REPORT TO THE FLORIDA BAR BOARD OF GOVERNORS BY THE SPECIAL COMMITTEE TO REVIEW THE ABA MODEL RULES 2002

Respectfully submitted by the Special Committee to Review The ABA Model Rules 2002:

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Andrew S. Berman
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REPORT OF THE
SPECIAL COMMITTEE TO REVIEW THE ABA MODEL RULES 2002

Introduction

The Florida Bar's Ethics 2000 Review Panel was appointed by President Terrence Russell on September 5, 2001. Chaired by Adele I. Stone, members of the special committee were Timothy W. Gaskill, Vice-chair, Andrew S. Berman, Randolph Braccialarghe, Timothy P. Chinaris, James K. Clark, Mark K. Delegal, Charles P. Pillans, III, The Honorable Ronald J. Rothschild, D. Culver Smith, III, and Bruce A. Weihe. Elizabeth Clark Tarbert served as counsel to the committee. The panel was charged with the following mission:

> The Ethics 2000 Review Panel has been created to study the recommendations of the American Bar Association Ethics Commission 2000. The panel's charge is to analyze the ABA recommendations, and compare them with existing Rules Regulating The Florida Bar. The primary concern in analyzing the ABA Ethics Commission 2000 recommendations should be protecting the public and maintaining the core values of the legal profession.

The panel understood its primary purpose as reviewing the changes to the ABA Model Rules by the ABA "Ethics 2000" Commission to make recommendations to The Florida Bar Board of Governors to assist the bar's representatives in the ABA House of Delegates scheduled to vote on the proposed changes in February 2002. The panel reviewed each model rule, noted substantive changes, compared the model rule with Florida's comparable rule, recommended whether the changes should be adopted, and made suggestions for alternative language to a few of the model rules.

The panel agreed with the majority of the changes proposed by the ABA "Ethics 2000" Commission, with notable exceptions. The most notable exception related to rules voted on in August 2001 by the House of Delegates in Model Rules 1.7, 1.8, 1.9, and 1.10; the changes, also voted down by the ABA House of Delegates, would have allowed "screening" of attorneys within the same law firm to resolve conflicts of interest. The panel disagreed with other changes to Model Rules 1.7, 1.8, 1.9 and 1.10 besides the screening issue, and with some of the changes in the terminology section.

The panel disagreed with or qualified some of the recommendations to the following model rules voted on by the ABA House of Delegates in February 2002: 1.12 (Conflicts of Former Judge or Arbitrator), 1.18 (Prospective Clients), 3.3 (Candor Toward the Tribunal), 3.7 (Lawyer as Witness), 4.2 (Communication with Represented Persons), 4.3 (Communication with Unrepresented Persons), 5.4 (Professional Independence of a Lawyer), 5.7 (Responsibilities Regarding Nonlegal Services), 6.1 (Voluntary Pro Bono Service), 6.5 (Nonprofit and Court-annexed Limited Legal Services Programs), 7.1 and 7.2 (attorney advertising rules), and 8.4 (General Misconduct).

The final report was presented to The Florida Bar Board of Governors in October 2001, and President Russell provided copies of the report to all of the Florida delegates.

After the vote by the ABA House of Delegates in February 2002, President Tod Aronovitz appointed a successor committee, the Special Committee to Review the ABA Model Rules 2002, charging the special committee with the following mission statement:

> The Special Committee to Review the ABA Model Rules 2002 has been created to study the changes to the ABA Model Rules of Professional Conduct adopted by the ABA House of Delegates in February 2002 from recommendations of the American Bar Association Ethics Commission 2000. Building on the work of the Ethics 2000 Review panel, this committee's charge is to analyze the changes to the ABA Model Rules of Professional Conduct, compare them with existing Rules Regulating The Florida Bar, and consider whether The Florida Bar should adopt the recommended changes. The primary concern in analyzing the changes to the ABA Model Rules of Professional Conduct should be protecting the public and maintaining the core values of the legal profession.

Chaired by Adele I. Stone, members of the special committee were: Andrew S. Berman, Randolph Braccialarghe, Timothy P. Chinaris, Mark K. Delegal, Timothy W. Gaskill, Charles P. Pillans, III, The Honorable Ronald J. Rothschild, and D. Culver Smith, III. Elizabeth Clark Tarbert served as counsel to the committee.

The committee reviewed the changes actually adopted by the ABA House of Delegates that became final after its February 2002 meeting. The committee divided into subcommittees to review the actual changes adopted by the ABA House of Delegates and make recommendations to the full committee. Each subcommittee report was reviewed by the full committee and either adopted, modified or rejected. The committee met numerous times in person and by telephone conference; minutes of the committee's meetings are attached as Appendix A. The committee then adopted an interim report for distribution to interested members. The interim report followed the same format as the predecessor panel report to the delegates, with a review of each model rule, notation of substantive changes, comparison between the model rule with Florida's comparable rule, recommendation of whether the changes should be adopted, and suggestions for alternative language when appropriate. The committee sent a letter to the chair of each standing committee and section of The Florida Bar requesting input on the interim report and proposed rule changes; a copy of the letter is attached as Appendix B. The committee also published articles in the Florida Bar *News* inviting Florida Bar members to review and comment on the interim report; copies of the articles are attached as Appendix C. The interim report was posted on the bar's website for comment. The committee reviewed the comments received, adopting some changes recommended by those who commented and declining to adopt others.

In considering the ABA Model Rules, the committee reviewed not only the changes recently adopted by the ABA House of Delegates, but also reviewed the existing ABA Model Rules to determine where Florida's rules differ from the ABA Model Rules. The committee

agreed that conformity with the ABA Model Rules was desirable as a goal, but not where Florida has diverged from the ABA Model Rules for important policy considerations. As an example, Florida's confidentiality rule, 4-1.6, contains mandatory exceptions to prevent a client from committing a crime and to prevent death or substantial bodily harm, whereas the ABA model rule's exceptions are merely permissive. The committee recommends retention of the existing Florida rule as providing more protection to the public by removing discretion of the lawyer not to disclose in those circumstances. As another example, Florida as a policy has determined that post-trial contact with jurors is impermissible without notice to the court and opposing side; therefore, a majority of the committee recommends retention of existing Rule 4-3.5 with no changes. As a final example, the committee does not recommend adopting any changes to the attorney advertising rules (4-7.1 through 4-7.11), as this area is one in which there is great divergence from the ABA Model Rules based on policy decisions by numerous Florida Bar commissions.

Finally, the committee reviewed changes to ABA Model Rules 1.6 (Confidentiality of Information) and 1.13 (Organization as Client) that were made at the recommendation of the ABA Task Force on Corporate Responsibility in the wake of the Sarbanes-Oxley Act and the SEC regulations that were adopted after Sarbanes-Oxley. The changes to ABA Model Rule 1.6 would allow an attorney to disclose confidential information to either prevent or mitigate financial injury in which the lawyer's services have been used to further a client's crime or fraud. Changes to ABA Model Rule 1.13 would allow an attorney to disclose a corporate client's legal violations that would damage the corporation to those outside the corporation if the corporation fails to address the violation after the lawyer has reported the issue "up the ladder" at the corporation. The committee does not recommend similar changes to Florida rules 4-1.6 and 4-1.13 for a number of reasons: the proposed changes are broad, go beyond even the new SEC regulations created in the wake of Sarbanes-Oxley, go far beyond any exceptions to confidentiality already in the rules of professional conduct, and create conflicts between attorneys and their clients. A special supplemental report on these proposed changes is attached as Appendix D.

Significant Recommendations

Some of the changes made were either of such import or were so pervasive throughout the rules that they merit special mention. This section of the report describes those changes.

Throughout the rules, the ABA House of Delegates changed "consent after consultation" to "informed consent." The ABA Ethics Commission 2000 stated that they believed the change clarified and strengthened the requirement of communication with clients regarding consent. "Informed consent" is defined as "agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct." The committee agrees that the lawyer's duty of communication to the client is more clearly delineated by this definition and therefore recommends adoption of this change throughout the rules, appearing in terminology, 4-1.2 (Scope of Representation), 4-1.4 (Communication), 4-1.6 (Confidentiality of

Information), 4-1.7 (Conflict of Interest; Current Clients), 4-1.8 (Conflict of Interest; Prohibited and Other Transactions), 4-1.9 (Conflict of Interest; Former Client), 4-1.11 (Special Conflicts of Interest for Former and Current Government Officers and Employees), 4-1.12 (Former Judge or Arbitrator), and 4-2.3 (Evaluation for Use by Third Persons).

The ABA House of Delegates also adopted in many rules a requirement that consent be "confirmed in writing." A lawyer is required to either have the person give consent in writing or the lawyer may obtain oral consent after which the lawyer gives or sends a written statement that the consent has occurred. The committee initially rejected this approach, then determined that the requirement did not place an unreasonable burden on the lawyer or unreasonably "chill" the lawyer-client relationship, because it does not require that the person actually sign a consent. It merely requires that the lawyer provide a written confirmation that the consent occurred to the person who consented. The committee does not recommend adoption of this requirement in every rule that the ABA House of Delegates modified, confining the change to terminology and rules 4-1.7, 4-1.11, and 4-1.12.

The ABA House of Delegates adopted and the committee recommends changes to Rule 4-1.4 (Communication) that strengthen a lawyer's obligation to communicate with clients. The changes to the rule set forth specific requirements of communication, such as the obligation to promptly inform the client of any decision or requirement in the rules, consult with the client about how the goals of the representation will be accomplished, keep the client informed on the progress of the matter, respond to requests for information, and consult with the client when the lawyer understands that the client wants the lawyer to engage in unethical or illegal conduct. Changes to the comment reflect the modifications to the rule.

The committee recommends changes to Rule 4-1.7(Conflict of Interest) based on changes made by the ABA House of Delegates. In the main, no change in the substance of the rule is intended. The changes are intended to better organize and clarify the meaning of the rule. One change, already noted, is the requirement that the client give informed consent to waive a conflict, and that informed consent must be confirmed in writing. The ABA House of Delegates adopted numerous changes to the comment to Rule 4-1.7; the committee declines to recommend adoption of the vast majority of the changes. The committee believes the existing comment to the rule provides better guidance than the changes adopted by the ABA, and the additions made by the ABA are already covered in existing Florida authority such as caselaw and ethics opinions. The committee does recommend adding an explanation of confirmed in writing to the comment.

The committee recommends adoption of requirements that strengthen the protection of clients in Rule 4-1.8 (Conflict of Interest; Prohibited and Other Transactions). The changes include clarifying that in a business transaction with a client, the requirement that there be written consent by the client includes that the writing spell out the terms of the transaction and the lawyer's role in the transaction in subdivision (a). The committee also recommends adding to subdivision (c) that a lawyer cannot solicit a substantial gift from a client to the existing prohibition against preparing an instrument by a client giving any substantial gift to the lawyer

or the lawyer's family. The committee also recommends adding in subdivision (g) that consent to aggregate settlement of client claims must be in writing, signed by the client. There are also substantial additions to the comment, providing additional explanation to existing rules. Finally, new subdivision (k) imputes all conflicts listed in the rule to lawyers in the same firm; previously, subdivision (c) regarding preparing an instrument in which a client gave a substantial gift to the lawyer or lawyer's family was excepted from the imputation of conflicts.

Substantial amendments to ABA Model Rule 1.9 were adopted by the ABA House of Delegates. The committee recommends against adoption of most of the changes. As noted above, the committee recommends adopting the change from "consent after consultation" to "gives informed consent" for consistency with the other rules. However, the ABA changes require that consent be confirmed in writing. The committee recommends against this change, believing that although conflicts involving current conflicts of interest should be confirmed in writing because of the existing relationship, confirmation in writing should not be required when conflicts involving former clients because the relationship considerations are minimized with former clients. The committee believes that a lawyer should not be disciplined for failing to confirm a waiver of a conflict of interest involving a former client in writing if the former client has made an informed waiver. Although the ABA did not attempt to define "generally known" for purposes of this rule, Florida's rule 4-1.9 has a definition of "generally known." In the process of examining the rule regarding the ABA changes, the committee reviewed the definition. The committee believes the definition of "generally known" is best placed in the comment of the rule, being more consistent with the general format of the rule. The committee also recommends the language be clarified to make clear that "generally known" is subject to a "but for" test; that is, "but for" the prior attorney-client relationship, the lawyer would neither know nor discover the information. Finally, the committee appreciates the attempt by the ABA to define "substantially related;" however, the committee finds the ABA's attempt to define "substantially related" unhelpful because it blurs the distinction between the duties of loyalty and confidentiality owed to former clients. The committee therefore recommends adoption of some of the explanatory language of the new ABA comment, but separates the two concepts of loyalty and confidentiality for purposes of Florida's comment.

ABA Model Rule 1.10 was amended so that personal conflicts of interest of one lawyer are not imputed to the lawyer's firm unless there is a significant risk that the representation of the client would be affected. The rationale for the change is that neither loyalty considerations nor protection of confidential information are raised by removing the imputation as long as the remaining firm members who will actually represent the client are not affected by the personal conflict of one firm lawyer. The example provided in the new comment is a lawyer with strong political beliefs in conflict with the representation of the client. As long as the other lawyers in the firm remain unaffected by the individual lawyer's personal conflict, those other lawyers should be able to represent the client. The committee agrees with the rationale offered for the change and therefore recommends the change in Florida rule 4-1.10. An addition to the comment to this rule addresses the frequently raised issue of conflicts of nonlawyer employees. The addition notes that conflicts of nonlawyers will not be imputed to the entire law firm, but that the law firm must make adequate provisions to screen the nonlawyer from participation in

the matter.

ABA Model Rule 1.12 was amended to extend the rule to include former mediators and other third-party neutrals. The change recognizes that more lawyers are serving in the capacity of third-party neutrals and clarifies their responsibilities under the Rules of Professional Conduct. The committee agrees with and recommends this change. The committee recommends the further addition to the comment that a Florida Bar member who is a certified mediator is subject to applicable law and other rules governing certified mediators.

The committee recommends the changes to Rule 4-1.14 approved by the ABA House of Delegates. The rule, currently titled client under a disability, involves a change in terminology to "diminished capacity." The rule currently allows an attorney to take protective action when the client cannot act in the client's own interest because of the disability, and the committee recommends adding the requirement that the client is at risk of substantial physical, financial or other harm unless the action is taken. Additionally, changes to the rule would specifically allow an attorney to disclose confidential information in order to protect the client's interests, but only to the extent necessary to protect those interests. The changes to the comment reflect the changes to the rule, and address factors a lawyer should consider in determining diminished capacity. The comment also would provide additional guidance on appropriate protective action for an attorney in dealing with a client with diminished capacity.

The ABA House of Delegates approved changes to its sale of a law practice rule (model rule 1.17) that would allow the sale of part of a practice as opposed to the former requirement that the sale be of the entire practice to one purchaser. The change eliminates the requirement that the sale be to a single purchaser. The rationale for the change is that the prior rule was unduly restrictive for its purpose: to ensure that all cases and clients were disposed of in the event the practice was sold. The committee agrees with the rationale and therefore recommends amendment of Florida Rule 4-1.17 to allow the sale of a practice or an area of practice to one or more purchasers. The committee disagreed, however, with the ABA requirement that the seller discontinue the practice of law in the event of a sale of the entire practice or discontinue the area of practice if an area of practice is sold. The committee believes that requirement is unduly restrictive and does not serve to protect the interests of clients.

An entirely new rule, 1.18, was added to the ABA Model Rules regarding duties to prospective clients. The rule mainly addresses the lawyer's responsibility to maintain confidentiality of prospective clients' information, based on the duty of confidentiality owed to former clients. Lawyers would therefore be precluded from representation adverse to a prospective client who had consulted with the lawyer in the same or a substantially related matter if the information gained from that consultation "could be significantly harmful" to the prospective client. The ABA adopted two exceptions to the prohibited representation: with the informed consent of both the client and prospective client or with timely appropriate screening of the disqualified lawyer. The committee believes the principles set forth in the rule are important and would provide guidance to lawyers on dealing with prospective clients. However, the committee disagrees with the concept of screening to avoid conflicts, which is generally

impermissible in Florida except under very limited circumstances that are not present in the prospective client situation. Therefore, the committee recommends adoption of new Rule 4-1.18, but without the screening exception employed by the ABA and changing the phrase "could be significantly harmful" to "could be used to the disadvantage of" to the prospective client to more closely conform to existing concepts in Florida.

ABA Rule 2.2, Intermediary, has been deleted in its entirety. The reporter's explanation for the deletion is that the rule was mainly adopted to address the perception that lawyers believed that common representation of multiple clients was prohibited. However, common representation is much more accepted today, and the concepts of common representation are best set forth in 1.7, the rule dealing with conflicts involving current clients. The committee agrees with the action of the ABA House of Delegates and therefore recommends deletion of Rule 4-2.2. However, in order to retain the existing numeric scheme for ease of use and research, the committee recommends designating the number 4-2.2 as "open" so that the rules need not be renumbered.

The ABA also adopted an entirely new rule on lawyers serving as third-party neutrals, in recognition that many more lawyers are serving in this capacity. New ABA Model Rule 2.4 includes a definition of serving as a third-party neutral and a requirement that the lawyer inform the parties involved that the lawyer does not represent them. The new rule imposes a duty on the lawyer to correct any misunderstanding regarding the lawyer's role when acting as a third-party neutral. The committee agrees with the rationale and rule and recommends adoption of new Florida Rule 4-2.4 that is identical to the model rule.

Although the changes made by the ABA House of Delegates to the trial publicity rule (3.6) were relatively minor with no intended change in substance, the previous ABA model rule already substantially differed from the current Florida rule, 4-3.6. After study, the committee recommends adopting changes in Florida's rule to conform Florida's rule to the ABA model rule by adding the safe harbor provisions existing in the ABA model rule and by adding the self defense exception. The safe harbor provisions, which the committee recommends adding in subdivision (c), set forth those things that an attorney may state to the media without fear of violating the trial publicity rule. The self defense exception, which the committee recommends adding in subdivision (d), would allow an attorney to respond with public statements to the media on behalf of a client when there has been adverse publicity not initiated by the lawyer or client. The committee believes that these additions will provide clearer guidance to lawyers regarding their responsibilities under the trial publicity rule.

Similarly, there were only minor changes made by the ABA House of Delegates to model rule 3.8, Special Responsibilities of Prosecutors, but there were already significant differences between it and Florida's counterpart, 4-3.8. The committee recommends that Florida's rule be changed to encompass some, but not all, of the concepts addressed in the ABA model rule. The committee agrees that prosecutors should make efforts to ensure that a person accused of a crime has been advised of the right to counsel and has been given a reasonable opportunity to consult with counsel, and therefore recommends addition of new subdivision (b). The committee also

agrees with and recommends adoption of new subdivision (e), which prohibits a prosecutor from issuing a subpoena to a lawyer in a proceeding to testify about a client unless the information is not privileged and is necessary to the case. On the other hand, the committee disagrees with and recommends against adding the requirement that prosecutors make efforts to ensure that others such as police and investigators, follow the trial publicity rule. Prosecutors are already required to make such efforts under the trial publicity rule, so a special requirement here is unnecessary.

Because the issue arises so frequently with modern modes of communication, the ABA House of Delegates chose to address the issue of the misdelivered document in model rule 4.4, adding a provision setting forth the lawyer's responsibility under that circumstance. The provision states that the lawyer must promptly notify the sender. Additional commentary provides further guidance, but notes that any other responsibility and whether or not the document is privileged are matters outside the scope of the rules. The committee agrees that the issue arises with such frequency that guidance in the rules is desirable and recommends adoption of the new subdivision (b) and commentary to Florida Rule 4-4.4.

The ABA House of Delegates approved changes to model rule 5.4 to allow fee sharing with nonprofit, pro bono legal services organizations that employ or recommend a lawyer in accordance with ABA Formal Ethics Opinion 93-374, which found such fee-sharing permissible. The reporter's notes indicate that the change to the rule was proposed because many states, although agreeing with the rationale for allowing such fee sharing, felt that it was prohibited by the plain language of the rule. The reporter's notes indicate that Ethics Commission 2000 believed that division of fees with a nonprofit, pro bono legal services organization offered less of a "threat to independent professional judgment" in making the recommendation. The committee agrees with this rationale and recommends the change to Florida's Rule 4-5.4.

The ABA House of Delegates approved changes to the scienter requirement in the reporting rule, model rule 8.3 from "having knowledge" to "knows" to conform to scienter requirements elsewhere in the rules. The committee recommends making those changes. While reviewing the model rule, the committee noted that the ABA model rule contains an exception to the reporting requirement for lawyers participating in a lawyers assistance program to encourage lawyers and judges to take steps to seek assistance. The committee agrees with the rationale and recommends conforming Florida's rule 4-8.3 to include such an exception, but also recommends provisions that allows disclosure of information about lawyers who are participating in an assistance program as part of a disciplinary sanction.

The committee recommends only minor changes to some rules. The changes are mainly organizational, to add clarity, or to conform to terminology used elsewhere in the rules. Rules with minor changes include: 4-1.6, 4-1.11 (former and current government officers and employees), 4-1.13 (Organization as Client), 4-1.16 (Declining or Terminating Representation), 4-3.1 (Meritorious Claims and Contentions), 4-3.3 (Expediting Litigation), 4-3.7 (Candor Toward the Tribunal), 4-3.9 (Advocate in Nonadjudicative Proceedings), 4-4.3 (Dealing with Unrepresented Persons), 4-5.1 (Responsibilities of a Partner or Lawyer), 4-5.3 (Responsibilities Regarding Nonlawyer Assistants), 4-5.6 (Restrictions on Right to Practice), 4-8.4 (Misconduct),

and 5-1.1 (Trust Accounts).

The committee recommends changes to only the comments in 8 rules: 4-1.1 (Competence), 4-1.3 (Diligence), 4-1.5 (Fees for Legal Services), 4-2.1 (Adviser), 4-3.2 (Expediting Litigation), 4-4.1 (Truthfulness in Statements to Others), 4-4.2 (Communication with Person Represented by Counsel), and 4-8.1 (Bar Admission and Disciplinary Matters).

The committee recommends making no changes to 25 rules: 4-3.4 (Fairness to Opposing Party and Counsel), 4-3.5 (Impartiality and Decorum of the Tribunal), 4-5.2 (Responsibilities of a Subordinate Lawyer), 4-5.5 (Unlicensed Practice of Law), 4-5.7 (Responsibilities Regarding Nonlegal Services), 4-6.1 (Pro Bono Public Service), 4-6.2 (Accepting Appointments), 4-6.4 (Law Reform Activities Affecting Client Interests), 4-6.5 (Voluntary Pro Bono Plan), 4-7.1 through 4-7.11 (Attorney Advertising Rules), 4-8.1 (Bar Admission and Disciplinary Matters), 4-8.2 (Judicial and Legal Officials), 4-8.5 (Jurisdiction), 4-8.6 (Authorized Business Entities), and 5-1.2 (Trust Accounting Records and Procedures). Some of the counterparts in the ABA Model Rules were changed by the ABA House of Delegates.

As noted above, the committee recommends against making changes to rules where Florida has clearly chosen as a policy to diverge from the ABA Model Rules. Additionally, the committee recommends against adopting some of the changes made to the ABA Model Rules, where the changes involve issues under study by other Florida Bar committees. The ABA House of Delegates adopted changes to the model rules in response to a study on multijurisdictional practice in ABA Model Rules 5.5 and 8.5. The committee recommends against adopting the change in Florida's counterpart rules 4-5.5 and 4-8.5, because of the study currently being concluded by The Florida Bar's Special Commission on the Multijurisdictional Practice of Law 2002. Similarly, the committee recommends against most changes to Florida's Rule 4-4.2, because The Florida Bar's Special Committee to Review Rule 4-4.2 concluded a study of the rule in October 2002, recommending a very minor change to the comment of the rule only. Therefore, the committee recommends adopting relatively minor changes to the comment that do not conflict with the recommendations of the Special Committee to Review Rule 4-4.2, and recommends against adopting the "authorized by law or court order" exception to the rule contained in new ABA Model Rule 4.2 (the model rule already contained the "authorized by law" exception, but added the exception of authorized by court order).

Finally, as a form change, the committee recommends numbering the paragraphs of the commentary of all rules, following ABA format for the model rules. The change is not substantive, but is intended for ease of reference in researching the rules.

MODEL RULE: PREAMBLE

SUMMARY of Substantive Changes Adopted by ABA House of Delegates

1. ¶ 1 of the Preamble specifies that a lawyer is a representative of clients, an officer of the legal system, and a public citizen having special responsibility for the quality of justice. The change to ¶ 1 recognizes the lawyer's role as "a member of the legal profession." This addition reflects a recent ABA House of Delegates' Resolution passed in August 2000.

2. ¶ 2 of the Preamble is amended to delete references to a lawyer as an "intermediary." This is consistent with the Commission's decision to delete Rule 2.2. That Rule was deleted because the Commission was concerned that it was a source of confusion in so far as it suggests that a lawyer representing multiple clients as an "intermediary" is not fully subject to Rule 1.7 (involving conflicts of interest).

3. The Preamble contains a new ¶ 3 which addresses a lawyer's role as a third-party neutral. This is a "non-representational role" assumed to help parties resolve a dispute. It obviously recognizes the growing trend of having lawyers serve as mediators or other participating in alternative dispute resolution proceedings. It reminds lawyers serving in that capacity that some Rules may apply when lawyers are serving as third-party neutrals or not otherwise engaged in representing clients.

4. Current ¶ 5 of the Preamble is now delineated as ¶ 6. It adds the lawyer's duty, as a public citizen, to seek improvement in the "access to the legal system." In addition, it adds language expanding a lawyer's duty to further the public's understanding of, and confidence in, law.

5. Current ¶ 8 to the Preamble now is numbered ¶ 9. It contains stylistic changes but adds a sentence clarifying that lawyers should represent clients zealously but "within the bounds of the law, while maintaining a professional, courteous and civil attitude towards all persons involved in the legal system."

6. The first paragraph of the "Scope" of the Rules of Professional Conduct, currently identified as ¶ 13 to the Preamble, is amended to clarify what is meant by "professional discretion." It equates "professional discretion" to the exercise of professional judgment.

7. The second paragraph under the Scope of the Rules of Professional Conduct is currently numbered ¶ 14. The current language in that Rule is not identical to the corresponding provision in the Florida Rules. Both paragraphs, however, address the significance of the commentary to each Rule. The ABA Rule has been amended to suggest that the comments are sometimes used to alert lawyers to their responsibilities under other laws.

8. Current ¶ 16 now delineated ¶ 18 under the proposed changes to the Scope. It deletes what is termed to be n inaccurate statement of the responsibilities of government lawyers, who do not ordinarily represent "the public interest."

9. Current ¶ 18 of the Scope is now numbered ¶ 20. It has been changed to indicate that violation of a Rule should not *itself* give rise to a cause of action against a lawyer or state a presumption that a legal duty has been breached. It adds a sentence that violation of a Rule does not necessarily warrant another non-disciplinary remedy, such as disqualification of a lawyer in a pending litigation matter. It adds a sentence that since the Rules do establish standards of conduct, a lawyer's violation of Rule *may be* evidence of a breach of applicable standard of conduct.

10. Current ¶s 19 and 20 have been deleted because, as the reporter notes, they merely repeat what is stated elsewhere in the Rules, primarily in the Comment to Rule 1.6.

11. Current ¶ 21 to the Scope of the Rules of Professional Conduct deletes research note to be superseded by the legal background sections of the Annotated Model Rules of Professional Conduct.

How ABA Rule DIFFERS from EXISTING FLORIDA Rule

Florida's preamble to the Rules of Professional Conduct, including scope, are largely the same as the current model rules. There are some differences, particularly regarding self-governance, and they are organized somewhat differently. The proposed changes above are not contained in Florida's preamble.

RECOMMENDATION of Yes or No and REASONS

YES and NO. The changes clarify the existing preamble. Existing paragraphs in Florida's preamble that are not contained in the ABA Model Rules should also be retained. Finally, the language "nothing in these rules should be deemed to augment. . ." in paragraph 16 of Florida's preamble should be retained.

FLORIDA'S Rule in LEGISLATIVE FORMAT

PREAMBLE: A LAWYER'S RESPONSIBILITIES

[1] A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system, and a public citizen having special responsibility for the quality of justice.

[2] As a representative of clients, a lawyer performs various functions. As an adviser, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As an advocate, a lawyer zealously asserts the client's position under the rules of the adversary system. As a negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealing with others. ~~As an intermediary between clients, a lawyer seeks to reconcile their interests as an adviser and, to a limited extent, as a spokesperson for each client. A~~ As an evaluator, a lawyer acts ~~as an evaluator~~ by examining a client's legal affairs and reporting about them to the client or to others.

[3] In addition to these representational functions, a lawyer may serve as a third-party neutral, a nonrepresentational role helping the parties to resolve a dispute or other matter. Some of these Rules apply directly to lawyers who are or have served as third-party neutrals. See, e.g., Rules 1.12 and 2.4. In addition, there are Rules that apply to lawyers who are not active in the practice of law or to practicing lawyers even when they are acting in a nonprofessional capacity. For example, a lawyer who commits fraud in the conduct of a business is subject to discipline for engaging in conduct involving dishonesty, fraud, deceit or misrepresentation. See Rule 8.4.

[4] In all professional functions a lawyer should be competent, prompt, and diligent. A lawyer should maintain communication with a client concerning the representation. A lawyer should keep in confidence information relating to representation of a client except so far as disclosure is required or permitted by the Rules of Professional Conduct or by law.

[5] A lawyer's conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer's business and personal affairs. A lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others. A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers, and public officials. While it is a lawyer's duty, when necessary, to challenge the rectitude of official action, it is also a lawyer's duty to uphold legal process.

[6] As a public citizen, a lawyer should seek improvement of the law, access to the legal system, the administration of justice, and the quality of service rendered by the legal profession. As a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients, employ that knowledge in reform of the law, and work to strengthen legal education. In addition, a lawyer should further the public's understanding of and confidence in the rule of law and the justice system, because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority. A lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance~~, and~~ Therefore, all lawyers should ~~therefore~~ devote professional time and resources and use civic influence ~~in their behalf~~ to ensure equal access to our system of justice for all those who because of economic or social barriers cannot afford or secure adequate legal counsel. A lawyer should aid the legal profession in pursuing these objectives and should help the bar regulate itself in the public interest.

[7] Many of the lawyer's professional responsibilities are prescribed in the Rules of Professional Conduct and in substantive and procedural law. A lawyer is also guided by personal conscience and the approbation of professional peers. A lawyer should strive to attain the highest level of skill, to improve the law and the legal profession, and to exemplify the legal profession's ideals of public service.

[8] A lawyer's responsibilities as a representative of clients, an officer of the legal system, and a public citizen are usually harmonious. Zealous advocacy is not inconsistent with justice. Moreover, unless violations of law or injury to another or another's property is involved,

preserving client confidences ordinarily serves the public interest because people are more likely to seek legal advice, and thereby heed their legal obligations, when they know their communications will be private.

[9] In the practice of law conflicting responsibilities are often encountered. Difficult ethical problems may arise from a conflict between a lawyer's responsibility to a client and the lawyer's own sense of personal honor, including obligations to society and the legal profession. The Rules of Professional Conduct often prescribe terms for resolving such conflicts. Within the framework of these rules, however, many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the rules. These principles include the lawyer's obligation to protect and pursue a client's legitimate interests, within the bounds of the law, while maintaining a professional, courteous and civil attitude toward all persons involved in the legal system.

[10] Lawyers are officers of the court and they are responsible to the judiciary for the propriety of their professional activities. Within that context, the legal profession has been granted powers of self-government. Self-regulation helps maintain the legal profession's independence from undue government domination. An independent legal profession is an important force in preserving government under law, for abuse of legal authority is more readily challenged by a profession whose members are not dependent on the executive and legislative branches of government for the right to practice. Supervision by an independent judiciary, and conformity with the rules the judiciary adopts for the profession, assures both independence and responsibility.

[11] Thus, every lawyer is responsible for observance of the Rules of Professional Conduct. A lawyer should also aid in securing their observance by other lawyers. Neglect of these responsibilities compromises the independence of the profession and the public interest that it serves.

Scope:

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

[13] The comment accompanying each rule explains and illustrates the meaning and purpose of the rule. The comments are intended only as guides to interpretation, whereas the

text of each rule is authoritative. Thus, comments, even when they use the term "should," do not add obligations to the rules but merely provide guidance for practicing in compliance with the rules.

[14] The rules presuppose a larger legal context shaping the lawyer's role. That context includes court rules and statutes relating to matters of licensure, laws defining specific obligations of lawyers, and substantive and procedural law in general. Compliance with the rules, as with all law in an open society, depends primarily upon understanding and voluntary compliance, secondarily upon reinforcement by peer and public opinion, and finally, when necessary, upon enforcement through disciplinary proceedings. The rules do not, however, exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules. The rules simply provide a framework for the ethical practice of law. The comments are sometimes used to alert lawyers to their responsibilities under other law.

[15] Furthermore, for purposes of determining the lawyer's authority and responsibility, principles of substantive law external to these rules determine whether a client-lawyer relationship exists. Most of the duties flowing from the client-lawyer relationship attach only after the client has requested the lawyer to render legal services and the lawyer has agreed to do so. But there are some duties, such as that of confidentiality under rule 4-1.6, which ~~may~~ attach when the lawyer agrees to consider whether a client-lawyer relationship shall be established. See rule 4-1.18. Whether a client-lawyer relationship exists for any specific purpose can depend on the circumstances and may be a question of fact.

[16] Failure to comply with an obligation or prohibition imposed by a rule is a basis for invoking the disciplinary process. The rules presuppose that disciplinary assessment of a lawyer's conduct will be made on the basis of the facts and circumstances as they existed at the time of the conduct in question in recognition of the fact that a lawyer often has to act upon uncertain or incomplete evidence of the situation. Moreover, the rules presuppose that whether discipline should be imposed for a violation, and the severity of a sanction, depend on all the circumstances, such as the willfulness and seriousness of the violation, extenuating factors, and whether there have been previous violations.

[17] Violation of a rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached. In addition, violation of a rule does not necessarily warrant any other nondisciplinary remedy, such as disqualification of a lawyer in pending litigation. The rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability. Furthermore, the purpose of the rules can be subverted when they are invoked by opposing parties as procedural weapons. The fact that a rule is a just basis for a lawyer's self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the rule. Accordingly, nothing in the rules should be deemed to augment any substantive legal duty of lawyers or the extra-

disciplinary consequences of violating such duty. Nevertheless, since the rules do establish standards of conduct by lawyers, a lawyer's violation of a rule may be evidence of breach of the applicable standard of conduct.

~~Moreover, these rules are not intended to govern or affect judicial application of either the attorney-client or work product privilege. Those privileges were developed to promote compliance with law and fairness in litigation. In reliance on the attorney-client privilege, clients are ordinarily entitled to expect that communications within the scope of the privilege will be protected against compelled disclosure. The attorney-client privilege is that of the client and not of the lawyer. In exceptional situations, the rules might allow or require the lawyer to disclose a client confidence. This, however, does not vitiate the proposition that, as a general matter, the client has a reasonable expectation that information relating to the client will not be voluntarily disclosed and that disclosure of such information may be compelled only in accordance with recognized exceptions to the attorney-client and work product privileges.~~

~~The lawyer's exercise of discretion not to disclose information under rule 4-1.6 should not be subject to reexamination. Permitting such reexamination would be incompatible with the general policy of promoting compliance with law through assurances that communications will be protected against disclosure.~~

MODEL RULE: TERMINOLOGY

SUMMARY of Substantive Changes Adopted by ABA House of Delegates

1. This proposed model Rule deletes the definitions of "consult" and "consultation." The stated purpose for the deletion is that the new definition of "informed consent" is added which more adequately addresses the issue. The definition "informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct. The expressed rationale for the change is that "the Commission believes that 'consultation' is a term that is not well understood and does not sufficiently indicate the extent to which clients must be given adequate information and explanation in order to make reasonably informed decisions." The commission notes that no change in substance is intended by this change in terminology.

2. Definitions of "firm" and "law firm" have been changed. Conflicts arising under Rules 1.7 and 1.9 are imputed to all lawyers associated in a "firm" under Rule 1.10. The change to the definitions of "firm" and "law firm" merely specify the various entities through which lawyers are authorized to practice law. This recognizes the reality that whether two or more lawyers constitute a "firm" depends largely on specific facts.

3. The definition of "fraud" or "fraudulent" has been changed to express that conduct constituting "fraud" must not only have the "intent to deceive," but "must be fraudulent under applicable substantive or procedural law." In other words, under the current definition, conduct might be considered "fraudulent" merely because it involves an intention to deceive although it does not violate any other law.

4. The definition of "partner" has been changed in order to expand the definition to encompass lawyers practicing in limited liability entities.

5. The Terminology section in the Preamble adds a new definition for the term "screened," because the Rules do not impute conflicts of interest in certain situations when a personally disqualified lawyer is "screened" from any participation in a matter. A "screen" denotes the isolation of a lawyer from participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information.

6. The Terminology section in the Preamble adds the definition of the word "tribunal." It clarifies that a "tribunal" includes not only courts but also binding arbitration and legislative bodies, administrative agencies, or other bodies acting in an adjudicative capacity.

7. The words "writing" and "written" have also been added to this section. Because "writings" are required in more circumstances under the proposed Rules, the commission felt that the term should be defined and include not only tangible but also electronic records. It also acknowledges recent technological advances that allow a digitized document to be signed with an electronic

symbol.

8. The commentary to 1.0 is all new. The first paragraph, involving "confirmed in writing," was added to clarify that if it is not feasible to obtain or transmit a writing at the time a person gives informed consent, a lawyer may undertake continued representation based upon an oral informed consent, so long as the writing is obtained or transmitted within a reasonable time thereafter.

9. ¶s 2, 3, and 4 of the Commentary involve the "firm" and "law firm" terminology. These paragraphs were taken directly from the commentary to Rule 1.10. ¶ 2 discusses that whether two or more lawyers constitute a "firm" depends on the specific facts of the situation. It also notes that a group of lawyers can be regarded as a "firm" for conflict purposes while not being regarded as such for the purposes of the Rule that information acquired by one lawyer is attributed to another.

¶ 3 notes that there can be uncertainty as to the identity of the client in situations where the "firm" is a law department of an organization, including the government.

¶ 4 also notes that similar questions can arise with respect to lawyers and legal aid and legal services organizations.

10. ¶ 5 of the commentary references the definition of the word "fraud. It specifies that "fraud" does not include merely negligent misrepresentation or negligent failure to apprise another of relevant information and that reliance is not required by the Rule. The Rule focuses entirely on the nature of the conduct in question. It indicates that "intention to deceive" is not enough to constitute "fraud" but that the conduct must also be fraudulent under applicable substantive or procedural law.

11. ¶ 6 of the commentary discusses "informed consent." It attempts in a more complete manner to set forth the requirements that a lawyer obtain informed consent of a client or another person within the meaning of the Rule.

12. ¶ 7 of the commentary also falls under the category of "informed consent." This paragraph explains what is required in order to constitute a manifestation of consent by a client. It notes that confirmed consent will usually require an affirmative response by the client but a lawyer may not assume consent from the client's silence.

13. ¶s 8, 9, and 10 of the commentary all involve the term "screened." These new comments provide cross-references to Rules that provide for screening and explain in more detail what measures may be adequate to assure an effective screen. They delineate that the purpose of screening is to assure the affected parties that confidential information remains protected. They require the personally disqualified lawyer to acknowledge the obligation not to communicate with other members of the firm with respect to the matter. They note that, to be effective, it may be appropriate for the firm to undertake such procedures in writing.

How ABA Rule DIFFERS from EXISTING FLORIDA Rule

Florida's Terminology section in the Preamble is substantially the same as the existing model rules, with the exception that Florida's Terminology section defines "lawyer." The proposed changes above are not contained in the existing Florida Terminology section in the Preamble.

RECOMMENDATION of Yes or No and REASONS

1, 2, and 4-13. **YES**. The changes are not substantive, but add specificity or clarify existing terminology, so the changes are recommended.

3. **NO**. The only change not recommended is in number (3) above regarding the definition of "fraud." The definition is too narrow, because it encompasses only conduct that is fraudulent under substantive or procedural law, and does not address conduct that is intended to deceive. Additionally, because the committee recommends that the screening provisions of ABA Rule 1.18 not be adopted in Florida, then mention of 1.18 should not be adopted in paragraph 8 of the comment to the terminology.

FLORIDA'S Rule in LEGISLATIVE FORMAT

Rule 1.0 Terminology:

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

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

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

(c) "Firm" or "law firm" denotes a lawyer or lawyers in a ~~private firm,~~ law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in the legal department of a corporation or other organization~~, and lawyers employed in a legal services organization. See comment, rule 4-1.10.~~

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

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

material risks of and reasonably available alternatives to the proposed course of conduct.

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

(g) "Lawyer" denotes a person who is a member of The Florida Bar or otherwise authorized to practice in any court of the State of Florida.

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

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

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

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

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

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

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

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

Comment

Confirmed in Writing

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

Firm

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

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

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

Fraud

[5] When used in these rules, the terms "fraud" or "fraudulent" refer to conduct that has a purpose to deceive. This does not include merely negligent misrepresentation or negligent failure to apprise another of relevant information. For purposes of these rules, it is not necessary that anyone has suffered damages or relied on the misrepresentation or failure to inform.

Informed Consent

[6] Many of the Rules of Professional Conduct require the lawyer to obtain the informed consent of a client or other person (e.g., a former client or, under certain circumstances, a

prospective client) before accepting or continuing representation or pursuing a course of conduct. See, e.g, rules 4-1.2(c), 4-1.6(a) and 4-1.7(b). The communication necessary to obtain such consent will vary according to the rule involved and the circumstances giving rise to the need to obtain informed consent. The lawyer must make reasonable efforts to ensure that the client or other person possesses information reasonably adequate to make an informed decision. Ordinarily, this will require communication that includes a disclosure of the facts and circumstances giving rise to the situation, any explanation reasonably necessary to inform the client or other person of the material advantages and disadvantages of the proposed course of conduct and a discussion of the client's or other person's options and alternatives. In some circumstances it may be appropriate for a lawyer to advise a client or other person to seek the advice of other counsel. A lawyer need not inform a client or other person of facts or implications already known to the client or other person; nevertheless, a lawyer who does not personally inform the client or other person assumes the risk that the client or other person is inadequately informed and the consent is invalid. In determining whether the information and explanation provided are reasonably adequate, relevant factors include whether the client or other person is experienced in legal matters generally and in making decisions of the type involved, and whether the client or other person is independently represented by other counsel in giving the consent. Normally, such persons need less information and explanation than others, and generally a client or other person who is independently represented by other counsel in giving the consent should be assumed to have given informed consent.

[7] Obtaining informed consent will usually require an affirmative response by the client or other person. In general, a lawyer may not assume consent from a client's or other person's silence. Consent may be inferred, however, from the conduct of a client or other person who has reasonably adequate information about the matter. A number of Rules require that a person's consent be confirmed in writing. See, e.g., rule 4-1.7(b). For a definition of "writing" and "confirmed in writing," see terminology above. Other rules require that a client's consent be obtained in a writing signed by the client. See, e.g., rule 4-1.8(a). For a definition of "signed," see terminology above.

Screened

[8] This definition applies to situations where screening of a personally disqualified lawyer is permitted to remove imputation of a conflict of interest under rules 4-1.11 or 4-1.12.

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

avoid any communication with other firm personnel and any contact with any firm files or other materials relating to the matter, written notice and instructions to all other firm personnel forbidding any communication with the screened lawyer relating to the matter, denial of access by the screened lawyer to firm files or other materials relating to the matter and periodic reminders of the screen to the screened lawyer and all other firm personnel.

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

MODEL RULE: 1.1, COMPETENCE

SUMMARY of Substantive Changes Adopted by the ABA House of Delegates

The Rule was not changed. Comments 5 and 6 add that an attorney, by agreement with the client, may limit the scope of representation, that a lawyer keep abreast of changes in the law and practice, and comply with all CLE requirements to which the lawyer is subject.

How Proposed ABA Rule DIFFERS from EXISTING FLORIDA Rule

Florida Rule 4-1.2(c) provides that a lawyer may limit the objectives of the representation if the client consents after consultation. It does not appear that the new comment to Model Rule 1.1 is substantially different from Florida Rule 4-1.2(c).

RECOMMENDATION of Yes or No and REASONS

YES and NO. All changes should be adopted except the last sentence in paragraph 5 of the commentary, "An agreement between the lawyer and the client regarding the scope of the representation may limit the matters for which the lawyer is responsible. See Rule 1.2(c)" because the references properly belong in Rule 4-1.2.

FLORIDA'S Rule in LEGISLATIVE FORMAT

RULE 4-1.1 COMPETENCE

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

Comment

Legal knowledge and skill

[1] In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter, and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question. In many instances the required proficiency is that of a general practitioner. Expertise in a particular field of law may be required in some circumstances.

[2] A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. A newly admitted lawyer can be as competent as a practitioner with long experience. Some important legal skills, such as the

analysis of precedent, the evaluation of evidence and legal drafting, are required in all legal problems. Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge. A lawyer can provide adequate representation in a wholly novel field through necessary study. Competent representation can also be provided through the association of a lawyer of established competence in the field in question.

[3] In an emergency a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required where referral to or consultation or association with another lawyer would be impractical. Even in an emergency, however, assistance should be limited to that reasonably necessary in the circumstances, for ill-considered action under emergency conditions can jeopardize the client's interest.

[4] A lawyer may accept representation where the requisite level of competence can be achieved by reasonable preparation. This applies as well to a lawyer who is appointed as counsel for an unrepresented person. See also rule 4-6.2.

Thoroughness and preparation

[5] Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more ~~elaborate~~ extensive treatment than matters of lesser complexity and consequence. The lawyer should consult with the client about the degree of thoroughness and the level of preparation required as well as the estimated costs involved under the circumstances.

Maintaining competence

[6] To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.

MODEL RULE: 1.2, SCOPE OF REPRESENTATION AND ALLOCATION OF AUTHORITY BETWEEN CLIENT AND LAWYER

SUMMARY of Substantive Changes Adopted by the ABA House of Delegates

1. Subparagraph (a) of the Rule adds a provision that a lawyer may take such action as is impliedly authorized to carry out the representation and a new comment that at the outset of the representation, the client may authorize the lawyer to take specific action on the client's behalf without further consultation.

2. Subparagraph (c) has been changed to provide that: "A lawyer may limit the ~~objectives~~ scope of the representation if the limitation is reasonable under the circumstances and the client ~~consents after consultation~~ gives informed consent."

3. The Rule eliminates subparagraph (e), which provided that "when a lawyer knows that a client expects assistance not permitted by the Rules of Professional Conduct or other law, the lawyer shall consult with the client regarding the relevant limitation on the lawyer's conduct," but sets forth the provisions in paragraph 13 of the comment.

4. The new ABA comment (paragraph 1) eliminates the comment found in the Florida Rule that within limits imposed by law and a lawyer's professional obligations, the client has a right to consult with the attorney about the means to be used in pursuing objectives and that "[a]t the same time, a lawyer is not required to pursue objectives or employ means simply because a client may wish that the lawyer do so. A clear distinction between objectives and means sometimes cannot be drawn, and in many cases the client-lawyer relationship partakes of a joint undertaking. In questions of means, the lawyer should assume responsibility for technical and legal tactical issues, but should defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected. The new ABA comment (paragraph 2) provides a more ambiguous statement that "[o]n occasion, however, a lawyer and a client may disagree about the means to be used to accomplish the client's objectives. Clients normally defer to the special knowledge and skill of their lawyer with respect to the means to be used to accomplish their objectives, particularly with respect to technical, legal, and tactical matters. Conversely, the lawyers then usually defer to the client regarding such questions as the expense to be incurred and the concern for third parties who might be adversely affected." The comment further provides that because of the varied nature of matters about which there might be disagreement, the Rule does not prescribe how such disagreements are to be resolved, but the lawyer should consult with the client and seek a mutually acceptable resolution of the disagreement and if that is unavailing and the lawyer has a fundamental disagreement, the lawyer may withdraw or the client may discharge the lawyer.

5 The new ABA comment (paragraph 3) adds a comment that at the outset of a representation, the client may authorize a lawyer to take specific action on the client's behalf without further

consultation and that absent material change and circumstances, a lawyer may rely on such advance authorization, but that the client may revoke such authorization at any time.

6. The new ABA comment (paragraph 4) changes the term "mental disability" to "diminished capacity" to reflect changes elsewhere in the rules.

7. The new ABA comment (paragraph 6) provides that a lawyer may limit the scope of services to be provided by agreement with the client. This is consistent with the new Florida Rule 12.040 relating to the unbundling of legal services and limited appearances.

8. The new ABA comment (paragraph 7) further discusses limiting the representation if it is reasonable under the circumstances and that although an agreement for a limited representation does not exempt the lawyer from the duty of providing competent representation, it is a factor in determining whether the lawyer acted competently.

9. With respect to the new ABA comment (paragraph 10) that in some cases withdrawal alone when a lawyer knows he is assisting a client in criminal or fraudulent conduct might be insufficient and it may be necessary for a lawyer to give notice of the fact of withdrawal and to disaffirm any opinion, document and affirmance or the like, the current Florida Rule and comment do not make this suggestion.

As noted above, new paragraph 13 is identical to previous subdivision (e) of the rule that was deleted by the ABA.

There are minor changes to other comments that are not substantive.

How ABA Rule DIFFERS from EXISTING FLORIDA Rule

1-. Florida's rule is substantially the same as the prior ABA rule and does not contain the changes.

RECOMMENDATION of Yes or No and REASONS

1-3. **YES and NO**. The ABA Model Rule language should be adopted, except that the current Florida standard of "knows or reasonably should know" should be retained in subsection (d).

4-. **YES and NO as to commentary**. As to ¶ 1 of the comment, the committee recommends against adopting the ABA changes deleting portions of the paragraph stating the following:

> Within those limits, a client also has a right to consult with the lawyer about the means to be used in pursuing those objectives. At the same time, a lawyer is not required to pursue objectives or employ means simply because a client may wish that the lawyer do so. A clear distinction between objectives and means sometimes cannot be drawn, and in many cases the client-lawyer relationship

> partakes of a joint undertaking. In questions of means, the lawyer should assume responsibility for technical and legal tactical issues but should defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected. Law defining the lawyer's scope of authority in litigation varies among jurisdictions.

The committee agreed that new language included in ¶ 1 should be recommended for adoption. However, existing language in ¶ 1 should be retained, because lawyers have relied on this language in the commentary to make certain decisions, such as whether or not to agree to a continuance without objection, without obtaining the client's consent. To remove the language may hamper lawyers from making decisions that have traditionally been the lawyer's province.

Regarding ¶ 2, the committee agreed that the new language in the first sentence and last 3 sentences should be adopted, but the remaining language should not be adopted. Although the committee believes the language accurately describes what normally occurs, the new language in the ABA Model Rule comment, like the deletion of the language in ¶ 1, would lead lawyers to believe that the lawyer is not able to make decisions in tactical matters, which has not been the case in the past.

The present Florida comment refers to Rule 4.1, Truthfulness in Statements to Others, which imposes a duty of truthfulness on a lawyer when dealing with others on a client's behalf. Paragraph 3 of the comment to Rule 4.1 relating to a client's crime or fraud also adds the provision that "sometimes it may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm any opinion, document, affirmation or the like"; that "in extreme cases, substantive law may require a lawyer to disclose information relating to the representation to avoid being deemed to have assisted in the client's crime or fraud"; and that "if the lawyer can avoid assisting in a client's crime or fraud only by disclosing this information, then under paragraph (b), the lawyer is required to do so, unless the disclosure is prohibited by Rule 1.6." The comment entitled "Fraud by Client" to current Florida Rule 4-4.1 provides that "substantive law may require a lawyer to disclose certain information to avoid being deemed to have assisted the client's crime or fraud." The comment to existing Florida Rule 4-1.6 on Confidentiality of Information entitled "Withdrawal" provides, after stating that a lawyer must withdraw if his services will be used by the client in materially furthering a course of criminal or fraudulent conduct, that "the lawyer may also . . . disaffirm any opinion, document, affirmation or the like."

Inasmuch as the requirements of disclosures and disaffirmance are presently in the comments to Rules 4-4.1 and 4-1.6 and are currently a part of the Florida Code of Professional Conduct, it does not appear that the inclusion of the disaffirmance comment in the new ABA Model Rule 1.2 would impose any new duties on attorneys.

The committee notes that The Florida Bar Unbundled Legal Services Special Committee proposed changes to this rule and comment that are currently pending before the Supreme Court of Florida. The committee does not believe that any of these proposed changes conflict with the changes currently pending with the court.

The committee agreed that ¶s 5, 9, and 11 in Florida's rule should be retained as is. The committee recommends that the changes to ¶s 3, 4, 6 (including title), 7, 10, 12, and 13 should be adopted. The committee recommends that ¶ 8 in Florida's rule should be retained as is, with the exception of replacing the word "thus" with "for example."

FLORIDA'S Rule in LEGISLATIVE FORMAT

RULE 4-1.2 SCOPE OF REPRESENTATION

(a) Lawyer to Abide by Client's Decisions. ~~A~~ Subject to subdivisions (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation~~, subject to subdivisions (c), (d), and (e),~~ and, as required by rule 4-1.4, shall reasonably consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to ~~make or accept an offer of settlement of~~ 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) No Endorsement of Client's Views or Activities. 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) Limitation of Objectives of Representation. A lawyer may limit the ~~objectives~~ scope of the representation if the limitation is reasonable under the circumstances and the client ~~consents after consultation~~ gives informed consent.

(d) Criminal or Fraudulent Conduct. A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows or reasonably should know is criminal or fraudulent. However, a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning, or application of the law.

~~**(e) Limitation on Lawyer's Conduct.** When a lawyer knows or reasonably should know that a client expects assistance not permitted by the Rules of Professional Conduct or by law, the lawyer shall consult with the client regarding the relevant limitations on the lawyer's conduct.~~

Comment

~~**Scope of representation**~~ **Allocation of Authority between Client and Lawyer**

[1] ~~Both lawyer and client have authority and responsibility in the objectives and means of representation. The~~ Subdivision (c) confers upon the client ~~has~~ the ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law

and the lawyer's professional obligations. Within those limits, a client also has a right to consult with the lawyer about the means to be used in pursuing those objectives. At the same time, a lawyer is not required to pursue objectives or employ means simply because a client may wish that the lawyer do so. A clear distinction between objectives and means sometimes cannot be drawn, and in many cases the client-lawyer relationship partakes of a joint undertaking. In questions of means, the lawyer should assume responsibility for technical and legal tactical issues but should defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected. Law defining the lawyer's scope of authority in litigation varies among jurisdictions. The decisions specified in subdivision (a), such as whether to settle a civil matter, must also be made by the client. See rule 4-1.4(a)(1) for the lawyer's duty to communicate with the client about such decisions. With respect to the means by which the client's objectives are to be pursued, the lawyer shall consult with the client as required by rule 4-1.4(a)(2) and may take such action as is impliedly authorized to carry out the representation.

[2] On occasion, however, a lawyer and a client may disagree about the means to be used to accomplish the client's objectives. The lawyer should consult with the client and seek a mutually acceptable resolution of the disagreement. If such efforts are unavailing and the lawyer has a fundamental disagreement with the client, the lawyer may withdraw from the representation. See rule 4-1.16(b)(4). Conversely, the client may resolve the disagreement by discharging the lawyer. See rule 4-1.16(a)(3).

[3] At the outset of a representation, the client may authorize the lawyer to take specific action on the client's behalf without further consultation. Absent a material change in circumstances and subject to Rule 1.4, a lawyer may rely on such an advance authorization. The client may, however, revoke such authority at any time.

[4] In a case in which the client appears to be suffering ~~mental disability~~ diminished capacity, the lawyer's duty to abide by the client's decisions is to be guided by reference to rule 4-1.14.

Independence from client's views or activities

[5] Legal representation should not be denied to people who are unable to afford legal services or whose cause is controversial or the subject of popular disapproval. By the same token representing a client does not constitute approval of the client's views or activities.

~~Services limited in objectives or means~~ Agreements Limiting Scope of Representation

[6] The ~~objectives or~~ scope of services to be provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer's services are made available to the client. ~~For example, a retainer may be for a specifically defined purpose. Representation provided through a legal aid agency may be subject to limitations on the types of cases the agency handles.~~ When a lawyer has been retained by an insurer to represent an insured, for

example, the representation may be limited to matters related to the insurance coverage. ~~The~~ A limited representation may be appropriate because the client has limited objectives for the representation. In addition, the terms upon which representation is undertaken may exclude specific ~~objectives or~~ means that might otherwise be used to accomplish the client's objectives. Such limitations may exclude ~~objectives or means~~ actions that the client thinks are too costly or that the lawyer regards as repugnant or imprudent.

[7] Although this Rule affords the lawyer and client substantial latitude to limit the representation, the limitation must be reasonable under the circumstances. If, for example, a client's objective is limited to securing general information about the law the client needs in order to handle a common and typically uncomplicated legal problem, the lawyer and client may agree that the lawyer's services will be limited to a brief telephone consultation. Such a limitation, however, would not be reasonable if the time allotted was not sufficient to yield advice upon which the client could rely. Although an agreement for a limited representation does not exempt a lawyer from the duty to provide competent representation, the limitation is a factor to be considered when determining the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. See rule 4-1.1.

[8] An agreement concerning the scope of representation must accord with the Rules of Professional Conduct and law. ~~Thus~~ For example, the client may not be asked to agree to representation so limited in scope as to violate rule 4-1.1 or to surrender the right to terminate the lawyer's services or the right to settle litigation that the lawyer might wish to continue.

Criminal, fraudulent, and prohibited transactions

[9] A lawyer is required to give an honest opinion about the actual consequences that appear likely to result from a client's conduct. The fact that a client uses advice in a course of action that is criminal or fraudulent does not, of itself, make a lawyer a party to the course of action. However, a lawyer may not assist a client in conduct that the lawyer knows or reasonably should know to be criminal or fraudulent. There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity.

[10] When the client's course of action has already begun and is continuing, the lawyer's responsibility is especially delicate. ~~The lawyer is not permitted to reveal the client's wrongdoing, except where permitted or required by rule 4-1.6. However, the~~ The lawyer is required to avoid ~~furthering the purpose~~ assisting the client, for example, by drafting or delivering documents that the lawyer knows are fraudulent or by suggesting how ~~it~~ the wrongdoing might be concealed. A lawyer may not continue assisting a client in conduct that the lawyer originally ~~supposes is~~ supposed was legally proper but then discovers is criminal or fraudulent. ~~Withdrawal~~ The lawyer must, therefore, withdraw from the representation~~, therefore, may be required~~ of the client in the matter. See rule 4-1.16(a). In some cases, withdrawal alone might be insufficient. It may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm any opinion, document, affirmation or the like. See rule 4-4.1.

