IN THE SUPREME COURT OF THE STATE OF KANSAS

Administrative Order

2021-RL-169

FILED

November 29, 2021

DOUGLAS T. SHIMA
CLERK OF APPELLATE COURTS

Rules Relating to Discipline of Attorneys

The following rule changes are effective the date of this order:

- Supreme Court Rules 208, 215, 223, 224, 228, 230, 232, 234, 235, and 237 are amended;
- Supreme Court Rule 240, Kansas Rules of Professional Conduct Preamble and Rules 1.7, 1.8, and 3.1 are amended;
- Supreme Court Rule 240, Kansas Rule of Professional Conduct 6.5 is adopted; and
- Supreme Court Rule 241 is amended.

Dated this 29th day of November 2021.

FOR THE COURT

MARLA LUCKERT
Chief Justice

Rule 208

INITIAL COMPLAINT OR REPORT OF MISCONDUCT

(a) **Submission to Disciplinary Administrator.** An initial complaint or a report of attorney misconduct must be submitted to the disciplinary administrator. An initial complaint or a report submitted to the Board, a board member, the clerk of the appellate courts, the Office of Judicial Administration, or a state or local bar association must be delivered immediately to the disciplinary administrator.

(b) **Dismissal.** The disciplinary administrator may decline to investigate and may dismiss an initial complaint or a report received under subsection (a) under the following circumstances:

(1) if the allegations in the initial complaint or report do not constitute misconduct;

(2) if the initial complaint or report is facially frivolous, lacks adequate factual detail, or is ~~duplicitous~~duplicative; or

(3) if the matter is outside the Board's jurisdiction.

(c) **Investigation.** Unless the disciplinary administrator dismisses an initial complaint or a report under subsection (b), the disciplinary administrator must proceed as follows:

(1) conduct an informal inquiry to determine whether to dismiss the initial complaint or report if it appears to be frivolous or without merit or to docket the initial complaint or report for investigation under Rule 209; or

(2) promptly docket the initial complaint or report for investigation under Rule 209.

Rule 215

PLEADINGS; SERVICE

(a) **Formal Complaint; Notice of Hearing.**

(1) The disciplinary administrator must file a formal complaint with the Board as follows:

(A) at 701 Southwest Jackson Street, First Floor, Topeka, Kansas 66603; or

(B) by email to kbda@kscourts.org.

(2) The disciplinary administrator must serve the respondent and each hearing panel member with a copy of the formal complaint and notice of hearing no later than 45 days before the hearing on the formal complaint.

(3) Service under subsection (a)(2) on the respondent must be made by one of the following methods:

(A) personal service;

(B) certified mail to the respondent's most recent registration address with the Office of Judicial Administration; or

(C) on respondent's counsel by personal service, first-class mail, or email.

(4) Service under subsection (a)(2) on each hearing panel member must be made by personal service, first-class mail, or email.

(b) **Answer**.

(1) The respondent must file an answer to the formal complaint with the Board as follows:

(A) at 701 Southwest Jackson Street, First Floor, Topeka, Kansas 66603; or

(B) by email to kbda@kscourts.org.

(2) The respondent must serve the disciplinary administrator and each hearing panel member with a copy of the answer. The answer must be filed and served no later than 21 days after service of the formal complaint on the respondent.

(3) Service under subsection (b)(2) must be made by personal service, first-class mail, or email.

(4) For good cause, the presiding officer may extend the time for the respondent to file and serve an answer to the formal complaint.

(5) If the respondent fails to file and serve the disciplinary administrator and each hearing panel member with a timely answer to the formal complaint, the disciplinary administrator may file a motion under Rule 213 for temporary suspension.

(c) **Motion, Response, and Other Filing.**

(1) The disciplinary administrator and respondent must file any other pleading, motion, response, reply, notice, or other filing with the Board as follows:

(A) at 701 Southwest Jackson Street, First Floor, Topeka, Kansas 66603; or

(B) by email to kbda@kscourts.org.

(2) The disciplinary administrator must serve a copy of any other pleading, motion, response, reply, notice, or other filing as follows:

(A) on the respondent by personal service, certified mail, first-class mail, or email to the respondent's most recent registration address or email address; or ~~and~~

(B) if represented by counsel, by personal service, certified mail, first-class mail, or email to the respondent's counsel; and

(C~~B~~) on each hearing panel member by personal service, first-class mail, or email.

(3) The respondent must serve the disciplinary administrator and each hearing panel member with a copy of any other pleading, motion, response, reply, notice, or other filing by personal service, first-class mail, or email.

(d) **Complete When Mailed.** Service under this rule by certified mail or first-class mail is deemed complete on mailing, regardless of whether the mail is actually received.

(e) **Reference to Certain Persons or Information.** A party filing a pleading, motion, response, or other filing must protect personally identifiable information as follows:

(1) by complying with Rule 7.043 when referencing certain persons;

(2) by redacting a person's date of birth except for the year; and

(3) by redacting the document to refer to only the last four digits of any of the following numbers:

(A) a Social Security number;

(B) a financial account number, including a bank, credit card, and debit card account;

(C) a taxpayer identification number (TIN);

(D) an employee identification number;

(E) a driver's license or nondriver's identification number;

(F) a passport number;

(G) a brokerage account number;

(H) an insurance policy account number;

(I) a loan account number;

(J) a customer account number;

(K) a patient or health care number;

(L) a student identification number; and

(M) a vehicle identification number (VIN).

Rule 223

SUMMARY SUBMISSION

(a) **Definition.** "Summary submission" is submission by agreement of an attorney disciplinary case to the Supreme Court on a written record.

(b) **Agreement.** An agreement between the disciplinary administrator and the respondent to proceed by summary submission must be in writing and contain the following:

(1) an admission that the respondent engaged in the misconduct;

(2) a stipulation as to the following:

(A) the contents of the record;

(B) the findings of fact; ~~and~~

(C) the conclusions of law, ~~—~~including each violation of the Kansas Rules of Professional Conduct, the Rules Relating to Discipline of Attorneys, or the attorney's oath of office; and

(D) any applicable aggravating and mitigating factors;

(3) a recommendation for discipline;

(4) a waiver of the hearing on the formal complaint; and

(5) a statement by the parties that no exceptions to the findings of fact or conclusions of law will be taken.

(c) **Timing.** The disciplinary administrator and the respondent may enter into the agreement at any time after the review committee directs a hearing on a formal complaint but no later than 30 days before the scheduled hearing on the formal complaint.

(d) **Notice to Complainant.** After the disciplinary administrator and the respondent enter into an agreement to proceed by summary submission, the disciplinary administrator will provide a copy of the agreement to the complainant. The complainant has 21 days to provide the disciplinary administrator with the complainant's position regarding the agreement.

(e) **Procedure.**

(1) **Board Chair.** After the disciplinary administrator and the respondent enter into an agreement to proceed by summary submission, the disciplinary administrator will forward a copy of the agreement and the complainant's position to the Board chair for consideration of the summary submission.

(2) **Approved.** If the chair approves the summary submission, a hearing on the formal complaint is cancelled and the case proceeds according to Rule 228.

(3) **Rejected.** If the chair rejects the summary submission, the case proceeds according to Rule 222.

(f) **Supreme Court's Discretion.** An agreement to proceed by summary submission is advisory only and does not prevent the Supreme Court from making its own conclusions regarding rule violations or imposing discipline greater or lesser than the parties' recommendation.

Rule 224

WITNESSES AND EXHIBITS

(a) **Disciplinary Administrator's Witness List and Exhibits.** No later than 14 days after service of a formal complaint, the disciplinary administrator must file a witness and exhibit list and the original exhibits, marked numerically. The disciplinary administrator must serve the respondent and each hearing panel member with a copy of the list and a copy of each exhibit.

(b) **Respondent's Witness List and Exhibits.** No later than 14 days after the answer to a formal complaint is due, the respondent must file a witness and exhibit list and the original exhibits, marked alphabetically. The respondent must serve the disciplinary administrator and each hearing panel member with a copy of the list and a copy of each exhibit.

(c) **Reference to Certain Persons or Information.** A party offering an exhibit for admission into evidence must protect personally identifiable information as follows:

(1) by complying with Rule 7.043 when referencing certain persons;

(2) by redacting a person's date of birth except for the year; and

(3) by sealing the exhibit or redacting the exhibit to refer to only the last four digits of any of the following numbers:

(A) a Social Security number;

(B) a financial account number, including a bank, credit card, and debit card account;

(C) a taxpayer identification number (TIN);

(D) an employee identification number;

(E) a driver's license or nondriver's identification number;

(F) a passport number;

(G) a brokerage account number;

(H) an insurance policy account number;

(I) a loan account number;

(J) a customer account number;

(K) a patient or health care number;

(L) a student identification number; and

(M) a vehicle identification number (VIN);

(4) by sealing any exhibit that is a medical, substance abuse, psychological, or psychiatric report or record; and

(5) by sealing or redacting the exhibit for other good cause shown.

(~~c~~d) **Procedures for Calling an Expert Witness.**

(1) No later than 21 days after service of a formal complaint, a party planning to call an expert witness must file notice of intent to call an expert witness.

(A) Written notice and any expert witness' report must be served on each hearing panel member and the opposing party.

(B) If the expert witness has not issued a report, the notice must include a proffer of the subject matter on which the expert is expected to testify and the substance of the facts and opinions to which the expert is expected to testify.

(2) If the opposing party plans to call a rebuttal expert witness, the opposing party must file notice of intent to call a rebuttal expert witness no later than 21 days after service of a notice under subsection (c)(1).

(A) Written notice of intent to call a rebuttal expert witness and any rebuttal expert witness' report must be served on each hearing panel member and the other party.

(B) If the rebuttal expert witness has not issued a report, the notice must include a proffer of the subject matter on which the rebuttal expert is expected to testify and the substance of the facts and opinions to which the rebuttal expert is expected to testify.

(~~d~~e) **Scope of Testimony.** An expert witness may not testify unless the following apply:

(1) the witness is qualified as an expert by knowledge, skill, experience, training, or education;

(2) the testimony will help the hearing panel understand the evidence;

(3) the testimony is based on sufficient facts or data;

(4) the testimony is the product of reliable principles and methods; and

(5) the witness has reliably applied the principles and methods to the facts of the formal complaint.

(~~e~~f) **Additional Witness and Exhibit; Time Limit.** For good cause, the hearing panel may allow a party to endorse an additional witness or offer an additional exhibit at any time, including at the hearing on the formal complaint.

Rule 228

PROCEDURE BEFORE SUPREME COURT

(a) **Case Caption.** A case in the Supreme Court under these rules must be captioned as follows:

In the Matter of No. _____

_____

(Respondent) or (Petitioner).

(b) **Docketing.** To docket a case in the Supreme Court, the disciplinary administrator must complete the following:

(1) file any formal complaint, answer, and final hearing report or summary submission agreement; and

(2) submit the record and table of contents as directed by the clerk of the appellate courts.

(c) **Record.** The record must include the following:

(1) each filing by the disciplinary administrator and respondent, any order issued by the hearing panel, the final hearing report issued by the panel, and any agreement regarding a summary submission entered into by the disciplinary administrator and respondent;

(2) a transcript of any hearing and deposition;

(3) the disciplinary administrator's exhibits offered for admission into evidence; and

(4) the respondent's exhibits offered for admission into evidence.

(d) **Notice of Docketing.** After the disciplinary administrator dockets a case, the clerk of the appellate courts will notify the respondent by certified mail that the case has been docketed.

(e) **When Exception Required.** No later than 21 days after providing the notice under subsection (d), the disciplinary administrator and the respondent must file one of the following unless subsection (f)(2) applies:

(1) an exception to a finding of fact or conclusion of law in the final hearing report to preserve the issue for review by the Supreme Court; or

(2) a statement that the party will not file an exception to the findings of fact or conclusions of law in the final hearing report.

(f) **When Exception Not Required or Allowed.**

(1) The disciplinary administrator and the respondent may contest the recommendation of discipline made by a hearing panel without filing an exception.

(2) Neither party may file an exception in a case submitted to the Supreme Court by summary submission under Rule 223.

(g) **No Exception.**

(1) **By Respondent.** If the respondent files a statement under subsection (e)(2) that the respondent will not file an exception or if the respondent fails to timely file an exception, the findings of fact and conclusions of law in the final hearing report will be deemed admitted by the respondent.

(2) **By Disciplinary Administrator.** If the disciplinary administrator files a statement under subsection (e)(2) that the disciplinary administrator will not file an exception or if the disciplinary administrator fails to timely file an exception, the findings of fact and conclusions of law in the final hearing report will be deemed admitted by the disciplinary administrator.

(h) **Exception Filed.** When the disciplinary administrator or the respondent timely files an exception under subsection (e)(1) to a finding of fact or conclusion of law, the following provisions apply.

(1) **Transcript.** The clerk of the appellate courts will order a copy of the transcript of the hearing on the formal complaint. The clerk will provide the copy to the respondent.

(2) **Briefs.**

(A) The party filing the exception must file an opening brief no later than 30 days after the clerk provides the transcript to the respondent. If both parties file an exception, the disciplinary administrator must file an opening brief no later than 30 days after the clerk provides the transcript to the respondent.

(B) The party responding to the opening brief must file a response brief no later than 30 days after service of the opening brief.

(C) The party filing the opening brief may file a reply brief no later than 14 days after service of the response brief.

