

Serial: 127394

**IN THE SUPREME COURT OF MISSISSIPPI**

**No. 89-R-99018-SCT**

***RE: RULES OF PROFESSIONAL  
CONDUCT***

**ORDER**

This matter has come before the Court en banc on Petition to Amend Certain Provisions of and Comments to the Mississippi Rules of Professional Conduct filed by the Mississippi Bar. The Bar's petition was published on the Court's web site with a request for comments, and comments were received and examined.

The petition proposes to revise various sections of the Rules of Professional Conduct to adopt recommendations of the American Bar Association incorporated in the ABA Model Rules of Professional Responsibility. In addition, the petition suggests revision of Rule 1.15 relating to the safekeeping of property, specifically as it addresses disbursements from common client trust funds.

The petition, following the ABA model, also recommends deleting Rule 2.2. The Court considered this, but adopted another approach, as recommended by the comments received, and revised Rule 2.2 so as to address the extent and manner in which lawyers may serve as intermediaries between their clients.

Subject to these and other modifications, the Court finds that the proposed amendments will promote the fair and effective administration of justice and that they should be adopted.

IT IS THEREFORE ORDERED that the Petition to Amend Certain Provisions of and Comments to the Mississippi Rules of Professional Conduct is granted to the extent set forth in this order, and that the Mississippi Rules of Professional Conduct and the Comments thereto are amended as set forth in Exhibits “A” through “H” hereto.

IT IS FURTHER ORDERED that the Clerk of this Court shall spread this order upon the minutes of the Court and shall forthwith forward a true certified copy hereof to West Publishing Company for publication as soon as practical in the advance sheets of *Southern Reporter, Second Series (Mississippi Edition)* and in the next edition of *Mississippi Rules of Court*.

SO ORDERED, this the 3rd day of November, 2005.

/s/ William L. Waller, Jr.

WILLIAM L. WALLER, JR., PRESIDING  
JUSTICE

EASLEY AND GRAVES, JJ., WOULD DENY.  
DIAZ, J., NOT PARTICIPATING.

**EXHIBIT “A” TO ORDER**  
**MISSISSIPPI RULES OF**  
**PROFESSIONAL CONDUCT**

**PREAMBLE: A LAWYER'S RESPONSIBILITIES**

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.

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

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.

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 other law.

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.

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 civil 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.

Many of a lawyer's professional responsibilities are prescribed in the Rules of Professional Conduct, as well as substantive and procedural law. However, 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.

A lawyer's responsibilities as a representative of clients, an officer of the legal system and a public citizen are usually harmonious. Thus, when an opposing party is well represented, a lawyer can be a zealous advocate on behalf of a client and at the same time assume that justice is being done. So also, a lawyer can be sure that 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.

In the nature of law practice, however, conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system and to the lawyer's own interest in remaining an upright person while earning a satisfactory living. The Rules of Professional Conduct prescribe terms for resolving such conflicts. Within the framework of these Rules 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 zealously 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.

. . . . *[No changes in remainder of the Preamble.]*

[Amended effective November 3, 2005 to address lawyers' responsibilities as arbitrators, mediators and other third party neutrals and to emphasize lawyers' responsibilities to promote public understanding of the rule of law and promoting equal access to the legal system.]

## SCOPE

The Rules of Professional Conduct are rules of reason. They should be interpreted with reference to the purposes of legal representation and of the law itself. Some of the Rules are imperatives, cast in the terms "shall" or "shall not." These define proper conduct for purposes of professional discipline. Others, generally cast in the term "may," are permissive and define areas under the Rules in which the lawyer has professional discretion. 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. Many of the Comments use the term "should." Comments do not add obligations to the Rules but provide guidance for practicing in compliance with the Rules.

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. The Comments are sometimes used to alert lawyers to their responsibilities under such other law. Compliance with the Rules, as with all laws 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.

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 1.6, that may attach when the lawyer agrees to consider whether a client-lawyer relationship shall be established. Whether a client-lawyer relationship exists for any specific purpose can depend on the circumstances and may be a question of fact.

Under various legal provisions, including constitutional, statutory and common law, the responsibilities of government lawyers may include authority concerning legal matters that ordinarily reposes in the client in the private client-lawyer relationships. For example, a lawyer for a government agency may have authority on behalf of the government to decide upon settlement or whether to appeal from an adverse judgment. Such authority in various respects is generally vested in the attorney general and the state's attorney in state government, and their federal counterparts, and the same may be true of other government law officers. Also, lawyers under the supervision of these officers may be authorized to represent several government agencies in intra governmental legal controversies where a private lawyer could not represent multiple private clients. ~~They may also have authority to represent the "public interest" in circumstances where a private lawyer could not be authorised to do so.~~ These Rules do not abrogate any such authority.

. . . . *[No changes in remainder of the Scope.]*

[Amended effective November 3, 2005 to make technical changes in text.]

## TERMINOLOGY

"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.