[11] Where the client is a fiduciary, the lawyer may be charged with special obligations in dealings with a beneficiary.

[12] Subdivision (d) applies whether or not the defrauded party is a party to the transaction. ~~Hence~~ For example, a lawyer ~~should~~ must not participate in a ~~sham~~ transaction~~; for example, a transaction~~ to effectuate criminal or fraudulent ~~escape~~ avoidance of tax liability. Subdivision (d) does not preclude undertaking a criminal defense incident to a general retainer for legal services to a lawful enterprise. The last sentence of subdivision (d) recognizes that determining the validity or interpretation of a statute or regulation may require a course of action involving disobedience of the statute or regulation or of the interpretation placed upon it by governmental authorities.

[13] If a lawyer comes to know or reasonably should know that a client expects assistance not permitted by the Rules of Professional Conduct or other law or if the lawyer intends to act contrary to the client's instructions, the lawyer must consult with the client regarding the limitations on the lawyer's conduct. See Rule 1.4(a)(5).

MODEL RULE: 1.3, DILIGENCE

SUMMARY of Substantive Changes Adopted by the ABA House of Delegates

No substantive changes to the rule.

How Proposed ABA Rule DIFFERS from EXISTING FLORIDA Rule

The comment adds that the lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect; that a lawyer's workload must be controlled so that each matter can be handled competently; that a lawyer's duty to act with reasonable promptness does not preclude the lawyer from agreeing to a reasonable request for a postponement that will not prejudice the lawyer's client; and that, to prevent neglect of client matters in the event of a sole practitioner's death or disability, the duty of due diligence may require each sole practitioner to prepare a plan designating another competent lawyer to review client files and notify the clients of the lawyer's death or disability and determine the need for protective action.

RECOMMENDATION of Yes or No and REASONS

YES and **NO**. Adopt the changes to the commentary which promote the civility initiative. Do not adopt the obligations imposed on sole practitioners as they are discriminatory. The Florida Bar Disciplinary Procedures Committee is independently reviewing a proposed change to Rule 1-3.8 that would require that sole practitioners designate a Florida Bar member who has agreed to act as inventory attorney in the event that the sole practitioner dies or becomes incapacitated.

FLORIDA'S Rule in LEGISLATIVE FORMAT

RULE 4-1.3 DILIGENCE

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

Comment

[1] A lawyer should pursue a matter on behalf of a client despite opposition, obstruction, or personal inconvenience to the lawyer and ~~may~~ take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer ~~should~~ must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf. ~~However, a~~ A lawyer is not bound, however, to press for every advantage that might be realized for a client. ~~A~~ For example, a lawyer ~~has~~ may have authority to exercise professional discretion in determining the means by which a matter should be pursued. See rule 4-1.2. ~~A lawyer's workload should be controlled so that each matter can be handled adequately.~~ The lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect.

[2] A lawyer's workload must be controlled so that each matter can be handled competently.

[3] Perhaps no professional shortcoming is more widely resented than procrastination. A client's interests often can be adversely affected by the passage of time or the change of conditions; in extreme instances, as when a lawyer overlooks a statute of limitations, the client's legal position may be destroyed. Even when the client's interests are not affected in substance, however, unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer. A lawyer's duty to act with reasonable promptness, however, does not preclude the lawyer from agreeing to a reasonable request for a postponement that will not prejudice the lawyer's client.

[4] Unless the relationship is terminated as provided in rule 4-1.16, a lawyer should carry through to conclusion all matters undertaken for a client. If a lawyer's employment is limited to a specific matter, the relationship terminates when the matter has been resolved. If a lawyer has served a client over a substantial period in a variety of matters, the client sometimes may assume that the lawyer will continue to serve on a continuing basis unless the lawyer gives notice of withdrawal. Doubt about whether a client-lawyer relationship still exists should be clarified by the lawyer, preferably in writing, so that the client will not mistakenly suppose the lawyer is looking after the client's affairs when the lawyer has ceased to do so. For example, if a lawyer has handled a judicial or administrative proceeding that produced a result adverse to the client ~~but has not been specifically instructed concerning pursuit of an~~ and the lawyer and the client have not agreed that the lawyer will handle the matter on appeal, the lawyer ~~should advise~~ must consult with the client ~~of~~ about the possibility of appeal before relinquishing responsibility for the matter. See rule 4-1.4(a)(2). Whether the lawyer is obligated to prosecute the appeal for the client depends on the scope of the representation the lawyer has agreed to provide to the client. See rule 4-1.2.

MODEL RULE: 1.4, COMMUNICATION

SUMMARY of Substantive Changes Adopted by the ABA House of Delegates

In lieu of a general statement in the prior rule that a lawyer shall keep reasonably informed about the status of a matter and promptly comply with reasonable requests for information, the new rule specifically requires that the lawyer (1) promptly inform the client of any decision or circumstances with respect to which the client's informed consent is required; (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 reasonable requests for information; and (5) consult with the client about any relevant limitations on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the rules.

How Proposed ABA Rule DIFFERS from EXISTING FLORIDA Rule

The rule and commentary expands the lawyer's duty to communicate with the client and the duty is more explicit. It also adds the duty to consult with client about limitations on lawyer's conduct. The new comment provides that "client telephone calls should be promptly returned or acknowledged," moves the comment that "Practical exigency may also require a lawyer to act for a client without prior consultation," to ¶ 3 of the commentary, and adds that a lawyer may not withhold information to serve the interest or convenience of another person.

RECOMMENDATION of Yes or No and REASONS

YES with modification. The committee recommends that 1.4(a)(5) standard of "knows" be changed to "knows or reasonably should know" to comport with the standard currently in Florida's Rules.

FLORIDA'S Rule in LEGISLATIVE FORMAT

RULE 4-1.4 COMMUNICATION

(a) Informing Client of Status of Representation. A lawyer shall ~~keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.~~:

(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in terminology, is required by these rules;

(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 reasonable requests for information; and

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

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

Comment

[1] Reasonable communication between the lawyer and the client is necessary for the client effectively to participate in the representation.

Communicating with Client

[2] If these Rules require that a particular decision about the representation be made by the client, paragraph (a)(1) requires that the lawyer promptly consult with and secure the client's consent prior to taking action unless prior discussions with the client have resolved what action the client wants the lawyer to take. For example, a lawyer who receives from opposing counsel an offer of settlement in a civil controversy or a proffered plea bargain in a criminal case must promptly inform the client of its substance unless the client has previously indicated that the proposal will be acceptable or unacceptable or has authorized the lawyer to accept or to reject the offer. See Rule 1.2(a).

[3] Paragraph (a)(2) requires the lawyer to reasonably consult with the client about the means to be used to accomplish the client's objectives. In some situations - depending on both the importance of the action under consideration and the feasibility of consulting with the client - this duty will require consultation prior to taking action. In other circumstances, such as during a trial when an immediate decision must be made, the exigency of the situation may require the lawyer to act without prior consultation. In such cases the lawyer must nonetheless act reasonably to inform the client of actions the lawyer has taken on the client's behalf. Additionally, paragraph (a)(3) requires that the lawyer keep the client reasonably informed about the status of the matter, such as significant developments affecting the timing or the substance of the representation.

[4] A lawyer's regular communication with clients will minimize the occasions on which a client will need to request information concerning the representation. When a client makes a reasonable request for information, however, paragraph (a)(4) requires prompt compliance with the request, or if a prompt response is not feasible, that the lawyer, or a member of the lawyer's staff, acknowledge receipt of the request and advise the client when a response may be expected. Client telephone calls should be promptly returned or acknowledged.

Explaining Matters

[5] The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so. ~~For example, a lawyer negotiating on behalf of a client should provide the client with facts relevant to the matter, inform the client of communications from another party, and take other reasonable steps that permit the client to make a decision regarding a serious offer from another party. A lawyer who receives from opposing counsel an offer of settlement in a civil controversy or a proffered plea bargain in a criminal case should promptly inform the client of its substance unless prior discussions with the client have left it clear that the proposal will be unacceptable. See rule 4-1.2(a). Even when a client delegates authority to the lawyer, the client should be kept advised of the status of the matter.~~ Adequacy of communication depends in part on the kind of advice or assistance that is involved. For example, ~~in negotiations where~~ when there is time to explain a proposal made in a negotiation, the lawyer should review all important provisions with the client before proceeding to an agreement. In litigation a lawyer should explain the general strategy and prospects of success and ordinarily should consult the client on tactics that ~~might~~ are likely to result in significant expense or to injure or coerce others. On the other hand, a lawyer ordinarily ~~cannot~~ will not be expected to describe trial or negotiation strategy in detail. The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests and the client's overall requirements as to the character of representation. In certain circumstances, such as when a lawyer asks a client to consent to a representation affected by a conflict of interest, the client must give informed consent, as defined in terminology.

[6] Ordinarily, the information to be provided is that appropriate for a client who is a comprehending and responsible adult. However, fully informing the client according to this standard may be impracticable, for example, where the client is a child or suffers from ~~mental disability~~ diminished capacity. See rule 4-1.14. When the client is an organization or group, it is often impossible or inappropriate to inform every one of its members about its legal affairs; ordinarily, the lawyer should address communications to the appropriate officials of the organization. See rule 4-1.13. Where many routine matters are involved, a system of limited or occasional reporting may be arranged with the client. ~~Practical exigency may also require a lawyer to act for a client without prior consultation.~~

Withholding information

[7] In some circumstances, a lawyer may be justified in delaying transmission of information when the client would be likely to react imprudently to an immediate communication. Thus, a lawyer might withhold a psychiatric diagnosis of a client when the examining psychiatrist indicates that disclosure would harm the client. A lawyer may not withhold information to serve the lawyer's own interest or convenience or the interests or convenience of another person. Rules or court orders governing litigation may provide that information supplied to a lawyer may not be disclosed to the client. Rule 4-3.4(c) directs

879 compliance with such rules or orders.

MODEL RULE: 1.5, FEES

SUMMARY of Substantive Changes Adopted by the ABA House of Delegates

1. Changes the text of the rule from providing that a lawyer's fees shall be reasonable to prohibiting a lawyer from making an agreement for, charge or collect an unreasonable fee or an unreasonable amount of expenses in subparagraph (a). Sets forth the factors to be considered in determining the reasonableness of a fee.

2. Adds that the lawyer must communicate the scope of representation and that any changes in the basis or rate of the fee must be communicated to the client in subparagraph (b).

3. Requires that all contingent fee contracts be signed by the client and that the contract must inform the client of any expenses that the client will be responsible for in subparagraph (c).

4. Requires that all division of fees between lawyers in different firms that is not proportional to services provided by the lawyers consent to the agreement with confirmation in writing.

How Proposed ABA Rule DIFFERS from EXISTING FLORIDA Rule

1. Florida Rule 4-1.5 already prohibits an attorney from entering into an agreement to charge a clearly excessive fee, so the change to the Model Rule brings it in line with the Florida Rule. The Model Rule explicitly prohibits unreasonable expenses and the commentary also provides that a lawyer may seek reimbursement for the cost of services performed in-house, such as copying and telephone charges, charging a reasonable amount to which the client has agreed in advance or by charging an amount that reasonably reflects the cost incurred by the lawyer.

The commentary relating to the prohibition against contingent fees in domestic cases provides that the provision does not preclude a contract for a contingent fee for legal representation in connection with the recovery of post-judgment balances due under support, alimony or other financial orders. Although the commentary to the Florida Rule does not cover this question, Florida ethics opinions have approved contingent fees in these circumstances.

2. Florida's Rule 4-1.5(e) is substantially the same as the old ABA Model Rule 4-1.5(b) and does not contain the provisions regarding scope of representation or changes to the rate of fee or expenses.

3. Florida's Rule 4-1.5(f) already requires that all contingent fee contracts be signed by the client and other contingent fee requirements are much more extensive than the ABA model rule.

4. Florida's Rule 4-1.5(g)(2) already provides that division of fees be in writing and signed by the client, offering more protection than the ABA rule.

RECOMMENDATION of Yes or No and REASONS

1. **YES and NO**. The current Florida Rule is more comprehensive and the vast majority of the Florida rule should be maintained as is. However, Florida should adopt ¶6 of the commentary on "Prohibited contingent fees," because that paragraph offers a more full explanation regarding permitting contingent fees to collect arrearages in domestic cases, and the similar provision in the current Florida Rule 4-1.5 in the last paragraph of the commentary under "Terms of Payment" should be deleted.

2. **NO**. There is case law in Florida that indicates that a lawyer may not unilaterally change an agreed upon fee. *In re Estate of Johnson*, 566 So.2d 1345 (Fla. 4th DCA 1990); *Mercy Hospital, Inc. v. Johnson*, 390 So.2d 103 (Fla. 3d DCA 1980); *The Florida Bar v. Hollander*, 594 So.2d. 307 (Fla. 1992); *The Florida Bar v. Murphy*, 614 So.2d 1090 (Fla. 1993); *Searcy, Denney, Scarola, Barnhart & Shipley, P.A. v. Scheller*, 629 So.2d 947 (Fla. 4th DCA 1993.

3. **NO**. Florida's Rule 4-1.5(f) already requires that all contingent fee contracts be signed by the client and other contingent fee requirements are much more extensive than the ABA model rule.

4. **NO**. Florida's Rule 4-1.5(g)(2) already requires division of fees not in proportion to services provided be in writing and provides more protection than the ABA model rule by requiring that the client consent in writing.

FLORIDA'S Rule in LEGISLATIVE FORMAT

RULE 4-1.5 FEES FOR LEGAL SERVICES

(a) Illegal, Prohibited, or Clearly Excessive Fees. An attorney shall not enter into an agreement for, charge, or collect an illegal, prohibited, or clearly excessive fee or a fee generated by employment that was obtained through advertising or solicitation not in compliance with the Rules Regulating The Florida Bar. A fee is clearly excessive when:

(1) after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee exceeds a reasonable fee for services provided to such a degree as to constitute clear overreaching or an unconscionable demand by the attorney; or

(2) the fee is sought or secured by the attorney by means of intentional misrepresentation or fraud upon the client, a nonclient party, or any court, as to either entitlement to, or amount of, the fee.

(b) Factors to Be Considered in Determining Reasonable Fee. Factors to be considered as guides in determining a reasonable fee include:

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

(2) the likelihood that the acceptance of the particular employment will preclude other

employment by the lawyer;

(3) the fee, or rate of fee, customarily charged in the locality for legal services of a comparable or similar nature;

(4) the significance of, or amount involved in, the subject matter of the representation, the responsibility involved in the representation, and the results obtained;

(5) the time limitations imposed by the client or by the circumstances and, as between attorney and client, any additional or special time demands or requests of the attorney by the client;

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

(7) the experience, reputation, diligence, and ability of the lawyer or lawyers performing the service and the skill, expertise, or efficiency of effort reflected in the actual providing of such services; and

(8) whether the fee is fixed or contingent, and, if fixed as to amount or rate, then whether the client's ability to pay rested to any significant degree on the outcome of the representation.

(c) Consideration of All Factors. In determining a reasonable fee, the time devoted to the representation and customary rate of fee need not be the sole or controlling factors. All factors set forth in this rule should be considered, and may be applied, in justification of a fee higher or lower than that which would result from application of only the time and rate factors.

(d) Enforceability of Fee Contracts. Contracts or agreements for attorney's fees between attorney and client will ordinarily be enforceable according to the terms of such contracts or agreements, unless found to be illegal, obtained through advertising or solicitation not in compliance with the Rules Regulating The Florida Bar, prohibited by this rule, or clearly excessive as defined by this rule.

(e) Duty to Communicate Basis or Rate of Fee to Client. When the lawyer has not regularly represented the client, the basis or rate of the fee shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation.

(f) Contingent Fees. As to contingent fees:

(1) 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 subdivision (f)(3) or by law. A contingent fee agreement shall be in writing and shall state 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 after the contingent fee is

calculated. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

(2) Every lawyer who accepts a retainer or enters into an agreement, express or implied, for compensation for services rendered or to be rendered in any action, claim, or proceeding whereby the lawyer's compensation is to be dependent or contingent in whole or in part upon the successful prosecution or settlement thereof shall do so only where such fee arrangement is reduced to a written contract, signed by the client, and by a lawyer for the lawyer or for the law firm representing the client. No lawyer or firm may participate in the fee without the consent of the client in writing. Each participating lawyer or law firm shall sign the contract with the client and shall agree to assume joint legal responsibility to the client for the performance of the services in question as if each were partners of the other lawyer or law firm involved. The client shall be furnished with a copy of the signed contract and any subsequent notices or consents. All provisions of this rule shall apply to such fee contracts.

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

(A) any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony or support, or property settlement in lieu thereof; or

(B) a contingent fee for representing a defendant in a criminal case.

(4) A lawyer who enters into an arrangement for, charges, or collects any fee in an action or claim for personal injury or for property damages or for death or loss of services resulting from personal injuries based upon tortious conduct of another, including products liability claims, whereby the compensation is to be dependent or contingent in whole or in part upon the successful prosecution or settlement thereof shall do so only under the following requirements:

(A) The contract shall contain the following provisions:

(i) "The undersigned client has, before signing this contract, received and read the statement of client's rights and understands each of the rights set forth therein. The undersigned client has signed the statement and received a signed copy to refer to while being represented by the undersigned attorney(s)."

(ii) "This contract may be cancelled by written notification to the attorney at any time within 3 business days of the date the contract was signed, as shown below, and if cancelled the client shall not be obligated to pay any fees to the attorney for the work performed during that time. If the attorney has advanced funds to others in representation of the client, the attorney is entitled to be reimbursed for such amounts as the attorney has reasonably advanced on behalf of the client."

(B) The contract for representation of a client in a matter set forth in subdivision (f)(4) may provide for a contingent fee arrangement as agreed upon by the client and the lawyer, except as limited by the following provisions:

(i) Without prior court approval as specified below, any contingent fee that exceeds the following standards shall be presumed, unless rebutted, to be clearly excessive:

a. Before the filing of an answer or the demand for appointment of arbitrators or, if no answer is filed or no demand for appointment of arbitrators is made, the expiration of the time period provided for such action:

1. 33 1/3% of any recovery up to $1 million; plus

2. 30% of any portion of the recovery between $1 million and $2 million; plus

3. 20% of any portion of the recovery exceeding $2 million.

b. After the filing of an answer or the demand for appointment of arbitrators or, if no answer is filed or no demand for appointment of arbitrators is made, the expiration of the time period provided for such action, through the entry of judgment:

1. 40% of any recovery up to $1 million; plus

2. 30% of any portion of the recovery between $1 million and $2 million; plus

3. 20% of any portion of the recovery exceeding $2 million.

c. If all defendants admit liability at the time of filing their answers and request a trial only on damages:

1. 33 1/3% of any recovery up to $1 million; plus

2. 20% of any portion of the recovery between $1 million and $2 million; plus

3. 15% of any portion of the recovery exceeding $2 million.

d. An additional 5% of any recovery after institution of any appellate proceeding is filed or post-judgment relief or action is required for recovery on the judgment.

(ii) If any client is unable to obtain an attorney of the client's choice because of the limitations set forth in subdivision (f)(4)(B)(i), the client may petition the court in

which the matter would be filed, if litigation is necessary, or if such court will not accept jurisdiction for the fee division, the circuit court wherein the cause of action arose, for approval of any fee contract between the client and an attorney of the client's choosing. Such authorization shall be given if the court determines the client has a complete understanding of the client's rights and the terms of the proposed contract. The application for authorization of such a contract can be filed as a separate proceeding before suit or simultaneously with the filing of a complaint. Proceedings thereon may occur before service on the defendant and this aspect of the file may be sealed. A petition under this subdivision shall contain a certificate showing service on the client and The Florida Bar in Tallahassee. Authorization of such a contract shall not bar subsequent inquiry as to whether the fee actually claimed or charged is clearly excessive under subdivisions (a) and (b).

(C) Before a lawyer enters into a contingent fee contract for representation of a client in a matter set forth in this rule, the lawyer shall provide the client with a copy of the statement of client's rights and shall afford the client a full and complete opportunity to understand each of the rights as set forth therein. A copy of the statement, signed by both the client and the lawyer, shall be given to the client to retain and the lawyer shall keep a copy in the client's file. The statement shall be retained by the lawyer with the written fee contract and closing statement under the same conditions and requirements as subdivision (f)(5).

(D) As to lawyers not in the same firm, a division of any fee within subdivision (f)(4) shall be on the following basis:

(i) To the lawyer assuming primary responsibility for the legal services on behalf of the client, a minimum of 75% of the total fee.

(ii) To the lawyer assuming secondary responsibility for the legal services on behalf of the client, a maximum of 25% of the total fee. Any fee in excess of 25% shall be presumed to be clearly excessive.

(iii) The 25% limitation shall not apply to those cases in which 2 or more lawyers or firms accept substantially equal active participation in the providing of legal services. In such circumstances counsel shall apply to the court in which the matter would be filed, if litigation is necessary, or if such court will not accept jurisdiction for the fee division, the circuit court wherein the cause of action arose, for authorization of the fee division in excess of 25%, based upon a sworn petition signed by all counsel that shall disclose in detail those services to be performed. The application for authorization of such a contract may be filed as a separate proceeding before suit or simultaneously with the filing of a complaint, or within 10 days of execution of a contract for division of fees when new counsel is engaged. Proceedings thereon may occur before service of process on any party and this aspect of the file may be sealed. Authorization of such contract shall not bar subsequent inquiry as to whether the fee actually claimed or charged is clearly excessive. An application under this subdivision shall contain a certificate showing service on the client and The Florida Bar. Counsel may proceed with representation of the client pending court approval.

(iv) The percentages required by this subdivision shall be applicable after deduction of any fee payable to separate counsel retained especially for appellate purposes.

(5) In the event there is a recovery, upon the conclusion of the representation, the lawyer shall prepare a closing statement reflecting an itemization of all costs and expenses, together with the amount of fee received by each participating lawyer or law firm. A copy of the closing statement shall be executed by all participating lawyers, as well as the client, and each shall receive a copy. Each participating lawyer shall retain a copy of the written fee contract and closing statement for 6 years after execution of the closing statement. Any contingent fee contract and closing statement shall be available for inspection at reasonable times by the client, by any other person upon judicial order, or by the appropriate disciplinary agency.

(6) In cases in which the client is to receive a recovery that will be paid to the client on a future structured or periodic basis, the contingent fee percentage shall be calculated only on the cost of the structured verdict or settlement or, if the cost is unknown, on the present money value of the structured verdict or settlement, whichever is less. If the damages and the fee are to be paid out over the long term future schedule, this limitation does not apply. No attorney may negotiate separately with the defendant for that attorney's fee in a structured verdict or settlement when separate negotiations would place the attorney in a position of conflict.

(g) Division of Fees Between Lawyers in Different Firms. Subject to the provisions of subdivision (f)(4)(D), a division of fee between lawyers who are not in the same firm may be made only if the total fee is reasonable and:

(1) the division is in proportion to the services performed by each lawyer; or

(2) by written agreement with the client:

(A) each lawyer assumes joint legal responsibility for the representation and agrees to be available for consultation with the client; and

(B) the agreement fully discloses that a division of fees will be made and the basis upon which the division of fees will be made.

(h) Credit Plans. Charges made by any lawyer or law firm under an approved credit plan shall be only for services actually rendered or cash actually paid on behalf of the client. No higher fee shall be charged and no additional charge shall be imposed by reason of a lawyer's or law firm's participation in an approved credit plan.

STATEMENT OF CLIENT'S RIGHTS FOR CONTINGENCY FEES

Before you, the prospective client, arrange a contingent fee agreement with a lawyer, you should understand this statement of your rights as a client. This statement is not a part of the

actual contract between you and your lawyer, but, as a prospective client, you should be aware of these rights:

1. There is no legal requirement that a lawyer charge a client a set fee or a percentage of money recovered in a case. You, the client, have the right to talk with your lawyer about the proposed fee and to bargain about the rate or percentage as in any other contract. If you do not reach an agreement with one lawyer you may talk with other lawyers.

2. Any contingent fee contract must be in writing and you have 3 business days to reconsider the contract. You may cancel the contract without any reason if you notify your lawyer in writing within 3 business days of signing the contract. If you withdraw from the contract within the first 3 business days, you do not owe the lawyer a fee although you may be responsible for the lawyer's actual costs during that time. If your lawyer begins to represent you, your lawyer may not withdraw from the case without giving you notice, delivering necessary papers to you, and allowing you time to employ another lawyer. Often, your lawyer must obtain court approval before withdrawing from a case. If you discharge your lawyer without good cause after the 3-day period, you may have to pay a fee for work the lawyer has done.

3. Before hiring a lawyer, you, the client, have the right to know about the lawyer's education, training, and experience. If you ask, the lawyer should tell you specifically about the lawyer's actual experience dealing with cases similar to yours. If you ask, the lawyer should provide information about special training or knowledge and give you this information in writing if you request it.

4. Before signing a contingent fee contract with you, a lawyer must advise you whether the lawyer intends to handle your case alone or whether other lawyers will be helping with the case. If your lawyer intends to refer the case to other lawyers, the lawyer should tell you what kind of fee sharing arrangement will be made with the other lawyers. If lawyers from different law firms will represent you, at least 1 lawyer from each law firm must sign the contingent fee contract.

5. If your lawyer intends to refer your case to another lawyer or counsel with other lawyers, your lawyer should tell you about that at the beginning. If your lawyer takes the case and later decides to refer it to another lawyer or to associate with other lawyers, you should sign a new contract that includes the new lawyers. You, the client, also have the right to consult with each lawyer working on your case and each lawyer is legally responsible to represent your interests and is legally responsible for the acts of the other lawyers involved in the case.

6. You, the client, have the right to know in advance how you will need to pay the expenses and the legal fees at the end of the case. If you pay a deposit in advance for costs, you may ask reasonable questions about how the money will be or has been spent and how much of it remains unspent. Your lawyer should give a reasonable estimate about future necessary costs. If your lawyer agrees to lend or advance you money to prepare or research the case, you have the right to know periodically how much money your lawyer has spent on your behalf. You also

have the right to decide, after consulting with your lawyer, how much money is to be spent to prepare a case. If you pay the expenses, you have the right to decide how much to spend. Your lawyer should also inform you whether the fee will be based on the gross amount recovered or on the amount recovered minus the costs.

7. You, the client, have the right to be told by your lawyer about possible adverse consequences if you lose the case. Those adverse consequences might include money that you might have to pay to your lawyer for costs and liability you might have for attorney's fees, costs, and expenses to the other side.

8. You, the client, have the right to receive and approve a closing statement at the end of the case before you pay any money. The statement must list all of the financial details of the entire case, including the amount recovered, all expenses, and a precise statement of your lawyer's fee. Until you approve the closing statement you need not pay any money to anyone, including your lawyer. You also have the right to have every lawyer or law firm working on your case sign this closing statement.

9. You, the client, have the right to ask your lawyer at reasonable intervals how the case is progressing and to have these questions answered to the best of your lawyer's ability.

10. You, the client, have the right to make the final decision regarding settlement of a case. Your lawyer must notify you of all offers of settlement before and after the trial. Offers during the trial must be immediately communicated and you should consult with your lawyer regarding whether to accept a settlement. However, you must make the final decision to accept or reject a settlement.

11. If at any time you, the client, believe that your lawyer has charged an excessive or illegal fee, you have the right to report the matter to The Florida Bar, the agency that oversees the practice and behavior of all lawyers in Florida. For information on how to reach The Florida Bar, call 850/561-5600, or contact the local bar association. Any disagreement between you and your lawyer about a fee can be taken to court and you may wish to hire another lawyer to help you resolve this disagreement. Usually fee disputes must be handled in a separate lawsuit, unless your fee contract provides for arbitration. You can request, but may not require, that a provision for arbitration (under Chapter 682, Florida Statutes, or under the fee arbitration rule of the Rules Regulating The Florida Bar) be included in your fee contract.

_____	_____
Client Signature	Attorney Signature
_____	_____
Date	Date

Comment

Basis or rate of fee

[1] When the lawyer has regularly represented a client, they ordinarily will have evolved an understanding concerning the basis or rate of the fee. In a new client-lawyer relationship, however, an understanding as to the fee should be promptly established. It is not necessary to recite all the factors that underlie the basis of the fee but only those that are directly involved in its computation. It is sufficient, for example, to state the basic rate is an hourly charge or a fixed amount or an estimated amount, or to identify the factors that may be taken into account in finally fixing the fee. When developments occur during the representation that render an earlier estimate substantially inaccurate, a revised estimate should be provided to the client. A written statement concerning the fee reduces the possibility of misunderstanding. Furnishing the client with a simple memorandum or a copy of the lawyer's customary fee schedule is sufficient if the basis or rate of the fee is set forth.

[2] Rule 4-1.8(e) should be consulted regarding a lawyer's providing financial assistance to a client in connection with litigation.

Terms of payment

[3] A lawyer may require advance payment of a fee but is obliged to return any unearned portion. See rule 4-1.16(d). A lawyer is not, however, required to return retainers that, pursuant to an agreement with a client, are not refundable. A lawyer may accept property in payment for services, such as an ownership interest in an enterprise, providing this does not involve acquisition of a proprietary interest in the cause of action or subject matter of the litigation contrary to rule 4-1.8(i). However, a fee paid in property instead of money may be subject to special scrutiny because it involves questions concerning both the value of the services and the lawyer's special knowledge of the value of the property.

[4] An agreement may not be made whose terms might induce the lawyer improperly to curtail services for the client or perform them in a way contrary to the client's interest. For example, a lawyer should not enter into an agreement whereby services are to be provided only up to a stated amount when it is foreseeable that more extensive services probably will be required, unless the situation is adequately explained to the client. Otherwise, the client might have to bargain for further assistance in the midst of a proceeding or transaction. However, it is proper to define the extent of services in light of the client's ability to pay. A lawyer should not exploit a fee arrangement based primarily on hourly charges by using wasteful procedures. When there is doubt whether a contingent fee is consistent with the client's best interest, the lawyer should offer the client alternative bases for the fee and explain their implications. Applicable law may impose limitations on contingent fees, such as a ceiling on the percentage.

~~Rule 4-1.5(f)(3) does not apply to lawyers seeking to obtain or enforce judgments for arrearages.~~

Prohibited Contingent Fees

[5] Paragraph (d) prohibits a lawyer from charging a contingent fee in a domestic

relations matter when payment is contingent upon the securing of a divorce or upon the amount of alimony or support or property settlement to be obtained. This provision does not preclude a contract for a contingent fee for legal representation in connection with the recovery of post-judgment balances due under support, alimony or other financial orders because such contracts do not implicate the same policy concerns.

Contingent fee regulation

[6] Rule 4-1.5(f)(4) should not be construed to apply to actions or claims seeking property or other damages arising in the commercial litigation context.

[7] Rule 4-1.5(f)(4)(B) is intended to apply only to contingent aspects of fee agreements. In the situation where a lawyer and client enter a contract for part noncontingent and part contingent attorney's fees, rule 4-1.5(f)(4)(B) should not be construed to apply to and prohibit or limit the noncontingent portion of the fee agreement. An attorney could properly charge and retain the noncontingent portion of the fee even if the matter was not successfully prosecuted or if the noncontingent portion of the fee exceeded the schedule set forth in rule 4-1.5(f)(4)(B). Rule 4-1.5(f)(4)(B) should, however, be construed to apply to any additional contingent portion of such a contract when considered together with earned noncontingent fees. Thus, under such a contract a lawyer may demand or collect only such additional contingent fees as would not cause the total fees to exceed the schedule set forth in rule 4-1.5(f)(4)(B).

[8] The limitations in rule 4-1.5(f)(4)(B)(i)c are only to be applied in the case where all the defendants admit liability at the time they file their initial answer and the trial is only on the issue of the amount or extent of the loss or the extent of injury suffered by the client. If the trial involves not only the issue of damages but also such questions as proximate cause, affirmative defenses, seat belt defense, or other similar matters, the limitations are not to be applied because of the contingent nature of the case being left for resolution by the trier of fact.

[9] Rule 4-1.5(f)(4)(B)(ii) provides the limitations set forth in subdivision (f)(4)(B)(i) may be waived by the client upon approval by the appropriate judge. This waiver provision may not be used to authorize a lawyer to charge a client a fee that would exceed rule 4-1.5(a) or (b). It is contemplated that this waiver provision will not be necessary except where the client wants to retain a particular lawyer to represent the client or the case involves complex, difficult, or novel questions of law or fact that would justify a contingent fee greater than the schedule but not a contingent fee that would exceed rule 4-1.5(b).

[10] Upon a petition by a client, the trial court reviewing the waiver request must grant that request if the trial court finds the client: (a) understands the right to have the limitations in rule 4-1.5(f)(4)(B) applied in the specific matter; and (b) understands and approves the terms of the proposed contract. The consideration by the trial court of the waiver petition is not to be used as an opportunity for the court to inquire into the merits or details of the particular action or claim that is the subject of the contract.

[11] The proceedings before the trial court and the trial court's decision on a waiver request are to be confidential and not subject to discovery by any of the parties to the action or by any other individual or entity except The Florida Bar. However, terms of the contract approved by the trial court may be subject to discovery if the contract (without court approval) was subject to discovery under applicable case law or rules of evidence.

[12] Rule 4-1.5(f)(6) prohibits a lawyer from charging the contingent fee percentage on the total, future value of a recovery being paid on a structured or periodic basis. This prohibition does not apply if the lawyer's fee is being paid over the same length of time as the schedule of payments to the client.

[13] Contingent fees are prohibited in criminal and certain domestic relations matters. In domestic relations cases, fees that include a bonus provision or additional fee to be determined at a later time and based on results obtained have been held to be impermissible contingency fees and therefore subject to restitution and disciplinary sanction as elsewhere stated in these Rules Regulating The Florida Bar.

[14] Fees that provide for a bonus or additional fees and that otherwise are not prohibited under the Rules Regulating The Florida Bar can be effective tools for structuring fees. For example, a fee contract calling for a flat fee and the payment of a bonus based on the amount of property retained or recovered in a general civil action is not prohibited by these rules. However, the bonus or additional fee must be stated clearly in amount or formula for calculation of the fee (basis or rate). Courts have held that unilateral bonus fees are unenforceable. The test of reasonableness and other requirements of this rule apply to permissible bonus fees.

Division of fee

[15] A division of fee is a single billing to a client covering the fee of 2 or more lawyers who are not in the same firm. A division of fee facilitates association of more than 1 lawyer in a matter in which neither alone could serve the client as well, and most often is used when the fee is contingent and the division is between a referring lawyer and a trial specialist. Subject to the provisions of subdivision (f)(4)(D), subdivision (g) permits the lawyers to divide a fee on either the basis of the proportion of services they render or by agreement between the participating lawyers if all assume responsibility for the representation as a whole and the client is advised and does not object. It does require disclosure to the client of the share that each lawyer is to receive. Joint responsibility for the representation entails the obligations stated in rule 4-5.1 for purposes of the matter involved.

Disputes over fees

[16] Since the fee arbitration rule (Chapter 14) has been established by the bar to provide a procedure for resolution of fee disputes, the lawyer should conscientiously consider submitting to it. Where law prescribes a procedure for determining a lawyer's fee, for example, in representation of an executor or administrator, a class, or a person entitled to a reasonable fee as

part of the measure of damages, the lawyer entitled to such a fee and a lawyer representing another party concerned with the fee should comply with the prescribed procedure.

Referral fees and practices

[17] A secondary lawyer shall not be entitled to a fee greater than the limitation set forth in rule 4-1.5(f)(4)(D)(ii) merely because the lawyer agrees to do some or all of the following: (a) consults with the client; (b) answers interrogatories; (c) attends depositions; (d) reviews pleadings; (e) attends the trial; or (f) assumes joint legal responsibility to the client. However, the provisions do not contemplate that a secondary lawyer who does more than the above is necessarily entitled to a larger percentage of the fee than that allowed by the limitation.

[18] The provisions of rule 4-1.5(f)(4)(D)(iii) only apply where the participating lawyers have for purposes of the specific case established a co-counsel relationship. The need for court approval of a referral fee arrangement under rule 4-1.5(f)(4)(D)(iii) should only occur in a small percentage of cases arising under rule 4-1.5(f)(4).

[19] In determining if a co-counsel relationship exists, the court should look to see if the lawyers have established a special partnership agreement for the purpose of the specific case or matter. If such an agreement does exist, it must provide for a sharing of services or responsibility and the fee division is based upon a division of the services to be rendered or the responsibility assumed. It is contemplated that a co-counsel situation would exist where a division of responsibility is based upon, but not limited to, the following: (a) based upon geographic considerations, the lawyers agree to divide the legal work, responsibility, and representation in a convenient fashion. Such a situation would occur when different aspects of a case must be handled in different locations; (b) where the lawyers agree to divide the legal work and representation based upon their particular expertise in the substantive areas of law involved in the litigation; or (c) where the lawyers agree to divide the legal work and representation along established lines of division, such as liability and damages, causation and damages, or other similar factors.

[20] The trial court's responsibility when reviewing an application for authorization of a fee division under rule 4-1.5(f)(4)(D)(iii) is to determine if a co-counsel relationship exists in that particular case. If the court determines a co-counsel relationship exists and authorizes the fee division requested, the court does not have any responsibility to review or approve the specific amount of the fee division agreed upon by the lawyers and the client.

[21] Rule 4-1.5(f)(4)(D)(iv) applies to the situation where appellate counsel is retained during the trial of the case to assist with the appeal of the case. The percentages set forth in subdivision (f)(4)(D) are to be applicable after appellate counsel's fee is established. However, the effect should not be to impose an unreasonable fee on the client.

MODEL RULE: 1.6, CONFIDENTIALITY OF INFORMATION

SUMMARY of Substantive Changes Adopted by the ABA House of Delegates in 2002

1. In subsection (a)(1), changes "consents after consultation" to "gives informed consent" consistent with the changes to the other model rules.

2. In subsection (b)(1), deletes requirement that death or substantial bodily harm be the result of a client's criminal act in order to allow disclosure of confidential information to prevent the death or substantial bodily harm. Also changes "imminent" to "reasonably certain."

3. Adds an exception "to secure legal advice about the lawyer's compliance with these Rules" in subsection (b)(2).

4. Adds an exception "to comply with other law or a court order" in subsection (b)(4).

5. Deletes or moves the first three paragraphs of the comment.

6. Adds new ¶ 1 of the comment discussing a lawyers duty to a prospective client and to former clients.

7. Adds the concept of informed consent in new ¶ 2.

8. Deletes former ¶ 6 regarding application of the rule to government lawyers.

9. Adds new ¶ 4 that indicates that lawyers cannot disclose information that could lead to discovery of confidential information, but allows lawyer to use a hypothetical to discuss a representation if there is no likelihood the third party would be able to identify the client.

10. Deletes parts of former ¶9 and adds new ¶ 6 regarding the value of human life as the rationale for one of the exceptions to the confidentiality rule, using examples.

11. Deletes former ¶s 10-14 regarding assisting a client in criminal or fraudulent conduct and bodily harm.

12. Adds ¶ 7 regarding disclosing information to obtain advice in order to comply with the rules.

13. Adds ¶s 10 and 11 regarding disclosures required by law or court.

14. Adds ¶ 12, which is mostly made up of parts of prior ¶s in the former comment.

15. Adds ¶ 13 regarding permissive disclosure under the rule.

16. Deletes former ¶s 20-21 regarding attorney-client privilege and other provisions in the rules

either permitting or requiring disclosure of confidential information.

17. Adds ¶s 15-16 regarding a lawyers supervisory responsibility over others and regarding a lawyer's obligation to take special precautions under certain circumstances.

18. Adds a reference to former clients in new ¶ 17.

How Proposed ABA Rule DIFFERS from EXISTING FLORIDA Rule

1. Current Florida Rule 4-1.6(a) uses "consents after disclosure to the client" as opposed to "gives informed consent."

2. Florida Rule 4-1.6(b) provides that a lawyer shall reveal information that the lawyer reasonably believes necessary to prevent a client from committing a crime or to prevent death or substantial bodily harm to another, as distinguished from the permissive provision of the Model Rule. The change from allowing a lawyer to disclose confidential information to prevent the client from committing a criminal act that the lawyer reasonably believes is likely to result to a provision that the lawyer may disclose confidential information to prevent reasonably certain death or substantial bodily harm provides a more objective standard.

3. Current Florida Rule 4-1.6(c)(5) permits a lawyer to disclose information "to comply with the Rules of Professional Conduct," which encompasses the new ABA exception "to secure legal advice about the lawyer's compliance with these Rules."

4. Current Florida Rule 4-1.6(d) addresses a lawyer disclosing information to comply with a court order, and the comment to current Florida Rule 4-1.6 states that "whether another provision of law supersedes rule 4-1.6 is a matter of interpretation beyond the scope of these rules, but a presumption should exist against such a supersession."

5-18. Florida's comment does not contain these changes.

RECOMMENDATION of Yes or No and REASONS

1. **YES and NO**. Florida should adopt the change of "gives informed consent" to be consistent with changes elsewhere in the rule, but no other change to subsection (a).

2. **NO**. Florida Rule 4-1.6 is more restrictive than the ABA because a lawyer must disclose information to prevent a client from committing a crime or to prevent death or substantial bodily harm to another.

3. **NO**. Florida's Rule 4-1.6(c)(5) permits a lawyer to disclose information "to comply with the Rules of Professional Conduct," which encompasses the new ABA exception "to secure legal

advice about the lawyer's compliance with these Rules." The change is therefore unnecessary.

4. **NO**. The change is unnecessary, because the current Florida rule already addresses these issues adequately. Current Florida Rule 4-1.6(d) addresses a lawyer disclosing information to comply with a court order, and the comment to current Florida Rule 4-1.6 states that "whether another provision of law supersedes rule 4-1.6 is a matter of interpretation beyond the scope of these rules, but a presumption should exist against such a supersession."

5. **YES and NO**. The committee recommends retention of the existing first paragraph in Florida's comment, because it provides a framework for discussion of confidentiality, including the rationale for the rule. The committee recommends deleting ¶s 2-4 of the existing Florida comment, because they cover the same information discussed in ABA ¶s 1 and 2.

6-18. **YES and NO**. The committee recommends adopting new ABA ¶s 1 and 2 of the comment as Florida ¶s 2 and 3, but correcting rule references to represent Florida's numbering scheme. The committee recommends adopting new ¶7 of the ABA comment regarding disclosure of information necessary to obtain advice about the lawyer's compliance with the Rules of Professional Conduct under the header "Dispute Concerning Lawyer's Conduct." The committee also recommends adding the reference to appropriate Florida rules on former clients in new ABA ¶ 17. The committee recommends against adoption of other changes to the comments, because the new ABA comments reflect changes to the ABA Model Rule that the committee recommends against adopting.

FLORIDA'S Rule in LEGISLATIVE FORMAT

RULE 4-1.6 CONFIDENTIALITY OF INFORMATION

(a) Consent Required to Reveal Information. A lawyer shall not reveal information relating to representation of a client except as stated in subdivisions (b), (c), and (d), unless the client ~~consents after disclosure to the client~~ gives informed consent.

(b) When Lawyer Must Reveal Information. A lawyer shall reveal such information to the extent the lawyer reasonably believes necessary:

(1) to prevent a client from committing a crime; or

(2) to prevent a death or substantial bodily harm to another.

(c) When Lawyer May Reveal Information. A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

(1) to serve the client's interest unless it is information the client specifically requires not to be disclosed;

(2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and client;

(3) to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved;

(4) to respond to allegations in any proceeding concerning the lawyer's representation of the client; or

(5) to comply with the Rules of Professional Conduct.

(d) Exhaustion of Appellate Remedies. When required by a tribunal to reveal such information, a lawyer may first exhaust all appellate remedies.

(e) Limitation on Amount of Disclosure. When disclosure is mandated or permitted, the lawyer shall disclose no more information than is required to meet the requirements or accomplish the purposes of this rule.

Comment

[1] The lawyer is part of a judicial system charged with upholding the law. One of the lawyer's functions is to advise clients so that they avoid any violation of the law in the proper exercise of their rights.

[2] This Rule governs the disclosure by a lawyer of information relating to the representation of a client during the lawyer's representation of the client. See rule 4-1.18 for the lawyer's duties with respect to information provided to the lawyer by a prospective client, rule 4-1.9(b) for the lawyer's duty not to reveal information relating to the lawyer's prior representation of a former client and rules 4-1.8(b) and 4-1.9(b) for the lawyer's duties with respect to the use of such information to the disadvantage of clients and former clients.

~~The observance of the ethical obligation of a lawyer to hold inviolate confidential information of the client not only facilitates the full development of facts essential to proper representation of the client but also encourages people to seek early legal assistance.~~

~~Almost without exception, clients come to lawyers in order to determine what their rights are and what is, in the maze of laws and regulations, deemed to be legal and correct. The common law recognizes that the client's confidences must be protected from disclosure. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld.~~

[3] A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer ~~maintain confidentiality of~~ must not reveal information relating to the representation. See terminology for the definition of informed consent. This

contributes to the trust that is the hallmark of the client-lawyer relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld.

[4] The principle of confidentiality is given effect in 2 related bodies of law, the attorney-client privilege (which includes the work product doctrine) in the law of evidence and the rule of confidentiality established in professional ethics. The attorney-client privilege applies in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule applies not merely to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or by law. However, none of the foregoing limits the requirement of disclosure in subdivision (b). This disclosure is required to prevent a lawyer from becoming an unwitting accomplice in the fraudulent acts of a client. See also Scope.

[5] The requirement of maintaining confidentiality of information relating to representation applies to government lawyers who may disagree with the policy goals that their representation is designed to advance.

Authorized disclosure

[6] A lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation, except to the extent that the client's instructions or special circumstances limit that authority. In litigation, for example, a lawyer may disclose information by admitting a fact that cannot properly be disputed or in negotiation by making a disclosure that facilitates a satisfactory conclusion.

[7] Lawyers in a firm may, in the course of the firm's practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers.

Disclosure adverse to client

[8] The confidentiality rule is subject to limited exceptions. In becoming privy to information about a client, a lawyer may foresee that the client intends serious harm to another person. However, to the extent a lawyer is required or permitted to disclose a client's purposes, the client will be inhibited from revealing facts that would enable the lawyer to counsel against a wrongful course of action. While the public may be protected if full and open communication by

the client is encouraged, several situations must be distinguished.

[9] First, the lawyer may not counsel or assist a client in conduct that is criminal or fraudulent. See rule 4-1.2(d). Similarly, a lawyer has a duty under rule 4-3.3(a)(4) not to use false evidence. This duty is essentially a special instance of the duty prescribed in rule 4-1.2(d) to avoid assisting a client in criminal or fraudulent conduct.

[10] Second, the lawyer may have been innocently involved in past conduct by the client that was criminal or fraudulent. In such a situation the lawyer has not violated rule 4-1.2(d), because to "counsel or assist" criminal or fraudulent conduct requires knowing that the conduct is of that character.

[11] Third, the lawyer may learn that a client intends prospective conduct that is criminal. As stated in subdivision (b)(1), the lawyer shall reveal information in order to prevent such consequences. It is admittedly difficult for a lawyer to "know" when the criminal intent will actually be carried out, for the client may have a change of mind.

[12] Subdivision (b)(2) contemplates past acts on the part of a client that may result in present or future consequences that may be avoided by disclosure of otherwise confidential communications. Rule 4-1.6(b)(2) would now require the attorney to disclose information reasonably necessary to prevent the future death or substantial bodily harm to another, even though the act of the client has been completed.

[13] The lawyer's exercise of discretion requires consideration of such factors as the nature of the lawyer's relationship with the client and with those who might be injured by the client, the lawyer's own involvement in the transaction, and factors that may extenuate the conduct in question. Where practical the lawyer should seek to persuade the client to take suitable action. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to the purpose.

Withdrawal

[14] If the lawyer's services will be used by the client in materially furthering a course of criminal or fraudulent conduct, the lawyer must withdraw, as stated in rule 4-1.16(a)(1).

[15] After withdrawal the lawyer is required to refrain from making disclosure of the client's confidences, except as otherwise provided in rule 4-1.6. Neither this rule nor rule 4-1.8(b) nor rule 4-1.16(d) prevents the lawyer from giving notice of the fact of withdrawal, and the lawyer may also withdraw or disaffirm any opinion, document, affirmation, or the like.

[16] Where the client is an organization, the lawyer may be in doubt whether contemplated conduct will actually be carried out by the organization. Where necessary to guide conduct in connection with the rule, the lawyer may make inquiry within the organization as indicated in rule 4-1.13(b).

Dispute concerning lawyer's conduct

[17] A lawyer's confidentiality obligations do not preclude a lawyer from securing confidential legal advice about the lawyer's personal responsibility to comply with these Rules. In most situations, disclosing information to secure such advice will be impliedly authorized for the lawyer to carry out the representation. Even when the disclosure is not impliedly authorized, paragraph (b)(5) permits such disclosure because of the importance of a lawyer's compliance with the Rules of Professional Conduct.

[18] Where a legal claim or disciplinary charge alleges complicity of the lawyer in a client's conduct or other misconduct of the lawyer involving representation of the client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense. The same is true with respect to a claim involving the conduct or representation of a former client. The lawyer's right to respond arises when an assertion of such complicity has been made. Subdivision (c) does not require the lawyer to await the commencement of an action or proceeding that charges such complicity, so that the defense may be established by responding directly to a third party who has made such an assertion. The right to defend, of course, applies where a proceeding has been commenced. Where practicable and not prejudicial to the lawyer's ability to establish the defense, the lawyer should advise the client of the third party's assertion and request that the client respond appropriately. In any event, disclosure should be no greater than the lawyer reasonably believes is necessary to vindicate innocence, the disclosure should be made in a manner that limits access to the information to the tribunal or other persons having a need to know it, and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.

[19] If the lawyer is charged with wrongdoing in which the client's conduct is implicated, the rule of confidentiality should not prevent the lawyer from defending against the charge. Such a charge can arise in a civil, criminal, or professional disciplinary proceeding and can be based on a wrong allegedly committed by the lawyer against the client or on a wrong alleged by a third person; for example, a person claiming to have been defrauded by the lawyer and client acting together. A lawyer entitled to a fee is permitted by subdivision (c) to prove the services rendered in an action to collect it. This aspect of the rule expresses the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary. As stated above, the lawyer must make every effort practicable to avoid unnecessary disclosure of information relating to a representation, to limit disclosure to those having the need to know it, and to obtain protective orders or make other arrangements minimizing the risk of disclosure.

Disclosures otherwise required or authorized

[20] The attorney-client privilege is differently defined in various jurisdictions. If a lawyer is called as a witness to give testimony concerning a client, absent waiver by the client, rule 4-1.6(a) requires the lawyer to invoke the privilege when it is applicable. The lawyer must comply with the final orders of a court or other tribunal of competent jurisdiction requiring the lawyer to give information about the client.

[21] The Rules of Professional Conduct in various circumstances permit or require a lawyer to disclose information relating to the representation. See rules 4-2.2, 4-2.3, 4-3.3, and 4-4.1. In addition to these provisions, a lawyer may be obligated or permitted by other provisions of law to give information about a client. Whether another provision of law supersedes rule 4-1.6 is a matter of interpretation beyond the scope of these rules, but a presumption should exist against such a supersession.

Former client

[22] The duty of confidentiality continues after the client-lawyer relationship has terminated. See rule 4-1.9 for the prohibition against using such information to the disadvantage of the former client.

MODEL RULE: 1.7, CONFLICT OF INTEREST: CURRENT CLIENTS

Summary of Substantive Changes Adopted by the ABA House of Delegates

The ABA's changes attempt to more clearly define conflict of interest situations involving current clients, and to more clearly articulate the situations in which a lawyer may represent a client notwithstanding the existence of a conflict. It also provides that any necessary client consent must be "informed" and "confirmed in writing."

Paragraph (a) of the ABA Rule is restructured to address both "directly adverse" conflicts and other current client conflicts in a single paragraph. Paragraph (b) lists the requirements that must be met in order to enter or continue a representation when a conflict exists. The revised ABA Comment is considerably longer than the prior Comment, adding a number of new provisions and deleting some provisions.

Brief Explanation of How the ABA Rule Differs from the Florida Rule

The Florida Rule is based on the prior ABA Rule. Accordingly, the Florida Rule addresses "directly adverse" conflicts and other current client conflicts in two separate paragraphs. The revised ABA Rule addresses both "directly adverse" conflicts and other current client conflicts in a single revised paragraph (a). Paragraph (b) of the ABA Rule contains the requirements that must be met in order to enter or continue a representation when a conflict exists. This paragraph specifies that certain types of conflicts that are nonconsentable, such as representations "prohibited by law" (Rule 1.7(b)(2)) or a representation in which a lawyer would assert a claim against another current client that the lawyer represents in that same proceeding (Rule 1.7(b)(3)). In the Florida Rule, most of the "consentability" issues are addressed in the Comment rather than the Rule.

An important difference is that the Florida Rule concerning client consent requires "consent after consultation" (as did the prior ABA Rule), but does not require that consent be written or confirmed in writing. The ABA rule requires "informed consent, confirmed in writing."

The Florida Rule includes two paragraphs that are not contained in ABA Rule 1.7. Florida paragraph (c) requires a lawyer representing multiple clients in the same matter to provide an "explanation of the implications of the common representation and the advantages and risks involved." Florida paragraph (d) concerns conflicts involving lawyers related by blood or marriage (the ABA counterpart to this provision is contained in ABA Rule 1.8).

The revised ABA Comment is considerably longer than the Florida Comment. The ABA Comment adds provisions concerning the new standard of "informed consent, confirmed in writing," advance consent, conflicts in class action litigation, certain confidentiality issues in common representations, and conflicts involving organizations. The Florida Comment does not directly address these topics, except for the organizational conflict issue which is covered in the

Comment to Florida Rule 4-1.13. At the same time, the revised ABA Comment deletes provisions concerning evaluating consentability from the viewpoint of the "disinterested lawyer," insurance defense conflicts, the disclosure of confidential information in seeking consent, and the issue of conflicts as they may affect the fair or efficient administration of justice. All of these helpful provisions appear in the Florida Comment.

Recommendation of Yes or No, and Reasons

Qualified YES to the Rule, NO to the Comment. The format of the ABA Rule (covering all types of conflicts in one paragraph, and the provisions dealing with conflict waivers in a second paragraph) is more logical and easier to use than the current format. We recommend adopting this format, with two clarifying changes.

First, paragraph (a) of the ABA Rule identifies conflict situations to include those in which "there is a *significant risk* that the representation of one or more clients *will be* materially limited by" the lawyer's responsibilities to other persons or by the lawyer's personal interest. This language is a change from the Florida Rule and the prior ABA Rule, which provide that a lawyer should not represent a client "if the lawyer's representation of that client *may be* materially limited by" such responsibilities or personal interests. Although the ABA Reporter's Explanation of Changes indicates that this change is not intended to be substantive, the committee members are concerned that adopting this new wording would result in a substantive change to the conflict standard. Hoping to avoid this undesired result, we recommend that Florida adopt the new ABA Rule after changing "significant risk" to "*substantial* risk." We believe that a "substantial" risk is a lower threshold that is more similar to the existing Florida Rule.

Second, subdivision (b)(3) of the ABA Rule appears to prohibit (as a nonconsentable conflict) the same lawyer (or law firm, pursuant to Rule 1.10(a)) from representing two (or more) clients in the same litigation when those clients have adverse interests in that proceeding. We agree with this principle, but believe that the ABA Rule's language is not as clear as it could be on this point. Therefore, we have recommended language that we believe is clearer and less susceptible to misinterpretation.

Existing Florida Rule paragraph (c) should be modified to reflect the change to "informed consent, confirmed in writing." Paragraph (d) should be retained.

Regarding the Comment, we believe that, with several slight modifications, the Florida Comment is superior to the ABA Comment. We recommend that, similar to the new ABA Comment, the first paragraph of the Florida Comment be amended by adding language identifying the types of conflicts the Rule addresses. We also recommend adding a new final paragraph addressing the significant change of requiring that client consent be "confirmed in writing."

We recommend keeping the remainder of the Florida Comment unchanged. The Florida

Comment contains provisions uniquely suited to Florida (e.g., paragraph [12] refers to Florida law regarding identity of a lawyer's client in an estate administration situation). Additionally, the new ABA Comment unwisely deletes provisions that are helpful to Florida practitioners (e.g., existing Florida Comment paragraph [4] specifies that the propriety of asking for client consent is evaluated from the viewpoint of a "disinterested lawyer;" existing Florida Comment paragraph [9] concerns tripartite relationship insurance defense conflict issues). Finally, most of the other issues addressed for the first time in the ABA Comment have already been addressed in one fashion or another by relevant Florida authority (e.g., organizational conflicts are addressed in the Comment to Florida Rule 4-1.13; confidentiality issues in common representations are discussed in Florida Ethics Opinion 95-4).

FLORIDA'S Rule in LEGISLATIVE FORMAT

RULE 4-1.7 CONFLICT OF INTEREST; ~~GENERAL RULE~~ CURRENT CLIENTS

~~**(a) Representing Adverse Interests.** A lawyer shall not represent a client if the representation of that client will be directly adverse to the interests of another client, unless:~~

~~(1) the lawyer reasonably believes the representation will not adversely affect the lawyer's responsibilities to and relationship with the other client; and~~

~~(2) each client consents after consultation.~~

~~**(b) Duty to Avoid Limitation on Independent Professional Judgment.** A lawyer shall not represent a client if the lawyer's exercise of independent professional judgment in the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person or by the lawyer's own interest, unless:~~

~~(1) the lawyer reasonably believes the representation will not be adversely affected; and~~

~~(2) the client consents after consultation.~~

(a) Representing Adverse Interests. Except as provided in paragraph (b), a lawyer shall not represent a client if:

(1) the representation of one client will be directly adverse to another client; or

(2) there is a substantial risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a 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 involved the assertion of a position adverse to another client when the lawyer represents both clients in the same proceeding before a tribunal; and

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

(c) Explanation to Clients. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

(d) Lawyers Related by Blood or Marriage. A lawyer related to another lawyer as parent, child, sibling, or spouse shall not represent a client in a representation directly adverse to a person who the lawyer knows is represented by the other lawyer except upon consent by the client after consultation regarding the relationship.

Comment

Loyalty to a client

[1] Loyalty ~~is an~~ and independent judgment are essential ~~element~~ elements in the lawyer's relationship to a client. Conflicts of interest can arise from the lawyer's responsibilities to another client, a former client or a third person or from the lawyer's own interests. For specific rules regarding certain conflicts of interest, see Rule 4-1.8. For former client conflicts of interest, see Rule 4-1.9. For conflicts of interest involving prospective clients, see rule 4-1.18. For definitions of "informed consent" and "confirmed in writing," see terminology.