(D) The parties must file and serve the briefs as directed by the clerk of the appellate courts, and the briefs must be in the format provided by Rule 6.02 et seq.

(E) If either party fails to file a brief, that party will be deemed to have admitted the findings of fact and conclusions of law in the final hearing report.

(i) **Oral Argument.** The clerk of the appellate courts will set the case for oral argument before the Supreme Court. The clerk will notify the respondent and the disciplinary administrator of the date, time, and location or manner of the oral argument. The respondent and the disciplinary administrator must appear at the oral argument. This subsection applies even if the case is submitted under Rule 223 or if the respondent or the disciplinary administrator fails to file an exception or a brief.

(j) **Discipline Effective Immediately.** Any discipline ordered by the Supreme Court is effective immediately on the filing of the order or opinion with the clerk of the appellate courts, unless otherwise ordered by the court.

(k) **Motion for Rehearing; Motion for Modification.** No later than 21 days after the filing of an order or opinion of the Supreme Court imposing discipline, the respondent may file a motion for rehearing or a motion for modification under Rule 7.06. The filing of the motion does not stay the effect of an order of discipline, unless otherwise ordered by the court.

Rule 230

VOLUNTARY SURRENDER OF LICENSE

(a) **Voluntary Surrender Procedure.** An attorney may voluntarily surrender the attorney's license to practice law. The attorney must complete the following requirements:

(1) ~~file~~ submit to the Office of Judicial Administration a request to surrender the attorney's license ~~with the Supreme Court~~ on a form provided by the disciplinary administrator ~~or the Office of Judicial Administration~~;

(2) serve the disciplinary administrator with a copy of the request; and

(3) return to the Office of Judicial Administration the attorney's certificate of admission to the bar and the attorney's current bar registration card or, if either document is unavailable, explain why the document cannot be returned.

(b) **Voluntary Surrender of License by Respondent or Suspended Attorney.**

(1) **Effect of Voluntary Surrender.** If a respondent or suspended attorney voluntarily surrenders the respondent's or attorney's license to practice law under subsection (a), the following provisions apply:

(A) the Supreme Court will issue an order disbarring the attorney;

(B) the Office of Judicial Administration will strike the attorney's name from the roll of attorneys; and

(C) any pending board proceeding or case terminates, but the disciplinary administrator may direct an investigator to complete a pending investigation to preserve evidence.

(2) **Reinstatement.** An attorney who voluntarily surrendered the attorney's license to practice law under subsection (b)(1) may seek reinstatement under Rule 232.

(c) **Voluntary Surrender of License by Attorney in Good Standing.**

(1) **Voluntary Surrender.**

(A) The following provisions apply if an attorney voluntarily surrenders the attorney's license to practice law when the attorney is in good standing and is not a respondent:

(i) the attorney must provide an affidavit to the Supreme Court that establishes the attorney is not counsel of record in any matter pending before a court or tribunal in Kansas and the attorney is not providing legal services to any client in Kansas;

(ii) the Supreme Court will issue an order accepting the attorney's surrender; and

(iii) the Office of Judicial Administration will strike the attorney's name from the roll of attorneys.

(B) If an attorney is not in good standing due to an administrative suspension, the attorney must comply with the requirements of the suspension order and obtain reinstatement before voluntarily surrendering the license.

(C) After the Supreme Court issues an order accepting an attorney's voluntary surrender, the attorney is no longer authorized to practice law.

(2) **Reinstatement.** An attorney who voluntarily surrendered the attorney's license to practice law under subsection (c)(1) may seek reinstatement.

(A) The attorney must complete the following requirements:

(i) file with the Supreme Court a petition for reinstatement;

(ii) pay the current active attorney registration fee and the active attorney registration fee required for each year since the voluntary surrender;

(iii) pay the current continuing legal education fee and the continuing legal education fee required for each year since the voluntary surrender; and

(iv) complete the continuing legal education hours required for each year since the voluntary surrender.

(B) The Supreme Court may require the attorney to do the following:

(i) appear before a Board hearing panel for a reinstatement hearing under Rule 232; and

(ii) demonstrate compliance with other conditions for reinstatement.

(3) **Misconduct.** An attorney remains subject to disciplinary proceedings for misconduct that occurred prior to the voluntary surrender of the attorney's license to practice law.

Rule 232

REINSTATEMENT FOLLOWING SUSPENSION OR DISBARMENT

(a) **Eligibility.**

(1) **Definite Suspension.** A respondent suspended by the Supreme Court for a definite period of time is eligible to petition for reinstatement after the stated period of suspension has passed.

(2) **Indefinite Suspension.** A respondent indefinitely suspended by the Supreme Court is eligible to petition for reinstatement three years after the date of suspension.

(3) **Disbarment.** A respondent disbarred by the Supreme Court is eligible to petition for reinstatement five years after the date of disbarment.

(b) **Petition for Reinstatement.**

(1) A respondent seeking reinstatement must file with the Supreme Court a verified petition for reinstatement that sets forth facts establishing the following:

(A) the respondent is eligible to petition for reinstatement under subsection (a);

(B) the respondent has complied with Rule 231 and the Supreme Court's orders;

(C) the respondent has paid any costs assessed under Rule 229; and

(D) the respondent should be reinstated to the practice of law.

(2) At the time the petition is filed, the petitioner must complete the following requirements:

(A) pay a reinstatement filing fee of $1,250 to the clerk of the appellate courts to be deposited in the disciplinary fee fund, unless the attorney's license was transferred to disabled status under Rule 234; and

(B) serve the disciplinary administrator with a copy of the petition.

(c) **Disciplinary Administrator's Response.** No later than seven days after service of the petition for reinstatement, the disciplinary administrator must file a response to

the petition with the Supreme Court and serve the respondent with a copy. In the response, the disciplinary administrator must certify the following:

(1) whether the petitioner complied fully with the provisions in subsection (b)(1)(A)-(D); and

(2) considering the gravity of the misconduct leading to disbarment or suspension, whether the disciplinary administrator believes that sufficient time has elapsed since the date of disbarment or suspension to justify the Supreme Court's reconsideration of its order.

(d) **Reinstatement Hearing Not Specified.** If the Supreme Court suspends a respondent for a definite period of time and does not specify in the suspension order that the respondent is required to undergo a reinstatement hearing, the following provisions will apply:

(1) the Supreme Court will reinstate the petitioner without a hearing if the petitioner establishes and the disciplinary administrator certifies in the response that the petitioner complied fully with subsection (b); or

(2) if the disciplinary administrator certifies in the response to the petition that the petitioner has not complied fully with subsection (b), the disciplinary administrator must file a motion for a reinstatement hearing.

(e) **Reinstatement Hearing Required or Specified.** When the Supreme Court disbars or indefinitely suspends a respondent or when the Supreme Court suspends a respondent for a definite period of time and specifies in the suspension order that the respondent must undergo a reinstatement hearing, the following provisions ~~rules~~ apply.

(1) **Supreme Court's Determination.** After the disciplinary administrator files a response to the petition for reinstatement under subsection (c), the Supreme Court will determine whether sufficient time has elapsed since the date of disbarment or suspension to justify reconsideration of its order. The court will consider the gravity of the misconduct leading to the discipline.

(A) If the Supreme Court determines that sufficient time has not elapsed to justify reconsideration of its order, the court will dismiss the petition.

(B) If the Supreme Court determines that sufficient time has elapsed to justify reconsideration of its order, the court will direct the disciplinary administrator to conduct an investigation of the facts alleged in the petition and the petitioner's conduct since the court imposed discipline.

(2) **Hearing Panel.** After the disciplinary administrator's investigation, the Board chair will appoint a hearing panel to conduct a hearing on the petition. The panel will schedule the reinstatement hearing.

(3) **Burden of Proof.** The petitioner has the burden of proof to establish that the petitioner is fit to practice law and that the factors in subsection (e)(4) weigh in favor of reinstatement.

(4) **Reinstatement Factors.** At the reinstatement hearing, the petitioner must present evidence that establishes the following:

(A) the petitioner's current moral fitness;

(B) the petitioner's consciousness of the wrongful nature of the petitioner's misconduct and the disrepute the misconduct brought the profession;

(C) the seriousness of the misconduct leading to disbarment or suspension does not preclude reinstatement;

(D) the petitioner's conduct since the Supreme Court imposed discipline;

(E) the petitioner's present ability to practice law;

(F) the petitioner's compliance with the Supreme Court's orders;

(G) the petitioner has not engaged in the unauthorized practice of law;

(H) the petitioner has received adequate treatment or rehabilitation for any substance abuse, infirmity, or problem; and

(I) the petitioner has resolved or attempted to resolve any other initial complaint, report, or docketed complaint against the petitioner.

(f) **Reinstatement Final Hearing Report.**

(1) **Contents.** Following a hearing on a petition for reinstatement, the hearing panel will issue a reinstatement final hearing report that includes findings of fact, conclusions of law, a discussion of the reinstatement factors under subsection (e)(4), and a recommendation regarding reinstatement.

(A) **Findings of Fact.** Each finding of fact must be established by clear and convincing evidence.

(B) **Conclusions of Law.** Each conclusion of law must be set forth separately.

(C) **Reinstatement Factors.** The hearing panel must consider each factor in subsection (e)(4).

(D) **Recommendation Regarding Reinstatement.** The hearing panel's recommendation regarding reinstatement is advisory only.

(2) **Concurring or Dissenting Opinion.** If a member of the hearing panel cannot agree on a finding of fact, conclusion of law, reinstatement factor, or the recommendation regarding reinstatement, the panel member's concurring or dissenting opinion will be included in the reinstatement final hearing report.

(3) **Distribution.** After the hearing panel issues the reinstatement final hearing report, the panel will serve the disciplinary administrator and the petitioner with a copy of the report.

(g) **Procedure Following Distribution.**

(1) **Submission to Supreme Court.** On service under subsection (f)(3) of the reinstatement final hearing report, the disciplinary administrator must complete the following:

(A) file the reinstatement final hearing report with the Supreme Court; and

(B) submit the record and a table of contents as directed by the clerk of the appellate courts.

(2) **Record.** The record in a reinstatement case must include the following:

(A) the petition for reinstatement, each filing by the petitioner and the disciplinary administrator in the reinstatement action, any order issued by the hearing panel, and the reinstatement final hearing report issued by the panel;

(B) the transcript of the reinstatement hearing and any deposition;

(C) the petitioner's exhibits offered for admission into evidence; and

(D) the disciplinary administrator's exhibits offered for admission into evidence.

(3) **Reinstatement Recommended.** If the hearing panel recommends granting the petition for reinstatement, the matter will be submitted for the Supreme Court's consideration.

(4) **Reinstatement Not Recommended.**

(A) If the hearing panel recommends denying the petition for reinstatement, the petitioner may file with the Supreme Court an exception to a finding of fact or conclusion of law no later than 21 days after service of a copy of the reinstatement final hearing report.

(B) If the petitioner files an exception, the petitioner must serve the disciplinary administrator with a copy of the exception.

(C) On filing of an exception or the expiration of the time to file an exception, the matter will be submitted for the Supreme Court's consideration.

(D) Neither briefs nor oral arguments will be permitted unless requested by the Supreme Court.

(h) **Condition for Reinstatement; Limitation on Practice.** If the Supreme Court grants a petition for reinstatement, it may order the attorney to comply with any condition or limitation on the attorney's practice. The court may also order that the attorney's practice be supervised for a period of time.

Rule 234

TRANSFER TO DISABLED STATUS

(a) **Definition.** In this rule, "disabled" means unable to continue the practice of law due to a mental or physical limitation.

(b) **Examination.** The disciplinary administrator may file with the Supreme Court a motion for an order requiring an attorney to submit to examination by a physician, psychologist, or other treatment professional. The attorney may file a response within 14 days.

(1) **Consent.** By registering as an active attorney under Rule 206, an attorney consents to submit to examination by a physician, psychologist, or other treatment professional when ordered to do so by the Supreme Court and to waive all objections to the admissibility of the examination report.

(2) **Submission.** If the Supreme Court grants the motion, the attorney must submit to examination by a physician, psychologist, or other treatment professional designated by the court to determine whether the attorney is disabled.

(3) **Costs of Examination.** The costs of examination may be paid from the disciplinary fee fund. If a disciplinary proceeding is pending, the costs may be charged as costs of the action.

(4) **Refusal to Submit to Examination.** If the attorney refuses to submit to examination when required under subsection (b)(2) or fails to appear for a scheduled appointment for an examination, the Supreme Court will issue an order temporarily suspending the attorney's license to practice law.

(5) **Reinstatement.** If the Supreme Court temporarily suspends the attorney's license to practice law under subsection (b)(4), the attorney may petition for reinstatement under Rule 232. The petition for reinstatement must show the following:

(A) the attorney has completed examination by the physician, psychologist, or other treatment professional; and

(B) the attorney is no longer disabled and is eligible for reinstatement to the practice of law.

(~~b~~c) **Automatic Transfer.**

(1) **District Court Clerk's Duty.** When a court has entered an order declaring an attorney to be incapacitated or subject to involuntary civil commitment, the clerk of the district court must send a certified copy of the order to the disciplinary administrator.

(2) **Disciplinary Administrator's Duty.** When the disciplinary administrator receives a certified copy of an order declaring an attorney to be incapacitated or subject to involuntary civil commitment, the disciplinary administrator must notify the Supreme Court that the attorney should be transferred to disabled status.

