a lawyer shall 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 or paragraph (c) of this Rule that is material to the matter.

(c) 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.

RULE 1.10: Imputation of Conflicts of Interest

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rule 1.7, 1.8 or 1.9, except as otherwise provided therein.

(b) When a lawyer has terminated an association with a firm, the firm is prohibited from thereafter representing a person with interests that the firm knows or reasonably should know are materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm if the firm or any lawyer remaining in the firm has information protected by Rule 1.6 or Rule 1.9(c) that is material to the matter.

(c) When a lawyer becomes associated with a firm, the firm may not knowingly represent a client in a matter that is the same as or substantially related to a matter in which the newly associated lawyer, or a firm with which that lawyer was associated, formerly represented a client whose interests are materially adverse to the prospective or current client unless the newly associated lawyer did not acquire any information protected by Rule 1.6 or Rule 1.9(c) that is material to the current matter.

(d) A disqualification prescribed by this Rule may be

waived by the affected client or former client under the conditions stated in Rule 1.7.

(e) A law firm shall make a written record of its engagements, at or near the time of each new engagement, and shall implement and maintain a system by which proposed engagements are checked against current and previous engagements when:

(1) the firm agrees to represent a new client;

(2) the firm agrees to represent an existing client in a new matter;

(3) the firm hires or associates with another lawyer; or

(4) an additional party is named or appears in a pending matter.

(f) Substantial failure to keep records or to implement or maintain a conflict-checking system that complies with paragraph (e) shall be a violation thereof regardless of whether there is another violation of these Rules.

(g) Where a violation of paragraph (e) by a law firm is a substantial factor in causing a violation of paragraph (a) by a lawyer, the law firm, as well as the individual lawyer, shall be responsible for the violation of paragraph (a).

(h) A lawyer related to another lawyer as parent, child, sibling or spouse shall not represent in any matter a client whose interests differ from those of another party to the matter who the lawyer knows is represented by the other lawyer unless the client consents to the representation after full disclosure and the lawyer concludes that the lawyer can adequately represent the interests of the client.

RULE 1.11:

Special Conflicts of Interest for Former and Current Government Officers and Employees

(a) Except as law may otherwise expressly provide, a lawyer who has formerly served as a public officer or employee of the government:

(1) shall comply with Rule 1.9(c); and

(2) shall not represent a client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency gives its informed consent, confirmed in writing, to the representation. This provision shall not apply to matters governed by Rule 1.12(a).

(b) When a lawyer is disqualified from representation under paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless:

(1) the firm acts promptly and reasonably to:

(i) 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) implement effective screening procedures to prevent the flow of information about the matter between the personally disqualified lawyer and the others in the firm;

(iii) ensure that the disqualified lawyer is apportioned no part of the fee therefrom; and

(iv) give written notice to the appropriate government agency to enable it to ascertain compliance with the provisions of this Rule; and

(2) there are no other circumstances in the particular representation that create an appearance of impropriety.

(c) Except as law may otherwise expressly provide, a lawyer having information that the lawyer knows is confidential government information about a person, acquired when the lawyer was a public officer or employee, may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person. As used in

this Rule, the term "confidential government information" means information that has been obtained under governmental authority and that, at the time this Rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose, and that is not otherwise available to the public. A firm with which that lawyer is associated may undertake or continue representation in the matter only if the disqualified lawyer is timely and effectively screened from any participation in the matter in accordance with the provisions of paragraph (b).

(d) Except as law may otherwise expressly provide, a lawyer currently serving as a public officer or employee shall not:

(1) participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless under applicable law no one is, or by lawful delegation may be, authorized to act in the lawyer's stead in the matter; or

(2) negotiate for private 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.

(e) As used in this Rule, the term "matter" as defined in Rule 1.0(l) does not include or apply to agency rulemaking functions.

(f) A lawyer who holds public office shall not:

(1) use the public position to obtain, or attempt to obtain, a special advantage in legislative matters for the lawyer or for a client under circumstances where the lawyer knows or it is obvious that such action is not in the public interest;

(2) use the public position to influence, or attempt to influence, a tribunal to act in favor of the lawyer or of a client; or

(3) accept anything of value from any person when the lawyer knows or it is obvious that the offer is for the purpose of influencing the lawyer's action as a public official.

RULE 1.12:

Specific Conflicts of Interest for Former Judges, Arbitrators, Mediators or Other Third-Party Neutrals

(a) A lawyer shall not accept private employment in a matter upon the merits of which the lawyer has acted in a judicial capacity.

(b) Except as stated in paragraph (e), and unless all parties to the proceeding give informed consent, confirmed in writing, a lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as:

(1) an arbitrator, mediator or other third-party neutral; or

(2) a law clerk to a judge or other adjudicative officer or an arbitrator, mediator or other third-party neutral.

(c) A lawyer shall 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 judge or other adjudicative officer or as an arbitrator, mediator or other third-party neutral.

(d) 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:

(1) the firm acts promptly and reasonably to:

(i) 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) implement effective screening procedures to prevent the flow of information about the matter between the personally disqualified lawyer and the others in the firm;

(iii) ensure that the disqualified lawyer is apportioned no part of the fee therefrom; and

(iv) give written notice to the parties and any appropriate tribunal to enable it to ascertain compliance with the provisions of this Rule; and

(2) there are no other circumstances in the particular representation that create an appearance of impropriety.

(e) An arbitrator selected as a partisan of a party in a multimember arbitration panel is not prohibited from subsequently representing that party.

RULE 1.13: ORGANIZATION AS CLIENT

(a) When a lawyer employed or retained by an organization is dealing with the organization's directors, officers, employees, members, shareholders or other constituents, and it appears that the organization's interests may differ from those of the constituents with whom the lawyer is dealing, the lawyer shall explain that the lawyer is the lawyer for the organization and not for any of the constituents.

(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action or intends to act or refuses to act in a matter related to the representation that (i) is a violation of a legal obligation to the organization or a violation of law that reasonably might be imputed to the organization, and (ii) is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. In determining how to proceed, the lawyer shall give due consideration to the seriousness of the violation and its consequences, the scope and nature of the lawyer's representation, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters and any other relevant considerations. Any measures taken shall be designed to minimize disruption of the organization and the risk of revealing information relating to the representation to persons outside the organization. Such measures may include, among others:

(1) asking reconsideration of the matter;

(2) advising that a separate legal opinion on the matter be sought for presentation to an appropriate authority in the organization; and

(3) referring the matter to higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest authority that can act in behalf of the organization as determined by applicable law.

(c) If, despite the lawyer's efforts in accordance with paragraph (b), the highest authority that can act on behalf of the organization insists upon action, or a refusal to act, that is clearly in violation of law and is likely to result in a substantial injury to the organization, the lawyer may reveal confidential information only if permitted by Rule 1.6, and may resign in accordance with Rule 1.16.

(d) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the concurrent representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

RULE 1.14: CLIENT WITH DIMINISHED CAPACITY

(a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a conventional relationship with the client.

(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial

physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.

(c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

RULE 1.15:

Preserving Identity of Funds and Property of Others; Fiduciary Responsibility; Commingling and Misappropriation of Client Funds or Property; Maintenance of Bank Accounts; Record Keeping; Examination of Records

(a) Prohibition Against Commingling and Misappropriation of Client Funds or Property.

A lawyer in possession of any funds or other property belonging to another person, where such possession is incident to his or her practice of law, is a fiduciary, and must not misappropriate such funds or property or commingle such funds or property with his or her own.

(b) Separate Accounts.

(1) A lawyer who is in possession of funds belonging to another person incident to the lawyer's practice of law shall maintain such funds in a banking institution within New York State that agrees to provide dishonored check reports in accordance with the provisions of 22 N.Y.C.R.R. Part 1300. "Banking institution" means a state or national bank, trust company, savings bank, savings and loan association or credit union. Such funds shall be maintained, in the lawyer's own name, or in the name of a firm of lawyers of which the lawyer is a member, or in the name of the lawyer or firm of lawyers by whom the lawyer is employed, in a special account or accounts, separate from any business or personal accounts of the lawyer or lawyer's firm, and separate from any accounts that the lawyer may maintain as executor, guardian, trustee or receiver, or in any other fiduciary capacity; into such special account or accounts all funds held in escrow or otherwise entrusted to the lawyer or firm shall be deposited; provided, however, that such funds may be maintained in a banking institution located outside New York State if such banking institution complies with 22 N.Y.C.R.R. Part 1300 and the lawyer has obtained the prior written approval of the person to whom such funds belong specifying the name and address of the office or branch of the banking institution where such funds are to be maintained.

(2) A lawyer or the lawyer's firm shall identify the special bank account or accounts required by Rule 1.15(b)(1) as an "Attorney Special Account," "Attorney Trust Account," or "Attorney Escrow Account," and shall obtain checks and deposit slips that bear such title. Such title may be accompanied by such other descriptive language as the lawyer may deem appropriate, provided that such additional language distinguishes such special account or accounts from other bank accounts that are maintained by the lawyer or the lawyer's firm.

(3) Funds reasonably sufficient to maintain the account or to pay account charges may be deposited therein.

(4) Funds belonging in part to a client or third person and in part currently or potentially to the lawyer or law firm shall be kept in such special account or accounts, but the portion belonging

to the lawyer or law firm may be withdrawn when due unless the right of the lawyer or law firm to receive it is disputed by the client or third person, in which event the disputed portion shall not be withdrawn until the dispute is finally resolved.

(c) Notification of Receipt of Property; Safekeeping; Rendering Accounts; Payment or Delivery of Property.

A lawyer shall:

(1) promptly notify a client or third person of the receipt of funds, securities, or other properties in which the client or third person has an interest;

(2) identify and label securities and properties of a client or third person promptly upon receipt and place them in a safe deposit box or other place of safekeeping as soon as practicable;

(3) maintain complete records of all funds, securities, and other properties of a client or third person coming into the possession of the lawyer and render appropriate accounts to the client or third person regarding them; and

(4) promptly pay or deliver to the client or third person as requested by the client or third person the funds, securities, or other properties in the possession of the lawyer that the client or third person is entitled to receive.

(d) Required Bookkeeping Records.

(1) A lawyer shall maintain for seven years after the events that they record:

(i) the records of all deposits in and withdrawals from the accounts specified in Rule 1.15(b) and of any other bank account that concerns or affects the lawyer's practice of law; these records shall specifically identify the date, source and description of each item deposited, as well as the date, payee and purpose of each withdrawal or disbursement;

(ii) a record for special accounts, showing the source of all funds deposited in such accounts, the names of all persons for whom the funds are or were held, the amount of such funds, the description and amounts, and the names of all persons to whom such funds were disbursed;

(iii) copies of all retainer and compensation agreements with clients;

(iv) copies of all statements to clients or other persons showing the disbursement of funds to them or on their behalf;

(v) copies of all bills rendered to clients;

(vi) copies of all records showing payments to lawyers, investigators or other persons, not in the lawyer's regular employ, for services rendered or performed;

(vii) copies of all retainer and closing statements filed with the Office of Court Administration; and

(viii) all checkbooks and check stubs, bank statements, prenumbered canceled checks and duplicate deposit slips.

(2) Lawyers shall make accurate entries of all financial transactions in their records of receipts and disbursements, in their special accounts, in their ledger books or similar records, and in any other books of account kept by them in the regular course of their practice, which entries shall be made at or near the time of the act, condition or event recorded.

(3) For purposes of Rule 1.15(d), a lawyer may satisfy the requirements of maintaining "copies" by maintaining any of the following items: original records, photocopies, microfilm, optical imaging, and any other medium that preserves an image of the document that cannot be altered without detection.

(e) Authorized Signatories.

All special account withdrawals shall be made only

to a named payee and not to cash. Such withdrawals shall be made by check or, with the prior written approval of the party entitled to the proceeds, by bank transfer. Only a lawyer admitted to practice law in New York State shall be an authorized signatory of a special account.

(f) Missing Clients.

Whenever any sum of money is payable to a client and the lawyer is unable to locate the client, the lawyer shall apply to the court in which the action was brought if in the unified court system, or, if no action was commenced in the unified court system, to the Supreme Court in the county in which the lawyer maintains an office for the practice of law, for an order directing payment to the lawyer of any fees and disbursements that are owed by the client and the balance, if any, to the Lawyers' Fund for Client Protection for safeguarding and disbursement to persons who are entitled thereto.

(g) Designation of Successor Signatories.

(1) Upon the death of a lawyer who was the sole signatory on an attorney trust, escrow or special account, an application may be made to the Supreme Court for an order designating a successor signatory for such trust, escrow or special account, who shall be a member of the bar in good standing and admitted to the practice of law in New York State.

(2) An application to designate a successor signatory shall be made to the Supreme Court in the judicial district in which the deceased lawyer maintained an office for the practice of law. The application may be made by the legal representative of the deceased lawyer's estate; a lawyer who was affiliated with the deceased lawyer in the practice of law; any person who has a beneficial interest in such trust, escrow or special account; an officer of a city or county bar association; or counsel for an attorney disciplinary committee. No lawyer may charge a legal fee for assisting with an application to designate a successor signatory pursuant to this Rule.

(3) The Supreme Court may designate a successor signatory and may direct the safeguarding of funds from such trust, escrow or special account, and the disbursement of such funds to persons who are entitled thereto, and may order that funds in such account be deposited with the Lawyers' Fund for Client Protection for safeguarding and disbursement to persons who are entitled thereto.

(h) Dissolution of a Firm.

Upon the dissolution of any firm of lawyers, the former partners or members shall make appropriate arrangements for the maintenance, by one of them or by a successor firm, of the records specified in Rule 1.15(d).

(i) Availability of Bookkeeping Records: Records Subject to Production in Disciplinary Investigations and Proceedings.

The financial records required by this Rule shall be located, or made available, at the principal New York State office of the lawyers subject hereto, and any such records shall be produced in response to a notice or subpoena duces tecum issued in connection with a complaint before or any investigation by the appropriate grievance or departmental disciplinary committee, or shall be produced at the direction of the appropriate Appellate Division before any person designated by it. All books and records produced pursuant to this Rule shall be kept confidential, except for the purpose of the particular proceeding, and their contents shall not be disclosed by anyone in violation of the attorney-client privilege.

(j) Disciplinary Action.

A lawyer who does not maintain and keep the accounts and records as specified and required by this Rule, or who does not produce any such records pursuant to this Rule, shall be deemed in violation of these Rules and shall be subject to disciplinary proceedings.

RULE 1.16:
Declining or Terminating Representation

(a) A lawyer shall not accept employment on behalf of a person if the lawyer knows or reasonably should know that such person wishes to:

(1) bring a legal action, conduct a defense, or assert a position in a matter, or otherwise have steps taken for such person, merely for the purpose of harassing or maliciously injuring any person; or

(2) present a claim or defense in a matter that is not warranted under existing law, unless it can be supported by a good faith argument for an extension, modification, or reversal of existing law.

(b) Except as stated in paragraph (d), a lawyer shall withdraw from the representation of a client when:

(1) the lawyer knows or reasonably should know that the representation will result in a violation of these Rules or of law;

(2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client;

(3) the lawyer is discharged; or

(4) the lawyer knows or reasonably should know that the client is bringing the legal action, conducting the defense, or asserting a position in the matter, or is otherwise having steps taken, merely for the purpose of harassing or maliciously injuring any person.

(c) Except as stated in paragraph (d), a lawyer may withdraw from representing a client when:

(1) withdrawal can be accomplished without material adverse effect on the interests of the client;

(2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;

(3) the client has used the lawyer's services to perpetrate a crime or fraud;

(4) the client insists upon taking action with which the lawyer has a fundamental disagreement;

(5) the client deliberately disregards an agreement or obligation to the lawyer as to expenses or fees;

(6) the client insists upon presenting a claim or defense that is not warranted under existing law and cannot be supported by good faith argument for an extension, modification, or reversal of existing law;

(7) the client fails to cooperate in the representation or otherwise renders the representation unreasonably difficult for the lawyer to carry out employment effectively;

(8) the lawyer's inability to work with co-counsel indicates that the best interest of the client likely will be served by withdrawal;

(9) the lawyer's mental or physical condition renders it difficult for the lawyer to carry out the representation effectively;

(10) the client knowingly and freely assents to termination of the employment;

(11) withdrawal is permitted under Rule 1.13(c) or other law;

(12) the lawyer believes in good faith, in a matter pending before a tribunal, that the tribunal will find the existence of other good cause for withdrawal; or

(13) the client insists that the lawyer pursue a course of conduct which is illegal or prohibited under these Rules.

(d) If permission for withdrawal from employment is required by the rules of a tribunal, a lawyer shall not withdraw from employment in a matter before that tribunal without its permission. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

(e) Even when withdrawal is otherwise permitted or required, upon termination of representation, a

lawyer shall take steps, to the extent reasonably practicable, to avoid foreseeable prejudice to the rights of the client, including giving reasonable notice to the client, allowing time for employment of other counsel, delivering to the client all papers and property to which the client is entitled, promptly refunding any part of a fee paid in advance that has not been earned and complying with applicable laws and rules.

RULE 1.17: Sale of Law Practice

(a) A lawyer retiring from a private practice of law; a law firm, one or more members of which are retiring from the private practice of law with the firm; or the personal representative of a deceased, disabled or missing lawyer, may sell a law practice, including goodwill, to one or more lawyers or law firms, who may purchase the practice. The seller and the buyer may agree on reasonable restrictions on the seller's private practice of law, notwithstanding any other provision of these Rules. Retirement shall include the cessation of the private practice of law in the geographic area, that is, the county and city and any county or city contiguous thereto, in which the practice to be sold has been conducted.

(b) Confidential information.

(1) With respect to each matter subject to the contemplated sale, the seller may provide prospective buyers with any information not protected as confidential information under Rule 1.6.

(2) Notwithstanding Rule 1.6, the seller may provide the prospective buyer with information as to individual clients:

(i) concerning the identity of the client, except as provided in paragraph (b)(6);

(ii) concerning the status and general nature of the matter;

(iii) available in public court files; and

(iv) concerning the financial terms of the client-lawyer relationship and the payment status of the client's account.

(3) Prior to making any disclosure of confidential information that may be permitted under paragraph (b)(2), the seller shall provide the prospective buyer with information regarding the matters involved in the proposed sale sufficient to enable the prospective buyer to determine whether any conflicts of interest exist. Where sufficient information cannot be disclosed without revealing client confidential information, the seller may make the disclosures necessary for the prospective buyer to determine whether any conflict of interest exists, subject to paragraph (b)(6). If the prospective buyer determines that conflicts of interest exist prior to reviewing the information, or determines during the course of review that a conflict of interest exists, the prospective buyer shall not review or continue to review the information unless the seller shall have obtained the consent of the client in accordance with Rule 1.6(a)(1).

(4) Prospective buyers shall maintain the confidentiality of and shall not use any client information received in connection with the proposed sale in the same manner and to the same extent as if the prospective buyers represented the client.

