

2016

Mediation Advocacy Training

SEPTEMBER 14, 2016
EDNY ADR DEPARTMENT

EASTERN DISTRICT OF NEW YORK | 225 Cadman Plaza, Brooklyn, NY

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

MEDIATION ADVOCACY TRAINING

Central Jury Room (2nd Floor)
225 Cadman Plaza East
Brooklyn, New York

Wednesday, September 14, 2016

9:00am – 9:30am

Registration and Breakfast

9:30am – 9:40am

Introduction and Program Overview
Robyn Weinstein, EDNY ADR Department

9:40am – 10:30am

Representing a Pro Se Client at Mediation
Paul Radvany, Fordham Law School

10:30am – 10:45am

Break

10:45am – 12:30pm

Overview of Employment Discrimination Laws
David Weisenfeld, Cardozo Law School

12:30pm – 1:00pm

Lunch

1:00pm – 1:50pm

Mediation Advocacy Tips
Nina Martinez, New York Legal Assistance Group

1:50pm – 2:00pm

Q&A and Closing Remarks

TRAINER BIOGRAPHIES

NINA MARTINEZ

Nina Martinez is a Skadden Fellow and staff attorney at the New York Legal Assistance Group (NYLAG). She manages the Employment Mediation Project at NYLAG which provides free and reduced-price mediation services to parties involved in employment-related disputes ranging from wage and hour issues, discrimination, and accommodations claims. Ms. Martinez also represents plaintiffs in employment discrimination and wage and hour disputes at the EEOC, New York City Commission of Human Rights, New York State Division of Human Rights, as well as the Southern and Eastern Districts.

Ms. Martinez received her B.A. from University of Florida and is a member of Phi Beta Kappa. Ms. Martinez taught first grade in Harlem as a Teach for America Corps Member and earned her M.S. in Elementary Education from Hunter College in 2012. Ms. Martinez is a graduate of the University of Pennsylvania Law School. Ms. Martinez has worked as a law clerk at Make the Road New York, the Office of the General Counsel of the Equal Employment Opportunity Commission, and the federal Department of Labor's Regional Office of the Solicitor.

PAUL RADVANY

Paul Radvany is a Clinical Professor at Fordham Law School where he directs the Securities Litigation and Arbitration Clinic and also teaches Trial and Arbitration Advocacy. He is the immediate past Chair of the American Association of Law Schools' Litigation Section. He is an active mediator and a member of the mediation panel for International Institute for Conflict Prevention & Resolution, Inc. ("CPR"), the Southern District of New York, the Hurricane Sandy panel for Eastern District of New York as well as the Commercial Division of New York Supreme Court. Professor Radvany was recently appointed to be a mediator for a pilot mediation program for the Second Circuit. He was also appointed to the inaugural Mediation Advisory Committee for the Southern District of New York. He has taught and trained lawyers, law students and LLM students on various aspects of arbitration and mediation has been appointed as a member of the Securities Industry Conference on Arbitration. He is a member of the following New York State Bar Association Committees: Securities Litigation and Arbitration Committee; Commercial and Federal Litigation Committee on Arbitration and ADR; and the Dispute Resolution Section's Mediation Committee.

Before joining Fordham's faculty, Professor Radvany was a Deputy Chief of the Criminal Division for the United States Attorney's Office in the Southern District of New York, where he oversaw the Securities and Commodities Fraud, Major Crimes, and General Crimes Units where he trained their new prosecutors on trial skills. He also is an adjunct professor at Columbia Law School, where he teaches Trial Practice and the Federal Court Clerk Externship class. Before joining the U.S. Attorney's Office, Professor Radvany was a litigation associate at Debevoise & Plimpton. He clerked for the Hon. Michael H. Dolinger in the Southern District of New York, and he received his J.D. from Columbia Law School, where he was a Harlan Fiske Stone Scholar, and his B.A. from Columbia College.