[2] An impermissible conflict of interest may exist before representation is undertaken, in which event the representation should be declined. If such a conflict arises after representation has been undertaken, the lawyer should withdraw from the representation. See rule 4-1.16. Where more than 1 client is involved and the lawyer withdraws because a conflict arises after representation, whether the lawyer may continue to represent any of the clients is determined by rule 4-1.9. See also rule 4-2.2(c). As to whether a client-lawyer relationship exists or, having once been established, is continuing, see comment to rule 4-1.3 and scope.

[3] As a general proposition, loyalty to a client prohibits undertaking representation directly adverse to that client's or another client's interests without the affected client's consent. Subdivision (a) expresses that general rule. Thus, a lawyer ordinarily may not act as advocate against a person the lawyer represents in some other matter, even if it is wholly unrelated. On the other hand, simultaneous representation in unrelated matters of clients whose interests are only generally adverse, such as competing economic enterprises, does not require consent of the

respective clients. Subdivision (a) applies only when the representation of 1 client would be directly adverse to the other and where the lawyer's responsibilities of loyalty and confidentiality of the other client might be compromised.

[4] Loyalty to a client is also impaired when a lawyer cannot consider, recommend, or carry out an appropriate course of action for the client because of the lawyer's other responsibilities or interests. The conflict in effect forecloses alternatives that would otherwise be available to the client. Subdivision (b) addresses such situations. A possible conflict does not itself preclude the representation. The critical questions are the likelihood that a conflict will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client. Consideration should be given to whether the client wishes to accommodate the other interest involved.

Consultation and consent

[5] A client may consent to representation notwithstanding a conflict. However, as indicated in subdivision (a)(1) with respect to representation directly adverse to a client and subdivision (b)(1) with respect to material limitations on representation of a client, when a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent. When more than 1 client is involved, the question of conflict must be resolved as to each client. Moreover, there may be circumstances where it is impossible to make the disclosure necessary to obtain consent. For example, when the lawyer represents different clients in related matters and 1 of the clients refuses to consent to the disclosure necessary to permit the other client to make an informed decision, the lawyer cannot properly ask the latter to consent.

Lawyer's interests

[6] The lawyer's own interests should not be permitted to have adverse effect on representation of a client. For example, a lawyer's need for income should not lead the lawyer to undertake matters that cannot be handled competently and at a reasonable fee. See rules 4-1.1 and 4-1.5. If the probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice. A lawyer may not allow related business interests to affect representation, for example, by referring clients to an enterprise in which the lawyer has an undisclosed interest.

Conflicts in litigation

[7] Subdivision (a) prohibits representation of opposing parties in litigation. Simultaneous representation of parties whose interests in litigation may conflict, such as co-plaintiffs or co-defendants, is governed by subdivisions (b) and (c). An impermissible conflict may exist by reason of substantial discrepancy in the parties' testimony, incompatibility in

positions in relation to an opposing party, or the fact that there are substantially different possibilities of settlement of the claims or liabilities in question. Such conflicts can arise in criminal cases as well as civil. The potential for conflict of interest in representing multiple defendants in a criminal case is so grave that ordinarily a lawyer should decline to represent more than 1 co-defendant. On the other hand, common representation of persons having similar interests is proper if the risk of adverse effect is minimal and the requirements of subdivision (b) are met. Compare rule 4-2.2 involving intermediation between clients.

[8] Ordinarily, a lawyer may not act as advocate against a client the lawyer represents in some other matter, even if the other matter is wholly unrelated. However, there are circumstances in which a lawyer may act as advocate against a client. For example, a lawyer representing an enterprise with diverse operations may accept employment as an advocate against the enterprise in an unrelated matter if doing so will not adversely affect the lawyer's relationship with the enterprise or conduct of the suit and if both clients consent upon consultation. By the same token, government lawyers in some circumstances may represent government employees in proceedings in which a government agency is the opposing party. The propriety of concurrent representation can depend on the nature of the litigation. For example, a suit charging fraud entails conflict to a degree not involved in a suit for a declaratory judgment concerning statutory interpretation.

[9] A lawyer may represent parties having antagonistic positions on a legal question that has arisen in different cases, unless representation of either client would be adversely affected. Thus, it is ordinarily not improper to assert such positions in cases pending in different trial courts, but it may be improper to do so in cases pending at the same time in an appellate court.

Interest of person paying for a lawyer's service

[10] A lawyer may be paid from a source other than the client, if the client is informed of that fact and consents and the arrangement does not compromise the lawyer's duty of loyalty to the client. See rule 4-1.8(f). For example, when an insurer and its insured have conflicting interests in a matter arising from a liability insurance agreement and the insurer is required to provide special counsel for the insured, the arrangement should assure the special counsel's professional independence. So also, when a corporation and its directors or employees are involved in a controversy in which they have conflicting interests, the corporation may provide funds for separate legal representation of the directors or employees, if the clients consent after consultation and the arrangement ensures the lawyer's professional independence.

Other conflict situations

[11] Conflicts of interest in contexts other than litigation sometimes may be difficult to assess. Relevant factors in determining whether there is potential for adverse effect include the duration and intimacy of the lawyer's relationship with the client or clients involved, the functions being performed by the lawyer, the likelihood that actual conflict will arise, and the likely prejudice to the client from the conflict if it does arise. The question is often one of

proximity and degree.

[12] For example, a lawyer may not represent multiple parties to a negotiation whose interests are fundamentally antagonistic to each other, but common representation is permissible where the clients are generally aligned in interest even though there is some difference of interest among them.

[13] Conflict questions may also arise in estate planning and estate administration. A lawyer may be called upon to prepare wills for several family members, such as husband and wife, and, depending upon the circumstances, a conflict of interest may arise. In estate administration the identity of the client may be unclear under the law of some jurisdictions. In Florida, the personal representative is the client rather than the estate or the beneficiaries. The lawyer should make clear the relationship to the parties involved.

[14] A lawyer for a corporation or other organization who is also a member of its board of directors should determine whether the responsibilities of the 2 roles may conflict. The lawyer may be called on to advise the corporation in matters involving actions of the directors. Consideration should be given to the frequency with which such situations may arise, the potential intensity of the conflict, the effect of the lawyer's resignation from the board, and the possibility of the corporation's obtaining legal advice from another lawyer in such situations. If there is material risk that the dual role will compromise the lawyer's independence of professional judgment, the lawyer should not serve as a director.

Conflict charged by an opposing party

[15] Resolving questions of conflict of interest is primarily the responsibility of the lawyer undertaking the representation. In litigation, a court may raise the question when there is reason to infer that the lawyer has neglected the responsibility. In a criminal case, inquiry by the court is generally required when a lawyer represents multiple defendants. Where the conflict is such as clearly to call in question the fair or efficient administration of justice, opposing counsel may properly raise the question. Such an objection should be viewed with caution, however, for it can be misused as a technique of harassment. See scope.

Family relationships between lawyers

[16] Rule 4-1.7(d) applies to related lawyers who are in different firms. Related lawyers in the same firm are also governed by rules 4-1.9 and 4-1.10. The disqualification stated in rule 4-1.7(d) is personal and is not imputed to members of firms with whom the lawyers are associated.

Consent Confirmed in Writing

[17] Paragraph (b) requires the lawyer to obtain the informed consent of the client, confirmed in writing. Such a writing may consist of a document executed by the client or one

that the lawyer promptly records and transmits to the client following an oral consent. See terminology. If it is not feasible to obtain or transmit the writing at the time the client gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter. See terminology. The requirement of a writing does not supplant the need in most cases for the lawyer to talk with the client, to explain the risks and advantages, if any, of representation burdened with a conflict of interest, as well as reasonably available alternatives, and to afford the client a reasonable opportunity to consider the risks and alternatives and to raise questions and concerns. Rather, the writing is required in order to impress upon clients the seriousness of the decision the client is being asked to make and to avoid disputes or ambiguities that might later occur in the absence of a writing.

MODEL RULE: 1.8, Conflict of Interest: Current Clients: Specific Rules

Summary of Substantive Changes Adopted by the ABA House of Delegates

The ABA's changes provide additional guidance for lawyers facing the varying specific conflict of interest situations addressed in the Rule. Most of the changes are in the nature of clarifications, but some are substantive.

1. Paragraph (a) of the ABA Rule adds two additional requirements for the lawyer engaging in a business or similar transaction with a client: the client must be "advised in writing of the desirability of seeking independent counsel" regarding entering into the transaction; and the client must provide informed consent to both the "essential terms of the transaction and the lawyer's role in the transaction."

2. In paragraph (c), the prohibition on soliciting substantial gifts from clients has been broadened. The former Rule barred the lawyer from preparing an instrument effecting such a gift, while the amended Rule extends this prohibition to any solicitation of a substantial gift.

3. Paragraph (g), concerning a lawyer representing multiple clients in making an aggregate settlement of the clients' claims, now provides that each client must give "informed consent, in a writing signed by the client." The former Rule did not require written consent.

4. There have been two substantive changes to paragraph (h), concerning prospective limitations on malpractice liability and settling malpractice claims. First, the revised Rule no longer requires that agreements prospectively limiting malpractice liability be "permitted by law." Second, the portion of the Rule regarding settling malpractice claims now expressly extends to "potential claim[s]."

5. Former paragraph (i), concerning imputation of conflicts among lawyers related by blood or marriage, has been deleted. (Note: The corresponding Florida provision is Rule 4-1.7(d).)

6. New paragraph (i) states the general principle that lawyers are prohibited from acquiring "a proprietary interest in the cause of action or subject matter of litigation," and spells out two exceptions. The amended Rule changes one of the exceptions from liens "granted by law" to liens "authorized by law." The Reporter's Explanation of Changes states that this is intended as a clarification, but under some existing authority this could be interpreted as a substantive change (e.g., a mortgage can be considered a lien "authorized by law" rather than one "granted by law," such as a common law attorney's lien).

7. Paragraph (j) prohibits most sexual relations between lawyer and client. (Note: The corresponding Florida provision is Rule 4-8.4(i).)

8. Paragraph (k) imputes most of the conflicts in Rule 1.8 to all lawyers in a conflicted lawyers firm. (The one exception is the sexual relationship conflict expressed in paragraph (j).) Under

the existing imputed conflict rule, Rule 1.10(a), only paragraph (c) of Rule 1.8 is expressly designated as an imputed conflict.

9. New ABA Comments [1]-[4] explain the principles of paragraph (a) of the Rule, and apply them in the context of Rule 1.7 and in a situation in which the client is independently represented.

10. New ABA Comment [5] discusses a lawyer's use of confidential information to a client's disadvantage.

11. Additions to ABA Comment [6] (Florida Comment [2]) indicate that a lawyer may accept even a substantial gift from a client, as long as the lawyer did not suggest the gift.

12. New ABA Comment [8] clarifies that, provided Rule 1.7 is complied with, Rule 1.8 is not violated when a lawyer seeks to have the client name the lawyer (or someone in the lawyer's firm) as executor of the client's estate.

13. New ABA Comment [10] explains the rationale underlying paragraph (e) of the Rule, which prohibits certain financial assistance by the lawyer.

14. New ABA Comments [11]-[12] replace former ABA Comment [4] (identical to the Florida Comment) and expand the discussion regarding third party payment for a lawyer's services.

15. New ABA Comments [13] addresses aggregate settlements.

16. New ABA Comments [14]-[15] address prospectively limiting malpractice liability and settling actual or potential malpractice claims, including stating that a contract provision requiring arbitration of malpractice claims does not violate the Rule.

17. New ABA Comment [16] expands the discussion regarding acquisition of an interest in the cause of action or subject matter of litigation.

18. New ABA Comments [17]-[19] deal with lawyer-client sexual relations.

19. New ABA Comment [20] concerns imputation of Rule 1.8 conflicts within a law firm.

Brief Explanation of How the ABA Rule Differs from the Florida Rule

1-8. Paragraphs (a), (b), (c), (f), (g), and (h) of Florida Rule 4-1.8 are identical to the corresponding paragraphs of the former ABA Rule. Paragraph (i) of Florida Rule 4-1.8 is identical to paragraph (j) of former ABA Rule 1.8.

Florida Rule 4-1.8 contains paragraph (j), which is a provision unique to Florida that requires a lawyer defending a non-governmental insured at the insurer's expense to provide the insured

with a "Statement of Insured Client's Rights."

As noted, Florida addresses lawyer-client sexual relations in Florida Rule 4-8.4(i), and the provision concerning imputation of conflicts among lawyers related by blood or marriage is retained in Florida Rule 4-1.7(d).

9-18. Florida's commentary does not contain the ABA changes. Additions to ABA Comment [6] (Florida Comment [2]) indicate that a lawyer may accept even a substantial gift from a client, as long as the lawyer did not suggest the gift. In contrast, the Florida Comment can be read to suggest that only non-substantial gifts are permissible.

Recommendation of Yes or No, and Reasons

1-8. Yes and **NO**, It is recommended that Florida **adopt the changes to paragraphs (a), (b), (c), (f), (g), and (k) of the ABA Rule**. The changes to paragraphs (a), (g), and (k) provide greater clarity for lawyers and increased protection for clients. The changes to paragraphs (b) and (f) provide consistency with the "informed consent" standard used elsewhere in the Rules. The changes to paragraph (c) provide greater protection for lawyers. Regarding paragraph (c), the committee recommends all of the ABA changes except striking the language "or individual" to make clear that it is only persons with a familial relationship and not others who may have a relationship that is not a true familial relationship, that are excepted.

4. **No**, it is recommended that Florida **not adopt the changes to ABA paragraph (h)**. The ABA Reporter's Explanation of Changes incorrectly states that no jurisdiction has addressed the question of legal permissibility of prospective malpractice waivers (see *Little v. Middleton*, 401 S.E.2d 751 (Ga. 1991)). Retaining the existing Florida language reinforces the view that such waivers are not favored.

6. **No**, it is recommended that Florida **not adopt the changes to ABA paragraph (i)**. The question of broadening the permissible exceptions to include liens "authorized by law" rather than just those "granted by law" has been considered and rejected by the Florida Bar Professional Ethics Committee and the Disciplinary Procedure Committee of the Board of Governors.

7. **No**, it is recommended that Florida **not adopt changes to ABA paragraph (j)**. The concepts of this subdivision appear in Florida Rule 4-8.4(i), and the Florida Bar Board of Governors approved changes to this rule in January 2003 after extensive study of the issue and debate.

9-18. **Regarding the Comment**, as with many of the other Rules we believe that the existing Florida Comment generally does a superior job of capturing the ethical principles applicable to Florida lawyers.

Several of the changes should <u>not</u> be adopted:

- ABA Comment [5] should not be adopted; it blurs the distinction between the principles of loyalty and confidentiality, much as the ABA's change to the Comment to Rule 1.9 does.

- ABA Comments [14]-[15] favor making it easier for lawyers to prospectively limit their malpractice liability and to allow lawyers to include in their fee agreements a provision mandating that all lawyer-client disputes, including malpractice claims, be arbitrated. Such positions go beyond what historically has been considered permissible by the Professional Ethics Committee and the Board of Governors.

- ABA Comment [16] support the changes to new paragraph (i) of the ABA Rule, which we have recommended not be adopted.

- ABA Comments [17]-[19]deal with lawyer-client sexual relations, which Florida has addressed in a different rule.

Other changes are acceptable, though not necessary or particularly desirable. These include the changes to ABA Comments [2]-[4], [6], [8] and [11]-[12].

A few of the changes should be adopted, with some revisions:

ABA Comment [1] should be adopted, because it discusses the general principles and rationale behind subdivision (a) of the rule, but the committee recommends against adoption of some of the specific examples, which the committee believes do not provide particularly helpful guidance to bar members: "for example, a loan or sales transaction or a lawyer investment on behalf of a client" and "for example, the sale of title insurance or investment services to existing clients of the lawyer's legal practice. See Rule 5.7."

- ABA Comment [10] explains the limitations on a lawyer's provision of financial assistance to a client. To more clearly reflect the intent of the Rule, however, it is recommended that: the word "advancing" be substituted for the word "lending" in the present phrase "lending a client court costs and litigation expenses;" and the word "reasonable" be inserted before the phrase "costs of obtaining and presenting evidence."

- ABA Comment [13] regarding aggregate settlements should have the words "may not have a full client-lawyer relationship with each member of the class; nevertheless, such lawyers" stricken. Issues relating to ethical duties owed to, and the nature of the lawyer-client relationship with, members of a class in class action litigation have not been definitively resolved in Florida and thus should not be addressed in the Rule or the Comment.

- ABA Comment [20] regarding imputation of prohibitions in the rule should be adopted except for the last sentence dealing with subdivision (j) of the rule on lawyer-client sexual relations, because the committee recommends against adopting subdivision (j).

FLORIDA'S Rule in LEGISLATIVE FORMAT

RULE 4-1.8 CONFLICT OF INTEREST; PROHIBITED AND OTHER TRANSACTIONS

(a) Business Transactions With or Acquiring Interest Adverse to Client. A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security, or other pecuniary interest adverse to a client, except a lien granted by law to secure a lawyer's fee or expenses, unless:

(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing ~~to the client~~ 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 ~~in~~ on the transaction; and

(3) the client ~~consents~~ gives informed consent, in a writing ~~thereto~~ 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) Using Information to Disadvantage of Client. A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client ~~consents after consultation~~ gives informed consent, except as permitted or required by ~~rule 4-1.6~~ these rules.

(c) Gifts to Lawyer or Lawyer's Family. A lawyer shall not solicit any substantial gift from a client, including a testamentary gift, or prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer ~~as parent, child, sibling, or spouse~~ any substantial gift ~~from a client, including a testamentary~~ unless the lawyer or other recipient of the gift~~, except where the client~~ is related to the ~~donee~~ client. For purposes of this paragraph, related persons include a spouse, child, grandchild, parent, grandparent or other relative with whom the lawyer or the client maintains a close, familial relationship.

(d) Acquiring Literary or Media Rights. Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.

(e) Financial Assistance to Client. A lawyer shall not provide financial assistance to a

client in connection with pending or contemplated litigation, 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; and

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

(f) Compensation by Third Party. A lawyer shall not accept compensation for representing a client from one other than the client unless:

(1) the client ~~consents after consultation~~ gives informed consent;

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

(3) information relating to representation of a client is protected as required by rule 4-1.6.

(g) Settlement of Claims for Multiple Clients. A lawyer who represents 2 or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client ~~consents after consultation, including~~ gives informed consent, in a writing signed by the client. The lawyer's disclosure ~~of~~ shall include the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

(h) Limiting Liability for Malpractice. A lawyer shall not make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless permitted by law and the client is independently represented in making the agreement. A lawyer shall not settle a claim for such liability with an unrepresented client or former client without first advising that person in writing that independent representation is appropriate in connection therewith.

(i) Acquiring Proprietary Interest in Cause of Action. 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 granted by law to secure the lawyer's fee or expenses; and

(2) contract with a client for a reasonable contingent fee.

(j) Representation of Insureds. When a lawyer undertakes the defense of an insured other than a governmental entity, at the expense of an insurance company, in regard to an action or claim for personal injury or for property damages, or for death or loss of services resulting from personal injuries based upon tortious conduct, including product liability claims, the

Statement of Insured Client's Rights shall be provided to the insured at the commencement of the representation. The lawyer shall sign the statement certifying the date on which the statement was provided to the insured. The lawyer shall keep a copy of the signed statement in the client's file and shall retain a copy of the signed statement for 6 years after the representation is completed. The statement shall be available for inspection at reasonable times by the insured, or by the appropriate disciplinary agency. Nothing in the Statement of Insured Client's Rights shall be deemed to augment or detract from any substantive or ethical duty of a lawyer or affect the extradisciplinary consequences of violating an existing substantive legal or ethical duty; nor shall any matter set forth in the Statement of Insured Client's Rights give rise to an independent cause of action or create any presumption that an existing legal or ethical duty has been breached.

STATEMENT OF INSURED CLIENT'S RIGHTS

An insurance company has selected a lawyer to defend a lawsuit or claim against you. This Statement of Insured Client's Rights is being given to you to assure that you are aware of your rights regarding your legal representation. This disclosure statement highlights many, but not all, of your rights when your legal representation is being provided by the insurance company.

1. *Your Lawyer*. If you have questions concerning the selection of the lawyer by the insurance company, you should discuss the matter with the insurance company and the lawyer. As a client, you have the right to know about the lawyer's education, training, and experience. If you ask, the lawyer should tell you specifically about the lawyer's actual experience dealing with cases similar to yours and give you this information in writing, if you request it. Your lawyer is responsible for keeping you reasonably informed regarding the case and promptly complying with your reasonable requests for information. You are entitled to be informed of the final disposition of your case within a reasonable time.

2. *Fees and Costs*. Usually the insurance company pays all of the fees and costs of defending the claim. If you are responsible for directly paying the lawyer for any fees or costs, your lawyer must promptly inform you of that.

3. *Directing the Lawyer*. If your policy, like most insurance policies, provides for the insurance company to control the defense of the lawsuit, the lawyer will be taking instructions from the insurance company. Under such policies, the lawyer cannot act solely on your instructions, and at the same time, cannot act contrary to your interests. Your preferences should be communicated to the lawyer.

4. *Litigation Guidelines*. Many insurance companies establish guidelines governing how lawyers are to proceed in defending a claim. Sometimes those guidelines affect the range of actions the lawyer can take and may require authorization of the insurance company before certain actions are undertaken. You are entitled to know the guidelines affecting the extent and level of legal services being provided to you. Upon request, the lawyer or the insurance

company should either explain the guidelines to you or provide you with a copy. If the lawyer is denied authorization to provide a service or undertake an action the lawyer believes necessary to your defense, you are entitled to be informed that the insurance company has declined authorization for the service or action.

5. *Confidentiality*. Lawyers have a general duty to keep secret the confidential information a client provides, subject to limited exceptions. However, the lawyer chosen to represent you also may have a duty to share with the insurance company information relating to the defense or settlement of the claim. If the lawyer learns of information indicating that the insurance company is not obligated under the policy to cover the claim or provide a defense, the lawyer's duty is to maintain that information in confidence. If the lawyer cannot do so, the lawyer may be required to withdraw from the representation without disclosing to the insurance company the nature of the conflict of interest which has arisen. Whenever a waiver of the lawyer-client confidentiality privilege is needed, your lawyer has a duty to consult with you and obtain your informed consent. Some insurance companies retain auditing companies to review the billings and files of the lawyers they hire to represent policyholders. If the lawyer believes a bill review or other action releases information in a manner that is contrary to your interests, the lawyer should advise you regarding the matter.

6. *Conflicts of Interest*. Most insurance policies state that the insurance company will provide a lawyer to represent your interests as well as those of the insurance company. The lawyer is responsible for identifying conflicts of interest and advising you of them. If at any time you believe the lawyer provided by the insurance company cannot fairly represent you because of conflicts of interest between you and the company (such as whether there is insurance coverage for the claim against you), you should discuss this with the lawyer and explain why you believe there is a conflict. If an actual conflict of interest arises that cannot be resolved, the insurance company may be required to provide you with another lawyer.

7. *Settlement*. Many policies state that the insurance company alone may make a final decision regarding settlement of a claim, but under some policies your agreement is required. If you want to object to or encourage a settlement within policy limits, you should discuss your concerns with your lawyer to learn your rights and possible consequences. No settlement of the case requiring you to pay money in excess of your policy limits can be reached without your agreement, following full disclosure.

8. *Your Risk*. If you lose the case, there might be a judgment entered against you for more than the amount of your insurance, and you might have to pay it. Your lawyer has a duty to advise you about this risk and other reasonably foreseeable adverse results.

9. *Hiring Your Own Lawyer*. The lawyer provided by the insurance company is representing you only to defend the lawsuit. If you desire to pursue a claim against the other side, or desire legal services not directly related to the defense of the lawsuit against you, you will need to make your own arrangements with this or another lawyer. You also may hire another lawyer, at your own expense, to monitor the defense being provided by the insurance

company. If there is a reasonable risk that the claim made against you exceeds the amount of coverage under your policy, you should consider consulting another lawyer.

10. *Reporting Violations*. If at any time you believe that your lawyer has acted in violation of your rights, you have the right to report the matter to The Florida Bar, the agency that oversees the practice and behavior of all lawyers in Florida. For information on how to reach The Florida Bar call (850) 561-5839 or you may access the Bar at www.FlaBar.org.

IF YOU HAVE ANY QUESTIONS ABOUT YOUR RIGHTS,
PLEASE ASK FOR AN EXPLANATION.

CERTIFICATE

The undersigned hereby certifies that this Statement of Insured Client's Rights has been provided to.....(name of insured/client(s))..... by .....(mail/hand delivery)..... at .....(address of insured/client(s) to which mailed or delivered, on .....(date).....

_____
[Signature of Attorney]

_____
[Print/Type Name]

Florida Bar No.:_____

(k) While lawyers are associated in a firm, a prohibition in the foregoing subdivisions (a) through (i) that applies to any one of them shall apply to all of them.

Comment

~~Transactions~~ Business transactions between client and lawyer

[1] ~~As a general principle, all transactions between client and lawyer should be fair and reasonable to the client. In such transactions a review by independent counsel on behalf of the client is often advisable. Furthermore, a lawyer may not exploit information relating to the representation to the client's disadvantage. For example, a lawyer who has learned that the client is investing in specific real estate may not, without the client's consent, seek to acquire nearby property where doing so would adversely affect the client's plan for investment.~~ ~~Subdivision (a)~~ A lawyer's legal skill and training, together with the relationship of trust and confidence between lawyer and client, create the possibility of overreaching when the lawyer participates in a business, property or financial transaction with a client. The requirements of subdivision (a) must be met even when the transaction is not closely related to the subject matter of the representation. The rule applies to lawyers engaged in the sale of goods or services related to the practice of law. See rule 4-5.7. It does not apply to ordinary fee arrangements between

client and lawyer, which are governed by rule 4-1.5, although its requirements must be met when the lawyer accepts an interest in the client's business or other nonmonetary property as payment for all or part of a fee. In addition, the rule does not~~, however,~~ apply to standard commercial transactions between the lawyer and the client for products or services that the client generally markets to others, for example, banking or brokerage services, medical services, products manufactured or distributed by the client, and utilities services. In such transactions the lawyer has no advantage in dealing with the client, and the restrictions in subdivision (a) are unnecessary and impracticable. Likewise, subdivision (a) does not prohibit a lawyer from acquiring or asserting a lien granted by law to secure the lawyer's fee or expenses.

[2] Subdivision (a)(1) requires that the transaction itself be fair to the client and that its essential terms be communicated to the client, in writing, in a manner that can be reasonably understood. Subdivision (a)(2) requires that the client also be advised, in writing, of the desirability of seeking the advice of independent legal counsel. It also requires that the client be given a reasonable opportunity to obtain such advice. Subdivision (a)(3) requires that the lawyer obtain the client's informed consent, in a writing signed by the client, both to the essential terms of the transaction and to the lawyer's role. When necessary, the lawyer should discuss both the material risks of the proposed transaction, including any risk presented by the lawyer's involvement, and the existence of reasonably available alternatives and should explain why the advice of independent legal counsel is desirable. See terminology (definition of informed consent).

[3] The risk to a client is greatest when the client expects the lawyer to represent the client in the transaction itself or when the lawyer's financial interest otherwise poses a significant risk that the lawyer's representation of the client will be materially limited by the lawyer's financial interest in the transaction. Here the lawyer's role requires that the lawyer must comply, not only with the requirements of subdivision (a), but also with the requirements of rule 4-1.7. Under that rule, the lawyer must disclose the risks associated with the lawyer's dual role as both legal adviser and participant in the transaction, such as the risk that the lawyer will structure the transaction or give legal advice in a way that favors the lawyer's interests at the expense of the client. Moreover, the lawyer must obtain the client's informed consent. In some cases, the lawyer's interest may be such that rule 4-1.7 will preclude the lawyer from seeking the client's consent to the transaction.

[4] If the client is independently represented in the transaction, subdivision (a)(2) of this rule is inapplicable, and the subdivision (a)(1) requirement for full disclosure is satisfied either by a written disclosure by the lawyer involved in the transaction or by the client's independent counsel. The fact that the client was independently represented in the transaction is relevant in determining whether the agreement was fair and reasonable to the client as subdivision (a)(1) further requires.

Gifts to Lawyers

[5] A lawyer may accept a gift from a client, if the transaction meets general standards of

fairness. For example, a simple gift such as a present given at a holiday or as a token of appreciation is permitted. If a client offers the lawyer a more substantial gift, subdivision (c) does not prohibit the lawyer from accepting it, although such a gift may be voidable by the client under the doctrine of undue influence, which treats client gifts as presumptively fraudulent. In any event, due to concerns about overreaching and imposition on clients, a lawyer may not suggest that a substantial gift be made to the lawyer or for the lawyer's benefit, except where the lawyer is related to the client as set forth in subdivision (c). If effectuation of a substantial gift requires preparing a legal instrument such as a will or conveyance, however, the client should have the detached advice that another lawyer can provide. Subdivision (c) recognizes an exception where the client is a relative of the donee or the gift is not substantial.

[6] This rule does not prohibit a lawyer from seeking to have the lawyer or a partner or associate of the lawyer named as personal representative of the client's estate or to another potentially lucrative fiduciary position. Nevertheless, such appointments will be subject to the general conflict of interest provision in rule 4-1.7 when there is a significant risk that the lawyer's interest in obtaining the appointment will materially limit the lawyer's independent professional judgment in advising the client concerning the choice of a personal representative or other fiduciary. In obtaining the client's informed consent to the conflict, the lawyer should advise the client concerning the nature and extent of the lawyer's financial interest in the appointment, as well as the availability of alternative candidates for the position.

Literary rights

[7] An agreement by which a lawyer acquires literary or media rights concerning the conduct of the representation creates a conflict between the interests of the client and the personal interests of the lawyer. Measures suitable in the representation of the client may detract from the publication value of an account of the representation. Subdivision (d) does not prohibit a lawyer representing a client in a transaction concerning literary property from agreeing that the lawyer's fee shall consist of a share in ownership in the property if the arrangement conforms to rule 4-1.5 and ~~subdivision~~ subdivisions (a) and (i).

Financial Assistance

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

Person paying for lawyer's services

~~Rule 4-1.8(f) requires disclosure of the fact that the lawyer's services are being paid for by a third party. Such an arrangement must also conform to the requirements of rule 4-1.6 concerning confidentiality and rule 4-1.7 concerning conflict of interest. Where the client is a class, consent may be obtained on behalf of the class by court-supervised procedure.~~

[9] Lawyers are frequently asked to represent a client under circumstances in which a third person will compensate the lawyer, in whole or in part. The third person might be a relative or friend, an indemnitor (such as a liability insurance company) or a co-client (such as a corporation sued along with one or more of its employees). Because third-party payers frequently have interests that differ from those of the client, including interests in minimizing the amount spent on the representation and in learning how the representation is progressing, lawyers are prohibited from accepting or continuing such representations unless the lawyer determines that there will be no interference with the lawyer's independent professional judgment and there is informed consent from the client. See also rule 4-5.4(d) (prohibiting interference with a lawyer's professional judgment by one who recommends, employs or pays the lawyer to render legal services for another).

[10] Sometimes, it will be sufficient for the lawyer to obtain the client's informed consent regarding the fact of the payment and the identity of the third-party payer. If, however, the fee arrangement creates a conflict of interest for the lawyer, then the lawyer must comply with rule 4-1.7. The lawyer must also conform to the requirements of rule 4-1.6 concerning confidentiality. Under rule 4-1.7(a), a conflict of interest exists if there is significant risk that the lawyer's representation of the client will be materially limited by the lawyer's own interest in the fee arrangement or by the lawyer's responsibilities to the third-party payer (for example, when the third-party payer is a co-client). Under rule 4-1.7(b), the lawyer may accept or continue the representation with the informed consent of each affected client, unless the conflict is nonconsentable under that paragraph. Under rule 4-1.7(b), the informed consent must be confirmed in writing.

Aggregate Settlements

[11] Differences in willingness to make or accept an offer of settlement are among the risks of common representation of multiple clients by a single lawyer. Under rule 4-1.7, this is one of the risks that should be discussed before undertaking the representation, as part of the process of obtaining the clients' informed consent. In addition, rule 4-1.2(a) protects each client's right to have the final say in deciding whether to accept or reject an offer of settlement and in deciding whether to enter a guilty or nolo contendere plea in a criminal case. The rule stated in this paragraph is a corollary of both these rules and provides that, before any settlement offer or plea bargain is made or accepted on behalf of multiple clients, the lawyer must inform each of them about all the material terms of the settlement, including what the other clients will receive or pay if the settlement or plea offer is accepted. See also terminology (definition of informed consent). Lawyers representing a class of plaintiffs or defendants, or those proceeding

derivatively, must comply with applicable rules regulating notification of class members and other procedural requirements designed to ensure adequate protection of the entire class.

Acquisition of interest in litigation

[12] Subdivision (i) states the traditional general rule that lawyers are prohibited from acquiring a proprietary interest in litigation. This general rule, which has its basis in common law champerty and maintenance, is subject to specific exceptions developed in decisional law and continued in these rules, such as the exception for reasonable contingent fees set forth in rule 4-1.5 and the exception for certain advances of the costs of litigation set forth in subdivision (e).

[13] This rule is not intended to apply to customary qualification and limitations in legal opinions and memoranda.

Representation of insureds

[14] As with any representation of a client when another person or client is paying for the representation, the representation of an insured client at the request of the insurer creates a special need for the lawyer to be cognizant of the potential for ethical risks. The nature of the relationship between a lawyer and a client can lead to the insured or the insurer having expectations inconsistent with the duty of the lawyer to maintain confidences, avoid conflicts of interest, and otherwise comply with professional standards. When a lawyer undertakes the representation of an insured client at the expense of the insurer, the lawyer should ascertain whether the lawyer will be representing both the insured and the insurer, or only the insured. Communication with both the insured and the insurer promotes their mutual understanding of the role of the lawyer in the particular representation. The Statement of Insured Client's Rights has been developed to facilitate the lawyer's performance of ethical responsibilities. The highly variable nature of insurance and the responsiveness of the insurance industry in developing new types of coverages for risks arising in the dynamic American economy render it impractical to establish a statement of rights applicable to all forms of insurance. The Statement of Insured Client's Rights is intended to apply to personal injury and property damage tort cases. It is not intended to apply to workers' compensation cases. Even in that relatively narrow area of insurance coverage, there is variability among policies. For that reason, the statement is necessarily broad. It is the responsibility of the lawyer to explain the statement to the insured. In particular cases, the lawyer may need to provide additional information to the insured.

[15] Because the purpose of the statement is to assist laypersons in understanding their basic rights as clients, it is necessarily abbreviated. Although brevity promotes the purpose for which the statement was developed, it also necessitates incompleteness. For these reasons, it is specifically provided that the statement shall not serve to establish any legal rights or duties, nor create any presumption that an existing legal or ethical duty has been breached. As a result, the statement and its contents should not be invoked by opposing parties as grounds for disqualification of a lawyer or for procedural purposes. The purpose of the statement would be subverted if it could be used in such a manner.

[16] The statement is to be signed by the lawyer to establish that it was timely provided to the insured, but the insured client is not required to sign it. It is in the best interests of the lawyer to have the insured client sign the statement to avoid future questions, but it is considered impractical to require the lawyer to obtain the insured client's signature in all instances.

[17] Establishment of the statement and the duty to provide it to an insured in tort cases involving personal injury or property damage should not be construed as lessening the duty of the lawyer to inform clients of their rights in other circumstances. When other types of insurance are involved, when there are other third-party payors of fees, or when multiple clients are represented, similar needs for fully informing clients exist, as recognized in rules 4-1.7(c) and 4-1.8(f).

Imputation of Prohibitions

[18] Under subdivision (k), a prohibition on conduct by an individual lawyer in subdivisions (a) through (i) also applies to all lawyers associated in a firm with the personally prohibited lawyer. For example, one lawyer in a firm may not enter into a business transaction with a client of another member of the firm without complying with subdivision (a), even if the first lawyer is not personally involved in the representation of the client.

MODEL RULE: 1.9, DUTIES TO FORMER CLIENTS

Summary of Substantive Changes Adopted by the ABA House of Delegates

Consistent with recommended changes throughout the conflict rules, the consent provisions of the Rule are changed to require "informed consent" and to further require that this consent be "confirmed in writing."

The Comment has been substantively changed in several ways. New Comment [3] attempts to define when matters are "substantially related" for purposes of Rule 1.9. Former Comments [4]-[5], concerning lawyers moving between firms, have been deleted. Former Comment 10] has been deleted. Comment [10] addressed the duty of loyalty underlying the prohibition in paragraph (a) of the Rule against lawyers opposing former clients in substantially related matters without consent. It also specified that, when a lawyer moves between law firms, the prohibition expressed Rule 1.9(a) continues to apply to the moving lawyer but does not necessarily extend the moving lawyer's disqualification to the new firm.

Brief Explanation of How the ABA Rule Differs from the Florida Rule

Initially, it must be noted that the ABA Rule and Florida Rule 4-1.9 differ significantly in their approaches: Florida Rule 4-1.9 incorporates all of the imputed conflict provisions concerning lawyers who move between private firms, while the ABA Rules which place some of these provisions in Rule 1.9 and the others in Rule 1.10.

Florida Rule 4-1.9 does not require that a former client's consent be confirmed in writing.

The current Florida Rule contains a definition of "generally known" information relating to the representation of a former client. The ABA Rule does not define this term.

The Florida Comment does not address lawyers moving between firms. (As noted above, this issue is addressed in Florida Rule 4-1.10.)

Recommendation of Yes or No, and Reasons

Qualified YES to the Rule and Comment.

Consistent with the ABA Rule, the Florida Rule should be revised to require that a lawyer obtain a former client's "informed consent" when a conflict exists under this Rule. In contrast to the rules governing conflicts involving current clients, however, this consent should *not* have to be confirmed in writing. The importance of maintaining an effective working relationship with existing clients supports requiring conflict waivers with current clients to be confirmed in writing; these relationship considerations are minimized with respect to former clients. A lawyer should not be subject to discipline for failing to confirm a waiver in writing if the former client, in fact, has made an informed waiver of the conflict.

It is recommended that any definition of "generally known" information be placed in the Comment rather than the Rule. Such placement is more consistent with the overall format of Rule 4-1.9 and other Rules (e.g., the term "matter" is defined in the Comment rather than in the text of Rule 4-1.9).

Attempting to more clearly explain what is meant by "substantially related" matters is laudable, but the language used in the ABA Comment is not very helpful because it blurs the distinction between the issues of loyalty and confidentiality in conflict of interest analysis. An alternative version of the Rule and Comment is proposed. This version includes some of the more useful explanatory language from the ABA Comment, but separates the concepts of loyalty (which is addressed in Rule 4-1.9(a)) and confidentiality (addressed in Rule 4-1.9(b)) into separate comment paragraphs.

FLORIDA'S Rule in LEGISLATIVE FORMAT

RULE 4-1.9 CONFLICT OF INTEREST; FORMER CLIENT

A lawyer who has formerly represented a client in a matter shall not thereafter:

(a) 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 ~~consents after consultation~~ gives informed consent; or

(b) use information relating to the representation to the disadvantage of the former client except as rule 4-1.6 would permit with respect to a client or when the information has become generally known. ~~For purposes of this rule, "generally known" shall mean information of the type that a reasonably prudent lawyer would obtain from public records or through authorized processes for discovery of evidence.~~

Comment

[1] After termination of a client-lawyer relationship, a lawyer may not represent another client except in conformity with this rule. The principles in rule 4-1.7 determine whether the interests of the present and former client are adverse. Thus, a lawyer could not properly seek to rescind on behalf of a new client a contract drafted on behalf of the former client. So also a lawyer who has prosecuted an accused person could not properly represent the accused in a subsequent civil action against the government concerning the same transaction.

[2] The scope of a "matter" for purposes of rule 4-1.9(a) may depend on the facts of a particular situation or transaction. The lawyer's involvement in a matter can also be a question of degree. When a lawyer has been directly involved in a specific transaction, subsequent representation of other clients with materially adverse interests clearly is prohibited. On the other hand, a lawyer who recurrently handled a type of problem for a former client is not

precluded from later representing another client in a wholly distinct problem of that type even though the subsequent representation involves a position adverse to the prior client. Similar considerations can apply to the reassignment of military lawyers between defense and prosecution functions within the same military jurisdiction. The underlying question is whether the lawyer was so involved in the matter that the subsequent representation can be justly regarded as a changing of sides in the matter in question.

[3] Matters are "substantially related" for purposes of this rule if they involve the same transaction or legal dispute, or if the current matter would involve the lawyer attacking work that the lawyer performed for the former client. For example, a lawyer who has previously represented a client in securing environmental permits to build a shopping center would be precluded from representing neighbors seeking to oppose rezoning of the property on the basis of environmental considerations; however, the lawyer would not be precluded, on the grounds of substantial relationship, from defending a tenant of the completed shopping center in resisting eviction for nonpayment of rent.

[4] Lawyers owe confidentiality obligations to former clients, and thus ~~i~~information acquired by the lawyer in the course of representing a client may not subsequently be used by the lawyer to the disadvantage of the client without the former client's consent. For example, a lawyer who has represented a businessperson and learned extensive private financial information about that person may not then represent that person's spouse in seeking a divorce. However, the fact that a lawyer has once served a client does not preclude the lawyer from using generally known information~~, as defined in rule 4-1.9(b),~~ about that client when later representing another client. Information that has been widely disseminated by the media to the public, or that typically would be obtained by any reasonably prudent lawyer who had never represented the former client, should be considered generally known and ordinarily will not be disqualifying. The essential question is whether, but for having represented the former client, the lawyer would know or discover the information.

[5] Information acquired in a prior representation may have been rendered obsolete by the passage of time. In the case of an organizational client, general knowledge of the client's policies and practices ordinarily will not preclude a subsequent representation; on the other hand, knowledge of specific facts gained in a prior representation that are relevant to the matter in question ordinarily will preclude such a representation. A former client is not required to reveal the confidential information learned by the lawyer in order to establish a substantial risk that the lawyer has confidential information to use in the subsequent matter. A conclusion about the possession of such information may be based on the nature of the services the lawyer provided the former client and information that would in ordinary practice be learned by a lawyer providing such services.

[6] ~~Disqualification from subsequent representation is~~ The provisions of this rule are for the protection of clients and can be waived ~~by them. A waiver is effective only if there is disclosure of the circumstances, including the lawyer's intended role in behalf of the new client~~ if the former client gives informed consent. See terminology.

[7] With regard to an opposing party's raising a question of conflict of interest, see comment to rule 4-1.7. With regard to disqualification of a firm with which a lawyer is associated, see rule 4-1.10.

MODEL RULE: 1.10, IMPUTATION OF CONFLICTS OF INTEREST: GENERAL RULE

Summary of Substantive Changes Adopted by the ABA House of Delegates

1. Paragraph (a) of the ABA Rule contains 2 changes. First, the imputation of conflict under Rule 1.8(c) (lawyer preparing document transferring gift from client to lawyer) has been eliminated. This change should not be considered substantive, however, because the conflict formerly addressed in Rule 1.8(c) is now covered in Rule 1.8(k), with the same result of imputing the conflict to all lawyers in the a firm.

2. Second, the imputation of "personal interest" conflicts from a lawyer to other lawyers in the same firm has been eliminated in Rule 1.10. (Note: "Personal interest" conflicts of a financial or business transaction nature are still imputed among all lawyers in a law firm pursuant to ABA Rule 1.8(k).)

3. For the first time, Paragraph (d) of ABA Rule 1.10 now expressly provides that "disqualification of lawyers associated in a firm with former or current government lawyers is governed by Rule 1.11." The ABA Reporter's Explanation of Changes indicates that this revision is not a substantive change but a clarification that Rule 1.11 is the exclusive Rule governing the imputation of conflicts of interests of current or former government lawyers.

4. Portions of former ABA Comments [1]-[3] that provided a helpful explanation of the meaning of a "firm" for purposes of this rule have been deleted.

5. Former ABA Comment [4], concerning the rationale for differing conflict standards for private and government lawyers has been deleted.

6. New ABA Comment [3] explains the change to the Rule concerning non-imputation of some purely "personal interest" conflicts.

7. New ABA Comment [4] addresses the difficult issues of imputing conflicts within a law firm based upon the activities of a nonlawyer or the activities of a person who has since become a lawyer.

8. New ABA Comment [6] addresses the issue of consent, including the new standard of "informed consent, confirmed in writing" contained in revised ABA Rule 1.7.

9. New ABA Comment [8] specifies that Rule 1.8(k), rather than Rule 1.10, governs the imputation of conflicts addressed in Rule 1.8.

How the ABA Rule DIFFERS from the EXISTING FLORIDA Rule

1-3. Of course, Florida's Rule 4-1.10 does not include these changes. Additionally, Florida Rule 4-1.10 incorporates all of the imputed conflict provisions concerning lawyers who move

between private firms. (This contrasts with the ABA Rules, which place these provisions in Rule 1.9 and 1.10.)

4-9. The ABA changes to the comments are not in the Florida commentary to Rule 4-1.10. Comments formerly included in the ABA rule are included in the current Florida rule, and new comments adopted by the ABA are not included in the current Florida rule.

Recommendation of Yes or No, and Reasons

1-3. **YES**, as to the changes to the Rule. As noted above, most of these changes are not of a substantive nature in light of changes to ABA Rule 1.8(k). The change concerning non-financial "personal interest" can be considered substantive, but affects only conflicts of a truly personal nature (e.g., a lawyer's ideological beliefs, or a lawyer's individual job search.)

4-9. **A qualified NO**, as to the changes to the Comment. Generally, Florida's Comment should be left intact with only a few changes. (Because the format of Florida Rule 4-1.10 differs significantly from ABA Rule 1.10 by combining all "moving lawyer" conflict considerations into one rule, much of the Florida Comment is unique to Florida and must remain unchanged.)

The language in existing ABA Comments [1]-[4] is helpful and should be kept in the Florida Comment. New ABA Comments [3] should be added to the "Principles of Imputed Disqualification" section of the Florida Comment. New ABA Comment [4], with the deletion of the second sentence, should also be added to Florida's Comment. (It should be noted that the second sentence conflicts with existing Florida case law, and that the principles expressed in the remainder of this paragraph are consistent with the approach taken by some, but not all, of Florida's appellate courts.) New ABA Comment [6], concerning client consent, should be added to the end of the Florida Comment along with new ABA Comment [8].

FLORIDA'S Rule in LEGISLATIVE FORMAT

RULE 4-1.10 ~~IMPUTED DISQUALIFICATION~~ IMPUTATION OF CONFLICTS OF INTEREST; GENERAL RULE

(a) Imputed Disqualification of All Lawyers in Firm. While lawyers are associated in a firm, none of them shall knowingly represent a client when any 1 of them practicing alone would be prohibited from doing so by rule 4-1.7~~, 4-1.8(c),~~ or 4-1.9~~, or 4-2.2~~ except as provided elsewhere in this rule, or unless the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.

(b) Former Clients of Newly Associated Lawyer. When a lawyer becomes associated with a firm, the firm may not knowingly represent a person in the same or a substantially related matter in which that lawyer, or a firm with which the lawyer was associated, had previously represented a client whose interests are materially adverse to that person and about whom the lawyer had acquired information protected by rules 4-1.6 and 4-1.9(b) that is material to the

matter.

(c) Representing Interests Adverse to Clients of Formerly Associated Lawyer. When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer unless:

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

(2) any lawyer remaining in the firm has information protected by rules 4-1.6 and 4-1.9(b) that is material to the matter.

(d) Waiver of Conflict. A disqualification prescribed by this rule may be waived by the affected client under the conditions stated in rule 4-1.7.

(e) Government Lawyers. The disqualification of lawyers associated in a firm with former or current government lawyers is governed by rule 4-1.11.

Comment

Definition of "firm"

~~For purposes of the Rules of Professional Conduct, the term "firm" includes lawyers in a private firm and lawyers employed in the legal department of a corporation or other organization or in a legal services organization. Whether 2 or more lawyers constitute a firm within this definition can depend on the specific facts. For example, 2 practitioners who share office space and occasionally consult or assist each other ordinarily would not be regarded as constituting a firm. However, if they present themselves to the public in a way suggesting that they are a firm or conduct themselves as a firm, they should be regarded as a firm for purposes of the rules. The terms of any formal agreement between associated lawyers are relevant in determining whether they are a firm, as is the fact that they have mutual access to confidential information concerning the clients they serve. Furthermore, it is relevant in doubtful cases to consider the underlying purpose of the rule that is involved. A group of lawyers could be regarded as a firm for purposes of the rule that the same lawyer should not represent opposing parties in litigation, while it might not be so regarded for purposes of the rule that information acquired by one lawyer is attributed to another.~~

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

and its local affiliates.

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

[3] Where a lawyer has joined a private firm after having represented the government, the situation is governed by rule 4-1.11(a) and (b); where a lawyer represents the government after having served private clients, the situation is governed by rule 4-1.11(c)(1). The individual lawyer involved is bound by the rules generally, including rules 4-1.6, 4-1.7, and 4-1.9.

[4] Different provisions are thus made for movement of a lawyer from 1 private firm to another and for movement of a lawyer between a private firm and the government. The government is entitled to protection of its client confidences and, therefore, to the protections provided in rules 4-1.6, 4-1.9, and 4-1.11. However, if the more extensive disqualification in rule 4-1.10 were applied to former government lawyers, the potential effect on the government would be unduly burdensome. The government deals with all private citizens and organizations and thus has a much wider circle of adverse legal interests than does any private law firm. In these circumstances, the government's recruitment of lawyers would be seriously impaired if rule 4-1.10 were applied to the government. On balance, therefore, the government is better served in the long run by the protections stated in rule 4-1.11.

Principles of imputed disqualification

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

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

[7] The rule in subdivision (a) also does not prohibit representation by others in the law

firm where the person prohibited from involvement in a matter is a nonlawyer, such as a paralegal or legal secretary. Such persons, however, ordinarily must be screened from any personal participation in the matter to avoid communication to others in the firm of confidential information that both the nonlawyers and the firm have a legal duty to protect. See terminology and rule 4-5.3.

Lawyers moving between firms

[8] When lawyers have been associated in a firm but then end their association, however, the problem is more complicated. The fiction that the law firm is the same as a single lawyer is no longer wholly realistic. There are several competing considerations. First, the client previously represented must be reasonably assured that the principle of loyalty to the client is not compromised. Second, the rule of disqualification should not be so broadly cast as to preclude other persons from having reasonable choice of legal counsel. Third, the rule of disqualification should not unreasonably hamper lawyers from forming new associations and taking on new clients after having left a previous association. In this connection, it should be recognized that today many lawyers practice in firms, that many to some degree limit their practice to 1 field or another, and that many move from 1 association to another several times in their careers. If the concept of imputed disqualification were defined with unqualified rigor, the result would be radical curtailment of the opportunity of lawyers to move from 1 practice setting to another and of the opportunity of clients to change counsel.

[9] Reconciliation of these competing principles in the past has been attempted under 2 rubrics. One approach has been to seek per se rules of disqualification. For example, it has been held that a partner in a law firm is conclusively presumed to have access to all confidences concerning all clients of the firm. Under this analysis, if a lawyer has been a partner in one law firm and then becomes a partner in another law firm, there is a presumption that all confidences known by a partner in the first firm are known to all partners in the second firm. This presumption might properly be applied in some circumstances, especially where the client has been extensively represented, but may be unrealistic where the client was represented only for limited purposes. Furthermore, such a rigid rule exaggerates the difference between a partner and an associate in modern law firms.

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

[11] A rule based on a functional analysis is more appropriate for determining the

question of vicarious disqualification. Two functions are involved: preserving confidentiality and avoiding positions adverse to a client.

Confidentiality

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

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

[14] Subdivisions (b) and (c) operate to disqualify the firm only when the lawyer involved has actual knowledge of information protected by rules 4-1.6 and 4-1.9(b). Thus, if a lawyer while with 1 firm acquired no knowledge or information relating to a particular client of the firm and that lawyer later joined another firm, neither the lawyer individually nor the second firm is disqualified from representing another client in the same or a related matter even though the interests of the 2 clients conflict.

[15] Independent of the question of disqualification of a firm, a lawyer changing professional association has a continuing duty to preserve confidentiality of information about a client formerly represented. See rules 4-1.6 and 4-1.9.

Adverse positions

[16] The second aspect of loyalty to client is the lawyer's obligation to decline subsequent representations involving positions adverse to a former client arising in substantially related matters. This obligation requires abstention from adverse representation by the individual lawyer involved, but does not properly entail abstention of other lawyers through imputed disqualification. Hence, this aspect of the problem is governed by rule 4-1.9(a). Thus, if a lawyer left 1 firm for another, the new affiliation would not preclude the firms involved from continuing to represent clients with adverse interests in the same or related matters so long as the conditions of rule 4-1.10(b) and (c) concerning confidentiality have been met.

[17] Rule 4-1.10(d) removes imputation with the informed consent of the affected client or former client under the conditions stated in rule 4-1.7. The conditions stated in rule 4-1.7 require the lawyer to determine that the representation is not prohibited by rule 4-1.7(b) and that

each affected client or former client has given informed consent to the representation, confirmed in writing. In some cases, the risk may be so severe that the conflict may not be cured by client consent. For a discussion of the effectiveness of client waivers of conflicts that might arise in the future, see rule 4-1.7, comment. For a definition of informed consent, see terminology.

[18] Where a lawyer is prohibited from engaging in certain transactions under rule 4-1.8, subdivision (k) of that rule, and not this rule, determines whether that prohibition also applies to other lawyers associated in a firm with the personally prohibited lawyer.

MODEL RULE: 1.11 - SPECIAL CONFLICTS OF INTEREST FOR FORMER AND CURRENT GOVERNMENT OFFICERS AND EMPLOYEES

SUMMARY of Substantive Changes Adopted by the ABA

1. The ABA's changes provide additional guidance for former and current government lawyers. The title of the Rule has been changed to make it clear that current government lawyers as well as former government lawyers are covered by the Rule.

2. Paragraph (a) adds to the Rule language that says the former government lawyer is subject to the confidentiality requirements to not reveal confidences under 1.9(c) and substitutes "gives its informed consent, confirmed in writing" for "consents after consultation" for a waiver by the government agency.

3. Paragraph (b) contains language that was formerly in paragraph (a) and adds the word "timely" to the screening provision of the disqualified lawyer who joins a new firm.

4. Paragraph (c) is the old paragraph (b) and adds new language defining "confidential government information" as information that has been obtained under government authority and which the government is prohibited by law from disclosing to the public or has a legal privilege to not disclose and which is otherwise not available to the public.

5. Paragraph (d) is the old paragraph (c) with the addition of language that points out that a lawyer currently serving as a public officer or employee is subject to Rules 1.7 and 1.9 and requires the appropriate government agency to give informed consent in writing if there is to be a waiver.

6. Paragraph (c) is old paragraph (d) and is unchanged.

7. Old paragraph (c) has been deleted as that definition of confidential government information has been moved to new paragraph (c).

8. Paragraph 1, which explains that Rule 1.11 is the counterpart to Rule 1.10, is deleted.

9. New Paragraph 1 of the comment is old paragraph 2 and adds the language which says the Rule refers to current as well as former government lawyers and refers attorneys to Rule 1.0(e) for the definition of "informed consent."

10. New Paragraph 2 of the Comment is new and points out that Rule 1.10 is not applicable to current or former government lawyers and that Rule 1.11 provides screening and notice. It also points out that the Rule does not impute conflicts of a government lawyer to other government lawyers.

11. Paragraph 3 of the Comment is also new and merely points out that a lawyer may not exploit

public office for the advantage of another client nor may a lawyer who has pursued a claim on behalf of a former client pursue that claim on behalf of the government except as authorized by paragraph (d), which requires informed consent confirmed in writing.

12. New Paragraph 4 of the Comment is old Paragraph 3 and has very few changes, mainly for clarification such as pointing out that a former government lawyer is disqualified only from particular matters in which the lawyer participated personally and substantially. This paragraph also has a new sentence that points out that the limitation of disqualification is to matters involving a specific party or parties, rather than extending the disqualification to all substantive issues on which the lawyer worked.

13. New Paragraph 5 of the Comment is old Paragraph 4 and addresses the situation when a government lawyer moves from one government agency to a second government agency and then that second agency is treated as a client for the purposes of the Rule. An additional sentence is added to the Comment to point out that the latter agency is not required to screen the lawyer in the same way that a private law firm would have been required to screen the lawyer.

14. New Paragraph 6 of the Comment is old Paragraph 5 which is reworded to more clearly explain that while a former government lawyer who has been screened is not prohibited from receiving a salary or partnership share in his new firm, he may not receive compensation directly relating to the matter in which the lawyer is disqualified.

15. New Paragraph 7 of the Comment is a new paragraph and urges that notice of the screened lawyer's prior representation and the screening procedures employed should be given as soon as practicable after the need for screening becomes apparent.

16. Old Paragraph 6 has been deleted as its subject matter is now covered by new Paragraph 7 of the Comment.

17. New Paragraph 8 of the Comment is old Paragraph 7 with one minor change to reflect the new numbering of the Rule ((c) is substituted for (b)).

18. New Paragraph 9 of the Rule is old Paragraph 8 with the same type of change as found in new Paragraph 8. Old Paragraph 9 of the Rule has been deleted as its substance, that other lawyers in the government agency are not disqualified, is addressed in another Comment.

19. New Paragraph 10 of the Comment is a new Paragraph, and merely points out that in determining what a "matter" is under the Rule, the lawyer should consider the extent to which the matter involves the same basic facts, the same related parties, and the time elapsed, as a "matter" may continue in another form.

How Proposed ABA Rule DIFFERS from EXISTING FLORIDA Rule

1-7. Rule 4-1.11 is the old ABA 1.11. Changes adopted by the ABA are not included in the

current Florida rule.

6-19. The current Florida Comment is the same as the old ABA Comments except that Florida paragraphs 5 through 9 begin with the word "subdivision" (or "subdivisions") whereas the ABA Comments begin with the word "Paragraph" (or "Paragraphs").

RECOMMENDATION of Yes or No and REASONS

1-19. **YES**. The new ABA Rule 1.11 and its Comments do not change the substance of the old ABA 1.11, but explain the Rule more clearly. We recommend adoption of the changes to ABA Rule 1.11.

FLORIDA'S Rule in LEGISLATIVE FORMAT

RULE 4-1.11 ~~SUCCESSIVE~~ SPECIAL CONFLICTS OF INTEREST FOR FORMER AND CURRENT GOVERNMENT OFFICERS AND ~~PRIVATE EMPLOYMENT~~ EMPLOYEES

(a) Representation of Private Client by Former Public Officer or Employee. A lawyer who has formerly served as a public officer or employee of the government:

(1) is subject to rule 4-1.9(b); and

(2) shall not otherwise represent a ~~private~~ 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 ~~consents after consultation~~ gives its informed consent, confirmed in writing, to the representation.