"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. If it is not feasible to obtain or transmit the writing at the time the person gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.

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

"Firm" or "law firm" denotes a lawyer or lawyers in a ~~private firm law partnership,~~ professional corporation, professional association, professional limited liability company, sole proprietorship, governmental agency, or other association whose members are authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation or other organization, ~~and lawyers employed in a legal services organization. See Comment, Rule 1.10.~~

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

“Informed consent” denotes voluntary acceptance and agreement by a person of a proposed course of conduct after adequate information has been imparted to the person that allows the person to arrive at a decision.

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

“Partner” denotes the member of a partnership ~~and~~ a shareholder in a law firm organized as a professional corporation, professional association, or a member of a professional limited liability company or an entity whose members are authorized to practice law.

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

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

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

“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.

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

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

[Amended effective November 3, 2005 to add definitions for “confirmed in writing,” “informed consent,” “knowingly, known, or knows,” “screened,” and “writing or written.” At that time the definitions for “firm or law firm” and “partner” were modified.]

**EXHIBIT “B” TO ORDER**

**MISSISSIPPI RULES OF  
PROFESSIONAL CONDUCT**

**CLIENT-LAWYER RELATIONSHIP**

....

**RULE 1.2 SCOPE OF REPRESENTATION**

....

(c) A lawyer may limit the objectives of the representation if the client  
~~consents after consultation~~ gives informed consent.

....

[Amended effective November 3, 2005]

**Comment**

....

**RULE 1.6 CONFIDENTIALITY  
OF INFORMATION**

(a) A lawyer shall not reveal information, ~~which is confidential or privileged by law, or relating to representation of a client, which a lawyer has reason to believe may be detrimental to the client or which client has requested not be disclosed~~ relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

(1) ~~to prevent the client from committing a criminal act;~~ to prevent reasonably certain death or substantial bodily harm;

(2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interest 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;

(4) to secure legal advice about the lawyer's compliance with these rules;

(5)-(2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.

(6) to comply with other law or a court order.

....

[Amended June 23, 1994; amended April 18, 2002; amended effective November 3, 2005 to add circumstances under which disclosure of otherwise confidential information is permitted.]

### **Comment**

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.

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.~~

A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the

representation. See Terminology for definition of “informed consent.” maintain confidentiality of information relating to the representation. 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.

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

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.

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

**Authorized Disclosure.** Except to the extent that the client’s instructions or special circumstances limit that authority, a ~~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. In some situations, for example, a lawyer may be impliedly authorized to admit a fact that~~

cannot properly be disputed or to make a disclosure that facilitates a satisfactory conclusion to a matter.

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.** Although the public interest is usually best served by a strict rule requiring lawyers to preserve the confidentiality of information relating to the representation of their clients, the ~~The~~ confidentiality rule is subject to limited exceptions. Paragraph (b)(1) recognizes the overriding value of life and physical integrity and permits disclosure reasonably necessary to prevent reasonably certain death or substantial bodily harm. Such harm is reasonably certain to occur if it will be suffered imminently or if there is a present and substantial threat that a person will suffer such harm at a later date if the lawyer fails to take action necessary to eliminate the threat. Thus, a lawyer who knows that a client has accidentally discharged toxic waste into a town's water supply may reveal this information to the authorities if there is a present and substantial risk that a person who drinks the water will contract a life-threatening or debilitating disease and the lawyer's disclosure is necessary to eliminate the threat or reduce the number of victims. 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 which would enable the lawyer to counsel against a wrongful course of action. The public is better protected if full and open communication by the client is encouraged than if it is inhibited.

Paragraph (b)(2) is a limited exception to the rule of confidentiality that permits the lawyer to reveal information to the extent necessary to enable affected persons or appropriate authorities to prevent the client from committing a crime or fraud, as defined in the Terminology section, that is reasonably certain to result in substantial injury to the financial or property interest of another and in furtherance of which the client has used or is using that lawyer's services. Such a serious abuse of the client-lawyer relationship by the client forfeits the protection of this rule. The client can, of course, prevent such disclosure by refraining from the wrongful conduct. Although paragraph (b)(2) does not require the lawyer to reveal the client's misconduct, the lawyer may not counsel or assist the client in conduct the lawyer knows is criminal or fraudulent. Re Rule 1.2(d). See also Rule 1.16 with respect to the lawyer's obligation or right to withdraw from the representation of the client in such circumstances.

Paragraph (b)(3) addresses the situation in which the lawyer does not learn of the client's crime or fraud until after it has been consummated. Although the client no longer has the option of preventing disclosure by refraining from the wrongful conduct, there will be situations in which the loss suffered by the affected person can be prevented, rectified or

mitigated. In such situations, the lawyer may disclose information related to the representation to the extent necessary to enable the affected persons to prevent or mitigate reasonably certain losses or to attempt to recoup their losses. Paragraph (b)(3) does not apply when a person who has committed a crime or fraud thereafter employs a lawyer for representation concerning that offense.