(3) **Supreme Court Action.** The Supreme Court will automatically transfer the attorney to disabled status without a hearing when the court receives notification from the disciplinary administrator under subsection (~~b~~c)(2).

(~~c~~d) **When Docketed Complaint Not Pending.** When no docketed complaint is pending against an attorney and the attorney serves the disciplinary administrator with a copy of evidence that establishes the attorney is disabled, the attorney may register as a disabled attorney under Rule 206(b)(1).

(~~d~~e) **When Docketed Complaint Pending.**

(1) **Voluntary Transfer.** When an investigation of a docketed complaint is pending, the respondent may request transfer to disabled status. The following provisions ~~rules~~ apply.

(A) **Respondent's Duties.** The respondent must cease practicing law and serve the disciplinary administrator with a copy of evidence that establishes the respondent is disabled.

(B) **Motion and Response.**

(i) The respondent may file with the Supreme Court a motion requesting transfer to disabled status. The disciplinary administrator must file with the Supreme Court a response no later than 14 days after service of the motion.

(ii) Upon the respondent's request, the disciplinary administrator may file a motion with the Supreme Court to transfer the respondent to disabled status. The respondent may file with the Supreme Court a response no later than 14 days after service of the motion.

~~(B) **Disciplinary Administrator's Duty.** If the respondent serves the disciplinary administrator with a copy of evidence that establishes the respondent is disabled, the disciplinary administrator must petition the Supreme Court to transfer the respondent to disabled status.~~

(2) **Involuntary Transfer.** When an investigation of a docketed complaint is pending, the Supreme Court may involuntarily transfer the respondent to disabled status. The following provisions ~~rules~~ apply.

(A) **Motion and Response.** The disciplinary administrator may file with the Supreme Court a motion to transfer the respondent to disabled status. The respondent may file with the Supreme Court a response no later than 14 days after service of the motion.

(B) **Burden of Proof.** The disciplinary administrator must establish by clear and convincing evidence that the respondent is disabled.

(C) **Appointment of Counsel.** The Supreme Court may appoint counsel to represent the respondent. The costs of appointed counsel may be paid from the disciplinary fee fund and charged as costs of the action.

~~(D) **Examination.** The disciplinary administrator may file with the Supreme Court a motion for an order requiring the respondent to submit to examination by a physician, psychologist, or other treatment professional.~~

~~(i) **Consent.** By registering as an active attorney under Rule 206, an attorney consents to submit to examination by a physician, psychologist, or other treatment professional when ordered to do so by the Supreme Court and to waive all objections to the admissibility of the examination report.~~

~~(ii) **Submission.** If the Supreme Court grants the motion, the attorney must submit to examination by a physician, psychologist, or other treatment professional designated by the court to determine whether the attorney is disabled.~~

~~(iii) **Costs of Examination.** The costs of examination may be paid from the disciplinary fee fund and charged as costs of the action.~~

~~(iv) **Refusal to Submit to Examination.** If the attorney refuses to submit to examination when required under subsection~~

~~(d)(2)(D)(ii) or fails to appear for a scheduled appointment for an examination, the Supreme Court will issue an order temporarily suspending the attorney's license to practice law.~~

~~(v) **Reinstatement.** If the Supreme Court temporarily suspends the attorney's license to practice law under subsection (d)(2)(D)(iv), the attorney may petition for reinstatement under Rule 232. The petition for reinstatement must show the following:~~

~~(I) the attorney has completed examination by the physician, psychologist, or other treatment professional; and~~

~~(II) the attorney is no longer disabled and is eligible for reinstatement to the practice of law.~~

(~~E~~D) **Report of Examination and Other Evidence.**

(i) The disciplinary administrator must file with the Supreme Court and serve the attorney with the report of any examination under subsection (b~~d~~)~~(2)(D)(ii)~~ and any other evidence regarding whether the attorney is disabled.

(ii) No later than 30 days after the disciplinary administrator files the report and any other evidence, the attorney may file with the Supreme Court and serve the disciplinary administrator with additional evidence regarding whether the attorney is disabled.

(~~F~~E) **Transfer.** If the Supreme Court determines based on the record that the attorney is disabled, the court will issue an order transferring the attorney to disabled status.

(e~~f~~) **Service.** When the Supreme Court transfers an attorney to disabled status, the clerk of the appellate courts will serve a copy of the order on the following individuals:

(1) the attorney;

(2) the director of any institution where the attorney is committed as described in subsection (b~~c~~)(1);

(3) the disciplinary administrator; and

(4) the administrative judge in the judicial district where the attorney's office is located, according to the attorney's most recent registration address with the Office of Judicial Administration.

(~~f~~g) **Practice of Law.** An attorney transferred to disabled status may not engage in the practice of law until the Supreme Court reinstates the attorney to active status.

(~~g~~h) **Reinstatement.** An attorney on disabled status may file a petition for reinstatement with the Supreme Court when the attorney is no longer disabled. The following provisions ~~rules~~ apply regardless of whether the attorney registered as disabled under Rule 206(b)(1) or whether the attorney's status changed through an automatic, a voluntary, or an involuntary transfer under this rule.

(1) **Waiver of Privilege.** By filing a petition for reinstatement, the attorney waives any privilege applicable to treatment received while the attorney was on disabled status.

(2) **No Fee Required**. The attorney is not required to pay the reinstatement fee required by Rule 232(b)(2)(A).

(3) **Evidence.** The attorney must attach to the petition evidence that the attorney is no longer disabled.

(4) **Investigation.** If the Supreme Court determines from the petition and the evidence that there is probable cause to believe the attorney is no longer disabled, the Supreme Court will direct the disciplinary administrator to investigate the attorney's petition.

(A) **Examination.** During the investigation of the petition, the disciplinary administrator may direct the attorney to submit to examination by a physician, psychologist, or other treatment professional. The costs of examination may be paid from the disciplinary fee fund and charged as costs of the action.

(B) **Attorney's Duties.** The attorney must cooperate in the following ways with the disciplinary administrator's investigation:

(i) timely respond to requests for information;

(ii) submit to examination by a physician, psychologist, or other treatment professional on direction of the disciplinary administrator;

(iii) disclose the name of every physician, psychologist, treatment professional, institution, hospital, or facility that examined the

attorney or provided treatment to the attorney while the attorney was on disabled status;

(iv) consent in writing to allow the disciplinary administrator to obtain information and records regarding any examination or treatment of the attorney while the attorney was on disabled status; and

(v) comply with other requests made by the disciplinary administrator.

(5) **Disciplinary Administrator's Recommendation.** When the investigation is complete, the disciplinary administrator must determine whether the attorney has established by clear and convincing evidence that the attorney is no longer disabled.

(A) If the disciplinary administrator determines the attorney is no longer disabled, the disciplinary administrator will recommend that the Supreme Court grant the petition for reinstatement.

(B) If the disciplinary administrator determines the attorney has not established that the attorney is no longer disabled, the disciplinary administrator will recommend to the Supreme Court that the petition be set for hearing before a hearing panel.

(6) **Supreme Court.**

(A) If the disciplinary administrator recommends that the Supreme Court grant the petition, the court will reinstate the attorney without further proceedings, subject to any condition or limitation imposed under subsection (~~g~~h)(10).

(B) If the disciplinary administrator recommends that the petition be set for hearing before a hearing panel, the Supreme Court may do one of the following:

(i) reinstate the attorney without further proceedings, subject to any condition or limitation imposed under subsection (~~g~~h)(10); or

(ii) direct the Board chair to appoint a hearing panel to conduct a hearing on the petition.

(7) **Hearing Procedure.**

(A) **Hearing.** The hearing panel will schedule the reinstatement hearing.

(B) **Burden of Proof.** To be reinstated to the active practice of law, an attorney must establish by clear and convincing evidence that the attorney is no longer disabled.

(8) **Reinstatement Final Hearing Report.**

(A) **Contents.** Following a hearing on the petition, the hearing panel will issue a reinstatement final hearing report setting forth findings of fact, conclusions of law, and a recommendation regarding whether the attorney should be reinstated to the active practice of law.

(i) **Findings of Fact.** Each finding of fact must be established by clear and convincing evidence.

(ii) **Conclusions of Law.** Each conclusion of law must be set forth separately.

(iii) **Recommendation Regarding Reinstatement.** The hearing panel's recommendation regarding reinstatement is advisory only.

(B) **Concurring or Dissenting Opinion.** If a member of the hearing panel cannot agree on a finding of fact, conclusion of law, or the recommendation regarding reinstatement, the panel member's concurring or dissenting opinion will be included in the reinstatement final hearing report.

(C) **Distribution.** After the hearing panel issues the reinstatement final hearing report, the panel will serve the disciplinary administrator and the attorney with a copy of the report.

(9) **Procedure Following Distribution.**

(A) **Case Docketed with Supreme Court.** On service of the reinstatement final hearing report, the disciplinary administrator must complete the following:

(i) file the petition for reinstatement, response, and reinstatement final hearing report with the Supreme Court; and

(ii) submit the record and table of contents as directed by the clerk of the appellate courts.

(B) **Record.** The record in a reinstatement case must be filed under seal and include the following:

(i) the petition for reinstatement, each filing by the attorney and the disciplinary administrator in the reinstatement action, any order issued by the hearing panel, and the reinstatement final hearing report issued by the panel;

(ii) the transcript of the reinstatement hearing and any deposition;

(iii) the attorney's exhibits offered for admission into evidence; and

(iv) the disciplinary administrator's exhibits offered for admission into evidence.

(C) **Reinstatement Recommended.** If the hearing panel recommends granting the petition for reinstatement, the matter is submitted for the Supreme Court's consideration.

(D) **Reinstatement Not Recommended.**

(i) If the hearing panel recommends denying the petition for reinstatement, the attorney may file with the Supreme Court an exception to a finding of fact or conclusion of law no later than 21 days after service of a copy of the reinstatement final hearing report.

(ii) If the attorney files an exception, the attorney must serve the disciplinary administrator with a copy of the exception.

(iii) On filing of an exception or the expiration of the time to file an exception, the matter will be submitted for the Supreme Court's consideration.

(iv) Briefs and oral arguments are not permitted unless requested by the Supreme Court.

(10) **Condition for Reinstatement; Limitation on Practice.** If the Supreme Court grants the petition for reinstatement, the court may order the attorney to comply with any condition or limitation on the attorney's practice. The

court may also order that the attorney's practice be supervised for a period of time.

(11) **Reinstatement Denied.** If the Supreme Court denies the petition for reinstatement, the attorney may not file another petition for reinstatement until one year after the date of the order denying the petition or as otherwise directed by the court.

(~~h~~i) **Board Proceedings.**

(1) When the Supreme Court transfers an attorney to disabled status or temporarily suspends an attorney's license to practice law under subsection (~~d~~b)(~~2~~4)~~(D)(iv)~~, a pending disciplinary board proceeding against the attorney will be stayed. But the disciplinary administrator may direct the investigator to complete a pending investigation to preserve evidence.

(2) When the Supreme Court reinstates an attorney from disabled status, a disciplinary board proceeding that was pending at the time of the transfer will resume.

Rule 235

APPOINTMENT OF COUNSEL TO PROTECT CLIENT INTERESTS

(a) **Appointment of Counsel.**

(1) **Circumstances.** The chief judge of a judicial district may appoint counsel to protect the interests of an attorney's clients under the following circumstances:

(A) the Supreme Court has transferred the attorney to disabled status under Rule 234;

(B) the attorney has disappeared or died;

(C) the Supreme Court has suspended or disbarred the attorney and the attorney has not complied with Rule 231; or

(D) the attorney has neglected client affairs.

(2) **Action.** The chief judge may take the following action:

(A) authorize counsel appointed under subsection (a)(1) to do the following:

(i~~A~~) review and inventory the attorney's client files;

(ii~~B~~) access the attorney's trust account; and

(iii~~C~~) take any other action necessary to protect the interests of the attorney and the attorney's clients;~~.~~

(B) transfer any identifiable property not claimed by the owner to the Kansas State Treasurer's office under the Disposition of Unclaimed Property Act; and

(C) after reasonable efforts to identify the owner, transfer any property that is unidentifiable to the Lawyers' Fund for Client Protection under Rule 241.

(b) **Confidentiality.** Counsel appointed under subsection (a) to review and inventory client files or to access the attorney's trust account must not disclose any information unless necessary to carry out the chief judge's order.

(c) **Chief Judge's Duty.** No later than seven days after issuing an order under this rule, the chief judge must provide a copy of the order to the disciplinary administrator.

Rule 237

CONFIDENTIALITY AND DISCLOSURE

(a) **Confidentiality.** Except as otherwise provided in this rule or by order of the Supreme Court, the following documents are confidential and must not be divulged:

(1) an initial complaint or a report, a docketed complaint, and an investigative report; and

(2) notes, correspondence, and work product of the disciplinary administrator, an investigator, the review committee, a hearing panel, and the Board.

(b) **Complaint and Response.** The disciplinary administrator must provide the initial complaint or report to the respondent. If the respondent files a response to the initial complaint or report, the disciplinary administrator may provide the response to the complainant.

(c) **Disclosure by Complainant or Respondent.** This rule does not prohibit a complainant or respondent from disclosing the existence of an initial complaint or a report, a docketed complaint, or any document or correspondence filed by, served on, or provided to that person.