(b) ~~No~~ When a lawyer is disqualified from representation under subdivision (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 disqualified lawyer is timely screened from any participation in the matter and is directly apportioned no part of the fee therefrom; and

(2) written notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this rule.

~~(b)~~ (c) Use of Confidential Government Information. 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 which, 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 which 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 screened from any participation in the matter and is apportioned no part of the fee therefrom.

~~(c)~~ **(d) Limits on Participation of Public Officer or Employee.** A lawyer currently serving as a public officer or employee:

(1) is subject to rules 4-1.7 and 4-1.9; and

(2) shall not:

~~(1)~~ (i) 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~~ the appropriate government agency gives its informed consent, confirmed in writing; or

~~(2)~~ (ii) negotiate for private employment with any person who is involved as a party or as attorney for a party in a matter in which the lawyer is participating personally and substantially.

~~(d)~~**(e) Matter Defined.** As used in this rule, the term "matter" includes:

(1) any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest, or other particular matter involving a specific party or parties; and

(2) any other matter covered by the conflict of interest rules of the appropriate government agency.

~~**(e) Confidential Government Information Defined.** 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.~~

Comment

~~This rule prevents a lawyer from exploiting public office for the advantage of a private client. It is a counterpart of rule 4-1.10(b), which applies to lawyers moving from 1 firm to another.~~

[1] A lawyer ~~representing a government agency, whether employed or specially retained by the government,~~ who has served or is currently serving as a public officer or employee is

personally subject to the rules of professional conduct, including the prohibition against ~~representing adverse interests~~ concurrent conflicts of interest stated in rule 4-1.7 ~~and the protections afforded former clients in rule 4-1.9~~. In addition, such a lawyer ~~is~~ may be subject to ~~rule 4-1.11 and to~~ statutes and government regulations regarding conflict of interest. Such statutes and regulations may circumscribe the extent to which the government agency may give consent under this rule. See terminology for definition of informed consent.

[2] Subdivisions (a)(1), (a)(2) and (d)(1) restate the obligations of an individual lawyer who has served or is currently serving as an officer or employee of the government toward a former government or private client. Rule 4-1.10 is not applicable to the conflicts of interest addressed by this Rule. Rather, subdivision (b) sets forth a special imputation rule for former government lawyers that provides for screening and notice. Because of the special problems raised by imputation within a government agency, subdivision (d) does not impute the conflicts of a lawyer currently serving as an officer or employee of the government to other associated government officers or employees, although ordinarily it will be prudent to screen such lawyers.

[3] Subdivisions (a)(2) and (d)(2) apply regardless of whether a lawyer is adverse to a former client and are thus designed not only to protect the former client, but also to prevent a lawyer from exploiting public office for the advantage of another client. For example, a lawyer who has pursued a claim on behalf of the government may not pursue the same claim on behalf of a later private client after the lawyer has left government service, except when authorized to do so by the government agency under subdivision (a). Similarly, a lawyer who has pursued a claim on behalf of a private client may not pursue the claim on behalf of the government, except when authorized to do so by subdivision (d). As with subdivisions (a)(1) and (d)(1), rule 4-1.10 is not applicable to the conflicts of interest addressed by these paragraphs.

[4] ~~Where~~ This rule represents a balancing of interests. On the one hand, where the successive clients are a ~~public~~ government agency and ~~a private~~ another client, public or private, the risk exists that power or discretion vested in that agency ~~public authority~~ might be used for the special benefit of ~~a private~~ the other client. A lawyer should not be in a position where benefit to ~~a private~~ the other client might affect performance of the lawyer's professional functions on behalf of the government ~~public authority~~. Also, unfair advantage could accrue to the ~~private~~ other client by reason of access to confidential government information about the client's adversary obtainable only through the lawyer's government service. ~~However~~ On the other hand, the rules governing lawyers presently or formerly employed by a government agency should not be so restrictive as to inhibit transfer of employment to and from the government. The government has a legitimate need to attract qualified lawyers as well as to maintain high ethical standards. Thus a former government lawyer is disqualified only from particular matters in which the lawyer participated personally and substantially. The provisions for screening and waiver in subdivision (b) are necessary to prevent the disqualification rule from imposing too severe a deterrent against entering public service. The limitation of disqualification in paragraphs (a)(2) and (d)(2) to matters involving a specific party or parties, rather than extending disqualification to all substantive issues on which the lawyer worked, serves a similar function.

[5] When ~~the client is an agency of~~ a lawyer has been employed by 1 government agency and then moves to a second government agency, it may be appropriate to treat that second~~, the~~ agency ~~should be treated~~ as ~~a private~~ another client for purposes of this rule ~~if the lawyer thereafter represents an agency of another government~~, as when a lawyer ~~represents~~ is employed by a city and subsequently is employed by a federal agency. However, because the conflict of interest is governed by subdivision (d), the latter agency is not required to screen the lawyer as subdivision (b) requires a law firm to do. The question of whether 2 government agencies should be regarded as the same or different clients for conflict of interest purposes is beyond the scope of these rules. See rule 4-1.13 comment, Government Agency.

[6] Subdivisions ~~(a)(1) and~~ (b) and (c) contemplate a screening arrangement. See terminology (requirements for screening procedures). These subdivisions do not prohibit a lawyer from receiving a salary or partnership share established by prior independent agreement~~.~~ ~~They prohibit~~, but that the lawyer may not receive compensation directly relating the attorney's compensation to the fee in the matter in which the lawyer is disqualified.

[7] Notice, including a description of the screened lawyer's prior representation and of the screening procedures employed, generally should be given as soon as practicable after the need for screening becomes apparent.

~~Subdivision (a)(2) does not require that a lawyer give notice to the government agency at a time when premature disclosure would injure the client; a requirement for premature disclosure might preclude engagement of the lawyer. Such notice is, however, required to be given as soon as practicable in order that the government agency or affected person will have a reasonable opportunity to ascertain that the lawyer is complying with rule 4-1.11 and to take appropriate action if the agency or person believes the lawyer is not complying.~~

[8] Subdivision ~~(b)~~ (c) operates only when the lawyer in question has knowledge of the information, which means actual knowledge; it does not operate with respect to information that merely could be imputed to the lawyer.

[9] Subdivisions (a) and ~~(c)~~ (d) do not prohibit a lawyer from jointly representing a private party and a government agency when doing so is permitted by rule 4-1.7 and is not otherwise prohibited by law.

~~Subdivision (c) does not disqualify other lawyers in the agency with which the lawyer in question has become associated.~~

[10] For purposes of subdivision (e) of this rule, a "matter" may continue in another form. In determining whether 2 particular matters are the same, the lawyer should consider the extent to which the matters involve the same basic facts, the same or related parties, and the time elapsed.

MODEL RULE: 1.12, FORMER JUDGE, ARBITRATOR, MEDIATOR, OR OTHER THIRD-PARTY NEUTRAL

SUMMARY of Substantive Changes Proposed by Ethics 2000

1. Expands the coverage of Rule 1.12 to include mediators and other "third-party neutrals."

2. Consistent with recommended changes throughout the conflict rules, the consent provisions of the Rule are changed to require "informed consent" and further require that the consent be "confirmed in writing."

3. Adds the requirement that any screening permitted under the Rule be "timely" put into effect.

How Proposed ABA Rule DIFFERS from EXISTING FLORIDA Rule

1. Florida Rule 1.12 does not presently address mediators and other third-party neutrals.

2. Florida Rule 1.12 does *not* require that this consent be in confirmed in writing.

3. Florida Rule 1.12 does not contain the "timely" requirement.

RECOMMENDATION of Yes or No and REASONS

1. **YES**. Expanding the rule to cover all third-party neutrals is appropriate in view of the growing role of alternative dispute resolution methods in today's legal environment. However, commentary should be added to clarify that certified mediators may be subject to rules and/or statutes governing their conduct.

2. **YES**. There should be confirmation in writing of a conflict waiver.

3. **YES**.

FLORIDA'S Rule in LEGISLATIVE FORMAT

RULE 4-1.12 FORMER JUDGE ~~OR~~, ARBITRATOR, MEDIATOR OR OTHER THIRD-PARTY NEUTRAL

(a) Representation of Private Client by Former Judge, ~~Arbitrator, or~~ Law Clerk, or other Third-Party Neutral. Except as stated in subdivision (d), a lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as a judge or other adjudicative officer, ~~arbitrator,~~ or law clerk to such a person or as an arbitrator, mediator or other third-party neutral, unless all parties to the proceeding give informed consent ~~after disclosure~~, confirmed in writing.

(b) Negotiation of Employment by Judge, ~~Arbitrator, or~~ Law Clerk, or Other Third-Party Neutral. A lawyer shall not negotiate for employment with any person who is involved as a party or as attorney 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. A lawyer serving as a law clerk to a judge~~,~~ or other adjudicative officer~~, or arbitrator~~ may negotiate for employment with a party or attorney involved in a matter in which the clerk is participating personally and substantially, but only after the lawyer has notified the judge~~,~~ or other adjudicative officer~~, or arbitrator~~.

(c) Imputed Disqualification of Law Firm. If a lawyer is disqualified by subdivision (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in the matter unless:

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

(2) written notice is promptly given to the parties and any appropriate tribunal to enable it to ascertain compliance with the provisions of this rule.

(d) Exemption for Arbitrator as Partisan. An arbitrator selected as a partisan of a party in a multimember arbitration panel is not prohibited from subsequently representing that party.

Comment

[1] This rule generally parallels rule 4-1.11. The term "personally and substantially" signifies that a judge who was a member of a multimember court, and thereafter left judicial office to practice law, is not prohibited from representing a client in a matter pending in the court, but in which the former judge did not participate. So also the fact that a former judge exercised administrative responsibility in a court does not prevent the former judge from acting as a lawyer in a matter where the judge had previously exercised remote or incidental administrative responsibility that did not affect the merits. Compare the comment to rule 4-1.11. The term "adjudicative officer" includes such officials as judges pro tempore, referees, special masters, hearing officers, and other parajudicial officers and also lawyers who serve as part-time judges. Compliance Canons A(2), B(2), and C of Florida's Code of Judicial Conduct provide that a part-time judge, judge pro tempore, or retired judge recalled to active service may not "act as a lawyer in a proceeding in which [the lawyer] has served as a judge or in any other proceeding related thereto." Although phrased differently from this rule, those rules correspond in meaning.

[2] Like former judges, lawyers who have served as arbitrators, mediators or other third-party neutrals may be asked to represent a client in a matter in which the lawyer participated personally and substantially. This Rule forbids such representation unless all of the parties to the proceedings give their informed consent, confirmed in writing. See terminology. Other law or

codes of ethics governing third-party neutrals may impose more stringent standards of personal or imputed disqualification. See Rule 2.4.

[3] Although lawyers who serve as third-party neutrals do not have information concerning the parties that is protected under Rule 1.6, they typically owe the parties an obligation of confidentiality under law or codes of ethics governing third-party neutrals. Thus, subdivision (c) provides that conflicts of the personally disqualified lawyer will be imputed to other lawyers in a law firm unless the conditions of this paragraph are met.

[4] Requirements for screening procedures are stated in terminology. Subdivision (c)(1) does not prohibit the screened lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly related to the matter in which the lawyer is disqualified.

[5] Notice, including a description of the screened lawyer's prior representation and of the screening procedures employed, generally should be given as soon as practicable after the need for screening becomes apparent.

[6] A Florida Bar member who is a certified mediator is governed by the applicable law and rules relating to certified mediators.

MODEL RULE: 1.13, ORGANIZATION AS CLIENT

SUMMARY of Substantive Changes Adopted by the ABA House of Delegates

No change in substance intended.

How Proposed ABA Rule DIFFERS from EXISTING FLORIDA Rule

The new ABA Rule clarifies the scienter requirement of subsection (d) by providing that in dealing with an organization's directors, officers, employees, members, shareholders, or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

Paragraph 6 of the comment was modified to indicate that defining the client in the government context is difficult and outside the scope of the rules.

RECOMMENDATION of Yes or No and REASONS

YES.

FLORIDA'S Rule in LEGISLATIVE FORMAT

RULE 4-1.13 ORGANIZATION AS CLIENT

(a) Representation of Organization. A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

(b) Violations by Officers or Employees of Organization. If a lawyer for an organization knows that an officer, employee, or other person associated with the organization is engaged in action, intends to act, or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization or a violation of law that reasonably might be imputed to the organization and is likely to result in substantial injury to the organization, 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 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) Resignation as Counsel for Organization. If, despite the lawyer's efforts in accordance with subdivision (b), the highest authority that can act on behalf of the organization insists upon action, or a refusal to act, that is clearly a violation of law and is likely to result in substantial injury to the organization, the lawyer may resign in accordance with rule 4-1.16.

(d) Identification of Client. In dealing with an organization's directors, officers, employees, members, shareholders, or other constituents, a lawyer shall explain the identity of the client when ~~it is apparent~~ the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

(e) Representing Directors, Officers, Employees, Members, Shareholders, or Other Constituents of Organization. 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 4-1.7. If the organization's consent to the dual representation is required by rule 4-1.7, 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.

Comment

The entity as the client

[1] An organizational client is a legal entity, but it cannot act except through its officers, directors, employees, shareholders, and other constituents. Officers, directors, employees, and shareholders are the constituents of the corporate organizational client. The duties defined in this comment apply equally to unincorporated associations. "Other constituents" as used in this comment means the positions equivalent to officers, directors, employees, and shareholders held by persons acting for organizational clients that are not corporations.

[2] When 1 of the constituents of an organizational client communicates with the organization's lawyer in that person's organizational capacity, the communication is protected by rule 4-1.6. Thus, by way of example, if an organizational client requests its lawyer to investigate allegations of wrongdoing, interviews made in the course of that investigation between the lawyer and the client's employees or other constituents are covered by rule 4-1.6. This does not mean, however, that constituents of an organizational client are the clients of the lawyer. The lawyer may not disclose to such constituents information relating to the representation except for disclosures explicitly or impliedly authorized by the organizational client in order to carry out the representation or as otherwise permitted by rule 4-1.6.

[3] When constituents of the organization make decisions for it, the decisions ordinarily must be accepted by the lawyer even if their utility or prudence is doubtful. Decisions concerning policy and operations, including ones entailing serious risk, are not as such in the lawyer's province. However, different considerations arise when the lawyer knows that the organization may be substantially injured by action of a constituent that is in violation of law. In such a circumstance, it may be reasonably necessary for the lawyer to ask the constituent to reconsider the matter. If that fails, or if the matter is of sufficient seriousness and importance to the organization, it may be reasonably necessary for the lawyer to take steps to have the matter reviewed by a higher authority in the organization. Clear justification should exist for seeking review over the head of the constituent normally responsible for it. The stated policy of the organization may define circumstances and prescribe channels for such review, and a lawyer should encourage the formulation of such a policy. Even in the absence of organization policy, however, the lawyer may have an obligation to refer a matter to higher authority, depending on the seriousness of the matter and whether the constituent in question has apparent motives to act at variance with the organization's interest. Review by the chief executive officer or by the board of directors may be required when the matter is of importance commensurate with their authority. At some point it may be useful or essential to obtain an independent legal opinion.

[4] ~~In an extreme case, it may be reasonably necessary for the lawyer to refer the matter to the~~ The organization's highest authority~~. Ordinarily, that is~~ to whom a matter may be referred ordinarily will be the board of directors or similar governing body. However, applicable law may prescribe that under certain conditions highest authority reposes elsewhere; for example, in the independent directors of a corporation.

Relation to other rules

[5] The authority and responsibility provided in ~~subdivision (b)~~ this rule are concurrent with the authority and responsibility provided in other rules. In particular, this rule does not limit or expand the lawyer's responsibility under rule 4-1.6, 4-1.8, 4-1.16, 4-3.3, or 4-4.1. If the lawyer's services are being used by an organization to further a crime or fraud by the organization, rule 4-1.2(d) can be applicable.

Government agency

[6] The duty defined in this rule applies to governmental organizations. ~~However, when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful official act is prevented or rectified, for public business is involved. In addition, duties of lawyers employed by the government or lawyers in military service may be defined by statutes and regulation. Therefore, defining~~ Defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context and is a matter beyond the scope of these rules. Although in some circumstances the client may be a specific agency, it ~~is generally~~ may also be a branch of the government, such as the executive branch, or the government as a whole. For example, if the action or failure to act involves the head of a bureau, either the

department of which the bureau is a part or the relevant branch of government ~~as a whole~~ may be the client for purposes of this rule. Moreover, in a matter involving the conduct of government officials, a government lawyer may have authority under applicable law to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances. Thus, when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful act is prevented or rectified, for public business is involved. In addition, duties of lawyers employed by the government or lawyers in military service may be defined by statutes and regulation. This rule does not limit that authority. See ~~note on~~ scope.

Clarifying the lawyer's role

[7] There are times when the organization's interest may be or becomes adverse to those of 1 or more of its constituents. In such circumstances the lawyer should advise any constituent whose interest the lawyer finds adverse to that of the organization of the conflict or potential conflict of interest that the lawyer cannot represent such constituent and that such person may wish to obtain independent representation. Care must be taken to assure that the constituent understands that, when there is such adversity of interest, the lawyer for the organization cannot provide legal representation for that constituent and that discussions between the lawyer for the organization and the constituent may not be privileged.

[8] Whether such a warning should be given by the lawyer for the organization to any constituent may turn on the facts of each case.

Dual representation

[9] Subdivision (e) recognizes that a lawyer for an organization may also represent a principal officer or major shareholder.

Derivative actions

[10] Under generally prevailing law, the shareholders or members of a corporation may bring suit to compel the directors to perform their legal obligations in the supervision of the organization. Members of unincorporated associations have essentially the same right. Such an action may be brought nominally by the organization, but usually is, in fact, a legal controversy over management of the organization.

[11] The question can arise whether counsel for the organization may defend such an action. The proposition that the organization is the lawyer's client does not alone resolve the issue. Most derivative actions are a normal incident of an organization's affairs, to be defended by the organization's lawyer like any other suit. However, if the claim involves serious charges of wrongdoing by those in control of the organization, a conflict may arise between the lawyer's duty to the organization and the lawyer's relationship with the board. In those circumstances, rule 4-1.7 governs who should represent the directors and the organization.

Representing related organizations

[12] Consistent with the principle expressed in subdivision (a) of this rule, ~~an attorney~~ a lawyer or law firm who represents or has represented a corporation (or other organization) ordinarily is not presumed to also represent, solely by virtue of representing or having represented the client, an organization (such as a corporate parent or subsidiary) that is affiliated with the client. There are exceptions to this general proposition, such as, for example, when an affiliate actually is the alter ego of the organizational client or when the client has revealed confidential information to an attorney with the reasonable expectation that the information would not be used adversely to the client's affiliate(s). Absent such an exception, an attorney or law firm is not ethically precluded from undertaking representations adverse to affiliates of an existing or former client.

MODEL RULE: 1.14, CLIENT WITH DIMINISHED CAPACITY

SUMMARY of Substantive Changes Adopted by the ABA House of Delegates

Changes terminology from clients with a "disability" to clients with "diminished capacity," which is explained as a change in terminology only. New rule also focuses on degrees of a client's capacity with provisions for emergency legal assistance for clients with seriously diminished capacity and sets forth protective measures a lawyer may take short of requesting a guardian if a lawyer reasonably believes that there is risk of substantial harm unless action is taken. Commentary provides guidance to attorneys dealing with clients with diminished capacity. Old commentary regarding an attorney acting as "de facto" guardian for the client was deleted.

How ABA Rule DIFFERS from EXISTING FLORIDA Rule

Florida Rule 4-1.14 uses the term "disability," but otherwise is substantially the same as the new ABA model rule. The ABA commentary eliminates the provision in the Florida comment that if a client suffering a disability has no guardian or legal representative, "the lawyer often must act as *de facto* guardian," adds a provision regarding consultation with family members, eliminates the provision imposing an obligation on lawyers to seek the appointment of a legal guardian and adds detailed guidance for lawyers regarding the taking of protective action.

RECOMMENDATION of Yes or No and REASONS

YES. The committee recommends adoption of the new ABA Model Rule as providing superior guidance to lawyers than the existing rule. The committee specifically discussed whether deletion of the commentary "the lawyer often must act as *de facto* guardian" is desirable. The committee concluded that if the ABA Model Rule is adopted, there is no need for this provision. The new ABA Rule 1.14(b) provides that "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 actions, including consulting with individuals or entities that have the ability to take action to protect the client . . . ." Paragraph 5 of the commentary to the Rule sets out in detail the various types of protective action a lawyer may take if he reasonably believes that a client is at risk of substantial physical, financial or other harm. These detailed provisions are much more helpful than the vague statement that a lawyer must often act as a de facto guardian.

FLORIDA'S Rule in LEGISLATIVE FORMAT

RULE 4-1.14 CLIENT ~~UNDER A DISABILITY~~ WITH DIMINISHED CAPACITY

(a) Maintenance of Normal Relationship. When a client's ~~ability~~ capacity to make adequately considered decisions in connection with ~~the~~ a representation is ~~impaired~~ diminished,

whether because of minority, mental disability, or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

(b) Appointment of Guardian. ~~A lawyer may seek the appointment of a guardian or take other protective action with respect to a client only when~~ 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) Confidentiality. Information relating to the representation of a client with diminished capacity is protected by the rule on confidentiality of information. When taking protective action pursuant to this rule, the lawyer is impliedly authorized under the rule on confidentiality of information to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

Comment

[1] The normal client-lawyer relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters. When the client is a minor or suffers from a diminished mental capacity ~~disorder or disability~~, however, maintaining the ordinary client-lawyer relationship may not be possible in all respects. In particular, ~~an~~ a severely incapacitated person may have no power to make legally binding decisions. Nevertheless, a client ~~lacking legal competence~~ with diminished capacity often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being. ~~Furthermore, to an increasing extent the law recognizes intermediate degrees of competence.~~ For example, children as young as 5 or 6 years of age, and certainly those of 10 or 12, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody. So also, it is recognized that some persons of advanced age can be quite capable of handling routine financial matters while needing special legal protection concerning major transactions.

[2] The fact that a client suffers a disability does not diminish the lawyer's obligation to treat the client with attention and respect. ~~If the person has no guardian or legal representative, the lawyer often must act as de facto guardian.~~ Even if the person ~~does have~~ has a legal representative, the lawyer should as far as possible accord the represented person the status of client, particularly in maintaining communication.

[3] The client may wish to have family members or other persons participate in discussions with the lawyer. When necessary to assist in the representation, the presence of such persons generally does not affect the applicability of the attorney-client evidentiary privilege. Nevertheless, the lawyer must keep the client's interests foremost and, except for protective action authorized under paragraph (b), must to look to the client, and not family members, to

make decisions on the client's behalf.

[4] If a legal representative has already been appointed for the client, the lawyer should ordinarily look to the representative for decisions on behalf of the client. ~~If a legal representative has not been appointed, the lawyer should see to such an appointment where it would serve the client's best interests. Thus, if a disabled client has substantial property that should be sold for the client's benefit, effective completion of the transaction ordinarily requires appointment of a legal representative. In many circumstances, however, appointment of a legal representative may be expensive or traumatic for the client. Evaluation of these considerations is a matter of professional judgment on the lawyer's part.~~ In matters involving a minor, whether the lawyer should look to the parents as natural guardians may depend on the type of proceeding or matter in which the lawyers is representing the minor. If the lawyer represents the guardian as distinct from the ward and is aware that the guardian is acting adversely to the ward's interest, the lawyer may have an obligation to prevent or rectify the guardian's misconduct. See rule 4-1.2(d).

Taking Protective Action

[5] If a lawyer reasonably believes that a client is at risk of substantial physical, financial or other harm unless action is taken, and that a normal client-lawyer relationship cannot be maintained as provided in paragraph (a) because the client lacks sufficient capacity to communicate or to make adequately considered decisions in connection with the representation, then paragraph (b) permits the lawyer to take protective measures deemed necessary. Such measures could include: consulting with family members, using a reconsideration period to permit clarification or improvement of circumstances, using voluntary surrogate decisionmaking tools such as durable powers of attorney or consulting with support groups, professional services, adult-protective agencies or other individuals or entities that have the ability to protect the client. In taking any protective action, the lawyer should be guided by such factors as the wishes and values of the client to the extent known, the client's best interests and the goals of intruding into the client's decisionmaking autonomy to the least extent feasible, maximizing client capacities and respecting the client's family and social connections.

[6] In determining the extent of the client's diminished capacity, the lawyer should consider and balance such factors as: the client's ability to articulate reasoning leading to a decision, variability of state of mind and ability to appreciate consequences of a decision; the substantive fairness of a decision; and the consistency of a decision with the known long-term commitments and values of the client. In appropriate circumstances, the lawyer may seek guidance from an appropriate diagnostician.

[7] If a legal representative has not been appointed, the lawyer should consider whether appointment of a guardian ad litem, conservator or guardian is necessary to protect the client's interests. Thus, if a client with diminished capacity has substantial property that should be sold for the client's benefit, effective completion of the transaction may require appointment of a legal representative. In addition, rules of procedure in litigation sometimes provide that minors or persons with diminished capacity must be represented by a guardian or next friend if they do not

have a general guardian. In many circumstances, however, appointment of a legal representative may be more expensive or traumatic for the client than circumstances in fact require. Evaluation of such circumstances is a matter entrusted to the professional judgment of the lawyer. In considering alternatives, however, the lawyer should be aware of any law that requires the lawyer to advocate the least restrictive action on behalf of the client.

Disclosure of client's condition

[8] ~~Rules of procedure in litigation generally provide that minors or persons suffering mental disability shall be represented by a guardian or next friend if they do not have a general guardian. However, disclosure~~ Disclosure of the client's ~~disability can~~ diminished capacity could adversely affect the client's interests. For example, raising the question of diminished capacity could, in some circumstances, lead to proceedings for involuntary commitment. Information relating to the representation is protected by rule 4-1.6. Therefore, unless authorized to do so, the lawyer may not disclose such information. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized to make the necessary disclosures, even when the client directs the lawyer to the contrary. Nevertheless, given the risks of disclosure, paragraph (c) limits what the lawyer may disclose in consulting with other individuals or entities or seeking the appointment of a legal representative. At the very least, the lawyer should determine whether it is likely that the person or entity consulted with will act adversely to the client's interests before discussing matters related to the client. The lawyer's position in such cases is an unavoidably difficult one. ~~The lawyer may seek guidance from an appropriate diagnostician.~~

Emergency Legal Assistance

[9] In an emergency where the health, safety or a financial interest of a person with seriously diminished capacity is threatened with imminent and irreparable harm, a lawyer may take legal action on behalf of such a person even though the person is unable to establish a client-lawyer relationship or to make or express considered judgments about the matter, when the person or another acting in good faith on that person's behalf has consulted with the lawyer. Even in such an emergency, however, the lawyer should not act unless the lawyer reasonably believes that the person has no other lawyer, agent or other representative available. The lawyer should take legal action on behalf of the person only to the extent reasonably necessary to maintain the status quo or otherwise avoid imminent and irreparable harm. A lawyer who undertakes to represent a person in such an exigent situation has the same duties under these Rules as the lawyer would with respect to a client.

[10] A lawyer who acts on behalf of a person with seriously diminished capacity in an emergency should keep the confidences of the person as if dealing with a client, disclosing them only to the extent necessary to accomplish the intended protective action. The lawyer should disclose to any tribunal involved and to any other counsel involved the nature of his or her relationship with the person. The lawyer should take steps to regularize the relationship or implement other protective solutions as soon as possible. Normally, a lawyer would not seek

compensation for such emergency actions taken.

MODEL RULE: 1.15, SAFEKEEPING PROPERTY

SUMMARY of Substantive Changes adopted by the ABA House of Delegates

1. Two new sections have been added to Rule 1.15. Section (b) has been added to address a problem experienced in some jurisdictions where lawyers are unable to avoid bank charges unless they are permitted to deposit money in a client trust account to cover such charges. The new section (b) allows a lawyer to deposit their own funds in a client trust account for that purpose only.

2. A new section (c) has also been added. This section provides practical guidance to a lawyer on how to handle advanced deposits of fees and expenses. It provides that a lawyer may withdraw from the trust account fees and expenses only as they are actually earned or incurred. The reporter explains that this provision was posed in response to reports "that the largest single class of claims made to client protection funds is for the taking of unearned fees."

3. Current Rule 1.15(c) corresponds with Rule 5-1.1(f), Rule Regulating The Florida Bar. These rules are presently written, and understood, to cover disputes between a lawyer and "another person," usually the client. The proposed changes to Rule 1.15(c) [now Rule 1.15(e)] recognize that other types of disputes are in fact possible: client-lawyer, client-creditor, and lawyer-client's creditor. The proposed changes continue a lawyer's obligation to keep disputed property separate until the dispute is resolved. The final additional sentence clarifies that it is the lawyer's duty to distribute all portions of the property held which are not in dispute.

4. ¶ 1 of the commentary to this Rule has been amended by adding a phrase to make clear that prospective clients are included among the third parties to whom a lawyer owes a duty to protect property. This is consistent with the changes proposed to current Rule 1.15(c). In addition, a sentence has been added to ¶ 1 of the commentary to require a lawyer to maintain, on a current basis, trust account books and records "in accordance with general accepted accounting practices" and to comply with any record keeping rules established by law or court order.

5. A new ¶ 2 has been added to the commentary to address the proposed new subsection (b) to the Rule. This allows a lawyer to deposit personal funds in a client trust account for the purposes of paying a bank service charge. The new paragraph requires that accurate records must be kept detailing which part of the funds belong to the lawyer.

6. The second paragraph of the current commentary has been delineated as new ¶ 3. Current language only refers to funds received from third parties. The change recognize that other parties, including the client, may be providing funds from which a lawyer's fee is paid. Another proposed change to that paragraph indicates that a lawyer should not have to perceive a "risk" that the client may divert funds without paying a fee before being allowed to reserve funds which the lawyer reasonably believes represents fees owed. Another change to the commentary more accurately reflects the requirement in the current rule that disputed funds be kept in a trust account.

7. The current third paragraph of the commentary to Rule 1.15 has been renumbered as ¶ 4. This paragraph addresses the situation where a client's creditor attempts to attach funds in the hands of a lawyer. Under the current paragraph, it is explained that lawyers have a duty to protect such third party claims against wrongful interference by a client and that lawyers should not unilaterally assume to arbitrate disputes between a client and a third party. The current paragraph indicates that, where appropriate, a lawyer should "consider the possibility" of depositing the disputed funds into the registry of an applicable court of competent jurisdiction so that the matter may be adjudicated. The new ¶ 4 recognizes that third parties may have lawful claims against specific funds in a lawyer's custody and that lawyer "*may* have a duty" to protect such third-party claims against wrongful interference by the client. The change requires, that "when the third-party claim is not frivolous" a lawyer *must* refuse to surrender the property of the client until the claim is resolved. The new paragraph allows a lawyer to file an action to have a court resolve the dispute when there are substantial grounds for dispute as to the person entitled to the funds.

8. The current ¶ 4 of the commentary has been renumbered as ¶ 5. It merely clarifies that when a lawyer holds funds in a capacity other than as a lawyer representing a client, the Rule does not apply.

9. Current ¶ 5 is renumbered ¶ 6. It does not have a corresponding provision in the commentary to Florida Chapter 5. It merely establishes that in those jurisdictions where a lawyer's fund for client protection has been established, a lawyer must participate where it is mandatory and, even when it is voluntary, a lawyer should participate.

How ABA Rule DIFFERS from EXISTING FLORIDA Rule

1. Florida's Chapter 5 on trust accounting do not contain this provision. However, The Florida Bar in practice advises lawyers that they may keep up to $100 of their own money in a trust account for the purposes of paying for bank checks and other administrative charges that should not properly be passed on to any clients. Florida has a rule change pending that addresses the substance of this rule, but does not use the exact language that the ABA adopted.

2. The comment to Florida's Chapter 5 on trust accounting already addresses the issue of how to handle advance fees and costs, although the language is not the same as that used by the ABA.

3. Florida's Rule 5-1.1(f) contains the same substance as the rule, but does use the exact language of the ABA model rule.

4. Florida's comment to Chapter 5 does not contain the commentary about protecting the interests of prospective clients. Florida's rules contain Chapter 5, which sets forth specific accounting requirements for trust accounts.

5. Florida's Rule 5-1.1 does not contain commentary that a lawyer can keep a small amount of money in the account to cover administrative costs. However, The Florida Bar in practice

advises lawyers that they may keep up to $100 of their own money in a trust account for the purposes of paying for bank checks and other administrative charges that should not properly be passed on to any clients.

6, 7, and 8. The commentary to Florida's Chapter 5 does not contain these changes, although Florida's Chapter 5 does contain the substance of some of the changes, if not the exact language.

9. Florida's Client Security Fund is administered separately under Rules 1-8.4 and Chapter 7, with 7-3.2 establishing the amount each Florida Bar member pays to the fund, and therefore no commentary about client security fund appears in Chapter 5.

RECOMMENDATION of Yes or No and REASONS

1. **NO**. The substance of this change is already pending in a separate rule change before The Florida Bar Board of Governors, and the change is therefore unnecessary.

2. **NO**. Because the comment to Florida's Chapter 5 already addresses this issue, this rule change is unnecessary.

3. **YES and NO**. These changes will help clarify a lawyer's obligation when a lienor or other creditor of the client exerts a claim on funds of the client held by the lawyer. This is an issue which arises often, especially in the personal injury practice. Hence it is recommended that the change be adopted clarifying that any two or more persons could have an interest in the funds including the lawyer and that any portion not in dispute be disbursed immediately, but keeping the remainder of the language currently used in Florida's Rule 5-1.1(f).

4. **NO**. Florida's existing rules adequately address the issue.

5. **NO**. The change does not clarify the rule regarding prospective clients, who are clearly already covered by the existing rule, and the requirement that trust account books be kept in accordance with generally accepted accounting practices could be confusing in light of the strict requirements for trust account records set forth in Florida Rule 5-1.2.

6. **YES**.

7. **YES and NO**. The change from "just" to "lawful" and adding "when the third-party claim is not frivolous under applicable law, the lawyer must" are recommended as appropriate clarifications of the rule. Florida's existing commentary provides superior guidance and the other changes are therefore not recommended.

8. **YES**. This is a clarifying change only and should be adopted.

9. **NO**. Florida's Client Security Fund is administered separately under Rules 1-8.4 and Chapter 7, with 7-3.2 establishing the amount each Florida Bar member pays to the fund, and therefore

this commentary is unnecessary in Chapter 5.

FLORIDA'S Rule in LEGISLATIVE FORMAT

RULE 5-1.1 TRUST ACCOUNTS

(a) Nature of Money or Property Entrusted to Attorney.

(1) *Trust Account Required; Commingling Prohibited.* A lawyer shall hold in trust, separate from the lawyer's own property, funds and property of clients or third persons that are in a lawyer's possession in connection with a representation. All funds, including advances for fees, costs, and expenses, shall be kept in a separate bank or savings and loan association account maintained in the state where the lawyer's office is situated or elsewhere with the consent of the client or third person and clearly labeled and designated as a trust account.

(2) *Compliance With Client Directives.* Trust funds may be separately held and maintained other than in a bank or savings and loan association account if the lawyer receives written permission from the client to do so and provided that written permission is received before maintaining the funds other than in a separate account.

(3) *Safe Deposit Boxes.* If a member of the bar uses a safe deposit box to store trust funds or property, the member shall advise the institution in which the deposit box is located that it may include property of clients or third persons.

(b) Application of Trust Funds or Property to Specific Purpose. Money or other property entrusted to an attorney for a specific purpose, including advances for fees, costs, and expenses, is held in trust and must be applied only to that purpose. Money and other property of clients coming into the hands of an attorney are not subject to counterclaim or setoff for attorney's fees, and a refusal to account for and deliver over such property upon demand shall be deemed a conversion.

(c) Liens Permitted. This subchapter does not preclude the retention of money or other property upon which the lawyer has a valid lien for services nor does it preclude the payment of agreed fees from the proceeds of transactions or collection.

(d) Controversies as to Amount of Fees. Controversies as to the amount of fees are not grounds for disciplinary proceedings unless the amount demanded is clearly excessive, extortionate, or fraudulent. In a controversy alleging a clearly excessive, extortionate, or fraudulent fee, announced willingness of an attorney to submit a dispute as to the amount of a fee to a competent tribunal for determination may be considered in any determination as to intent or in mitigation of discipline; provided, such willingness shall not preclude admission of any other relevant admissible evidence relating to such controversy, including evidence as to the withholding of funds or property of the client, or to other injury to the client occasioned by such controversy.

(e) Notice of Receipt of Trust Funds; Delivery; Accounting. Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.

(f) Disputed Ownership of Trust Funds. When in the course of representation a lawyer is in possession of property in which ~~both~~ two or more persons (one of whom may be the lawyer) ~~and another person~~ claim interests, the property shall be treated by the lawyer as trust property, but the portion belonging to the lawyer or law firm shall be withdrawn within a reasonable time after it becomes due unless the right of the lawyer or law firm to receive it is disputed, in which event the portion in dispute shall be kept separate by the lawyer until the dispute is resolved. The lawyer shall promptly distribute all portions of the property as to which the interests are not in dispute.

(g) Interest on Trust Accounts (IOTA) Program.

(1) *Definitions*. As used herein, the term:

(A) "nominal or short term" describes funds of a client or third person that, pursuant to subdivision (3), below, the lawyer has determined cannot practicably be invested for the benefit of the client or third person;

(B) "Foundation" means The Florida Bar Foundation, Inc.;

(C) "IOTA account" means an interest or dividend-bearing trust account benefitting The Florida Bar Foundation established in an eligible institution for the deposit of nominal or short-term funds of clients or third persons;

(D) "Eligible Institution" means any bank or savings and loan association authorized by federal or state laws to do business in Florida and insured by the Federal Savings and Loan Insurance Corporation, or any successor insurance corporation(s) established by federal or state laws, or any open-end investment company registered with the Securities and Exchange Commission and authorized by federal or state laws to do business in Florida, all of which must meet the requirements set out in subdivision (5), below.

(E) "Interest or dividend-bearing trust account" means a federally insured checking account or investment product, including a daily financial institution repurchase agreement or a money market fund. A daily financial institution repurchase agreement must be fully collateralized by, and an open-end money market fund must consist solely of, United States Government Securities. A daily financial institution repurchase agreement may be established only with an eligible institution that is deemed to be "well capitalized" or "adequately capitalized" as defined by applicable federal statutes and regulations. An open- end money

market fund must hold itself out as a money market fund as defined by applicable federal statutes and regulations under the Investment Company Act of 1940, and have total assets of at least $250,000,000. The funds covered by this rule shall be subject to withdrawal upon request and without delay.

(2) *Required Participation*. All nominal or short-term funds belonging to clients or third persons that are placed in trust with any member of The Florida Bar practicing law from an office or other business location within the state of Florida shall be deposited into one or more IOTA accounts, except as provided elsewhere in these rules with respect to funds maintained other than in a bank account, or as provided in this chapter. Only trust funds that are nominal or short term shall be deposited into an IOTA account. The member shall certify annually, in writing, that the member is in compliance with, or is exempt from, the provisions of this rule.

(3) *Determination of Nominal or Short-Term Funds*. The lawyer shall exercise good faith judgment in determining upon receipt whether the funds of a client or third person are nominal or short term. In the exercise of this good faith judgment, the lawyer shall consider such factors as:

(A) the amount of a client's or third person's funds to be held by the lawyer or law firm;

(B) the period of time such funds are expected to be held;

(C) the likelihood of delay in the relevant transaction(s) or proceeding(s);

(D) the cost to the lawyer or law firm of establishing and maintaining an interest-bearing account or other appropriate investment for the benefit of the client or third person; and

(E) minimum balance requirements and/or service charges or fees imposed by the eligible institution.

The determination of whether a client's or third person's funds are nominal or short term shall rest in the sound judgment of the lawyer or law firm. No lawyer shall be charged with ethical impropriety or other breach of professional conduct based on the exercise of such good faith judgment.

(4) *Notice to Foundation*. Lawyers or law firms shall advise the Foundation, at Post Office Box 1553, Orlando, Florida 32802-1553, of the establishment of an IOTA account for funds covered by this rule. Such notice shall include: the IOTA account number as assigned by the eligible institution; the name of the lawyer or law firm on the IOTA account; the eligible institution name; the eligible institution address; and the name and Florida Bar attorney number of the lawyer, or of each member of The Florida Bar in a law firm, practicing from an office or other business location within the state of Florida that has established the IOTA account.

(5) *Eligible Institution Participation in IOTA*. Participation in the IOTA program is voluntary for banks, savings and loan associations, and investment companies. Institutions that choose to offer and maintain IOTA accounts must meet the following requirements:

(A) Interest Rates and Dividends. Eligible institutions shall maintain IOTA accounts which pay the highest interest rate or dividend generally available from the institution to its non-IOTA account customers when IOTA accounts meet or exceed the same minimum balance or other account eligibility qualifications, if any.

(B) Determination of Interest Rates and Dividends. In determining the highest interest rate or dividend generally available from the institution to its non-IOTA accounts in compliance with subdivision (5)(A), above, eligible institutions may consider factors, in addition to the IOTA account balance, customarily considered by the institution when setting interest rates or dividends for its customers, provided that such factors do not discriminate between IOTA accounts and accounts of non-IOTA customers, and that these factors do not include that the account is an IOTA account.

(C) Remittance and Reporting Instructions. Eligible institutions shall:

(i) calculate and remit interest or dividends on the balance of the deposited funds, in accordance with the institution's standard practice for non-IOTA account customers, less reasonable service charges or fees, if any, in connection with the deposited funds, at least quarterly, to the Foundation;

(ii) transmit with each remittance to the Foundation a statement showing the name of the lawyer or law firm from whose IOTA account the remittance is sent, the lawyer's or law firm's IOTA account number as assigned by the institution, the rate of interest applied, the period for which the remittance is made, the total interest or dividend earned during the remittance period, the amount and description of any service charges or fees assessed during the remittance period, and the net amount of interest or dividend remitted for the period; and

(iii) transmit to the depositing lawyer or law firm, for each remittance, a statement showing the amount of interest or dividend paid to the Foundation, the rate of interest applied, and the period for which the statement is made.

(6) *Small Fund Amounts*. The Foundation may establish procedures for a lawyer or law firm to maintain an interest-free trust account for client and third-person funds that are nominal or short term when their nominal or short-term trust funds cannot reasonably be expected to produce or have not produced interest income net of reasonable eligible institution service charges or fees.

(7) *Confidentiality*. The Foundation shall protect the confidentiality of information regarding a lawyer's or law firm's trust account obtained by virtue of this rule.

(h) Unidentifiable Trust Fund Accumulations and Trust Funds Held for Missing

Owners. When an attorney's trust account contains an unidentifiable accumulation of trust funds or property, or trust funds or property held for missing owners, such funds or property shall be so designated. Diligent search and inquiry shall then be made by the attorney to determine the beneficial owner of any unidentifiable accumulation or the address of any missing owner. If the beneficial owner of an unidentified accumulation is determined, the funds shall be properly identified as the lawyer's trust property. If a missing beneficial owner is located, the trust funds or property shall be paid over or delivered to the beneficial owner if the owner is then entitled to receive the same. Trust funds and property that remain unidentifiable and funds or property that are held for missing owners after being designated as such shall, after diligent search and inquiry fail to identify the beneficial owner or owner's address, be disposed of as provided in applicable Florida law.

(i) Disbursement Against Uncollected Funds. A lawyer generally may not use, endanger, or encumber money held in trust for a client for purposes of carrying out the business of another client without the permission of the owner given after full disclosure of the circumstances. However, certain categories of trust account deposits are considered to carry a limited and acceptable risk of failure so that disbursements of trust account funds may be made in reliance on such deposits without disclosure to and permission of clients owning trust account funds subject to possibly being affected. Except for disbursements based upon any of the 6 categories of limited-risk uncollected deposits enumerated below, a lawyer may not disburse funds held for a client or on behalf of that client unless the funds held for that client are collected funds. For purposes of this provision, "collected funds" means funds deposited, finally settled, and credited to the lawyer's trust account. Notwithstanding that a deposit made to the lawyer's trust account has not been finally settled and credited to the account, the lawyer may disburse funds from the trust account in reliance on such deposit:

(1) when the deposit is made by certified check or cashier's check;

(2) when the deposit is made by a check or draft representing loan proceeds issued by a federally or state-chartered bank, savings bank, savings and loan association, credit union, or other duly licensed or chartered institutional lender;

(3) when the deposit is made by a bank check, official check, treasurer's check, money order, or other such instrument issued by a bank, savings and loan association, or credit union when the lawyer has reasonable and prudent grounds to believe the instrument will clear and constitute collected funds in the lawyer's trust account within a reasonable period of time;

(4) when the deposit is made by a check drawn on the trust account of a lawyer licensed to practice in the state of Florida or on the escrow or trust account of a real estate broker licensed under applicable Florida law when the lawyer has a reasonable and prudent belief that the deposit will clear and constitute collected funds in the lawyer's trust account within a reasonable period of time;

(5) when the deposit is made by a check issued by the United States, the State of Florida,

or any agency or political subdivision of the State of Florida;

(6) when the deposit is made by a check or draft issued by an insurance company, title insurance company, or a licensed title insurance agency authorized to do business in the state of Florida and the lawyer has a reasonable and prudent belief that the instrument will clear and constitute collected funds in the trust account within a reasonable period of time.

A lawyer's disbursement of funds from a trust account in reliance on deposits that are not yet collected funds in any circumstances other than those set forth above, when it results in funds of other clients being used, endangered, or encumbered without authorization, may be grounds for a finding of professional misconduct. In any event, such a disbursement is at the risk of the lawyer making the disbursement. If any of the deposits fail, the lawyer, upon obtaining knowledge of the failure, must immediately act to protect the property of the lawyer's other clients. However, if the lawyer accepting any such check personally pays the amount of any failed deposit or secures or arranges payment from sources available to the lawyer other than trust account funds of other clients, the lawyer shall not be considered guilty of professional misconduct.

RULE 5-1.2 TRUST ACCOUNTING RECORDS AND PROCEDURES

(a) Applicability. The provisions of these rules apply to all trust funds received or disbursed by members of The Florida Bar in the course of their professional practice of law as members of The Florida Bar except special trust funds received or disbursed by an attorney as guardian, personal representative, receiver, or in a similar capacity such as trustee under a specific trust document where the trust funds are maintained in a segregated special trust account and not the general trust account and wherein this special trust position has been created, approved, or sanctioned by law or an order of a court that has authority or duty to issue orders pertaining to maintenance of such special trust account. These rules shall apply to matters wherein a choice of laws analysis indicates that such matters are governed by the laws of Florida.

(b) Minimum Trust Accounting Records. The following are the minimum trust accounting records that shall be maintained:

(1) A separate bank or savings and loan association account or accounts in the name of the lawyer or law firm and clearly labeled and designated as a "trust account."

(2) Original or duplicate deposit slips and, in the case of currency or coin, an additional cash receipts book, clearly identifying:

(A) the date and source of all trust funds received; and

(B) the client or matter for which the funds were received.

(3) Original canceled checks, all of which must be numbered consecutively, or, if the financial institution wherein the trust account is maintained does not return the original checks, copies thereof, as provided by the financial institution.

(4) Other documentary support for all disbursements and transfers from the trust account.

(5) A separate cash receipts and disbursements journal, including columns for receipts, disbursements, transfers, and the account balance, and containing at least:

(A) the identification of the client or matter for which the funds were received, disbursed, or transferred;

(B) the date on which all trust funds were received, disbursed, or transferred;

(C) the check number for all disbursements; and

(D) the reason for which all trust funds were received, disbursed, or transferred.

(6) A separate file or ledger with an individual card or page for each client or matter, showing all individual receipts, disbursements, or transfers and any unexpended balance, and containing:

(A) the identification of the client or matter for which trust funds were received, disbursed, or transferred;

(B) the date on which all trust funds were received, disbursed, or transferred;

(C) the check number for all disbursements; and

(D) the reason for which all trust funds were received, disbursed, or transferred.

(7) All bank or savings and loan association statements for all trust accounts.

(c) Minimum Trust Accounting Procedures. The minimum trust accounting procedures that shall be followed by all members of The Florida Bar (when a choice of laws analysis indicates that the laws of Florida apply) who receive or disburse trust money or property are as follows:

(1) The lawyer shall cause to be made monthly:

(A) reconciliations of all trust bank or savings and loan association accounts, disclosing the balance per bank, deposits in transit, outstanding checks identified by date and check number, and any other items necessary to reconcile the balance per bank with the balance

per the checkbook and the cash receipts and disbursements journal; and

(B) a comparison between the total of the reconciled balances of all trust accounts and the total of the trust ledger cards or pages, together with specific descriptions of any differences between the 2 totals and reasons therefor.

(2) At least annually, the lawyer shall prepare a detailed listing identifying the balance of the unexpended trust money held for each client or matter.

(3) The above reconciliations, comparisons, and listing shall be retained for at least 6 years.

(4) The lawyer or law firm shall authorize and request any bank or savings and loan association where the lawyer is a signatory on a trust account to notify Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300, in the event any trust check is returned due to insufficient funds or uncollected funds, absent bank error.

(5) The lawyer shall file with The Florida Bar between June 1 and August 15 of each year a trust accounting certificate showing compliance with these rules on a form approved by the board of governors.

(d) Record Retention. A lawyer or law firm that receives and disburses client or third party funds or property shall maintain the records required by this chapter for 6 years subsequent to the final conclusion of each representation in which the trust funds or property were received.

(e) Audits. Any of the following shall be cause for The Florida Bar to order an audit of a trust account:

(1) failure to file the trust account certificate required by rule 5-1.2(c)(5);

(2) return of a trust account check for insufficient funds or for uncollected funds, absent bank error;

(3) filing of a petition for creditor relief on behalf of an attorney;

(4) filing of felony charges against an attorney;

(5) adjudication of insanity or incompetence or hospitalization of the attorney under The Florida Mental Health Act;

(6) filing of a claim against the attorney with the Clients' Security Fund;

(7) when requested by a grievance committee or the board of governors; or

(8) upon court order.

(f) Cost of Audit. Audits conducted in any of the circumstances enumerated in this rule shall be at the cost of the attorney audited only when the audit reveals that the attorney was not in substantial compliance with the trust accounting requirements. It shall be the obligation of any attorney who is being audited to produce all records and papers concerning property and funds held in trust and to provide such explanations as may be required for the audit. Records of general accounts are not required to be produced except to verify that trust money has not been deposited thereto. If it has been determined that trust money has been deposited into a general account, all of the transactions pertaining to any firm account will be subject to audit.

(g) Failure to Comply With Subpoena.

(1) Members of the bar are under an obligation to maintain trust accounting records as required by these rules and, as a condition of the privilege of practicing law in Florida, may not assert any privilege personal to the lawyer that may be applicable to production of same in these disciplinary proceedings.

(2) Notice of noncompliance with a subpoena may be filed with the Supreme Court of Florida only if a grievance committee or a referee shall first find that no good cause exists for failure to comply. A grievance committee or referee shall hear the issue of noncompliance and issue findings thereon within 30 days of the request for issuance of the notice of noncompliance.

(3) After notice is filed with the Supreme Court of Florida by The Florida Bar that a member of the bar has failed to fully comply with a properly issued subpoena directing the production of any trust accounting records that are required by these rules, unless good cause for the failure to comply is shown, the member may be suspended from the practice of law in Florida, by order of the Supreme Court of Florida, until such time as the member fully complies with the subpoena and/or until further order of the court.

(4) Any member subject to suspension under this rule may petition the court, within 10 days of the filing of the notice, to withhold entry of the order of suspension or at any time after entry of an order of suspension may petition the court to terminate or modify the order of suspension. If the court determines it necessary to refer the petition to terminate or modify the suspension to a referee for receipt of evidence, the referee proceedings shall be conducted in the same manner as proceedings before a referee on a petition to withhold, terminate, or modify an order of emergency suspension, as elsewhere provided in these rules.

Comment

[1] These rules shall apply to matters wherein a choice of laws analysis indicates that such matters are governed by the laws of Florida.

[2] A lawyer must hold property of others with the care required of a professional

fiduciary. This chapter requires maintenance of a bank or savings and loan association account, clearly labeled as a trust account and in which only client or third party trust funds are held.

[3] Securities should be kept in a safe deposit box, except when some other form of safekeeping is warranted by special circumstances.

[4] All property that is the property of clients or third persons should be kept separate from the lawyer's business and personal property and, if money, in 1 or more trust accounts, unless requested otherwise in writing by the client. Separate trust accounts may be warranted when administering estate money or acting in similar fiduciary capacities.

[5] Lawyers often receive funds from ~~third parties from~~ which the lawyer's fee will be paid. ~~If there is risk that the client may divert the funds without paying the fee, the~~ The lawyer is not required to remit ~~the portion from which the fee is to be paid~~ to the client funds that the lawyer reasonably believes represent fees owed. However, a lawyer may not hold funds to coerce a client into accepting the lawyer's contention. The disputed portion of the funds ~~should~~ must be kept in a trust account and the lawyer should suggest means for prompt resolution of the dispute, such as arbitration. The undisputed portion of the funds shall be promptly distributed.

[6] Third parties, such as a client's creditors, may have ~~just~~ lawful claims against funds or other property in a lawyer's custody. A lawyer may have a duty under applicable law to protect such third party claims against wrongful interference by the client ~~and, accordingly, may~~. In such cases, when the third-party claim is not frivolous under applicable law, the lawyer must refuse to surrender the property to the client until the claims are resolved. However, a lawyer should not unilaterally assume to arbitrate a dispute between the client and the third party, and, where appropriate, the lawyer should consider the possibility of depositing the property or funds in dispute into the registry of the applicable court so that the matter may be adjudicated.

[7] The obligations of a lawyer under this chapter are independent of those arising from activity other than rendering legal services. For example, a lawyer who serves only as an escrow agent is governed by the applicable law relating to fiduciaries even though the lawyer does not render legal services in the transaction and is not governed by this rule.

[8] Each lawyer is required to be familiar with and comply with Rules Regulating Trust Accounts as adopted by the Supreme Court of Florida.

[9] Money or other property entrusted to a lawyer for a specific purpose, including advances for fees, costs, and expenses, is held in trust and must be applied only to that purpose. Money and other property of clients coming into the hands of a lawyer are not subject to counterclaim or setoff for attorney's fees, and a refusal to account for and deliver over such property upon demand shall be a conversion. This does not preclude the retention of money or other property upon which a lawyer has a valid lien for services or to preclude the payment of agreed fees from the proceeds of transactions or collections.

[10] Advances for fees and costs (funds against which costs and fees are billed) are the property of the client or third party paying same on a client's behalf and are required to be maintained in trust, separate from the lawyer's property. Retainers are not funds against which future services are billed. Retainers are funds paid to guarantee the future availability of the lawyer's legal services and are earned by the lawyer upon receipt. Retainers, being funds of the lawyer, may not be placed in the client's trust account.

[11] The test of excessiveness found elsewhere in the Rules Regulating The Florida Bar applies to all fees for legal services including retainers, nonrefundable retainers, and minimum or flat fees.

MODEL RULE: 1.16, DECLINING OR TERMINATING REPRESENTATION

SUMMARY of Substantive Changes Proposed by Ethics 2000

1. Changes the requirement regarding permissive withdrawal when lawyer and client disagree over course of representation. Two specific changes are proposed:

a. The proposed Rule permits withdrawal when the lawyer has a "fundamental disagreement" with action insisted upon by the client; the current standard appears to be less restrictive, requiring only that the lawyer believe the client directive in question to be "imprudent."

b. Additionally, the proposed rule broadens the type of client directive that would permit withdrawal from one relating to pursuit of "an objective" to one involving "taking action."

2. Expressly states that a lawyer is obligated to comply with "applicable law requiring notice to or permission of a tribunal" when attempting to withdraw from a representation.

3. Adds language requiring that, upon termination of a representation, a lawyer return to the client any unexpended cost advances (in addition to the unearned fees already covered by the Rule).

How Proposed ABA Rule DIFFERS from EXISTING FLORIDA Rule

1. Florida Rule 1.16 tracks the language of the existing ABA Rule, regarding a client's insistence that a lawyer pursue "objectives" that the lawyer considers "imprudent."

2 and 3. Florida Rule 1.16 does not include the proposed language.

RECOMMENDATION of Yes or No and REASONS

YES and NO. The proposed change regarding permissive withdrawal in the event of a lawyer-client disagreement serves to emphasize that the lawyer's withdrawal option is a serious step that is most appropriately exercised in the case of a serious dispute with the client over the course of action to be taken during a representation. The reference to compliance with applicable law upon withdrawal may not be necessary, but alerts lawyers of this already-existing requirement.

The committee recommends that subsections (2) and (3) under 1.16(b) be moved from section (b), permissive withdrawal, to section (a), mandatory withdrawal.

The reason for this suggestion is that if a client persists in a course of conduct involving the lawyer's services that is criminal or fraudulent, or the client has used the lawyer's services to perpetrate a crime or a fraud, the lawyer is going to have to get the client to reveal and correct what he (the client) has done, and if the client refuses, the lawyer will have to reveal, which will

then put the lawyer in a 1.7 conflict with the client, and that will require that the lawyer withdraw.

In addition to moving subsections (2) and (3) to section (a), we also recommend that the following words be added to both: "unless the client agrees to disclose and rectify the crime or the fraud."

Additionally, the language concerning compliance with applicable law could be improved by a change reflecting that persons other than the court may be entitled to notice of the attempted withdrawal.

FLORIDA'S Rule in LEGISLATIVE FORMAT

RULE 4-1.16 DECLINING OR TERMINATING REPRESENTATION

(a) When Lawyer Must Decline or Terminate Representation. Except as stated in subdivision (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

(1) the representation will result in violation of the Rules of Professional Conduct or law;

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

(3) the lawyer is discharged~~.~~;

(4) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent, unless the client agrees to disclose and rectify the crime or fraud; or

(5) the client has used the lawyer's services to perpetrate a crime or fraud, unless the client agrees to disclose and rectify the crime or fraud.

(b) When Withdrawal Is Allowed. Except as stated in subdivision (c), a lawyer may withdraw from representing a client if:

(1) withdrawal can be accomplished without material adverse effect on the interests of the client~~, or if:~~;

~~(1) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;~~

~~(2) the client has used the lawyer's services to perpetrate a crime or fraud;~~

~~(3)~~ (2) ~~a~~ the client insists upon ~~pursuing an objective~~ taking action that the lawyer considers repugnant, ~~or~~ imprudent or with which the lawyer has a fundamental disagreement;

~~(4)~~ (3) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;

~~(5)~~ (4) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or

~~(6)~~ (5) other good cause for withdrawal exists.

(c) Compliance With Order of Tribunal. A lawyer must comply with applicable law requiring notice or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

(d) Protection of Client's Interest. Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interest, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled, and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers and other property relating to or belonging to the client to the extent permitted by law.