(5) Absent the consent of the client after full disclosure, a seller shall not provide a prospective buyer with information if doing so would cause a violation of the attorney-client privilege.

(6) If the seller has reason to believe that the identity of the client or the fact of the representation itself constitutes confidential information in the circumstances, the seller may not provide such information to a prospective buyer without first advising the client of the identity of the prospective buyer and obtaining the client's consent to the proposed disclosure.

(c) Written notice of the sale shall be given jointly by

the seller and the buyer to each of the seller's clients and shall include information regarding:

(1) the client's right to retain other counsel or to take possession of the file;

(2) the fact that the client's consent to the transfer of the client's file or matter to the buyer will be presumed if the client does not take any action or otherwise object within 90 days of the sending of the notice, subject to any court rule or statute requiring express approval by the client or a court;

(3) the fact that agreements between the seller and the seller's clients as to fees will be honored by the buyer;

(4) proposed fee increases, if any, permitted under paragraph (e); and

(5) the identity and background of the buyer or buyers, including principal office address, bar admissions, number of years in practice in New York State, whether the buyer has ever been disciplined for professional misconduct or convicted of a crime, and whether the buyer currently intends to resell the practice.

(d) When the buyer's representation of a client of the seller would give rise to a waivable conflict of interest, the buyer shall not undertake such representation unless the necessary waiver or waivers have been obtained in writing.

(e) The fee charged a client by the buyer shall not be increased by reason of the sale, unless permitted by a retainer agreement with the client or otherwise specifically agreed to by the client.

RULE 1.18: DUTIES TO PROSPECTIVE CLIENTS

(a) A person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a "prospective client."

(b) Even when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation, except as Rule 1.9 would permit with respect to information of a former client.

(c) A lawyer subject to paragraph (b) shall 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 paragraph (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 paragraph (d).

(d) When the lawyer has received disqualifying information as defined in paragraph (c), representation is permissible if:

(1) both the affected client and the prospective client have given informed consent, confirmed in writing; 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 procedures 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.

(e) A person who:

(1) 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; or

(2) 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, is not a prospective client with the meaning of paragraph (a).

RULE 2.1:
Advisor

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social, psychological, and political factors that may be relevant to the client's situation.

RULE 2.2:
[Reserved]

RULE 2.3:
Evaluation for Use by Third Persons

(a) A lawyer may provide an evaluation of a matter affecting a client for the use of someone other than the client if the lawyer reasonably believes that making the evaluation is compatible with other aspects of the lawyer's relationship with the client.

(b) When the lawyer knows or reasonably should know that the evaluation is likely to affect the client's interests materially and adversely, the lawyer shall not provide the evaluation unless the client gives informed consent.

(c) Unless disclosure is authorized in connection with a report of an evaluation, information relating to the evaluation is protected by Rule 1.6.

RULE 2.4:
Lawyer Serving as Third-Party Neutral

(a) 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.

(b) A lawyer serving as a third-party neutral shall 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 shall explain the difference between the lawyer's role as a third-party neutral and a lawyer's role as one who represents a client.

RULE 3.1:
Non-Meritorious Claims and Contentions

(a) A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous. A lawyer for the defendant in a criminal proceeding or for the respondent in a proceeding that could result in incarceration may nevertheless so defend the proceeding as to require that every element of the case be established.

(b) A lawyer's conduct is "frivolous" for purposes of this Rule if:

(1) the lawyer knowingly advances a claim or defense that is unwarranted under existing law, except that the lawyer may advance such claim or defense if it can be supported by good faith argument for an extension, modification, or reversal of existing law;

(2) the conduct has no reasonable purpose other than to delay or prolong the resolution of litigation, in violation of Rule 3.2, or serves merely

to harass or maliciously injure another; or

(3) the lawyer knowingly asserts material factual statements that are false.

RULE 3.2:
Delay of Litigation

In representing a client, a lawyer shall not use means that have no substantial purpose other than to delay or prolong the proceeding or to cause needless expense.

RULE 3.3:
Conduct Before a Tribunal

(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

(2) fail to disclose to the tribunal controlling legal authority known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(3) offer or use evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

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

(c) The duties stated in paragraphs (a) and (b) apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

(e) In presenting a matter to a tribunal, a lawyer shall disclose, unless privileged or irrelevant, the identities of the clients the lawyer represents and of the persons who employed the lawyer.

(f) In appearing as a lawyer before a tribunal, a lawyer shall not:

(1) fail to comply with known local customs of courtesy or practice of the bar or a particular tribunal without giving to opposing counsel timely notice of the intent not to comply;

(2) engage in undignified or discourteous conduct;

(3) intentionally or habitually violate any established rule of procedure or of evidence; or

(4) engage in conduct intended to disrupt the tribunal.

RULE 3.4:
Fairness to Opposing Party and Counsel

A lawyer shall not:

(a) (1) suppress any evidence that the lawyer or the client has a legal obligation to reveal or pro duce;

(2) advise or cause a person to hide or leave the jurisdiction of a tribunal for the purpose of making the person unavailable as a witness therein;

(3) conceal or knowingly fail to disclose that which the lawyer is required by law to reveal;

(4) knowingly use perjured testimony or false evidence;

(5) participate in the creation or preservation of evidence when the lawyer knows or it is obvious that the evidence is false; or

(6) knowingly engage in other illegal conduct or

conduct contrary to these Rules;

(b) offer an inducement to a witness that is prohibited by law or pay, offer to pay or acquiesce in the payment of compensation to a witness contingent upon the content of the witness's testimony or the outcome of the matter. A lawyer may advance, guarantee or acquiesce in the payment of:

(1) reasonable compensation to a witness for the loss of time in attending, testifying, preparing to testify or otherwise assisting counsel, and reasonable related expenses; or

(2) a reasonable fee for the professional services of an expert witness and reasonable related expenses;

(c) disregard or advise the client to disregard a standing rule of a tribunal or a ruling of a tribunal made in the course of a proceeding, but the lawyer may take appropriate steps in good faith to test the validity of such rule or ruling;

(d) in appearing before a tribunal on behalf of a client:

(1) state or allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence;

(2) assert personal knowledge of facts in issue except when testifying as a witness;

(3) assert a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused but the lawyer may argue, upon analysis of the evidence, for any position or conclusion with respect to the matters stated herein; or

(4) ask any question that the lawyer has no reasonable basis to believe is relevant to the case and that is intended to degrade a witness or other person; or

(e) present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter.

RULE 3.5:

Maintaining and Preserving the Impartiality of Tribunals and Jurors

(a) A lawyer shall not:

(1) seek to or cause another person to influence a judge, official or employee of a tribunal by means prohibited by law or give or lend anything of value to such judge, official, or employee of a tribunal when the recipient is prohibited from accepting the gift or loan but a lawyer may make a contribution to the campaign fund of a candidate for judicial office in conformity with Part 100 of the Rules of the Chief Administrator of the Courts;

(2) in an adversarial 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 pending, except:

(i) in the course of official proceedings in the matter;

(ii) in writing, 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;

(3) seek to or cause another person to influence a juror or prospective juror by means prohibited by law;

(4) communicate or cause another to communicate with a member of the jury venire from which the jury will be selected for the trial of a case or, during the trial of a case, with any member of

the jury unless authorized to do so by law or court order;

(5) communicate with a juror or prospective juror after discharge of the jury if:

(i) the communication is prohibited by law or court order;

(ii) the juror has made known to the lawyer a desire not to communicate;

(iii) the communication involves misrepresentation, coercion, duress or harassment; or

(iv) the communication is an attempt to influence the juror's actions in future jury service; or

(6) conduct a vexatious or harassing investigation of either a member of the venire or a juror or, by financial support or otherwise, cause another to do so.

(b) During the trial of a case a lawyer who is not connected therewith shall not communicate with or cause another to communicate with a juror concerning the case.

(c) All restrictions imposed by this Rule also apply to communications with or investigations of members of a family of a member of the venire or a juror.

(d) A lawyer shall reveal promptly to the court improper conduct by a member of the venire or a juror, or by another toward a member of the venire or a juror or a member of his or her family of which the lawyer has knowledge.

RULE 3.6:
Trial Publicity

(a) A lawyer who is participating in or has participated in a criminal or civil matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

(b) A statement ordinarily is likely to prejudice materially an adjudicative proceeding when it refers to a civil matter triable to a jury, a criminal matter or any other proceeding that could result in incarceration, and the statement relates to:

(1) the character, credibility, reputation or criminal record of a party, suspect in a criminal investigation or witness, or the identity of a witness or the expected testimony of a party or witness;

(2) in a criminal matter that could result in incarceration, the possibility of a plea of guilty to the offense or the existence or contents of any confession, admission or statement given by a defendant or suspect, or that person's refusal or failure to make a statement;

(3) the performance or results of any examination or test, or the refusal or failure of a person to submit to an examination or test, or the identity or nature of physical evidence expected to be presented;

(4) any opinion as to the guilt or innocence of a defendant or suspect in a criminal matter that could result in incarceration;

(5) information the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and would, if disclosed, create a substantial risk of prejudicing an impartial trial; or

(6) the fact that a defendant has been charged with a crime, unless there is included therein a statement explaining that the charge is merely an accusation and that the defendant is presumed innocent until and unless proven guilty.

(c) Provided that the statement complies with paragraph (a), a lawyer may state the following without elaboration:

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

(2) information contained in a public record;

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

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

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

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

(7) in a criminal matter:

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

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

(iii) the identity of investigating and arresting officers or agencies and the length of the investigation; and

(iv) the fact, time and place of arrest, resistance, pursuit and use of weapons, and a description of physical evidence seized, other than as contained only in a confession, admission or statement.

(d) Notwithstanding paragraph (a), a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.

(e) No lawyer associated in a firm or government agency with a lawyer subject to paragraph (a) shall make a statement prohibited by paragraph (a).

RULE 3.7:
Lawyer As Witness

(a) A lawyer shall 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 tribunal.

(b) A lawyer may not act as advocate before a tribunal in a matter if:

(1) 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

(2) the lawyer is precluded from doing so by Rule 1.7 or Rule 1.9.

RULE 3.8:
Special Responsibilities of Prosecutors and Other Government Lawyers

(a) A prosecutor or other government lawyer shall not institute, cause to be instituted or maintain a criminal charge when the prosecutor or other government lawyer knows or it is obvious that the charge is not supported by probable cause.

(b) A prosecutor or other government lawyer in criminal litigation shall make timely disclosure to counsel for the defendant or to a defendant who has no counsel of the existence of evidence or information known to the prosecutor or other government lawyer that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the sentence, except when relieved of this responsibility by a protective order of a tribunal.

RULE 3.9:

Advocate In Non-Adjudicative Matters

A lawyer communicating in a representative capacity with a legislative body or administrative agency in connection with a pending non-adjudicative matter or proceeding shall disclose that the appearance is in a representative capacity, except when the lawyer seeks information from an agency that is available to the public.

RULE 4.1:

Truthfulness In Statements To Others

In the course of representing a client, a lawyer shall not knowingly make a false statement of fact or law to a third person.

RULE 4.2:

Communication With Person Represented By Counsel

(a) In representing a client, a lawyer shall not communicate or cause another to communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the prior consent of the other lawyer or is authorized to do so by law.

(b) Notwithstanding the prohibitions of paragraph (a), and unless otherwise prohibited by law, a lawyer may cause a client to communicate with a represented person unless the represented person is not legally competent, and may counsel the client with respect to those communications, provided the lawyer gives reasonable advance notice to the represented person's counsel that such communications will be taking place.

RULE 4.3:

Communicating With Unrepresented Persons

In communicating on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person other than the advice to secure counsel if the lawyer knows or reasonably should know that the interests of such person are or have a reasonable possibility of being in conflict with the interests of the client.

RULE 4.4:

Respect for Rights of Third Persons

(a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass or harm a third person or use methods of obtaining evidence that violate the legal rights of such a person.

(b) 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 shall promptly notify the sender.

RULE 4.5:

Communication After Incidents Involving Personal Injury or Wrongful Death

(a) In the event of a specific incident involving potential claims for personal injury or wrongful death, no unsolicited communication shall be made to an individual injured in the incident or to a family member or legal representative of such an individual, by a lawyer or law firm, or by any associate, agent, employee or other representative of a lawyer or law firm representing actual or potential defendants or entities that may defend and/or indemnify said defendants, before the 30th day after the date of the incident, unless a filing must be made within 30 days of the incident as a legal prerequisite to the particular claim, in which case no unsolicited communication shall be made before the 15th day after

the date of the incident.

(b) An unsolicited communication by a lawyer or law firm, seeking to represent an injured individual or the legal representative thereof under the circumstance described in paragraph (a) shall comply with Rule 7.3(e).

RULE 5.1:

Responsibilities of Law Firms, Partners, Managers and Supervisory Lawyers

(a) A law firm shall make reasonable efforts to ensure that all lawyers in the firm conform to these Rules.

(b) (1) A lawyer with management responsibility in a law firm shall make reasonable efforts to ensure that other lawyers in the law firm conform to these Rules.

(2) A lawyer with direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the supervised lawyer conforms to these Rules.

(c) A law firm shall ensure that the work of partners and associates is adequately supervised, as appropriate. A lawyer with direct supervisory authority over another lawyer shall adequately supervise the work of the other lawyer, as appropriate. In either case, the degree of supervision required is that which is reasonable under the circumstances, taking into account factors such as the experience of the person whose work is being supervised, the amount of work involved in a particular matter, and the likelihood that ethical problems might arise in the course of working on the matter.

(d) A lawyer shall be responsible for a violation of these Rules by another lawyer if:

(1) the lawyer orders or directs the specific conduct or, with knowledge of the specific conduct, ratifies it; or

(2) the lawyer is a partner in a law firm or is a lawyer who individually or together with other lawyers possesses comparable managerial responsibility in a law firm in which the other lawyer practices or is a lawyer who has supervisory authority over the other lawyer; and

(i) knows of such conduct at a time when it could be prevented or its consequences avoided or mitigated but fails to take reasonable remedial action; or

(ii) in the exercise of reasonable management or supervisory authority should have known of the conduct so that reasonable remedial action could have been taken at a time when the consequences of the conduct could have been avoided or mitigated.

RULE 5.2:

Responsibilities of a Subordinate Lawyer

(a) A lawyer is bound by these Rules notwithstanding that the lawyer acted at the direction of another person.

(b) A subordinate lawyer does not violate these Rules if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty.

RULE 5.3:

Lawyer's Responsibility for Conduct of Nonlawyers

(a) A law firm shall ensure that the work of nonlawyers who work for the firm is adequately supervised, as appropriate. A lawyer with direct supervisory authority over a nonlawyer shall adequately supervise the work of the nonlawyer, as appropriate. In either case, the degree of supervision required is that which is reasonable under the circumstances, taking into account factors such as the experience of the person whose work is being supervised, the amount of work involved in a particular matter and the like-

lihood that ethical problems might arise in the course of working on the matter.

(b) A lawyer shall be responsible for conduct of a nonlawyer employed or retained by or associated with the lawyer that would be a violation of these Rules if engaged in by a lawyer, if:

(1) the lawyer orders or directs the specific conduct or, with knowledge of the specific conduct, ratifies it; or

(2) the lawyer is a partner in a law firm or is a lawyer who individually or together with other lawyers possesses comparable managerial responsibility in a law firm in which the nonlawyer is employed or is a lawyer who has supervisory authority over the nonlawyer; and

(i) knows of such conduct at a time when it could be prevented or its consequences avoided or mitigated but fails to take reasonable remedial action; or

(ii) in the exercise of reasonable management or supervisory authority should have known of the conduct so that reasonable remedial action could have been taken at a time when the consequences of the conduct could have been avoided or mitigated.

RULE 5.4:
Professional Independence of a Lawyer

(a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that:

(1) an agreement by a lawyer with the lawyer's firm or another lawyer associated in the firm may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;

(2) a lawyer who undertakes to complete unfinished legal business of a deceased lawyer may pay to the estate of the deceased lawyer that portion of the total compensation that fairly represents the services rendered by the deceased lawyer; and

(3) a lawyer or law firm may compensate a nonlawyer employee or include a nonlawyer employee in a retirement plan based in whole or in part on a profit-sharing arrangement.

(b) A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.

(c) Unless authorized by law, a lawyer shall 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 Rule 1.6.

(d) A lawyer shall not practice with or in the form of an entity authorized to practice law for profit, if:

(1) a nonlawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration;

(2) a nonlawyer is a member, corporate director or officer thereof or occupies a position of similar responsibility in any form of association other than a corporation; or

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

RULE 5.5:
Unauthorized Practice of Law

(a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction.

(b) A lawyer shall not aid a nonlawyer in the unauthorized practice of law.

RULE 5.6:
Restrictions On Right To Practice

(a) A lawyer shall not participate in offering or making:

(1) a partnership, shareholder, operating, employment, or other similar type of agreement that restricts the right of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement; or

(2) an agreement in which a restriction on a lawyer's right to practice is part of the settlement of a client controversy.

(b) This Rule does not prohibit restrictions that may be included in the terms of the sale of a law practice pursuant to Rule 1.17.

RULE 5.7:
Responsibilities Regarding Nonlegal Services

(a) With respect to lawyers or law firms providing nonlegal services to clients or other persons:

(1) A lawyer or law firm that provides nonlegal services to a person that are not distinct from legal services being provided to that person by the lawyer or law firm is subject to these Rules with respect to the provision of both legal and nonlegal services.

(2) A lawyer or law firm that provides nonlegal services to a person that are distinct from legal services being provided to that person by the lawyer or law firm is subject to these Rules with respect to the nonlegal services if the person receiving the services could reasonably believe that the nonlegal services are the subject of a client-lawyer relationship.

(3) A lawyer or law firm that is an owner, controlling party or agent of, or that is otherwise affiliated with, an entity that the lawyer or law firm knows to be providing nonlegal services to a person is subject to these Rules with respect to the nonlegal services if the person receiving the services could reasonably believe that the nonlegal services are the subject of a client-lawyer relationship.

(4) For purposes of paragraphs (a)(2) and (a)(3), it will be presumed that the person receiving nonlegal services believes the services to be the subject of a client-lawyer relationship unless the lawyer or law firm has advised the person receiving the services in writing that the services are not legal services and that the protection of a client-lawyer relationship does not exist with respect to the nonlegal services, or if the interest of the lawyer or law firm in the entity providing nonlegal services is de minimis.

(b) Notwithstanding the provisions of paragraph (a), a lawyer or law firm that is an owner, controlling party, agent, or is otherwise affiliated with an entity that the lawyer or law firm knows is providing nonlegal services to a person shall not permit any nonlawyer providing such services or affiliated with that entity to direct or regulate the professional judgment of the lawyer or law firm in rendering legal services to any person, or to cause the lawyer or law firm to compromise its duty under Rule 1.6(a) and (c) with respect to the confidential information of a client receiving legal services.