(d) **Disclosure to Respondent.** On request, the disciplinary administrator must disclose to the respondent the investigative report and all evidence in the disciplinary administrator's possession. Except as otherwise provided in Rule 218, no other discovery is permitted. The disciplinary administrator is not required to disclose any work product, including a summary and recommendation prepared under Rule 209(d).

(e) **Disclosure to Third Person.** The following provisions apply to disclosure by the disciplinary administrator to a third person.

(1) If the review committee directs the disciplinary administrator to impose an informal admonition, the disciplinary administrator may disclose, and must disclose upon request, the nature and disposition of the case.

(2) If thea review committee directs a hearing on a formal complaint, the disciplinary administrator may disclose, and must disclose upon request, any formal complaint; answer; filing by the disciplinary administrator or respondent; order issued by the hearing panel; final hearing report; summary submission agreement; the pleadings filed under Rule 215; and the exhibits admitted during the hearing on the formal complaint, subject to

~~any seal order; and the disposition of the board proceeding~~. The disclosure is subject to any seal order.

(3) If a respondent voluntarily surrenders the respondent's license to practice law, the disciplinary administrator may disclose the nature and disposition of the complaint; the disciplinary administrator must disclose a copy of an order of disbarment upon request.

(4) The disciplinary administrator and anyone appointed to assist the disciplinary administrator in conducting an investigation may disclose information reasonably necessary to complete the investigation.

(5) The disciplinary administrator may disclose relevant information and submit all or part of a disciplinary file to the following:

(A) the Kansas Lawyers Assistance Program or other lawyer assistance program;

(B) a government official, commission, committee, or body for use in evaluating an applicant or prospective appointee or nominee for a judicial appointment;

(C) the Supreme Court for use in evaluating an applicant or prospective appointee or nominee for service on a commission, committee, or board; or

(D) a law enforcement agency, licensing authority, or other disciplinary authority.

(f) **Disclosure to Complainant.** On dismissal under Rules 208, 209, or 211 or on imposition of an informal admonition, the disciplinary administrator must notify the complainant of the action taken and may reveal to the complainant information necessary to adequately explain the basis for the decision and the action taken.

Rule 240

KANSAS RULES OF PROFESSIONAL CONDUCT

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 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 an evaluator, a lawyer acts as 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~~2.3. 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 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 other 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. Therefore, all lawyers should devote professional time and resources and use civic influence 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. The attributes contained in this paragraph for lawyers' conduct shall be an aspirational goal of all lawyers.

[7] 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.

[8] 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.

[9] 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 ethical person while earning a satisfactory living. 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 zealously 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] The legal profession is largely self-governing. Although other professions also have been granted powers of self-government, the legal profession is unique in this respect because of the close relationship between the profession and the processes of government and law enforcement. This connection is manifested in the fact that ultimate authority over the legal profession is vested largely in the courts.

[11] To the extent that lawyers meet the obligations of their professional calling, the occasion for government regulation is obviated. Self-regulation also helps maintain the legal profession's independence from 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 government for the right to practice.

[12] The legal profession's relative autonomy carries with it special responsibilities of self-government. The profession has a responsibility to assure that its regulations are conceived in the public interest and not in furtherance of parochial or self-interested concerns of the bar. 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 which it serves.

[13] Lawyers play a vital role in the preservation of society. The fulfillment of this role requires an understanding by lawyers of their relationship to our legal system. The Rules of Professional Conduct, when properly applied, serve to define that relationship.

RULE 1.7 Conflict of Interest: Current Clients

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists 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 concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

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

(2) the representation is not prohibited by law;

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

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

Comment

General Principles

[1] Loyalty and independent judgment are essential elements in the lawyer's relationship to a client. Concurrent 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 concurrent conflicts of interest see Rule 1.8. For former client conflicts of interest, see Rule 1.9. For conflicts of interest involving prospective clients, see Rule 1.18. For definitions of "informed consent" and "confirmed in writing," see Rule 1.0(f) and (b).

[2] Resolution of a conflict of interest problem under this Rule requires the lawyer to: 1) clearly identify the client or clients; 2) determine whether a conflict of interest exists; 3) decide whether the representation may be undertaken despite the existence of a conflict, i.e., whether the conflict is consentable; and 4) if so, consult with the clients affected under paragraph (a) and obtain their informed consent, confirmed in writing. The clients affected under paragraph (a) include both of the clients referred to in paragraph

(a)(1) and the one or more clients whose representation might be materially limited under paragraph (a)(2).

[3] A conflict of interest may exist before representation is undertaken, in which event the representation must be declined, unless the lawyer obtains the informed consent of each client under the conditions of paragraph (b). To determine whether a conflict of interest exists, a lawyer should adopt reasonable procedures, appropriate for the size and type of firm and practice, to determine in both litigation and non-litigation matters the persons and issues involved. See also Comment to Rule 5.1. Ignorance caused by a failure to institute such procedures will not excuse a lawyer's violation of this Rule. As to whether a client-lawyer relationship exists or, having once been established, is continuing, see Comment to Rule 1.3 and Scope.

[4] If a conflict arises after representation has been undertaken, the lawyer ordinarily must withdraw from the representation, unless the lawyer had obtained the informed consent of the client under the conditions of paragraph (b). See Rule 1.16. Where more than one client is involved, whether the lawyer may continue to represent any of the clients is determined both by the lawyer's ability to comply with duties owed to the former client and by the lawyer's ability to represent adequately the remaining client or clients, given the lawyer's duties to the former client. See Rule 1.9. See also Comments [5] and [2~~8~~9].

[5] Unforeseeable developments, such as changes in corporate and other organizational affiliations or the addition or realignment of parties in litigation, might create conflicts in the midst of a representation, as when a company sued by the lawyer on behalf of one client is bought by another client represented by the lawyer in an unrelated matter. Depending on the circumstances, the lawyer may have the option to withdraw from one of the representations in order to avoid the conflict. The lawyer must seek court approval where necessary and take steps to minimize harm to the clients. See Rule 1.16. The lawyer must continue to protect the confidences of the client from whose representation the lawyer has withdrawn. See Rule 1.9(c).

Identifying Conflicts of Interest: Directly Adverse

[6] Loyalty to a current client prohibits undertaking representation directly adverse to that client without that client's informed consent. Thus, absent consent, a lawyer may not act as an advocate in one matter against a person the lawyer represents in some other matter, even when the matters are wholly unrelated. The client as to whom the representation is directly adverse is likely to feel betrayed, and the resulting damage to the client-lawyer relationship is likely to impair the lawyer's ability to represent the client effectively. In addition, the client on whose behalf the adverse representation is undertaken reasonably may fear that the lawyer will pursue that client's case less effectively out of deference to the other client, i.e., that the representation may be materially limited by the lawyer's interest in retaining the current client. Similarly, a

directly adverse conflict may arise when a lawyer is required to cross-examine a client who appears as a witness in a lawsuit involving another client, as when the testimony will be damaging to the client who is represented in the lawsuit. On the other hand, simultaneous representation in unrelated matters of clients whose interests are only economically adverse, such as representation of competing economic enterprises in unrelated litigation, does not ordinarily constitute a conflict of interest and thus may not require consent of the respective clients.

[7] Directly adverse conflicts can also arise in transactional matters. For example, if a lawyer is asked to represent the seller of a business in negotiations with a buyer represented by the lawyer, not in the same transaction but in another, unrelated matter, the lawyer could not undertake the representation without the informed consent of each client.

Identifying Conflicts of Interest: Material Limitation

[8] Even where there is no direct adverseness, a conflict of interest exists if there is a significant risk that a lawyer's ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer's other responsibilities or interests. For example, a lawyer asked to represent several individuals seeking to form a joint venture is likely to be materially limited in the lawyer's ability to recommend or advocate all possible positions that each might take because of the lawyer's duty of loyalty to the others. The conflict in effect forecloses alternatives that would otherwise be available to the client. The mere possibility of subsequent harm does not itself require disclosure and consent. The critical questions are the likelihood that a difference in interests 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.

Responsibilities to Former Clients and Other Third Persons

[9] In addition to conflicts with other current clients, a lawyer's duties of loyalty and independence may be materially limited by responsibilities to former clients under Rule 1.9 or by the lawyer's responsibilities to other persons, such as fiduciary duties arising from a lawyer's service as a trustee, executor or corporate director.

Personal Interest Conflicts

[10] The lawyer's own interests should not be permitted to have an adverse effect on representation of a client. For example, 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. Similarly, when a lawyer has discussions concerning possible employment with an opponent of the lawyer's client, or with a law firm representing the opponent, such discussions could materially limit the lawyer's representation of the

client. In addition, 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 financial interest. See Rule 1.8 for specific Rules pertaining to a number of personal interest conflicts, including business transactions with clients. See also Rule 1.10 (personal interest conflicts under Rule 1.7 ordinarily are not imputed to other lawyers in a law firm).

~~[11] When lawyers representing different clients in the same matter or in substantially related matters are closely related by blood or marriage, there may be a significant risk that client confidences will be revealed and that the lawyer's family relationship will interfere with both loyalty and independent professional judgment. As a result, each client is entitled to know of the existence and implications of the relationship between the lawyers before the lawyer agrees to undertake the representation. Thus, a lawyer related to another lawyer, e.g., as parent, child, sibling or spouse, ordinarily may not represent a client in a matter where that lawyer is representing another party, unless each client gives informed consent. The disqualification arising from a close family relationship is personal and ordinarily is not imputed to members of firms with whom the lawyers are associated. See Rule 1.10.~~

[11~~2~~] A lawyer is prohibited from engaging in sexual relationships with a client unless the sexual relationship predates the formation of the client-lawyer relationship. See Rule 1.8(k).

Interest of Person Paying for a Lawyer's Service

[12~~3~~] A lawyer may be paid from a source other than the client, including a co-client, if the client is informed of that fact and consents and the arrangement does not compromise the lawyer's duty of loyalty or independent judgment to the client. See Rule 1.8(f). If acceptance of the payment from any other source presents a significant risk that the lawyer's representation of the client will be materially limited by the lawyer's own interest in accommodating the person paying the lawyer's fee or by the lawyer's responsibilities to a payer who is also a co-client, then the lawyer must comply with the requirements of paragraph (b) before accepting the representation, including determining whether the conflict is consentable and, if so, that the client has adequate information about the material risks of the representation.

Prohibited Representations

[13~~4~~] Ordinarily, clients may consent to representation notwithstanding conflict. However, as indicated in paragraph (b), some conflicts are nonconsentable, meaning that the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent. When the lawyer is representing more than one client, the question of consentability must be resolved as to each client.

[14~~5~~] Consentability is typically determined by considering whether the interests of the clients will be adequately protected if the clients are permitted to give their informed consent to representation burdened by a conflict of interest. Thus, under paragraph (b)(1), representation is prohibited if in the circumstances the lawyer cannot reasonably conclude that the lawyer will be able to provide competent and diligent representation. See Rule 1.1 (competence) and Rule 1.3 (diligence).

[15~~6~~] Paragraph (b)(2) describes conflicts that are nonconsentable because the representation is prohibited by applicable law. For example, in some states substantive law provides that the same lawyer may not represent more than one defendant in a capital case, even with the consent of the clients, and under federal criminal statutes certain representations by a former government lawyer are prohibited, despite the informed consent of the former client. In addition, decisional law in some states limits the ability of a governmental client, such as a municipality, to consent to a conflict of interest.

[16~~7~~] Paragraph (b)(3) describes conflicts that are nonconsentable because of the institutional interest in vigorous development of each client's position when the clients are aligned directly against each other in the same litigation or other proceeding before a tribunal. Whether clients are aligned directly against each other within the meaning of this paragraph requires examination of the context of the proceeding. Although this paragraph does not preclude a lawyer's multiple representation of adverse parties to a mediation (because mediation is not a proceeding before a "tribunal" under Rule 1.0(n)), such representation may be precluded by paragraph (b)(1).

Informed Consent

[17~~8~~] Informed consent requires that each affected client be aware of the relevant circumstances and of the material and reasonably foreseeable ways that the conflict could have adverse effects on the interests of that client. See Rule 1.0(f) (informed consent). The information required depends on the nature of the conflict and the nature of the risks involved. When representation of multiple clients in a single matter is undertaken, the information must include the implications of the common representation, including possible effects on loyalty, confidentiality and the attorney-client privilege and the advantages and risks involved. See Comments [29] and [30] ~~and [31]~~ (effect of common representation on confidentiality).

[18~~9~~] Under some circumstances it may be impossible to make the disclosure necessary to obtain consent. For example, when the lawyer represents different clients in related matters and one 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. In some cases the alternative to common representation can be that each party may have to obtain separate representation with the possibility of incurring additional costs. These costs, along with the benefits of securing separate representation,

are factors that may be considered by the affected client in determining whether common representation is in the client's interests.

Consent Confirmed in Writing

[19~~20~~] 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 Rule 1.0(b). See also Rule 1.0(o) (writing includes electronic transmission). 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 Rule 1.0(b). 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.

Revoking Consent

[20~~1~~] A client who has given consent to a conflict may revoke the consent and, like any other client, may terminate the lawyer's representation at any time. Whether revoking consent to the client's own representation precludes the lawyer from continuing to represent other clients depends on the circumstances, including the nature of the conflict, whether the client revoked consent because of a material change in circumstances, the reasonable expectations of the other client and whether material detriment to the other clients or the lawyer would result.