~~Several situations must be distinguished:~~

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

~~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 1.2(d), because to “counsel or assist” criminal or fraudulent conduct requires knowing that the conduct is of that character.~~

~~Third, the lawyer may learn that a client intends prospective conduct that is criminal. As stated in paragraph (b)(1), the lawyer has professional discretion to reveal the information necessary to prevent the crime, which he reasonably believes is intended by the client. The lawyer is not required but is permitted to exercise discretion in determining whether to do so based on a determination of whether preventing the harm involved is more compelling than preserving the confidentiality of information relating to the client in a particular case.~~

~~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. A lawyer’s decision not to take preventive action permitted by paragraph (b)(1) does not violate this Rule.~~

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)(4) permits such disclosure because of the importance of a lawyer’s compliance with the Rules of Professional Conduct.

A lawyer entitled to a fee is permitted by paragraph (b)(5) 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.

**Withdrawal.** 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 1.16(a)(1).

After withdrawal the lawyer is required to refrain from making disclosure of the clients' confidences, except as otherwise provided in Rule 1.6. Neither this rule nor Rule 1.8(b) nor Rule 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.

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 this Rule, the lawyer may make inquiry within the organization as indicated in Rule 1.13(b).

**Dispute Concerning Lawyer's Conduct.** 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 that lawyer reasonably believes necessary to establish a defense. The same is true with respect to a claim involving the conduct or representation of a former client. Such a charge can arise in a civil, criminal, disciplinary or other proceeding and can be based on a wrong allegedly committed by the lawyer against the client or on a wrong alleged by a third person, for example, a person claiming to have been defrauded by the lawyer and client acting together. The lawyer's right to respond arises when an assertion of such complicity has been made. Paragraph (b)(2)(5) 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 also applies, of course, 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 which limits access to the information to the tribunal or other person having a need to know it, and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.~~

~~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 paragraph (b)(2)(5) 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.

Other law may require that a lawyer disclose information about a client. Whether such a law supersedes Rule 1.6 is a question of law beyond the scope of these rules. When disclosure of information relating to the representation appears to be required by other law, the lawyer must discuss the matter with the client to the extent required by Rule 1.4. If, however, the other law supersedes this rule and requires disclosure, paragraph (b)(6) permits the lawyer to make such disclosures as are necessary to comply with the law.

A lawyer may be ordered to reveal information, relating to the representation of a client, by a court or by another tribunal or governmental entity claiming authority pursuant to other law to compel the disclosure. Absent informed consent of the client to do otherwise, the lawyer should assert on behalf of the client all nonfrivolous claims that the order is not authorized by other law or that the information sought is protected against disclosure by the other law or that the information sought is protected against disclosure by the attorney-client privilege or other applicable law. In the event of an adverse ruling, the lawyer must consult with the client about the possibility of appeal to the extent required by Rule 1.4. Unless review is sought, however, paragraph (b)(6) permits the lawyer to comply with the court's order.

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

Paragraph (b) permits but does not require the disclosure of information relating to a client's representation to accomplish the purposes specified in paragraphs (b)(1) through (b)(6). In exercising the discretion conferred by this rule, the lawyer may consider such factors as the nature of the lawyer's relationship with the client and with those who might be injured by the client, the lawyer's own involvement in the transaction and factors that

may extenuate the conduct in question. A lawyer's decision not to disclose as permitted by paragraph (b) does not violate this rule. Disclosure may be required, however, by other rules. Some rules require disclosure only if such disclosure would be permitted by paragraph (b). See Rules 4.1(b), 8.1 and 8.3. Rule 3.3, on the other hand, requires disclosure in some circumstances regardless of whether such disclosure is permitted by this rule.

**Acting Competently to Preserve Confidentiality.** A lawyer must act competently to safeguard information relating to the representation of a client against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. See rules 1.1, 5.1 and 5.3.

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

**Disclosures Otherwise Required or Authorized.** 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 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.

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

**Former Client.** The duty of confidentiality continues after the client-lawyer relationship has terminated. See Rule 1.9.

[Amended June 23, 1994; amended effective November 3, 2005.]

....

#### **RULE 1.10 IMPUTED DISQUALIFICATION: GENERAL RULE**

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7, 1.8(c), 1.9 or ~~2.2~~ 2.4.

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[Amended effective November 3, 2005 to add reference to Rule 2.4.]

#### **Comment**

....

#### **RULE 1.12 FORMER JUDGE, OR ARBITRATOR, MEDIATOR OR OTHER THIRD PARTY NEUTRAL**

(a) Except as stated in paragraph (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 person or as an arbitrator, mediator or other third-party neutral, unless all parties to the proceeding give informed consent confirmed in writing.