(c) For purposes of this Rule, "nonlegal services" shall mean those services that lawyers may lawfully provide and that are not prohibited as an unauthorized practice of law when provided by a nonlawyer.

RULE 5.8:
Contractual Relationship Between Lawyers and Nonlegal Professionals

(a) The practice of law has an essential tradition of complete independence and uncompromised loyalty to those it serves. Recognizing this tradition, clients of lawyers practicing in New York State are guaranteed "independent professional judgment and undivided loyalty uncompromised by conflicts

of interest." Indeed, these guarantees represent the very foundation of the profession and allow and foster its continued role as a protector of the system of law. Therefore, a lawyer must remain completely responsible for his or her own independent professional judgment, maintain the confidences and secrets of clients, preserve funds of clients and third parties in his or her control, and otherwise comply with the legal and ethical principles governing lawyers in New York State.

Multi-disciplinary practice between lawyers and nonlawyers is incompatible with the core values of the legal profession and therefore, a strict division between services provided by lawyers and those provided by nonlawyers is essential to protect those values. However, a lawyer or law firm may enter into and maintain a contractual relationship with a nonlegal professional or nonlegal professional service firm for the purpose of offering to the public, on a systematic and continuing basis, legal services performed by the lawyer or law firm as well as other nonlegal professional services, notwithstanding the provisions of Rule 1.7(a), provided that:

(1) the profession of the nonlegal professional or nonlegal professional service firm is included in a list jointly established and maintained by the Appellate Divisions pursuant to Section 1205.3 of the Joint Appellate Division Rules;

(2) the lawyer or law firm neither grants to the nonlegal professional or nonlegal professional service firm, nor permits such person or firm to obtain, hold or exercise, directly or indirectly, any ownership or investment interest in, or managerial or supervisory right, power or position in connection with the practice of law by the lawyer or law firm, nor, as provided in Rule 7.2(a)(1), shares legal fees with a nonlawyer or receives or gives any monetary or other tangible benefit for giving or receiving a referral; and

(3) the fact that the contractual relationship exists is disclosed by the lawyer or law firm to any client of the lawyer or law firm before the client is referred to the nonlegal professional service firm, or to any client of the nonlegal professional service firm before that client receives legal services from the lawyer or law firm; and the client has given informed written consent and has been provided with a copy of the "Statement of Client's Rights In Cooperative Business Arrangements" pursuant to section 1205.4 of the Joint Appellate Divisions Rules.

(b) For purposes of paragraph (a):

(1) each profession on the list maintained pursuant to a Joint Rule of the Appellate Divisions shall have been designated sua sponte, or approved by the Appellate Divisions upon application of a member of a nonlegal profession or nonlegal professional service firm, upon a determination that the profession is composed of individuals who, with respect to their profession:

(i) have been awarded a bachelor's degree or its equivalent from an accredited college or university, or have attained an equivalent combination of educational credit from such a college or university and work experience;

(ii) are licensed to practice the profession by an agency of the State of New York or the United States Government; and

(iii) are required under penalty of suspension or revocation of license to adhere to a code of ethical conduct that is reasonably comparable to that of the legal profession;

(2) the term "ownership or investment interest" shall mean any such interest in any form of debt or equity, and shall include any interest commonly considered to be an interest accruing to or enjoyed by an owner or investor.

(c) This Rule shall not apply to relationships consisting solely of non-exclusive reciprocal referral agreements or understandings between a lawyer or law firm and a nonlegal professional or nonlegal professional service firm.

RULE 6.1:
Voluntary Pro Bono Service

Lawyers are strongly encouraged to provide pro bono legal services to benefit poor persons.

(a) Every lawyer should aspire to:

(1) provide at least 20 hours of pro bono legal services each year to poor persons; and

(2) contribute financially to organizations that provide legal services to poor persons.

(b) Pro bono legal services that meet this goal are:

(1) professional services rendered in civil matters, and in those criminal matters for which the government is not obliged to provide funds for legal representation, to persons who are financially unable to compensate counsel;

(2) activities related to improving the administration of justice by simplifying the legal process for, or increasing the availability and quality of legal services to, poor persons; and

(3) professional services to charitable, religious, civic and educational organizations in matters designed predominantly to address the needs of poor persons.

(c) Appropriate organizations for financial contributions are:

(1) organizations primarily engaged in the provision of legal services to the poor; and

(2) organizations substantially engaged in the provision of legal services to the poor, provided that the donated funds are to be used for the provision of such legal services.

(d) This Rule is not intended to be enforced through the disciplinary process, and the failure to fulfill the aspirational goals contained herein should be without legal consequence.

RULE 6.2:
[Reserved]

RULE 6.3:
Membership in a Legal Services Organization

A lawyer may serve as a director, officer or member of a not-for-profit legal services organization, apart from the law firm in which the lawyer practices, notwithstanding that the organization serves persons having interests that differ from those of a client of the lawyer or the lawyer's firm. The lawyer shall not knowingly participate in a decision or action of the organization:

(a) if participating in the decision or action would be incompatible with the lawyer's obligations to a client under Rules 1.7 through 1.13; or

(b) where the decision or action could have a material adverse effect on the representation of a client of the organization whose interests differ from those of a client of the lawyer or the lawyer's firm.

RULE 6.4
Law Reform Activities Affecting Client Interests

A lawyer may serve as a director, officer or member of an organization involved in reform of the law or its administration, notwithstanding that the reform may affect the interests of a client of the lawyer. When the lawyer knows that the interests of a client may be materially benefitted by a decision in which the lawyer actively participates, the lawyer shall disclose that fact to the organization, but need not identify the client. When the lawyer knows that the interests of a client may be adversely affected by a decision in which the lawyer actively participates, the lawyer shall disclose that fact to the client.

RULE 6.5:
Participation in Limited Pro Bono Legal Service Programs

(a) A lawyer who, under the auspices of a program sponsored by a court, government agency, bar association or not-for-profit legal services organization, provides short-term limited legal services to a

client without expectation by either the lawyer or the client that the lawyer will provide continuing representation in the matter:

(1) shall comply with Rules 1.7, 1.8 and 1.9, concerning restrictions on representations where there are or may be conflicts of interest as that term is defined in these Rules, only if the lawyer has actual knowledge at the time of commencement of representation that the representation of the client involves a conflict of interest; and

(2) shall comply with Rule 1.10 only if the lawyer has actual knowledge at the time of commencement of representation that another lawyer associated with the lawyer in a law firm is affected by Rules 1.7, 1.8 and 1.9.

(b) Except as provided in paragraph (a)(2), Rule 1.7 and Rule 1.9 are inapplicable to a representation governed by this Rule.

(c) Short-term limited legal services are services providing legal advice or representation free of charge as part of a program described in paragraph (a) with no expectation that the assistance will continue beyond what is necessary to complete an initial consultation, representation or court appearance.

(d) The lawyer providing short-term limited legal services must secure the client's informed consent to the limited scope of the representation, and such representation shall be subject to the provisions of Rule 1.6.

(e) This Rule shall not apply where the court before which the matter is pending determines that a conflict of interest exists or, if during the course of the representation, the lawyer providing the services becomes aware of the existence of a conflict of interest precluding continued representation.

RULE 7.1: ADVERTISING

(a) A lawyer or law firm shall not use or disseminate or participate in the use or dissemination of any advertisement that:

(1) contains statements or claims that are false, deceptive or misleading; or

(2) violates a Rule.

(b) 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.

(c) An advertisement shall not:

(1) include an endorsement of, or testimonial about, a lawyer or law firm from a client with respect to a matter still pending;

(2) include a paid endorsement of, or testimonial about, a lawyer or law firm without disclosing that the person is being compensated therefor;

(3) include the portrayal of a judge, the portrayal of a fictitious law firm, the use of a fictitious name to refer to lawyers not associated together in a law firm, or otherwise imply that lawyers are associated in a law firm if that is not the case;

(4) use actors to portray the lawyer, members of the law firm, or clients, or utilize depictions of fictionalized events or scenes, without disclosure of same;

(5) rely on techniques to obtain attention that demonstrate a clear and intentional lack of relevance to the selection of counsel, including the portrayal of lawyers exhibiting characteristics clearly unrelated to legal competence;

(6) be made to resemble legal documents; or

(7) utilize a nickname, moniker, motto or trade name that implies an ability to obtain results in a matter.

(d) An advertisement that complies with paragraph (e) may contain the following:

(1) statements that are reasonably likely to create an expectation about results the lawyer can achieve;

(2) statements that compare the lawyer's services with the services of other lawyers;

(3) testimonials or endorsements of clients, where not prohibited by paragraph (c)(1), and of former clients; or

(4) statements describing or characterizing the quality of the lawyer's or law firm's services.

(e) It is permissible to provide the information set forth in paragraph (d) provided:

(1) its dissemination does not violate paragraph (a);

(2) it can be factually supported by the lawyer or law firm as of the date on which the advertisement is published or disseminated; and

(3) it is accompanied by the following disclaimer: "Prior results do not guarantee a similar outcome."

(f) 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 Rule 7.3(a)(1), shall 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" shall appear therein. In the case of electronic mail, the subject line shall contain the notation "ATTORNEY ADVERTISING."

(g) A lawyer or law firm shall not utilize:

(1) a pop-up or pop-under advertisement in connection with computer-accessed communications, 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 these Rules.

(h) All advertisements shall include the name, principal law office address and telephone number of the lawyer or law firm whose services are being offered.

(i) Any words or statements required by this Rule 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 shall appear on the home page.

(j) A lawyer or law firm advertising any fixed fee for specified legal services shall, at the time of fee publication, have available to the public a written statement clearly describing the scope of each advertised service, which statement shall be available to the client at the time of retainer for any such service. Such legal services shall include all those services

that are recognized as reasonable and necessary under local custom in the area of practice in the community where the services are performed.

(k) All advertisements shall be pre-approved by the lawyer or law firm, and a copy shall be retained for a period of not less than three years following its initial dissemination. Any advertisement contained in a computer-accessed communication shall be retained for a period of not less than one year. A copy of the contents of any web site covered by this Rule shall be preserved upon the initial publication of the web site, any major web site redesign, or a meaningful and extensive content change, but in no event less frequently than once every 90 days.

(l) If a lawyer or law firm advertises a range of fees or an hourly rate for services, the lawyer or law firm shall not charge more than the fee advertised for such services. If a lawyer or law firm advertises a fixed fee for specified legal services, or performs services described in a fee schedule, the lawyer or law firm shall not charge more than the fixed fee for such stated legal service as set forth in the advertisement or fee schedule, unless the client agrees in writing that the services performed or to be performed were not legal services referred to or implied in the advertisement or in the fee schedule and, further, that a different fee arrangement shall apply to the transaction.

(m) Unless otherwise specified in the advertisement, if a lawyer publishes any fee information authorized under this Rule in a publication that is published more frequently than once per month, the lawyer shall be bound by any representation made therein for a period of not less than 30 days after such publication. If a lawyer publishes any fee information authorized under this Rule in a publication that is published once per month or less frequently, the lawyer shall be bound by any representation made therein until the publication of the succeeding issue. If a lawyer publishes any fee information authorized under this Rule in a publication that has no fixed date for publication of a succeeding issue, the lawyer shall be bound by any representation made therein for a reasonable period of time after publication, but in no event less than 90 days.

(n) Unless otherwise specified, if a lawyer broadcasts any fee information authorized under this Rule, the lawyer shall be bound by any representation made therein for a period of not less than 30 days after such broadcast.

(o) A lawyer shall not compensate or give any thing of value to representatives of the press, radio, television or other communication medium in anticipation of or in return for professional publicity in a news item.

(p) All advertisements that contain information about the fees charged by the lawyer or law firm, including those indicating that in the absence of a recovery no fee will be charged, shall comply with the provisions of Judiciary Law §488(3).

(q) A lawyer may accept employment that results from participation in activities designed to educate the public to recognize legal problems, to make intelligent selection of counsel or to utilize available legal services.

(r) Without affecting the right to accept employment, a lawyer may speak publicly or write for publication on legal topics so long as the lawyer does not undertake to give individual advice.

RULE 7.2: PAYMENT FOR REFERRALS

(a) A lawyer shall not compensate or give anything of value to a person or organization to recommend or obtain employment by a client, or as a reward for having made a recommendation resulting in employment by a client, except that:

(1) a lawyer or law firm may refer clients to a nonlegal professional or nonlegal professional service firm pursuant to a contractual relationship with such nonlegal professional or nonlegal professional service firm to provide legal and

other professional services on a systematic and continuing basis as permitted by Rule 5.8, provided however that such referral shall not otherwise include any monetary or other tangible consideration or reward for such, or the sharing of legal fees; and

(2) a lawyer may pay the usual and reasonable fees or dues charged by a qualified legal assistance organization or referral fees to another lawyer as permitted by Rule 1.5(g).

(b) A lawyer or the lawyer's partner or associate or any other affiliated lawyer may be recommended, employed or paid by, or may cooperate with one of the following offices or organizations that promote the use of the lawyer's services or those of a partner or associate or any other affiliated lawyer, or request one of the following offices or organizations to recommend or promote the use of the lawyer's services or those of the lawyer's partner or associate, or any other affiliated lawyer as a private practitioner, if there is no interference with the exercise of independent professional judgment on behalf of the client:

(1) a legal aid office or public defender office:

(i) operated or sponsored by a duly accredited law school;

(ii) operated or sponsored by a bona fide, non-profit community organization;

(iii) operated or sponsored by a governmental agency; or

(iv) operated, sponsored, or approved by a bar association;

(2) a military legal assistance office;

(3) a lawyer referral service operated, sponsored or approved by a bar association or authorized by law or court rule; or

(4) any bona fide organization that recommends, furnishes or pays for legal services to its members or beneficiaries provided the following conditions are satisfied:

(i) Neither the lawyer, nor the lawyer's partner, nor associate, nor any other affiliated lawyer nor any nonlawyer, shall have initiated or promoted such organization for the primary purpose of providing financial or other benefit to such lawyer, partner, associate or affiliated lawyer;

(ii) Such organization is not operated for the purpose of procuring legal work or financial benefit for any lawyer as a private practitioner outside of the legal services program of the organization;

(iii) The member or beneficiary to whom the legal services are furnished, and not such organization, is recognized as the client of the lawyer in the matter;

(iv) The legal service plan of such organization provides appropriate relief for any member or beneficiary who asserts a claim that representation by counsel furnished, selected or approved by the organization for the particular matter involved would be unethical, improper or inadequate under the circumstances of the matter involved; and the plan provides an appropriate procedure for seeking such relief;

(v) The lawyer does not know or have cause to know that such organization is in violation of applicable laws, rules of court or other legal requirements that govern its legal service operations; and

(vi) Such organization has filed with the appropriate disciplinary authority, to the extent required by such authority, at least annually a report with respect to its legal service plan, if any, showing its terms, its schedule of benefits, its subscription charges, agreements with counsel and financial results of its legal service activities or, if it has failed to do so, the lawyer does not know or have cause to know of such failure.

RULE 7.3:

Solicitation and Recommendation of Professional Employment

(a) A lawyer shall not engage in solicitation:

(1) by in-person or telephone contact, or by real-time or interactive computer-accessed communication unless the recipient is a close friend, relative, former client or existing client; or

(2) by any form of communication if:

(i) the communication or contact violates Rule 4.5, Rule 7.1(a), or paragraph (e) of this Rule;

(ii) the recipient has made known to the lawyer a desire not to be solicited by the lawyer;

(iii) the solicitation involves coercion, duress or harassment;

(iv) the lawyer knows or reasonably should know that the age or the physical, emotional or mental state of the recipient makes it unlikely that the recipient will be able to exercise reasonable judgment in retaining a lawyer; or

(v) the lawyer intends or expects, but does not disclose, that the legal services necessary to handle the matter competently will be performed primarily by another lawyer who is not affiliated with the soliciting lawyer as a partner, associate or of counsel.

(b) For purposes of this Rule, "solicitation" means any 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.

(c) A solicitation directed to a recipient in this State shall be subject to the following provisions:

(1) A copy of the solicitation shall at the time of its dissemination be filed with the attorney disciplinary committee of the judicial district or judicial department wherein the lawyer or law firm maintains its principal office. Where no such office is maintained, the filing shall be made in the judicial department where the solicitation is targeted. A filing shall consist of:

(i) a copy of the solicitation;

(ii) a transcript of the audio portion of any radio or television solicitation; and

(iii) if the solicitation is in a language other than English, an accurate English-language translation.

(2) Such solicitation shall contain no reference to the fact of filing.

(3) If a solicitation is directed to a predetermined recipient, a list containing the names and addresses of all recipients shall be retained by the lawyer or law firm for a period of not less than three years following the last date of its dissemination.

(4) Solicitations filed pursuant to this subdivision shall be open to public inspection.

(5) The provisions of this paragraph shall 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).

(d) A written solicitation shall not be sent by a method

that requires the recipient to travel to a location other than that at which the recipient ordinarily receives business or personal mail or that requires a signature on the part of the recipient.

(e) No solicitation relating to a specific incident involving potential claims for personal injury or wrongful death shall be disseminated before the 30th day after the date of the incident, unless a filing must be made within 30 days of the incident as a legal prerequisite to the particular claim, in which case no unsolicited communication shall be made before the 15th day after the date of the incident.

(f) Any solicitation made in writing or by computer-accessed communication and directed to a pre-determined recipient, if prompted by a specific occurrence involving or affecting a recipient, shall disclose how the lawyer obtained the identity of the recipient and learned of the recipient's potential legal need.

(g) If a retainer agreement is provided with any solicitation, the top of each page shall be marked "SAMPLE" in red ink in a type size equal to the largest type size used in the agreement and the words "DO NOT SIGN" shall appear on the client signature line.

(h) Any solicitation covered by this section shall include the name, principal law office address and telephone number of the lawyer or law firm whose services are being offered.

(i) The provisions of this Rule shall apply to a lawyer or members of a law firm not admitted to practice in this State who shall solicit retention by residents of this State.

RULE 7.4:
Identification of Practice and Specialty

(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 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."

RULE 7.5:

Professional Notices, Letterheads and Signs

(a) 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 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) or Rule 7.4. A professional card of a law 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.

(b) A lawyer in private practice shall not practice under a trade name, a name that is misleading as to the identity of the lawyer or lawyers practicing under such name, or a firm name containing names other than those of one or more of the lawyers in the firm, except that the name of a professional corporation shall contain "PC" or such symbols permitted by law, the name of a limited liability company or partnership shall contain "LLC," "LLP" or such symbols permitted by law and, if otherwise lawful, a firm may use as, or continue to include in its name the name or names of one or more deceased or retired members of the firm or of a predecessor firm in a continuing line of succession. Such terms as "legal clinic," "legal aid," "legal service office," "legal assistance office," "defender office" and the like may be used only by qualified legal assistance organizations, except that the term "legal clinic" may be used by any lawyer or law firm provided the name of a participating lawyer or firm is incorporated therein. A lawyer or law firm may not include the name of a nonlawyer in its firm name, nor may a lawyer or law firm that has a contractual relationship with a nonlegal professional or nonlegal professional service firm pursuant to Rule 5.8 to provide legal and other professional services on a systematic and continuing basis include in its firm name the name of the nonlegal professional service firm or any individual nonlegal professional affiliated therewith. A lawyer who assumes a judicial, legislative or public executive or administrative post or office shall not permit the lawyer's name to re-

main in the name of a law firm or to be used in professional notices of the firm during any significant period in which the lawyer is not actively and regularly practicing law as a member of the firm and, during such period, other members of the firm shall not use the lawyer's name in the firm name or in professional notices of the firm.