Consent to Future Conflict

[21~~2~~] Whether a lawyer may properly request a client to waive conflicts that might arise in the future is subject to the test of paragraph (b). The effectiveness of such waivers is generally determined by the extent to which the client reasonably understands the material risks that the waiver entails. The more comprehensive the explanation of the types of future representations that might arise and the actual and reasonably foreseeable adverse consequences of those representations, the greater the likelihood that the client will have the requisite understanding. Thus, if the client agrees to consent to a particular type of conflict with which the client is already familiar, then the consent ordinarily will be effective with regard to that type of conflict. If the consent is general and open-ended, then the consent ordinarily will be ineffective, because it is not reasonably likely that the client will have understood the material risks involved. On the other hand, if the client is an experienced user of the legal services involved and is reasonably informed regarding the risk that a conflict may arise, such consent is more likely to be effective, particularly

if, e.g., the client is independently represented by other counsel in giving consent and the consent is limited to future conflicts unrelated to the subject of the representation. In any case, advance consent cannot be effective if the circumstances that materialize in the future are such as would make the conflict nonconsentable under paragraph (b).

Conflicts in Litigation

[22~~3~~] Paragraph (b)(3) prohibits representation of opposing parties in the same litigation, regardless of the clients' consent. On the other hand, simultaneous representation of parties whose interests in litigation may conflict, such as coplaintiffs or codefendants, is governed by paragraph (a)(2). A 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 one codefendant. On the other hand, common representation of persons having similar interests in civil litigation is proper if the requirements of paragraph (b) are met.

[23~~4~~] Ordinarily a lawyer may take inconsistent legal positions in different tribunals at different times on behalf of different clients. The mere fact that advocating a legal position on behalf of one client might create precedent adverse to the interests of a client represented by the lawyer in an unrelated matter does not create a conflict of interest. A conflict of interest exists, however, if there is a significant risk that a lawyer's action on behalf of one client will materially limit the lawyer's effectiveness in representing another client in a different case; for example, when a decision favoring one client will create a precedent likely to seriously weaken the position taken on behalf of the other client. Factors relevant in determining whether the clients need to be advised of the risk include: where the cases are pending, whether the issue is substantive or procedural, the temporal relationship between the matters, the significance of the issue to the immediate and long-term interests of the clients involved and the clients' reasonable expectations in retaining the lawyer. If there is significant risk of material limitation, then absent informed consent of the affected clients, the lawyer must refuse one of the representations or withdraw from one or both matters.

[24~~5~~] When a lawyer represents or seeks to represent a class of plaintiffs or defendants in a class-action lawsuit, unnamed members of the class are ordinarily not considered to be clients of the lawyer for purposes of applying paragraph (a)(1) of this Rule. Thus, the lawyer does not typically need to get the consent of such a person before representing a client suing the person in an unrelated matter. Similarly, a lawyer seeking to represent an opponent in a class action does not typically need the consent of an unnamed member of the class whom the lawyer represents in an unrelated matter.

Nonlitigation Conflicts

[25~~6~~] Conflicts of interest under paragraphs (a)(1) and (a)(2) arise in contexts other than litigation. For a discussion of directly adverse conflicts in transactional matters, see Comment [7]. Relevant factors in determining whether there is significant potential for material limitation 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 disagreements will arise and the likely prejudice to the client from the conflict. The question is often one of proximity and degree. See Comment [8].

[26~~7~~] For example, conflict questions may 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 be present. In estate administration the identity of the client may be unclear under the law of a particular jurisdiction. Under one view, the client is the fiduciary; under another view the client is the estate or trust, including its beneficiaries. In order to comply with conflict of interest rules, the lawyer should make clear the lawyer's relationship to the parties involved.

[27~~8~~] Whether a conflict is consentable depends on the circumstances. 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 in interest among them. Thus, a lawyer may seek 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 two or more clients are entrepreneurs, working out the financial reorganization of an enterprise in which two or more clients have an interest or arranging a property distribution in settlement of an estate. The lawyer seeks to resolve potentially adverse interests by developing the parties' mutual interests. Otherwise, each party might have to obtain separate representation, with the possibility of incurring additional cost, complication or even litigation. Given these and other relevant factors, the clients may prefer that the lawyer act for all of them.

Special Considerations in Common Representation

[28~~9~~] In considering whether to represent multiple clients in the same matter, a lawyer should be mindful that if the common representation fails because the potentially adverse interests cannot be reconciled, the result can be additional cost, embarrassment and recrimination. Ordinarily, the lawyer will be forced to withdraw from representing all of the clients if the common representation fails. In some situations, the risk of failure is so great that multiple representation is plainly impossible. For example, a lawyer cannot undertake common representation of clients where contentious litigation or negotiations between them are imminent or contemplated. Moreover, because the lawyer is required to be impartial between commonly represented clients, representation of multiple clients is

improper when it is unlikely that impartiality can be maintained. Generally, if the relationship between the parties has already assumed antagonism, the possibility that the clients' interest can be adequately served by common representation is not very good. Other relevant factors are whether the lawyer subsequently will represent both parties on a continuing basis and whether the situation involves creating or terminating a relationship between the parties.

[29~~30~~] A particularly important factor in determining the appropriateness of common representation is the effect on client-lawyer confidentiality and the attorney-client privilege. 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.

[30~~1~~] As to the duty of confidentiality, continued common representation will almost certainly be inadequate if one client asks the lawyer not to disclose to the other client information relevant to the common representation. This is so because the lawyer has an equal duty of loyalty to each client, and each client has the right to be informed of anything bearing on the representation that might affect that client's interests and the right to expect that the lawyer will use that information to that client's benefit. See Rule 1.4. The lawyer should, at the outset of the common representation and as part of the process of obtaining each client's informed consent, advise each client that information will be shared and that the lawyer will have to withdraw if one client decides that some matter material to the representation should be kept from the other. In limited circumstances, it may be appropriate for the lawyer to proceed with the representation when the clients have agreed, after being properly informed, that the lawyer will keep certain information confidential. For example, the lawyer may reasonably conclude that failure to disclose one client's trade secrets to another client will not adversely affect representation involving a joint venture between the clients and agree to keep that information confidential with the informed consent of both clients.

[31~~2~~] When seeking to establish or adjust a relationship between clients, the lawyer should make clear that the lawyer's role is not that of partisanship normally expected in other circumstances and, thus, that the clients may be required to assume greater responsibility for decisions than when each client is separately represented. Any limitations on the scope of the representation made necessary as a result of the common representation should be fully explained to the clients at the outset of the representation. See Rule 1.2(c).

[32~~3~~] Subject to the above limitations, each client in the common representation has the right to loyal and diligent representation and the protection of Rule 1.9 concerning the obligations to a former client. The client also has the right to discharge the lawyer as stated in Rule 1.16.

Organizational Clients

[33~~4~~] A lawyer who represents a corporation or other organization does not, by virtue of that representation, necessarily represent any constituent or affiliated organization, such as a parent or subsidiary. See Rule 1.13(a). Thus, the lawyer for an organization is not barred from accepting representation adverse to an affiliate in an unrelated matter, unless the circumstances are such that the affiliate should also be considered a client of the lawyer, there is an understanding between the lawyer and the organizational client that the lawyer will avoid representation adverse to the client's affiliates, or the lawyer's obligations to either the organizational client or the new client are likely to limit materially the lawyer's representation of the other client.

[34~~5~~] 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 two 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 or should cease to act as the corporation's lawyer when conflicts of interest arise. The lawyer should advise the other members of the board that in some circumstances matters discussed at board meetings while the lawyer is present in the capacity of director might not be protected by the attorney-client privilege and that conflict of interest considerations might require the lawyer's recusal as director or might require the lawyer and the lawyer's firm to decline representation of the corporation in a matter.

RULE 1.8 Conflict of Interest: Current Clients: Specific Rules

(a) 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 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 which can be reasonably understood by the client; and

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

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

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

(c) A lawyer shall not 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 any substantial gift unless the lawyer or other recipient of the gift is related to the client. For purposes of this paragraph, related persons include a spouse, child, grandchild, parent, grandparent or other relative or individual with whom the lawyer or the client maintains a close, familial relationship.

(d) Prior to 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) 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) A lawyer shall not accept compensation for representing a client from one other than the client unless:

(1) the client 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 1.6.

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

(h) A lawyer shall not:

(1) make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client is independently represented in making the agreement; or

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

~~(i) A lawyer 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.~~

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

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

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

(j) 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.

(k) A lawyer shall not have sexual relations with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced.

(l) While lawyers are associated in a firm, a prohibition in the foregoing paragraphs (a) through ~~(i)~~ (h) ~~and (j)~~ that applies to any one of them shall apply to all of them.

Comment

Business Transactions Between Client and Lawyer

[1] 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, for example, a loan or sales transaction or a lawyer investment on behalf of a client. The requirements of paragraph (a) must be met even when the transaction is not closely related to the subject matter of the representation, as when a lawyer drafting a will for a client learns that the client needs money for unrelated expenses and offers to make a loan to the client. The Rule applies to lawyers engaged in the sale of goods or services related to the practice of law, for example, the sale of title insurance or investment services to existing clients of the lawyer's legal practice. See Rule 5.7. It also applies to lawyers purchasing property from estates they represent. It does not apply to ordinary fee arrangements between client and lawyer, which are governed by Rule 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 of all or part of a fee. In addition, the Rule does not 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 paragraph (a) are unnecessary and impracticable.

[2] Paragraph (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. Paragraph (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. Paragraph (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 Rule 1.0(f) (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 paragraph (a), but also with the

requirements of Rule 1.7. Under that Rule, the lawyer must disclose the risks associated with the lawyer's dual role as both legal advisor 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 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, paragraph (a)(2) of this Rule is inapplicable, and the paragraph (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 paragraph (a)(1) further requires.

Use of Information Related to Representation

[5] Use of information relating to the representation to the disadvantage of the client violates the lawyer's duty of loyalty. Paragraph (b) applies when the information is used to benefit either the lawyer or a third person, such as another client or business associate of the lawyer; for example, if a lawyer learns that a client intends to purchase and develop several parcels of land, the lawyer may not use that information to purchase one of the parcels in competition with the client or to recommend that another client make such a purchase. The Rule does not prohibit uses that do not disadvantage the client. For example, a lawyer who learns a government agency's interpretation of trade legislation during the representation of one client may properly use that information to benefit other clients. Paragraph (b) prohibits disadvantageous use of client information unless the client gives informed consent, except as permitted or required by these Rules. See Rules 1.2(c), 1.6, 1.9(c), 3.3, 4.1(b), 8.1 and 8.3.

Gifts to Lawyers

[6] 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, paragraph (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 paragraph (c).

[7] If effectuation of a substantial gift requires preparing a legal instrument such as a will or conveyance, the client should have the detached advice that another lawyer can provide. The sole exception to this Rule is where the client is a relative of the donee.

[8] This Rule does not prohibit a lawyer from seeking to have the lawyer or a partner or associate of the lawyer named as executor 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 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 an executor 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

[9] 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. Paragraph (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 1.5 and paragraphs (a) and (i).

Financial Assistance

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

Person Paying for a Lawyer's Services

[11] 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 5.4(c) (prohibiting interference with a lawyer's professional judgment by one who recommends, employs or pays the lawyer to render legal services for another).

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

Aggregate Settlements

[13] 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 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 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 Rule 1.0(f) (definition of informed consent). Lawyers representing a class of plaintiffs or defendants, or those proceeding derivatively, may not have a full client-lawyer relationship with each member of the class; nevertheless, such lawyers must comply with applicable rules regulating notification of class members and other procedural requirements designed to ensure adequate protection of the entire class.

Limiting Liability and Settling Malpractice Claims

[14] Agreements prospectively limiting a lawyer's liability for malpractice are prohibited unless the client is independently represented in making the agreement because they are likely to undermine competent and diligent representation. Also, many clients are unable to evaluate the desirability of making such an agreement before a dispute has arisen, particularly if they are then represented by the lawyer seeking the agreement. This paragraph does not, however, prohibit a lawyer from entering into an agreement with the client to arbitrate legal malpractice claims, provided such agreements are enforceable and the client is fully informed of the scope and effect of the agreement.

Nor does this paragraph limit the ability of lawyers to practice in the form of a limited-liability entity, where permitted by law, provided that each lawyer remains personally liable to the client for his or her own conduct and the firm complies with any conditions required by law, such as provisions requiring client notification or maintenance of adequate liability insurance. Nor does it prohibit an agreement in accordance with Rule 1.2 that defines the scope of the representation, although a definition of scope that makes the obligations of representation illusory will amount to an attempt to limit liability.

[15] Agreements settling a claim or a potential claim for malpractice are not prohibited by this Rule. Nevertheless, in view of the danger that a lawyer will take unfair advantage of an unrepresented client or former client, the lawyer must first advise such a person in writing of the appropriateness of independent representation in connection with such a settlement. In addition, the lawyer must give the client or former client a reasonable opportunity to find and consult independent counsel.