Comment

[1] A lawyer should not accept representation in a matter unless it can be performed competently, promptly, without improper conflict of interest, and to completion. Ordinarily, a representation in a matter is completed when the agreed-upon assistance has been concluded. See rule 4-1.2, and the comment to rule 4-1.3.

Mandatory withdrawal

[2] A lawyer ordinarily must decline or withdraw from representation if the client demands that the lawyer engage in conduct that is illegal or violates the Rules of Professional Conduct or law. The lawyer is not obliged to decline or withdraw simply because the client suggests such a course of conduct; a client may make such a suggestion in the hope that a lawyer will not be constrained by a professional obligation. Withdrawal is also mandatory if the client persists in a course of action that the lawyer reasonably believes is criminal or fraudulent, unless the client agrees to disclose and rectify the crime or fraud. Withdrawal is also required if the lawyer's services were misused in the past even if that would materially prejudice the client.

[3] When a lawyer has been appointed to represent a client, withdrawal ordinarily requires approval of the appointing authority. See also rule 4-6.2. Similarly, court approval or

notice to the court is often required by applicable law before a lawyer withdraws from pending litigation. Difficulty may be encountered if withdrawal is based on the client's demand that the lawyer engage in unprofessional conduct. The court may ~~wish~~ request an explanation for the withdrawal, while the lawyer may be bound to keep confidential the facts that would constitute such an explanation. The lawyer's statement that professional considerations require termination of the representation ordinarily should be accepted as sufficient. Lawyers should be mindful of their obligations to both clients and the court under rules 4-1.6 and 4-3.3.

Discharge

[4] A client has a right to discharge a lawyer at any time, with or without cause, subject to liability for payment for the lawyer's services. Where future dispute about the withdrawal may be anticipated, it may be advisable to prepare a written statement reciting the circumstances.

[5] Whether a client can discharge appointed counsel may depend on applicable law. A client seeking to do so should be given a full explanation of the consequences. These consequences may include a decision by the appointing authority that appointment of successor counsel is unjustified, thus requiring the client to be self-represented .

[6] If the client ~~is mentally incompetent~~ has severely diminished capacity, the client may lack the legal capacity to discharge the lawyer, and in any event the discharge may be seriously adverse to the client's interests. The lawyer should make special effort to help the client consider the consequences and~~, in an extreme case,~~ may ~~initiate proceedings for a conservatorship or similar protection of the client. See~~ take reasonably necessary protective action as provided in rule 4-1.14.

Optional withdrawal

[7] A lawyer may withdraw from representation in some circumstances. The lawyer has the option to withdraw if it can be accomplished without material adverse effect on the client's interests. ~~Withdrawal is also justified if the client persists in a course of action that the lawyer reasonably believes is criminal or fraudulent, for a lawyer is not required to be associated with such conduct even if the lawyer does not further it. Withdrawal is also permitted if the lawyer's services were misused in the past even if that would materially prejudice the client.~~ The lawyer also may withdraw where the client insists on ~~a~~ taking action that the lawyer considers repugnant ~~or~~ imprudent, ~~objective~~ or with which the lawyer has a fundamental disagreement.

[8] A lawyer may withdraw if the client refuses to abide by the terms of an agreement relating to the representation, such as an agreement concerning fees or court costs or an agreement limiting the objectives of the representation.

Assisting the client upon withdrawal

[9] Even if the lawyer has been unfairly discharged by the client, a lawyer must take all

reasonable steps to mitigate the consequences to the client. The lawyer may retain papers and other property as security for a fee only to the extent permitted by law. See rule 5-1.1.

~~Whether a lawyer for an organization may under certain unusual circumstances have a legal obligation to the organization after withdrawing or being discharged by the organization's highest authority is beyond the scope of these rules.~~

Refunding advance payment of unearned fee

[10] Upon termination of representation, a lawyer should refund to the client any advance payment of a fee that has not been earned. This does not preclude a lawyer from retaining any reasonable nonrefundable fee that the client agreed would be deemed earned when the lawyer commenced the client's representation. See also rule 4-1.5.

MODEL RULE: 1.17, Sale of Law Practice

SUMMARY of Substantive Changes Adopted by the ABA House of Delegates:

1. Model Rule 1.17 has been amended to remove the requirement that the sale of a law practice be in its entirety to a single buyer.

2. Model Rule 1.17 has been amended to prohibit increasing the fees charged to clients by reason of the sale of a practice or area of practice.

How the ABA Rule DIFFERS From the EXISTING Florida Rule:

1. Like the pre-amendment version of Model Rule 1.17, Florida Bar Rule 4-1.17 prohibits the sale of a law practice except in its entirety to a single lawyer or law firm.

2. Model Rule 1.17 requires the seller to cease engaging in the private practice of law, or in the area of practice that has been sold, in the jurisdiction or geographical area in which the practice has been conducted. Florida Bar Rule 4-1.17 does not. (This difference preexisted the 2002 amendments to Model Rule 1.17.)

RECOMMENDATION of Yes or No and REASONS:

1. **YES**: Amend Florida Bar Rule 4-1.17 to permit the sale of an area of practice. As noted by the Ethics 2000 Commission:

> [T]he present requirement is unduly restrictive and potentially disserves clients. While it remains important to ensure the disposition of the entire caseload, it is not necessary to require that all cases must be sold to a single buyer. For example, it may make better sense to allow the sale of family-law cases to a family lawyer and bankruptcy cases to a bankruptcy lawyer. Common sense would suggest the lawyer should sell the cases to the most competent practitioner and not be limited by such a "single buyer" rule.

2. **NO**. It is unduly restrictive to require that the lawyer cease the practice of law.

3. **YES and NO**. Adopt the revised Commentary except for provisions regarding the requirement that the lawyer cease the practice of law or area of practice, because the committee recommends against adopting that portion of the rule.

FLORIDA'S Rule in LEGISLATIVE FORMAT

RULE 4-1.17 SALE OF LAW PRACTICE

A lawyer or a law firm may sell or purchase a law practice, or an area of practice,

including good will, provided that:

(a) Sale of Practice or Area of Practice as an Entirety. The entire practice, or the entire area of practice, is sold ~~as an entirety~~ to ~~a single purchaser, which is another lawyer~~ one or more lawyers or law ~~firm~~ firms authorized to practice law in Florida.

(b) Notice to Clients. Written notice is served by certified mail, return receipt requested, upon each of the seller's clients of:

(1) the proposed sale;

(2) the client's right to retain other counsel; and

(3) the fact that the client's consent to the substitution of counsel will be presumed if the client does not object within 30 days after being served with notice.

(c) Court Approval Required. If a representation involves pending litigation, there shall be no substitution of counsel or termination of representation unless authorized by the court. The seller may disclose, in camera, to the court information relating to the representation only to the extent necessary to obtain an order authorizing the substitution of counsel or termination of representation.

(d) Client Objections. If a client objects to the proposed substitution of counsel, the seller shall comply with the requirements of rule 4-1.16(d).

(e) Consummation of Sale. A sale of a law practice shall not be consummated until:

(1) with respect to clients of the seller who were served with written notice of the proposed sale, the 30-day period referred to in subdivision (b)(3) has expired or all such clients have consented to the substitution of counsel or termination of representation; and

(2) court orders have been entered authorizing substitution of counsel for all clients who could not be served with written notice of the proposed sale and whose representations involve pending litigation; provided, in the event the court fails to grant a substitution of counsel in a matter involving pending litigation, that matter shall not be included in the sale and the sale otherwise shall be unaffected. Further, the matters not involving pending litigation of any client who cannot be served with written notice of the proposed sale shall not be included in the sale and the sale otherwise shall be unaffected.

(f) Existing Fee Contracts Controlling. The purchaser shall honor the fee agreements that were entered into between the seller and the seller's clients. The fees charged clients shall not be increased by reason of the sale.

Comment

[1] The practice of law is a profession, not merely a business. Clients are not commodities that can be purchased and sold at will. In accordance with the requirements of this rule, when a lawyer or an entire firm sells the practice and ~~another lawyer~~ other lawyers or ~~firm~~ firms ~~takes~~ take over the representation, the selling lawyer or firm may obtain compensation for the reasonable value of the practice as may withdrawing partners of law firms. See rules 4-5.4 and 4-5.6.

~~Single purchaser~~

[2] The requirement that all of the private practice, or all of an area of practice, be sold is satisfied if the seller in good faith makes the entire practice, or area of practice, available for sale to the ~~purchaser~~ purchasers. The fact that a number of the seller's clients decide not to be represented by the ~~purchaser~~ purchasers but take their matters elsewhere, therefore, does not result in a violation. Similarly, a violation does not occur merely because a court declines to approve the substitution of counsel in the cases of a number of clients who could not be served with written notice of the proposed sale.

Sale of Entire Practice or Entire Area of Practice

[3] The rule requires that the seller's entire practice, or an area of practice, be sold. ~~as an entirety to a single purchaser~~. The prohibition against ~~piecemeal~~ sale of ~~a~~ less than an entire practice area protects those clients whose matters are less lucrative and who might find it difficult to secure other counsel if a sale could be limited to substantial fee-generating matters. The ~~purchaser is~~ purchasers are required to undertake all client matters in the practice or practice area, subject to client consent or court authorization. ~~If,~~ This requirement is satisfied, however, ~~the~~ even if a purchaser is unable to undertake ~~all~~ a particular client ~~matters~~ matter because of a conflict of interest ~~in a specific matter respecting which the purchaser is not permitted by rule 4-1.7 or another rule to represent the client, the requirement that there be a single purchaser is nevertheless satisfied~~.

Client confidences, consent, and notice

[4] Negotiations between seller and prospective purchaser prior to disclosure of information relating to a specific representation of an identifiable client do not violate the confidentiality provisions of rule 4-1.6 any more than do preliminary discussions concerning the possible association of another lawyer or mergers between firms, with respect to which client consent ordinarily is not required. Providing the prospective purchaser access to client-specific information relating to the representation and to the file, however, requires client consent or court authorization. See rule 4-1.6. Rule 4-1.17 provides that the seller must attempt to serve each client with written notice of the contemplated sale, including the identity of the purchaser and the fact that the decision to consent to the substitution of counsel or to make other arrangements must be made within 30 days. If nothing is heard within that time from a client who was served with written notice of the proposed sale, that client's consent to the substitution of counsel is presumed. However, with regard to clients whose matters involve pending

litigation but who could not be served with written notice of the proposed sale, authorization of the court is required before the files and client-specific information relating to the representation of those clients may be disclosed by the seller to the purchaser and before counsel may be substituted.

[5] A lawyer or law firm selling a practice cannot be required to remain in practice just because some clients cannot be served with written notice of the proposed sale. Because these clients cannot themselves consent to the substitution of counsel or direct any other disposition of their representations and files, with regard to clients whose matters involve pending litigation the rule requires an order from the court authorizing the substitution (or withdrawal) of counsel. The court can be expected to determine whether reasonable efforts to locate the client have been exhausted, and whether the absent client's legitimate interests will be served by authorizing the substitution of counsel so that the purchaser may continue the representation. Preservation of client confidences requires that the petition for a court order be considered in camera. If, however, the court fails to grant substitution of counsel in a matter involving pending litigation, that matter shall not be included in the sale and the sale may be consummated without inclusion of that matter.

[6] The rule provides that matters not involving pending litigation of clients who could not be served with written notice may not be included in the sale. This is because the clients' consent to disclosure of confidential information and to substitution of counsel cannot be obtained and because the alternative of court authorization ordinarily is not available in matters not involving pending litigation. Although such matters shall not be included in the sale, the sale may be consummated without inclusion of those matters.

[7] If a client objects to the proposed substitution of counsel, the rule treats the seller as attempting to withdraw from representation of that client and, therefore, provides that the seller must comply with the provisions of rule 4-1.16 concerning withdrawal from representation. Additionally, the seller must comply with applicable requirements of law or rules of procedure.

[8] All the elements of client autonomy, including the client's absolute right to discharge a lawyer and transfer the representation to another, survive the sale of the practice or an area of practice.

Fee arrangements between client and purchaser

[9] The sale may not be financed by increases in fees charged the clients of the practice. Existing agreements between the seller and the client as to fees and the scope of the work must be honored by the purchaser. This obligation of the purchaser is a factor that can be taken into account by seller and purchaser when negotiating the sale price of the practice.

Other applicable ethical standards

[10] Lawyers participating in the sale of a law practice or a practice area are subject to

the ethical standards applicable to involving another lawyer in the representation of a client for all matters pending at the time of the sale. These include, for example, the seller's ethical obligation to exercise competence in identifying a purchaser qualified to assume the practice and the purchaser's obligation to undertake the representation competently (see rule 4-1.1); the obligation to avoid disqualifying conflicts, and to secure ~~client~~ the client's informed consent ~~after consultation~~ for those conflicts that can be agreed to (see rule 4-1.7 regarding conflicts and see the terminology section of the Preamble for the definition of informed consent); and the obligation to protect information relating to the representation (see rules 4-1.6, 4-1.8(b), and 4-1.9(b)). If the terms of the sale involve the division between purchaser and seller of fees from matters that arise subsequent to the sale, the fee-division provisions of rule 4-1.5 must be satisfied with respect to such fees. These provisions will not apply to the division of fees from matters pending at the time of sale.

[11] If approval of the substitution of the purchasing attorney for the selling attorney is required by the rules of any tribunal in which a matter is pending, such approval must be obtained before the matter can be included in the sale (see rule 4-1.16).

Applicability of this rule

[12] This rule applies, among other situations, to the sale of a law practice by representatives of a lawyer who is deceased, disabled, or has disappeared. It is possible that a nonlawyer, who is not subject to the Rules of Professional Conduct, might be involved in the sale. When the practice of a lawyer who is deceased, is disabled, or has disappeared is being sold, the notice required by subdivision (b) of this rule must be given by someone who is legally authorized to act on the selling lawyer's behalf, such as a personal representative or a guardian. This is because the sale of a practice and transfer of representation involve legal rights of the affected clients.

[13] Bona fide admission to, withdrawal from, or retirement from a law partnership or professional association, retirement plans and similar arrangements, and a sale of tangible assets of a law practice, do not constitute a sale or purchase governed by this rule.

MODEL RULE: 1.18, DUTIES TO PROSPECTIVE CLIENT

SUMMARY of Substantive Changes Adopted by the ABA House of Delegates

1. This a *completely new rule* that defines a "prospective client"and sets forth duties owed by a lawyer to such a person.

2. The proposed Rule specifies that a lawyer owes a duty of confidentiality to a prospective client concerning information learned in a consultation regarding a matter. This duty is based on, but more limited than, the confidentiality duty owed to former clients as expressed in Rule 1.9. This duty precludes the lawyer from opposing that prospective client in the same or a substantially related matter, but only if the information in question "could be significantly harmful" to the prospective client.

3. The proposed rule contains two exceptions to the prohibited representation situation:

a. The affected prospective client and client both give "informed consent, confirmed in writing;" or

b. Other lawyers who work in a law firm with the disqualified lawyer are *not* disqualified if the disqualified lawyer is "timely screened from any participation in the matter and is apportioned no part of the fee therefrom."

How Proposed ABA Rule DIFFERS from EXISTING FLORIDA Rule

1. Florida presently has no corresponding Rule.

2. Although Florida presently has no Rule corresponding to proposed Rule 1.18, Florida case law and ethics opinions impose a duty of confidentiality on lawyers with respect to prospective clients.

3. Although Florida presently has no Rule corresponding to proposed Rule 1.18, Florida authorities would not require consent of the affected prospective client and client to be in writing, nor would screening be recognized as an effective means of defeating a disqualification resulting from the duty of confidentiality.

RECOMMENDATION of Yes or No and REASONS

YES with modifications to the rule. The concern that proposed Rule 1.18 speaks to is important. Although it is addressed by existing Florida authorities, adding this principle to the Rules of Professional Conduct through new Rule 1.18 would provide further guidance to practicing lawyers. Two important modifications to the ABA's rule, however, are suggested.

First, as noted above, the duty of confidentiality as expressed in ABA rule 1.18 precludes the

lawyer from opposing the prospective client in the same or a substantially related matter only if the information in question "could be significantly harmful" to the prospective client. There is no definition of this term or explanation of how one determines whether information is "significantly harmful." Because this concept is foreign to existing Florida rules and opinions, adopting a rule including such a concept would expose Florida lawyers to needless uncertainty and potential litigation. Perhaps more importantly, it is difficult to imagine a compelling reason why the confidentiality of prospective client information should be treated in a less protective manner than other client information.

Second, because the concept of screening to prevent disqualification in this type of situation is not permitted in Florida, a law firm should not be able to use screening to avoid disqualification in a situation involving a prospective client. There is no compelling reason why the general principle of imputed disqualification expressed in Rule 4-1.10(a) should not apply to prospective client conflicts as well; this would be the result under existing Florida law.

FLORIDA'S Rule in LEGISLATIVE FORMAT

RULE 4-1.18, DUTIES TO PROSPECTIVE CLIENT

(a) Prospective Client. 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) Confidentiality of information. 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) Subsequent representation. A lawyer subject to subdivision (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 used to the disadvantage of that person in the matter, except as provided in subdivision (d). If 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, except as provided in subdivision (d).

(d) Permissible representation. When the lawyer has received disqualifying information as defined in subdivision (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 and prospective client have conditioned the consultation on the prospective client's informed consent that no information disclosed during the consultation would prohibit the lawyer from representing a different client in the matter and 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.

Comment

[1] Prospective clients, like clients, may disclose information to a lawyer, place documents or other property in the lawyer's custody, or rely on the lawyer's advice. A lawyer's discussions with a prospective client usually are limited in time and depth and leave both the prospective client and the lawyer free (and the lawyer sometimes required) to proceed no further. Hence, prospective clients should receive some but not all of the protection afforded clients.

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

[3] It is often necessary for a prospective client to reveal information to the lawyer during an initial consultation prior to the decision about formation of a client-lawyer relationship. The lawyer often must learn such information to determine whether there is a conflict of interest with an existing client and whether the matter is one that the lawyer is willing to undertake. Subdivision (b) prohibits the lawyer from using or revealing that information, except as permitted by rule 4-1.9, even if the client or lawyer decides not to proceed with the representation. The duty exists regardless of how brief the initial conference may be.

[4] In order to avoid acquiring disqualifying information from a prospective client, a lawyer considering whether or not to undertake a new matter should limit the initial interview to only such information as reasonably appears necessary for that purpose. Where the information indicates that a conflict of interest or other reason for non-representation exists, the lawyer should so inform the prospective client or decline the representation. If the prospective client wishes to retain the lawyer, and if consent is possible under rule 4-1.7, then consent from all affected present or former clients must be obtained before accepting the representation.

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

[6] Even in the absence of an agreement, under subdivision (c), the lawyer is not prohibited from representing a client with interests adverse to those of the prospective client in the same or a substantially related matter unless the lawyer has received from the prospective client information that could be used to the disadvantage of the prospective client in the matter.

[7] Under subdivision (c), the prohibition in this rule is imputed to other lawyers as provided in

rule 4-1.10, but, under subdivision (d)(1), the prohibition and its imputation may be avoided if the lawyer obtains the informed consent, confirmed in writing, of both the prospective and affected clients. In the alternative, the prohibition and its imputation may be avoided if the conditions of subdivision (d)(2) are met.

[8] The duties under this rule presume that the prospective client consults the lawyer in good faith. A person who consults a lawyer simply with the intent of disqualifying the lawyer from the matter, with no intent of possibly hiring the lawyer, has engaged in a sham and should not be able to invoke this rule to create a disqualification.

[8] For the duty of competence of a lawyer who gives assistance on the merits of a matter to a prospective client, see rule 4-1.1. For a lawyer's duties when a prospective client entrusts valuables or papers to the lawyer's care, see rule 4-1.15.

MODEL RULE: 2.1, ADVISOR

SUMMARY of Substantive Changes Adopted by the ABA House of Delegates

No change in text of the rule. Commentary adds that a lawyer when offering advice and the matter is likely to involve litigation, it may be necessary under Rule 1.4 to inform the client of forms of dispute resolution that might constitute reasonable alternatives to litigation.

How Proposed ABA Rule DIFFERS from EXISTING FLORIDA Rule

Florida Rule 2.1 does not contain commentary regarding informing clients about alternative dispute resolution.

RECOMMENDATION of Yes or No and REASONS

Yes.

FLORIDA'S Rule in LEGISLATIVE FORMAT

RULE 4-2.1 ADVISER

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, and political factors that may be relevant to the client's situation.

Comment

Scope of advice

[1] A client is entitled to straightforward advice expressing the lawyer's honest assessment. Legal advice often involves unpleasant facts and alternatives that a client may be disinclined to confront. In presenting advice, a lawyer endeavors to sustain the client's morale and may put advice in as acceptable a form as honesty permits. However, a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client.

[2] Advice couched in narrowly legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people, are predominant. Purely technical legal advice, therefore, can sometimes be inadequate. It is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice. Although a lawyer is not a moral adviser as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied.

[3] A client may expressly or impliedly ask the lawyer for purely technical advice. When such a request is made by a client experienced in legal matters, the lawyer may accept it at face value. When such a request is made by a client inexperienced in legal matters, however, the lawyer's responsibility as adviser may include indicating that more may be involved than strictly legal considerations.

[4] Matters that go beyond strictly legal questions may also be in the domain of another profession. Family matters can involve problems within the professional competence of psychiatry, clinical psychology, or social work; business matters can involve problems within the competence of the accounting profession or of financial specialists. Where consultation with a professional in another field is itself something a competent lawyer would recommend, the lawyer should make such a recommendation. At the same time, a lawyer's advice at its best often consists of recommending a course of action in the face of conflicting recommendations of experts.

Offering advice

[5] In general, a lawyer is not expected to give advice until asked by the client. However, when a lawyer knows that a client proposes a course of action that is likely to result in substantial adverse legal consequences to the client, the lawyer's duty to the client under rule 4-1.4 may require that the lawyer ~~act~~ offer advice if the client's course of action is related to the representation. Similarly, when a matter is likely to involved litigation, it may be necessary under rule 4-1.4 to inform the client of forms of dispute resolution that might constitute reasonable alternatives to litigation. A lawyer ordinarily has no duty to initiate investigation of a client's affairs or to give advice that the client has indicated is unwanted, but a lawyer may initiate advice to a client when doing so appears to be in the client's interest.

MODEL RULE: 2.2, INTERMEDIARY

SUMMARY of Substantive Changes Adopted by the ABA House of Delegates

Rule on Intermediary between clients deleted and the discussion of common representation moved to Rule 1.7 comment.

How Proposed ABA Rule DIFFERS from EXISTING FLORIDA Rule

Florida Rule 4-2.2 on intermediaries is substantially the same as the former model rule.

RECOMMENDATION of Yes or No and REASONS

YES.

FLORIDA'S Rule in LEGISLATIVE FORMAT

RULE 4-2.2 Open ~~INTERMEDIARY~~

~~**(a) When Lawyer May Act as Intermediary.** A lawyer may act as intermediary between clients if the lawyer:~~

~~(1) consults with each client concerning the implications of the common representation, including the advantages and risks involved and the effect on the attorney-client privileges, and obtains each client's consent to the common representation;~~

~~(2) reasonably believes that the matter can be resolved on terms compatible with the clients' best interests, that each client will be able to make adequately informed decisions in the matter, and that there is little risk of material prejudice to the interests of any of the clients if the contemplated resolution is unsuccessful; and~~

~~(3) reasonably believes that the common representation can be undertaken impartially and without improper effect on other responsibilities the lawyer has to any of the clients.~~

~~**(b) Lawyer as Intermediary; Consultation With Clients.** While acting as intermediary, the lawyer shall consult with each client concerning the decisions to be made and the considerations relevant in making them, so that each client can make adequately informed decisions.~~

~~**(c) Withdrawal as Intermediary; Effect.** A lawyer shall withdraw as intermediary if any of the clients so request or if any of the conditions stated in subdivision (a) are no longer satisfied. Upon withdrawal, the lawyer shall not continue to represent any of the clients in the matter that was the subject of the intermediation.~~

Comment

A lawyer acts as intermediary under this rule when the lawyer represents 2 or more parties with potentially conflicting interests. A key factor in defining the relationship is whether the parties share responsibility for the lawyer's fee, but the common representation may be inferred from other circumstances. Because confusion can arise as to the lawyer's role where each party is not separately represented, it is important that the lawyer make clear the relationship.

The rule does not apply to a lawyer acting as arbitrator or mediator between or among parties who are not clients of the lawyer, even where the lawyer has been appointed with the concurrence of the parties. In performing such a role the lawyer may be subject to applicable codes of ethics, such as the Code of Ethics for Arbitration in Commercial Disputes prepared by a joint committee of the American Bar Association and the American Arbitration Association.

A lawyer acts as intermediary in seeking to establish or adjust a relationship between clients on an amicable and mutually advantageous basis; for example, in helping to organize a business in which 2 or more clients are entrepreneurs, working out the financial reorganization of an enterprise in which 2 or more clients have an interest, arranging a property distribution in settlement of an estate, or mediating a dispute between clients. The lawyer seeks to resolve potentially conflicting interests by developing the parties' mutual interests. The alternative can be that each party may have to obtain separate representation, with the possibility in some situations of incurring additional cost, complication, or even litigation. Given these and other relevant factors, all the clients may prefer that the lawyer act as intermediary.

In considering whether to act as intermediary between clients, a lawyer should be mindful that if the intermediation fails the result can be additional cost, embarrassment, and recrimination. In some situations the risk of failure is so great that intermediation is plainly impossible. For example, a lawyer cannot undertake common representation of clients between whom contentious litigation is imminent or who contemplate contentious negotiations. More generally, if the relationship between the parties has already assumed definite antagonism, the possibility that the clients' interests can be adjusted by intermediation ordinarily is not very good.

The appropriateness of intermediation can depend on its form. Forms of intermediation range from informal arbitration, where each client's case is presented by the respective client and the lawyer decides the outcome, to mediation, to common representation where the clients' interests are substantially though not entirely compatible. One form may be appropriate in circumstances where another would not. Other relevant factors are whether the lawyer subsequently will represent both parties on a continuing basis and whether the situation involves creating a relationship between the parties or terminating one.

Confidentiality and privilege

A particularly important factor in determining the appropriateness of intermediation is

~~the effect on client-lawyer confidentiality and the attorney-client privilege. In a common representation, the lawyer is still required both to keep each client adequately informed and to maintain confidentiality of information relating to the representation. See rules 4-1.4 and 4-1.6. Complying with both requirements while acting as intermediary requires a delicate balance. If the balance cannot be maintained, the common representation is improper. With regard to the attorney-client privilege, the prevailing rule is that as between commonly represented clients the privilege does not attach. Hence, it must be assumed that if litigation eventuates between the clients, the privilege will not protect any such communications, and the clients should be so advised.~~

~~Since the lawyer is required to be impartial between commonly represented clients, intermediation is improper when that impartiality cannot be maintained. For example, a lawyer who has represented 1 of the clients for a long period and in a variety of matters might have difficulty being impartial between that client and one to whom the lawyer has only recently been introduced.~~

~~Consultation~~

~~In acting as intermediary between clients, the lawyer is required to consult with the clients on the implications of doing so and to proceed only upon consent based on such a consultation. The consultation should make clear that the lawyer's role is not that of partisanship normally expected in other circumstances.~~

~~Subdivision (b) is an application of the principle expressed in rule 4-1.4. Where the lawyer is intermediary, the clients ordinarily must assume greater responsibility for decisions than when each client is independently represented.~~

~~Withdrawal~~

~~Common representation does not diminish the rights of each client in the client-lawyer relationship. Each has the right to loyal and diligent representation, the right to discharge the lawyer as stated in rule 4-1.16, and the protection of rule 4-1.9 concerning obligations to a former client.~~

MODEL RULE: 2.3, EVALUATION FOR USE BY THIRD PARTIES

SUMMARY of Substantive Changes Adopted by the ABA House of Delegates

No substantive changes. Text restructured to clarify circumstances in which lawyer may provide evaluation for use of third persons and adds a provision that when the lawyer knows or reasonably should know that the evaluation is likely to affect the client's interest materially and adversely, the lawyer shall not provide the evaluation unless the client gives informed consent. The comment states that this is to clarify that informed consent is not required in all cases, but, rather, only those in which there is a significant risk of a material adverse effect on the client's interest. The comment also adds that an evaluation may be performed not only at the client's direction, but also "when impliedly authorized in order to carry out the representation. See Rule 1.2."

1. The rule has been restructured and allows a lawyer to give an evaluation to third parties if impliedly authorized.

2. Language in subsection (c) regarding confidentiality of information in the evaluation has been changed from an exception "as disclosure is required" to "as disclosure is authorized."

3. The comment, in ¶ 1 discusses the evaluation as impliedly authorized concept.

4. ¶ 2 regarding lawyers for the government giving opinions was deleted as being unclear.

5. ¶ 4 added language stating that lawyers may never make false statements of fact or law in giving an evaluation.

6. Adds ¶ 5 regarding again discussing implied authorization to give an evaluation and obtaining client consent.

How ABA Rule DIFFERS from EXISTING FLORIDA Rule

1-6. Florida Rule 4-2.3 is substantially the same as the old model rule, except that it contains subsection (b) which provides that a lawyer must indicate in the report any limitations on the inquiry's scope or on disclosure of information. The Florida comment does not contain the provision for implied authorization.

RECOMMENDATION of Yes or No and REASONS

1. **Qualified NO**. The committee recommends against adopting the language in the rule and comment permitting a lawyer to give an evaluation because it is "impliedly authorized." The committee believes that a lawyer should always obtain the client's informed consent when giving an evaluation so that the client may determine whether the information being disclosed in the evaluation may be detrimental to the client's interests. The committee does recommend

changing the language in subdivision (a) of Florida rule 2.3 from "consents after consultation" to "gives informed consent" to be consistent with the same change elsewhere in the rules.

2. **NO**. The committee recommends against changing "required" to "authorized" in subdivision (c) of the Florida rule because, although the reporter's notes do not indicate that the meaning is intended to be changed, the committee believes that the meaning of the rule will be changed, as referenced in the comment to Rule 4-1.6, and because it is unclear who is intended to give the "authority" referenced in ABA Rule 2.3.

3. **NO**. The committee recommends against adoption of the changes to ¶ 1 of the comment, because it discusses the impliedly authorized concept that the committee recommends against.

4. **YES**. The committee recommends that ¶ 2 regarding lawyers for the government be deleted, because it agrees that the meaning of the example is unclear.

5. **YES**. The committee recommends adoption of the change to new ¶ 4 regarding making false statements in giving evaluations.

6. **NO**. The committee recommends against adoption of the changes to new ¶ 5 of the comment, because it discusses the impliedly authorized concept that the committee recommends against.

FLORIDA'S Rule in LEGISLATIVE FORMAT

RULE 4-2.3 EVALUATION FOR USE BY THIRD PERSONS

(a) When Lawyer May ~~Undertake~~ Provide Evaluation. A lawyer may ~~undertake~~ provide an evaluation of a matter affecting a client for the use of someone other than the client if:

(1) the lawyer reasonably believes that making the evaluation is compatible with other aspects of the lawyer's relationship with the client; and

(2) the client ~~consents after consultation~~ gives informed consent.

(b) Limitation on Scope of Evaluation. In reporting the evaluation, the lawyer shall indicate any material limitations that were imposed on the scope of the inquiry or on the disclosure of information.

(c) Maintaining Client Confidences. Except as disclosure is required in connection with a report of an evaluation, information relating to the evaluation is otherwise protected by rule 4-1.6.

Comment

Definition

[1] An evaluation may be performed at the client's direction but for the primary purpose of establishing information for the benefit of third parties; for example, an opinion concerning the title of property rendered at the behest of a vendor for the information of a prospective purchaser or at the behest of a borrower for the information of a prospective lender. In some situations, the evaluation may be required by a government agency; for example, an opinion concerning the legality of the securities registered for sale under the securities laws. In other instances, the evaluation may be required by a third person, such as a purchaser of a business.

~~Lawyers for the government may be called upon to give a formal opinion on the legality of contemplated government agency action. In making such an evaluation, the government lawyer acts at the behest of the government as the client but for the purpose of establishing the limits of the agency's authorized activity. Such an opinion is to be distinguished from confidential legal advice given agency officials. The critical question is whether the opinion is to be made public.~~

[2] A legal evaluation should be distinguished from an investigation of a person with whom the lawyer does not have a client-lawyer relationship. For example, a lawyer retained by a purchaser to analyze a vendor's title to property does not have a client-lawyer relationship with the vendor. So also, an investigation into a person's affairs by a government lawyer, or by special counsel employed by the government, is not an evaluation as that term is used in this rule. The question is whether the lawyer is retained by the person whose affairs are being examined. When the lawyer is retained by that person, the general rules concerning loyalty to client and preservation of confidences apply, which is not the case if the lawyer is retained by someone else. For this reason, it is essential to identify the person by whom the lawyer is retained. This should be made clear not only to the person under examination, but also to others to whom the results are to be made available.

Duty to third person

[3] When the evaluation is intended for the information or use of a third person, a legal duty to that person may or may not arise. That legal question is beyond the scope of this rule. However, since such an evaluation involves a departure from the normal client-lawyer relationship, careful analysis of the situation is required. The lawyer must be satisfied as a matter of professional judgment that making the evaluation is compatible with other functions undertaken in behalf of the client. For example, if the lawyer is acting as an advocate in defending the client against charges of fraud, it would normally be incompatible with that responsibility for the lawyer to perform an evaluation for others concerning the same or a related transaction. Assuming no such impediment is apparent, however, the lawyer should advise the client of the implications of the evaluation, particularly the lawyer's responsibilities to third persons and the duty to disseminate the findings.

Access to and disclosure of information

[4] The quality of an evaluation depends on the freedom and extent of the investigation

upon which it is based. Ordinarily, a lawyer should have whatever latitude of investigation seems necessary as a matter of professional judgment. Under some circumstances, however, the terms of the evaluation may be limited. For example, certain issues or sources may be categorically excluded or the scope of search may be limited by time constraints or the noncooperation of persons having relevant information. Any such limitations that are material to the evaluation should be described in the report. If, after a lawyer has commenced an evaluation, the client refuses to comply with the terms upon which it was understood the evaluation was to have been made, the lawyer's obligations are determined by law, having reference to the terms of the client's agreement and the surrounding circumstances. In no circumstances is the lawyer permitted to knowingly make a false statement of material fact or law in providing an evaluation under this rule. See rule 4-4.1.

Financial auditors' requests for information

[5] When a question concerning the legal situation of a client arises at the instance of the client's financial auditor and the question is referred to the lawyer, the lawyer's response may be made in accordance with procedures recognized in the legal profession. Such a procedure is set forth in the American Bar Association Statement of Policy Regarding Lawyers' Responses to Auditors' Requests for Information, adopted in 1975.

MODEL RULE: 2.4: LAWYER SERVING AS THIRD-PARTY NEUTRAL

SUMMARY of Substantive Changes Adopted by the ABA House of Delegates

Model Rule 2.4 is a new rule which provides that a lawyer serving as a third-party neutral when the lawyer is assisting two or more persons who are not the lawyer's clients to reach a resolution of a dispute must inform the unrepresented parties that the lawyer is not representing them and if the lawyer knows or reasonably should know that the party does not understand the lawyer's role, the lawyer must explain the difference between the lawyer's role as a third-party neutral and a lawyer's role as one who represents a client.

How ABA Rule DIFFERS From EXISTING FLORIDA Rule

There is no comparable Florida Rule.

RECOMMENDATION of Yes or No and REASONS

YES. The new rule recognizes the increasing trend of lawyers to be involved in matters as mediators and arbitrators, and requires lawyers to clarify that role with the participants. The proposed rule also covers arbitrators and other third-party neutrals in addition to mediators. In addition, it is not uncommon in Florida for lawyers to be engaged to act as a mediator even though they are not certified. There is, therefore, a benefit to adopting the Rule, even though there are specific rules that apply to certified mediators. The committee does recommend the addition of language to the comment indicating that certified mediators must comply with applicable rules and statutes.

FLORIDA'S Rule in LEGISLATIVE FORMAT

RULE 4-2.4: 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.

Comment

[1] Alternative dispute resolution has become a substantial part of the civil justice system. Aside from representing clients in dispute-resolution processes, lawyers often serve as third-party neutrals. A third-party neutral is a person, such as a mediator, arbitrator, conciliator or evaluator, who assists the parties, represented or unrepresented, in the resolution of a dispute or in the arrangement of a transaction. Whether a third-party neutral serves primarily as a facilitator, evaluator or decisionmaker depends on the particular process that is either selected by the parties or mandated by a court.

[2] The role of a third-party neutral is not unique to lawyers, although, in some court-connected contexts, only lawyers are allowed to serve in this role or to handle certain types of cases. In performing this role, the lawyer may be subject to court rules or other law that apply either to third-party neutrals generally or to lawyers serving as third-party neutrals. Lawyer-neutrals may also be subject to various codes of ethics, such as the Code of Ethics for Arbitration in Commercial Disputes prepared by a joint committee of the American Bar Association and the American Arbitration Association or the Model Standards of Conduct for Mediators jointly prepared by the American Bar Association, the American Arbitration Association and the Society of Professionals in Dispute Resolution. A Florida Bar member who is a certified mediator is governed by the applicable law and rules relating to certified mediators.

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

[4] A lawyer who serves as a third-party neutral subsequently may be asked to serve as a lawyer representing a client in the same matter. The conflicts of interest that arise for both the individual lawyer and the lawyer's law firm are addressed in rule 4-1.12.

[5] Lawyers who represent clients in alternative dispute-resolution processes are governed by the Rules of Professional Conduct. When the dispute-resolution process takes place before a tribunal, as in binding arbitration (see terminology), the lawyer's duty of candor is governed by rule 4-3.3. Otherwise, the lawyer's duty of candor toward both the third-party neutral and other parties is governed by rule 4-4.1.

MODEL RULE: 3.1, MERITORIOUS CLAIMS AND CONTENTIONS

SUMMARY of Substantive Changes adopted by the ABA House of Delegates

1. Very little change. The revised rule simply adds the words "law and fact" so that it is clear that a lawyer shall not bring or defend a proceeding unless there is a basis in "law and fact."

2. The comment, ¶ 2, explicitly says that a lawyer must educate him or herself about law and fact. Also, the comment eliminates language that currently prohibits bringing an action forth for the primary purpose of harassment or for a malicious purpose.

3. The comment, ¶ 3 is also amended to say that obligations of an attorney under these rules are subordinate to the Constitution.

How ABA Rule DIFFERS from EXISTING FLORIDA Rule

1. Florida's Rule 4-3.1 does not use the words "law and fact" in its test of whether a claim or contention is frivolous.

2. Florida's Rule 4-3.1 does not contain the change in the comment.

3. Florida's Rule 4-3.1 does not contain the change in the comment.

RECOMMENDATION of Yes or No and REASONS

1. **YES**. The addition of the words "law and fact" will clarify and strengthen the rule and are consistent with making sure that lawyers are bringing legitimate cases.

2. **YES**. Bringing a case for the "primary" purpose of harassing and for malicious intent should be acceptable if the case is otherwise not frivolous and indicates that an action is not frivolous merely because the primary purpose is to harass.

3. **YES**. The addition to the comment is instructive.

FLORIDA'S Rule in LEGISLATIVE FORMAT

RULE 4-3.1 MERITORIOUS CLAIMS AND CONTENTIONS

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, which includes a good faith argument for an extension, modification, or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or 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.

Comment

[1] The advocate has a duty to use legal procedure for the fullest benefit of the client's cause, but also a duty not to abuse legal procedure. The law, both procedural and substantive, establishes the limits within which an advocate may proceed. However, the law is not always clear and never is static. Accordingly, in determining the proper scope of advocacy, account must be taken of the law's ambiguities and potential for change.

[2] The filing of an action or defense or similar action taken for a client is not frivolous merely because the facts have not first been fully substantiated or because the lawyer expects to develop vital evidence only by discovery. What is required of lawyers, however, is that they inform themselves about the facts of their clients' cases and the applicable law and determine that they can make good faith arguments in support of their clients' positions. Such action is not frivolous even though the lawyer believes that the client's position ultimately will not prevail. The action is frivolous, however, if the ~~client desires to have the action taken primarily for the purpose of harassing or maliciously injuring a person or if the~~ lawyer is unable either to make a good faith argument on the merits of the action taken or to support the action taken by a good faith argument for an extension, modification, or reversal of existing law.

[3] The lawyer's obligations under this rule are subordinate to federal or state constitutional law that entitles a defendant in a criminal matter to the assistance of counsel in presenting a claim or contention that otherwise would be prohibited by this rule.

MODEL RULE: 3.2, EXPEDITING LITIGATION

SUMMARY of Substantive Changes adopted by the ABA House of Delegates

1. No substantive changes to the rule were adopted.

2. The comment was changed to recognize that there may be circumstances where it is acceptable for a lawyer to request postponement of litigation for personal reasons.

How ABA Rule DIFFERS from EXISTING FLORIDA Rule

1. Florida's rule is substantially the same as the ABA Model Rule.

2. Florida's rule does not contain this commentary.

RECOMMENDATION of Yes or No and REASONS

1. Not applicable.

2. **YES**. The change in the comment seems reasonable.

FLORIDA'S Rule in LEGISLATIVE FORMAT

RULE 4-3.2 EXPEDITING LITIGATION

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

Comment

[1] Dilatory practices bring the administration of justice into disrepute. ~~Delay should not be indulged merely for the convenience of the advocates or~~ Although there will be occasions when a lawyer may properly seek a postponement for personal reasons, it is not proper for a lawyer to routinely fail to expedite litigation solely for the convenience of the advocates. Nor will a failure to expedite be reasonable if done for the purpose of frustrating an opposing party's attempt to obtain rightful redress or repose. It is not a justification that similar conduct is often tolerated by the bench and bar. The question is whether a competent lawyer acting in good faith would regard the course of action as having some substantial purpose other than delay. Realizing financial or other benefit from otherwise improper delay in litigation is not a legitimate interest of the client.

MODEL RULE: 3.3, CANDOR TOWARD THE TRIBUNAL

SUMMARY of Substantive Changes adopted by the ABA House of Delegates

The revised rule now makes clear that a lawyer must not allow the introduction of false evidence and must take remedial steps where the lawyer comes to know that material evidence offered by the client or a witness called by the lawyer is false- regardless of the client's wishes.

1. In subsection (a), the ABA Model Rule deletes the word "material" in prohibiting a lawyer from making a false statement of fact or law and adds the requirement "fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer.

2. Deletes the requirement that a lawyer shall not fail to disclose a material fact to the court when failure to do so would assist a client in crime or fraud in former subsection (a)(2).

3. Modifies subsection (a)(3) to require that the lawyer's duty to take remedial measures applies to false evidence given to the court by the lawyer's client or a witness called by the lawyer in addition to evidence offered by the lawyer and adds that remedial measures may include disclosure to the tribunal. Additionally, moves from subsection (c) to subsection (a)(3) that a lawyer may refuse to offer evidence that the lawyer reasonably believes is false. Adds the exception in (a)(3) for a criminal defendant's testimony.

4. Adds subsection (b) that requires a lawyer to take remedial measures, including disclosure to the court, when the client is or has engaged in criminal or fraudulent conduct relating to the proceedings.

5. Deletes subsection (c), which was moved to subsection (a)(3).

6. Adds ¶ 1 to the commentary explaining that the rule applies to proceedings ancillary to the actual court proceeding.

7. Makes changes to ¶ 2 of the commentary discussing the lawyer's role in an adversary proceeding, commenting that a lawyer is not required to be impartial, but cannot let the court be misled by falsity.

8. Deletes former ¶s 4 and 5 regarding false evidence and substituting new ¶s 5, 6, and 7 discussing a lawyer's obligations regarding offering false testimony.

9. Changes ¶ 9 to address a criminal defendant's constitutional right to testify except where the lawyer knows the testimony will be false.

10. Deletes ¶s 7, 8, 9, and 10 dealing with false testimony by a criminal defendant.

11. Modifies ¶ 10 regarding remedial measures

12. Deletes references to an exception for criminally accused in ¶11.

13. ¶ 12 addresses remedial measures to preserve the integrity of the process (the commentary pre-existed the changes to the ABA Model Rule).

14. Modifies ¶ 13 to address the extent of the lawyers duties, defining "conclusion of the proceeding" as the extent of the lawyer's duty in the rule.

15. Adds ¶ 15 addressing withdrawal when the lawyer's obligation under this rule may be adverse to the client's interests.

How ABA Rule DIFFERS from EXISTING FLORIDA Rule

1-15. Florida's Rule 4-3.3 is substantially the same as the previous model rule, except that Florida's rule states that a lawyer cannot let any witness, including a criminal defendant, offer testimony the lawyer knows to be false. The Florida rule also addresses testimony in the narrative. The change eliminates the requirement that the false statement must be a "material" fact or statement. The revised rule now permits a lawyer to refuse to offer testimony that the lawyer "reasonably " believes is false. The only exception is in criminal cases. Under the new rule the lawyer must let the client testify falsely unless the lawyer "knows" that said testimony will be false. Florida's Rule 4-3.3 does not contain these changes. Florida's rule also contains commentary in ¶s 13-26 addressing the issue of a lawyer's obligation to refuse to offer false evidence and citing to Florida rules and cases addressing this issue.

RECOMMENDATION of Yes or No and REASONS

YES and **NO**. The requirement that the lawyer can and should refuse to allow false testimony is good and should be added to the Florida rule. However, there should be no difference between the ethics of a criminal lawyer and a civil lawyer. If a criminal lawyer reasonably believes that the client is going to present false testimony the duty of that lawyer should be the same as the duties imposed upon the civil lawyers.

1. **YES** as to subsection (a)(1). The committee recommends adoption of the ABA Model Rule as to subsection (a)(1), because lawyers should not offer false evidence, even if not material, and should correct any material false statements previously made.

2. **NO** as to subsection (a)(2). The committee recommends against deleting subsection (a)(2) because lawyers should be required to disclose material facts to avoid assisting a client in criminal or fraudulent conduct involving the tribunal. The ABA reporter's explanation states that there was no intent to change the substance of the rule, but the committee believes the ABA changes fail to adequately address this issue.

3. **YES** as to subsection (a)(3). The committee recommends adoption of the ABA subsection (a)(3) with the exception of the phrase "other than the testimony of a defendant in a criminal

matter."

4. **YES** as to subsection (b). The committee recommends adoption of ABA subsection (b), because it further protects the integrity of court proceedings.

5. **NO** as to subsection (c). The committee recommends retaining current Florida subsection (b), which extends a lawyer's duties beyond the conclusion of the proceeding, which is more protective than the ABA model rule which extends a lawyer's duties only to the end of a proceeding. The committee also recommends changing the language of Florida's current subsection (b) to state "the duties stated in this rule. . ." and changing the numbering of the subsection to clarify that the duties apply to all of the situations outlined in the rule, including ex parte proceedings.

6. **YES** as to new ¶ 1 of the ABA comment. The ABA position that the rule applies to proceedings ancillary to court proceedings is consistent with Florida's position. See Florida Ethics Opinion 79-15.

7. **YES** as to changes to ¶ 2 of the ABA comment. The changes provide further guidance to lawyers, emphasizing their role as officers of the court.

8. **YES** as to ¶s 4 and 5 of the comment.

9. **YES** as to new ¶ 6 in the ABA comment. The new paragraph replaces former ¶ 5 of the former ABA comment.

10. **YES and NO** as to new ¶ 7 in the ABA comment. The committee recommends adoption of the first sentence of the paragraph, indicating that the rule imposes obligations of all lawyers, but deletes explanation of criminal defendants giving false testimony in the narrative, because existing portions of Florida's comment explain a criminal defense lawyer's obligations in Florida better than the ABA comment.

11. **YES** as to changes to ¶ 9 of the ABA comment. The new commentary provides better guidance regarding the prohibition against offering false testimony.

12. The committee recommends retention of existing ¶s 6, 9, and 13-26, because they were specifically adopted by prior Florida Bar committees to provide guidance to Florida Bar members regarding a lawyer's responsibilities in Florida, particularly with false testimony of a criminal defendant. The committees notes, however, that current ¶ 9 should be reviewed, because the committee does not believe the commentary gives meaningful guidance consistent with the rule because it appears to suggest that an attorney whose client gave a false name to law enforcement may represent to the court that the person is charged under the client's true name by filing documents in the false name and responding to the false name.

13. **NO** as to changes to new ¶ 10 of the ABA comment, ¶ 12 of the ABA comment, ¶13 of the

ABA comment and ¶ 15 of the ABA comment. Existing Florida commentary addresses the issue in ABA ¶10 and 12, ABA ¶ 13 deals with the extent of a lawyer's duties, which the committee did not recommend in the substance of the rule, ¶ 15 of the ABA comment is not consistent with Florida's interpretation of a lawyer's requirement to move to withdraw when the lawyer's duties under the rule are adverse to the client.

FLORIDA'S Rule in LEGISLATIVE FORMAT

RULE 4-3.3 CANDOR TOWARD THE TRIBUNAL

(a) False Evidence; Duty to Disclose. A lawyer shall not knowingly:

(1) make a false statement of ~~material~~ 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 a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client;

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

(4) ~~permit any witness, including a criminal defendant, to~~ offer ~~testimony or other~~ evidence that the lawyer knows to be false. A lawyer may not offer testimony that the lawyer knows to be false in the form of a narrative unless so ordered by the tribunal. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer ~~thereafter~~ 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 that the lawyer reasonably believes is false.

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

~~**(b) Extent of Lawyer's Duties**. The duties stated in subdivision (a) continue beyond the conclusion of the proceeding and apply even if compliance requires disclosure of information otherwise protected by rule 4-1.6.~~

~~**(c) Evidence Believed to Be False.** A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.~~

~~(d)~~ (c) Ex Parte Proceedings. 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.

(d) Extent of Lawyer's Duties. The duties stated in this rule continue beyond the conclusion of the proceeding and apply even if compliance requires disclosure of information otherwise protected by rule 4-1.6.

Comment

[1] This rule governs the conduct of a lawyer who is representing a client in the proceedings of a tribunal. See terminology for the definition of "tribunal." It also applies when the lawyer is representing a client in an ancillary proceeding conducted pursuant to the tribunal's adjudicative authority, such as a deposition. Thus, for example, subdivision (a)(4) requires a lawyer to take reasonable remedial measures if the lawyer comes to know that a client who is testifying in a deposition has offered evidence that is false.

[2] ~~The advocate's task is~~ This rule sets forth the special duties of lawyers as officers of the court to avoid conduct that undermines the integrity of the adjudicative process. A lawyer acting as an advocate in an adjudicative proceedings has an obligation to present the client's case with persuasive force. Performance of that duty while maintaining confidences of the client is qualified by the advocate's duty of candor to the tribunal. ~~However~~ Consequently, ~~an advocate does~~ although a lawyer in an adversary proceeding is not required to present an impartial exposition of the law or to vouch for the evidence submitted in a cause~~;~~, the lawyer must not allow the tribunal ~~is responsible for assessing its probative value~~ to be misled by false statements of law or fact or evidence that the lawyer knows to be false.

Representations by a lawyer

[3] An advocate is responsible for pleadings and other documents prepared for litigation, but is usually not required to have personal knowledge of matters asserted therein, for litigation documents ordinarily present assertions by the client, or by someone on the client's behalf, and not assertions by the lawyer. Compare rule 4-3.1. However, an assertion purporting to be on the lawyer's own knowledge, as in an affidavit by the lawyer or in a statement in open court, may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry. There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation. The obligation prescribed in rule 4-1.2(d) not to counsel a client to commit or assist the client in committing a fraud applies in litigation. Regarding compliance with rule 4-1.2(d), see the comment to that rule. See also the comment to rule 4-8.4(b).

Misleading legal argument

[4] Legal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal. A lawyer is not required to make a disinterested exposition of the law, but must recognize the existence of pertinent legal authorities. Furthermore, as stated in

subdivision (a)(3), an advocate has a duty to disclose directly adverse authority in the controlling jurisdiction that has not been disclosed by the opposing party. The underlying concept is that legal argument is a discussion seeking to determine the legal premises properly applicable to the case.

False evidence

~~When evidence that a lawyer knows to be false is provided by a person who is not the client, the lawyer must refuse to offer it regardless of the client's wishes.~~

~~When false evidence is offered by the client, however, a conflict may arise between the lawyer's duty to keep the client's revelations confidential and the duty of candor to the court. Upon ascertaining that material evidence is false, the lawyer should seek to persuade the client that the evidence should not be offered or, if it has been offered, that its false character should immediately be disclosed. If the persuasion is ineffective, the lawyer must take reasonable remedial measures.~~

[5] Subdivision (a)(4) requires that the lawyer refuse to offer evidence that the lawyer knows to be false, regardless of the client's wishes. This duty is premised on the lawyer's obligation as an officer of the court to prevent the trier of fact from being misled by false evidence. A lawyer does not violate this Rule if the lawyer offers the evidence for the purpose of establishing its falsity.

[6] If a lawyer knows that the client intends to testify falsely or wants the lawyer to introduce false evidence, the lawyer should seek to persuade the client that the evidence should not be offered. If the persuasion is ineffective and the lawyer continues to represent the client, the lawyer must refuse to offer the false evidence. If only a portion of a witness's testimony will be false, the lawyer may call the witness to testify but may not elicit or otherwise permit the witness to present the testimony that the lawyer knows is false.

[7] The duties stated in subdivisions (a) and (b) apply to all lawyers, including defense counsel in criminal cases.

[8] Except in the defense of a criminally accused, the rule generally recognized is that, if necessary to rectify the situation, an advocate must disclose the existence of the client's deception to the court or to the other party. Such a disclosure can result in grave consequences to the client, including not only a sense of betrayal but also loss of the case and perhaps a prosecution for perjury. But the alternative is that the lawyer cooperate in deceiving the court, thereby subverting the truth-finding process that the adversary system is designed to implement. See rule 4-1.2(d). Furthermore, unless it is clearly understood that the lawyer will act upon the duty to disclose the existence of false evidence, the client can simply reject the lawyer's advice to reveal the false evidence and insist that the lawyer keep silent. Thus, the client could in effect coerce the lawyer into being a party to fraud on the court.

Perjury by a criminal defendant

[9] Whether an advocate for a criminally accused has the same duty of disclosure has been intensely debated. While it is agreed that the lawyer should seek to persuade the client to refrain from perjurious testimony, there has been dispute concerning the lawyer's duty when that persuasion fails. If the confrontation with the client occurs before trial, the lawyer ordinarily can withdraw. Withdrawal before trial may not be possible if trial is imminent, if the confrontation with the client does not take place until the trial itself, or if no other counsel is available.

[10] The most difficult situation, therefore, arises in a criminal case where the accused insists on testifying when the lawyer knows that the testimony is perjurious. The lawyer's effort to rectify the situation can increase the likelihood of the client's being convicted as well as opening the possibility of a prosecution for perjury. On the other hand, if the lawyer does not exercise control over the proof, the lawyer participates, although in a merely passive way, in deception of the court.

[11] Although the offering of perjured testimony or false evidence is considered a fraud on the tribunal, these situations are distinguishable from that of a client who, upon being arrested, provides false identification to a law enforcement officer. The client's past act of lying to a law enforcement officer does not constitute a fraud on the tribunal, and thus does not trigger the disclosure obligation under this rule, because a false statement to an arresting officer is unsworn and occurs prior to the institution of a court proceeding. If the client testifies, the lawyer must attempt to have the client respond to any questions truthfully or by asserting an applicable privilege. Any false statements by the client in the course of the court proceeding will trigger the duties under this rule.

Remedial measures

[12] If perjured testimony or false evidence has been offered, the advocate's proper course ordinarily is to remonstrate with the client confidentially. If that fails, the advocate should seek to withdraw if that will remedy the situation. Subject to the caveat expressed in the next section of this comment, if withdrawal will not remedy the situation or is impossible and the advocate determines that disclosure is the only measure that will avert a fraud on the court, the advocate should make disclosure to the court. It is for the court then to determine what should be done--making a statement about the matter to the trier of fact, ordering a mistrial, or perhaps nothing. If the false testimony was that of the client, the client may controvert the lawyer's version of their communication when the lawyer discloses the situation to the court. If there is an issue whether the client has committed perjury, the lawyer cannot represent the client in resolution of the issue and a mistrial may be unavoidable. An unscrupulous client might in this way attempt to produce a series of mistrials and thus escape prosecution. However, a second such encounter could be construed as a deliberate abuse of the right to counsel and as such a waiver of the right to further representation.

Constitutional requirements

[13] The general rule--that an advocate must disclose the existence of perjury with respect to a material fact, even that of a client--applies to defense counsel in criminal cases, as well as in other instances. However, the definition of the lawyer's ethical duty in such a situation may be qualified by constitutional provisions for due process and the right to counsel in criminal cases.

Refusing to offer proof believed to be false

[14] ~~Generally speaking,~~ Although subdivision (a)(4) only prohibits a lawyer ~~has authority~~ from offering evidence the lawyer knows to be false, it permits the lawyer to refuse to offer testimony or other proof that the lawyer reasonably believes is ~~untrustworthy~~ false. Offering such proof may reflect adversely on the lawyer's ability to discriminate in the quality of evidence and thus impair the lawyer's effectiveness as an advocate. ~~In criminal cases, however, a lawyer may, in some jurisdictions, be denied this authority by constitutional requirements governing the right to counsel.~~ Because of the special protections historically provided criminal defendants, however, this rule does not permit a lawyer to refuse to offer the testimony of such a client where the lawyer reasonably believes but does not know that the testimony will be false. Unless the lawyer knows the testimony will be false, the lawyer must honor the client's decision to testify.

[15] A lawyer may not assist the client or any witness in offering false testimony or other false evidence, nor may the lawyer permit the client or any other witness to testify falsely in the narrative form unless ordered to do so by the tribunal. If a lawyer knows that the client intends to commit perjury, the lawyer's first duty is to attempt to persuade the client to testify truthfully. If the client still insists on committing perjury, the lawyer must threaten to disclose the client's intent to commit perjury to the judge. If the threat of disclosure does not successfully persuade the client to testify truthfully, the lawyer must disclose the fact that the client intends to lie to the tribunal and, per 4-1.6, information sufficient to prevent the commission of the crime of perjury.

[16] The lawyer's duty not to assist witnesses, including the lawyer's own client, in offering false evidence stems from the Rules of Professional Conduct, Florida statutes, and caselaw.

[17] Rule 4-1.2(d) prohibits the lawyer from assisting a client in conduct that the lawyer knows or reasonably should know is criminal or fraudulent.

[18] Rule 4-3.4(b) prohibits a lawyer from fabricating evidence or assisting a witness to testify falsely.

[19] Rule 4-8.4(a) prohibits the lawyer from violating the Rules of Professional Conduct or knowingly assisting another to do so.

[20] Rule 4-8.4(b) prohibits a lawyer from committing a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer.

[21] Rule 4-8.4(c) prohibits a lawyer from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation.