(c) Lawyers shall not hold themselves out as having a partnership with one or more other lawyers unless they are in fact partners.

(d) A partnership shall not be formed or continued between or among lawyers licensed in different jurisdictions unless all enumerations of the members and associates of the firm on its letterhead and in other permissible listings make clear the jurisdictional limitations on those members and associates of the firm not licensed to practice in all listed jurisdictions; however, the same firm name may be used in each jurisdiction.

(e) 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 these Rules.

(f) A lawyer or law firm may utilize a telephone number which contains a domain name, nickname, moniker or motto that does not otherwise violate these Rules.

RULE 8.1:
Candor in the Bar Admission Process

(a) A lawyer shall be subject to discipline if, in connection with the lawyer's own application for admission to the bar previously filed in this state or in any other jurisdiction, or in connection with the application of another person for admission to the bar, the lawyer knowingly:

(1) has made or failed to correct a false statement of material fact; or

(2) has failed to disclose a material fact requested in connection with a lawful demand for information from an admissions authority.

RULE 8.2:
Judicial Officers and Candidates

(a) A lawyer shall not knowingly make a false statement of fact concerning the qualifications, conduct or integrity of a judge or other adjudicatory officer or of a candidate for election or appointment to judicial office.

(b) A lawyer who is a candidate for judicial office shall comply with the applicable provisions of Part 100 of the Rules of the Chief Administrator of the Courts.

RULE 8.3:
Reporting Professional Misconduct

(a) A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation.

(b) A lawyer who possesses knowledge or evidence concerning another lawyer or a judge shall not fail to respond to a lawful demand for information from a tribunal or other authority empowered to investigate or act upon such conduct.

(c) This Rule does not require disclosure of:

(1) information otherwise protected by Rule 1.6;

or

(2) information gained by a lawyer or judge while participating in a bona fide lawyer assistance program.

RULE 8.4: MISCONDUCT

A lawyer or law firm shall not:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) engage in illegal conduct that adversely reflects on the lawyer's honesty, trustworthiness or fitness as a lawyer;

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice;

(e) state or imply an ability:

(1) to influence improperly or upon irrelevant grounds any tribunal, legislative body or public official; or

(2) to achieve results using means that violate these Rules or other law;

(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law;

(g) unlawfully discriminate in the practice of law, including in hiring, promoting or otherwise determining conditions of employment on the basis of age, race, creed, color, national origin, sex, disability, marital status or sexual orientation. Where there is a tribunal with jurisdiction to hear a complaint, if timely brought, other than a Departmental Disciplinary Committee, a complaint based on unlawful discrimination shall be brought before such tribunal in the first instance. A certified copy of a determination by such a tribunal, which has become final and enforceable and as to which the right to judicial or appellate review has been exhausted, finding that the lawyer has engaged in an unlawful discriminatory practice shall constitute prima facie evidence of professional misconduct in a disciplinary proceeding; or

(h) engage in any other conduct that adversely reflects on the lawyer's fitness as a lawyer.

RULE 8.5: DISCIPLINARY AUTHORITY AND CHOICE OF LAW

(a) A lawyer admitted to practice in this state is subject to the disciplinary authority of this state, regardless of where the lawyer's conduct occurs. A lawyer may be subject to the disciplinary authority of both this state and another jurisdiction where the lawyer is admitted for the same conduct.

(b) In any exercise of the disciplinary authority of this state, the rules of professional conduct to be applied shall be as follows:

(1) For conduct in connection with a proceeding in a court before which a lawyer has been admitted to practice (either generally or for purposes of that proceeding), the rules to be applied shall be the rules of the jurisdiction in which the court sits, unless the rules of the court provide otherwise; and

(2) For any other conduct:

(i) If the lawyer is licensed to practice only in this state, the rules to be applied shall be the rules of this state, and

(ii) If the lawyer is licensed to practice in this state and another jurisdiction, the rules to be applied shall be the rules of the admitting jurisdiction in which the lawyer principally practices; provided, however, that if particular conduct clearly has its predominant effect in another jurisdiction in which the lawyer is licensed to practice, the rules of that jurisdiction shall be applied to that conduct.

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at which the report of the standing committee on recommendations upon the application will be presented. After said application is acted upon at such bar meeting, the standing committee on recommendations for admission shall file with the clerk a copy of its report, with the action of the meeting endorsed thereon. The application for admission may then be claimed for the short calendar, of which claim the clerk shall give notice to every member of the bar of the county. Such admission shall, however, be upon a temporary license for a period of one year.

(P.B. 1978-1997, Sec. 22.)

Sec. 2-15. —Permanent License

(a) Not less than thirty nor more than sixty days before the expiration of such temporary license, the applicant may file a motion that such license be made permanent with the clerk, who shall forthwith give notice thereof to the standing committee on recommendations for admission. Said committee shall claim the motion for the short calendar as soon as it is prepared to make recommendations thereon to the court. If it shall appear to the court at a hearing thereon that said applicant has, since admission, devoted the major portion of his or her working time to the practice of law in the state of Connecticut and intends to continue so to practice, and that the applicant's good moral character and fitness to practice law remain satisfactory, such license shall be made permanent; but if the applicant shall fail to make such motion or if the court shall upon the hearing thereon refuse to make such finding, then said temporary license shall terminate upon its expiration, but the court may for good cause shown continue said hearing and extend said license for a period of not more than three months from the original date of its expiration.

(b) Provided, however, that whenever, during the period for which such temporary license may have been issued, such licensee has entered the military or naval service of the United States and by reason thereof has been unable to continue in practice in Connecticut, the period between such entrance and final discharge from such service, or other termination thereof, shall not be included in computing the term of such temporary license; and upon satisfactory proof to the court hearing said motion for a permanent license of such entrance and discharge or other termination, and of compliance with the other requirements of this section, the court may make such license permanent.

(P.B. 1978-1997, Sec. 23.) (Amended June 21, 2010, to take effect Jan. 1, 2011.)

HISTORY—2011: In 2011, ''good moral character and fitness to practice law'' was substituted for ''moral qualifications'' in the third sentence of subsection (a).

COMMENTARY—2011: The changes in subsection (a) above make clear, as set forth in Section 2-5, that fitness to practice law is a qualification for admission to practice law.

Sec. 2-15A. —Authorized House Counsel

(a) **Purpose**

The purpose of this section is to clarify the status of house counsel as authorized house counsel as defined herein, and to confirm that such counsel are subject to regulation by the judges of the superior court. Notwithstanding any other section of this chapter relating to admission to the bar, this section shall authorize attorneys licensed to practice in jurisdictions other than Connecticut to be permitted to undertake these activities, as defined herein, in Connecticut without the requirement of taking the bar examination so long as they are exclusively employed by an organization.

(b) **Definitions**

(1) **Authorized House Counsel.** An ''authorized house counsel'' is any person who:

(A) is a member in good standing of the entity governing the practice of law of each state (other than Connecticut) or territory of the United States, or the District of Columbia or any foreign jurisdiction in which the member is licensed;

(B) has been certified on recommendation of the bar examining committee in accordance with this section;

(C) agrees to abide by the rules regulating members of theConnecticut bar and submit to the jurisdiction of the statewide grievance committee and the superior court; and

(D) is, at the date of application for registration under this rule, employed in the state of Connecticut by an organization or relocating to the state of Connecticut in furtherance of such employment within three months of such application under this section and receives or shall receive compensation for activities performed for that business organization.

(2) **Organization.** An ''organization'' for the purpose of this rule is a corporation, partnership, association, or employer sponsored benefit plan or other legal entity (taken together with its respective parents, subsidiaries, and affiliates) that is not itself engaged in the practice of law or the rendering of legal services outside such organization, whether for a fee or otherwise, and does not charge or collect a fee for the representation or advice other than to entities comprising such organization for the activities of the authorized house counsel.

(c) **Activities**

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(1) **Authorized Activities.** An authorized house counsel, as an employee of an organization, may provide legal services in the state of Connecticut to the organization for which a registration pursuant to subsection (d) is effective, provided, however, that such activities shall be limited to:

(A) the giving of legal advice to the directors, officers, employees, trustees, and agents of the organization with respect to its business and affairs;

(B) negotiating and documenting all matters for the organization; and

(C) representation of the organization in its dealings with any administrative agency, tribunal or commission having jurisdiction; provided, however, authorized house counsel shall not be permitted to make appearances as counsel before any state or municipal administrative tribunal, agency, or commission, and shall not be permitted to make appearances in any court of this state, unless the attorney is specially admitted to appear in a case before such tribunal, agency, commission or court.

(2) **Disclosure.** Authorized house counsel shall not represent themselves to be members of the Connecticut bar or commissioners of the superior court licensed to practice law in this state. Such counsel may represent themselves as Connecticut authorized house counsel.

(3) **Limitation on Representation.** In no event shall the activities permitted hereunder include the individual or personal representation of any shareholder, owner, partner, officer, employee, servant, or agent in any matter or transaction or the giving of advice therefor unless otherwise permitted or authorized by law, code, or rule or as may be permitted by subsection (c) (1). Authorized house counsel shall not be permitted to prepare legal instruments or documents on behalf of anyone other than the organization employing the authorized house counsel.

(4) **Limitation on Opinions to Third Parties.** An authorized house counsel shall not express or render a legal judgment or opinion to be relied upon by any third person or party other than legal opinions rendered in connection with commercial, financial or other business transactions to which the authorized house counsel's employer organization is a party and in which the legal opinions have been requested from the authorized house counsel by another party to the transaction. Nothing in this subsection (c) (4) shall permit authorized house counsel to render legal opinions or advice in consumer transactions to customers of the organization employing the authorized house counsel.

(d) **Registration**

(1) **Filing with the Bar Examining Committee.** The bar examining committee shall investigate whether the applicant is at least eighteen years of age and is of good moral character, consistent with the requirement of Section 2-8 (3) regarding applicants for admission to the bar. In addition, the applicant shall file with the bar examining committee, and the committee shall consider, the following:

(A) a certificate from each entity governing the practice of law of a state or territory of the United States, or the District of Columbia or any foreign jurisdiction in which the applicant is licensed to practice law certifying that the applicant is a member in good standing;

(B) a sworn statement by the applicant:

(i) that the applicant has read and is familiar with the Connecticut Rules of Professional Conduct for attorneys and Chapter 2 (Attorneys) of the Superior Court Rules, General Provisions, and will abide by the provisions thereof;

(ii) that the applicant submits to the jurisdiction of the statewide grievance committee and the superior court for disciplinary purposes, and authorizes notification to or from the entity governing the practice of law of each state or territory of the United States, or the District of Columbia in which the applicant is licensed to practice law of any disciplinary action taken against the applicant;

(iii) listing any jurisdiction in which the applicant is now or ever has been licensed to practice law; and

(iv) disclosing any disciplinary sanction or pending proceeding pertaining or relating to his or her license to practice law including, but not limited to, reprimand, censure, suspension or disbarment, or whether the applicant has been placed on inactive status;

(C) a certificate from an organization certifying that it is qualified as set forth in subsection (b) (2); that it is aware that the applicant is not licensed to practice law in Connecticut; and that the applicant is employed or about to be employed in Connecticut by the organization as set forth in subsection (b) (1) (D);

(D) an appropriate application pursuant to the regulations of the bar examining committee;

(E) remittance of a filing fee to the bar examining committee as prescribed and set by that committee; and

(F) an affidavit from each of two members of the Connecticut bar, who have each been licensed to practice law in Connecticut for at least five years, certifying that the applicant is of good moral character and that the applicant is employed or will

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be employed by an organization as defined above in subsection (b) (2).

(2) **Certification.** Upon recommendation of the bar examining committee, the court may certify the applicant as authorized house counsel and shall cause notice of such certification to be published in the Connecticut Law Journal.

(3) **Annual Client Security Fund Fee.** Individuals certified pursuant to this section shall comply with the requirements of Sections 2-68 and 2-70 of this chapter, including payment of the annual fee and shall pay any other fees imposed on attorneys by court rule.

(4) **Annual Registration**. Individuals certified pursuant to this section shall register annually with the statewide grievance committee in accordance with Sections 2-26 and 2-27 (d) of this chapter.

(e) **Termination or Withdrawal of Registration**

(1) **Cessation of Authorization to Perform Services.** Authorization to perform services under this rule shall cease upon the earliest of the following events:

(A) the termination or resignation of employment with the organization for which registration has been filed, provided, however, that if the authorized house counsel shall commence employment with another organization within thirty days of the termination or resignation, authorization to perform services under this rule shall continue upon the filing with the bar examining committee of a certificate as set forth in subsection (d) (1) (C);

(B) the withdrawal of registration by the authorized house counsel;

(C) the relocation of an authorized house counsel outside of Connecticut for a period greater than 180 consecutive days; or

(D) the failure of authorized house counsel to comply with any applicable provision of this rule.

Notice of one of the events set forth in subsections (e) (1) (A) through (C) or a new certificate as provided in subsection (e) (1) (A) must be filed with the bar examining committee by the authorized house counsel within thirty days after such action. Failure to provide such notice by the authorized house counsel shall be a basis for discipline pursuant to the Rules of Professional Conduct for attorneys.

(2) **Notice of Withdrawal of Authorization**. Upon receipt of the notice required by subsection (e) (1), the bar examining committee shall forward a request to the statewide bar counsel that the authorization under this chapter be revoked. Notice of the revocation shall be mailed by the statewide bar counsel to the authorized house counsel and the organization employing the authorized house counsel.

(3) **Reapplication**. Nothing herein shall prevent an individual previously authorized as house counsel to reapply for authorization as set forth in subsection (d).

(f) **Discipline**

(1) **Termination of Authorization by Court.** In addition to any appropriate proceedings and discipline that may be imposed by the statewide grievance committee, the superior court may, at any time, with cause, terminate an authorized house counsel's registration, temporarily or permanently.

(2) **Notification to Other States**. The statewide bar counsel shall be authorized to notify each entity governing the practice of law in the state or territory of the United States, or the District of Columbia, in which the authorized house counsel is licensed to practice law, of any disciplinary action against the authorized house counsel.

(g) **Transition**

(1) **Preapplication Employment in Connecticut**. The performance of an applicant's duties as an employee of an organization in Connecticut prior to the effective date of this rule shall not be grounds for the denial of registration of such applicant if application for registration is made within six months of the effective date of this rule.

(2) **Immunity from Enforcement Action.** An authorized house counsel who has been duly registered under this rule shall not be subject to enforcement action for the unlicensed practice of law for acting as counsel to an organization prior to the effective date of this rule.

(Adopted June 29, 2007, to take effect Jan. 1, 2008; amended June 30, 2008, to take effect Jan. 1, 2009; amended June 22, 2009, to take effect Jan. 1, 2010.)

Sec. 2-16. —Attorney Appearing Pro Hac Vice

An attorney who is in good standing at the bar of another state, the District of Columbia, or the commonwealth of Puerto Rico, may, upon special and infrequent occasion and for good cause shown upon written application presented by a member of the bar of this state, be permitted in the discretion of the court to participate to such extent as the court may prescribe in the presentation of a cause or appeal in any court of this state; provided, however, that (1) such application shall be accompanied by the affidavit of the applicant (a) certifying whether such applicant has a grievance pending against him or her in any other jurisdiction, has ever been reprimanded, suspended, placed on inactive status, disbarred, or otherwise disciplined, or has ever resigned from the practice of law and, if so, setting forth the circumstances

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Part 522 - Rules for the Registration of In-House Counsel

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§ 522.1 Registration of In-House Counsel

(a) In-House Counsel defined. An in-house counsel is an attorney who is employed full time in this State by a non-governmental corporation, partnership, association, or other legal entity, including its subsidiaries and organizational affiliates, that is not itself engaged in the practice of law or the rendering of legal services outside such organization.

(b) In its discretion, the Appellate Division may register as in-house counsel an applicant who:

(1) has been admitted to practice in the highest law court in any other state or territory of the United States or in the District of Columbia;

(2) is currently admitted to the bar as an active member in good standing in at least one other jurisdiction which would similarly permit an attorney admitted to practice in this State to register as in-house counsel; and

(3) possesses the good moral character and general fitness requisite for a member of the bar of this State.

§ 522.2 Proof required

An applicant under this Part shall file with the Clerk of the Appellate Division of the department in which the applicant resides, is employed or intends to be employed as in-house counsel:

(a) a certificate of good standing from each jurisdiction in which the applicant is licensed to practice law;

(b) a letter from each such jurisdiction's grievance committee, or other body entertaining complaints against attorneys, certifying whether charges have been filed with or by such committee or body against the applicant, and, if so, the substance of the charges and the disposition thereof;

(c) an affidavit certifying that the applicant:

(1) performs or will perform legal services in this State solely and exclusively as provided in section 522.4; and

(2) agrees to be subject to the disciplinary authority of this State and to comply with the New York Rules of Professional Conduct (22 NYCRR Part 1200) and the rules governing the conduct of attorneys in the judicial department where the attorney's registration will be issued; and

(d) an affidavit or affirmation signed by an officer, director, or general counsel of the applicant's employer, on behalf of said employer, attesting that the applicant is or will be employed as an attorney for the employer and that the nature of the employment conforms to the requirements of this Part.

§ 522.3 Compliance

An attorney registered as in-house counsel under this Part shall:

(a) remain an active member in good standing in at least one state or territory of the United States or in the District of Columbia;

(b) promptly notify the appropriate Appellate Division department of a disposition made in a disciplinary proceeding in another jurisdiction;

(c) register with the Office of Court Administration and comply with the appropriate biennial registration requirements; and

(d) except as specifically limited herein, abide by all of the laws and rules that govern attorneys admitted to the practice of law in this State.

§ 522.4 Scope of legal services

An attorney registered as in-house counsel under this Part shall:

(a) provide legal services in this State only to the single employer entity or its organizational affiliates, including entities that control, are controlled by, or are under common control with the employer entity, and to employees, officers and directors of such entities, but only on matters directly related to the attorney's work for the employer entity, and to the extent consistent with the New York Rules of Professional Conduct;

(b) not make appearances in this State before a tribunal, as that term is defined in the New York Rules of Professional Conduct (22 NYCRR 1200.0 Rule 1.0[w]) or engage in any activity for which *pro hac vice* admission would be required if engaged in by an attorney who is not admitted to the practice of law in this State;

(c) not provide personal or individual legal services to any customers, shareholders, owners, partners, officers, employees or agents of the identified employer; and

(d) not hold oneself out as an attorney admitted to practice in this State except on the employer's letterhead with a limiting designation.