Acquiring Proprietary Interest in Litigation

[16] Paragraph (ij) states the traditional general rule that lawyers are prohibited from acquiring a proprietary interest in litigation. Like paragraph (e), the general rule has its basis in common law champerty and maintenance and is designed to avoid giving the lawyer too great an interest in the representation. In addition, when the lawyer acquires an ownership interest in the subject of the representation, it will be more difficult for a client to discharge the lawyer if the client so desires. The Rule is subject to specific exceptions developed in decisional law and continued in these Rules. The exception for certain advances of the costs of litigation is set forth in paragraph (e). In addition, paragraph (ij) sets forth exceptions for liens authorized by law to secure the lawyer's fees or expenses and contracts for reasonable contingent fees. The law of each jurisdiction determines which liens are authorized by law. These may include liens granted by statute, liens originating in common law and liens acquired by contract with the client. When a lawyer acquires by contract a security interest in property other than that recovered through the lawyer's efforts in the litigation, such an acquisition is a business or financial transaction with a client and is governed by the requirements of paragraph (a). Contracts for contingent fees in civil cases are governed by Rule 1.5.

Client-Lawyer Sexual Relationships

[17] The relationship between lawyer and client is a fiduciary one in which the lawyer occupies the highest position of trust and confidence. The relationship is almost always unequal; thus, a sexual relationship between lawyer and client can involve unfair exploitation of the lawyer's fiduciary role, in violation of the lawyer's basic ethical obligation not to use the trust of the client to the client's disadvantage. In addition, such a relationship presents a significant danger that, because of the lawyer's emotional involvement, the lawyer will be unable to represent the client without impairment of the exercise of independent professional judgment. Moreover, a blurred line between the

professional and personal relationships may make it difficult to predict to what extent client confidences will be protected by the attorney-client evidentiary privilege, since client confidences are protected by privilege only when they are imparted in the context of the client-lawyer relationship. Because of the significant danger of harm to client interests and because the client's own emotional involvement renders it unlikely that the client could give adequate informed consent, this Rule prohibits the lawyer from having sexual relations with a client regardless of whether the relationship is consensual and regardless of the absence of prejudice to the client.

[18] Sexual relationships that predate the client-lawyer relationship are not prohibited. Issues relating to the exploitation of the fiduciary relationship and client dependency are diminished when the sexual relationship existed prior to the commencement of the client-lawyer relationship. However, before proceeding with the representation in these circumstances, the lawyer should consider whether the lawyer's ability to represent the client will be materially limited by the relationship. See Rule 1.7(a)(2).

[19] When the client is an organization, paragraph (k) of this Rule prohibits a lawyer for the organization (whether inside counsel or outside counsel) from having a sexual relationship with a constituent of the organization who supervises, directs or regularly consults with that lawyer concerning the organization's legal matters.

Imputation of Prohibitions

[20] Under paragraph (l), a prohibition on conduct by an individual lawyer in paragraphs (a) through (ij) 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 paragraph (a), even if the first lawyer is not personally involved in the representation of the client. The prohibitions set forth in paragraphs (j) and (k) are~~is~~ personal and are~~is~~ not applied to associated lawyers.

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 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.

RULE 6.5 Limited Legal Services Through a Nonprofit or Court Program

(a) A lawyer may provide pro bono or low-cost short-term, limited legal services through a nonprofit or court program without expectation by either the lawyer or the client that the lawyer will provide continuing representation in the matter. The following provisions apply to providing these services:

(1) Rules 1.7 and 1.9(a) apply only if the lawyer knows that the representation of the client involves a conflict of interest; and

(2) Rule 1.10 applies only if the lawyer knows that another lawyer associated with the lawyer in a law firm is disqualified by Rule 1.7 or 1.9(a) with respect to the matter.

(b) A lawyer's participation in a program described in subsection (a) will not preclude the lawyer's firm under Rule 1.10 from representing a client with interests adverse to a client the lawyer represented through the program.

Comment

[1] Nonprofit and court programs through which lawyers provide pro bono or low-cost short-term, limited legal services help people address their legal problems without further representation by a lawyer. For example, a lawyer might provide legal advice or help a person complete legal forms through a legal-advice hotline, advice-only clinic, or pro se counseling program. Alternatively, a lawyer might participate in the Kansas Bar Association's Ask-a-Lawyer program that charges a fee of $2 per minute for a person to talk with an attorney. In these programs, a lawyer-client relationship is established, but there is no expectation that the lawyer's representation of the client will continue beyond the limited consultation. Such programs are normally operated under circumstances in which it is not feasible for a lawyer to systematically screen for conflicts of interest as is generally required before undertaking a representation. See, e.g., Rules 1.7, 1.9, and 1.10.

[2] A lawyer who provides short-term, limited legal services under this rule must secure the client's informed consent to the limited scope of the representation. See Rule 1.2(c). If a pro bono or low-cost short-term, limited representation would not be reasonable under the circumstances, the lawyer may offer advice to the client but must also advise the client of the need for further assistance of counsel. Except as provided in this rule, the Rules of Professional Conduct are applicable to the limited representation, including Rules 1.6 and 1.9(c).

[3] A lawyer who is representing a client in the circumstances addressed by this rule ordinarily is not able to systematically screen for conflicts of interest. Subsection (a) requires compliance with Rules 1.7 or 1.9(a) only if the lawyer knows that the representation presents a conflict of interest for the lawyer. Subsection (a) requires

compliance with Rule 1.10 only if the lawyer knows that another lawyer in the lawyer's firm is disqualified in the matter by Rule 1.7 or 1.9(a).

[4] The limited nature of the services significantly reduces the risk of conflicts of interest with other matters being handled by the lawyer's firm. Subsection (b) provides that Rule 1.10 is inapplicable to a representation governed by this rule except as provided by subsection (a)(2). Subsection (a)(2) requires the participating lawyer to comply with Rule 1.10 when the lawyer knows that the lawyer's firm is disqualified by Rule 1.7 or 1.9(a). By virtue of subsection (b), however, a lawyer's participation in a pro bono or low-cost short-term, limited legal services program will not preclude the lawyer's firm from undertaking or continuing the representation of a client with interests adverse to a client being represented by the lawyer through the program. Nor will the personal disqualification of a lawyer participating in the program be imputed to other lawyers participating in the program.

[5] After commencing a short-term, limited representation in accordance with this rule, if a lawyer represents the client in the matter on an ongoing basis, Rules 1.7, 1.9(a), and 1.10 become applicable.

Rule 241

RULE RELATING TO THE LAWYERS' FUND FOR CLIENT PROTECTION

(a) **Purpose and Scope.**

(1) The purpose of the Lawyers' Fund for Client Protection is to promote public confidence in the administration of justice and the integrity of the legal profession by reimbursing the loss to a client caused by the dishonest conduct of a lawyer admitted and licensed to practice law in Kansas when the loss occurs in the course of a lawyer-client relationship between the lawyer and the claimant.

(2) The Supreme Court, in the exercise of its inherent power to oversee the administration of justice and to regulate the practice of law and Kansas attorneys in the exercise of their professional responsibility, finds the need to participate in collective efforts of the bar to reimburse and to protect, insofar as reasonably possible, persons who may be injured by the dishonest conduct of lawyers. Therefore, the Supreme Court adopts this rule to carry out that purpose.

(3) The Fund is not a guarantor of honesty in the practice of law. Dishonest conduct by a member of the bar imposes no separate legal obligation on the profession collectively, or on the Fund, to compensate for the lawyer's misconduct. The Fund is a lawyer-financed public service, and the payment of reimbursement is a matter of grace and discretion by the Client Protection Fund Commission.

(4) Losses caused by the dishonest conduct of lawyers serving as fiduciaries outside of a lawyer-client relationship are not reimbursable.

(b) **Establishment.**

(1) The Lawyers' Fund for Client Protection is established.

(2) Under the supervision of the Supreme Court, the Client Protection Fund Commission is established. The Commission may award payments to qualified claimants and authorize disbursements from the Fund under this rule.

(3) This rule is effective for claims arising out of conduct occurring on or after July 1, 1993.

(4) The Chief Justice has authority to contract on behalf of the Commission for the investment of money with the Pooled Money Investment Board established under K.S.A. 75-4221a prior to the organizational meeting of the Commission.

(c) **Funding.**

(1) The Supreme Court may provide for funding by Kansas lawyers through annual assessments and from transfers of money from the disciplinary fee fund.

(2) The Fund is not a part of the state treasury. Any money recovered by the Commission will be redeposited into the Fund.

(3) Any lawyer whose actions have caused payment of funds to a claimant from the Fund must make restitution or be subject to an action for restitution to the Fund for all money paid as a result of the lawyer's conduct with interest at the prejudgment rate under K.S.A. 16-201, in addition to payment of the procedural costs of processing the claim, including any attorney fees.

(4) The Fund may accept any unidentifiable property transferred under Rule 235(a)(2)(C).

(d) **Funds and Disbursements.** All money or other assets of the Fund will be held in the name of the Fund. All disbursements and expenditures must be made upon warrants of the director of accounts and reports issued through vouchers prepared by the Commission and approved by the Chief Justice or the Chief Justice's designee. The chief financial officer with the Office of Judicial Administration will conduct an annual review of financial internal controls, processes and procedures, and reports.

(e) **Composition and Officers of the Commission.**

(1) The Commission is comprised of four lawyers registered as active under Rule 206; one active or retired district judge, Court of Appeals judge, or Supreme Court justice; and two nonlawyers appointed by the Supreme Court for initial terms as follows:

(A) two lawyers for one year;

(B) one nonlawyer for two years;

(C) one judge or justice and one lawyer for two years;

(D) one nonlawyer for three years; and

(E) one lawyer for three years.

(2) Subsequent appointments will be for a three-year term. The Supreme Court will fill any vacancy occurring on the Commission. A person appointed to fill a vacancy on the Commission will serve the unexpired term of the previous member. No member will serve more than two consecutive three-year terms, except that any person initially appointed for less than three years may then serve two consecutive three-year terms.

(3) The Supreme Court may appoint a temporary Commission member on the request of the Commission.

(4) Commission members will serve without compensation but will be reimbursed for their necessary expenses incurred in the discharge of their duties.

(5) The Commission must elect a chair and vice-chair to serve for a term of one year and until a successor is elected. The vice-chair will perform all of the duties and exercise the authority of chair in the chair's absence.

(6) The disciplinary administrator will act as the custodian of the official files and records of the Commission and perform other ministerial functions as the Commission directs. All papers and pleadings will be filed with the disciplinary administrator.

(f) **Commission Meetings.**

(1) The Commission will meet as necessary to conduct the business of the Fund and to timely process claims.

(2) A quorum for any meeting of the Commission is four members of the Commission.

(3) Minutes of meetings will be taken and maintained by the disciplinary administrator.

(g) **Duties and Responsibilities of the Commission.** The Commission has the following duties and responsibilities:

(1) to receive, investigate, evaluate, and pay or deny claims, or portions thereof, as the Commission deems appropriate;

(2) to promulgate rules of procedure not inconsistent with this rule;

(3) to contract with the Pooled Money Investment Board—the Commission's status to contract and authority for such contract is established by this rule;

(4) to advise and consult with the Pooled Money Investment Board on appropriate general investment objectives and cash flow needs of the Fund;

(5) to provide an annual financial report to the Supreme Court and to make other reports as necessary;

(6) to publicize its activities to the public and the bar;

(7) to retain and compensate legal counsel to make or supervise an investigation and the gathering of evidence, to present evidence to the Commission, and to take any other legal action necessary to effectuate the purpose of the Fund;

(8) to prosecute claims for restitution to which the Fund is entitled;

(9) to participate in studies and programs for client protection and prevention of dishonest conduct by lawyers; and

(10) to perform all other acts necessary or proper for the fulfillment of the purposes of the Fund and its effective administration.

(h) **Money and Investments.**

(1) All money received as interest earned by the investment of Fund money by the Pooled Money Investment Board will be credited to the Fund.

(2) All money transferred from the disciplinary fee fund under this rule will be credited to the Fund.

(3) Any return on investment is to be compatible with the Fund's responsibility to consider and pay, in full or in part, legitimate claims as determined within the sole discretion of the Commission.

(i) **Conflict of Interest.**

(1) A Commission member who has or has had a lawyer-client relationship or financial relationship with a claimant or lawyer who is the subject of a claim must not participate in the investigation or determination of a claim involving that claimant or lawyer.

(2) A Commission member with a past or present relationship, other than as provided in subsection (i)(1), with a claimant or the lawyer who is the subject of the claim must disclose such relationship to the Commission and, if the Commission deems appropriate, that Commission member will not participate in any proceeding relating to such claim.

(j) **Immunity.** Commission members, commission counsel, commission staff, a person investigating a claim on behalf of the Commission, the disciplinary administrator, members of the Office of the Disciplinary Administrator, claimants, and lawyers who assist claimants are entitled to judicial immunity from civil liability for all acts in the course of their official duties.

(k) **Reimbursement from Fund Is a Matter of Grace.** No person has the legal right to reimbursement from the Fund.

(l) **Eligible Claims.**

(1) The claimant's loss must be caused by the dishonest conduct of a member or former member of the Kansas bar and must have arisen under the following circumstances:

(A) in the course of a lawyer-client relationship between the lawyer and the claimant; and

(B) in Kansas or as a result of the lawyer's federal practice based on the lawyer's Kansas license.

(2) The claim must have been filed no later than one year after the claimant knew or should have known of the dishonest conduct of the lawyer.

(3) As used in this rule, "dishonest conduct" means any of the following:

(A) acts committed by a lawyer in the wrongful taking or conversion of money, property, or other things of value;

(B) refusal to refund unearned fees received in advance where the lawyer performed no services or such an insignificant portion of the service that the refusal to refund the unearned fees constitutes a wrongful taking or conversion of money;

(C) the borrowing of money from a client without an intention to repay it or with disregard of the lawyer's inability or reasonably anticipated inability to repay it; or

(D) a lawyer's act of intentional dishonesty that proximately leads to the loss of money or property.