[22] Rule 4-8.4(d) prohibits a lawyer from engaging in conduct that is prejudicial to the administration of justice.

[23] Rule 4-1.6(b) requires a lawyer to reveal information to the extent the lawyer reasonably believes necessary to prevent a client from committing a crime.

[24] This rule, 4-3.3(a)(2), requires a lawyer to reveal a material fact to the tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client, and 4-3.3(a)(4) prohibits a lawyer from offering false evidence and requires the lawyer to take reasonable remedial measures when false material evidence has been offered.

[25] Rule 4-1.16 prohibits a lawyer from representing a client if the representation will result in a violation of the Rules of Professional Conduct or law and permits the lawyer to withdraw from representation if the client persists in a course of action that the lawyer reasonably believes is criminal or fraudulent or repugnant or imprudent. Rule 4-1.16(c) recognizes that notwithstanding good cause for terminating representation of a client, a lawyer is obliged to continue representation if so ordered by a tribunal.

[26] To permit or assist a client or other witness to testify falsely is prohibited by section 837.02, Florida Statutes (1991), which makes perjury in an official proceeding a felony, and by section 777.011, Florida Statutes (1991), which proscribes aiding, abetting, or counseling commission of a felony.

[27] Florida caselaw prohibits lawyers from presenting false testimony or evidence. *Kneale v. Williams*, 30 So. 2d 284 (Fla. 1947), states that perpetration of a fraud is outside the scope of the professional duty of an attorney and no privilege attaches to communication between an attorney and a client with respect to transactions constituting the making of a false claim or the perpetration of a fraud. *Dodd v. The Florida Bar*, 118 So. 2d 17 (Fla. 1960), reminds us that "the courts are . . . dependent on members of the bar to . . . present the true facts of each cause . . . to enable the judge or the jury to [decide the facts] to which the law may be applied. When an attorney . . . allows false testimony . . . [the attorney] . . . makes it impossible for the scales [of justice] to balance." See *The Fla. Bar v. Agar*, 394 So. 2d 405 (Fla. 1981), and *The Fla. Bar v. Simons*, 391 So. 2d 684 (Fla. 1980).

[28] The United States Supreme Court in *Nix v. Whiteside*, 475 U.S. 157 (1986), answered in the negative the constitutional issue of whether it is ineffective assistance of counsel for an attorney to threaten disclosure of a client's (a criminal defendant's) intention to testify falsely.

Ex parte proceedings

[29] Ordinarily, an advocate has the limited responsibility of presenting 1 side of the matters that a tribunal should consider in reaching a decision; the conflicting position is expected to be presented by the opposing party. However, in an ex parte proceeding, such as an application for a temporary injunction, there is no balance of presentation by opposing advocates. The object of an ex parte proceeding is nevertheless to yield a substantially just result. The judge has an affirmative responsibility to accord the absent party just consideration. The lawyer for the represented party has the correlative duty to make disclosures of material facts known to the lawyer and that the lawyer reasonably believes are necessary to an informed decision.

MODEL RULE: 3.4, FAIRNESS TO OPPOSING PARTY AND COUNSEL

SUMMARY of Substantive Changes adopted by the ABA House of Delegates

1. No substantive changes to Rule 3.4 were adopted.

2. Commentary was added in ¶ 2 about a defense lawyer taking possession of evidence with a duty not to alter or destroy the evidence, and a possible duty to turn the evidence over to the police.

How ABA Rule DIFFERS from EXISTING FLORIDA Rule

1. Florida's Rule 4-3.4 is substantially the same as the ABA Model Rule, except that Florida Rule 4-3.4 in subsections (g) and (h) prohibits using criminal charges and disciplinary prosecution as leverage in a civil matter.

2. Florida does not contain the additional commentary regarding an attorney coming into possession of criminal evidence.

RECOMMENDATION of Yes or No and REASONS

1. **NOT APPLICABLE**.

2. **NO**. Florida should not adopt the additional commentary. The rule itself does not specifically address possession of criminal evidence. The commentary addresses substantive law that could create confusion because it does not create clear guidance as to Florida requirements regarding evidence of a crime.

FLORIDA'S Rule in LEGISLATIVE FORMAT

Not applicable.

MODEL RULE: 3.5, IMPARTIALITY AND DECORUM OF THE TRIBUNAL

SUMMARY of Substantive Changes adopted by the ABA House of Delegates

1. The revised rule allows a lawyer to communicate with jurors or the court during a proceeding only if authorized by law or court order (adding the "court order exception) in subsection (b).

2. The revised rule allows the lawyer to communicate with discharged jurors unless prohibited by law or court order, the lawyer knows the juror does not wish to engage in the communication, or there is misrepresentation, coercion, duress or harassment, in subsection (c).

3. The revised commentary reflects the changes to the rule above.

How ABA Rule DIFFERS from EXISTING FLORIDA Rule

1. Florida's rule is substantially different than the ABA model rule. Florida's rule allows contact with the court during the official proceeding, in writing with a contemporaneous copy to opposing counsel, orally upon notice to opposing counsel in addition to communications authorized by law in subdivision (b).

2. The Florida rule in subsection (d) has specific steps that must be followed before a lawyer can talk to a discharged juror, while the ABA rule allows the lawyer to talk to discharged jurors unless the juror protests or it is prohibited by a law or a court order. Florida Rule of Civil Procedure 1.431(g) also sets forth specific steps that must be followed in contacting jurors. Many Florida cases also indicate strong disapproval of juror contact post-trial. See, e.g., *The Florida Bar v. Newhouse*, 498 So.2d 935 (Fla. 1986); *Seymour v. Soloman*, 683 So.2d 167 (Fla. 3d DCA 1996); *Baptist Hospital of Miami, Inc. v. Maler*, 579 So.2d 97 (Fla. 1991); *State v. Hamilton*, 574 So.2d 124 (Fla. 1991); *Kriston v. Webster*, 688 So.2d 346 (Fla. 5th DCA 1997); *Phares v. Froehlich*, 582 So.2d 683 (Fla. 2d DCA 1991); *Walgreens, Inc. v. Newcomb*, 603 So.2d 5 (Fla. 4th DCA 1992), rev. denied, 613 So.2d 7 (Fla. 1993); *Roland v. State*, 584 So.2d 68 (Fla. 1st DCA 1991); *Judson v. Nicson Engineering Co.*, 478 So.2d 1188 (Fla. 4th DCA 1985).

3. Florida's rule does not contain the commentary adopted by the ABA.

RECOMMENDATION of Yes or No and REASONS

1-3. **NO**. In light of the strong public policy expressed numerous times by the Supreme Court of Florida and other Florida courts, the committee does not recommend adoption of the new ABA Model Rule. A minority of the committee recommends adopting the changes to the ABA rule, believing that it is not inherently unethical to contact jurors post-verdict. The minority would allow the contact where permitted by law or court rule.

FLORIDA'S Rule in LEGISLATIVE FORMAT

4900 Not applicable.

MODEL RULE: 3.6, TRIAL PUBLICITY

SUMMARY of Substantive Changes adopted by the ABA House of Delegates

1. Subsection (a) replaces the words "reasonable person" with "reasonable lawyer."

2. Added ¶ 8 to the commentary that addresses duties of prosecutors in connection with trial publicity imposed by Rule 3.8(f).

How ABA Rule DIFFERS from EXISTING FLORIDA Rule

1. Florida's Rule 4-3.6 says the standard is "reasonable man" rather than "reasonable lawyer" in subsection (a).

2. Florida Rule 4-3.6 does not contain ¶ 8 of the commentary.

3. Florida Rule 4-3.6 does not contain existing subsection (b) of the ABA Model Rule that sets forth a safe harbor of permissible statements.

4. Florida Rule 4-3.6 does not contain existing subsection (c) of the ABA Model rule that allows a lawyer to make statements in "self-defense" to negate prejudice to the client by responding to publicity not initiated by the lawyer or the lawyer's client.

5. Florida Rule 4-3.6 does not contain existing subsection (d) of the ABA Model Rule that states that no lawyer associated with another lawyer may make a statement that would be prohibited if the lawyer handling the matter made the statement.

6. Florida Rule 4-3.6 does not contain existing paragraphs 2-7 of the ABA Model Rule commentary giving specific examples.

RECOMMENDATION of Yes or No and REASONS

1. **YES and NO**. Florida should adopt the ABA language regarding use of a "reasonable lawyer" standard. However, Florida should retain existing language in Rule 4-3.6 regarding a "substantial and detrimental effect" that was added to resolve concerns about the rule in the wake of the *Gentile* case.

2. **NO**. Florida should not adopt ¶ 8 of the commentary, because the committee recommends against adopting the corresponding paragraphs in 4-3.8.

3. **YES**. Florida should adopt subsection (b) of the ABA Model Rule because it provides a safe harbor and helpful guidance to lawyers regarding permissible statements.

4. **YES**. Florida should adopt subsection (c) of the ABA Model Rule to allow lawyers to

respond to publicity not generated by the lawyer or the client that has had an adverse impact on the client.

5. **YES**. Florida should adopt subsection (d) of the ABA Model Rule to clarify that neither the lawyer representing the client nor any lawyer associated with that lawyer may make statements that violate the trial publicity rule.

6. **YES**. Florida should adopt paragraphs 2-7 of the ABA Model Rule commentary that provide helpful guidance to lawyers in interpreting the rule.

FLORIDA'S Rule in LEGISLATIVE FORMAT

RULE 4-3.6 TRIAL PUBLICITY

(a) Prejudicial Extrajudicial Statements Prohibited. A lawyer shall not make an extrajudicial statement that ~~a reasonable person would expect to~~ the lawyer knows or reasonably should know will be disseminated by means of public communication ~~if the lawyer knows or reasonably should know that it~~ and will have a substantial likelihood of materially prejudicing an adjudicative proceeding due to its creation of an imminent and substantial detrimental effect on that proceeding.

(b) Statements of Third Parties. A lawyer shall not counsel or assist another person to make such a statement. Counsel shall exercise reasonable care to prevent investigators, employees, or other persons assisting in or associated with a case from making extrajudicial statements that are prohibited under this rule.

(c) Permissible statements. Notwithstanding paragraph (a), a lawyer may state:

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

(2) information contained in a public record;

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

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

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

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

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

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

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

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

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

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

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

Comment

[1] It is difficult to strike a balance between protecting the right to a fair trial and safeguarding the right of free expression. Preserving the right to a fair trial necessarily entails some curtailment of the information that may be disseminated about a party prior to trial, particularly where trial by jury is involved. If there were no such limits, the result would be the practical nullification of the protective effect of the rules of forensic decorum and the exclusionary rules of evidence. On the other hand, there are vital social interests served by the free dissemination of information about events having legal consequences and about legal proceedings themselves. The public has a right to know about threats to its safety and measures aimed at assuring its security. It also has a legitimate interest in the conduct of judicial proceedings, particularly in matters of general public concern. Furthermore, the subject matter of legal proceedings is often of direct significance in debate and deliberation over questions of public policy.

[2] Special rules of confidentiality may validly govern proceedings in juvenile, domestic relations and mental disability proceedings, and perhaps other types of litigation. Rule 4-3.4(c) requires compliance with such rules.

[3] The rule sets forth a basic general prohibition against a lawyer's making statements that the lawyer knows or should know will have a substantial likelihood of materially prejudicing an adjudicative proceeding. Recognizing that the public value of informed commentary is great and the likelihood of prejudice to a proceeding by the commentary of a lawyer who is not involved in the proceeding is small, the rule applies only to lawyers who are, or who have been

involved in the investigation or litigation of a case, and their associates.

[4] Paragraph (c) identifies specific matters about which a lawyer's statements would not ordinarily be considered to present a substantial likelihood of material prejudice, and should not in any event be considered prohibited by the general prohibition of paragraph (a). Paragraph (c) is not intended to be an exhaustive listing of the subjects upon which a lawyer may make a statement, but statements on other matters may be subject to paragraph (a).

[5] There are, on the other hand, certain subjects that are more likely than not to have a material prejudicial effect on a proceeding, particularly when they refer to a civil matter triable to a jury, a criminal matter, or any other proceeding that could result in incarceration. These subjects relate 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 case or proceeding 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 case or proceeding that could result in incarceration;

(5) information that the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and that 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.

[6] Another relevant factor in determining prejudice is the nature of the proceeding involved. Criminal jury trials will be most sensitive to extrajudicial speech. Civil trials may be less sensitive. Non-jury hearings and arbitration proceedings may be even less affected. The Rule will still place limitations on prejudicial comments in these cases, but the likelihood of prejudice may be different depending on the type of proceeding.

[7] Finally, extrajudicial statements that might otherwise raise a question under this Rule may be permissible when they are made in response to statements made publicly by another

party, another party's lawyer, or third persons, where a reasonable lawyer would believe a public response is required in order to avoid prejudice to the lawyer's client. When prejudicial statements have been publicly made by others, responsive statements may have the salutary effect of lessening any resulting adverse impact on the adjudicative proceeding. Such responsive statements should be limited to contain only such information as is necessary to mitigate undue prejudice created by the statements made by others.

MODEL RULE: 3.7, LAWYER AS WITNESS

SUMMARY of Substantive Changes adopted by the ABA House of Delegates

1. No substantive changes proposed to the ABA Model Rule.

2. The ABA change to ¶ 1 of the comment acknowledges that combining the role of lawyer and witness can prejudice the tribunal and other parties.

3. In ¶ 2, the ABA Model rule was amended to address the potential prejudice to the "tribunal," when the trier of fact may be confused or misled by the lawyer serving as a witness and advocate.

4. The amendments to ¶s 3 and 4 of the comment further include the potential effect on the tribunal of an attorney acting as both witness and advocate.

5. ¶ 5 of comment to the ABA Model Rule is designed to separate the conflict analysis between when a lawyer acts as a witness and when a member of the lawyer's firm acts as a witness.

6. ¶ 6 of the comment clarifies the analysis required when a conflict of interest is presented by an attorney being compelled to offer adverse testimony against the client. Further, the comment imposes a written waiver requirement and references that there are situations where the conflict cannot be waived. ¶ 7 addresses instances of imputed disqualification.

How ABA Rule DIFFERS from EXISTING FLORIDA Rule

1. Florida's Rule 4-3.7 is the better rule, because subsection (a)(2) provides an exception for testimony by the lawyer that is a mere formality and unlikely to be contested. The committee recommends retaining that exception in the existing Florida rule.

2-7. Florida's rule is substantially the same as the prior ABA Model Rule and does not contain the changes to the ABA rule commentary.

RECOMMENDATION of Yes or No and REASONS

1. **YES and NO**. Florida should retain subsection (a)(2), but should change "except where" to "unless" in subsection (a).

2-7. **Qualified YES**. Florida should adopt the changes to the comment because they clarify the rationale behind the rule and provide guidance in interpreting the rule. However, in paragraph 2 of the comment, the phrase "has proper objection" should be modified because the language is "legalese" that does not aid in understanding the rule.

FLORIDA'S Rule in LEGISLATIVE FORMAT

RULE 4-3.7 LAWYER AS WITNESS

(a) When Lawyer May Testify. A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness on behalf of the client ~~except where~~ unless:

(1) the testimony relates to an uncontested issue;

(2) 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;

(3) the testimony relates to the nature and value of legal services rendered in the case; or

(4) disqualification of the lawyer would work substantial hardship on the client.

(b) Other Members of Law Firm as Witnesses. A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by rule 4-1.7 or 4-1.9.

Comment

[1] Combining the roles of advocate and witness can prejudice the tribunal and the opposing party and can also involve a conflict of interest between the lawyer and client.

[2] The trier of fact may be confused or misled by a lawyer serving as both advocate and witness. The ~~opposing party has proper objection where the~~ combination of roles may prejudice ~~that~~ another party's rights in the litigation. A witness is required to testify on the basis of personal knowledge, while an advocate is expected to explain and comment on evidence given by others. It may not be clear whether a statement by an advocate-witness should be taken as proof or as an analysis of the proof.

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

[4] Apart from these 2 exceptions, subdivision (a)(4) recognizes that a balancing is required between the interests of the client and those of the tribunal and the opposing party. Whether the tribunal is likely to be misled or the opposing party is likely to suffer prejudice depends on the nature of the case, the importance and probable tenor of the lawyer's testimony,

and the probability that the lawyer's testimony will conflict with that of other witnesses. Even if there is risk of such prejudice, in determining whether the lawyer should be disqualified, due regard must be given to the effect of disqualification on the lawyer's client. It is relevant that one or both parties could reasonably foresee that the lawyer would probably be a witness. The ~~principle of imputed disqualification~~ conflict of interest principles stated in ~~rule~~ rules 4-1.7, 4-1.9 and 4-1.10 ~~has~~ have no application to this aspect of the problem.

[5] Because the tribunal is not likely to be misled when a lawyer acts as advocate in a trial in which another lawyer in the lawyer's firm will testify as a necessary witness, subdivision (b) permits the lawyer to do so except in situations involving a conflicts of interest.

[6] ~~Whether the combination of roles involves an improper~~ In determining if it is permissible to act as advocate in a trial in which the lawyer will be a necessary witness, the lawyer must also consider that the dual role may give rise to a conflict of interest ~~with respect to the client is determined by rule~~ that will require compliance with rules 4-1.7 or 4-1.9. For example, if there is likely to be substantial conflict between the testimony of the client and that of the lawyer ~~or a member of the lawyer's firm~~, the representation ~~is improper~~ involves a conflict of interest that requires compliance with rule 4-1.7. This would be true even though the lawyer might not be prohibited by subdivision (a) from simultaneously serving as advocate and witness because the lawyer's disqualification would work a substantial hardship on the client. Similarly, a lawyer who might be permitted to simultaneously serve as an advocate and a witness by subdivision (a)(3) might be precluded from doing so by rule 4-1.9. The problem can arise whether the lawyer is called as a witness on behalf of the client or is called by the opposing party. Determining whether such a conflict exists is primarily the responsibility of the lawyer involved. If there is a conflict of interest, the lawyer must secure the client's informed consent, confirmed in writing. In some cases, the lawyer will be precluded from seeking the client's consent. See ~~comment to~~ rule 4-1.7. If a lawyer who is a member of a firm may not act as both advocate and witness by reason of conflict of interest, rule 4-1.10 disqualifies the firm also. See terminology for the definitions of "confirmed in writing" and "informed consent."

[7] Subdivision (b) provides that a lawyer is not disqualified from serving as an advocate because a lawyer with whom the lawyer is associated in a firm is precluded from doing so by subdivision (a). If, however, the testifying lawyer would also be disqualified by rule 4-1.7 or 4-1.9 from representing the client in the matter, other lawyers in the firm will be precluded from representing the client by rule 4-1.10 unless the client gives informed consent under the conditions state in rule 4-1.7.

MODEL RULE: 3.8, SPECIAL RESPONSIBILITIES OF A PROSECUTOR

SUMMARY of Substantive Changes adopted by the ABA House of Delegates

1. In subsection (f), added requirement that lawyers ensure that investigators, law enforcement and nonlawyer employees not make public statements that prosecutors are prohibited from making.

2. Adds commentary in ¶ 2 that prosecutors should not try to obtain waivers of pretrial rights from unrepresented suspects.

3. Adds commentary in ¶ 6 regarding prosecutors responsibilities to supervise nonlawyer employees and law enforcement, particularly in making public statements about persons charged with crimes.

How ABA Rule DIFFERS from EXISTING FLORIDA Rule

1-3. The ABA rule is very extensive while the Florida rule is very short and limited. Florida's Rule 4-3.8 does not contain ABA provisions that a prosecutor must make reasonable efforts to ensure that a criminal defendant has been advised of the right to an attorney in subsection (b) of the ABA Model Rule, that a prosecutor shall not subpoena a lawyer to testify in grand jury or criminal proceedings with limited exceptions in subsection (e) of the ABA Model Rule and that a prosecutor shall not make comments or allow others working with the prosecutor to make comments outside the proceeding that have a likelihood of "heightening public condemnation of the accused" in subsection (f) of the ABA Model Rule. The existing Florida rule also does not contain the new or prior commentary in the ABA Model Rule in ¶s 4, 5, and 6, regarding prosecutors subpoenaing lawyers.

RECOMMENDATION of Yes or No and REASONS

1-3. **YES and NO**. The committee recommends adoption of subsection (b) of the ABA Model Rule, requiring prosecutors to make sure that unrepresented criminal defendants are aware of their right to an attorney and affording them an opportunity to obtain an attorney. The committee also recommends adoption of subsections (e)(1) and (e)(2) that prohibit a prosecutor from issuing a subpoena to a lawyer to provide evidence regarding the lawyer's client or past client unless the evidence is not privileged and is essential to the prosecution of the case. The committee is in favor of the proposed additions because they provide additional protection to clients and ensure that clients at least have the opportunity to be represented by counsel in criminal proceedings. The committee recommends against adopting subsection (e)(3) which adds an additional requirement that information cannot be obtained from any other feasible source. The committee recommends adopting ¶ 5 of the ABA comment, because it addresses the issue of subpoenas to lawyers and the committee recommends adoption of portions of that subdivision in (e). The committee recommends against adoption of ABA Model Rule subsection (f), because it merely duplicates a lawyer's duties under the trial publicity rule and the rule

requiring lawyers to make sure nonlawyer employees follow the Rules of Professional Conduct. Additionally, to the extent the rule requires prosecutors ensure that law enforcement and others connected with criminal prosecution adhere to the same duties of a lawyer, the rule is not enforceable as to persons over whom prosecutors have no supervisory authority.

The committee recommends deletion of portions of ¶ 1 of Florida's existing commentary referring to Florida having adopted the American Bar Association Standards of Criminal Justice, because the statement is inaccurate. The committee also recommends against deletion of portions of ¶ 1 of the Florida comment that refer to the rule on ex parte proceedings applying to grand jury proceedings, believing that a grand jury proceeding is ex parte. The committee recommends adoption of the ABA changes to ¶2 except for the addition of the first sentence and the word "accordingly," because the first sentence elaborates on the issue of defendants waiving preliminary hearing which does not, as a practical matter, seem to be an issue that is of great import to Florida where preliminary hearings are rarely held in state court. Finally, the committee recommends against adoption of ¶s 5 and 6 of the ABA Model Rule, because the commentary applies to subsection (f) on trial publicity that the committee also recommends against adoption. Therefore, the commentary is irrelevant.

FLORIDA'S Rule in LEGISLATIVE FORMAT

RULE 4-3.8 SPECIAL RESPONSIBILITIES OF A PROSECUTOR

The prosecutor in a criminal case shall:

(a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;

(b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;

~~**(b)**~~ **(c)** not seek to obtain from an unrepresented accused a waiver of important pre-trial rights such as a right to a preliminary hearing;

~~**(c)**~~ **(d)** make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal.

(e) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes:

(1) the information sought is not protected from disclosure by any applicable privilege; and

(2) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution.

Comment

[1] A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations such as making a reasonable effort to assure that the accused has been advised of the right to and the procedure for obtaining counsel and has been given a reasonable opportunity to obtain counsel so that guilt is decided upon the basis of sufficient evidence. Precisely how far the prosecutor is required to go in this direction is a matter of debate. ~~Florida has adopted the American Bar Association Standards of Criminal Justice Relating to Prosecution Function. This is the product of prolonged and careful deliberation by lawyers experienced in criminal prosecution and defense and should be consulted for further guidance.~~ See also rule 4-3.3(c) governing ex parte proceedings, among which grand jury proceedings are included. Applicable law may require other measures by the prosecutor and knowing disregard of these obligations or systematic abuse of prosecutorial discretion could constitute a violation of rule 4-8.4.

[2] Prosecutors should not seek to obtain waivers of preliminary hearings or other important pretrial rights from unrepresented accused persons. Subdivision ~~(b)~~ (c) does not apply, however, to an accused appearing pro se with the approval of the tribunal, nor does it forbid the lawful questioning of ~~a~~ an uncharged suspect who has knowingly waived the rights to counsel and silence.

[3] The exception in subdivision ~~(c)~~ (d) recognizes that a prosecutor may seek an appropriate protective order from the tribunal if disclosure of information to the defense could result in substantial harm to an individual or to the public interest.

[4] Subdivision (e) is intended to limit the issuance of lawyer subpoenas in grand jury and other criminal proceedings to those situations in which there is a genuine need to intrude into the client-lawyer relationship.

MODEL RULE: 3.9, ADVOCATE IN NONADJUDICATIVE PROCEEDINGS

SUMMARY of Substantive Changes adopted by the ABA House of Delegates

1. Simply adds the word "body" to the word "legislative" and changes "tribunal" to "agency."

2. Adds citations to relevant rules in ¶ 1 of the commentary.

3. Clarifies that the rule does not apply to representation of clients in license applications, income tax and other reporting requirements, or where the client is being investigated by the government.

How ABA Rule DIFFERS from EXISTING FLORIDA Rule

1. Florida rule refers to a "legislative or administrative tribunal" rather than the recommended language of "legislative body or administrative agency"

2. Florida's commentary does not contain these rules references.

3. Florida's commentary does not contain the clarifying language.

RECOMMENDATION of Yes or No and REASONS

1. **QUALIFIED YES**. The changes should be adopted, except the references to Rule 3.5 in the rule and comment. The purpose of Rule 3.5 is prevent improper influence of the decision maker, prohibit ex parte contact with the decision maker, and prohibit contact with jurors during and after the trial. These notions are inconsistent with the legislative and administrative process in government and are unduly burdensome to practicing attorneys.

2. **YES**.

3. **YES**.

FLORIDA'S Rule in LEGISLATIVE FORMAT

RULE 4-3.9 ADVOCATE IN NONADJUDICATIVE PROCEEDINGS

A lawyer representing a client before a legislative body or administrative ~~tribunal~~ agency in a nonadjudicative proceeding shall disclose that the appearance is in a representative capacity and shall conform to the provisions of rules 4-3.3(a) through ~~(c)~~ (d), and 4-3.4(a) through (c)~~;~~ ~~and 4-3.5(a), (c), and (d)~~.

Comment

[1] In representation before bodies such as legislatures, municipal councils, and executive

and administrative agencies acting in a rule-making or policy-making capacity, lawyers present facts, formulate issues, and advance argument in the matters under consideration. The decision-making body, like a court, should be able to rely on the integrity of the submissions made to it. A lawyer appearing before such a body ~~should~~ must deal with the tribunal honestly and in conformity with applicable rules of procedure. See rules 4-3.3(a) through (d), and 3.4(a) through (c).

[2] Lawyers have no exclusive right to appear before nonadjudicative bodies, as they do before a court. The requirements of this rule therefore may subject lawyers to regulations inapplicable to advocates who are not lawyers. However, legislatures and administrative agencies have a right to expect lawyers to deal with them as they deal with courts.

[3] This rule only applies when a lawyer represents a client in connection with an official hearing or meeting of a governmental agency or a legislative body to which the lawyer or the lawyer's client is presenting evidence or argument. It does not apply to representation of a client in a negotiation or other bilateral transaction with a governmental agency~~; representation~~ or in connection with an application for a license or other privilege or the client's compliance with generally applicable reporting requirements, such as the filing of income-tax returns. Nor does it apply to the representation of a client in connection with an investigation or examination of the client's affairs conducted by government investigators or examiners. Representation in such ~~a transaction~~ matters is governed by rules 4-4.1 through 4-4.4.

MODEL RULE: 4.1, TRUTHFULNESS IN STATEMENTS TO OTHERS

SUMMARY of Substantive Changes adopted by the ABA House of Delegates

1. ¶ 1 of the Commentary has been expanded, and the last sentence of the current Commentary, which notes that "misrepresentations can also occur by failure to act" has been expanded and the words "failure to act" have been replaced by a fuller explanation, one that recognizes that a statement that is partially true or contains omissions can also be a false statement and hence a misrepresentation. An additional sentence is added to ¶1 , noting that conduct other than false statements or lawyer misrepresentations that occur outside the scope of representing a client are governed by Rule 8.4.

2. ¶ 2 of the Commentary (to Rule 4.1) has two minor changes. The first is to add the word "ordinarily" to the current last sentence of the paragraph, which makes clear that some estimates of price or value placed on the subject of a transaction and a party's intentions as to acceptable settlement of a claim, MAY be statements of material facts, and therefore a misstatement may be a violation of the Rule. The second proposed change is the addition of a fourth sentence to ¶ 2 of the Commentary, reminding lawyers that in addition to Rule 4.1, a representation may give rise to criminal prosecution or civil action in tort.

3. ¶ 3 of the Commentary to Rule 4.1 has been expanded to explain that subsection (b) of the Rule (which requires a lawyer to disclose a material fact to avoid assisting a criminal fraudulent act by the client) is a specific application of Rule 1.2(d) (which prohibits a lawyer from assisting a client in criminal or fraudulent conduct). The expanded comment reminds a lawyer that where a client has committed a crime or fraud, withdrawal may not be sufficient, and the lawyer may need to take additional steps such as giving notice of the fact of withdrawal and even disaffirming a previous opinion he has given.

4. The Comment also reminds us that to avoid having assisted his client's crime or fraud, in extreme cases, substantive law may require a lawyer to actually disclose information relating to the representation, if that is the only way a lawyer can avoid assisting the client's crime or fraud. In those cases, subsection (b)of the Rule requires the lawyer to disclose. The last sentence of the expanded comment points out that if disclosure is permitted by Rule 1.6, then the disclosure is required under Rule 4.1.

How ABA Rule DIFFERS from EXISTING FLORIDA Rule

1-4. Florida's Rule 4-4.1 is substantially the same as the existing model rule and does not contain the proposed changes.

RECOMMENDATION of Yes or No and REASONS

1-4. **QUALIFIED YES**. The expanded language in the three paragraphs of the Commentary does not change but merely more clearly explains a lawyer's duties. The changes should be adopted, but

the order of the changes should be different to provide better guidance.

FLORIDA'S Rule in LEGISLATIVE FORMAT

RULE 4-4.1 TRUTHFULNESS IN STATEMENTS TO OTHERS

In the course of representing a client a lawyer shall not knowingly:

(a) make a false statement of material fact or law to a third person; or

(b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by rule 4-1.6.

Comment

Misrepresentation

[1] A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts. A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false. Misrepresentations can also occur by ~~failure to act~~ partially true but misleading statements or omissions that are the equivalent of affirmative false statements. For dishonest conduct that does not amount to a false statement or for misrepresentations by a lawyer other than in the course of representing a client, see Rule 8.4.

Statements of fact

[2] This rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are ordinarily in this category, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud. Lawyers should be mindful of their obligations under applicable law to avoid criminal and tortious misrepresentation.

Crime or Fraud by client

[3] Under rule 1.2(d), a lawyer is prohibited from counseling or assisting a client in conduct that the lawyer knows is criminal or fraudulent. Subdivision (b) ~~recognizes that~~ states a specific application of the principle set forth in rule 4-1.2(d) and addresses the situation where a client's crime or fraud takes the form of a lie or misrepresentation. Ordinarily, a lawyer can avoid assisting a client's crime or fraud by withdrawing from the representation. Sometimes it may be necessary for the lawyer to give notice of the fact of withdrawal. In extreme cases, substantive law may

require a lawyer to disclose ~~certain~~ information relating to the representation to avoid being deemed to have assisted the client's crime or fraud, to disaffirm an opinion, document, affirmation or the like. ~~The requirement of~~ If the lawyer can avoid assisting a client's crime or fraud only by disclosing this information, then under subdivision (b) the lawyer is required to do so, unless the disclosure ~~created by this subdivision is, however, subject to the obligations created~~ is prohibited by rule 4-1.6.

MODEL RULE: 4.2, COMMUNICATION WITH PERSON REPRESENTED BY COUNSEL

SUMMARY of Substantive Changes adopted by the ABA House of Delegates

1. Other than one change in syntax, the only proposed addition to this one-sentence Rule is the addition of "or a court order" at the end of the Rule.

2. ¶ 1 of the Commentary to Rule 4.2 is a new paragraph which merely explains the reason for the Rule.

3. ¶ 2 of the Commentary was moved from its prior position and the language "whether or not a party to a formal adjudicative proceeding, contract or negotiation" was deleted.

4. ¶ 3 of the Comment expands the comment consistent with existing law, which states that the Rule applies even if the represented person is the one who initiates or consents to the communication and requires the lawyer to immediately terminate the communication.

5. The proposed change to ¶ 4 of the Commentary makes clear the existing law that a lawyer who is not already representing a client in a matter may communicate with someone else's client if that client is seeking advice (or a second opinion) about the matter in which the client is already represented.

A further addition to ¶ 4 of the comment reminds the lawyer that under Rule 8.4(a), a lawyer may not attempt to get around this Rule and communicate with another's client through a third person. However, another addition is a concern, and that expands the sentence which says that parties may communicate directly with each other, to add that a lawyer may advise a client regarding a communication that the client is legally entitled to make. This addition seems to authorize a lawyer to "prep" his client before his client talks to the opposing lawyer's client, and would lead to a lawyer masterminding the contact between his client and the opposing attorney's client. This undermines the spirit of Rule 4.2.

6. Changes to ¶s 5 of the Comment make clear that the Rule does not restrict communications by a lawyer on behalf of a client who is exercising his constitutional right to communicate with the government, and also that government lawyers (prosecutors) must also comply with the Rule.

7. New ¶ 6 states, in accordance with the change to the rule, that in exceptional circumstances, the rule authorizes the practice of a lawyer seeking a court order to communicate with a represented client.

8. New ¶ 7 of the comment addresses communications with the employees of a represented organization. The lawyer is prohibited from communicating with those constituents who supervise, direct, or regularly consult with the organization's lawyer concerning the matter, or who have authority to bind the organization or whose act or omission may be imputed to the

organization for the purpose of criminal or civil liability. This is an attempt to explain more clearly with whom a lawyer may communicate when an organization is represented by another lawyer. It permits a lawyer to communicate with a former constituent of the organization.

9. New ¶ 8 to the Comment (old ¶ 5) has deleted the sentence stating that a lawyer's knowledge that someone else is represented can be established by proof that the lawyer had "substantial reason to believe" that the person was represented, as this is inconsistent with the definition of "knows" in Rule 1.0(f), which requires actual knowledge and involves no duty to inquire. ¶ 9 provides that if the lawyer does not know the person is represented by counsel, communications are governed by the rule on communications with unrepresented persons.

How ABA Rule DIFFERS from EXISTING FLORIDA Rule

1. Unlike the ABA Rule, Florida's current Rule 4-4.2 was amended in 1992 to add an additional sentence noting that an attorney needs no prior consent to communicate with another attorney's client in order to meet the requirements of any statute or contract requiring notice, but requiring the attorney to serve a copy of the notice on the other lawyer as well as the other lawyer's client. Florida's Rule 4-4.2 does not contain the "authorized by law" exception that exists in the current and proposed model rule, although there is a reference to "authorized by law" in the comment to Florida's Rule 4-4.2. Florida's Rule 4-4.2 also does not contain the model rule addition allowing communications authorized by "court order."

2. Florida's Rule 4-4.2 commentary does not contain this paragraph.

3. Florida's Rule 4-4.2 commentary is substantially the same as the prior ABA model rule and the language "whether or not a party to a formal adjudicative proceeding, contract or negotiation" appears in Florida's rule.

4. Florida's Rule 4-4.2 commentary does not contain this paragraph.

5. Florida's Rule 4-4.2 commentary is substantially the same as the prior ABA model rule and does not contain the changes.

6. Florida's Rule 4-4.2 commentary does not contain this commentary.

7. Florida's Rule 4-4.2 commentary does not contain this commentary.

8. Florida's Rule 4-4.2 commentary is substantially the same as the prior ABA model rule and does not contain the changes to the commentary.

9. Florida's Rule 4-4.2 commentary does not contain the commentary.

RECOMMENDATION of Yes or No and REASONS

1. **NO**. The committee is opposed to the existing "authorized by law" exception to the model rule as it appears in the rule and commentary. The committee is also opposed to adopting an "authorized by court order" exception to the rule. The committee believes that discipline would be unlikely if a bar member sought and received a court order permitting the lawyer to communicate with a represented person whether or not Florida adopted an exception as authorized "by court order." However, Florida should not encourage members to circumvent the rationale behind the rule by applying for court orders and Florida should not risk the possibility that a court may adopt a rule for an entire district that would affect represented persons. The committee voted 4-1 against recommending adoption of the exception of communications authorized "by court order." The Special Committee to Review Rule 4-4.2 was appointed in 2002 to independently review the apparent conflict between the "authorized by law" reference in the comment to Florida's Rule 4-4.2 and the lack of a reference to "authorized by law" exception in the rule itself. The special committee voted to recommend that the Board of Governors petition the court to delete the reference to communications "authorized by law" in the comment, changing the language to "permissible contacts include."

2. **YES**. The change explains the rationale for the rule.

3. **YES**. Florida should be as consistent with the ABA model rule as possible, and the change does no harm to the commentary.

4. **YES**. These changes are consistent with Florida interpretation of the rule and provide guidance to bar members.

5. **QUALIFIED YES**. Yes to all recommendations with additional clarifying language added to the sentence on advising a client regarding communications the client is entitled to make. The commission's proposed addition seems to authorize a lawyer to "prep" the client before the client talks to the opposing lawyer's client, and would lead to a lawyer masterminding the contact between the client and the opposing attorney's client. This undermines the spirit of Rule 4.2. Accordingly, the panel recommends this change only with the addition of the phrase "provided that the client is not used to indirectly violate the Rules of Professional Conduct." No to deletion of language regarding communications with a government agency, as that language has already been reviewed and modified by the Special Committee to Review Rule 4-4.2.

6. **NO**. Florida does not contain the authorized by law exception, and these changes all discuss the concept of authorized by law.

7. **NO**. Florida should not encourage members to circumvent the rationale behind the rule by applying for court orders and should not risk the possibility that a court may adopt a rule for an entire district that would affect represented persons.

8. **YES**. The changes provide guidance to bar members.

9. **YES**. The changes provide guidance to bar members.

The committee notes that The Florida Bar Unbundled Legal Services Special Committee proposed changes to this rule and comment that are currently pending before the Supreme Court of Florida. The committee does not believe that any of these proposed changes conflict with the changes currently pending with the court.

FLORIDA'S Rule in LEGISLATIVE FORMAT

RULE 4-4.2 COMMUNICATION WITH PERSON REPRESENTED BY COUNSEL

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer. Notwithstanding the foregoing, an attorney may, without such prior consent, communicate with another's client in order to meet the requirements of any statute or contract requiring notice or service of process directly on an adverse party, in which event the communication shall be strictly restricted to that required by statute or contract, and a copy shall be provided to the adverse party's attorney.

Comment

[1] This Rule contributes to the proper functioning of the legal system by protecting a person who has chosen to be represented by a lawyer in a matter against possible overreaching by other lawyers who are participating in the matter, interference by those lawyers with the client-lawyer relationship and the uncounselled disclosure of information relating to the representation.

[2] This rule applies to communications with any person who is represented by counsel concerning the matter to which the communication relates.

[3] The Rule applies even though the represented person initiates or consents to the communication. A lawyer must immediately terminate communication with a person if, after commencing communication, the lawyer learns that the person is one with whom communication is not permitted by this Rule.

[4] This rule does not prohibit communication with a ~~party~~ represented person, or an employee or agent of such a ~~party~~ person, concerning matters outside the representation. For example, the existence of a controversy between a government agency and a private party, or between 2 organizations, does not prohibit a lawyer for either from communicating with nonlawyer representatives of the other regarding a separate matter. ~~Also, parties~~ Nor does this rule preclude communication with a represented person who is seeking advice from a lawyer who is not otherwise representing a client in the matter. A lawyer may not make a communication prohibited by this rule through the acts of another. See rule 4-8.4(a). Parties to a matter may communicate directly with each other, and a lawyer is not prohibited from advising a client concerning a communication that the client is legally entitled to make, provided that the client is not used to indirectly violate the Rues of Professional Conduct. Also, a lawyer having

independent justification for communicating with the other party is permitted to do so. Communications authorized by law include, for example, the right of a party to a controversy with a government agency to speak with government officials about the matter.

[5] In the case of ~~an~~ a represented organization, this rule prohibits communications ~~by a lawyer for 1 party concerning the matter in representation~~ with ~~persons having a managerial responsibility on behalf~~ a constituent of the organization ~~and with any other person~~ who supervises, directs or regularly consults with the organization's lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in connection with ~~that~~ the matter may be imputed to the organization for purposes of civil or criminal liability ~~or whose statement may constitute an admission on the part of the organization~~. Consent of the organization's lawyer is not required for communication with a former constituent. If ~~an agent or employee~~ a constituent of the organization is represented in the matter by the agent's or employee's own counsel, the consent by that counsel to a communication will be sufficient for purposes of this rule. Compare rule 4-3.4(f). In communication with a current or former constituent of an organization, a lawyer must not use methods of obtaining evidence that violate the legal rights of the organization. See rule 4-4.4. ~~This rule also covers any person, whether or not a party to a formal proceeding, who is represented by counsel concerning the matter in question.~~

[6] The prohibition on communications with a represented person only applies in circumstances where the lawyer knows that the person is in fact represented in the matter to be discussed. This means that the lawyer has actual knowledge of the fact of the representation; but such actual knowledge may be inferred from the circumstances. See terminology. Thus, the lawyer cannot evade the requirement of obtaining the consent of counsel by closing eyes to the obvious.

[7] In the event the person with whom the lawyer communicates is not known to be represented by counsel in the matter, the lawyer's communications are subject to Rule 4.3.

MODEL RULE: 4.3, DEALING WITH UNREPRESENTED PERSON

SUMMARY of Substantive Changes adopted by the ABA House of Delegates

1. The proposed change to Rule 4.3 is to add a third sentence to the Rule. The new sentence would prohibit a lawyer from giving legal advice to an unrepresented person if the lawyer knows or reasonably should know that the interests of such a person are OR HAVE A REASONABLE POSSIBILITY OF BEING in conflict with the interests of the client.

2. ¶ 1 of the Comment to 4.3 deletes the second sentence which prohibits the giving of advice to an unrepresented person, as that sentence is now in the text. Two additional sentences are added to ¶ 1 of the comment. The first new sentence (now the second sentence of the comment) states that the lawyer should typically identify his client and explain that the client has interests opposed to those of the unrepresented person. The new second sentence (the third sentence of comment) references the Rule 1.13(d) for the lawyer who represents the organization and is dealing with an unrepresented constituent.

3. A new ¶ (¶ 2) has been added to the Comment, explaining the reason for the Rule and distinguishing between supplying information and giving advice.

How ABA Rule DIFFERS from EXISTING FLORIDA Rule

1. Florida's Rule 4-4.3 does not have the proposed addition about giving legal advice to an unrepresented person if the person's interests "have a reasonable possibility" of conflicting with the lawyer's clients interests. The comment to Florida's Rule 4-4.3 states that the lawyer should give *no* advice other than to retain counsel.

2. Florida's Rule 4-4.3 has information about giving legal advice to an unrepresented person in the commentary, not in the body of the rule, as is being proposed.

3. Florida's Rule 4-4.3 does not contain the proposed commentary on the purpose behind the rule and explaining the difference between supplying information and giving advice.

RECOMMENDATION of Yes or No and REASONS

1. **YES and NO.** While the substance of the addition for the most part can be found in the comments to the current rule (see the second sentence of the two-sentence current comment to 4-4.3) the language "....or have a reasonable possibility..." may be too heavy a burden to place on an attorney who may lack a clairvoyant's abilities. The proposed rule is also significantly different than the current comment, which says that there should be *no* advice given other than to retain counsel. The new rule would allow a lawyer attorney to give advice to an unrepresented person if the advice does not conflict with the interests of the lawyer's client. Giving legal advice in many jurisdictions, including Florida, creates an attorney-client relationship, which should be avoided. As opposed to the ABA change, the current comment prohibiting giving any

legal advice other than to retain counsel should be moved to the body of the rule.

2 **YES**.

3. **YES and NO**. The first three sentences of ¶ 2 of the commentary discusses giving legal advice to an unrepresented person. Because the committee recommends against adoption of the change to the rule regarding legal advice except the advice to obtain counsel, the first three sentences should also not be adopted.

The committee notes that The Florida Bar Unbundled Legal Services Special Committee proposed changes to this rule and comment that are currently pending before the Supreme Court of Florida. The committee does not believe that any of these proposed changes conflict with the changes currently pending with the court.

FLORIDA'S Rule in LEGISLATIVE FORMAT

RULE 4-4.3 DEALING WITH UNREPRESENTED PERSONS

In dealing 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.

Comment

[1] An unrepresented person, particularly one not experienced in dealing with legal matters, might assume that a lawyer is disinterested in loyalties or is a disinterested authority on the law even when the lawyer represents a client. ~~During the course of a lawyer's representation of a client, the lawyer should not give advice to an unrepresented person other than the advice to obtain counsel.~~ In order to avoid a misunderstanding, a lawyer will typically need to identify the lawyer's client and, where necessary, explain that the client has interests opposed to those of the unrepresented person. For misunderstandings that sometimes arise when a lawyer for an organization deals with an unrepresented constituent, see rule 4-1.13(d).

[2] This rule does not prohibit a lawyer from negotiating the terms of a transaction or settling a dispute with an unrepresented person. So long as the lawyer has explained that the lawyer represents an adverse party and is not representing the person, the lawyer may inform the person of the terms on which the lawyer's client will enter into an agreement or settle a matter, prepare documents that require the person's signature and explain the lawyer's own view of the meaning of the document or the lawyer's view of the underlying legal obligations.

MODEL RULE: 4.4, RESPECT FOR RIGHTS OF THIRD PERSONS

SUMMARY of Substantive Changes adopted by the ABA House of Delegates

1. Rule 4.4 has been augmented by providing a second subsection (b). That subsection reads as follows:

> A lawyer who receives a document and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender.

The additional verbiage to Rule 4.4 is obviously added in light of the increasing frequency of the facsimile, and electronic, transmission of legal pleadings and documents. The change only requires a lawyer to notify a sender when the lawyer "knows or reasonable should know" that the material was inadvertently sent.

2. ¶ 1 of the commentary to Rule 4.4 has been amended to specify that while responsibility to a client requires a lawyer to subordinate the interests of others to those of the client, that responsibility does not imply that a lawyer may make unwarranted intrusions into privileged relationships, such as the client-lawyer relationship. This phrase has been added merely to identify that "intrusions into privileged relationships" are among those third-party rights a lawyer must respect.

3. A second paragraph is added to the commentary. It makes clear that the proposed changes to the Rule do not address additional obligations which may otherwise be imposed by law. It specifies that the Rule does not address an attorney's duty when a document is received that the lawyer "knows or reasonably should know" may have been wrongfully obtained by the sending person. It further defines "document" as including e-mail and other electronic modes of transmission

4. A new ¶ 3 has also been proposed to the commentary on Rule 4.4. This comment addresses the situation when a lawyer may chooses to return a document unread, as when a lawyer learns before receiving the document that it was inadvertently sent to the wrong address. In situations involving e-mail especially, a lawyer might be forewarned that the communication is missent prior to opening the electronic transmission. The new comment clarifies that the lawyer may properly return the document unread and, in so doing, "commits no act of disloyalty by choosing to act in accordance with professional courtesy."

How ABA Rule DIFFERS from EXISTING FLORIDA Rule

Florida's Rule 4-4.4 is substantially the same as the current ABA model rule and does not contain the proposed changes.

RECOMMENDATION of Yes or No and REASONS

1. **YES**. In light of the rapidly expanding use of technology in the practice of law, however, it seems clear that the inadvertent transmission of sensitive information can be an increasing problem. Accordingly, the published changes to Rule 4.4 should be adopted.

2. **YES**. The change in ¶ 1 to the commentary appears to be a corollary to the proposed change in the Rule and should therefore be adopted.

3. **YES**. The new ¶ 2 to the commentary explains the obligations imposed by proposed subsection (b) to the Rule.

4. **YES**. ¶ 3 of the commentary to Rule 4.4 clarifies the intent of the proposed changes to Rule 4.4 and, accordingly, should also be adopted.

FLORIDA'S Rule in LEGISLATIVE FORMAT

RULE 4-4.4 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, delay, or burden a third person or knowingly 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.

Comment

[1] Responsibility to a client requires a lawyer to subordinate the interests of others to those of the client, but that responsibility does not imply that a lawyer may disregard the rights of third persons. It is impractical to catalogue all such rights, but they include legal restrictions on methods of obtaining evidence from third persons and unwarranted intrusions into privileged relationships, such as the client-lawyer relationship.

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

[3] Some lawyers may choose to return a document unread, for example, when the lawyer learns before receiving the document that it was inadvertently sent to the wrong address. Where a lawyer is not required by applicable law to do so, the decision to voluntarily return such a document is a matter of professional judgment ordinarily reserved to the lawyer. See rules 4-1.2 and 4-1.4.

MODEL RULE: 5.1, RESPONSIBILITIES OF PARTNERS, MANAGERS, AND SUPERVISORY LAWYERS

***SUMMARY of Substantive Changes Adopted by the ABA House of Delegates*:**

1. Model Rule 5.1 has been amended to "clarify" that the ethical responsibilities of lawyers with managerial authority extend not only to partners or the equivalent in private law firms but also to lawyers with comparable authority in legal-services organizations and in corporate and governmental legal departments. Prior to the 2002 amendments, the rule applied to a "partner in a law firm," and the Commentary stated that it applied as well to shareholders in a law firm organized as a professional-service corporation and to lawyers with comparable authority in corporate and governmental legal departments. The amendment was intended to effect no substantive change.

2. The Commentary has been revised to more clearly distinguish between managerial authority and direct supervisory authority and otherwise to reflect or clarify the changes in the text of the rule.

How the ABA Rule DIFFERS From the EXISTING Florida Rule

Florida Bar Rule 4-5.1 currently applies to lawyers with managerial and supervisory authority in various forms of private law firms and to lawyers with *supervisory* authority over other lawyers in corporate or governmental legal departments. It does not, however, expressly extend to lawyers with general *managerial* authority over a corporate or governmental legal department.

RECOMMENDATION of Yes or No and REASONS:

1. **YES**. Adopt amended Model Rule 5.1 in its entirety. The amended rule more clearly establishes the responsibility of a lawyer with managerial authority in a setting other than a private law firm and more clearly distinguishes between managerial responsibilities and direct supervisory responsibilities.

2. **YES**. Adopt the revised Commentary in its entirety.

FLORIDA'S Rule in LEGISLATIVE FORMAT

RULE 4-5.1 RESPONSIBILITIES OF ~~A PARTNER OR~~ PARTNERS, MANAGERS, AND SUPERVISORY ~~LAWYER~~ LAWYERS

(a) Duties Concerning Adherence to Rules of Professional Conduct. A ~~member of the bar who is a~~ partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, ~~proprietor, shareholder, member of a limited liability company, officer, director, or manager in an authorized business entity, as defined elsewhere in these rules, or who has supervisory authority over another lawyer~~

~~in the law department of an enterprise or government agency~~, shall make reasonable efforts to ensure that the firm ~~authorized business entity, enterprise, or government agency~~ has in effect measures giving reasonable assurance that all lawyers therein conform to the Rules of Professional Conduct.

(b) Supervisory Lawyer's Duties. Any lawyer ~~in an authorized business entity, enterprise, or government agency~~ having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.

(c) Responsibility for Rules Violations. A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:

(1) the lawyer orders the specific conduct or, with knowledge thereof, ratifies the conduct involved; or

(2) the lawyer is a partner~~, proprietor, shareholder, member of a limited liability company, officer, director, partner, or manager in an authorized business entity, as defined elsewhere in these rules,~~ or has comparable managerial authority in the law firm in which the other lawyer practices or has direct supervisory authority over ~~another~~ the other lawyer ~~in the law department of an enterprise or government agency~~, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Comment

[1] ~~Subdivisions~~ Subdivision (a) ~~and (b) refer~~ applies to lawyers who have ~~supervisory~~ managerial authority over the professional work of a firm ~~or legal department of a government agency~~. See terminology. This includes members of a partnership, ~~proprietors,~~ the shareholders in a law firm organized as a professional corporation, and members of ~~a limited liability company~~ other associations authorized to practice law; ~~as well as~~ lawyers having ~~supervisory~~ comparable managerial authority in ~~the~~ a legal services organization or a law department of an enterprise or government agency; and lawyers who have intermediate managerial responsibilities in ~~an authorized business entity~~ a firm. Subdivision (b) applies to lawyers who have supervisory authority over the work of other lawyers in a firm.

[2] Subdivision (a) requires lawyers with managerial authority within a firm to make reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance that all lawyers in the firm will conform to the Rules of Professional Conduct. Such policies and procedures include those designed to detect and resolve conflicts of interest, identify dates by which actions must be taken in pending matters, account for client funds and property and ensure that inexperienced lawyers are properly supervised.

[3] ~~The~~ Other measures that may be required to fulfill the responsibility prescribed in ~~subdivisions~~ subdivision (a) ~~and (b)~~ can depend on the firm's structure and the nature of its

practice. In a small firm of experienced lawyers, informal supervision and ~~occasional admonition~~ periodic review of compliance with the required systems ordinarily ~~might be sufficient~~ will suffice. In a large firm, or in practice situations in which ~~intensely~~ difficult ethical problems frequently arise, more elaborate ~~procedures~~ measures may be necessary. Some firms, for example, have a procedure whereby junior lawyers can make confidential referral of ethical problems directly to a designated supervising lawyer or special committee. See rule 4-5.2. Firms, whether large or small, may also rely on continuing legal education in professional ethics. In any event the ethical atmosphere of a firm can influence the conduct of all its members and ~~a lawyer having authority over the work of another~~ the partners may not assume that ~~the subordinate lawyer~~ all lawyers associated with the firm will inevitably conform to the rules.

[4] Subdivision (c)~~(1)~~ expresses a general principle of personal responsibility for acts of another. See also rule 4-8.4(a).

[5] Subdivision (c)(2) defines the duty of a partner or other lawyer having comparable managerial authority in a law firm, as well as a lawyer having supervisory authority over performance of specific legal work by another lawyer. Whether a lawyer has such supervisory authority in particular circumstances is a question of fact. Partners~~, proprietors, shareholders, members of a limited liability company, officers, directors, and managers~~ and lawyers with comparable authority have at least indirect responsibility for all work being done by the firm, while a partner~~, shareholder, member of a limited liability company, officer, director, and~~ or manager in charge of a particular matter ordinarily also has ~~authority over~~ supervisory responsibility for the work of other firm lawyers engaged in the matter. Appropriate remedial action by a partner or managing lawyer would depend on the immediacy of ~~the partner's, shareholder's, member's (of a limited liability company), officer's, director's, or manager's~~ that lawyer's involvement and the seriousness of the misconduct. ~~The~~ A supervisor is required to intervene to prevent avoidable consequences of misconduct if the supervisor knows that the misconduct occurred. Thus, if a supervising lawyer knows that a subordinate misrepresented a matter to an opposing party in negotiation, the supervisor as well as the subordinate has a duty to correct the resulting misapprehension.

[6] Professional misconduct by a lawyer under supervision could reveal a violation of subdivision (b) on the part of the supervisory lawyer even though it does not entail a violation of subdivision (c) because there was no direction, ratification, or knowledge of the violation.

[7] Apart from this rule and rule 4-8.4(a), a lawyer does not have disciplinary liability for the conduct of a partner, shareholder, member of a limited liability company, officer, director, manager, associate, or subordinate. Whether a lawyer may be liable civilly or criminally for another lawyer's conduct is a question of law beyond the scope of these rules.

[8] The duties imposed by this rule on managing and supervising lawyers do not alter the personal duty of each lawyer in a firm to abide by the Rules of Professional Conduct. See rule 4-5.2(a).

MODEL RULE: 5.2, RESPONSIBILITIES OF A SUBORDINATE LAWYER

***SUMMARY of Substantive Changes Adopted by the ABA House of Delegates*:**

No change.

***How the ABA Rule DIFFERS From the EXISTING Florida Rule*:**

No difference.

***RECOMMENDATION of Yes or No and REASONS*:**

NOT APPLICABLE.

FLORIDA'S Rule in LEGISLATIVE FORMAT

Not applicable.

MODEL RULE: 5.3, RESPONSIBILITIES REGARDING NONLAWYER ASSISTANTS

SUMMARY of Substantive Changes Adopted by the ABA House of Delegates:

1. As with Model Rule 5.1, Model Rule 5.3 has been amended to "clarify" that the ethical responsibilities of lawyers with managerial authority extend not only to partners or the equivalent in private law firms but also to lawyers with comparable authority in legal-services organizations and in corporate and governmental legal departments. Prior to the 2002 amendments, the rule applied only to a "partner in a law firm." As with Model Rule 5.1, the amendment was intended to effect no substantive change.

2. In paragraph [1] of the Commentary, *must* has been substituted for should to conform to the mandatory nature of the obligation.

3. A new paragraph [2] has been added to the Commentary to distinguish between managerial authority and direct supervisory authority.

How the ABA Rule DIFFERS From the EXISTING Florida Rule:

1. Unlike Rule 4-5.1, Florida Bar Rule 4-5.3 does not expressly apply to lawyers with supervisory authority over nonlawyer assistants in corporate or governmental legal departments, referring instead only to "a partner in a law firm."

2. Rule 4-5.3 does not address corporate or governmental lawyers who have general *managerial* authority over a corporate or governmental legal department.

3. As a result of a recent amendment evidently aimed at strengthening the bar's ability to prosecute independent legal assistants for the unauthorized practice of law, Florida Bar Rule 4–5.3 goes beyond Model Rule 5.3 by including (1) a requirement that a person who uses the title of "paralegal," "legal assistant," or other similar term must work for or under the supervision of a lawyer or law firm and (2) a requirement that a lawyer who delegates duties to a paralegal or legal assistant without the lawyer's presence or active involvement must review and ultimately be responsible for the paralegal's or legal assistant's work product. (These two differences preexisted the August 2002 amendments to Model Rule 5.3.)

RECOMMENDATION of Yes or No and REASONS:

1. **YES**. Substitute the wording of amended Model Rule 5.3 in its entirety for Florida Bar Rule 4-5.3(b). The amended rule more clearly establishes the responsibility of a lawyer who manages or supervises nonlawyer assistants in a setting other than a private law firm and more clearly distinguishes between managerial responsibilities and direct supervisory responsibilities.

2. **YES**. Substitute must for *should* in the first paragraph of the Comment. The Comment should

conform to the mandatory nature of the rule itself.

3. **YES**. Adopt the new second paragraph of the Commentary. It supports the goal of more clearly distinguishing between managerial responsibilities and direct supervisory responsibilities.

4. Additionally, the committee recommends simplifying the wording of subsection (a) to substitute "law firm" for "an authorized business entity as defined elsewhere in these Rules Regulating the Florida Bar."

FLORIDA'S Rule in LEGISLATIVE FORMAT

RULE 4-5.3 RESPONSIBILITIES REGARDING NONLAWYER ASSISTANTS

(a) Use of Titles by Nonlawyer Assistants. A person who uses the title of paralegal, legal assistant, or other similar term when offering or providing services to the public must work for or under the direction or supervision of a lawyer or ~~an authorized business entity as defined elsewhere in these Rules Regulating The Florida Bar~~ law firm.