§ 522.5 Termination of registration

(a) Registration as in-house counsel under this Part shall terminate when:

(1) the attorney ceases to be an active member in another jurisdiction, as required in section 522.1(b)(2); or

(2) the attorney ceases to be an employee of the employer listed on the attorney's application, provided, however, that if such attorney, within 30 days of ceasing to be such an employee, becomes employed by another employer for which such attorney shall perform legal services as in-house counsel, such attorney may request continued registration under this Part by filing within said 30-day period with the appropriate Appellate Division department an affidavit to such effect, stating the dates on which the prior employment ceased and the new employment commenced, identifying the new employer and reaffirming that the attorney will provide legal services in this State solely and exclusively as permitted in section 522.4. The attorney shall also file an affidavit or affirmation of the new employer as described in section 522.2(d) and shall file an amended statement within said 30-day period with the Office of Court Administration.

(b) In the event that the employment of an attorney registered under this Part ceases with no subsequent employment by a successor employer, the attorney, within 30 days thereof, shall file with the Appellate Division department where registered a statement to such effect, stating the date that employment ceased. Noncompliance with this provision shall result in the automatic termination of the attorney's registration under this Part;

(c) Noncompliance with the provisions of section 468-a of the Judiciary Law and the rules promulgated thereunder, insofar as pertinent, shall, 30 days following the date set forth therein for compliance, result in the termination of the attorney's rights under this Part.

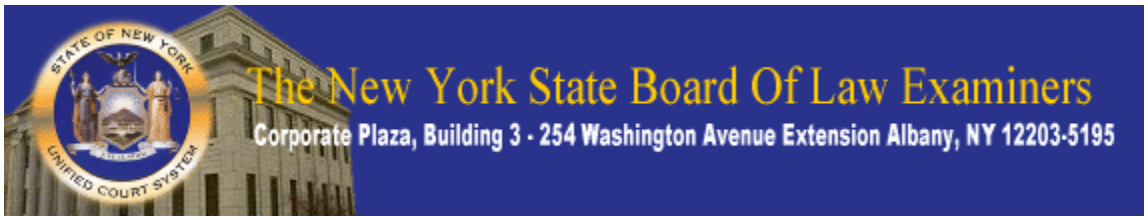
§ 522.6 Subsequent admission on motion

Where a person registered under this Part subsequently seeks to obtain admission without examination under section 520.10 of the Rules of this Court, the provision of legal services under this Part shall not be deemed to be the practice of law for the purpose of meeting the requirements of section 520.10(a)(2)(i).

§ 522.7 Saving Clause and Noncompliance

(a) An attorney employed as in-house counsel, as that term is defined in section 522.1(a), on the effective date of this Part, shall within 90 days of the date thereof, file an application in accordance with section 522.2. Attorneys employed as in-house counsel after the effective date of this Part shall file such an application within 30 days of the commencement of such employment;

(b) Failure to comply with the provisions of this Part shall be deemed professional misconduct, provided, however, that the Appellate Division may upon application of the attorney grant an extension upon good cause shown.



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Admission on Motion/Reciprocity:

Admission on Motion Packet

New York State permits admission on motion, without examination, for applicants who have practiced for five of the preceding seven years, are admitted to practice in at least one reciprocal jurisdiction, and have graduated from an American Bar Association approved law school. The first step in applying for admission is to obtain a Certificate of Legal Education from our Board. The fee for such certification is $400. New York has reciprocity with the following states:

Alaska	Arizona	Arkansas	Colorado	District of Columbia
Georgia	Idaho	Illinois	Indiana	Iowa
Kansas	Kentucky	Massachusetts	Michigan	Minnesota
Mississippi	Missouri	Nebraska	New Hampshire	North Carolina

North Dakota	Ohio	Oklahoma	Oregon	Pennsylvania
South Dakota	Tennessee	Texas	Utah	Washington
West Virginia	Wisconsin	Wyoming	Virginia	

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suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction under circumstances that do not create an unreasonable risk to the interests of their clients, the public or the courts. Subsection (c) identifies four such circumstances. The fact that conduct is not so identified does not imply that the conduct is or is not authorized. With the exception of subdivisions (d) (1) and (d) (2), this Rule does not authorize a lawyer to establish an office or other systematic and continuous presence in this jurisdiction without being admitted to practice generally here.

There is no single test to determine whether a lawyer's services are provided on a "temporary basis" in this jurisdiction and may, therefore, be permissible under subsection (c). Services may be "temporary" even though the lawyer provides services in this jurisdiction for an extended period of time, as when the lawyer is representing a client in a single lengthy negotiation or litigation.

Subsection (c) applies to lawyers who are admitted to practice law in any United States jurisdiction, which includes the District of Columbia and any state, territory or commonwealth of the United States. The word "admitted" in subsection (c) contemplates that the lawyer is authorized to practice in the jurisdiction in which the lawyer is admitted and excludes a lawyer who, while technically admitted, is not authorized to practice, because, for example, the lawyer is in an inactive status.

Subdivision (c) (1) recognizes that the interests of clients and the public are protected if a lawyer admitted only in another jurisdiction associates with a lawyer licensed to practice in this jurisdiction. For this subdivision to apply, however, the lawyer admitted to practice in this jurisdiction must actively participate in and share responsibility for the representation of the client.

Lawyers not admitted to practice generally in a jurisdiction may be authorized by law or order of a tribunal or an administrative agency to appear before the tribunal or agency. This authority may be granted pursuant to formal rules governing admission *pro hac vice* or pursuant to informal practice of the tribunal or agency. Under subdivision (c) (2), a lawyer does not violate this Rule when the lawyer appears before a tribunal or agency pursuant to such authority. To the extent that a court rule or other law of this jurisdiction requires a lawyer who is not admitted to practice in this jurisdiction to obtain admission *pro hac vice* before appearing before a tribunal or administrative agency, this Rule requires the lawyer to obtain that authority.

Subdivision (c) (2) also provides that a lawyer rendering services in this jurisdiction on a temporary basis does not violate this Rule when the lawyer engages in conduct in anticipation of a proceeding or hearing in a jurisdiction in which the lawyer is authorized to practice law or in which the lawyer reasonably expects to be admitted *pro hac vice*. Examples of such conduct include meetings with the client, interviews of potential witnesses, and the review of documents. Similarly, a lawyer admitted only in another jurisdiction may engage in conduct temporarily in this jurisdiction in connection with pending litigation in another jurisdiction in which the lawyer is or reasonably expects to be authorized to appear, including taking depositions in this jurisdiction.

When a lawyer has been or reasonably expects to be admitted to appear before a court or administrative agency, subdivision (c) (2) also permits conduct by lawyers who are associated with that lawyer in the matter, but who do not expect to appear before the court or administrative agency. For example, subordinate lawyers may conduct research, review documents, and attend meetings with witnesses in support of the lawyer responsible for the litigation.

Subdivision (c) (3) permits a lawyer admitted to practice law in another jurisdiction to perform services on a temporary basis in this jurisdiction if those services are in or reasonably related to a pending or potential mediation or other alternative dispute resolution proceeding in this or another jurisdiction, if the services are with respect to a matter that is substantially related to, or arises out of, a jurisdiction in which the lawyer is admitted to practice. The lawyer, however, must obtain admission *pro hac vice* in the case of a court-annexed arbitration or mediation or otherwise if court rules or law so require.

Subdivision (c) (4) permits a lawyer admitted in another jurisdiction to provide certain legal services on a temporary basis in this jurisdiction if they arise out of or are substantially related to the lawyer's practice in a jurisdiction in which the lawyer is admitted but are not within subdivisions (c) (2) or (c) (3). These services include both legal services and services that nonlawyers may perform but that are considered the practice of law when performed by lawyers.

Subdivision (c) (3) requires that the services be with respect to a matter that is substantially related to, or arises out of, a jurisdiction in which the lawyer is admitted. A variety of factors may evidence such a relationship. However, the matter, although involving other jurisdictions, must have a significant connection with the jurisdiction in which the lawyer is admitted to practice. A significant aspect of the lawyer's work might be conducted in that jurisdiction or a significant aspect of the matter may involve the law of that jurisdiction. The necessary relationship might arise when the client's activities and the resulting legal issues involve multiple jurisdictions. Subdivision (c) (4) requires that the services provided in this jurisdiction in which the lawyer is not admitted to practice be for (1) an existing client, i.e., one with whom the lawyer has a previous relationship and not arising solely out of a Connecticut-based matter and (2) arise out of or be substantially related to the legal services provided to that client in a jurisdiction in which the lawyer is admitted to practice. Without both, the lawyer is prohibited from practicing law in the jurisdiction in which the lawyer is not admitted to practice.

Subdivision (d) (2) recognizes that a lawyer may provide legal services in a jurisdiction in which the lawyer is not licensed when authorized to do so by federal or other law, which includes statute, court rule, executive regulation or judicial precedent.

A lawyer who practices law in this jurisdiction pursuant to subsections (c) or (d) or otherwise is subject to the disciplinary authority of this jurisdiction. See Rule 8.5 (a).

In some circumstances, a lawyer who practices law in this jurisdiction pursuant to subsections (c) or (d) may have to inform the client that the lawyer is not licensed to practice law in this jurisdiction.

Subsections (c) and (d) do not authorize communications advertising legal services to prospective clients in this jurisdiction by lawyers who are admitted to practice in other jurisdictions.

Rule 5.6. Restrictions on Right to Practice

A lawyer shall not participate in offering or making:

(1) A partnership, shareholders, operating, employment, or other similar type of agreement that restricts the right of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement; or

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(2) An agreement in which a restriction on the lawyer's right to practice is part of the settlement of a client controversy.

(P.B. 1978-1997, Rule 5.6.) (Amended June 26, 2006, to take effect Jan. 1, 2007.)

COMMENTARY: An agreement restricting the right of lawyers to practice after leaving a firm not only limits their professional autonomy but also limits the freedom of clients to choose a lawyer. Subdivision (1) prohibits such agreements except for restrictions incident to provisions concerning retirement benefits for service with the firm.

Subdivision (2) prohibits a lawyer from agreeing not to represent other persons in connection with settling a claim on behalf of a client.

This Rule does not apply to prohibit restrictions that may be included in the terms of the sale of a law practice pursuant to Rule 1.17.

PUBLIC SERVICE

Rule 6.1. Pro Bono Publico Service

A lawyer should render public interest legal service. A lawyer may discharge this responsibility by providing professional services at no fee or a reduced fee to persons of limited means or to public service or charitable groups or organizations, by service in activities for improving the law, the legal system or the legal profession, and by financial support for organizations that provide legal services to persons of limited means.

(P.B. 1978-1997, Rule 6.1.)

COMMENTARY: The ABA House of Delegates has formally acknowledged "the basic responsibility of each lawyer engaged in the practice of law to provide public interest legal services" without fee, or at a substantially reduced fee in one or more of the following areas: poverty law, civil rights law, public rights law, charitable organization representation and the administration of justice. This Rule expresses that policy but is not intended to be enforced through disciplinary process.

The rights and responsibilities of individuals and organizations in the United States are increasingly defined in legal terms. As a consequence, legal assistance in coping with the web of statutes, rules and regulations is imperative for persons of modest and limited means, as well as for the relatively well-to-do.

The basic responsibility for providing legal services for those unable to pay ultimately rests upon the individual lawyer, and personal involvement in the problems of the disadvantaged can be one of the most rewarding experiences in the life of a lawyer. Every lawyer, regardless of professional prominence or professional workload, should find time to participate in or otherwise support the provision of legal services to the disadvantaged. The provision of free legal services to those unable to pay reasonable fees continues to be an obligation of each lawyer as well as the profession generally, but the efforts of individual lawyers are often not enough to meet the need. Thus, it has been necessary for the profession and government to institute additional programs to provide legal services. Accordingly, legal aid offices, lawyer referral services and other related programs have been developed, and others will be developed by the profession and government. Every lawyer should support all proper efforts to meet this need for legal services. Law firms should act reasonably to enable and encourage all lawyers in the firm to provide the pro bono legal services recommended by this Rule.

Rule 6.2. Accepting Appointments

A lawyer shall not seek to avoid appointment by a tribunal to represent a person except for good cause, such as:

(1) Representing the client is likely to result in violation of the Rules of Professional Conduct or other law;

(2) Representing the client is likely to result in an unreasonable financial burden on the lawyer; or

(3) The client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client.

(P.B. 1978-1997, Rule 6.2.)

COMMENTARY: A lawyer ordinarily is not obliged to accept a client whose character or cause the lawyer regards as repugnant. The lawyer's freedom to select clients is, however, qualified. All lawyers have a responsibility to assist in providing pro bono publico service. See Rule 6.1. An individual lawyer fulfills this responsibility by accepting a fair share of unpopular matters or indigent or unpopular clients. A lawyer may also be subject to appointment by a court to serve unpopular clients or persons unable to afford legal services.

Appointed Counsel. For good cause a lawyer may seek to decline an appointment to represent a person who cannot afford to retain counsel or whose cause is unpopular. Good cause exists if the lawyer could not handle the matter competently, see Rule 1.1, or if undertaking the representation would result in an improper conflict of interest, for example, when the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client. A lawyer may also seek to decline an appointment if acceptance would be unreasonably burdensome, for example, when it would impose a financial sacrifice so great as to be unjust.

An appointed lawyer has the same obligations to the client as retained counsel, including the obligations of loyalty and confidentiality, and is subject to the same limitations on the client-lawyer relationship, such as the obligation to refrain from assisting the client in violation of the Rules.

Rule 6.3. Membership in Legal Services Organization

A lawyer may serve as a director, officer or member of a legal services organization, apart from the law firm in which the lawyer practices, notwithstanding that the organization serves persons having interests adverse to a client of the lawyer. The lawyer shall not knowingly participate in a decision or action of the organization:

(1) If participating in the decision or action would be incompatible with the lawyer's obligations to a client under Rule 1.7; or

(2) Where the decision or action could have a material adverse effect on the representation of a client of the organization whose interests are adverse to a client of the lawyer.

(P.B. 1978-1997, Rule 6.3.)

COMMENTARY: Lawyers should be encouraged to support and participate in legal service organizations. A lawyer who is an officer or a member of such an organization does not thereby have a client-lawyer relationship with persons served

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Investment Management
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7. New York Non-Compete Rule and New Jersey Opinion

RULE 5.6:
RESTRICTIONS ON RIGHT TO PRACTICE

(a) A lawyer shall not participate in offering or making:

(1) a partnership, shareholder, operating, employment, or other similar type of agreement that restricts the right of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement; or

(2) an agreement in which a restriction on a lawyer's right to practice is part of the settlement of a client controversy.

(b) This Rule does not prohibit restrictions that may be included in the terms of the sale of a law practice pursuant to Rule 1.17.

Comment

[1] An agreement restricting the right of lawyers to practice after leaving a firm not only limits their professional autonomy but also limits the freedom of clients to choose a lawyer. Paragraph (a) prohibits such agreements except for restrictions incident to provisions concerning retirement benefits for service with the firm.

[2] Paragraph (a)(2) prohibits a lawyer from agreeing not to represent other persons in connection with settling a claim on behalf of a client.

[3] This Rule does not apply to prohibit restrictions that may be included in the terms of the sale of a law practice pursuant to Rule 1.17.

____N.J.L.J.____

____ N.J.L. ____

Advisory Committee on Professional Ethics

Appointed by the Supreme Court of New Jersey

OPINION 708

Advisory Committee on Professional Ethics

Restrictive Covenants For In-House Counsel

The inquirer asks whether an employer's request that its in-house counsel execute restrictive covenants as a term and condition of employment violates the *Rules of Professional Conduct*.[1] Specifically, the following provisions from a proposed agreement have been identified by the inquirer as potentially violative of the *Rules*:

> 3. During and after my employment, I will keep secret and confidential, and will not disclose, transfer to others or use, directly or indirectly, any and all [Employer] Trade Secrets, Proprietary and Confidential Information as defined below, and I will handle [Employer] documents, computing and communications equipment in accordance with company policies and surrender all such materials to [Employer] upon request. …
>
> 4. I will disclose in writing to my supervisor and [Employer]'s Intellectual Property Department all inventions, discoveries, improvements, machines, devices, designs, processes, products, software, treatments, formulae, know-how, and/or compounds ("Inventions") conceived or made by me, whether alone or jointly with others, during my employment with [Employer]. All my right, title and interest in such Inventions, whether patentable or not, shall be the sole property of [Employer] and I hereby assign and agree to assign the same to [Employer]. …

---

[1] Because the inquirer is employed as an attorney, we do not address the applicability of the *Rules of Professional Conduct* upon a restrictive covenant agreement offered to a business person who happens to hold a law degree.

> 8. I agree that, during my employment and for a period of one (1) year immediately after termination of my employment:
>
> (a) I will not become employed by, provide services to or assist, whether as a consultant, employee, officer, director, proprietor, partner or other capacity, any person, firm business or corporation which (i) is a Competitor of [Employer] (as defined in paragraph 9 below) or (ii) is seeking to become a Competitor of [Employer]; provided however, that the provisions of this subparagraph (a) shall not apply if my employment is terminated by [Employer] without cause; and
>
> (b) I will not, alone or in concert with others, employ or attempt to employ, induce or solicit other employees of [Employer] to work for me, any other person, firm, business or corporation which (i) is a Competitor of [Employer] or (ii) is seeking to become a Competitor of [Employer]. …
>
> 9. As used in this Agreement, "Competitor of [Employer]" means any person, firm, corporation or business which, directly or indirectly, develops, manufactures, sells or distributes products and/or services, that are the same, or substantially similar to, or compete in the marketplace with, the products and/or services developed, manufactured, sold or distributed by the business unit(s) in which I worked, or as to which I had access to Trade Secrets, Proprietary and Confidential Information, during the last two (2) years of my employment with [Employer].

We begin by recognizing that long ago in *Solari Indus., Inc. v. Malady*, 55 *N.J.* 571, 585 (1970), New Jersey abandoned its prior view that such agreements are void *per se* and endorsed "the total or partial enforcement of noncompetitive agreements to the extent reasonable under the circumstances." Accord *Maw v. Advanced Clinical Communications, Inc.*, 179 *N.J.* 439, 447 (2004).

Notwithstanding the viability of restrictive covenants in commercial contexts, our Supreme Court also has made clear that direct and indirect restrictions of this nature on the practice of law violate both the language and the spirit of *RPC* 5.6. In *Jacob v. Norris, McLaughlin & Marcus*, 128 *N.J.* 10 (1992), our Supreme Court held:

> The *Rules of Professional Conduct* govern the practice of law based on ethical standards, not commercial desires. The commercial concerns of the firm and of the departing lawyer are secondary to the need to preserve client choice. The more lenient test used to determine the enforceability of a restrictive covenant in a commercial setting is not appropriate in the legal context.