(b) A lawyer shall not negotiate for employment with any person who is involved as a party or as an attorney for a party in a matter in which the lawyer is participating personally and substantially as a judge or other adjudicative officer, ~~arbitrator~~ or as a law clerk to such ~~a person~~ or as an arbitrator, mediator, or other third-party neutral.

(c) If a lawyer is disqualified by paragraph (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 screened from any participation in the matter and is apportioned no part of the fee therefrom; and

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



(d) An arbitrator selected as a partisan of a party in a multi-member arbitration panel is not prohibited from subsequently representing that party.

[Amended effective November 3, 2005 to include third party neutrals generally.]

### **Comment**

This Rule generally parallels Rule 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 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) and B(1) of the 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 he served as a judge or in any other proceeding related thereto."~~ Although phrased differently from this Rule, those Rules correspond in meaning.

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. Rule 2.4.

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, paragraph (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.

Requirements for screening procedures are stated in Terminology. Paragraph (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.

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.

[Amended effective November 3, 2005.]

....

#### **RULE 1.14 CLIENT UNDER A DISABILITY**

.... *[Insert new subsection (c) as follows.]*

(c) Information relating to the representation of a client who may be impaired is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent necessary to protect the client's interest.

[Amended effective November 3, 2005 to add subsection (c).]

#### **Comment**

....

**Disclosure of the Client's Condition.** Rules of procedure in litigation generally provide that minors or persons suffering a mental disability shall be represented by a guardian or next friend if they do not have a general guardian. However, disclosure of the client's disability could, in some circumstances, lead to proceedings for involuntary commitment. Information relating to the representation is protected by Rule 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 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.

[Amended effective November 3, 2005.]

....

#### **RULE 1.15 SAFEKEEPING PROPERTY**

. . . . *[Insert new subsection (h) as follows.]*

(h) A lawyer generally may not use, endanger, or encumber money held in trust for a client or third person without the permission of the owner given after full disclosure of the circumstances. Except for disbursements based upon any of the four categories of limited-risk uncollected deposits enumerated in paragraph A below, a lawyer may not disburse funds held in trust unless the funds are collected funds. For purposes of this provision, "collected funds" means funds deposited, finally settled, and credited to the lawyer's trust account.

(1) 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 and third persons owning trust account funds that may be affected by such disbursements. Provided the lawyer has other sources of funds available at the time of disbursement (other than client or third party funds) sufficient to replace any uncollected funds, 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 under any of the following circumstances:

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

(ii) when the deposit is made by a bank check, official check, treasurer's check, money order, or other such instrument where the payor is a bank, savings and loan association, or credit union;

(iii) when the deposit is made by a check issued by the United States, the State of Mississippi, or any agency or political subdivision of the State of Mississippi; or

(iv) 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 Mississippi.

In any of the above circumstances, a lawyer's disbursement of funds from a trust account in reliance on deposits that are not yet collected funds is at the risk of the lawyer making the disbursement. If any of the deposits fail, for any reason, the lawyer, upon obtaining knowledge of the failure, must immediately act to protect the property of the lawyer's clients and third persons. If the lawyer accepting any such check personally pays the amount of any failed deposit within three business days of receipt of notice that the deposit has failed, the lawyer will not be considered guilty

of professional misconduct based upon the disbursement of uncollected funds.

(2) 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 four categories set forth above, when it results in funds of clients or third persons being used, endangered, or encumbered, will be grounds for a finding of professional misconduct.

[Amended effective November 3, 2005 to add new sub-section (h).

### **Comment**

....

### **RULE 1.17 SALE OF LAW PRACTICE**

A lawyer or law firm may sell or purchase a law practice including good will if the conditions set forth in Rule 1.17 are satisfied. The estate of a deceased, disabled or disappeared lawyer may be a seller.

- (a) The selling lawyer or law firm ceases to engage in the private practice of law in the geographic area wherein the practice has been conducted;
- (b) The practice is sold as an entirety to another lawyer or law firm;
- (c) Actual written notice is given to each of the seller's clients regarding:
  - (1) the proposed sale;
  - ~~(2) the terms of any proposed change in the fee arrangement authorised by paragraph (d);~~
  - ~~(3) (2)~~ the client's right to retain other counsel or take possession of the file; and
  - ~~(4) (3)~~ the fact that the client's consent to the sale will be presumed if the client does not take any action or does not otherwise object within ninety (90) days of the receipt of the notice.

If a client cannot be given notice, the representation of that client may be transferred to the purchaser only upon entry of an order so authorizing by any court having jurisdiction. The seller may disclose to the court in camera information relating to

the representation only to the extent necessary to obtain an order authorizing the transfer of the file.

• • • •

[Amended effective November 3, 2005 to remove former subpart (c)(2) relating to disclosure of proposed changes in fee arrangements.]

**EXHIBIT “C” TO ORDER**  
**MISSISSIPPI RULES OF**  
**PROFESSIONAL CONDUCT**

**COUNSELOR**

**RULE 2.1 ADVISOR**

....