(4) Except as provided by subsection (l)(5), the following losses and damages are not reimbursable:

(A) a loss incurred by a spouse, child, parent, grandparent, sibling, partner, associate, or employee of the lawyer causing the loss;

(B) a loss covered by any bond, surety agreement, or insurance contract to the extent covered thereby, including any loss to which any bonding agent, surety, or insurer is subrogated to the extent of that subrogated interest;

(C) a loss incurred by any business entity controlled by the lawyer or any person or entity described in subsection (l)(4)(A);

(D) a loss incurred by any governmental entity or agency; and

(E) interest and other incidental and out-of-pocket expenses.

(5) In its discretion, ~~In a case of extreme hardship or special and unusual circumstances,~~ the Commission may~~, in its discretion,~~ consider ~~recognize~~ a claim ~~arising out of conduct occurring on or after July 1, 1993,~~ that would otherwise be excluded under this rule:

(A) when a claimant presents a case of extreme hardship or special and unusual circumstances; or

(B) in the event the Fund receives property under Rule 235(a)(2)(C) and the owner is later identified.

(m) **Procedures and Responsibilities for Submitting a Claim.**

(1) The Commission must prepare and approve a form for submitting a claim for reimbursement.

(2) The form will require at least the following information provided by the claimant under penalty of perjury:

(A) the name and address of the claimant, home and business telephone number, occupation and employer, and social security number or federal tax identification number;

(B) the name, address, and telephone number of the lawyer alleged to have dishonestly taken the claimant's money or property, and any family or business relationship of the claimant to the lawyer;

(C) the legal or other fiduciary services the lawyer was to perform for the claimant;

(D) the amount paid to the lawyer;

(E) a copy of any written agreement pertaining to the claim;

(F) the form of the claimant's loss, e.g., money, securities, or other property;

(G) the amount of the loss and the date when the loss occurred;

(H) the date when the claimant discovered the loss and how the claimant discovered the loss;

(I) a description of the lawyer's dishonest conduct and the name and address of any person who has knowledge of the loss;

(J) the name of any person to whom the loss has been reported, e.g., district attorney, police, disciplinary agency, or other person or entity, and a copy of any complaint and description of any action that was taken;

(K) any source from which the loss can be reimbursed, including any insurance, fidelity, or surety agreement;

(L) a description of any steps taken to recover the loss directly from the lawyer or any other source;

(M) the circumstances under which the claimant has been or will be reimbursed for any part of the claim, including the amount received or to be received and the source, along with a statement that the claimant agrees to notify the Commission of any reimbursements the claimant receives during the pendency of the claim;

(N) any other facts believed to be important to the Commission's consideration of the claim;

(O) the manner in which the claimant learned about the Fund;

(P) the name, address, and telephone number of the claimant's present lawyer, if any;

(Q) a statement that the claimant agrees to cooperate with the Commission in reference to the claim or as required by subsection (q) in reference to civil actions that may be brought in the name of the Commission under a subrogation and assignment clause contained within the claim;

(R) the name and address of any other state's fund to which the claimant has applied or intends to apply for reimbursement, together with a copy of the application; and

(S) a statement that the claimant agrees to the publication of appropriate information about the nature of the claim and the amount of reimbursement if reimbursement is made.

(3) The claimant has the responsibility to complete the claim form and provide satisfactory evidence of a reimbursable loss.

(4) The claim will be submitted to the Commission by filing the statement of claim form with the Office of the Disciplinary Administrator, 701 Southwest Jackson Street, First Floor, Topeka, Kansas 66603.

(5) As a condition precedent to the filing of a claim, the claimant must report the dishonest conduct to the disciplinary administrator.

(n) **Processing Claims.**

(1) When a claim is filed, the accused lawyer will be notified and given an opportunity to respond to the claim. A copy of the claim will be mailed by certified mail return receipt requested to the lawyer's last registered address

under Rule 206. The lawyer will have 20 days from the date of mailing to respond. A response is not required from the lawyer.

(2) The disciplinary administrator will investigate the claim, or the Commission will retain and compensate legal counsel as provided in subsection (g)(7).

(3) Whenever it appears that a claim is not eligible for reimbursement, the Commission will advise the claimant and lawyer of the reasons that the claim is not eligible for reimbursement and that, unless additional facts to support eligibility are submitted to the Commission within 30 days, the claim will be dismissed.

(4) A copy of an order disciplining a lawyer for the same act or conduct alleged in a claim, or a final judgment imposing civil or criminal liability, is evidence that the lawyer committed such act or conduct.

(5) The disciplinary administrator will furnish a report of the investigation of the matter to the Commission.

(6) Upon receipt of the disciplinary administrator's report of the investigation, the Commission will evaluate whether the investigation is complete and determine whether the Commission should conduct additional investigation or await the pendency of any disciplinary investigation or proceeding involving the same act or conduct that is alleged in the claim.

(7) The Commission may conduct additional investigation or may request the disciplinary administrator to conduct additional investigation and to verify any claim not previously investigated by the disciplinary administrator.

(8) The Commission may request that testimony or evidence be presented to complete the record. Upon request, the claimant or lawyer, or their personal representatives, will be given an opportunity to be heard. The chairman, vice-chairman, or any member of the Commission acting under this rule may administer oaths and affirmations and compel by subpoena the attendance of witnesses and the production of pertinent books, papers, and documents. All subpoenas will be issued by and returned to the disciplinary administrator. A judge of the district court of any judicial district in which the attendance or production is required must, upon proper application, enforce the attendance and testimony of any witness and the production of any documents subpoenaed. Subpoena and witness fees and mileage are the same as in the district court.

(9) The Commission may make a finding of dishonest conduct for purposes of determining a claim. The determination is not a finding of dishonest conduct for purposes of disciplinary proceedings or for civil or criminal judgments and is inadmissible in any other proceeding.

(10) When the record is complete, the claim will be determined on the basis of all available evidence, and the Commission will notify the claimant and the lawyer of its determination and reasoning. The approval or denial of the claim requires the affirmative votes of at least four Commission members.

(11) Any proceeding on a claim need not be conducted according to technical rules relating to evidence, procedure, and witnesses. Any relevant evidence will be admitted if it is the sort of evidence that responsible persons are accustomed to rely on in the conduct of serious affairs, regardless of the existence of any common-law or statutory rule that might make improper the admission of such evidence in court proceedings. The claimant has the duty to supply relevant evidence to support the claim.

(12) The Commission will determine the order and manner of payment and pay all approved claims.

(o) **Payment of Reimbursement.**

(1) The Commission is vested with the power, which it will exercise in its sole discretion, to determine whether a claim merits reimbursement from the Fund and, if so: the amount of such reimbursement, not to exceed $125,000 for any claimant, with an aggregate limit of $350,000 for claims against any one lawyer; the time, place, and manner of its payment; the conditions upon which payment will be made; and the order in which payment will be made. In making such determinations, the Commission may consider, together with such other factors as it deems appropriate, the following:

(A) the amounts available and likely to become available to the Fund for payment of claims;

(B) the size and number of claims that are likely to be presented in the future;

(C) the total amount of losses caused by the dishonest conduct of any one lawyer or associated group of lawyers;

(D) the unreimbursed amount of claims recognized by the Commission in the past as meriting reimbursement but for which reimbursement has not been made in the total amount of the loss sustained;

(E) the amount of the claimant's loss as compared with the amount of the losses sustained by others who may merit reimbursement from the Fund;

(F) the degree of hardship the claimant has suffered by the loss; and

(G) any conduct of the claimant that may have contributed to the loss.

(2) If a claimant is a minor or an incompetent person, the reimbursement may be paid to another person or an entity for the benefit of the claimant.

(p) **Reconsideration.** The claimant may request reconsideration within 30 days of the denial or the determination of the amount of reimbursement of the claim. If the claimant fails to make a request or the request is denied, the decision of the Commission is final.

(q) **Restitution and Subrogation.**

(1) A lawyer whose dishonest conduct results in reimbursement to a claimant may be liable to the Fund in an action for restitution. The Commission may bring such action as it deems advisable to determine and enforce its rights to restitution and as a subrogee or assignee of the claimant's rights.

(2) As a condition of reimbursement, a claimant is required to provide the Fund with a transfer of the claimant's rights against the lawyer and the lawyer's legal representative, estate, or assigns and of the claimant's rights against any third party or entity who may be liable for the claimant's loss, to the extent of the amount of the Fund's expenses and payments attributable to the claim. The Commission may sue to enforce such assigned or subrogated rights for the purposes of preserving its rights and recovering its expenses and payments to the claimant. The claimant retains all other rights arising and accruing by reason of the lawyer's dishonest conduct.

(3) Upon commencement of an action by the Commission as subrogee or assignee of a claimant, the Commission will advise the claimant, who may then join in such action to recover the claimant's unreimbursed losses.

(4) In the event that the claimant commences an action to recover unreimbursed losses against the lawyer or another entity who may be liable

for the claimant's losses, the claimant will be required to notify the Commission of such action.

(5) The claimant will be required to agree to cooperate in all efforts that the Commission undertakes to achieve restitution for the Fund.

(r) **Judicial Relief.**

(1) When a claim has been filed, the Commission may make application to the appropriate lower court for relief to protect the interests of the claimant or the Fund where the assets of the claimant appear to be in danger of misappropriation or loss or to secure the claimant's or Fund's right to restitution or subrogation.

(2) A court's jurisdiction in a proceeding includes the authority to appoint and compensate a custodial receiver to conserve the assets and to close the practice of a missing, incapacitated, or deceased lawyer.

(s) **Confidentiality.**

(1) A claim form, proceedings, and reports involving a claim for reimbursement are confidential until the Commission authorizes reimbursement to the claimant, except as provided in this rule. Any person violating this subsection may be subject to punishment for contempt of the Supreme Court.

(2) The rule of confidentiality does not apply to the claimant or the lawyer or to any information that the Commission considers to be relevant to any current or future criminal prosecution against the lawyer.

(3) The disciplinary administrator and anyone appointed to conduct an investigation may receive and disclose information reasonably necessary to complete the investigation.

(4) The Commission in its discretion is authorized to disclose to the Supreme Court Nominating Commission, the District Judicial Nominating Commissions, the Commission on Judicial Conduct, or the Governor all or any part of the file involving any judge or prospective nominee for judicial appointment and to make public any part of its files involving any candidate for election to or retention in public office.

(5) Both the claimant and the lawyer will be advised of the status of the Commission's consideration of the claim and will be informed of the final

determination. After payment of reimbursement, the Commission may publicize the nature of the claim, the amount of reimbursement, and the name of the lawyer. The Commission will not publicize the name and address of the claimant unless the claimant has granted specific written permission.

(t) **Compensation for Representing Claimant.** It is not intended that the claimant's application for reimbursement will be an adversarial process, and for that reason, counsel for the claimant generally will not be needed. If a claimant needs a lawyer, it is intended that lawyers will recognize this responsibility and provide assistance as a public service. It is also intended that all members of the Kansas bar will cooperate in providing any services that claimants may need.

Comments

Subsection (a)—Purpose and Scope.

[1] The Model Rules for the Lawyers' Fund for Client Protection, approved by the American Bar Association House of Delegates on August 9, 1989, as modified, have been generally adopted by the Supreme Court. The comments are intended solely to explain the intent of the rules to the Commission, the bar, and the public.

[2] Subsection (a)(2) recognizes that lawyers individually, and the bar collectively, have the obligation to support reimbursement programs for clients who have lost money or property as a result of a lawyer's dishonest conduct. The term "dishonest conduct" is defined in subsection (l).

[3] Despite the best attempts of the legal profession to establish high standards of ethics and severe disciplinary penalties for their breach, some lawyers steal money from their clients. Typically, those lawyers lack the financial means to make restitution to their clients.

[4] The organized bar throughout the United States has responded by creating security funds to provide necessary reimbursement. The funds have been created by court rule, legislation, and voluntary action of state and local bar associations.

[5] Client protection funds reimburse claimants for dishonest conduct by members of the bar within the licensing state. Generally, a reimbursable loss must occur within a lawyer-client relationship.

[6] The underlying philosophy for these funds is that the legal profession functions by seeking and obtaining the trust of clients. The public is therefore vulnerable to the rare dishonest lawyer who breaches that trust. Moreover, the misdeeds of a lawyer

in handling client money frequently taint the public atmosphere of trust on which the profession depends.

[7] Although these programs are essentially remedial in nature and do not provide preemptive public protection in the same manner as admission criteria and codes of professional responsibility, they address the growing awareness that discipline without reimbursement to claimants does not meet the profession's responsibility to itself and the public.

Subsection (b)—Establishment.

[8] The practice of law is so directly connected to the exercise of judicial power and the administration of justice that the right to define and regulate it belongs to the Supreme Court. The Supreme Court bears the responsibility for establishing qualifications for practice and for ensuring that lawyers subject to its jurisdiction adhere to the standards of conduct the Supreme Court mandates.

[9] Subsection (b)(2) links the establishment of a Fund to the Supreme Court's power to regulate the practice of law.

[10] Under subsection (b)(3), the Commission will not pay claims for losses incurred as a result of dishonest conduct committed prior to July 1, 1993.

Subsection (c)—Funding.

[11] Subsection (c)(1) suggests that the single most important factor in establishing and maintaining an effective client reimbursement program is ensuring adequate and continuous funding through a reliable source.