DAVID J. WEISENFELD

Professor Weisenfeld teaches is Professor of Practice at the Benjamin N. Cardozo School of Law, where he teaches ADR in the Workplace and Negotiation Theories & Skills in [Cardozo's Kukin Program for Conflict Resolution](#), as well as Contract Drafting, Employment Law, and Public Sector Labor & Employment Law.

In addition to teaching, Professor Weisenfeld is an active arbitrator and mediator of labor, employment, and commercial disputes. He serves on numerous neutral panels including those of the American Arbitration Association, Federal Mediation and Conciliation Service, NYC Office of Collective Bargaining, Equal Employment Opportunity Commission, Financial Industry Regulatory Authority, and US District Courts for the Southern and Eastern Districts of New York. Before becoming a neutral in 2005, he was a partner at Thelen Reid & Priest LLP and practiced labor and employment law in New York City for over 20 years. He is a member of the Bar in New York, at the US District Courts for the Southern and Eastern Districts of New York, the Second and Fourth Circuit Courts of Appeal, and the US Supreme Court.

Professor Weisenfeld earned his B.A from Trinity College (Hartford, CT) in 1978 and his J.D. from Harvard Law School, cum laude, in 1981.

Mediation Advocacy Training
US District Court, Eastern District of New York
September 14, 2016

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Overview of Employment Discrimination Laws

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Primary Employment Discrimination Laws

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- Title VII of the Civil Rights Act of 1964, 42 USC § § 2000e, et seq.
- Age Discrimination in Employment Act of 1967, 29 USC § § 621, et seq.
- Americans with Disabilities Act of 1990, 42 USC § § 12101, et seq.
- Equal Pay Act of 1963 (part of Fair Labor Standards Act of 1938), 29 USC § 206(d)
- New York State Human Rights Law, NY Executive Law § 291, et seq.
- New York City Human Rights Law, NYC Administrative Code § 8-101 et seq.



Primary Employment Discrimination Agencies

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- Equal Employment Opportunity Commission (Title VII, ADEA, ADA)
- US Department of Labor (EPA)
- NYS Division of Human Rights (NYS HRL)
- NYC Human Rights Commission (NYC HRL)

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Resources for Practitioners – Experienced or Not

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- Employment Discrimination Law, 5th Edition (2013)
Lindemann, Grossman & Weirich
Bloomberg BNA
(ABA, LEL Section, EEO Committee)
- (Lindemann, 2015 Supplement)
- EEOC regulations: 29 CFR § 1600, et seq.
- EEOC sub-regulatory guidance:
www.eeoc.gov/laws/guidance

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Title VII of the Civil Rights Act of 1964

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- Covered Employer – 15 or more employees
- Protected Characteristics:
 - Race
 - Color
 - National Origin
 - Religion
 - Sex
- Retaliation Also Prohibited

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Definitions

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- Race:
 - Broad racial groups (African American, Hispanic, Asian, Pacific Islander, Native American, Caucasian)
- Color:
 - Skin tone
- National Origin:
 - Country of birth/ancestry

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Definitions, continued

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- Religion:
 - Moral or ethical beliefs as to what is right and wrong, which are sincerely held with the strength of traditional religious views
 - Beliefs which are not part of a traditional church or sect, only subscribed to by a small number of people, or that seem illogical or unrecognizable to others
- Sex:
 - Male/Female
 - Sexual Orientation (evolving interpretation?)
 - Transgender (evolving interpretation?)

What Issues/Events are Covered?

8

- Title VII applies to all employer decisions affecting terms or conditions of employment
 - Hire
 - Separation
 - Promotion/Demotion
 - Assignment/Duties
 - Working conditions
 - Compensation
- Not just entry/exit

Beyond Discrimination: Reasonable Accommodation

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- Religion only (and disability under ADA)
- In addition to barring discrimination against applicants/employees of the basis of their religious beliefs
- Applicants/employees are entitled to reasonable accommodation in practicing their religion –
- Unless such accommodation would result in an undue hardship on the employer
- Potential examples:
 - Time off
 - Dress
 - Time/place to pray during the work day

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Broad Theories of Discrimination