**RULE 2.2 INTERMEDIARY**

*[The entire text of Rule 2.2 and its Comment are deleted and replaced with the following.]*

**RULE 2.2 LAWYER SERVING AS AN INTERMEDIARY BETWEEN CLIENTS**

(a) A lawyer represents clients as an intermediary when the lawyer provides impartial legal advice and assistance to two or more clients who are engaged in a candid and non-adversarial effort to accomplish a common objective with respect to the formation, conduct, modification, or termination of a consensual legal relation between them.

(b) A lawyer shall not represent two or more clients as an intermediary in a matter unless:

(1) as between the clients, the lawyer reasonably believes that the matter can be resolved on terms compatible with the best interests of each of the clients, that each client will be able to make adequately informed decisions in the matter, that there is little risk of material prejudice to the interest of any of the clients if the contemplated resolution is unsuccessful, and that the intermediation can be undertaken impartially;

(2) the lawyer's representation of each of the clients, or the lawyer's relationship with each, will not be adversely affected by the lawyer's responsibilities to other clients or third persons, or by the lawyer's own interests;

(3) the lawyer consults with each client about:

(i) the lawyer's responsibilities as an intermediary;

(ii) the implications of the intermediation (including the

advantages and risks involved, the effect of the intermediation on the attorney-client privilege, and the effect of the intermediation on any other obligation of confidentiality the lawyer may have);

(iii) any circumstances that will materially affect the lawyer's impartiality between the clients; and

(iv) the lawyer's representation in another matter of a client whose interests are directly adverse to the interests of any one of the clients; and any interests of the lawyer, the lawyer's other clients, or third persons that will materially limit the lawyer's representation of one of the clients; and

(4) each client consents in writing to the lawyer's representation and each client authorizes the lawyer to disclose to each of the other clients being represented in the matter any information relating to the representation to the extent that the lawyer reasonably believes is required to comply with Rule 1.4.

(c) While representing clients as an intermediary, the lawyer shall:

(1) act impartially to assist the clients in accomplishing their common objective;

(2) as between the clients, treat information relating to the intermediation as information protected by Rule 1.6 that the lawyer has been authorized by each client to disclose to the other clients to the extent the lawyer reasonably believes necessary for the lawyer to comply with Rule 1.4; and

(3) consult with each client concerning the decisions to be made with respect to the intermediation and the considerations relevant in making them, so that each client can make adequately informed decisions.

(d) A lawyer shall withdraw from service as an intermediary if:

(1) any of the clients so requests;

(2) any of the clients revokes the lawyer's authority to disclose to the other clients any information that the lawyer would be required by Rule 1.4 to reveal to them; or

(3) any of the other conditions stated in paragraph (b) are no longer satisfied.

(e) If the lawyer's withdrawal is required by paragraph (d)(2) the lawyer shall so advise each client of the withdrawal, but shall do so without any further disclosure of information protected by Rule 1.6.

[Adopted September 17, 2002, effective March 1, 2003; substantially rewritten effective November 3, 2005 to address specifically and exclusively lawyers intermediating between clients.]

### **Comments**

A lawyer acts as an intermediary under this Rule when the lawyer represents two or more clients who are cooperatively trying to accomplish a common objective with respect to the formation, conduct, modification, or termination of a consensual legal relation between them. The hallmarks of an intermediation include the impartiality of the lawyer who serves as an intermediary; the open, candid, and non-adversarial nature of the clients' pursuit of a common objective; and the limited subject matters in which a lawyer may serve multiple clients as an intermediary (i.e., the adjustment of a consensual legal relationship among or between the clients). Because intermediation differs significantly from the partisan role normally played by lawyers, and because it requires that the lawyer be impartial as between the clients rather than an advocate on behalf of each, a lawyer should only undertake this role with client consent after consultation about the distinctive features of this role. Also, given the risks associated with joint representation of parties whose interests may potentially be in conflict, the Rule provides a number of safeguards designed to limit its applicability and to protect the interests of the several clients.

Paragraph (b) specifies the circumstances in which a lawyer may serve multiple clients as an intermediary. With respect to the clients being served by an intermediary, this Rule, and not Rule 1.7, applies. Rule 1.7 remains applicable, however, to protect other clients the lawyer may be representing or may wish to represent in other matters. For example, if the lawyer's representation of two clients as an intermediary in a matter will materially limit the lawyer's representation of another client the lawyer is representing as an advocate, the lawyer must afford that client the protections of Rule 1.7. Similarly, if the lawyer's representation of two clients as an intermediary would be materially adverse to one of the lawyer's former clients and the matters are substantially related, the lawyer must afford the former client the protection of Rule 1.9.



Rule 2.2 does not apply to a lawyer acting as a dispute resolution neutral, such as an arbitrator or a mediator, as the parties to a dispute resolution proceeding are not clients of the lawyer, even where the lawyer has been appointed with the concurrence of the parties. Other rules of conduct govern a lawyer's service as a dispute resolution neutral. See Rule 2.4.