(b) Supervisory Responsibility. With respect to a nonlawyer employed or retained by or associated with a lawyer or an authorized business entity as defined elsewhere in these Rules Regulating The Florida Bar:

(1) a partner, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;

(2) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and

(3) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

(A) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

(B) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

(c) Ultimate Responsibility of Lawyer. Although paralegals or legal assistants may perform the duties delegated to them by the lawyer without the presence or active involvement of

the lawyer, the lawyer shall review and be responsible for the work product of the paralegals or legal assistants.

Comment

[1] Lawyers generally employ assistants in their practice, including secretaries, investigators, law student interns, and paraprofessionals such as paralegals and legal assistants. Such assistants, whether employees or independent contractors, act for the lawyer in rendition of the lawyer's professional services. A lawyer ~~should~~ must give such assistants appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to representation of the client. The measures employed in supervising nonlawyers should take account of the level of their legal training and the fact that they are not subject to professional discipline. If an activity requires the independent judgment and participation of the lawyer, it cannot be properly delegated to a nonlawyer employee.

[2] Subdivision (b)(1) requires lawyers with managerial authority within a law firm to make reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance that nonlawyers in the firm will act in a way compatible with the Rules of Professional Conduct. See comment to rule 4-5.1. Subdivision (b)(2) applies to lawyers who have supervisory authority over the work of a nonlawyer. Subdivision (b)(3) specifies the circumstances in which a lawyer is responsible for conduct of a nonlawyer that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer.

[3] Nothing provided in this rule should be interpreted to mean that a nonlawyer may have any ownership or partnership interest in a law firm, which is prohibited by rule 4-5.4. Additionally, this rule would not permit a lawyer to accept employment by a nonlawyer or group of nonlawyers, the purpose of which is to provide the supervision required under this rule. Such conduct is prohibited by rules 4-5.4 and 4-5.5.

MODEL RULE: 5.4, PROFESSIONAL INDEPENDENCE OF A LAWYER

SUMMARY of Substantive Changes Adopted by the ABA House of Delegates:

1. Model Rule 5.4 has been amended to permit a lawyer to share "court-awarded legal fees with a nonprofit organization that employed, retained or recommended employment of the lawyer in the matter.

2. Model Rule 5.4 has been amended to prohibit a lawyer from practicing with or in the form of a corporation not only (as now) if a nonlawyer is a corporate director or officer of the corporation but also if a nonlawyer "occupies the position of similar responsibility in any form of association other than a corporation."

3. Paragraph [2] has been added to the Commentary to provide a cross-reference to rule 1.8(f) on payment of a client's fee by a third person. No change in substance is intended.

How the ABA Rule DIFFERS From the EXISTING Florida Rule:

1. In addition to authorizing a lawyer who purchases the practice of a deceased lawyer to pay the agreed-upon purchase price to the deceased lawyer's estate, Florida Bar Rule 4-5.4 permits a lawyer who "undertakes to complete unfinished legal business of a deceased lawyer to make proportionate payments to the deceased lawyer's estate." (This difference preexisted the August 2002 amendments to Model Rule 5.4.)

2. In addition to authorizing a lawyer to establish compensation or retirement plans for nonlawyer employees, rule 4-5.4 permits a lawyer to pay bonuses to nonlawyer employees based on extraordinary efforts on a particular case or over a specified time period, with certain provisos. (This difference preexisted the August 2002 amendments to Model Rule 5.4.)

3. Rule 4–5.4 does not permit fee-sharing with a nonprofit organization that employed, retained, or recommended the employment of the lawyer.

4. Rule 4-5.4 does not expressly prohibit practicing in the form of a professional corporation or other authorized for-profit entity of which a nonlawyer is a corporate director or officer.

RECOMMENDATION of Yes or No and REASONS:

1. **YES with qualifications**. Amend Florida Bar Rule 5.4(a) to permit fee-sharing with nonprofit organizations, but limit it to nonprofit, pro-bono legal-services organizations. The Model Rule version is overbroad—perhaps broader than the Ethics 2000 Commission itself intended. The stated purpose of the amendment is "to *clarify* that a lawyer may share court-awarded legal fees with a nonprofit organization that employed, retained or recommended employment of the lawyer in the matter." According to the Ethics 2000 Commission reporter's notes, this is justified, because:

> [t]he propriety of such fee-sharing arrangements was upheld in Formal Opinion 93-374 of the ABA Standing Committee on Ethics and Professional Responsibility. Other state ethics committees, however, while agreeing with the policy underlying the ABA Opinion, found violations of state versions of Rule 5.4 because the text of the Rule appeared to prohibit such fee-sharing. The Commission agrees with the ABA Standing Committee that the threat to independent professional judgment is less here than in circumstances where a for-profit organization is involved and is therefore recommending this change.

ABA Formal Opinion 93–374 actually states that it is not unethical for a private lawyer to share court-awarded fees with a nonprofit pro-bono legal-services organization that sponsors the litigation undertaken by the lawyer. This is an appropriately limited exception. The exception should not extend to *all* nonprofit organizations.

The ABA Standing Committee justifies its conclusion by suggesting that a nonprofit organization's interest in a fee award "is not likely to be a predominant factor but at most a subsidiary one in the non-profit organization's sponsorship of the litigation" and that any incentive that the organization may have to intervene "is much more likely to relate to the merits of the case, rather than the expectancy of a fee award." Those assumptions are of questionable validity. A nonprofit organization, like a for-profit entity, has revenue and budget goals to achieve. If the organization is feeling pressure to achieve those goals, its zeal to do so may motivate it to intervene in the handling of the litigation for that purpose, without regard to the best interests of the cooperating lawyer's client. Also debatable is the committee's assumption that "mutually reinforcing economic incentives" are insufficient to cause the cooperating lawyer to yield to pressures brought by the sponsoring organization. Even the committee conceded that "it might be argued that a cooperating lawyer has an incentive to please the referring organization . . . in the interest of getting future referrals."

One might suggest that the risk is adequately addressed by the prohibition against permitting "a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services." The same logic, however, could be applied to permitting fee-sharing with a for-profit enterprise. When the Model Rules initially were proposed in 1981, rule 5.4 would have permitted fee arrangements that included direct compensation to nonlawyers, if no solicitation or interference with the lawyer's professional judgment was involved and the fee was reasonable. An amendment presented on the floor of the ABA House of Delegates resulted in the version of the rule that existed until this year. If the traditional policy of precluding fee-sharing with nonlawyers is still deemed paramount, the danger that it seeks to prevent is not unique to persons and entities with profit motives. Even if a sponsoring nonprofit organization's intervention and the cooperating lawyer's susceptibility to it are less likely than when a profit motive is involved, the risk of influence or control remains. The exception should be limited to nonprofit, pro-bono legal-services organizations.

2. **YES**. Adopt amended subsection (d)(2) of Model Rule 5.4 as a new subsection (e)(2) of Florida Bar Rule 4-5.4. The purpose of the model rule amendment is to expand what otherwise was "too limited because it employs terminology peculiar to corporate law." Florida Bar Rule 4-5.4 omits the prohibition altogether, perhaps on the theory that the prohibition against practicing in a firm if "a nonlawyer has the right to direct or control the professional judgment of a lawyer" suffices. Regardless of the original intent behind omitting the prohibition, clarity and interstate uniformity weigh in favor of adding the prohibition as contained in amended Model Rule 5.4(d)(2).

3. **YES**. Adopt the new paragraph of the Commentary. The cross-reference to rule 1.8(f) (Florida Bar Rule 4-1.8(f)) is useful.

4. The committee also recommends amending the first paragraph of the Comment by substituting subdivision (d) for subdivision (c). The correct reference is to subdivision (d).

FLORIDA'S Rule in LEGISLATIVE FORMAT

RULE 4-5.4 PROFESSIONAL INDEPENDENCE OF A LAWYER

(a) Sharing Fees with Nonlawyers. 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, partner, or associate 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 1 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 proportion of the total compensation that fairly represents the services rendered by the deceased lawyer;

(3) a lawyer who purchases the practice of a deceased, disabled, or disappeared lawyer may, in accordance with the provisions of rule 4-1.17, pay to the estate or other legally authorized representative of that lawyer the agreed upon purchase price; ~~and~~

(4) bonuses may be paid to nonlawyer employees based on their extraordinary efforts on a particular case or over a specified time period, provided that the payment is not based on the generation of clients or business and is not calculated as a percentage of legal fees received by the lawyer or law firm~~.~~; and

(5) a lawyer may share court-awarded fees with a nonprofit, pro-bono legal-services organization that employed, retained, or recommended employment of the lawyer in the matter.

(b) Qualified Pension Plans. A lawyer or law firm may include nonlawyer employees in a qualified pension, profit-sharing, or retirement plan, even though the lawyer's or law firm's

contribution to the plan is based in whole or in part on a profit-sharing arrangement.

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

(d) Exercise of Independent Professional Judgment. A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

(e) Nonlawyer Ownership of Authorized Business Entity. A lawyer shall not practice with or in the form of a business entity authorized to practice law for a 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; ~~or~~

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

~~(2)~~ (3) a nonlawyer has the right to direct or control the professional judgment of a lawyer.

Comment

[1] The provisions of this rule express traditional limitations on sharing fees. These limitations are to protect the lawyer's professional independence of judgment. Where someone other than the client pays the lawyer's fee or salary, or recommends employment of the lawyer, that arrangement does not modify the lawyer's obligation to the client. As stated in subdivision ~~(c)~~ (d), such arrangements should not interfere with the lawyer's professional judgment.

[2] This Rule also expresses traditional limitations on permitting a third party to direct or regulate the lawyer's professional judgment in rendering legal services to another. See also rule 4-1.8(f) (lawyer may accept compensation from a third party as long as there is no interference with the lawyer's independent professional judgment and the client gives informed consent).

[3] The prohibition against sharing legal fees with nonlawyer employees is not intended to prohibit profit-sharing arrangements that are part of a qualified pension, profit-sharing, or retirement plan. Compensation plans, as opposed to retirement plans, may not be based on legal fees.

MODEL RULE: 5.5, UNAUTHORIZED PRACTICE OF LAW

SUMMARY of Substantive Changes Adopted by the ABA House of Delegates:

The Ethics 2000 Commission proposed amendments that would create four "safe harbors" for lawyers engaged in multijurisdictional practice. The ABA House of Delegates did not take up the proposed amendments at its February 2002 meeting, deeming them to fall within the jurisdiction of the ABA Commission on Multijurisdictional Practice ("MJP Commission"). At the ABA annual meeting in August 2002, the MJP Commission proposed and the House of Delegates adopted amendments to rule 5.5 and its comment similar in concept to those proposed by the Ethics 2000 Commission.

How the ABA Rule DIFFERS From the EXISTING Florida Rule:

Unlike amended Model Rule 5.5, Florida Bar Rule 4-5.5 does not authorize multijurisdictional practice under any circumstance.

RECOMMENDATION of Yes or No and REASONS:

NONE. Refer amended Model Rule 5.5 and its Commentary to the Florida Bar's committee on multijurisdictional practice. The subject falls within that committee's jurisdiction.

FLORIDA'S Rule in LEGISLATIVE FORMAT

Not applicable.

MODEL RULE: 5.6, RESTRICTIONS ON RIGHT TO PRACTICE

SUMMARY of Substantive Changes Adopted by the ABA House of Delegates:

Model Rule 5.6 has been amended to clarify or confirm that it applies to all lawyers, not just "partners and associates," and to all agreements among lawyers, not just to "partnership" and "employment" agreements.

How the ABA Rule DIFFERS From the EXISTING Florida Rule:

Before the recent amendments, Model Rule 5.6 and Florida Bar Rule 4-5.6 were identical. The model rule now differs from rule 4-5.6 to the extent of the 2002 amendments.

RECOMMENDATION of Yes or No and REASONS:

YES. Adopt amended Model Rule 5.6 and its Commentary in their entirety. The current language is underinclusive, and the clarification made by the amendments is warranted.

FLORIDA'S Rule in LEGISLATIVE FORMAT

RULE 4-5.6 RESTRICTIONS ON RIGHT TO PRACTICE

A lawyer shall not participate in offering or making:

(a) a partnership ~~or~~, shareholders, operating, employment or other similar type of agreement that restricts the rights of a lawyer to practice after 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 client controversy ~~between private parties~~.

Comment

[1] An agreement restricting the right of ~~partners or associates~~ 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 (a) prohibits such agreements except for restrictions incident to provisions concerning retirement benefits for service with the firm.

[2] Subdivision (b) 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 in accordance with the provisions of rule 4-1.17.

[4] This rule is not a per se prohibition against severance agreements between lawyers and law firms. Severance agreements containing reasonable and fair compensation provisions designed to avoid disputes requiring time-consuming quantum meruit analysis are not prohibited by this rule. Severance agreements, on the other hand, that contain punitive clauses, the effect of which are to restrict competition or encroach upon a client's inherent right to select counsel, are prohibited. The percentage limitations found in rule 4-1.5(f)(4)(D) do not apply to fees divided pursuant to a severance agreement. No severance agreement shall contain a fee-splitting arrangement that results in a fee prohibited by the Rules Regulating The Florida Bar.

MODEL RULE: 5.7, RESPONSIBILITIES REGARDING LAW-RELATED SERVICES

SUMMARY of Substantive Changes Adopted by the ABA House of Delegates:

Model Rule 5.7 and its Commentary have been broadened to cover all circumstances in which a lawyer's provision of "law-related services" are distinct from the lawyer's provision of legal services. This change is intended to clarify (1) that there can be situations in which a law firm's provision of law-related services will be distinct from the firm's provision of legal services, even though rendered by the firm rather than a separate entity, and (2) that in such circumstances the lawyer must to take reasonable measures to ensure that a person obtaining the law-related services knows that the services are not legal services and that the protections of the client-lawyer relationship do not exist. The change is intended to close an unintended gap in the coverage of the rule.

How the ABA Rule DIFFERS From the EXISTING Florida Rule:

Model Rule 5.7 deals with "law-related services," which "denotes services that might reasonably be performed in conjunction with and in substance are related to the provision of legal services, and that are not prohibited as unauthorized practice of law when provided by a nonlawyer. Florida Bar Rule 4-5.7 addresses "nonlegal services" (which, one presumes, need not necessarily "be performed in conjunction with and in substance be related to the provision of legal services") and clearly addresses the points that the amendments to Model Rule 5.7 are intended to "clarify."

***RECOMMENDATION of Yes or No and REASONS*:**

NO. Florida Bar Rule 4-5.7 covers the subject adequately and more comprehensively than Model Rule 5.7.

FLORIDA'S Rule in LEGISLATIVE FORMAT

Not applicable.

MODEL RULE: 6.1, VOLUNTARY PRO BONO PUBLICO SERVICE

SUMMARY of Substantive Changes adopted by the ABA House of Delegates

No substantive changes proposed.

How ABA Rule DIFFERS from EXISTING FLORIDA Rule

Florida's Rule 4-6.1 only suggests 20 hours of pro bono services while the ABA suggests 50 hours per year. Florida uses the word "poor" as the standard while the ABA uses"unable to pay." Florida also has a mandatory reporting requirement, although the service itself is voluntary.

RECOMMENDATION of Yes or No and REASONS

NO. The changes were made to "give greater prominence" to the aspirational goal of providing pro bono service, but the change could give rise to discipline merely for failure to do pro bono when the rule was designed to be aspirational. Also, the changes do not comport with Florida's Rule 4-6.1.

FLORIDA'S Rule in LEGISLATIVE FORMAT

Not applicable.

MODEL RULE: 6.2, ACCEPTING APPOINTMENTS

SUMMARY of Substantive Changes adopted by the ABA House of Delegates

No substantive changes proposed.

How ABA Rule DIFFERS from EXISTING FLORIDA Rule

Florida's Rule 4-6.2 is substantially the same as the ABA model rule.

RECOMMENDATION of Yes or No and REASONS

NOT APPLICABLE.

FLORIDA'S Rule in LEGISLATIVE FORMAT

Not applicable.

MODEL RULE: 6.3, MEMBERSHIP IN LEGAL SERVICES ORGANIZATION

SUMMARY of Substantive Changes adopted by the ABA House of Delegates

No changes proposed.

How ABA Rule DIFFERS from EXISTING FLORIDA Rule

Florida's Rule 4-6.3 is substantially the same as the ABA model rule.

RECOMMENDATION of Yes or No and REASONS

NOT APPLICABLE.

FLORIDA'S Rule in LEGISLATIVE FORMAT

Not applicable.

MODEL RULE: 6.4, LAW REFORM ACTIVITIES AFFECTING CLIENT INTERESTS

SUMMARY of Substantive Changes adopted by the ABA House of Delegates

No changes proposed.

How ABA Rule DIFFERS from EXISTING FLORIDA Rule

Florida's Rule 4-6.4 is substantially the same as the ABA model rule.

RECOMMENDATION of Yes or No and REASONS

NOT APPLICABLE.

FLORIDA'S Rule in LEGISLATIVE FORMAT

Not applicable.

MODEL RULE: 6.5, NONPROFIT AND COURT-ANNEXED LIMITED LEGAL SERVICES PROGRAMS

SUMMARY of Substantive Changes adopted by the ABA House of Delegates

This is a new rule proposed by the ABA commission that deals with conflicts of interest issues when providing short-term legal services for not-for-profit organizations. The rule provides that lawyers can provide representation under a program sponsored by a not-for-profit organization unless the lawyer *knows* that the representation involves a conflict of interest for the lawyer or *knows* that a conflict of another lawyer should be imputed to the lawyer. This substantially lowers the conflict of interest standards as applied to persons receiving legal services under such a program.

How ABA Rule DIFFERS from EXISTING FLORIDA Rule

Florida does not have this particular rule strictly dealing with short-term legal services and not-for-profit organizations or Court.

RECOMMENDATION of Yes or No and REASONS

NO. A conflict is a conflict, regardless of the type and length of legal services provided.

FLORIDA'S Rule in LEGISLATIVE FORMAT

Not applicable.

MODEL RULES: **7.1, 7.2, 7.3, 7.4, 7.5, 7.6, INFORMATION ABOUT LEGAL SERVICES**

SUMMARY of Substantive Changes Adopted by the ABA House of Delegates:

Several amendments to Model Rules 7.1-7.5 have been enacted, some more substantive than others. Rule 7.6 is unchanged.

How the ABA Rule DIFFERS From the EXISTING Florida Rule:

Florida recently overhauled its rules on information about legal services. They bear only limited resemblance to the Model Rules and are far more detailed and comprehensive.

RECOMMENDATION of Yes or No and REASONS:

None. Refer the amendments to Model Rules 7.1-7.5 to the Florida Bar Standing Committee on Advertising for review and possible recommendations for corresponding amendments to the Florida Bar rules. In view of the recent, comprehensive changes to chapter 4-7 of the Florida Bar Rules and given the state's history of independent initiative in this field, enacting any amendments to chapter 4-7 might seem retrogressive. Some of the amendments to Model Rules 7.1-7.5, however, warrant consideration.

FLORIDA'S Rule in LEGISLATIVE FORMAT

Not applicable.

MODEL RULE: 8.1, BAR ADMISSION

SUMMARY of Substantive Changes adopted by the ABA House of Delegates

1. Adds language to the commentary that the rule requires lawyers to correct prior misstatements made to admissions or disciplinary authorities.

2. Adds language to the commentary that an attorney representing someone in a matter are specifically subject to the confidentiality rule and the rule on candor towards the tribunal.

How ABA Rule DIFFERS from EXISTING FLORIDA Rule

Florida's rule 4-8.1 tracks the ABA model rule and does not contain the proposed amendments.

RECOMMENDATION of Yes or No and REASONS

1 and 2. **YES**.

FLORIDA'S Rule in LEGISLATIVE FORMAT

RULE 4-8.1 BAR ADMISSION AND DISCIPLINARY MATTERS

An applicant for admission to the bar, or a lawyer in connection with a bar admission application or in connection with a disciplinary matter, shall not:

(a) knowingly make a false statement of material fact; or

(b) fail to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter or knowingly fail to respond to a lawful demand for information from an admissions or disciplinary authority, except that this rule does not require disclosure of information otherwise protected by rule 4-1.6.

Comment

[1] The duty imposed by this rule extends to persons seeking admission to the bar as well as to lawyers. Hence, if a person makes a material false statement in connection with an application for admission, it may be the basis for subsequent disciplinary action if the person is admitted and in any event may be relevant in a subsequent admission application. The duty imposed by this rule applies to a lawyer's own admission or discipline as well as that of others. Thus, it is a separate professional offense for a lawyer to knowingly make a misrepresentation or omission in connection with a disciplinary investigation of the lawyer's own conduct. ~~This~~ Subdivision (b) of this rule also requires correction of any prior misstatement in the matter that the applicant or lawyer may have made and affirmative clarification of any misunderstanding on the part of the admissions or disciplinary authority of which the person involved becomes aware.

[2] This rule is subject to the provisions of the fifth amendment of the United States Constitution and the corresponding provisions of the Florida Constitution. A person relying on such a provision in response to a question, however, should do so openly and not use the right of nondisclosure as a justification for failure to comply with this rule.

[3] A lawyer representing an applicant for admission to the bar, or representing a lawyer who is the subject of a disciplinary inquiry or proceeding, is governed by the rules applicable to the client-lawyer relationship, including rule 4-1.6 and, in some cases, rule 4-3.3.

MODEL RULE: 8.2, JUDICIAL AND LEGAL OFFICERS

SUMMARY of Substantive Changes adopted by the ABA House of Delegates

No changes were proposed.

How ABA Rule DIFFERS from EXISTING FLORIDA Rule

Florida's rule 4-8.2 tracks the ABA model rule, but adds "juror or member of the venire" to the list of persons whose integrity cannot be impugned and includes commentary regarding impugning the integrity of a juror.

RECOMMENDATION of Yes or No and REASONS

NOT APPLICABLE.

FLORIDA'S Rule in LEGISLATIVE FORMAT

Not applicable.

MODEL RULE: 8.3, REPORTING PROFESSIONAL MISCONDUCT

SUMMARY of Substantive Changes adopted by the ABA House of Delegates

1. The standard for reporting attorney misconduct has been changed everywhere it appears in the rule from "having knowledge" to "knows." The ABA reporter indicated that no change in substance was intended.

2. Clarifies that all information learned by a lawyer or judge about another lawyer's misconduct from participating in an approved lawyers assistance program need not be reported to a professional authority in both subsection (c) and comment.

3. Changes to ¶ 5 of the comment clarify the new exceptions to the reporting requirement for lawyers participating in approved assistance programs, pointing out that the rules do not address any confidentiality requirements imposed by the program itself or by law, and deleting references to privilege.

How ABA Rule DIFFERS from EXISTING FLORIDA Rule

1. Florida's rule 4-8.3 tracks the language of "having knowledge" and does not use the language "who knows."

2. Florida's rule 4-8.3 does not contain an exception from the reporting requirement for information learned by lawyers participating in a lawyers assistance program.

3. Florida's rule 4-8.3 does not contain any commentary about an exception for the reporting requirement for lawyers participating in an approved lawyers assistance program.

RECOMMENDATION of Yes or No and REASONS

1. **YES**.

2. **Qualified YES**. The language is clearer than the prior rule and lawyers should be encouraged to use lawyer assistance programs as a policy. However, if Florida adopts this change, Florida should also add the limitation that lawyers must report misconduct as part of a bar discipline sanction or contract to avoid discipline when reporting is required by the bar as part of the sanction or contract.

3. **YES**. The commentary is helpful to explain the rationale for the exception to the reporting requirement.

FLORIDA'S Rule in LEGISLATIVE FORMAT

RULE 4-8.3 REPORTING PROFESSIONAL MISCONDUCT

(a) Reporting Misconduct of Other Lawyers. A lawyer ~~having knowledge~~ who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects shall inform the appropriate professional authority.

(b) Reporting Misconduct of Judges. A lawyer ~~having knowledge~~ who knows that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the appropriate authority.

(c) Confidences Preserved. This rule does not require disclosure of information otherwise protected by rule 4-1.6 or information gained by a lawyer or judge while participating in an approved lawyers assistance program. Provided further, however, that if a lawyer's participation in an approved lawyers assistance program is part of a disciplinary sanction this limitation shall not be applicable and a report about the lawyer who is participating as part of a disciplinary sanction shall be made to the appropriate disciplinary agency.

(d) Limited Exception for LOMAS Counsel. A lawyer employed by or acting on behalf of the Law Office Management Assistance Service (LOMAS) shall not have an obligation to disclose knowledge of the conduct of another member of The Florida Bar that raises a substantial question as to the other lawyer's fitness to practice, if the lawyer employed by or acting on behalf of LOMAS acquired the knowledge while engaged in a LOMAS review of the other lawyer's practice. Provided further, however, that if the LOMAS review is conducted as a part of a disciplinary sanction this limitation shall not be applicable and a report shall be made to the appropriate disciplinary agency.

Comment

[1] Self-regulation of the legal profession requires that members of the profession initiate disciplinary investigation when they know of a violation of the Rules of Professional Conduct. Lawyers have a similar obligation with respect to judicial misconduct. An apparently isolated violation may indicate a pattern of misconduct that only a disciplinary investigation can uncover. Reporting a violation is especially important where the victim is unlikely to discover the offense.

[2] A report about misconduct is not required where it would involve violation of rule 4-1.6. However, a lawyer should encourage a client to consent to disclosure where prosecution would not substantially prejudice the client's interests.

[3] If a lawyer were obliged to report every violation of the rules, the failure to report any violation would itself be a professional offense. Such a requirement existed in many jurisdictions, but proved to be unenforceable. This rule limits the reporting obligation to those offenses that a self-regulating profession must vigorously endeavor to prevent. A measure of judgment is, therefore, required in complying with the provisions of this rule. The term "substantial" refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware.

[4] The duty to report professional misconduct does not apply to a lawyer retained to represent a lawyer whose professional conduct is in question. Such a situation is governed by the rules applicable to the client-lawyer relationship.

[5] Information about a lawyer's or judge's misconduct or fitness may be received by a lawyer in the course of that lawyer's participation in an approved lawyers or judges assistance program. In that circumstance, providing for an exception to the reporting requirements of subdivisions (a) and (b) of this rule encourages lawyers and judges to seek treatment through such a program. Conversely, without such an exception, lawyers and judges may hesitate to seek assistance from these programs, which may then result in additional harm to their professional careers and additional injury to the welfare of clients and the public. These rules do not otherwise address the confidentiality of information received by a lawyer or judge participating in an approved lawyers assistance program; such an obligation, however, may be imposed by the rules of the program or other law.

MODEL RULE: 8.4, MISCONDUCT

SUMMARY of Substantive Changes adopted by the ABA House of Delegates

1. Adds prohibition against stating or implying an ability to achieve results in a way that violates the Rules of Professional Conduct or law to subsection (e) of this rule. [The prohibition was moved from the advertising rules to extend to any communication.]

2. Adds commentary regarding violation of the rules through conduct of another. The commentary indicates that a violation of the rule occurs when an attorney requests or instructs an agent to act on the lawyer's behalf, but not when the lawyer advises a client regarding action the client is lawfully entitled to take.

How ABA Rule DIFFERS from EXISTING FLORIDA Rule

1. Florida currently contains this prohibition in the advertising rules (4-7.2(b)(1)(C)), but not in 4-8.4(e).

2. Florida's rule does not contain this commentary.

RECOMMENDATION of Yes or No and REASONS

1. **YES**.

2. **Qualified YES**. The committee recommends adoption of this change with additional language clearly indicating that, although a lawyer may advise a client about the client's rights, the lawyer may not use the client to violate the rules indirectly.

FLORIDA'S Rule in LEGISLATIVE FORMAT

RULE 4-8.4 MISCONDUCT

A lawyer 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) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects;

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

(d) engage in conduct in connection with the practice of law that is prejudicial to the administration of justice, including to knowingly, or through callous indifference, disparage,

humiliate, or discriminate against litigants, jurors, witnesses, court personnel, or other lawyers on any basis, including, but not limited to, on account of race, ethnicity, gender, religion, national origin, disability, marital status, sexual orientation, age, socioeconomic status, employment, or physical characteristic;

(e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct 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) fail to respond, in writing, to any official inquiry by bar counsel or a disciplinary agency, as defined elsewhere in these rules, when bar counsel or the agency is conducting an investigation into the lawyer's conduct. A written response shall be made:

(1) within 15 days of the date of the initial written investigative inquiry by bar counsel, grievance committee, or board of governors;

(2) within 10 days of the date of any follow-up written investigative inquiries by bar counsel, grievance committee, or board of governors;

(3) within the time stated in any subpoena issued under these Rules Regulating The Florida Bar (without additional time allowed for mailing);

(4) as provided in the Florida Rules of Civil Procedure or order of the referee in matters assigned to a referee; and

(5) as provided in the Florida Rules of Appellate Procedure or order of the Supreme Court of Florida for matters pending action by that court.

Except as stated otherwise herein or in the applicable rules, all times for response shall be calculated as provided elsewhere in these Rules Regulating The Florida Bar and may be extended or shortened by the inquirer upon good cause shown;

(h) willfully refuse, as determined by a court of competent jurisdiction, to timely pay a child support obligation; or

(i) engage in sexual conduct with a client that exploits the lawyer-client relationship.

Comment

[1] Lawyers are subject to discipline when they 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, as when they request or instruct an agent to do so on the lawyer's behalf. Subdivision

(a), however, does not prohibit a lawyer from advising a client concerning action the client is legally entitled to take, provided that the client is not used to indirectly violate the Rules of Professional Conduct.

[2] Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offense carry no such implication. Traditionally, the distinction was drawn in terms of offenses involving "moral turpitude." That concept can be construed to include offenses concerning some matters of personal morality, such as adultery and comparable offenses, that have no specific connection to fitness for the practice of law. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, or breach of trust or serious interference with the administration of justice are in that category. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.

[3] A lawyer may refuse to comply with an obligation imposed by law upon a good faith belief that no valid obligation exists. The provisions of rule 4-1.2(d) concerning a good faith challenge to the validity, scope, meaning, or application of the law apply to challenges of legal regulation of the practice of law.

[4] Subdivision (d) of this rule proscribes conduct that is prejudicial to the administration of justice. Such proscription includes the prohibition against discriminatory conduct committed by a lawyer while performing duties in connection with the practice of law. The proscription extends to any characteristic or status that is not relevant to the proof of any legal or factual issue in dispute. Such conduct, when directed towards litigants, jurors, witnesses, court personnel, or other lawyers, whether based on race, ethnicity, gender, religion, national origin, disability, marital status, sexual orientation, age, socioeconomic status, employment, physical characteristic, or any other basis, subverts the administration of justice and undermines the public's confidence in our system of justice, as well as notions of equality. This subdivision does not prohibit a lawyer from representing a client as may be permitted by applicable law, such as, by way of example, representing a client accused of committing discriminatory conduct.

[5] Lawyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer's abuse of public office can suggest an inability to fulfill the professional role of attorney. The same is true of abuse of positions of private trust such as trustee, executor, administrator, guardian, or agent and officer, director, or manager of a corporation or other organization.

[6] A lawyer's obligation to respond to an inquiry by a disciplinary agency is stated in subdivision (g) and rule 3-7.6(g)(2). While response is mandatory, the lawyer may deny the charges or assert any available privilege or immunity or interpose any disability that prevents disclosure of certain matter. A response containing a proper invocation thereof is sufficient under the Rules Regulating The Florida Bar. This obligation is necessary to ensure the proper

and efficient operation of the disciplinary system.

[7] Subdivision (h) of this rule was added to make consistent the treatment of attorneys who fail to pay child support with the treatment of other professionals who fail to pay child support, in accordance with the provisions of section 61.13015, Florida Statutes. That section provides for the suspension or denial of a professional license due to delinquent child support payments after all other available remedies for the collection of child support have been exhausted. Likewise, subdivision (h) of this rule should not be used as the primary means for collecting child support, but should be used only after all other available remedies for the collection of child support have been exhausted. Before a grievance may be filed or a grievance procedure initiated under this subdivision, the court that entered the child support order must first make a finding of willful refusal to pay. The child support obligation at issue under this rule includes both domestic (Florida) and out-of-state (URESA) child support obligations, as well as arrearages.

[8] Subdivision (i) proscribes exploitation of the client and the lawyer-client relationship by means of commencement of sexual conduct. The lawyer-client relationship is grounded on mutual trust. A sexual relationship that exploits that trust compromises the lawyer-client relationship. A sexual relationship between a lawyer and a client that exists before commencement of the lawyer-client relationship does not violate this subdivision if the lawyer and client continue to engage in sexual conduct during the legal representation. For purposes of this subdivision, client means an individual, not a corporate or other non-personal entity, and lawyer refers only to the lawyer(s) engaged in the legal representation and not other members of the law firm.

MODEL RULE: 8.5, DISCIPLINARY AUTHORITY; CHOICE OF LAW

SUMMARY of Substantive Changes adopted by the ABA House of Delegates

No changes were made to the ABA Model Rule in light of the ongoing study by the ABA Commission on Multijurisdictional Practice.

How ABA Rule DIFFERS from EXISTING FLORIDA Rule

Florida's rule and commentary are substantially different than the model rule. Florida's rule leaves broader discretion to the disciplinary authority to regulate the conduct of a member of The Florida Bar regardless of where the conduct occurs.

RECOMMENDATION of Yes or No and REASONS

NO. The committee recommends no changes to Florida's rule at this time, because Florida has a special committee studying MJP that expects to make specific recommendations on this topic and this rule to The Florida Bar Board of Governors in a separate report.

FLORIDA'S Rule in LEGISLATIVE FORMAT

Not applicable.

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APPENDIX A

MINUTES OF COMMITTEE MEETINGS

THE FLORIDA BAR
SPECIAL COMMITTEE TO REVIEW THE ABA MODEL RULES 2002
MINUTES
Friday, December 6, 2002, 9:00 a.m. until 10:30 a.m.
Conference Call

Chair Adele I. Stone presided over the meeting. Six members attended:

Braccialarghe	Delegal	Smith
Chinaris	Pillans	Stone

Ethics Counsel Elizabeth Clark Tarbert also attended the meeting.

The committee took the following actions:

1. The chair proposed adopting the subcommittee reports by acclamation for those rules that received no comments and for which there appears to be no disagreement. The committee members agreed to the proposal. The chair reported being pleased overall with the reports, but would like to see more detail in analysis, particularly dealing with some of the changes to the comments.

2. The committee reviewed the subcommittee report by Andrew Berman and Skip Smith. The chair commented that the footnotes were helpful for the subcommittee reports, but are inconsistent with the other subcommittee reports for purposes of the final reports. The committee direct staff to omit the footnotes from the final report. The committee voted to adopt the report in its entirety, omitting footnotes, approving the subcommittee's recommendations regarding rules 5.1, 5.2, 5.3, 5.4, 5.5, 5.6, 5.7, 1.17, 7.1, 7.2, 7.3, 7.4, 7.5, and 7.6.

3. The committee reviewed the subcommittee report by Adele Stone and Elizabeth Tarbert. Committee.

Committee chair Stone directed that in the report on Model Rule 1.5 in paragraph 3 under "summary of substantive changes adopted" that the phrase "now 1.15(e)" be added, to denote that the Model Rule numbering scheme changed. Committee chair Stone also directed that paragraph 3 in the "recommendations" section be changed to state that the committee recommends that the portion of the funds in trust not in dispute be disbursed immediately, and that paragraph 4 in the recommendations be changed to "no," because Florida's rules adequately address the issue already.

At the chair's direction, the committee discussed a change to Model Rule 4.2 to allow communication with a represented party as authorized "by court order." The committee discussed whether or not a member of the bar would be disciplined if the bar member sought a court order permitting the lawyer to communicate with a represented person and decided that discipline would be unlikely whether or not Florida adopted an exception as authorized "by court order." Committee members commented that Florida should not encourage members to circumvent the rationale behind the rule by applying for court orders and should not risk the

possibility that a court may adopt a rule for an entire district that would affect represented persons. The committee voted 4-1 against recommending adoption of the exception of communications authorized "by court order." The chair directed that staff include a reference in the final report to the work of the Special Committee to Review Rule 4-4.2.

Regarding Rule 4.3, committee chair Stone directed staff to change paragraph 1 in the recommendations section to "yes and no" to more accurately reflect the specific recommendation that follows.

The chair directed staff to add to the report on Model Rule 8.4 a summary and recommendation about the change to the comment adopted by the ABA House of Delegates.

The committee voted to adopt the report with the above changes, approving the subcommittee's recommendations regarding rules 1.15, 4.1, 4.2, 4.3, 4.4, 8.1, 8.2, 8.3, 8.4, and 8.5.

4. The committee reviewed the report by Charles Pillans and Judge Rothschild.

Regarding Rule 1.1, the committee voted to recommend not to adopt the last sentence to paragraph 5 of the commentary.

The chair appointed a subcommittee of committee members Randolph Braccialarghe and Charles Pillans to review Rule 1.2 in light of comments disseminated prior to the meeting.

Heard a report from staff that the Disciplinary Procedures Committee is reviewing a proposal to change Rule 1-3.8 to require that sole practitioners designate a Florida Bar member who has agreed to act as inventory attorney in the event that the sole practitioner dies or becomes incapacitated. The committee voted not to change the subcommittee recommendation as to Rule 1.3, but to direct staff to include a reference in the report to the proposal under consideration by the DPC.

The committee discussed recommendations regarding rule 1.5. The committee voted to recommend adoption of the change in paragraph 6 of the ABA model rule commentary regarding contingent fee agreements in arrearages for domestic relations cases, and to recommend deletion of the similar commentary contained in Florida's Rule 4-1.5 under "terms of payment."

The committee discussed subcommittee recommendations regarding changes to Rule 1.6. Committee member Braccialarghe commented that he has been concerned that Florida's Rule 4-1.6 does not permit an exception that would allow disclosure of confidential information that a client has committed a past crime for which another person has been charged and/or convicted. The chair appointed a subcommittee of members Randolph Braccialarghe and Charles Pillans to review the rule and make recommendations to the full committee on this proposal and on possible exceptions to the rule to comply with the Rules of Professional Conduct and to comply with law or court order, and to further review the changes to the comment.

The chair raised concerns about subcommittee recommendations regarding Rule 1.14 that would delete commentary about a lawyer acting as de facto guardian in paragraph 2 of the comment.

Referred rule 1.14 to the subcommittee consisting of committee members Charles Pillans and Ron Rothschild for additional review.

Discussed Rule 2.3 regarding evaluations impliedly authorized to carry out the representation. Some committee members questioned the need for evaluations impliedly authorized and whether that would ever actually occur. Committee member Smith pointed out that in insurance defense, a lawyer representing the insured may make an evaluation for the benefit of the insurance company and that evaluation may be impliedly authorized. Referred rule 2.3 to the subcommittee consisting of committee members Randolph Braccialarghe and Charles Pillans for additional review.

The chair appointed committee members Charles Pillans and Judge Rothschild to review Rule 2.4 that was not assigned with the other rules. Directed staff to forward a copy of the prior review panel report on the rule.

Voted to approve the report with the exceptions noted above, approving the report as to rules 1.1 (with change as noted), 1.3(with addition noted), 1.4, 1.5 (with change as noted), 1.13, 2.1, and 2.2.

5. Determined that another conference call would be held to discuss the remaining reports and directed staff to try to coordinate a conference call for Friday, December 13, 2002.

6. The meeting was adjourned.

THE FLORIDA BAR
SPECIAL COMMITTEE TO REVIEW THE ABA MODEL RULES 2002
MINUTES
Friday, December 13, 2002, 2:00 p.m. until 4:15 p.m.
Conference Call

Chair Adele I. Stone presided over the meeting. Six members attended:

Braccialarghe	Delegal	Smith
Chinaris	Gaskill	Stone

Ethics Counsel Elizabeth Clark Tarbert also attended the meeting.

The committee took the following actions:

1. Approved the minutes of the December 6, 2002 conference call with the correction of a typo.

2. Discussed the January meeting at midyear. The meeting is scheduled for Friday, January 17, 2003 from 10:00 a.m. until 1:00 p.m. Directed staff to send reminder to committee members about the meeting.

3. Discussed the subcommittee report submitted by members Delegal & Gaskill. Committee member Delegal commented that he had drafted additional comments to supplement the subcommittee report that were circulated earlier today.

4. Voted 6-0 to approve the subcommittee report for Rule 3.1 with the additional commentary provided by committee member Delegal, including a recommendation to adopt new paragraph 3 in the comment.

5. Voted 6-0 to approve the subcommittee report for Rule 3.2 with the additional commentary provided by committee member Delegal.

6. Voted 6-0 to adopt the proposed ABA changes to Rule 4-3.3(a)(1).

7. Voted 6-0 to keep 4-3.3(a)(2) as is and not adopt the ABA change, commenting that the rule may be duplicative of subsection (b), but finding no harm in leaving in.

8. The chair appointed a subcommittee with members Gaskill, Delegal, Chinaris and Braccialarghe to review Rule 3.3(a)(3). The committee discussed and agreed with the existing subcommittee report recommending against adoption of "other than the testimony of a defendant in a criminal matter" in ABA Rule 3.3(a)(3). Discussed deletion of "fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client" in ABA Rule 3.3(a)(2). Discussed the issue of "if necessary"in ABA Rule 3.3(a)(3). "A lawyer may not offer testimony that the lawyer knows to be false in the form of a narrative unless so ordered by the tribunal." Committee member Braccialarghe argued against keeping portion of Florida Rule 3.3 that says "A lawyer may not offer testimony that the lawyer knows to

be false in the form of a narrative unless so ordered by the tribunal." Subcommittee report deadline is January 10, 2003. The subcommittee members agreed to attend a conference call on January 3, 2003 at 2:00 p.m.

9. Voted to adopt the subcommittee report on Rule 3.4, and voted against adding the commentary, paragraph 2, adopted in the ABA Model rule, commenting that the committee is against adding a discussion of law when the committee is not sure what the law requires in Florida and when the comment does not really add any guidance to the Florida lawyer.

10. Regarding Rule 3.5, committee members Delegal and Gaskill spoke in favor of adopting the ABA Model Rule. 3.5 (b), citing to a Hawaii disciplinary case that said post-verdict contact with jurors involves important free speech issues. Committee member Delegal made a motion to recommend deletion of Florida rules prohibiting post-trial contact with jurors (Florida 4-3.5(d)(4)) and substitute ABA Model rule 3.5(c). Passed with one dissent (Chinaris). The committee reconsidered and the chair appointed a subcommittee of members Chinaris, Gaskill, Delegal to review rule 3.5 and report to the committee by January 10, 2003.

11. Regarding Rule 3.6, voted 6-0 to adopt the ABA Model rule changes to subsection (a) regarding "lawyer knows or reasonably should know" but leaving "substantial and detrimental effect in Florida's Rule 3.6(a) intact. On motion of committee members Delegal and Stone, voted 6-0 to adopt subsections (b), (c) and (d) and the commentary in paragraphs 2, 3,4, 5, 7.

12. Regarding Rule 3.7, committee member Braccialarghe moved that the committee add an exception for non-jury hearings/trials where the court has approved the lawyer to act as both witness and advocate. Committee member Smith commented that allowing the dual role in bench trials puts too much burden on judges, and approves a lawyer using the lawyer's office in an improper way to bolster the lawyer's own testimony where the lawyer has stake in outcome. Committee chair Stone spoke against the motion, stating that the rule should apply to any trier of fact. The committee voted against the proposed exception. Committee member made a motion to approve the subcommittee report, recommending the changes to the rule in subparagraph (a) and paragraphs 1, 2, 3, 4, 5, 6 (subject to whatever committee does re requiring writing in conflicts section), & 7, and directing staff to redraft language in paragraph 2 to delete "has proper objection" while maintaining the concept of the paragraph.

Tim Chinaris left the conference call.

13. Regarding Rule 3.8, committee chair Stone appointed a subcommittee with members Braccialarghe and Delegal. Committee member Braccialarghe commented that Florida should delete portion of comment that says Florida has adopted Aba Standards of Criminal Justice. . . ."

14. Regarding Rule 3.9, committee member Delegal made a motion to keep Florida Rule 4-3.9 as is and not adopt any ABA changes. Committee member Delegal commented that legislatures and agencies serve rule-making functions as well as tribunal-type functions, and application of 3.5 in particular to legislative and agency bodies places a large burden on lawyers representing clients in rule-making functions. The motion failed for lack of a second. Committee member Smith made a motion to recommend adoption of the ABA changes, but delete the reference to

3.5 in the rule and comment. The motion passed.

Committee member Smith left the conference call.

15. Voted to approve the subcommittee report regarding Rules 6.1 through 6.5.

16. The chair directed staff to coordinate another conference call for the week of December 16-20.

THE FLORIDA BAR
SPECIAL COMMITTEE TO REVIEW THE ABA MODEL RULES 2002
MINUTES
Friday, December 19, 2002, 3:00 p.m. until 5:00 p.m.
Conference Call

Chair Adele I. Stone presided over the meeting. Seven (7) members attended:

Berman	Delegal	Smith
Braccialarghe	Pillans	Stone

Ethics Counsel Elizabeth Clark Tarbert also attended the meeting.

The committee took the following actions:

1. Deferred approval of the minutes of the December 13, 2002 conference call until the January meeting.

2. The chair referred Rule 1.7 back to a subcommittee consisting of members Chinaris, Braccialarghe, and Smith. Committee member Pillans commented that the recommendation of the subcommittee is that the changes to 1.7 not be adopted. The subcommittee pointed out that most substantive change be confirmed in writing. There are several other places in the rules where there is a new writing requirement, and the committee should be consistent.

3. The committee voted to approve the subcommittee report on the Preamble, recommending approval of the ABA changes, with the exception that the committee approved retention of the language "nothing in rules should be deemed to augment. . . ." in existing paragraph 16 and paragraph 8 in the existing Florida preamble.

4. The committee voted to approve the subcommittee report on Terminology 1.0 with the exception of the definition of "fraud." Committee member Berman volunteered to review the rules to determine where in the rules fraud is discussed so that the committee can have the information available when they make a decision on the definition.

5. Discussed the subcommittee report on Rule 1.8 with the exception of the definition of "relative" in subsection (c). Discussed the definition in the final sentence. Discussed the issue as to whether "solicitation" part of rule should be adopted. Discussed subsection (i) regarding sexual relationships with clients. Determined not to adopt the ABA Model Rule changes because of proposed changes to Florida's Rule 4-8.4(i) under consideration by The Florida Bar Disciplinary Procedures Committee. Committee member Delegal made a motion to recommend that the ABA Model Rule changes not be adopted, leaving Florida Rule 4-1.8 as is. The motion died for lack of a second. Committee member Pillans moved to approve the ABA changes except striking "or individual" in the final sentence of subsection (c) and rejecting the proposed changes to subsection (i). The motion passed.

Committee member Delegal left the conference call.

Discussed the changes to the comment to ABA Model Rule 1.8. Voted to approved the report and recommend the changes to the comment with the exception of striking "e.g., a loan or sales transaction. . .," "as when a lawyer drafting a will for a client. . .," and "e.g., sale of title insurance or investment services. . . " in paragraph 1 of the comment. A suggestion to also delete "It also applies to lawyers purchasing property from estates they represent" from paragraph 1 failed.

Committee member Braccialarghe left the conference call.

6. Discussed the subcommittee report on Rule 1.9. Committee chair Stone referred the rule back to the subcommittee (Braccialarghe and Chinaris) for further review of the commentaryd.

7. Discussed the subcommittee report on Rule1.10. Discussed deleting paragraph 3 from the report because the concept of screening did not pass the ABA House of Delegates. Committee member Smith commented that the concept of screening to resolve conflicts of interset should be discussed in Florida, even though the concept did not pass the ABA House of Delegates. Committee member Smith commented that Florida should not impute conflicts that are personal to the attorney among all lawyers of the firm. Chair Stone referred the report back to the subcommittee (Braccialarghe and Chinaris) to provide further analysis of the commentary, to include some discussion of screening in the report, and to include additional discussion regarding imputation of personal conflicts of interest.

8. Discussed the subcommittee report on Rule 1.11. The committee voted to approve the report as to substantive rules changes, but the chair referred the report back to the subcommittee (Braccialarghe and Chinaris) for discussion of the comments to the rule.

Committee member Delegal rejoined the conference call.

9. Discussed the subcommittee report on Rule 1.12. Committee member Delegal made a motion to approved the subcommittee report, with the addition of commentary that Florida Bar members who are certified mediators are subject to statutes and rules for certified mediators. The committee again noted the need to address the issue of consent in writing.

Committee member Delegal left the conference call.

10. Voted to approve the subcommittee report on Rule 1.16 as is.

11. Discussed the subcommittee report on Rule 1.18. Committee member Pillans commented that he does not disagree with the recommendation not to adopt the rule, but found the commentary, paragraphs 4&5, particularly helpful and recommended that the committee consider adopting comments 4&5 elsewhere.

12. The meeting was adjourned.

THE FLORIDA BAR
SPECIAL COMMITTEE TO REVIEW THE ABA MODEL RULES 2002
SUBCOMMITTEE MINUTES
Friday, January 3, 2003, 2:00 p.m. until 4:00 p.m.
Conference Call

Subcommittee members attending the conference call: Braccialarghe, Chinaris, Delegal, Gaskill, Smith.

Elizabeth Clark Tarbert also attended.

1. Discussed Rule 3.5. Committee member Delegal stated that the subcommittee recommendation is to adopt the ABA Model Rule change, allowing lawyers to directly contact jurors unless the juror has made known that the juror does not wish to be contacted. Committee member Chinaris stated that the court has staunchly come down on the side of protecting jurors from harassment and protecting the privacy of the jury process as a matter of public policy, and therefore has required that a court approve any juror contact. He commented that he is reluctant to try to overturn such a strong public policy. Committee member Gaskill commented that the proposed change to the rule seems to be going too far because it would overturn public policy in Florida. Committee member Chinaris made a motion to include in report that Florida public policy that court has pronounced over the years and that the committee does not recommend the ABA change. The motion was seconded and passed, 4-0.

2. Discussed Rule 3.3. Committee member Delegal made a motion to recommend the change to (a)(1) by ABA and to reject deletion of (a)(2). The motion was seconded by committee member Gaskill. The motion passed, 4-0. Committee member Delegal made a motion to recommend adoption of ABA (a)(3) except the phrase "other than testimony of defendant in criminal. . . ." The motion was seconded and passed 4-0. The subcommittee discussed subsection (b). Committee member Delegal stated that the subcommittee recommended the rule change be approved. Committee member Braccialarghe questioned whether the phrase "if necessary" was necessary. Committee member Gaskill commented that he preferred to include "if necessary" because the phrase emphasizes that disclosure is a method of last resort and seconded committee member Delegal's motion to recommend adoption of the change with the phrase "if necessary." The motion passed, 4-0. Committee member Braccialarghe made a motion as to subsection (c) to change "to" to "beyond" to extend a lawyer's duties beyond the conclusion of the proceeding as in the current Florida rule. Committee member Delegal made a motion to retain current retention of Florida subsection (b) as new Florida subsection (c), which was seconded by committee member Braccialarghe. The motion passed 4-0. The subcommittee discussed the issue that the subsection "extent of duties" does not seem to apply to the subsection on ex parte proceedings. The committee discussed whether or not the omission was intentional. Committee member Delegal made a motion to recommend that current Florida (d) be moved to become subsection (c) and current (c) be changed to say "the duties stated in this rule" so that ex parte proceedings are included in the "extent of lawyer's duties. The motion was seconded by committee member Gaskill and passed, 4-0. Committee member Delegal moved approval of changes to the ABA comment in ¶ 1, which was seconded by committee member Gaskill. The motion passed, 4-0. Committee member Delegal moved approval of the changes to ¶ 2 of the

ABA comment - move approve ABA, which was seconded by committee member Chinaris. The motion passed, 4-0. Committee member Delegal moved approval of changes in ¶s 4 and 5 which was seconded and passed, 4-0. Committee member Delegal moved approval of ABA change to new ¶ 6 in the comment, which was seconded by committee member Gaskill. The motion passed, 4-0. Committee member Delegal moved approval of the first sentence of ABA comment, new ¶ 7, and recommend against adoption of the remainder of new ¶ 7, which was seconded and passed, 4-0. Committee member Chinaris made a motion to leave relevant portions existing Florida commentary (paragraphs 4,5 were already deleted by prior vote), including Florida's paragraph 6 under "false evidence," except the first part of the first sentence "except in the defense of a criminally accused". The motion was seconded and passed, 4-0. Committee member Delegal made a motion not to adopt ABA changes in new paragraph [9]. The motion was not seconded. Committee member Chinaris move approve ABA 9 as recommended, which was seconded by committee member Delegal and passed, 4-0. Braccialarghe made a motion to keep Florida's current paragraphs 13-26 intact and move these paragraphs immediately below new ABA paragraph 9, becoming new paragraphs 10-23 of the comment, and to delete paragraphs 7, 8, 9, and 10 (current paragraphs 7 & 8 of Florida) as ABA recommended. The motion was seconded and passed. Committee member Braccialarghe moved deletion of Florida paragraph 9, which was seconded by committee member Gaskill. The committee discussed that the paragraph was adopted in accordance with the recommendation of a prior Florida committee reviewing the rule and some committee members expressed reluctance to change part of the rule that Florida had specifically adopted.

Committee member Smith joined the conference call.

The motion to delete Florida ¶ 9 failed, 2-3.

Committee member Chinaris made a motion to instead leave paragraph 9 as is, but point out that the paragraph should be reviewed, because the committee fails to see how the commentary gives meaningful guidance or guidance consistent with the rule, because it seems to suggest that an attorney can represent to the court that a defendant's name under which the person is charged is accurate when the criminal defendant gave a false name to authorities and that false name is the name under which the defendant is charged. The motion was seconded by Delegal and passed, 5-0.

Committee member Delegal made a motion to approve ABA changes to new paragraph 10, which was seconded by committee member Gaskill. Committee member Braccialarghe commented that Florida's existing commentary (just approved) really addresses this issue and the change is therefore not necessary. Committee member Delegal withdrew his motion and seconded committee member Braccialarghe's motion to keep the paragraph as is. The motion passed, 5-0.

Committee member Delegal made a motion not to adopt ABA ¶ 12 of the comment, which was seconded and passed, 5-0.

Committee member Delegal made a motion to delete ¶ 12 as recommended by the ABA under "constitutional requirements" (current Florida p. 11). The motion was seconded by committee

member Braccialarghe and passed, 5-0.

Committee member Delegal made a motion not to adopt ABA ¶13 because it is inconsistent with Florida's rule extending a lawyer's duties "beyond the conclusion" of a court proceeding. Committee member Braccialarghe seconded the motion, which passed, 5-0.

Committee Braccialarghe made a motion not to adopt ABA new ¶15 regarding withdrawal, which was seconded by committee member Gaskill. The motion passed, 5-0.

Committee member Gaskill left the conference call.

3. Discussed Rule 3.8. Committee member Delegal commented that the changes are a matter of policy. He believes that prosecutors should have additional requirements in (e), while other committee members do not. Committee member Braccialarghe commented that he agrees with most of the changes philosophically, but the changes will create issues for prosecutors and it appears that Florida has specifically rejected some of the changes previously.

Committee member Delegal moved adoption of ABA current subsection (b), which was seconded by committee member Braccialarghe. The motion passed, 4-0.

Committee member Delegal made a motion to adopt ABA current subsection (e). Committee member Braccialarghe spoke against adoption of subsection (e)(3); in some cases, it would be legitimate fora prosecutor to speak to a criminal defense attorney, even though other alternatives available, particularly where the substance of the attorney's testimony would not even relate to the representation. Although the testimony may be cumulative, the other witnesses may be less reliable than the attorney. Committee member Braccialarghe therefore spoke in favor of deleting (e)(3). Committee member Smith spoke against adoption of the subsection, stating that the rule goes too far and appears to be a self-protective rule to keep lawyers from being harassed. Committee member Delegal spoke in favor of the motion, stating that the rule protects clients, because if lawyers are afraid they are going to be subpoenaed to the grand jury all the time,they will stop representing clients. Committee member Delegal accepted committee member Braccialarghe's friendly amendment to recommend adoption of (e)(1) & (2) but not (3). The motion was seconded and passed, 4-0.

Committee member Smith made a motion not to adopt ABA subsection (f), because it is duplicative of the trial publicity rule as to persons over whom prosecutors have supervisory authority and not enforceable as to persons over whom prosecutors have no supervisory authority. The motion was seconded by committee member Braccialarghe. The motion passed, 4-0.

Committee member Braccialarghe made a motion to delete in Florida's comment ¶ 1 that Florida has adopted the ABA Standards of Criminal Justice. . . . and the following sentence, because Florida has not and the inclusion of the paragraph was an error in adopting the ABA Model Rule. The motion was seconded by committee member Smith and passed, 4-0.

Committee member Smith moved adoption of the ABA recommendation to delete references to

Rule 3.3(d) in the comment, ¶ 1, stating that the reporter's notes indicated that grand jury proceedings are not ex parte proceedings. Committee member Braccialarghe spoke against the motion, commenting that a grand jury seems to be an ex parte proceeding, and the purpose of this comment is to make sure that prosecutors know they have a duty to present both sides. Committee member Smith withdrew the motion. Committee member Smith then made a motion not to adopt the ABA recommendation to delete references to 3.3(d) in the comment, ¶ 1. Committee member Braccialarghe seconded the motion, which passed, 4-0.

A motion was made and seconded to adopt the ABA changes to ¶ 2 except for the first sentence and the word "accordingly." The motion passed, 4-0.

A motion was made not to recommend adoption of ABA commentary ¶ 5 because it discusses subsection (f) of the rule that the subcommittee recommends against adopting. The motion was seconded by committee member Smith and passed, 4-0.

A motion was made not to recommend adoption of ABA commentary, ¶ 6 because the subcommittee recommended against adopting subsection (f). The motion was seconded by committee member Smith and passed, 4-0.

Committee member Delegal left the conference call.

Chinaris made a motion that the subcommittee hold a second, separate phone call to discuss proposed changes to the other rules, which passed. The subcommittee members agreed to meet by conference call on Tuesday, January 7, 2003 at 2:30 p.m.

The meeting was adjourned.

THE FLORIDA BAR
SPECIAL COMMITTEE TO REVIEW THE ABA MODEL RULES 2002
SUBCOMMITTEE MINUTES
Tuesday, January 7, 2003, 2:30 p.m. until 4:30 p.m.
Conference Call

Committee members: Braccialarghe, Pillans, and Smith and Florida Bar staff Elizabeth Clark Tarbert attended the conference call.