[12] The Supreme Court has the inherent power to establish a Fund and to require lawyers admitted to the practice of law in Kansas to contribute to it. For legislative acknowledgment, see Senate Concurrent Resolution No. 1644 (1992).

[13] Subsection (c)(3) assigns potential liability for payment of restitution to the lawyer who caused the loss that the Fund reimbursed. See subsection (q) for restitution and subrogation enforcement standards.

Subsection (d)—Funds and Disbursements.

[14] Matters and expenses for which the Fund may be used should be considered and stated by the Commission in written policies.

[15] Administrative expenses will be incurred in operating the Fund even though lawyers volunteer their services to the Commission. The cost of administering the Fund, e.g., expenses of the Commission, hearings on claims, record keeping, and salaries for full-time and part-time staff, will be paid out of either the disciplinary fee fund or the Fund as determined by the Supreme Court.

Subsection (e)—Composition and Officers of the Commission.

[16] A Commission composed of lawyers and nonlawyers results in balanced evaluation of claims within the full context of the lawyer-client relationship.

[17] A Commission of seven members is small enough to accomplish the work of the Fund and not so large as to discourage active involvement by each member or to be cumbersome.

[18] Terms of office are staggered to encourage continuity of experience and the development of policy and precedent.

[19] Commission members will serve without compensation, pro bono publico, but will be reimbursed for expenses incurred in the discharge of their office.

Subsection (g)—Duties and Responsibilities of the Commission.

[20] Investing money that is not needed to cover current claims permits a reasonable return without risking the integrity of the Fund. Investments should be of appropriate duration to maintain liquidity of assets and enable the Commission to pay losses promptly.

[21] Subsections (g)(5) and (g)(6) can require public information programs. The Commission has the affirmative obligation to publicize its activities to the bench, the bar, and the general public. It is suggested that the services of the Supreme Court's public information officer be utilized.

[22] The assets of the Fund should not be unduly diminished by employing investigative or other personnel who would duplicate the efforts of others interested in lawyer professional responsibility. See subsection (n) regarding the cooperative effort anticipated between the Commission and the disciplinary administrator.

[23] The Commission should make an attempt to prosecute all claims for restitution. Restitution is one way of replenishing the Fund's assets. See also subsection (q), which focuses on subrogation and other methods of restitution.

[24] Commission members should also consider involvement in seminars and continuing legal educational programs focusing on client protection. As programs for client protection become more sophisticated, the Commission should take advantage of planning or participating in these educational programs as a further deterrent to dishonest conduct.

Subsection (j)—Immunity.

[25] Immunity from civil liability encourages lawyers and nonlawyers to serve on the Commission and protects their independent judgment in the evaluation of claims. Immunity also protects the fiscal integrity of the Fund and encourages claimants and lawyers to participate in seeking reimbursement for eligible losses.

Subsection (k)—Reimbursement from Fund is a Matter of Grace.

[26] Although this rule establishes procedures for the processing of claims seeking reimbursement from the Fund, the rule is not intended to create either substantive rights to reimbursement, compensation, damages, or restitution for a lawyer's dishonest conduct or procedural rights subject to judicial review with respect to the determination of claims.

Subsection (l)—Eligible Claims.

[27] Subsection (l)(1) sets forth the basic criteria for compensability of a loss. The successful claimant is one who proves the following factors: (1) a demonstrable loss; (2) caused by the dishonest conduct of a lawyer; and (3) the loss was within or arising out of a lawyer-client relationship. Determining whether a loss arose out of a lawyer-client relationship can be difficult especially where the loss asserted occurred following an "investment." One approach to use is a "but for" test. The loss arose out of and in the course of a lawyer-client relationship. But for the lawyer-client relationship with the client, such loss could not have occurred. The following four factors may be considered in applying this test: the disparity in bargaining power between the lawyer and client, the extent to which the lawyer's status overcame the normal prudence of the client, the extent to which the lawyer received information about the financial affairs of the client, and whether the principal part of the transaction was an activity that required a license to practice law.

[28] Subsection (l)(2) contains a one-year limitation on the filing of claims from the date the claimant knew or should have known of the dishonest conduct.

[29] Subsection (l)(3) adds to the rule a definition of "dishonest conduct." Subsection (l)(3)(A) sets forth the basic concept as one of conversion or embezzlement. Subsections (l)(3)(B), (C), and (D) make clear that if the essential nature of the transaction was conversion, dishonest conduct will be found even where the lawyer took money in the guise of a fee, a loan, or an investment. Indeed, employing such a ruse is part of the dishonesty. Subsection (l)(3)(B) sets forth a standard for the handling of problematic unearned fee claims. It is not intended to encompass legitimate fee disputes. Where money received by a lawyer was clearly neither earned nor returned, however, the client may feel violated, hardship can result, and the Commission may find dishonest conduct. Subsection (l)(3)(C) anticipates overreaching by a lawyer, in the context of a loan to the lawyer by the client, to such an egregious extent as to be tantamount to theft. Similarly, under subsection (l)(3)(D), use by the lawyer of a purported "investment" to induce a client to turn over money will not preclude a finding of dishonest conduct where the "investment" is worthless or nonexistent.

[30] Subsection (l)(3) must be read in light of subsection (l)(1). In focusing on dishonest conduct, it must be kept in mind that such conduct must occur within or as a result of a lawyer-client relationship in order to be compensable.

[31] Subsection (l)(4) presents various exclusions from reimbursable claims. Subsections (l)(4)(A), (C), and (D) declare classes of potential claimants to be ineligible for policy reasons. Subsection (l)(4)(E) excludes as nonreimbursable such consequential damages as lost interest and a claimant's incidental and out-of-pocket expenses. Third parties such as title insurance companies and banks cashing checks over forged endorsements are suggested in subsection (l)(4)(B); to the extent possible, recourse from a third party should be sought prior to seeking it from the Fund. Third parties lack the lawyer-client relationship necessary to prosecute a claim in their own right.

[32] Subsection (l)(5) reiterates the critical importance of vesting in the Commission the discretion to do justice in each claim considered, without strictly following technical rules. Subsection (l)(5) recognizes that it is impossible to predict every factual circumstance that will be presented to the Commission.

Subsection (m)—Procedures and Responsibilities for Filing a Claim.

[33] The Commission is required to develop a claim form for claimants to establish their eligibility for reimbursement. The form should be comprehensive enough to minimize the investigative burden of the Commission but not so detailed as to discourage eligible claimants from applying for reimbursement.

[34] Subsection (m)(3) assigns the ultimate burden of establishing eligibility for reimbursement on the claimant. Consistent with the evidentiary standards in subsection (n), no formal or technical quantum of proof is imposed on the claimant or the Commission. In a case where the lawyer's dishonest conduct was already established in a disciplinary action based on the clear and convincing evidence standard under Rule 226 or the beyond a reasonable doubt standard in a criminal proceeding involving the same facts that constitute the claim for reimbursement, the Commission may grant a reimbursement to the claimant without further investigation or delay.

Subsection (n)—Processing Claims.

[35] This subsection seeks to set forth a framework that balances the Fund's duty to address the claimant's allegations efficiently with the need to present the respondent lawyer with an opportunity to defend. See subsections (n)(1), (3), (8), and (10).

[36] The overriding policy implicit in subsection (n) is that the Commission exercise its discretion so as to make the best possible decision in each claim presented. Under subsection (n)(11), technical rules of evidence will not be employed to hinder the Commission from accomplishing its mission. Under subsection (n)(7), the Commission may conduct any investigation it deems appropriate, including the taking of testimony as provided in subsection (n)(8). The order and manner of payment of claims is likewise within the Commission's discretion under subsection (n)(12). Under subsection (n)(10), the Commission is to articulate to each side the reason for its determination on a given claim.

[37] Note that under subsection (n)(10) the affirmative vote of at least four Commission members is required to dispose of a claim. For example, if the minimum four Commission members necessary for a quorum under subsection (f)(2) are present, any motion that cannot garner unanimous support will fail. Thus, a majority of the quorum present will not suffice. Subsection (n)(10) does not prevent determinations of claims by mail ballot.

[38] Ideally, the initial investigation should be done by the disciplinary administrator to avoid duplication of effort and inconsistent findings of both entities. The financial integrity of the Fund is preserved by using existing resources. Investigation by the Commission should be utilized to gather additional evidence or to provide evidence if necessary.

[39] In most matters, a criminal conviction or a finding during disciplinary proceedings will establish "dishonest conduct" for purposes of the Commission's determination of the claim.

Subsection (o)—Payment of Reimbursement.

[40] Full reimbursement is the goal of the Fund, and adequate financing is essential to its achievement. Realistically, however, this ideal must be tempered with the Fund's need to provide all eligible claimants with meaningful, if not total, reimbursement for their losses.

[41] A maximum limitation on reimbursement permits the assets of the developing fund to accumulate while establishing a historical record of claims presented. It also serves to protect the Fund from catastrophic losses.

[42] Maximum limitations, whether individual or aggregate, should be reviewed periodically in light of the Fund's actual experience in providing reimbursement to eligible claimants for their documented losses.

[43] Subsection (o)(1) assigns responsibility for the determination of the actual amount of each reimbursement to the discretion of the Commission not to exceed individual claimant and aggregate limits set by the Supreme Court.

[44] Subsection (o)(1) also grants the Commission flexibility in paying reimbursement. Depending on the Fund's financial and administrative needs, periodic payment dates can be established, and reimbursement can be paid in lump sums or in installments.

[45] Similarly, where a loss involves a minor or an incompetent person, subsection (o)(2) permits the Commission to pay the reimbursement directly to a parent or legal representative for the benefit of the claimant.

Subsection (p)—Reconsideration.

[46] Authorization for payment is within the discretion of the Commission. A procedure providing an opportunity for reconsideration of a claim permits an aggrieved claimant further consideration without creating a right of appeal or judicial review. The opportunity for reconsideration also provides a safeguard against dismissal of a claim not fully presented earlier.

Subsection (q)—Restitution and Subrogation.

[47] As fiduciaries of the Fund, the Commission has the obligation to seek restitution in appropriate cases for reimbursement paid to claimants. Successful restitution efforts can enlarge the Fund's financial capacity to provide reimbursement to eligible claimants and also reduce the need to increase assessments on lawyers to finance the Fund's operations.

[48] The Commission may seek restitution by direct legal action against a lawyer, as well as by the enforcement of rights provided by subrogation and assignment against the lawyer, the lawyer's estate, or any other person or entity who may be liable for the claimant's loss.

[49] Subsection (q)(1) is a statement of the Fund's right to seek restitution from the lawyer whose dishonest conduct resulted in a payment of reimbursement.

[50] Subsection (q)(2) requires the Commission to establish a subrogation policy that requires claimants who receive reimbursement from the Fund to contractually transfer to the Fund their rights against the lawyer and any other person or entity who may be liable for the reimbursed loss. This ordinary transfer of rights by subrogation is to the extent of the reimbursement provided by the Fund.

[51] Subsections (q)(3) and (q)(4) provide for appropriate notice and joinder of parties in subrogation actions by the Fund or by a claimant where the claimant has received less than full reimbursement from the Fund.

[52] Subsection (q)(5) requires that a claimant agree to cooperate with the Fund in its efforts to secure restitution.

[53] The provisions of subsections (q)(2), (3), (4), and (5) will ordinarily be incorporated into the Fund's subrogation agreement with the claimant.

[54] Subrogation agreements should be carefully drawn to maximize the Commission's creditor rights. In appropriate cases, subrogation should be supplemented with assignment of specific rights possessed by a claimant, such as a payee's rights as a party to a negotiable instrument or as a judgment creditor.

Subsection (r)—Judicial Relief.

[55] Occasionally a situation arises in which the protection of clients and this subsection require the appointment of a custodial receiver to wind down a lawyer's practice and to preserve assets. Subsection (r) makes explicit the Commission's authority to seek these remedies when available under Kansas law.

Subsection (s)—Confidentiality.

[56] The need to protect wrongly accused lawyers and to preserve the independence of the Commission's deliberations should be balanced with the interests of protecting the public and enhancing the administration of justice.

[57] It is within the discretion of the Commission to determine which agencies other than the disciplinary administrator should be given access to claim files. Criminal prosecutors and agencies considering judicial or administrative appointments may be assisted by access to information contained in claims for reimbursement from the Fund. Subsection (s)(2) adopts Rule 237(c)'s exclusion of the claimant and the lawyer from the rule of confidentiality.

[58] Publication of the decisions of the Commission highlights the responsiveness of the legal profession to clients and its commitment to self-regulation. The Commission should be aware that on occasion the need to protect the client's identity from the results of publicity may occur. Timing of the release may be based on other pending proceedings. Responsible public information programs are essential to achieve the Fund's purpose. Both the public and the news media should be kept informed of the Commission's activities and the Fund's status. After payment of reimbursement, the Commission may publicize the reimbursement through the Supreme Court's public information officer or in any other manner directed by the Commission.

Subsection (t)—Compensation for Representing Claimant.

[59] Claimants occasionally may appear before the Commission represented by counsel. Claimants in need of counsel in preparing or presenting a claim should receive such assistance. Since the Commission members volunteer their services, lawyers should also contribute their legal services pro bono publico. However, it is not the intent of this subsection to require assisting lawyers to spend their own money. They may request the Fund to reimburse out-of-pocket expenses.