Because this Rule only applies to the formation, conduct, modification or termination of consensual legal relationships between clients, it does not apply to the representation of multiple clients in connection with gratuitous transfers or other matters in which there is not a quid pro quo exchange. Thus, for example, conflicts of interest arising from the representation of multiple clients in estate planning or the administration of an estate are governed by Rule 1.7 rather than by this Rule. If, however, the effectuation of an estate plan or other gratuitous transfer entails the formation, modification or termination of a consensual legal relationship between clients, and the lawyer acts as an intermediary in connection with the transaction, this Rule, and not Rule 1.7, will apply.

A lawyer may act as an intermediary in seeking to establish or adjust a consensual legal relationship among or between clients on an amicable and mutually advantageous basis, such as helping to organize a business in which two or more clients are entrepreneurs or working out the financial reorganization of an enterprise in which two or more clients have an interest. As part of the work of an intermediary, the lawyer may seek to achieve the clients' common objective or to resolve potentially conflicting interests by developing the parties' mutual interests. The alternative may be that each party may have to obtain separate representation, with the possibility in some situations of incurring additional cost, complications, or even litigation. Given these and other relevant factors, each client may prefer to have one lawyer act as an intermediary for all rather than hiring a separate lawyer to serve as his or her partisan.

In considering whether to act as an 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 or imprudent for the lawyer or the clients. For example, a lawyer cannot undertake common representation of clients between whom contentious litigation is imminent or who contemplate contentious negotiations, as is often the case when dissolution of a marriage is involved. 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 an informal "facilitation," in which the lawyer's responsibilities are limited to presenting alternatives from which the clients will choose, to a full-blown representation in which the lawyer provides all legal services needed in connection with the proposed transaction. 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; whether the situation involves creating a relationship between the parties or terminating one; the relative experience, sophistication, and economic bargaining power of the clients; and the existence of prior familial, business, or legal relationships.

### **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 1.4 and 1.6. Complying with both requirements while acting as an intermediary requires a delicate balance. If the balance cannot be maintained, the common representation is improper.

Paragraphs (b)(4) and (c)(2) make clear that the obligations of attorney-client confidentiality apply to clients being served by a lawyer as an intermediary, but that, as between the clients being so served, confidentiality is inappropriate and must be waived by each of the clients. Thus, while the lawyer must maintain confidentiality as against strangers to the relationship, the lawyer has no such duty to keep information provided to the lawyer by one client confidential from the other clients. Moreover, the lawyer may well, depending on the circumstances, have an affirmative obligation to disclose such information obtained from one client to other clients. Obviously, this important implication of the lawyer's responsibilities as an intermediary must be disclosed and explained to the clients.

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 one 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 an intermediary between clients, the lawyer is required to consult with the clients on the implications of doing so and may 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. This consent must be in writing.

Paragraph (c)(3) is an application of the principle expressed in Rule 1.4. Where the lawyer is an 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 client has the right to loyal and diligent representation, the right to discharge the lawyer as stated in Rule 1.16, and the protection of Rule 1.9 concerning obligations to a former client.

Because of the obligations of a lawyer serving as an intermediary to the intermediation clients, the lawyer must withdraw from the representation if any of the intermediation clients so requests; if one or more of the clients denies the lawyer the authority to disclose certain information to any of the remaining clients, thereby preventing the lawyer from being able to discharge the lawyer's duties to the remaining clients to communicate with them and disclose information to them; or if any of the various predicate requirements for intermediation can no longer be satisfied.

Upon withdrawal from the role of intermediary or completion of an intermediation, the lawyer must afford all of the clients formerly served as an intermediary the protections of Rules 1.9 and 1.10.

[Amended effective November 3, 2005.]

### **RULE 2.3 EVALUATION FOR USE BY THIRD PERSONS**

(a) A lawyer may undertake 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 in writing.

(b) Except as disclosure is required in connection with a report of an evaluation, information relating to the evaluation is otherwise protected by Rule 1.6.

### **Comment**

....

### **RULE 2.4 LAWYERS SERVING AS THIRD PARTY NEUTRALS**

(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.

[Adopted effective November 3, 2005.]

### **Comment**

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 decision maker depends on the particular process that is either selected by the parties or mandated by a court.

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.

Unlike non-lawyers 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.

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 1.12.

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, the lawyer's duty of candor is governed by Rule 3.3. Otherwise, the lawyer's duty of candor toward both the third-party neutral and other parties is governed by Rule 4.1

[Adopted effective November 3, 2005.]

## **EXHIBIT “D” TO ORDER**

### **MISSISSIPPI RULES OF PROFESSIONAL CONDUCT**

#### **ADVOCATE**

##### **RULE 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 in 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.

[Amended effective November 3, 2005 to add the phrase “in law and in fact.”]

....