1. The subcommittee discussed Rule 1.2. Committee member Pillans reiterated his written comments to the subcommittee that the issue raised at the last committee meeting was whether the changes to the rule imposed new obligations on a lawyer regarding withdrawing documents that are false. He commented that the same obligation appears in Florida Rule 4-4.1 and the comment to Florida Rule 4-1.6. Committee member Braccialarghe commented that he agreed with committee member Pillans' written comments on Rule 1.2. Committee members Pillans and Braccialarghe agreed recommend adopting the changes to new ¶ 10 in the comment to 1.2.

2. The subcommittee discussed Rule 1.6, regarding confidentiality. Committee member Pillans commented that the exception "to secure legal advice about the lawyer's compliance with these Rules" is the covered by the exception to the current Florida rule "to comply with the Rules of Professional Conduct." He further commented that the exception "to comply with other law or court order" already is covered by subsection (d) in Florida's Rule 4-1.6(d) as to the court order, and in other law in the comment, which says that whether legal duty may supersede a lawyer's ethical obligation under the rule is outside the scope of the rules under "Disclosures otherwise required or permitted." Committee members Pillans and Braccialarghe agreed that the subcommittee takes no strong position one way or other and asks for the full committee to vote on the issue of whether the committee should recommend adoption of the exception "to comply with other law." Committee member Braccialarghe also wants the full committee to consider his proposal of an exception to allow a lawyer to disclose that a client committed a crime for which another person has been charged or convicted.

3. The subcommittee discussed Rule 1.14 regarding diminished capacity. Committee member Pillans commented that the full committee raised a concern regarding of the deletion of a portion of the existing comment regarding a lawyer acting as de facto guardian. Committee member Pillans commented that the new commentary provides more specific guidance on what lawyers should and should not do that is superior to the old "de facto" guardian. The subcommittee therefore continues to recommend that the ABA changes be adopted.

4. The subcommittee discussed Rule 2.3 regarding evaluations to third parties. Committee member Pillans commented that the concern raised at the full committee meeting was allowing lawyers discretion to decide to provide an evaluation for use by third parties with the client's prior consent. Committee member Braccialarghe commented that he prefers current 4-2.3(b) - the change to the ABA Rule seems to change the timing and puts the cart before the horse in allowing the lawyer to make an evaluation for third persons without discussion with the client of the potential consequences and what information the lawyer might have to disclose on the lawyer's limitations. The point of the existing rule 2.3 is that if a client tells you to perform an

evaluation for third persons, you must tell the client that you must disclose the parameters/limitations on the evaluation. The changes to the ABA rule allow the lawyer to go ahead and perform an evaluation without telling the client, including informing the client that the lawyer will be disclosing any limitations the lawyer is working under. Committee member Pillans recommended the full committee address this issue. The subcommittee members agreed.

5. The subcommittee discussed Rule 2.4 regarding lawyers serving as third party neutrals. Committee member Pillans commented that the issue raised by the full committee was that there are statutes and rules that apply to certified mediators. There is a benefit to having the rule, because lawyers serve as third-party neutrals in many situations other than as certified mediators, but commentary should be added that says that certified mediators are subject to other rules and should follow those rules or statutes..

6. The conference call was adjourned.

THE FLORIDA BAR
SPECIAL COMMITTEE TO REVIEW THE ABA MODEL RULES 2002
SUBCOMMITTEE MINUTES
Friday, January 10, 2003, 1:30 p.m. until 3:15 p.m.
Conference Call

Committee members Braccialarghe, Chinaris, and Smith and Florida Bar staff Elizabeth Clark Tarbert attended the conference call.

1. The subcommittee discussed Rule 1.7. Committee member Smith commented that he liked the ABA changes to the rule and found the structure to be more helpful. Committee member Chinaris stated that the old standard of "may be materially limited" may be too speculative, but "significant risk" may be too far the other way. He added that he was concerned about changing the rule when there is quite a bit of case law in Florida dealing with the existing rule, and does not want to make changes too lightly when there has been quite a bit of interpretation that could change if the rule changes. Committee member Braccialarghe stated that he read the change as making it more likely that the lawyer will represent one client when the representation could affect another client, making the rule less protective of clients. Committee member Smith commented that Florida courts are too prone to disqualify, so if the rule is changed, it more specifically defines harm seeking to prevent. Committee member Chinaris proposed considering something between the two extremes. Committee member Smith responded that the restatement uses the standard of "substantial risk" which may be a better standard. Committee member Braccialarghe commented that substantial would be better than significant. He added that new ABA subsection (b) has a more relaxed standard as to conflicts waivers. Committee member Chinaris commented that a more relaxed standard in the rule is particularly troubling in light of the ABA 's deletion of the portion of the comment that says if a disinterested lawyer would conclude that the client should not consent to the conflict, then an unwaivable conflict exists. If the two could be tied together using the new rule, but retaining the old comment, the new structure wouldn't create a tone of more permissiveness. Committee member Chinaris commented that new ABA subsection (b)(3) could be read to preclude representation of a client that the lawyer represents in a totally unrelated matter. The subcommittee agreed that they did not believe that interpretation to be the ABA's intent, and discussed re-drafting that section to make the intent more clear.

The subcommittee discussed the new requirement that conflict waivers be confirmed in writing. Committee member Smith commented that requiring confirmation in writing is fine, particularly in light of the fact that the client does not have to sign the waiver; the lawyer can make written confirmation through a letter. Committee member Braccialarghe raised the issue that the Board of Governors may reject the requirement that conflict waivers be "confirmed in writing." Committee member Chinaris commented that the committee should make a strong statement that the recommendations flow from adoption of "confirmed in writing." Committee member Smith commented that the writing seems to protect the lawyer more than the client, and he is not sure that it is unethical for lawyer not to be smart enough to protect self. He added that he sees the writing as being separate issue from the informed consent.

Committee member Smith commented that he does not like the use of "involves" in subsection (a); the term should be "involves or would involve." He added that he also doesn't like use of "concurrent." The subcommittee discussed instead stating "conflict of interests between two current clients" and "conflict of interest involving at least one current client," but was not satisfied that either conveyed the entire concept of the rule. The subcommittee agreed that the following best expressed the concept of the rule: "Except as provided in paragraph (b), a lawyer shall not represent a client if: (1)(2)(b)." Voted to approved the change. The subcommittee also voted to change "significant" to "substantial" and to delete "concurrent" in subsection (b). The subcommittee voted to clarify (b)(3) . The subcommittee voted that "confirmed in writing" should be adopted and should be emphasized as to importance in the context of this rule, because it strikes a balance between requiring a client to sign agreement and not leaving the consent memorialized. In addition, the requirement promotes economy in the discipline system, because proving what occurred costs resources in the discipline system. Directed staff to draft changes to the rule.

Discussed the comment to Rule 1.7. As to ¶1, committee member Smith commented that the new commentary is helpful and sets up a structure for the entire comment, but believes the word "concurrent" and the reference to rule 1.18 should be deleted.

Regarding ¶2, Smith commented that the additions are not harmful, although perhaps not particularly helpful. Committee member Chinaris agreed that the changes are not particularly harmful or helpful. The subcommittee agreed against recommending adoption of ¶2.

Committee member Braccialarghe commented that new ¶ 7 is problematic. Also, deletions of existing commentary are problematic because deletions lead to lawyers believing conduct previously discussed as prohibited in the commentary is now permissible. Committee member Braccialarghe made a motion that if the ABA model rule is adopted, the committee recommends retaining Florida's comment and not adopting the new ABA comment. Committee member Smith proposed a friendly amendment to committee member Braccialarghe's motion to not adopt the ABA commentary, except for ¶ 1, which should be adopted, while retaining all of Florida's ¶1 as a separate ¶. The friendly amendment was accepted. Committee member Chinaris proposed a friendly amendment to the motion to adopt ¶ 20 of the new ABA model rule comment, which was accepted. The motion, including friendly amendments, passed.

2. The subcommittee discussed ABA Model Rule 1.9. Committee member Chinaris commented that the new ABA rule and commentary blur the separate issues of loyalty and confidential information. Lawyers owe a duty of loyalty to former clients, but only as to the matter in which they actually represented the former client. Lawyers owe a separate duty of confidentiality as to all information related to the former representation. The ABA's explanation of substantial relationship, which should apply to the loyalty issue, seems to turn on whether or not the lawyer has confidential information, which is a separate question. Committee Smith commented that he did not see a problem with blurring the issues. The question of loyalty seems to be geared toward not attacking the attorney's own work product or switching sides in the same matter, and concern over use of confidential information. He added that some courts find that any relationship, whether substantial or not, is enough to disqualify. Committee member Chinaris commented that he would drop "otherwise" in ¶3 of the comment. HE further commented that

he argued against the definition of "generally known" just adopted in the current Florida Rule 4-1.9. Committee member Smith commented that Florida's definition does not encompass sources of information from which lawyers normally draw - informal interviews, media, gossip, etc. He added that he would like to see the subcommittee define substantial relationship better than the ABA does and not confuse it with the confidentiality in the comment, as appears in ¶ 3 of the ABA comment. Also, the subcommittee should define "generally known" in the comment rather than the rule. Committee member Chinaris commented that "substantial relationship" can be defined in the comment as the limited duty of loyalty to client not oppose the attorney's own work or take a position opposed to the client in the same matter.

Committee member Braccialarghe left the meeting.

Committee member Chinaris commented that perhaps the best tact is to take the current comment and add examples of what "substantially related" is not. E.g., "substantially related" is not just the same type of case, but the legal and factual issues must be related. Committee member Smith commented that the discussion brought him back to the position of leaving well enough alone. Committee member Smith made a motion to adopt ¶ 3 and split the two concepts of loyalty and confidential information into separate paragraphs, plus add a definition of generally known in the comment, and delete the current definition from Florida Rule 4-1.9. Subcommittee Chinaris agreed to draft a definition of "generally known" for an additional ¶ in the comment that wo7uld would make clear the definition includes something widely reported in the media. Directed staff to redraft ¶ 3 for full committee.

THE FLORIDA BAR
SPECIAL COMMITTEE TO REVIEW THE ABA MODEL RULES 2002
MINUTES
Friday, January 17, 2003, 10:00 a.m. until 1:00 p.m.

Chair Adele I. Stone presided over the meeting, which was held in conjunction with The Florida Bar's Midyear Meeting at the Hyatt Regency in Miami. Seven members attended:

Berman	Delegal	Smith
Braccialarghe	Pillans	Stone
Chinaris		

Florida Bar staff John Anthony Boggs, Elizabeth Clark Tarbert, and Kathy Bible also attended the meeting.

The committee took the following actions:

1. Approved the minutes of the December 13, 2002 conference call, the December 19, 2002 conference call, the January 3, 2003 subcommittee conference call, the January 7, 2003 subcommittee conference call, and the January 10, 2003 subcommittee conference call.

2. Discussed the subcommittee report on Rule 1.2. Committee chair Stone commented that the subcommittee needs to redraft the report to address changes to 1.2(c) and the changes to the comments.

The committee agreed that Florida's standard of "reasonably should know" in 1.2(d) should be retained.

The committee agreed that the subcommittee report should reference the changes to 4-1.2 proposed by the Unbundled Legal Services Special Committee that are currently pending before the Supreme Court of Florida.

The committee agreed that the subcommittee report recommendation should be changed to an unqualified "yes" including deletion of subsection (e) of Florida's rule, because subsection (e) appears not only in the comment, but also in the changes to Rule 1.4. However, in the recommendation for changes to Florida's Rule 4-1.4(a)(5), the committee agreed that the standard of "knows or reasonably should know" should be substituted for "knows."

Discussed the comment to Rule1.2. Regarding ¶ 1 of the comment, the committee agreed not to adopt the ABA changes deleting portions of the paragraph stating the following:

> Within those limits, a client also has a right to consult with the lawyer about the means to be used in pursuing those objectives. At the same time, a lawyer is not required to pursue objectives or employ means simply because a client may wish that the lawyer do so. A clear distinction between objectives and means sometimes cannot be drawn, and in many cases the client-lawyer relationship

> partakes of a joint undertaking. In questions of means, the lawyer should assume responsibility for technical and legal tactical issues but should defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected. Law defining the lawyer's scope of authority in litigation varies among jurisdictions.

The committee agreed that new language included in ¶ 1 should be recommended for adoption, but that existing language regarding decisions to be made by client and lawyer should be retained. The committee discussed that lawyers have relied on this language in the commentary to make certain decisions, such as whether or not to agree to a continuance without objection, without obtaining the client's consent. To remove the language may hamper lawyers from making decisions that have traditionally been the lawyer's province.

Regarding ¶ 2, the committee agreed that the new language in the first sentence and last 3 sentences should be adopted, but the remaining language should not be adopted. Although the committee believes the language accurately describes what normally occurs, the new language in the ABA Model Rule comment, like the deletion of the language in ¶ 1, would lead lawyers to believe that the lawyer is not able to make decisions in tactical matters, which has not been the case in the past. The language recommended to be adopted is as follows:

> On occasion, however, a lawyer and a client may disagree about the means to be used to accomplish the client's objectives. ~~Clients normally defer to the special knowledge and skill of their lawyer with respect to the means to be used to accomplish their objectives, particularly with respect to technical, legal and tactical matters. Conversely, lawyers usually defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected. Because of the varied nature of the matters about which a lawyer and client might disagree and because the actions in question may implicate the interests of a tribunal or other persons, this Rule does not prescribe how such disagreements are to be resolved. Other law, however, may be applicable and should be consulted by the lawyer.~~ The lawyer should ~~also~~ consult with the client and seek a mutually acceptable resolution of the disagreement. If such efforts are unavailing and the lawyer has a fundamental disagreement with the client, the lawyer may withdraw from the representation. See Rule 1.16(b)(4). Conversely, the client may resolve the disagreement by discharging the lawyer. See Rule 1.16(a)(3).

The committee agreed that the changes to ¶s 3, 4, 6 (including title), 7, 10, 12, and 13 should be adopted. The committee agreed that ¶ 8 in Florida's rule should be retained as is, with the exception of replacing the word "thus" with "for example." The committee agreed that ¶9 in Florida's rule should be retained as is.

3. Discussed the subcommittee report on Rule 1.6. The committee first discussed the change to the ABA rule creating an exception to allow disclosure in subsection (b)(4) "to comply with other law or a court order." Committee member Pillans commented that the concept of disclosure "to comply with court order" is already covered by current subsection (d) in Florida's

Rule 4-1.6, and the concept of "to comply with other law" is covered in Florida's comment, which states as follows:

> In addition to these provisions, a lawyer may be obligated or permitted by other provisions of law to give information about a client. Whether another provision of law supersedes rule 4-1.6 is a matter of interpretation beyond the scope of these rules, but a presumption should exist against such a supersession.

Regarding subsection 4-1.6(a) of Florida's rule, the committee agreed to adopt "informed consent" in place of "consent after consultation" to conform with other recommended changes elsewhere in the rules, but agreed that no other change to 4-1.6(a) would be recommended.

Regarding 4-1.6(b) of Florida's rule, the committee agreed not to recommend changes to Florida's rule, because Florida's rule currently provides more protection to the public in making certain disclosures mandatory.

Regarding 4-1.6(c), the committee agreed not to recommend changes to Florida's rule as in ABA subsection (b), because the ABA changes are already covered in Florida's subsection (c).

The committee discussed adding subsection to Florida's rule reflecting ABA Model Rule 1.6(b)(4) to permit disclosure "to comply with court order." The committee voted against adopting this provision, because the ABA rule is permissive disclosure, while current Florida Rule 4-1.6(d) mandates disclosure to comply with court order, although it allows an attorney to appeal the court order.

Committee member Smith made a motion to add a subsection to Florida's rule to reflect ABA Model Rule 1.6(b)(4) to permit disclosure "to comply with other law." The motion was seconded by committee member Delegal. Committee member Smith commented that the rules should not create a conflict by making it unethical to abide by a law requiring disclosure, and that requiring lawyers not to disclose information required by law would encroach on legislative function. Committee member Delegal commented that the Supreme Court of Florida has exclusive jurisdiction over the practice of law, and the separation of powers issue that arises is whether or not the legislature encroaches on the judicial function by passing laws requiring disclosure of information that the court has ruled is confidential. Committee member Berman spoke against the motion, commenting that changing Florida's rule would give the legislature an easy way to obliterate confidentiality. Committee member Braccialarghe spoke in favor of the motion, stating that he is more concerned about putting lawyers on the line where the Rules of Professional Conduct conflict with the law. The motion failed 2-4.

Committee member Braccialarghe made a motion to add a provision to Florida's rule to require disclosure of confidential information when a client or other person admits to having committed a crime for which another person has been charged. He commented that there are other situations in which disclosure is permitted, such as for a lawyer to make a civil claim against the client for fees, which have far less relationship to the proper functioning of the courts and the justice system than making sure that the innocent are not convicted. The motion died for lack of a second.

Committee chair Stone directed that the subcommittee review the changes to the comment to make specific recommendations to the full committee on whether or not changes to the comment should be adopted.

Committee chair Stone directed staff to circulate copies of the changes to the rules proposed by the Unbundled Legal Services Special Committee so that the committee can review the proposed changes to determine if they conflict with any recommendations of this committee.

4. Discussed the subcommittee report on Rule 1.7. Approved the rule as re-written by the subcommittee, except for subsection (b)(3). Approved changes to subsection (b)(3) to read "the representation does not involve the assertion of a position adverse to another client when the lawyer represents both clients in the same proceeding before a tribunal." Approved the changes to the comment as recommended by the subcommittee.

5. Approved the subcommittee report on Rule 1.14.

6. Approved the subcommittee report on Rule 2.4.

7. Discussed the future meeting schedule. Agreed to meet by conference call, dated to be determined, in February. Agreed tentatively to meet in person in Tallahassee on March 7, 2003, in the event the draft of the final report is not completed by that time.

THE FLORIDA BAR
SPECIAL COMMITTEE TO REVIEW THE ABA MODEL RULES 2002
MINUTES
Tuesday, February 18, 2003, 3:00 p.m. until 5:00 p.m.

Chair Adele I. Stone presided over the meeting, which was held by conference call. Five members attended:

Braccialarghe	Pillans	Stone (C)
Chinaris	Smith	

Florida Bar staff Elizabeth Clark Tarbert also attended the meeting.

The committee took the following actions:

1. The committee discussed the revisions to the subcommittee report on Rule 1.2, adding information about the commentary to 1.2. Committee chair Stone commented that the summary of changes adopted by the ABA should make reference to numerous additional comments added, although the report does not have to specify the exact changes, just that there were minor changes to the comments in ¶s 4 and 12, and that new paragraphs 7 and 13 were added with some commentary on their meaning. The committee directed staff to make the changes to the report. Committee chair Stone commented that the report should reference in the summary of changes that subdivision (c) was changed. Committee member Pillans volunteered to rewrite the first paragraph in summary to reference that and other changes. Committee chair Stone commented that where the report references a new ABA comment, the paragraph number should be added and directed staff to make the change. Committee chair Stone commented that the report should reference the Unbundled Special Committee changes to Rule 4-1.2 that are pending at the Supreme Court, and that the committee does not see any real inconsistencies between the concepts adopted by the ABA and the proposed rules submitted by the Unbundled Special Committee. The committee also directed staff to revise the report in the recommendations section that the committee recommends against deleting the language in ¶ 1 of the comment regarding tactical decisions for the lawyer to make and decisions for the client to make regarding third parties and costs. The committee also directed staff to strike out the word "also" in ¶2 of the comment. The committee directed staff to add the reference to the report. The voted to adopt the report as revised.

2. The committee discussed the changes to the report on Rule 1.6. Committee chair Stone commented that the recommendations on changes to the comments are not in the report. Committee member Pillans responded that the subcommittee recommended against adopting changes to the rule, so the subcommittee did not see a need to adopt changes to comment. Committee chair Stone requested that committee members Pillans and Smith rewrite the report as to recommendations on the changes to the comment. The committee directed staff to redraft number 4 in the "differs" and "recommendations" sections of the report to clarify the differences between the new ABA exceptions of "authorized by court order" and "authorized by other law."

3. Discussed the subcommittee report on Rule 1.7. The committee had previously adopted the

subcommittee's proposed changes to the rule. The report reflects the changes to the rule. The committee discussed whether or not any of the ABA changes to the commentary should be adopted. The subcommittee members reported that the ABA deleted references and examples in the commentary that provided helpful guidance, and substituted commentary that does not provide helpful guidance. The committee voted to approve the report on Rule 1.7.

4. Discussed the subcommittee report on Rule 1.8. Directed staff to revise the report to reflect that the committee recommended against adoption of some specific examples listed in ¶ 1 of the commentary. Directed staff to revise the report to add to the recommendations section that the committee recommends adopting new ¶ 20 of the report, except for the final sentence that deals with subdivision (j) of the rule, that the committee recommended against adopting. Voted to approve the report on 1.8 as revised.

5. Discussed the subcommittee report on rule 1.9. Committee chair Stone commented that, although the subcommittee made specific recommendations on changes to the rule, the report appears to be unchanged. The committee voted to approve the recommendations of the subcommittee on changes to the rule. Subcommittee members Chinaris and Braccialarghe volunteered to revise the report to reflect the committee's decisions on the rule amendments. Committee is ok with changes to the rule as recommended by the subcommittee. The committee agreed that changes to ¶ 9 of the ABA rule should be adopted, with the exception of references to "confirmed in writing" and the "effectiveness of an advance waiver," and adding "former" before client. The paragraph as revised would read as follows:

> ~~[12]~~ [9] ~~Disqualification from subsequent representation is~~ The provisions of this Rule are for the protection of former clients and can be waived ~~by them. A waiver is effective only if there is disclosure of the circumstances, including the lawyer's intended role in behalf of the new client~~ if the former client gives informed consent, ~~which consent must be confirmed in writing under paragraphs (a) and (b)~~. See ~~Rule 1.0(e)~~ terminology. ~~[13]~~ With regard to an opposing party's raising a question of conflict of interest ~~the effectiveness of an advance waiver~~, see ~~Comment [22]~~ comment to Rule 1.7. With regard to disqualification of a firm with which a lawyer is or was formerly associated, see Rule 1.10.

6. Discussed the subcommittee report on Rule 1.10. Committee discussed subdivision (a), exception for personal interest of lawyer. Committee agreed that the change in subdivision (a) of the ABA model rule should be adopted regarding an exception to the imputation rule if the conflict is based on a personal interest of the lawyer and another lawyer in the firm's representation would not be materially limited. The committee discussed the ambiguity between subdivision (a) and (b) of 4-1.10. The committee agreed to change subdivision (a) to state "prohibited from doing so by rules 4-1.7, 4-1.8, 4-1.9, except as provided elsewhere in this rule" to address the ambiguity. The committee agreed to recommend adopting subdivision (d) of the ABA rule regarding disqualification of government lawyers. The subcommittee members volunteered to revise the subcommittee report regarding the commentary to come back to committee. Committee member Smith commented that he believes new ¶s 3 & 4 should be adopted. The committee agreed that ¶ 8 of the ABA comment should be adopted to address imputation of conflicts in Rule1.8. The committee agreed to recommend against deletion of the

examples in ¶ 1 of the comment.

7. Briefly discussed the subcommittee report on Rule 1.11. The subcommittee volunteered to redraft the report to reflect changes to the comment.

8. Agreed to cancel the in-person meeting on March 7, 2003.

9. The meeting was adjourned.

THE FLORIDA BAR
SPECIAL COMMITTEE TO REVIEW THE ABA MODEL RULES 2002
MINUTES
Tuesday, February 25, 2003, 3:00 p.m. until 5:00 p.m.

Chair Adele I. Stone presided over the meeting, which was held by conference call. Six members attended:

Braccialarghe	Delegal	Smith
Chinaris	Pillans	Stone (C)

Florida Bar staff Elizabeth Clark Tarbert also attended the meeting.

The committee took the following actions:

1. Approved the minutes of the January 17, 200 meeting and the February 18, 2003 conference call with the following revision in the January 17, 2003 minutes: deletion of the word "also" in paragraph 2 of the commentary of 1.2 and adding language regarding Rule 1.2, comment, paragraph 1 recommending retaining language that the ABA deleted about division of decision-making between attorney and client.

2. The committee approved the revised subcommittee report for Rule 1. 2.

3. Discussed the revised subcommittee report on Rule 1.6 regarding commentary. Directed staff to revise summary section and reformat the report to match the other subcommittee reports. The committee approved the subcommittee report as revised.

4. Discussed the subcommittee report on Rule 1.8. The committee approved the report with revisions in concept. Committee chair Stone directed staff to change the summary to mention comment changes, which are explained later. Directed staff to revise the report to indicate in # 3 in the recommendations section that the committee recommended deleting the word "individual" from subdivision (c) of the ABA rule. The committee agreed to adopt the reference to Rule 4-5.7 in ¶ 1 of the comment. The committee agreed to strike specific examples of giving a loan to a client for whom an attorney is drafting a will and an attorney purchasing property from estates they represent in ¶ 1 of the comment. The committee approved the report as revised.

5. Discussed the subcommittee report on Rule 1.9. The committee previously approved the recommendations on rules changes, but requested committee member Chinaris to make change to the report. The committee chair directed staff to circulate the report once completed.

6. Discussed the subcommittee report on Rule 1.10. Directed committee member Chinaris to make the appropriate changes to the report and directed staff to circulate the report once completed.

Committee member Delegal joined conference call.

7. The committee approved the subcommittee report on Rule 1.11, but directed staff to reformat the report to match other subcommittee reports.

8. The committee approved the subcommittee report on Rule 3.3.

9. The committee discussed the subcommittee report on Rule 2.3. The committee agreed to recommend leaving the existing Florida rule as is except changing "undertake" to "provide" and "gives informed consent" in place of "consents after consultation" in subsection (a). Discussed changing "required" to "authorized" in subsection (c). Determined that the amendment changes the meaning of the rule - from required as by a third party to "authorized" meaning "authorized" by a client. The committee agreed not to recommend changing "required" to "authorized." Committee agreed not to adopt changes to ¶s 1 and 5 of the comment. The committee agreed to delete ¶ 2 of the existing Florida comment. The committee agreed to recommend adopting the last sentence to ¶ 4 of the comment. The committee directed staff to redraft the report with the changes above.

10. Discussed the subcommittee report on Rule 3.5. Directed staff to add to the report that a minority of the committee is of opinion that the rule should be changed to allow juror conduct if rules of court are changed to allow post-verdict contact, finding that it is not inherently unethical to contact jurors post-verdict. Committee chair Stone directed staff to add to the report that comments consistent with rule were adopted by the ABA, but since the committee recommends against adoption of the rule changes, the committee recommends against adoption of comments. The committee approved the report with the changes.

11. Approved the subcommittee report on Rule 3.8.

12. Committee chair Stone directed staff to reformat all reports so that they are numbered consistently between the summary, differences in the ABA and Florida rules, and recommendations sections.

13. The meeting was adjourned.

THE FLORIDA BAR
SPECIAL COMMITTEE TO REVIEW THE ABA MODEL RULES 2002
MINUTES

Wednesday, September 4, 2003, 2:00 p.m. until 5:00 p.m.

Chair Adele I. Stone presided over the meeting, which was held at the Tampa Airport Marriott. Five members attended:

Braccialarghe	Delegal	Stone (C)
Chinaris	Smith	

Florida Bar staff Elizabeth Clark Tarbert also attended the meeting.

The committee took the following actions:

1. Approved the minutes of the February 25, 2003 conference call.

2. Discussed the comments received by Florida Bar members on the interim report and additional issues raised by committee members after reviewing the comments and interim report. Determined that the comments would be discussed in the order of the rules, rather than by the person commenting or committee member requesting reconsideration.

Preamble ¶ 6 at lines 30-31: Florida Bar member Trawick commented, opposing the requirement that lawyers seek improvement and access to legal system. The committee voted to retain the original recommendation and report.

Preamble ¶ 6 at lines 34-36: Florida Bar member Trawick commented, opposing the addition of language regarding a lawyer furthering the public's understanding of the justice system. The committee voted to retain the original recommendation and report.

Preamble, lines 6, 50, and 62: committee member Delegal requested that the committee consider striking the term "zealous" because the term sends an inappropriate message to bar members. The committee voted to retain the term in lines 6 and 50 because the term pre-exists the changes to the ABA Model Rules, but to strike the term from line 62, because it is redundant.

Preamble, lines 142-145: Florida Bar member Trawick commented, opposing the deletion of the last paragraph of preamble before terminology regarding reexamination of a lawyer's use of discretion under the confidentiality rule. The committee voted to retain the original recommendation and report.

Terminology, line 163: a Professional Ethics Committee member requested that the word "consent" in terminology in "informed consent" be capitalized. The committee voted to retain the original recommendation and report to be stylistically consistent with the rest of the terminology and rules.

Terminology, lines 202-212: committee member Chinaris suggested that the definition comes directly from the comment to Rule 4-1.10, lines 1735-1748, so the comment to Rule 4-1.10, lines 1735-1748 should be stricken to avoid redundancy. The committee voted to make the change.

Florida Bar member Trawick commented, objecting to all changes requiring that consent be confirmed in writing that appears in numerous places in the rules. The committee voted to retain the original recommendation and report.

Rule 4-1.2(a): committee member Chinaris suggested that the committee add the word "reasonably" before the word "consult" to line 325 to be consistent with proposed changes to Rule 4-1.4(a)(2). The committee voted to adopt this change.

Rule 4-1.2(c), lines 334-336: Florida Bar member Trawick commented, objecting to a change limiting the lawyer's right to contract in limiting the scope of representation. The committee voted to retain the original recommendation and report.

Rule 4-1.4(a)(2), lines 482-483: Florida Bar member Trawick commented, objecting to change regarding the lawyer's ability to decide tactical issues. The committee voted to retain the original recommendation and report.

Rule 4-1.6, comment, lines 991 and 993: committee member Chinaris suggested that the committee change references to Rule 4-1.9(c) to Rule 4-1.9(b) to accurately reflect Florida rule numbering. The committee voted to adopt this change.

Rule 4-1.7(a)(2), lines 1145-1147: Florida Bar member Trawick commented, objecting to references to "third person." The committee voted to retain the original recommendation and report, noting that the references to "third person" predated the change to the model rules.

Rule 4-1.8(c), lines 1326: Florida Bar member Trawick commented, suggesting that the term "familial" be deleted. The committee voted to retain the original recommendation and report.

Rule 4-1.8(e): the chair of a committee appointed by the Trial Lawyers Section to review the interim report suggested that the committee consider a change to Rule 4-1.8(e) to reconcile the rule with the case of *Florida Bar v. Taylor*, in which the Supreme Court of Florida did not discipline an attorney for making a one-time charitable contribution to a client of used clothing and $200 where there was no agreement for repayment or an expectation that the gift was to maintain the lawyer-client relationship. The committee voted to retain the original recommendation and report.

Rule 4-1.11(a)(1), line 1879: Florida Bar member Radson commented that the proposed Rule refers to rule 4-1.9(c) that does not exist in Rule 4-1.9; the committee should change to 4-1.9(b), which is closest in meaning to the ABA 1.9(c). The committee voted to make the change and correct the reference.

Rule 4-1.11, line 1883-84: Florida Bar member Radson commented that he disagrees with the

requirement of obtaining consent to conflicts in writing for government clients. The committee voted to retain the original recommendation and report.

Rule 4-1.11, Comment ¶ 6, line 1979: Florida Bar member Radson commented that the term "Government Agency" should be added to the end of ¶ 6 of the comment to Rule 4-1.11 for easier reference. The committee voted to make the proposed change.

Rule 4-1.13, Comment ¶ 6, interim report, 1027-1028: Florida Bar member Radson commented, disagreeing with the characterization of changes to ¶ 6 of the comment to Rule 1.13, believing that the ABA Model Rule was revised to show that identifying the client in the government context is difficult and outside the scope of the rules. The committee voted to make the proposed change to the interim report.

Rule 4-1.13 Comment, line 2153: Florida Bar member Radson commented that the proposed change to the comment of 1.13 headed "government agency" improperly refers to Scope 18 that does not exist in Florida's rules. The committee voted to make the change and delete the reference to "Scope" in line 2153.

Rule 4-1.13, comment, lines 2193: committee member Chinaris proposed changing "an attorney" to "a lawyer" for consistency with the other rules. The committee voted to adopt the change.

Rule 4-1.14: Florida Bar member Salisbury recommended adoption of language that requires a lawyer to take the "least restrictive action" on behalf of a client with diminished capacity; that a lawyer should inform court of the client's wishes or help the client obtain alternate counsel if the lawyer cannot; that a lawyer should be required to inform client of exception to confidentiality if the lawyer must disclose information to take protective action even where a client directs otherwise at outset of representation; recommended changes in accordance with the Florida Commission for Legal Needs of Children that attorney representing child takes direction from the child. The committee voted to retain the original recommendation and report. Florida Bar member Salisbury's concerns about "least restrictive action" are taken into account in lines 2267 through 2269 of the comment, "the lawyer should be guided by such factors as the wishes and values of the client to the extent known, the client's best interests and the goals of intruding into the client's decisionmaking autonomy to the least extent feasible. . . ." Regarding the other concerns raised, the committee's understanding is that an implementation committee has been or will be appointed to address the issues raised by the report of the Florida Commission for the Legal Needs of Children.

Rule 4-1.16, line 2345: a Professional Ethics Committee member requested that the word "imprudent" be retained, because a lawyer may wish to withdraw based on a client taking an imprudent course of action that does not arise to the level of a fundamental disagreement with the client. The committee voted to make the change and retain the concept that a lawyer may withdraw based on a client taking a course of action that the lawyer finds imprudent as in the existing rule.

Rule 4-1.16(c), lines 2352-2355: Florida Bar member Trawick commented, suggesting that the rule make a tribunal's order on withdrawal appealable. The committee voted to retain the

original recommendation and report.

Rule 4-1.17: committee member Chinaris raised the issue of the requirement that a lawyer is required to cease practicing law in a particular area if that area of practice is sold. The committee discussed and agreed that requirement may conflict with other provisions in the comment that require a lawyer to comply with the fee division rule, Rule 4-1.5, for any fees divided from matters arising after sale in lines 1557 through 1559. The committee voted to adopt the proposal to delete the requirement and all references to it, therefore voting to delete subsection (a), lines 2423 through 2425, delete the paragraph heading at line 2463, delete the added portions of the comment at lines 2468 through 2472, lines 2476 through 2489.

Rule 1.18: Florida Bar member Craig and the chair of a committee appointed by the Trial Lawyers Section commented, requesting that the special committee adopt ABA Model Rule 1.18 on duties to prospective clients. Florida Bar member Salisbury commented that the committee should either adopt the first part of the rule regarding a duty of confidentiality to prospective clients or adopt similar language be adopted in 4-1.6. The committee voted to tentatively adopt Model Rule 1.18, but without the provisions for resolving the issue by screening the affected lawyer. Committee chair Stone appointed a subcommittee consisting of herself and member Chinaris to redraft the rule for the committee's consideration at a later conference call.
Rule 4-2.2, line 2617: committee member Chinaris proposed keeping the rule number 4-2.2 open and retaining the number for current rule 4-2.3 (Evaluation for Use by Third Persons) and renumbering new rule to 4-2.4 (Lawyer Serving as Third-Party Neutral) so that research will not be confusing in the future. The committee voted to adopt the proposal.

Rule 4-3.3(d), line 2887: committee member Chinaris proposed adding the term "for a reasonable time" to the lawyer's duty to disclose "beyond the conclusion of the proceeding." The committee determined not to adopt this change.

Rule 4-4.2, line 3422: Florida Bar member Radson commented that Rule 4-4.2 should be changed to make reference to the changes pending before the Supreme Court of Florida. The committee directed staff to make sure that the appropriate notation as required by the Supreme Court of Florida occurs when the rules are filed in the form of a petition with the court.

Rule 4-6.1: Florida Bar member Salisbury commented, recommending adoption of ABA proposed changes to Rule 4-6.1 and that Florida's pro bono hours be increased (to 50 hours) with Florida Bar members being encouraged to perform the pro bono for children; likewise with the financial contribution. The committee voted to retain the original recommendation and report.

Rule 4-6.5: Florida Bar member Salisbury commented, recommending adoption of ABA proposed changes re non-profit and court-annexed limited legal services programs. The committee voted to retain the original recommendation and report.

Rules 4-7.1 through 4-7.11: the Standing Committee on Advertising agreed with the special committee's recommendation against changing the advertising rules at this time. The committee determined that no action needed to be taken regarding this comment.

Rule 7.2(b)(4), Florida Bar member Smith opposes changes to ABA Model Rule 7.2(b)(4) allowing non-exclusive referral arrangements with nonlawyers, believing it to allow MDP through the back door. The committee determined that no action needed to be taken regarding this comment because the committee did not recommend adopting any of the ABA changes to the advertising rules.

Rule 4-8.4(a), lines 5053-5054: Florida Bar member Trawick commented, suggesting that references to a lawyer violating or attempting to violate the Rules of Professional Conduct be deleted. The committee voted to retain the original recommendation and report.

The committee discussed the concept of numbering the paragraphs in the comments to the rules as in the ABA Model Rules for easier reference. The committee voted to direct staff to number the paragraphs of the comment.

3. The committee discussed the recent changes to ABA Model Rules 1.6 and 1.13 in the wake of Sarbanes-Oxley, and determined that the committee should consider those in its report. Committee chair Stone appointed members Pillans and Smith to serve on a subcommittee to report back to the full committee with recommendations by October 15, 2003.

4. The committee determined that a conference call should be held prior to November 1, 2003 in order to finalize the report and recommendations for the December 2003 board meeting.

5. The meeting was adjourned.

THE FLORIDA BAR
SPECIAL COMMITTEE TO REVIEW THE ABA MODEL RULES 2002
MINUTES

Friday, October 31, 2003, 9:30 a.m. until 11:30 a.m.

Chair Adele I. Stone presided over the meeting, which was held via conference call. Eight (8) members attended:

Berman	Delegal	Smith
Braccialarghe	Gaskill	Stone (C)
Chinaris	Pillans	

Florida Bar staff Elizabeth Clark Tarbert also attended the meeting.

The committee took the following actions:

1. Approved the minutes of the September 4, 2003 meeting.

2. Discussed the subcommittee report by committee members Pillans and Smith on the ABA House of Delegates changes to ABA Model Rules 1.6 and 1.13 at the recommendation of the ABA Task Force on Corporate Responsibility in the wake of the Sarbanes-Oxley Act. Committee member Braccialarghe commented that if Florida does not adopt the ABA changes to Rule 4-1.6 regarding disclosure, it will be the first time that Florida would require less disclosure than the ABA allows in 30 years. Committee member Pillans commented that new ABA paragraph (b)(3) would be broader and is quite an expansion. Committee member Braccialarghe commented that he was pleasantly surprised the ABA went this far and suggested that the full committee recommend adoption of both subdivision (b)(2) and (b)(3).

Committee member Braccialarghe further commented that it is embarrassing to protect financial interests more than liberty interests, and the committee should also recommend adopting his prior suggestion that would allow disclosure to prevent an innocent person from being incarcerated. Massachusetts allows such a disclosure in its rules. Committee member Braccialarghe further commented that he believes these exceptions are going to be adopted at some point, either now or later. Committee member Smith asked how such a disclosure would play out. Committee member Braccialarghe responded that the first thing a lawyer should do is suggest to the lawyer a polygraph of the person wrongly charged and do all the lawyer could to get the state to not prosecute the wrongfully accused. Ultimately if there is no other course, the lawyer would have to disclose. If a lawyer can disclose to collect fees or to get the lawyer out of trouble, it makes no sense morally or ethically not to allow disclosure to prevent incarceration of the innocent.

Committee member Smith commented that the exception to comply with other law or court order is now in the ABA rule. He added that although the committee debated this exception in January and declined to recommend adoption of the exception, because of laws like Sarbanes-Oxley and others, the committee should recommend adoption of the exception to comply with other law or

court order, whether or not the committee recommends adoption of new ABA Model Rule 1.6 (b)(2) and (b)(3). Committee member Smith would favor recommending adoption of (b)(2) and (b)(3) also. He added that the comment regarding whether other law supercedes the confidentiality rule is not adequate. Lawyers should not be put on the line where it would be unethical for a lawyer to comply with law. Bar leaders talk about adhering to core values of loyalty and confidentiality. But a core value of lawyers should be adhering to the rule of law, especially in view of recent developments.

Committee member Smith left the conference call.

Committee member Pillans commented that he wrestled with this a great deal in drafting the subcommittee memo. He tends to agree with adopting the provision "to comply with law or court order" because it will give a safe harbor to attorneys, but is not as broad as the new provisions adopted by the ABA. He would favor adopting the exception "to comply with law." If the committee recommends adopting the new ABA provisions, he doubts the change would pass the board of governors. The change was not warmly embraced by the ABA House of Delegates; it passed narrowly. Although he would not be adverse to adopting subdivision (b)(2), subdivision (b)(3) seems to open the floodgates allowing disclosure to mitigate or rectify financial damage. Disclosure could be not just to the SEC, but others. The exception would put lawyers in the position where they have responsibility to rectify wrongs committee by clients, making lawyers adverse to clients and undermining the concept of confidentiality. The exception is broader than committee ought to go.

Committee chair Stone queried whether if the committee recommended adoption of the exception "to comply with other law or court order" that would envelop all of Sarbanes-Oxley changes as they come up, as well as adapt to changing laws and times. Committee member Pillans agreed, and added that provision 1.6 (b)(3) in the ABA model rules goes far beyond Sarbanes-Oxley. Committee member Pillans commented that the compromise would be acceptable, and the only reason he considers adoption of (b)(2) is because it is narrow. Committee member Chinaris commented that he agreed with Pillans. Prevention is far different than mitigation. Committee chair Stone commented that if adopted, the exception would be in Florida subdivision (c), making disclosure permissive, not mandatory.

Committee member Chinaris asked the committee members what they thought about committee member Braccialarghe's proposal about disclosure to exonerate the wrongfully accused. Committee member Delegal commented that the committee discussed and rejected the proposal in January. He added that he has serious problems with committee member Braccialarghe's proposal and with adding an exception "to comply with other law." Such an exception would allow the legislature to pass any law requiring disclosure and lawyers can comply. Lawyers ought to first be worried about their clients and owe loyalty to clients.

Committee member Chinaris asked committee member Delegal his opinion about a permissive exception to comply with law that allows lawyers to weigh issues such as whether a law is legitimate or not. Committee member Delegal responded that a blanket "comply with law" exception undermines the attorney-client relationship and added that the committee ought to recommend that the board leave 4-1.6 just as it is. Committee chair Stone stated that the crucial

question is do we open the door? Committee member Delegal responded that if the door is opened, we will start seeing erosion of separation of powers and the judiciary as an equal branch of government.

Committee member Pillans stated that the committee's other alternative is to leave the rule as is, recognizing that it contains a comment that other law may require disclosure, but whether or not other law supercedes the rules of professional conduct is beyond the scope of the rules.

Committee chair Stone commented that her conclusion is to leave the rule as is.

Committee member Braccialarghe noted the interplay between rules 4-1.6 and 4-3.3. Florida's board of governors changed the ABA time limit in 4-3.3, extending the ABA time limit on disclosure to court to beyond the conclusion of the proceeding, again providing for more disclosure than the ABA either permitted or required.

Committee member Berman commented that committee member Pillans' statement that the comment covers the exception as required by law, because the comment says there is a presumption that the rules of professional conduct trump law. Committee member Pillans responded that there is not much argument in the Sarbanes-Oxley matter, because the SEC regulations themselves state that they supercede all state law.

Committee member Berman made a motion, seconded by committee member Pillans, to recommend that the board adopt no additional changes to rule 4-1.6. The motion passed, with committee member Braccialarghe opposing.

Committee chair Stone directed staff to address this issue separately in the introduction to the committee's report and to the report itself.

3. The committee discussed the ABA changes to ABA Model Rule 1.13. Committee member Chinaris commented that, because the committee declined to recommend the changes to 4-1.6, the committee should not recommend adoption of the changes to 4-1.13, which conform to the changes to 1.6. Committee member Braccialarghe made a motion, seconded by committee member Pillans, not to recommend adoption of changes to ABA Model Rule 1.13. The motion passed. Committee chair Stone directed staff to address this issue separately in the introduction to the committee's report and to the report itself.

4. The committee discussed the subcommittee report on ABA Model Rule 1.18 by committee members Stone and Chinaris. Committee member Chinaris commented that the committee's original recommendation was against adoption of the rule, as the committee felt principles governing how attorneys must deal with prospective clients were spelled out in other authority such as caselaw and ethics opinions. The committee then discussed whether these principles should be clarified in a rule since the ABA has chosen to go that route. However, the committee wanted a rule drafted that would go along with principles already existing in Florida. The subcommittee had a concern with the ABA rule over the term "significantly harmful" as being too permissive. The subcommittee felt the standard should be the same as other standards regarding confidentiality, which is that information cannot be used to the disadvantage of the person. The

subcommittee's other concern with the ABA rule was the provision allowing screening of lawyers to resolve a conflict, which is against principles of confidentiality and conflicts that already exist in Florida. The subcommittee draft sets forth that there is confidentiality involved with prospective clients and that conflicts would be imputed.

Committee member Berman commented that in family law matters, lawyers have a problem with prospective clients consulting with every lawyer in town to create conflicts, and by striking the provisions in (d)(2) and paragraph 5 of the comment, the committee would allow prospective clients to do just that. Committee member Chinaris responded that attorneys are not precluded from setting forth ground rules before agreeing to consult with a prospective client, just like any client can agree to waivers. Committee member Braccialarghe commented that he recommends subdivision (d)(2) that was struck out, because if a prospective client ignores the warning not to disclose information to that lawyer that the prospective client does not want the lawyer to be able to use later, this cannot be used as a tactic to disqualify that lawyer. Committee member made a motion to approve the changes to the rule in concept of combining subdivision (d)(2) and comment 5 in subdivision (d)(2) of the rule, but without the concept of screening. The motion was seconded by committee member Pillans. The motion passed. The committee directed staff to draft the change to be circulated to and approved by the committee via electronic mail.

5. At the request of staff, the committee made several housekeeping changes to rules already voted on. The committee determined to add references to new rule 4-1.18 into scope, the comment to Rule 4-1.7, and the comment of Rule 4-1.6, to conform to the ABA model rules because the committee agreed to adopt a version of 1.18. The committee determined to change "executor" to "personal representative" in the comment to rule 4-1.8. The committee determined to add "or expense" and "or incurred" to 4-1.16(d) to clarify that advance payments for costs must be refunded to the client in the event the attorney withdraws. The committee direct staff to move portions of the comment regarding withdrawal if the client persists in crime or fraud or has used the lawyer's services to perpetrate crime or fraud from "optional withdrawal" to "mandatory withdrawal" to conform with the committee's changes to the rule. The committee determined to change Rule 4-3.9 to read "shall conform to the provisions of rules 4-3.3(a) through ~~(c)~~ (d)" to conform to changes made in rule 4-3.3.

6. The committee directed staff to circulate the minutes, the changes to the introduction addressing the ABA adoption of changes to rules 1.6 and 1.13, the committee's supplemental report on the ABA adoption of changes to rules 1.6 and 1.13 with the committee's recommendation and rational, and the changes adopted by the committee to proposed rule 4-1.18. The committee determined that the committee would approve these items via e-mail rather than via another conference call.

7. The meeting was adjourned.

APPENDIX B

LETTER TO FLORIDA BAR SECTIONS AND COMMITTEE CHAIRS

April , 2003

[Title] [Name of Section/Committee Chair]
[Address of Section/Committee Chair]

Re: Request for Comments on Proposed Changes to the Rules of Professional Conduct

Dear [Title] [Last name of Section/Committee Chair]:

The Special Committee to Review the ABA Model Rules 2002 requests your assistance and comments on proposed changes to The Florida Bar's Rules of Professional Conduct.

The committee was created to study the changes to the ABA Model Rules of Professional Conduct adopted by the ABA House of Delegates in February 2002 from recommendations by the American Bar Association Ethics Commission 2000. The changes adopted were extensive and affect the vast majority of the rules. The committee's charge is to analyze the changes to the ABA Model Rules of Professional Conduct, compare them with existing Rules Regulating The Florida Bar, and consider whether The Florida Bar should adopt the recommended changes.

The committee has completed its initial report on proposed changes to the Rules of Professional Conduct. The committee recommends adopting many of the changes to the ABA Model Rules. The committee recommends against adopting some changes, particularly where Florida has deliberately chosen to depart from the ABA Model Rules. Many of the changes are substantive, but some amendments are not. The report is available on The Florida Bar website at www.flabar.org in the "Organization" section under "Committees: Special." The committee requests that you review the proposed changes and provide comments to the committee prior to the committee submitting its final report to The Florida Bar Board of Governors. The committee will meet to consider any comments received at its meeting at 10 a.m. on Thursday, June 26, 2003 in Orlando Florida at the bar's Annual Meeting.

So that the committee members will have adequate time to review the comments prior to the meeting, any comments must be received no later than May 27, 2003. Comments should be sent to Elizabeth Clark Tarbert, Ethics Counsel, The Florida Bar, at the above address. Thank you for your assistance with the committee's work.

Sincerely,

Adele I. Stone, Chair

cc: [Name of Section or Committee Staff Liaison]
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APPENDIX C

FLORIDA BAR NEWS ARTICLES

APPENDIX D

SUPPLEMENTAL REPORT ON CHANGES TO MODEL RULES 1.6 AND 1.13 AFTER SARBANES-OXLEY

SUPPLEMENTAL REPORT ON
CHANGES TO MODEL RULES 1.6 AND 1.13

The Sarbanes-Oxley Act

In 2002, the Sarbanes-Oxley Act (15 U.S.C. § 7201 et seq.) was enacted, substantially affecting the duties and liabilities of publicly-traded corporations and their executives, directors, auditors and attorneys. Section 2307 of the Act (15 U.S.C. § 7245) directed the SEC to promulgate rules establishing standards of professional conduct for attorneys appearing and practicing before the Commission, "including a rule –

> (1) requiring an attorney to report evidence of a material violation of securities law or breach of fiduciary duty or similar violation by the company or any agent thereof, to the chief legal counsel or the chief executive officer of the company (or the equivalent thereof); and
>
> (2) if the counsel or officer does not appropriately respond to the evidence (adopting, as necessary, appropriate remedial measures or sanctions with respect to the violation), requiring the attorney to report the evidence to the audit committee of the board of directors of the issuer or to another committee of the board of directors comprised solely of directors not employed directly or indirectly by the issuer, or to the board of directors."

On January 23, 2002, the SEC adopted standards of general conduct (17 C.F.R. § 205 et seq.), including minimum standards of professional conduct for attorneys.

Under the SEC's new standards, it is the duty of an attorney representing a public company where he or she becomes aware that it is "reasonably likely" that a material violation has occurred or is about to occur of any federal or state securities law or fiduciary duty arising under federal or state law to report the violation to the chief legal officer, executive officer and, in some instances, to the corporation's board of directors. Once the attorney reports a "material violation," the chief legal officer is required to conduct an inquiry and provide an "appropriate response" to the attorney who reported the violation. If the attorney receives an "appropriate response," he or she will have satisfied all of the obligations under the rule. If the attorney does not receive an "appropriate response," he is obligated to report up the ladder to the audit committee, a committee composed of independent directors or the board of directors as a whole.

In addition, the SEC rule provides that an attorney may reveal confidential information to the SEC, without the company's consent, to the extent the attorney "reasonably believes" it is necessary to prevent the issuer from committing a material violation that is likely to cause substantial injury to the financial or property interest of the company or the investors or to rectify the consequences of a material violation that has or may cause substantial injury to the financial

interest or property of the company or investors in the furtherance of which the attorney's services were used [17 C.F.R. § 205.3(d)(2)]. The SEC notes that this corresponds to the ABA's recent revision to Model Rule 1.6.

Significantly, SEC Rule § 205.1 provides that the SEC rules govern in the event they conflict with state law.

The SEC also has a pending proposed rule, referred to as the "noisy withdrawal" requirement, which would require outside attorneys to withdraw and reveal client confidences to the government after having reported all the way up the ladder and having received no "appropriate response" if the attorney believes that a material violation is likely to result and substantial financial injury to the company or the investors, and attorneys employed by the company to disaffirm a document or filing evidencing a material violation.

MODEL RULES: 1.6, CONFIDENTIALITY

1.13, ORGANIZATION AS CLIENT

SUMMARY of Substantive Changes Adopted by ABA House of Delegates

In August 2003, the ABA, in light of Sarbanes-Oxley, adopted additional changes to ABA Model Rules 1.6 and 1.13.

The original ABA Model 2002 Rule 1.6 provided that a lawyer may reveal information relating to the representation of a client "to prevent reasonably certain death or substantial bodily injury" or "to comply with other law or a court order." The August 2003 proposal added the following two provisions:

> (b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
>
> . . . .
>
> (2) to prevent the client from committing a crime or fraud that is reasonable certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;
>
> (3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services.

At the same time, the ABA changed Rule 1.13 relating to an organization as a client to provide that if a lawyer for the organization knows that an officer, employee or other person associated with the organization is engaged in an action or intends to act or refuse to act in a matter relating to the representation that is in violation of a legal obligation or of the law that is likely to result in substantial injury to the organization, the lawyer, "unless the lawyer reasonably

believes that it is not necessary and in the best interests of the organization to do so, shall "refer the matter to higher authority in the organization" and, if the higher authority refuses to address the matter in a timely and appropriate manner, the lawyer may "reveal information relating to the representation whether or not Rule 1.6 permits such disclosure, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization." The change to the rule then provides that it does not apply with respect to information relating to a lawyer's representation of an organization to investigate or to defend the alleged violation.

Subparagraph (e) of the new Rule 1.13 provides that a lawyer who reasonably believes that he or she has been discharged because of the lawyer's action taken pursuant to paragraphs (b) or (c) or who withdraws in circumstances that require or permit the lawyer to take action under either of those paragraphs, shall proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal.

In summary, both the SEC rules adopted under the authority of Sarbanes-Oxley and the new ABA rules provide that an attorney may disclose confidences of his client to third parties to prevent, mitigate or rectify substantial financial injury to the organization or its investors. Both the SEC and ABA rules appear to go beyond the specific mandate of 15 U.S.C. § 7245.

How ABA Rule DIFFERS from EXISTING FLORIDA Rule

The current Florida Rule 4-1.6 provides that a lawyer shall reveal information reasonably believed necessary to "(1) prevent a client from committing a crime; or (2) prevent a death or substantial bodily harm to another."

The original ABA Rule Model 1.6 makes an additional exception in subsection (b)(4) that "the lawyer may disclose confidential information to comply with other law or a court order." The Special Committee has recommended that subsection (b)(4) not be adopted because the comment to current Florida Rule 4-1.6(b) states that in addition to the provisions of the Florida rules, "a lawyer may be obligated or permitted by other provisions of law to give information about a client" and "whether another provision of law supersedes Rule 4-1.6 is a matter of interpretation beyond the scope of these rules, but a presumption should exist against such a supersession." Thus, neither the current Florida Rule 4-1.6 nor the current recommendations of the Special Committee address the issues raised by the Sarbanes-Oxley Act and the SEC Rules promulgated thereunder.

Current Florida Rule 4-1.13 provides that if the 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 refuse to act in a matter related to the representation that is a violation of a legal obligation to the organization or of the law which is likely to result in substantial injury to the organization, the lawyer shall proceed as is reasonably necessary in the best interest of the organization, which may include referring the matter to the highest authority in the organization, and if the highest authority insists upon action or refuses to act, that is clearly a violation of the law and is likely to result in substantial injury to the organization, the lawyer may resign. The original ABA Model 2002 Rule 1.13 was substantially the same as present Florida 4-1.13 and the Special Committee recommended no changes to Florida's rule with respect to the issue of

revealing confidential information.

In conclusion, neither the current Florida rules nor the recommendations of the Special Committee specifically address the issues raised by Sarbanes-Oxley and the August 2003 changes to ABA Model Rules 1.6 and 1.13. As noted above, the SEC rules adopted pursuant to Sarbanes-Oxley provide that it supersedes any existing state law. The comment to current Florida Rule 4-1.6 provides that "whether another provision of law supersedes Rule 4-1.6 is a matter of interpretation beyond the scope of these rules, but a presumption should exist against such a supersession."

The text of Section 2307 of the Sarbanes-Oxley Act does not impose an obligation on attorneys to disclose their client's confidences to third parties and the SEC rules which authorize such disclosures are subject to much debate and controversy. In addition, the Sarbanes-Oxley Act and the SEC Rules are applicable only to attorneys appearing and practicing before the Commission.

RECOMMENDATION of Yes or No and REASONS

NO. The committee discussed the following three options: (1) Recommend that no further changes be made to Florida Rules 4-1.6 and 4-1.13, which would leave the issues raised by Sarbanes-Oxley and the SEC rules unaddressed; (2) add the additional exception to rule 4-1.6 that a lawyer may reveal confidential information "to comply with other law or a court order" so that lawyers practicing before the SEC will have a safe harbor if they determine that they must or wish to comply with the SEC rules; and (3) adopt the ABA Model rule changes in their entirety to the rule and comment.

The committee determined that the exceptions allowing disclosure of confidential information in 1.6 adopted by the ABA House of Delegates, particularly the second exception, were too broad. The exceptions were broader than required by the Sarbanes-Oxley Act. Florida has an exception to the confidentiality rule to prevent a client from committing a crime; the second exception would allow disclosure not just to prevent financial injury, but to mitigate damages from financial injury that has already occurred. The exception would put lawyers in the position where they have responsibility to mitigate or rectify financial damage, making lawyers adverse to their clients and undermining the concept of confidentiality. The committee recognized that the changes passed the ABA House of Delegates by a narrow margin, and Florida's delegates were opposed to the change.

The committee also reconsidered the option of adding an exception to Florida Rule 4-1.6 to allow disclosure "to comply with other law"as passed by the ABA House of Delegates in 2003. The committee had discussed and rejected this exception at an earlier meeting. The committee determined that such an exception would allow the legislature to pass any law requiring disclosure and lawyers would comply, while lawyers owe duties of loyalty and confidentiality to clients. The committee was concerned that allowing such an exception would erode separation of powers and the judiciary as an equal branch of government.

The committee discussed whether the current rules place lawyers in a position of conflict

between law and the rules of professional conduct. The committee noted that currently in the comment to rule 4-1.6, there is a statement that whether law requiring disclosure supercedes the rule is a question outside the scope of the rules, but there should be a presumption against supercession. However, at least as far as Sarbanes-Oxley is concerned, the SEC regulations themselves state that they supercede state law, so the SEC regulations would appear to be one of the situations where law may supercede the rules of professional conduct. Finally, the committee recommends against changes to rule 4-1.13, because the changes were to address the Sarbanes-Oxley issues as in the confidentiality rule, and the proposed changes are in conflict with the confidentiality rule that the committee recommends against changing.

A minority consisting of two committee members would have approved the additional exceptions to the confidentiality rule, allowing disclosure to prevent or mitigate financial injury caused by a client's crime or fraud in which the client used the lawyer's services to further the crime or fraud.