Id. at 27 (citations omitted). Adopting a rationale first articulated in *Dwyer v. Jung*, 133 *N.J. Super.* 343, 347 (Ch. Div.), *aff'd* 137 *N.J. Super.* 135 (App. Div. 1975), the Supreme Court discussed at length the policy considerations underlying its holding and concluded:

> The history behind [*RPC* 5.6] and its precursors reveals that the *RPC*'s underlying purpose is to ensure the freedom of clients to select counsel of their choice, despite its wording in terms of the lawyer's right to practice. The *RPC* is thus designed to serve the public interest in maximum access to lawyers and to preclude commercial arrangements that interfere with that goal.

Id. at 18 (citing Geoffrey C. Hazard, Jr. & W. William Hodes, *The Law of Lawyering: A Handbook on the Model Rules of Professional Conduct*, p. 486 (1985)). Thus, the New Jersey Supreme Court declared in *Jacob*: "The case law is clear that *RPC* 5.6 and its precursor, *DR* 2-108(A), forbid outright prohibitions on the practice of law." *Id.* at 19.

New Jersey has adopted ABA Model Rules 1.9 and 5.6. Specifically, New Jersey *Rule of Professional Conduct* 5.6 closely tracks the ABA model rule:

> A lawyer shall not participate in offering or making:
>
> (a) a partnership or employment agreement that restricts the rights of a lawyer to practice after the termination of the relationship, except an agreement concerning benefits upon retirement; or
>
> (b) an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a controversy between private parties.

RPC 5.6 (1984).

For its part, the ABA has consistently taken the position that the predecessors to these ethical rules generally prohibited the use of restrictive covenants between lawyers. ABA, Comm. on Prof. Ethics, Formal Op. No. 300 (Aug. 7, 1961); ABA, Comm. on Prof. Ethics, Informal Op. No. 1072 (Oct. 9, 1968). Similarly, the overwhelming majority of state bar associations and courts have decided that it is unethical for a lawyer to be party to an employment or partnership agreement which restricts the right of a lawyer to practice law after the termination of the relationship, except as a condition of the payment of retirement benefits. These states rely on ABA Model Rule 5.6 or DR 2-108(A) (or state versions of those model rules) and find that such non-compete agreements are unethical because they unduly limit the freedom of clients to choose their lawyer and improperly impinge upon the lawyer's professional autonomy.

In 1969, this Committee relied on the ABA's preliminary draft of DR 2-108(A), the predecessor to New Jersey's *RPC* 5.6, to hold a restrictive covenant in a law firm partnership agreement to be unenforceable. ACPE Opinion No. 147, 92 *N.J.L.J.* 177 (March 20, 1969). We concluded that the restrictive covenant at issue was "improper, unworthy of the legal profession, and unethical."

Turning to the precise issue posed by this inquiry, *i.e.*, the ethical impact upon "in-house" or corporate counsel who are asked to sign restrictive covenants purportedly designed to protect the employer's confidential business information and trade secrets, the ABA has rejected the use of such covenants for corporate counsel. ABA, Comm. Prof. Ethics, Informal Op. No. 1301 (Mar. 25, 1975). This opinion and its rationale were affirmed by the ABA in 1994. ABA, Comm. on Ethics and Prof. Responsibility, Formal Op. 94-381 (May 9, 1994).

Likewise, the several jurisdictions that have evaluated the ethical propriety of non-compete agreements for in-house counsel have all concluded that the fact that the lawyer worked in a corporate counsel position did not change or affect the analysis of the restrictive covenant.[2] Similarly, while accepting the applicability of attorney ethics to restrictive covenants for in-house counsel, ethics opinions from Connecticut and Washington have endorsed the use of "savings clauses," providing that the restrictive covenants were to be interpreted to comply with any applicable rules of professional conduct and expressly citing ABA Model Rule 5.6 or its state counterpart. Conn. Bar Ass'n, Comm. on Prof. Ethics, Information Op. No.02-05 (Feb. 26, 2002) (*available at* 2002 WL 570602); Wash. St. Bar Ass'n, Informal Op. No. 2100 (2005) (*available at* http://pro.wsba.org/io/).

Applicability of *RPC* 5.6 to Corporate Counsel. Against this backdrop, we first address the question of whether the New Jersey *Rules of Professional Conduct* apply to corporate counsel in a situation such as this. Pursuant to *Rule* 1:14, the *Rules of Professional Conduct* "shall govern the conduct of members of the bar and judges and employees of all courts of this State." Therefore, the *Rules of Professional Conduct* would apply to any lawyer who is admitted to practice in New Jersey, regardless of whether the lawyer is working for a law firm or in-house. For in-house counsel who are based in New Jersey but not admitted to practice in this State, the New Jersey Supreme Court recently enacted *Rule* 1:27-2. This rule permits an in-house lawyer to hold a "limited license," which authorizes the lawyer to perform legal work solely for his or her designated employer in New Jersey and requires the lawyer to follow our *Rules of Professional Conduct*. *R.* 1:27-2. Therefore, it is our opinion that in-house or corporate counsel in New Jersey must abide by the *Rules of Professional Conduct*, regardless of whether they are members of the bar of our State.

The Employment Agreement. With respect to the employment agreement specifically cited to us by the inquirer, it contains four distinct provisions which require our analysis. We will review each one separately, because as the Supreme Court instructed in *Jacob*, *supra*, 128 *N.J.* at 154-55, even if certain restrictive covenants which are part of an agreement involving lawyers violate our *Rules of Professional Conduct*, the remainder of the contract may remain enforceable if the offending provision does not defeat the central purpose of the agreement and can be severed.

---

[2] Va. St. Bar, Comm. Op. LEO #1650 (Feb. 7, 1995) (*available at* http://www.vacle.org/opinions/1615.TXT); Phila. Bar Ass'n, Prof. Guidance Comm., Guidance Op. No. 96-5 (May 1996) (*available at* 1996 WL 337310); Wash. D.C. Bar Ass'n Op. 291 (June 15, 1999) (*available at* http://www.dcbar.org/for_lawyers/ethics/legal_ethics/opinions); Maryland State Bar Ass'n, Committee on Ethics, Ethics Docket 91-34 (1991). *Cf.*, Ill. St. Bar Ass'n, Advisory Op. on Prof. Conduct, Op. No. 92-14 (Jan. 22, 1993) (*available at* 1993 WL 836947).

Post-Employment Restrictions. As mentioned above, the overwhelming majority of jurisdictions in the United States follow the ABA's approach and hold that restrictive covenants affecting lawyers, whether employed by corporations or private law firms, generally violate state ethical standards. Several jurisdictions have found that non-compete agreements designed to protect against the disclosure of a corporation's confidential information and trade secrets are superfluous, due to a lawyer's overriding obligation to maintain client confidentiality.

As for New Jersey, we last spoke on this issue in 1969 in Opinion 147, *supra*, 92 *N.J.L.J.* 177. Thirty-seven years later, the views expressed then retain their vitality and persuasiveness. The New Jersey Supreme Court has consistently taken the same position. Although our Supreme Court in *Maw* recently recognized the increasing importance of restrictive covenants in the commercial world, the Court subsequently reaffirmed the importance of the *Jacob* ban on restrictive covenants for the legal profession. *Community Hosp. Group, Inc. v. Moore*, 183 *N.J.* 36 (2005).

The fact that the restrictive covenant agreement in question arises in the corporate context, rather than within a law firm, is of no moment. The *Court Rules* make clear that in-house counsel in New Jersey, whether licensed by this State or not, are bound to follow our *Rules of Professional Conduct*, including *RPC* 5.6. And the result we reach is consistent with every other state and local committee that has looked at the applicability of this rule to in-house lawyers. Va. St. Bar Conn. Op. LEO#1650, *supra*; Ill. St. Bar Ass'n, Advisory Op. on Prof. Conduct, Op. No. 92-14, *supra*; Conn. Bar Ass'n Comm. on Prof. Ethics, Information Op. No. 02-05, *supra*; Wash. St. Bar Ass'n, Informal Op. No. 2100, *supra*; Phila. Bar Ass'n, Prof. Guidance Com., Guidance Op. No. 96-5, *supra*; Wash. D.C. Bar Ass'n, Op. 291, *supra*.

Thus, we are of the opinion that Section 8(a) of the employment agreement cited by the inquirer violates *RPC* 5.6.

Trade Secrets and Proprietary and Confidential Information. We assume, for purposes of discussion, that the trade secrets and confidential information which the agreement in question seeks to protect would be worthy of protection under New Jersey law.

Although general rules concerning confidential information, *RPC* 1.6, or attorney-client privilege, *N.J.S.A.* 2A:84A-20(d), are easy to state, they are often difficult to apply to in-house counsel, because legal advice given in the corporate setting "is often intimately intertwined with and difficult to distinguish from business advice." *Leonen v. Johns-Manville*, 135 *F.R.D.* 94, 98 (D.N.J. 1990). Information relating to legal representation of a client, including a corporate client, is confidential pursuant to *RPC* 1.6. Similarly, because in-house lawyers are entitled to the same attorney-client privilege protections as their outside colleagues, *Tucker v. Fischbein*, 237 *F.*3d 275, 288 (3d Cir. 2001), communications made by and to in-house lawyers in connection with representatives of a corporation seeking and obtaining legal advice may be protected by attorney-client privilege, just as communications with outside counsel. *See Upjohn Co. v. United States*, 449 *U.S.* 383, 389-97 (1981). Thus, in the corporate context, client information relating to legal representation, and attorney-client communications, remain protected and confidential.

However, *RPC* 1.6 provides that an attorney's duty to retain confidentiality extends only to information "relating to [legal] representation of a client." Further, communications made by and to the in-house lawyer regarding business matters, management decisions or business advice are not protected by the attorney-client privilege. *E.g., Boca Investing Partnership v. United States*, 31 *F. Supp.*2d 9, 11 (D.D.C. 1998) (citing *United States v. Wilson*, 798 *F.*2d 509, 513 (1st Cir. 1986)); *United States Postal Svcs. v. Phelps Dodge Refining Corp.*, 852 *F. Supp.* 156, 160 (E.D.N.Y. 1994) ("the attorney-client privilege attaches only to legal, as opposed to business services"); *Barr Marine Products Co., Inc. v. Borg Warner Corp.*, 84 *F.R.D.* 631, 633 (E.D.Pa. 1979) ("The communication must be made by the client to the attorney acting as an attorney and not, *e.g.*, as a business advisor.") For example, our Supreme Court has held that the attorney-client privilege does not extend to lawyers performing non-legal functions, such as conducting workplace investigations. *Payton v. New Jersey Turnpike Auth.*, 148 *N.J.* 524, 550-53 (1997).

Not all duties of an in-house lawyer may involve the practice of law. It is conceivable that an in-house lawyer could obtain confidential information and/or trade secrets which would not be protected by *RPC* 1.6 or the attorney-client privilege. Therefore, it may be reasonable for a corporation to request its lawyers to sign a non-disclosure or confidentiality agreement, provided that it does not restrict in any way the lawyer's ability to practice law or seek to expand the confidential nature of information obtained by the in-house lawyer in the course of performing legal functions beyond the scope of the *RPC*s.[3] Because the terms of the agreement presented by the inquirer make no reference either to the latter's functions and duties as a lawyer or to the *RPC*s, the requirements of Section 3 of the agreement in question are impermissible.

Assignment of Inventions. In reviewing Section 4 of the agreement cited by the inquirer, which purports to assign all "Inventions" as defined therein to the sole ownership of the employer, it appears to the Committee that none of the aspects of this provision relate to legal advice or the practice of law. As such, there do not appear to be any ethical considerations implicated by this provision.

Non-Solicitation of Corporate Employees. Finally, Section 8(b) of the agreement prohibits the inquirer from attempting "to employ, induce or solicit other employees of [Employer] to work for me, any other person, firm, business or corporation" which is a competitor of the inquirer's employer. This issue was directly addressed by our Supreme Court in *Jacob*, which held that an anti-raiding provision such as this one violates our *Rules of Professional Conduct* both with respect to the hiring of other attorneys and also paraprofessionals. Because "[t]he practice of law also involves seeking the best services for one's clients," the Supreme Court concluded that such provisions violate *RPC* 5.6 by interfering directly with the practice of law as well as with a lawyer's ability to best serve his or her clients. *Id.* at 152-54. Our Supreme Court specifically cited to similar results reached in other ethics opinions. ABA Informal Op. 1417 (1978); District of Columbia Bar

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[3] Because the agreement in question contains no such language, we take no position at this time regarding the viability of a "savings clause" as part of restrictive covenants in employment agreements involving lawyers. *See* Conn. Bar Ass'n, Com. on Prof. Ethics, Informal Op. No. 02-05, *supra*; Wash. St. Bar Ass'n, Informal Op. No. 2100 (2005), *supra*.

Ass'n Op. 181 (1987) (*reprinted in* Nat'l Rep. on Legal Ethics n.10 (1988)). Accordingly, it is our opinion that Section 8(b) of the agreement in question violates *RPC* 5.6.

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8. *Akzo Nobel Chemicals Ltd. and Akcros Chemicals Ltd. v. European Commission, Court of Justice of the European Union*

СЪД НА ЕВРОПЕЙСКИЯ СЪЮЗ
TRIBUNAL DE JUSTICIA DE LA UNIÓN EUROPEA
SOUDNÍ DVŮR EVROPSKÉ UNIE
DEN EUROPÆISKE UNIONS DOMSTOL
GERICHTSHOF DER EUROPÄISCHEN UNION
EUROOPA LIIDU KOHUS
ΔΙΚΑΣΤΗΡΙΟ ΤΗΣ ΕΥΡΩΠΑΪΚΗΣ ΕΝΩΣΗΣ
COURT OF JUSTICE OF THE EUROPEAN UNION
COUR DE JUSTICE DE L'UNION EUROPÉENNE
CÚIRT BHREITHIÚNAIS AN AONTAIS EORPAIGH
CORTE DI GIUSTIZIA DELL'UNIONE EUROPEA
EIROPAS SAVIENĪBAS TIESA

CVRIA
LUXEMBOURG

EUROPOS SĄJUNGOS TEISINGUMO TEISMAS
AZ EURÓPAI UNIÓ BÍRÓSÁGA
IL-QORTI TAL-ĠUSTIZZJA TAL-UNJONI EWROPEA
HOF VAN JUSTITIE VAN DE EUROPESE UNIE
TRYBUNAŁ SPRAWIEDLIWOŚCI UNII EUROPEJSKIEJ
TRIBUNAL DE JUSTIÇA DA UNIÃO EUROPEIA
CURTEA DE JUSTIŢIE A UNIUNII EUROPENE
SÚDNY DVOR EURÓPSKEJ ÚNIE
SODIŠČE EVROPSKE UNIJE
EUROOPAN UNIONIN TUOMIOISTUIN
EUROPEISKA UNIONENS DOMSTOL

JUDGMENT OF THE COURT (Grand Chamber)

14 September 2010 *

(Appeal – Competition – Measures of inquiry – Commission's powers of investigation – Legal professional privilege – Employment relationship between a lawyer and an undertaking – Exchanges of e-mails)

In Case C-550/07 P,

APPEAL under Article 56 of the Statute of the Court of Justice, brought on 30 November 2007,

Akzo Nobel Chemicals Ltd, established in Hersham (United Kingdom),

Akcros Chemicals Ltd, established in Hersham,

represented by M. Mollica, avocate, and subsequently by M. van der Woude, avocat and C. Swaak, advocaat,

appellants,

supported by

United Kingdom of Great Britain and Northern Ireland, represented by V. Jackson and E. Jenkinson, acting as Agents, and M. Hoskins, Barrister,

Ireland, represented by D. O'Hagan, acting as Agent, and D. O'Donnell SC, and R. Casey BL, with an address for service in Luxembourg,

Kingdom of the Netherlands, represented by C. Wissels, Y. de Vries and M. de Grave, acting as Agents,

interveners in the appeal,

the other parties to the proceedings being:

* Language of the case: English.

European Commission, represented by F. Castillo de la Torre and X. Lewis, acting as Agents, with an address for service in Luxembourg,

defendant at first instance,

Conseil des barreaux européens, established in Brussels (Belgium), represented by J. Flynn QC,

Algemene Raad van de Nederlandse Orde van Advocaten, established in The Hague (Netherlands), represented by O. Brouwer and C. Schillemans, advocaten,

European Company Lawyers Association, established in Brussels, represented by M. Dolmans and K. Nordlander, avocats, instructed by J. Temple Lang, solicitor,

American Corporate Counsel Association (ACCA) – European Chapter, established in Paris (France), represented by G. Berrisch, Rechtsanwalt, instructed by D. Hull, solicitor,

International Bar Association, established in London (United Kingdom), represented by J. Buhart and I. Michou, avocats,

interveners at first instance,

THE COURT (Grand Chamber)

composed of V. Skouris, President, A. Tizzano, J.N. Cunha Rodrigues, K. Lenaerts, J.-C. Bonichot, R. Silva de Lapuerta (Rapporteur) and E. Levits, Presidents of Chamber, A. Rosas, U. Lõhmus, M. Safjan and D. Šváby, Judges,

Advocate General: J. Kokott,

Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 9 February 2010,

after hearing the Opinion of the Advocate General at the sitting on 29 April 2010,

gives the following

Judgment

1 By their appeal, Akzo Nobel Chemicals Ltd (‘Akzo’) and Akcros Chemicals Ltd (‘Akcros’) seek to have set aside the judgment of the Court of First Instance of the European Communities (now ‘the General Court’) of 17 September 2007 in

Joined Cases T-125/03 and T-253/03 *Akzo Nobel Chemicals and Akcros Chemicals* v *Commission* ('the judgment under appeal'), in so far as it rejected the claim of legal professional privilege for correspondence with Akzo's in-house lawyer.

I – European Union law

2 Article 14 of Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles [81] and [82] of the Treaty (OJ, English Special Edition 1959-1962, p. 87) provides:

'1. In carrying out the duties assigned to it by Article [105 TFEU] and by provisions adopted under Article [103 TFEU], the Commission may undertake all necessary investigations into undertakings and associations of undertakings.

To this end the officials authorised by the Commission are empowered:

(a) to examine the books and other business records;

(b) to take copies of or extracts from the books and business records;

(c) to ask for oral explanations on the spot;

(d) to enter any premises; land and means of transport of undertakings.

2. The officials of the Commission authorised for the purpose of these investigations shall exercise their powers upon production of an authorisation in writing …

3. Undertakings and associations of undertakings shall submit to investigations ordered by decision of the Commission. The decision shall specify the subject matter and purpose of the investigation, appoint the date on which it is to begin and indicate the penalties … and the right to have the decision reviewed by the Court of Justice.

…'

II – Facts

3 In the judgment under appeal the General Court summarised the material facts as follows:

'1. On 10 February 2003 the Commission adopted decision C(2003) 559/4, amending its decision C(2003) 85/4 of 30 January 2003, whereby the Commission ordered, inter alia, Akzo … and Akcros … and their respective subsidiaries to submit to an investigation on the basis of Article 14(3) of

Regulation No 17… aimed at seeking evidence of possible anti-competitive practices (together "the decision ordering the investigation").