##### **RULE 3.5 IMPARTIALITY AND DECORUM OF THE TRIBUNAL**

A lawyer shall not:

(a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law;

(b) communicate ex parte with such a person ~~except as permitted~~ during the proceeding unless authorized to do so by law or court order;

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

(1) the communication is prohibited by law or court order: or

(2) the juror has made known to the lawyer a desire not to communicate.

~~(c)~~ (d) engage in conduct intended to disrupt a tribunal.

[Amended effective November 3, 2005 to add new subsection (c).]

....

##### **RULE 3.9 ADVOCATE IN NON-ADJUDICATIVE 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 3.3(a) through (c), 3.4(a) through (c), and 3.5.

[Amended effective November 3, 2005 to adopt language: “legislative body or administrative agency to replace prior text.]

....

## EXHIBIT “E” TO ORDER

### MISSISSIPPI RULES OF PROFESSIONAL CONDUCT

#### TRANSACTIONS WITH PERSONS OTHER THAN CLIENTS

##### RULE 4.1 TRUTHFULNESS IN STATEMENTS TO OTHERS

....

#### Comment

**Misrepresentation.** 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 or by 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.

....

[Amended effective November 3, 2005.]

....

##### RULE 4.3 DEALING WITH UNREPRESENTED PERSON

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, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonably possibility of being in conflict with the interests of the client. 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.



[Amended effective November 3, 2005 to cover giving legal advice to unrepresented persons.]

### **Comment**

....

## **RULE 4.4 RESPECT FOR RIGHTS OF THIRD PERSONS**

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

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

[Amended effective November 3, 2005 to add new subsection (b).]

### **Comment**

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 attorney-client relationship.

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

Some lawyers may choose to return a document unread, for example, when the lawyer learns before receiving the document that it is 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 1.2 and 1.4.

[Amended effective November 3, 2005.]

....

## EXHIBIT “F” TO ORDER

### MISSISSIPPI RULES OF PROFESSIONAL CONDUCT

#### LAW FIRMS AND ASSOCIATIONS

##### **RULE 5.1 RESPONSIBILITIES OF A PARTNER OR SUPERVISORY LAWYER**

(a) A partner in a law firm, 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 all lawyers in the firm conform to the rules of professional conduct.

....

(c) A lawyer shall be responsible for another lawyer's violation of the rules of professional conduct if:

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

(2) the lawyer is a partner in the law firm or has comparable managerial authority in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

[Amended effective November 3, 2005 to include in coverage not only partners but also those in comparable managerial authority.]

#### **Comment**

Paragraphs (a) and (b) refer to lawyers who have supervisory and/or managerial authority over the professional work of a firm or legal department of a government agency. This includes members of a partnership and, the shareholders in a law firm organized as a professional corporation, and members of other associations authorized to practice law; lawyers having supervisory comparable managerial authority in a legal services organization or a law department of an enterprise or government agency; and lawyers who have immediate managerial responsibilities in a firm. Paragraph (b) applies to lawyers who have supervisory authority over the work of other lawyers in a firm.

Paragraph (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.

The measures required to fulfill the responsibility prescribed in paragraphs (a) and (b) can depend on the firm's structure and the nature of its practice. In a small firm, informal supervision and occasional admonition ordinarily might be sufficient. In a large firm, or in practice situations in which intensely difficult ethical problems frequently arise, more elaborate procedures may be necessary. Some firms, for example, have a procedure whereby junior lawyers can make confidential referral of ethical problems directly to a designated senior partner or special committee. See Rule 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 may not assume that the subordinate lawyer will inevitably conform to the Rules.

Paragraph (c)(1) expresses a general principle of responsibility for acts of another. See also Rule 8.4(a).

Paragraph (c)(2) defines the duty of a lawyer having direct 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 of a private firm have at least indirect responsibility for all work being done by the firm, while a partner in charge of a particular matter ordinarily has direct authority over other firm lawyers engaged in the matter. Appropriate remedial action by a partner would depend on the immediacy of the partner's involvement and the seriousness of the misconduct. The 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.

Professional misconduct by a lawyer under supervision could reveal a violation of paragraph (b) on the part of the supervisory lawyer even though it does not entail a violation of paragraph (c) because there was no direction, ratification or knowledge of the violation.

Apart from this Rule and Rule 8.4(a), a lawyer does not have disciplinary liability for the conduct of a partner, 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.

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 5.2(a).

[Amended effective November 3, 2005.]

....

### **RULE 5.3 RESPONSIBILITIES REGARDING NON-LAWYER ASSISTANTS**

With respect to a non-lawyer employed or retained by or associated with a lawyer:

(a) 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;

(b) 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;

(c) 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:

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

(2) 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.

[Amended effective November 3, 2005 to add scope to include as well as partners, other lawyers possessing managerial authority]

### **Comment**

Lawyers generally employ assistants in their practice, including secretaries, investigators, law student interns, and paraprofessionals. Such assistants, whether employees or independent contractors, act for the lawyer in the rendition of the lawyer's professional services. A lawyer ~~should~~ must make reasonable efforts to 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, and should be responsible for their work product. The measures employed in supervising non-lawyers should take account of the fact that they do not have legal training and are not subject to professional discipline.

Paragraph (a) 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 non-lawyers in the firm will act in a way compatible with the Rules of Professional Conduct. See Comment to Rule 5.1. Paragraph (b) applies to lawyers who have supervisory authority over the work of a nonlawyer. Paragraph (c) 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.

[Amended effective November 3, 2005.]

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**EXHIBIT “G” TO ORDER**

**MISSISSIPPI RULES OF  
PROFESSIONAL CONDUCT**

**INFORMATION ABOUT LEGAL SERVICES**

**RULE 7.1 COMMUNICATIONS  
CONCERNING A LAWYER’S  
SERVICES**

....

**RULE 7.3 DIRECT CONTACT WITH PROSPECTIVE CLIENTS**

(a) A Lawyer shall not by in-person ~~or~~ live telephone or real-time electronic contact solicit professional employment from a particular prospective client with whom the lawyer has no family, close personal, or prior professional relationship when a significant motive of the lawyer's doing so is the lawyer's pecuniary gain.

(b) A lawyer shall not solicit professional employment from a particular prospective client by written ~~or~~ recorded or electronic communication or by in-person ~~or~~ telephone or real time electronic contact even when not otherwise prohibited by paragraph (a), if:

- (1) Prospective client has made known to the lawyer the desire not to be solicited by the lawyer or
- (2) The solicitation involves coercion, duress or harassment.

(c) Every written ~~A rewritten or~~ recorded or electronic communication from a lawyer soliciting professional employment from a particular prospective client known to be in need of legal services in a particular matter, with whom the lawyer has no family, close personal, or prior professional relationship, shall include the words, "solicitation material" on the outside envelope or at the beginning and ending of any recorded communication.

(d) Notwithstanding the prohibitions of paragraph (a), a lawyer may participate with a prepaid or group legal service plan operated by an organization not owned or directed by the lawyer which uses in-person or telephone contact to solicit memberships or subscriptions for the plan from persons who are not known to need legal services in a particular matter covered by the plan.

[Amended effective June 22, 1994; amended February 11, 1999; amended effective November 3, 2005.]

### **Comment**

There is a potential for abuse inherent in direct in-person, ~~or~~ live telephone or real-time electronic contact by a lawyer with a particular prospective client known to need legal services. These forms of contact between a lawyer and a prospective client subject the layperson to the private importuning of the trained advocate in a direct interpersonal encounter. The prospective client, who may already feel overwhelmed by the circumstances giving rise to the need for legal services, may find it difficult to fully evaluate all available alternatives with reasoned judgment and appropriate self-interest in the face of the lawyer's presence and insistence upon being retained immediately. The situation is fraught with the possibility of undue influence, intimidation, and over-reaching.

This potential for abuse inherent in direct in-person, ~~or~~ live telephone or real-time electronic solicitation of particular prospective clients justifies its prohibition, particularly since lawyer advertising and written and recorded communication permitted under Rule 7.2 offer alternative means of conveying necessary information to those who may be in need of legal services. Advertising and written and recorded communications which may be mailed or auto-dialed make it possible for a prospective client to be informed about the need for legal services, and about the qualifications of available lawyers and law firms, without subjecting the prospective client to direct in-person or telephone persuasion that may overwhelm the client's judgment.

The use of general advertising and written, ~~—and~~ recorded or electronic communications to transmit information from lawyer to prospective client, rather than direct in-person, ~~or~~ live telephone or real-time contact, will help to assure that the information flows cleanly as well as freely. The contents of advertisements and communications permitted under Rule 7.2 are permanently recorded so that they cannot be disputed and may be shared with others who know the lawyer. This potential for informal review is itself likely to help guard against statements and claims that might constitute false and misleading communications in violation of Rule 7.1. The contents of direct in-person, ~~or~~ live telephone or real-time electronic conversations between a lawyer and ~~to~~ a prospective client can be disputed and are not subject to third party scrutiny. Consequently, they are much more likely to approach (and occasionally cross) the dividing line between accurate representations and those that are false and misleading.

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[Amended effective June 22, 1994; amended February 11, 1999; amended effective November 3, 2005.]



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**EXHIBIT “H” TO ORDER**

**MISSISSIPPI RULES OF  
PROFESSIONAL CONDUCT**

**MAINTAINING THE INTEGRITY OF  
THE PROFESSION**

**RULE 8.1 BAR ADMISSIONS AND  
DISCIPLINARY MATTERS**

....

**RULE 8.4 MISCONDUCT**

It is professional misconduct for a lawyer to:

(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;

....

(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;  
or

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

[Amended effective November 3, 2005 to add new subsection (e) .]

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