2. On 12 and 13 February 2003, Commission officials, assisted by representatives of the Office of Fair Trading ('OFT', the British competition authority), carried out an investigation on the basis of the decision ordering the investigation at the applicants' premises in Eccles, Manchester (United Kingdom). During the investigation the Commission officials took copies of a considerable number of documents.

3. In the course of those operations the applicants' representatives informed the Commission officials that certain documents were likely to be covered by the protection of confidentiality of communications between lawyers and their clients ("legal professional privilege" or "LPP").

4. The Commission officials then informed the applicants' representatives that it was necessary for them to examine briefly the documents in question so that they could form their own opinion as to whether the documents should be privileged. Following a long discussion, and after the Commission officials and the OFT officials had reminded the applicants' representatives of the consequences of obstructing investigations, it was decided that the leader of the investigating team would briefly examine the documents in question, with a representative of the applicants at her side.

5. During the examination of the documents in question, a dispute arose in relation to five documents which were ultimately treated in two different ways by the Commission.

…

8. The third document which gave rise to a dispute consists of a number of handwritten notes made by Akcros' … general manager, which are said by the applicants to have been written during discussions with employees and used for the purpose of preparing the typewritten memorandum of Set A. Finally, the last two documents in issue are two e-mails, exchanged between Akcros' … general manager and Mr S., Akzo's … coordinator for competition law. The latter is enrolled as an Advocaat of the Netherlands Bar and, at the material time, was a member of Akzo's … legal department and was therefore employed by that undertaking on a permanent basis.

9. After examining the last three documents and obtaining the applicants' observations, the head of the investigating team took the view that they were definitely not privileged. Consequently, she took copies of them and placed the copies with the rest of the file, without isolating them in a sealed envelope. The applicants identified the three documents as "Set B".

10. On 17 February 2003 the applicants sent the Commission a letter setting out the reasons why, in their view, the documents … in Set B were protected by LPP.

11. By letter of 1 April 2003, the Commission informed the applicants that the arguments set forth in their letter of 17 February 2003 were insufficient to show that the documents in question were covered by LPP. However, the Commission pointed out that the applicants could submit observations on those provisional conclusions within two weeks, after which the Commission would adopt a final decision.

…

14. On 8 May 2003 the Commission adopted decision C(2003) 1533 final concerning a claim of legal privilege in the context of an investigation pursuant to Article 14(3) of Regulation No 17 ("the rejection decision of 8 May 2003"). In Article 1 of that decision the Commission rejects the applicants' request for the return of the documents in … Set B and for confirmation by the Commission that all copies of those documents in its possession had been destroyed. …

…

18. On 8 September 2003 … at the request of the President of the Court of First Instance, the Commission sent the President, under confidential cover, a copy of the Set B documents ...'

III – Procedure before the General Court and the judgment under appeal

4 The actions brought by the appellants before the General Court on 11 April and 4 July 2003 respectively, sought (i) the annulment of Commission Decision C(2003) 559/4 of 10 February 2003, and so far as necessary, of Commission decision C(2003) 85/4 of 30 January 2003 ordering Akzo, Akcros and their respective subsidiaries to submit to an investigation on the basis of Article 14(3) of Regulation No 17 (Case COMP/E-1/38.589) and (ii) an order requiring the Commission to return certain documents seized in the course of the investigation in question and not to use their contents (Case T-125/03) and the annulment of the rejection decision of 8 May 2003 (Case T-253/03).

5 By the judgment under appeal, the General Court dismissed the action for annulment of the decision ordering the investigation (Case T-125/03) as inadmissible and the action for annulment of the rejection decision of 8 May 2003 (Case T-253/03) as unfounded.

IV – Forms of order sought

6 Akzo/Akcros claim that the Court should:

– set aside that the judgment under appeal, in so far as the General Court rejected the claim of legal professional privilege for communications with Akzo's in-house lawyer;

– annul the rejection decision of 8 May 2003, in so far as it refused to return the e-mail correspondence with Akzo's in-house lawyer (part of Set B documents); and

– order the Commission to pay the costs of the appeal and of the proceedings before the General Court in as far as they concern the plea raised in the present appeal.

7 The Conseil des barreaux européen, intervener at first instance, claims that the Court should:

– set aside the judgment in so far as the General Court denies that the communications between Akzo and Mr S. benefit from legal professional privilege, and either annul the rejection decision of 8 May 2003 to the same extent or alternatively, if the Court should take the view that the matter is not in a state for it to rule upon the application, remit the matter to the General Court; and

– order the Commission to pay the costs incurred by it in the appeal proceedings and the proceedings before the General Court, in so far as they relate to the issues taken on appeal.

8 The Algemene Raad van de Nederlandse Orde van Advocaten, intervener at first instance, claims that the Court should:

– set aside the judgment under appeal in so far as it rejected the claim by Akzo that two e-mails exchanged between Ackros' general manager and Akzo's in-house lawyer were not covered by the Community concept of legal professional privilege in view of the employment relationship between that in-house lawyer and Akzo; and

– order the Commission to pay its costs in the proceedings before the General Court and in this appeal.

9 The European Company Lawyers Association, intervener at first instance, claims that the Court should:

– set aside the judgment under appeal in so far as the General Court held that the communications between Akcros and the member of the legal department of Akzo were not subject to legal professional privilege; and

– order the Commission to pay its costs.

10 The Association of Corporate Council Association (ACCA) – European Chapter, intervener at first instance, claims that the Court should:

– set aside the judgment under appeal in so far as the General Court rejected the claim of legal professional privilege for e-mail correspondence with Akzo's in-house lawyer (part of the Set B documents);

– annul the Commission's decision of 8 May 2003 refusing to return to the appellants copies of that e-mail correspondence or, alternatively, refer the matter back to the General Court; and

– order the Commission to pay the costs in connection with these proceedings and the proceedings before the General Court in so far as they relate to the issue under appeal.

11 The International Bar Association, intervener at first instance, claims that the Court should:

– set aside the judgment under appeal to the extent that it denies that the Set B e-mails exchanged between Akzo Nobel and Mr S. benefit from legal professional privilege; and

– order the Commission to pay the International Bar Association's costs of the appeal proceedings and of the proceedings before the General Court to the extent that the costs relate to issues considered in the appeal.

12 The United Kingdom of Great Britain and Northern Ireland and the Kingdom of the Netherlands, interveners on appeal, endorse the form of order sought by Akzo and Akcros.

13 The Commission contends that the Court should:

– dismiss the appeal; and

– order the appellants to pay the costs.

V – The appeal

A – *Subject-matter of the appeal*

14 The appeal concerns exclusively one part of the Series B documents, namely two e-mails exchanged between the Director General of Akcros and Mr S. When the investigations were carried out at the appellants' premises in the United Kingdom, Mr S., a member of the Netherlands Bar, was employed in the legal department of Akzo, a company incorporated under English law. The Commission added copies of those e-mails to the file.

15 The Commission has stated, without being contradicted on that point by the appellants, that its decision of 11 November 2009 to impose fines in the context of the procedure which had given rise to the investigations carried out in 2003 at the premises of Akzo and Akcros (Case COMP/38.589 – Heat stabilisers; SEC(2009) 1559 and SEC(2009) 1560) was not based on those two e-mails. The Commission's statement that no exchange of information with the national competition authorities has taken place with respect to those e-mails has also not been contradicted.

B – *Appellants' interest in bringing proceedings*

1. Arguments of the parties

16 First of all, the Commission questions whether Akzo and Akcros have an interest in bringing proceedings. The two e-mails do not fulfil the first condition for legal professional privilege set out in paragraphs 21 and 23 of the judgment in Case 155/79 *AM & S Europe* v *Commission* [1982] ECR 1575, according to which legal advice must be requested and given for the purposes of the client's rights of defence. The first e-mail is merely a request for comments on a draft letter to be sent to a third party. The second e-mail contains mere changes to the wording.

17 Therefore, the Commission takes the view that the two e-mails cannot in any event be covered by legal professional privilege.

18 Next, the Commission states that the appellants do not claim that the documents at issue fulfil the first condition for legal professional privilege laid down in paragraphs 21 and 23 of *AM & S Europe* v *Commission*.

19 Finally, the Commission adds that Akzo's and Akcros' interest in bringing proceedings ceased at the latest on the date of its decision of 11 November 2009 imposing fines on them.

20 Akzo and Akcros reply that the content of the two e-mails was never examined by the General Court. It upheld the rejection decision of 8 May 2003 on the basis that the documents at issue could not be privileged because they were not communications with an external lawyer. Moreover, that decision excluded legal

professional privilege not because of the content of the documents at issue, but solely because of the status of the lawyer concerned.

21 Akzo and Akcros submit that the question whether the two e-mails fulfil the first condition required for legal professional privilege is a question of fact which has not yet been decided. That issue cannot be resolved in the present proceedings, which are limited to questions of law.

2. Findings of the Court

22 In answer to the objection raised by the Commission, it must be recalled that the interest in bringing proceedings is a condition of admissibility which must continue up to the Court's decision in the case (see, Joined Cases C-373/06 P, C-379/06 P and C-382/06 P *Flaherty and Others* v *Commission* [2008] ECR I-2649, paragraph 25 and the case-law cited).

23 The Court also stated that such an interest exists as long as the appeal may, if successful, procure an advantage to the party bringing it (see, Case C-277/01 P *Parliament* v *Samper* [2003] ECR I-3019, paragraph 28, and Case C-362/05 P *Wunenburger* v *Commission* [2007] ECR I-4333, paragraph 42, and order of 8 April 2008 in Case C-503/07 *Saint-Gobain Glass Deutschland* v *Commission* [2008] ECR I-2217, paragraph 48 and the case-law cited).

24 As regards the present appeal, the Commission's assertion that the two e-mails exchanged between the Director General of Akcros and Mr S. clearly could not be covered by legal professional privilege, is not capable of affecting the appellants' interest in bringing proceedings. Such an argument, which seeks to show that the General Court rightly held that the two e-mails at issue are not covered by legal professional privilege is not a matter of admissibility, but pertains to the substance of the appeal.

25 As to the Commission's argument that the adoption of the decision of 11 November 2009 eliminated the appellants' interest in pursuing the present proceedings, it must be recalled that, by the rejection decision of 8 May 2003, which is the subject-matter of the judgment under appeal, the Commission refused to accede to the appellants' request, inter alia, to return to them the two e-mails exchanged between the Director General of Akcros and Mr S. and to confirm that all the copies of those documents in its possession had been destroyed. Any breach of legal professional privilege in the course of investigations does not take place when the Commission relies on a privileged document in a decision on the merits, but when such a document is seized by one of its officials. In those circumstances, the appellants' interest in bringing proceedings continues for at least as long as the Commission has the documents referred to in the rejection decision of 8 May 2003 or copies thereof.

26 In those circumstances, Akzo and Akcros have an interest in bringing this appeal.

C – *Substance*

27 Akzo and Akcros put forward three grounds of appeal, the first as the principal ground of appeal and the second and third as alternative grounds.

28 All the grounds of appeal are directed against paragraphs 165 to 180 of the judgment under appeal. The appellants submit in essence that the General Court wrongly refused to apply legal professional privilege to the two e-mails exchanged with Mr S.

29 The European Company Lawyers Association, intervener at first instance, and Ireland, intervener before the Court, have argued that by the judgment under appeal the General Court infringed the right to property and professional freedom. It must be observed that Akzo and Akcros did not raise those pleas at first instance. In those circumstances they must be rejected as inadmissible.

1. The first ground of appeal

30 Akzo and Akcros base the first ground of appeal on two arguments. They submit, first of all, that the General Court incorrectly interpreted the second condition for legal professional privilege, which concerns the professional status of the lawyer with whom communications are exchanged, as laid down in the *AM & S Europe* v *Commission* judgment, and, second, that by that interpretation the General Court breached the principle of equality.

31 The Commission submits that that ground of appeal is unfounded.

(a) The first argument

(i) Arguments of the parties

32 Akzo and Akcros submit that the General Court, in paragraphs 166 and 167 of the judgment under appeal, gave a 'literal and partial interpretation' in *AM & S Europe* v *Commission* of the second condition of legal professional privilege relating to the lawyer's status. The General Court should have chosen a 'teleological' interpretation of that condition and should have held that the exchanges at issue were protected by that principle.

33 Akzo and Akcros submit that paragraph 21, read in conjunction with paragraph 24, of *AM & S Europe* v *Commission*, reveals that the Court of Justice does not equate the existence of an employment relationship with a lack of independence on the part of the lawyer.

34 Akzo and Akcros, and a number of the interveners, submit that the criterion that the lawyer must be independent cannot be interpreted so as to exclude in-house lawyers. An in-house lawyer enrolled at a Bar or Law Society is, simply on account of his obligations of professional conduct and discipline, just as

independent as an external lawyer. Furthermore, the guarantees of independence enjoyed by an 'advocaat in dienstbetrekking', that is an enrolled lawyer in an employment relationship under Dutch law, are particularly significant.

35 Akzo and Akcros observe that the rules of professional ethics and discipline applicable in the present case make the employment relationship fully compatible with the concept of an independent lawyer. They argue that the contract between Mr S. and the company which employed him provided that the company was to respect the lawyer's freedom to perform his functions independently and to refrain from any act which might affect that task. The contract also authorised Mr S. to comply with all the professional obligations imposed by the Netherlands Bar.

36 Akzo and Akcros add that the employed lawyer concerned in this case is subject to a code of conduct and to the supervision of the Netherlands Bar. Furthermore, regulations lay down a certain number of additional guarantees aiming to resolve in an impartial manner any differences of opinion between the undertaking and its in-house lawyer.

37 The Commission states that the application, by the General Court, of legal professional privilege was correct. It is clear from paragraphs 24 to 26 of the judgment in *AM & S Europe* v *Commission* that the fundamental quality required of a lawyer so that communications with him are privileged is that he is not an employee of his client.

38 Accordingly, in the Commission's view, if the Court had wanted legal professional privilege to apply also to communications exchanged with lawyers who are employed by the person who asks their advice, it would not have limited the scope of the second condition, as set out in paragraph 21 of *AM & S Europe* v *Commission*.

39 The Commission submits that in *AM & S Europe* v *Commission* the Court placed lawyers in one of the following two categories: (i) employed salaried lawyers and (ii) lawyers who are not bound by a contract of employment. Only documents drafted by lawyers in the second category were regarded as being covered by legal professional privilege.

(ii) Findings of the Court

40 It must be recalled that, in *AM & S Europe* v *Commission*, the Court, taking account of the common criteria and similar circumstances existing at the time in the national laws of the Member States, held, in paragraph 21 of that judgment, that the confidentiality of written communications between lawyers and clients should be protected at Community level. However, the Court stated that that protection was subject to two cumulative conditions.

41 In that connection, the Court stated, first, that the exchange with the lawyer must be connected to 'the client's rights of defence' and, second, that the exchange

must emanate from 'independent lawyers', that is to say 'lawyers who are not bound to the client by a relationship of employment'.

42 As to the second condition, the Court observed, in paragraph 24 of the judgment in *AM & S Europe* v *Commission*, that the requirement as to the position and status as an independent lawyer, which must be fulfilled by the legal adviser from whom the written communications which may be protected emanate, is based on a conception of the lawyer's role as collaborating in the administration of justice and as being required to provide, in full independence and in the overriding interests of that cause, such legal assistance as the client needs. The counterpart to that protection lies in the rules of professional ethics and discipline which are laid down and enforced in the general interest. The Court also held, in paragraph 24, that such a conception reflects the legal traditions common to the Member States and is also to be found in the legal order of the European Union, as is demonstrated by the provisions of Article 19 of the Statute of the Court of Justice.

43 The Court repeated those findings in paragraph 27 of that judgment, according to which written communications which may be protected by legal professional privilege must be exchanged with 'an independent lawyer, that is to say one who is not bound to his client by a relationship of employment'.

44 It follows that the requirement of independence means the absence of any employment relationship between the lawyer and his client, so that legal professional privilege does not cover exchanges within a company or group with in-house lawyers.

45 As the Advocate General observed in points 60 and 61 of her Opinion, the concept of the independence of lawyers is determined not only positively, that is by reference to professional ethical obligations, but also negatively, by the absence of an employment relationship. An in-house lawyer, despite his enrolment with a Bar or Law Society and the professional ethical obligations to which he is, as a result, subject, does not enjoy the same degree of independence from his employer as a lawyer working in an external law firm does in relation to his client. Consequently, an in-house lawyer is less able to deal effectively with any conflicts between his professional obligations and the aims of his client.

46 As regards the professional ethical obligations relied on by the appellants in order to demonstrate Mr S.'s independence, it must be observed that, while the rules of professional organisation in Dutch law mentioned by Akzo and Akcros may strengthen the position of an in-house lawyer within the company, the fact remains that they are not able to ensure a degree of independence comparable to that of an external lawyer.

47 Notwithstanding the professional regime applicable in the present case in accordance with the specific provisions of Dutch law, an in-house lawyer cannot, whatever guarantees he has in the exercise of his profession, be treated in the

same way as an external lawyer, because he occupies the position of an employee which, by its very nature, does not allow him to ignore the commercial strategies pursued by his employer, and thereby affects his ability to exercise professional independence.

48 It must be added that, under the terms of his contract of employment, an in-house lawyer may be required to carry out other tasks, namely, as in the present case, the task of competition law coordinator, which may have an effect on the commercial policy of the undertaking. Such functions cannot but reinforce the close ties between the lawyer and his employer.

49 It follows, both from the in-house lawyer's economic dependence and the close ties with his employer, that he does not enjoy a level of professional independence comparable to that of an external lawyer.

50 Therefore, the General Court correctly applied the second condition for legal professional privilege laid down in the judgment in *AM & S Europe* v *Commission*.

51 Accordingly, the first argument put forward by Akzo and Ackros under the first ground of appeal cannot be accepted.

(b) The second argument

(i) Arguments of the parties

52 Akzo and Akcros submit that, in paragraph 174 of the judgment under appeal, the General Court wrongly rejected the claim that refusing to apply legal professional privilege to correspondence exchanged with an in-house lawyer violates the principle of equal treatment. The independence guaranteed by the rules of professional ethics and discipline applicable in the present case should be the benchmark for determining the scope of that principle. According to that criterion, the position of in-house lawyers enrolled with a Bar or Law Society is no different from that of external lawyers.

53 The Commission takes the view that the General Court, in paragraph 174 of the judgment under appeal, rightly held that in-house lawyers and external lawyers are clearly in very different situations, owing, in particular, to the personal, functional, structural and hierarchical integration of in-house lawyers within the companies that employ them.

(iii) Findings of the Court

54 It must be recalled that the principle of equal treatment is a general principle of European Union law, enshrined in Articles 20 and 21 of the Charter of Fundamental Rights of the European Union.

55 According to settled case-law, that principle requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified (see Case C-344/04 *IATA and ELFAA* [2006] ECR I-403, paragraph 95; Case C-303/05 *Advocaten voor de Wereld* [2007] ECR I-3633, paragraph 56; and Case C-127/07 *Arcelor Atlantique et Lorraine and Others* [2008] ECR I-9895, paragraph 23).

56 As to the essential characteristics of those two categories of lawyer, namely their respective professional status, it is clear from paragraphs 45 to 49 of this judgment that, despite the fact that he may be enrolled with a Bar or Law Society and that he is subject to a certain number of professional ethical obligations, an in-house lawyer does not enjoy a level of professional independence equal to that of external lawyers.

57 As the Advocate General stated, in point 83 of her Opinion, that difference in terms of independence is still significant, even though the national legislature, the Netherlands legislature in this case, seeks to treat in-house lawyers in the same way as external lawyers. After all, such equal treatment relates only to the formal act of admitting an in-house lawyer to a Bar or Law Society and the professional ethical obligations incumbent on him as a result of such admission. On the other hand, that legislative framework does not alter the economic dependence and personal identification of a lawyer in an employment relationship with his undertaking.

58 It follows from those considerations that in-house lawyers are in a fundamentally different position from external lawyers, so that their respective circumstances are not comparable for the purposes of the case-law set out in paragraph 55 of this judgment.

59 Therefore, the General Court rightly held that there was no breach of the principle of equal treatment.

60 Consequently, the second argument put forward as part of the first ground of appeal must also be rejected.

61 Therefore, that ground of appeal must be rejected in its entirety.

2. The second ground of appeal

62 Should the Court consider that the General Court has not erred in its interpretation of *AM & S Europe* v *Commission*, and that, by that judgment pronounced in 1982, it intended to exclude from the benefit of legal professional privilege correspondence with lawyers bound by a relationship of employment, Akzo and Akcros put forward, in the alternative, a second ground of appeal which consists of two arguments, each being divided into two parts.

63 In the first argument, the appellants, supported by a number of interveners, rely on the evolution of the national legal systems, on the one hand, and European Union law on the other. Akzo and Akcros base their second argument on the rights of defence and the principle of legal certainty.

64 In the Commission's view none of the arguments put forward support the ground of appeal.

(a) The first part of the first argument (evolution of the national legal systems)

(i) Arguments of the parties

65 Akzo and Akcros submit that, having regard to significant recent developments 'in the legal landscape' since 1982, the General Court should have 'reinterpreted' the judgment in *AM & S Europe* v *Commission*, as far as concerns the principle of legal professional privilege.

66 Akzo and Akcros take the view that, in paragraphs 170 and 171 of the judgment under appeal, the General Court wrongly refused to widen the personal scope of legal professional privilege on the ground that national laws are not unanimous and unequivocal in recognising legal professional privilege for communications with in-house lawyers. Notwithstanding the lack of a uniform tendency at national level, European Union law could set legal standards for the protection of the rights of defence which are higher than those set in certain national legal orders.

67 The Commission observes that, by their plea, the appellants are essentially asking the Court to change the case-law deriving from the judgment in *AM & S Europe* v *Commission*.

68 The Commission states that the appellants do not challenge the General Court's finding that there is no clear majority support in the laws of the Member States for the premiss that communications with in-house lawyers should be protected by legal professional privilege.

(ii) Findings of the Court

69 It must be recalled that the Court stated, in its reasoning in the judgment in *AM & S Europe* v *Commission* relating to legal professional privilege in investigation procedures in matters of competition law, that that area of European Union law must take into account the principles and concepts common to the laws of the Member States concerning the observance of confidentiality, in particular, as regards certain communications between lawyer and client (see paragraph 18 of that judgment). For that purpose, the Court compared various national laws.

70 The Court observed, in paragraphs 19 and 20 of the judgment in *AM & S Europe* v *Commission* that, although the protection of written communications between lawyer and client is generally recognised, its scope and the criteria for applying it

vary in accordance with the different national rules. However, the Court acknowledged, on the basis of that comparison, that legal professional privilege should be protected under European Union law, as long as the two conditions laid down in paragraph 21 of that judgment are fulfilled.

71 As the General Court held, in paragraph 170 of the judgment under appeal, even though it is true that specific recognition of the role of in-house lawyers and the protection of communications with such lawyers under legal professional privilege was relatively more common in 2004 than when the judgment in *AM & S Europe* v *Commission* was handed down, it was nevertheless not possible to identify tendencies which were uniform or had clear majority support in the laws of the Member States.

72 Furthermore, it is clear from paragraph 171 of the judgment under appeal that a comparative examination conducted by the General Court shows that a large number of Member States still exclude correspondence with in-house lawyers from protection under legal professional privilege. Additionally, a considerable number of Member States do not allow in-house lawyers to be admitted to a Bar or Law Society and, accordingly, do not recognise them as having the same status as lawyers established in private practice.

73 In that connection, Akzo and Akcros themselves accept that no uniform tendency can be established in the legal systems of the Member States towards the assimilation of in-house lawyers and lawyers in private practice.

74 Therefore no predominant trend towards protection under legal professional privilege of communications within a company or group with in-house lawyers may be discerned in the legal systems of the 27 Member States of the European Union.

75 In those circumstances, and contrary to the appellants' assertions, the legal regime in the Netherlands cannot be regarded as signalling a developing trend in the Member States, or as a relevant factor for determining the scope of legal professional privilege.

76 The Court therefore considers that the legal situation in the Member States of the European Union has not evolved, since the judgment in *AM & S Europe* v *Commission* was delivered, to an extent which would justify a change in the case-law and recognition for in-house lawyers of the benefit of legal professional privilege.

77 The first part of the first argument must therefore be dismissed.

(b) The second part of the first argument (development of the law of the European Union)

(i) Arguments of the parties

78 Akzo and Akcros submit that the General Court, in paragraphs 172 and 173 of the judgment under appeal, disregarded the relevance of the development of European Union law, resulting in particular from the entry into force of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ 2003 L 1, p. 1).

79 According to Akzo and Akcros, the 'modernisation' of the procedural rules on cartels has increased the need for in-house legal advice, the importance of which should not be underestimated in preventing infringements of competition law, since in-house lawyers are able to rely on intimate knowledge of the undertakings and their activities.

80 Akzo and Akcros add that the establishment of compliance programmes, which are desirable in the interest of the correct application of European Union competition law, requires that exchanges within an undertaking or group with in-house lawyers may take place in a confidential environment.

81 The Commission takes the view that the findings of the General Court in the judgment under appeal concerning the ground of appeal put forward by Akzo and Akcros are in no way vitiated by an error of law.

82 The Commission submits that the provisions of Regulation No 1/2003 have no effect on the scope of legal professional privilege.

(ii) Findings of the Court

83 Although it is true that Regulation 1/2003 has introduced a large number of amendments to the rules of procedure relating to European Union competition law, it is also the case that those rules do not suggest that they require lawyers in independent practice and in-house lawyers to be treated in the same way with respect to legal professional privilege, since that principle is not at all the subject-matter of the regulation.

84 It is clear from the provisions of Article 20 of Regulation No 1/2003 that the Commission may conduct all necessary inspections of undertakings and associations of undertakings, and in that context, examine the books and other records related to the business, irrespective of the medium on which they are stored, and also take or obtain in any form copies or extracts of such books or records.

85 That regulation, like Article 14(1)(a) and (b) of Regulation No 17, has therefore defined the powers of the Commission broadly. As it is clear from Recitals 25 and 26 in the preamble to Regulation No 1/2003, the detection of infringements of the competition rules is growing ever more difficult, and, in order to protect competition effectively and safeguard the effectiveness of inspections, the Commission should be empowered to enter any premises where business records may be kept, including private homes.

86 Thus, Regulation No 1/2003, contrary to the appellants' assertions, does not aim to require in-house and external lawyers to be treated in the same way as far as concerns legal professional privilege, but aims to reinforce the extent of the Commission's powers of inspection, in particular as regards documents which may be the subject of such measures.

87 Therefore, the amendment of the rules of procedure for competition law, resulting in particular from Regulation No 1/2003, is also unable to justify a change in the case-law established by the judgment in *AM & S Europe* v *Commission*.

88 Therefore, the second part of the first argument must also be dismissed.

89 It follows that the first argument put forward under the second plea must be rejected in its entirety.

(c) The first part of the second argument (rights of the defence)

(i) Arguments of the parties

90 Akzo and Akcros submit that the General Court's interpretation, in paragraph 176 of the judgment under appeal, concerning the scope of legal professional privilege, lowers the level of protection of the rights of defence of undertakings. Recourse to legal advice from an in-house lawyer would not be as valuable and its usefulness would be limited if the exchanges within an undertaking or group with such a lawyer were not protected by legal professional privilege.

91 The Commission takes the view that, contrary to the appellants' submissions, the rights of defence are in no way undermined by the interpretation of the scope of legal professional privilege adopted by the General Court.

(ii) Findings of the Court

92 It must be recalled that in all proceedings in which sanctions, especially fines or penalty payments, may be imposed observance of the rights of the defence is a fundamental principle of European Union law which has been emphasised on numerous occasions in the case-law of the Court (see, Case C-194/99 P *Thyssen Stahl* v *Commission* [2003] ECR I-10821, paragraph 30; Case C-289/04 P *Showa Denko* v *Commission* [2006] ECR I-5859, paragraph 68; Case C-3/06 P *Groupe Danone* v *Commission* [2007] ECR I-1331, paragraph 68), and which has been enshrined in Article 48(2) of the Charter of Fundamental Right of the European Union.

93 By this ground of appeal, the appellants seek to establish that the rights of the defence must include the right of freedom of choice as to the lawyer who will provide legal advice and representation and that legal professional privilege forms part of those rights, regardless of the professional status of the lawyer concerned.

94 In that connection, it must be observed that, when an undertaking seeks advice from its in-house lawyer, it is not dealing with an independent third party, but with one of its employees, notwithstanding any professional obligations resulting from enrolment at a Bar or Law Society.

95 It should be added that, even assuming that the consultation of in-house lawyers employed by the undertaking or group were to be covered by the right to obtain legal advice and representation, that would not exclude the application, where in-house lawyers are involved, of certain restrictions and rules relating to the exercise of the profession without that being regarded as adversely affecting the rights of the defence. Thus, in-house lawyers are not always able to represent their employer before all the national courts, although such rules restrict the possibilities open to potential clients in their choice of the most appropriate legal counsel.

96 It follows from those considerations that any individual who seeks advice from a lawyer must accept the restrictions and conditions applicable to the exercise of that profession. The rules on legal professional privilege form part of those restrictions and conditions.

97 Therefore, the argument alleging breach of the rights of the defence is unfounded.

(d) The second part of the second argument (principle of legal certainty)

(i) Arguments of the parties

98 Akzo and Akcros submit that the findings of the General Court undermine the principle of legal certainty, since Article 101 TFEU is often applied in parallel with the corresponding national provisions. Legal professional privilege for correspondence with in-housel lawyers should not therefore depend on whether it is the Commission or a national competition authority which carries out an investigation.

99 The Commission argues to the contrary that, if legal professional privilege, which is applicable to its investigations, were no longer defined at European Union level but under national law, that would give rise to complex and uncertain situations for all the persons concerned, which would prejudice the principle of legal certainty relied on by Akzo and Akcros.

(ii) Findings of the Court

100 It must be recalled that legal certainty is a general principle of European Union law which requires in particular that rules involving negative consequences for individuals should be clear and precise and their application predictable for those subject to them (see Case C-110/03 *Belgium* v *Commission* [2005] ECR I-2801, paragraph 30; Case C-76/06 P *Britannia Alloys & Chemicals* v *Commission*

[2007] ECR I-4405, paragraph 79; and Case C-226/08 *Stadt Papenburg* [2010] ECR I-0000, paragraph 45).

101 In answer to the complaint based on the abovementioned principle, it should be observed that the General Court's interpretation in the judgment under appeal that exchanges within an undertaking or group with in-house lawyers are not covered by legal professional privilege in the context of an investigation carried out by the Commission does not give rise to any legal uncertainty as to the scope of that protection.

102 The Commission's powers under Regulation No 17 and Regulation No 1/2003 may be distinguished from those in enquiries which may be carried out at national level. Both types of procedure are based on a division of powers between the various competition authorities. The rules on legal professional privilege may, therefore, vary according to that division of powers and the rules relevant to it.

103 The Court has held in that connection that restrictive practices are viewed differently by European Union law and national law. Whilst Articles 101 TFEU and 102 TFEU view them in the light of the obstacles which may result for trade between the Member States, each body of national legislation proceeds on the basis of considerations peculiar to it and considers restrictive practices solely in that context (see, to that effect, Case C-67/91 *Asociación Española de Banca Privada and Others* [1992] ECR I-4785, paragraph 11).

104 In those circumstances, the undertakings whose premises are searched in the course of a competition investigation are able to determine their rights and obligations vis-à-vis the competent authorities and the law applicable, as, for example, the treatment of documents likely to be seized in the course of such an investigation and whether the undertakings concerned are entitled to rely on legal professional privilege in respect of communications with in-house lawyers. The undertakings can therefore determine their position in the light of the powers of those authorities and specifically of those concerning the seizure of documents.

105 Therefore, the principle of legal certainty does not require that identical criteria be applied as regards legal professional privilege in those two types of procedure.

106 Accordingly, the fact that, in the course of an investigation by the Commission, legal professional privilege is limited to exchanges with external lawyers in no way undermines the principle relied on by Akzo and Akcros.

107 Therefore, the argument based on the principle of legal certainty is unfounded.

108 It follows that the second ground of appeal must be dismissed in its entirety.

3. The third ground of appeal

(a) Arguments of the parties

109 In the further alternative, Akzo and Akcros claim that the findings of the General Court, taken as a whole, violate the principle of national procedural autonomy and the principle of the conferred powers.

110 Akzo and Akcros state that Article 22(2) of Regulation No 1/2003 expresses the principle of national autonomy in procedural matters in the area in question. The European Union legislature expressly stated that, even in the case of inspections carried out at the request of the Commission in order to establish an infringement of the provisions of Article 101 TFEU or Article 102 TFEU, the agents of the national competition authority are to exercise their powers in accordance with their national rules. The legislature has not given a harmonised definition of legal professional privilege, which means that the Member States remain sovereign to decide that specific aspect of the protection of rights of defence.

111 The Commission submits that the judgment under appeal does not breach the principles referred to in the third ground of appeal. The principle of national procedural autonomy governs situations in which the courts and administrations of the Member States are required to implement European Union law, but does not apply where the legal limits of the actions of the institutions themselves are at issue.

112 The Commission concludes that the uniform scope of legal professional privilege throughout the European Union with respect to the procedures seeking to establish an infringement of Article 101 TFEU and Article 102 TFEU constituted a proper application of the judgment in *AM & S Europe* v *Commission* by the General Court. Consequently there has also been no breach of the principle of conferred powers.

(b) Findings of the Court

113 It must be recalled that, in accordance with the principle of national procedural autonomy, in the absence of European Union rules governing the matter, it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from European Union law (see, to that effect, Case 33/76 *Rewe* [1976] ECR 1989, paragraph 5; Case C-213/89 *Factortame and Others* [1990] ECR I-2433, paragraph 19; Case C-312/93 *Peterbroeck* [1995] ECR I-4599, paragraph 12; and Case C-13/01 *Safalero* [2003] ECR I-8679, paragraph 49).

114 However, in the present case, the Court is called on to decide on the legality of a decision taken by an institution of the European Union on the basis of a regulation adopted at European Union level, which, moreover, does not refer back to national law.

115 The uniform interpretation and application of the principle of legal professional privilege at European Union level are essential in order that inspections by the

Commission in anti-trust proceedings may be carried out under conditions in which the undertakings concerned are treated equally. If that were not the case, the use of rules or legal concepts in national law and deriving from the legislation of a Member State would adversely affect the unity of European Union law. Such an interpretation and application of that legal system cannot depend on the place of the inspection or any specific features of the national rules.

116 As far as concerns the principle of conferred powers, it must be stated that the rules of procedure with respect to competition law, as set out in Article 14 of Regulation No 17 and Article 20 of Regulation No 1/2003, are part of the provisions necessary for the functioning of the internal market whose adoption is part of the exclusive competence conferred on the Union by virtue of Article 3(1)(b) TFEU.

117 In accordance with the provisions of Article 103 TFEU, it is for the European Union to lay down the regulations or directives to give effect to the principles in Articles 101 TFEU and 102 TFEU concerning the competition rules applicable to undertakings. That power aims, in particular, to ensure observance of the prohibitions referred to in those articles by the imposition of fines and periodic penalty payments and to define the Commission's role in the application of those provisions.

118 In that connection, Article 105 TFEU provides that the Commission is to ensure the application of the principles laid down in Articles 101 TFEU and 102 TFEU and to investigate cases of suspected infringement.

119 As the Advocate General stated, in paragraph 172 of her Opinion, national law is applicable in the context of investigations conducted by the Commission as European competition authority only in so far as the authorities of the Member States lend their assistance, in particular with a view to overcoming opposition by the undertakings concerned through the use of coercive measures, in accordance with Article 14(6) of Regulation No 17 or Article 20(6) of Regulation No 1/2003. However, the question of which documents and business records the Commission may examine and copy as part of its inspections under antitrust legislation is determined exclusively in accordance with EU law.

120 Accordingly, neither the principle of national procedural autonomy nor the principle of conferred powers may be invoked against the powers enjoyed by the Commission in the area in question.

121 Therefore, the third ground of appeal must also be dismissed.

122 It follows from all of the foregoing considerations that the appeal is unfounded.

Costs

123 Under Article 69(2) of the Rules of Procedure, which applies to appeal proceedings by virtue of Article 118 thereof, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission applied for costs and Akzo and Akcros have been unsuccessful, the latter must be ordered to pay the costs. As they have brought the appeal jointly, they are to be jointly and severally liable for them.

124 The United Kingdom of Great Britain and Northern Ireland and the Kingdom of the Netherlands, as interveners in the proceedings before the Court, are each to bear their own costs, in accordance with the first paragraph of Article 69(4) of the Rules of Procedure.

125 The other parties to the proceedings, which supported the appeal and which were unsuccessful, are to bear their own costs by analogous application of the third paragraph of Article 69(4) of the Rules of Procedure.

On those grounds, the Court (Grand Chamber) hereby:

1. Dismisses the appeal;

2. Orders the United Kingdom of Great Britain and Northern Ireland, Ireland and the Kingdom of the Netherlands to bear their own costs;

3. Orders the Conseil des barreaux européens, the Algemene Raad van de Nederlandse Orde van Advocaten, the European Company Lawyers Association, the American Corporate Counsel Association (ACCA) – European Chapter and the International Bar Association to bear their own costs;

4. Orders the remainder of the costs of the proceedings to be born jointly and severally by Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd.

[Signatures]

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