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- Disparate Treatment
- Disparate Impact

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Disparate Treatment

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- Treating an individual (or group of individuals) differently on the basis of their membership in a particular protected class
- Examples:
 - ▣ Refusing to hire African Americans
 - ▣ Only promoting Males
 - ▣ Requiring (only) Hispanics to work mandatory overtime on holidays
 - ▣ Requiring pregnant employees to take unpaid leaves of absence regardless of ability to perform

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Employer Motivation is the Key

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- Negative employment actions (No hire, discharge, demote) are not per se unlawful
- Negative employment actions taken against members of protected classes are not per se unlawful
- Employers can/must manage their workplaces
- Employer liability is based on the reason/motive behind a particular employment action
 - ▣ Why was the African American not hired?
 - ▣ Why was the Muslim discharged?
 - ▣ Why was the Female not promoted?

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Proving Discriminatory Intent

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- Getting inside the employer's head
 - ▣ McDonnell Douglas Corp. v. Green, 411 US 792 (1973)
- Burden Shifting
- Plaintiff burden to make out a prima facie case
 - ▣ Member of protected class?
 - ▣ Treated differently?
 - ▣ Circumstances that suggest discrimination?
 - ▣ Example: qualified African American applicant is rejected; employer continues to seek other applicants

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McDonnell Douglas, continued

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- Burden shifts to employer to articulate a legitimate non-discriminatory reason for the action
 - ▣ Why is the proposed explanation (discrimination) not accurate?
 - ▣ But burden of proof always stays with plaintiff
- Burden shifts back to plaintiff to rebut the legitimate non-discriminatory reason
 - ▣ Is the stated reason not the real (or sole) reason?
 - ▣ Is it a pretext (cover) for discrimination?

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Pretext? Or Pretext Plus?

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- Plaintiff always has the burden to prove discriminatory intent
- Not enough merely for the employer's stated reason to be a pretext
- Must be a pretext for discrimination
- Jury question: jury can (not "must") infer discrimination from fact of pretext
 - Texas Department of Consumer Affairs v. Burdine, 450 US 248 (1993)
 - Reeves v. Sanderson Plumbing Products, Inc., 530 US 133 (2000)

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Discriminatory Intent?

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- What does the plaintiff need to show?
- Civil Rights Act of 1991
 - Amends § 703 (42 USC § 2000e-2)
 - "(m) Except as otherwise provided in this title, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice."

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Disparate Impact

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- Facially neutral employment practices that disproportionately disadvantage a group of applicants/employees of a protected class
- Absent a business necessity
- Relies on statistics for proof
 - Griggs v. Duke Power Co., 401 US 424 (1971)

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Harassment – Sexual or Otherwise

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- Quid Pro Quo
 - Benefits (employment, promotion, etc.) made dependent of submission to sexual behavior
 - Meritor Savings Bank v. Vinson, 477 US 57 (1986)
- Hostile Environment
 - Behavior that creates a work environment that a reasonable person would find to be hostile, intimidating, or offensive
 - Must be severe or (not “and”) pervasive
 - By supervisors, co-workers, or others
 - Harris v. Forklift Systems, Inc., 510 US 17 (1993)

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Harassment, continued

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- But, defense if:
 - Plaintiff has not suffered tangible employment harm,
 - Employer exercised reasonable care to prevent/correct harassing behavior, and
 - Plaintiff unreasonably failed to take advantage of any preventive or corrective opportunities provided by employer.
 - Burlington Industries v. Ellerth, 524 US 742 (1998) and Farragher v. City of Boca Raton, 542 US 775 (1998)

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Retaliation

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- Unlawful to retaliate against an applicant/employee who has, in good faith, opposed discrimination or (not “and”) participated in protected activity (42 USC § 2000e-3(a))
- Adverse employment action need not include the loss of a tangible benefit (discharge, demotion, etc.)
- Any change in wages, hours, or working conditions that would cause a reasonable person not to oppose discrimination or participate in protected activity
 - Burlington Northern & Santa Fe Railway Co. v. White, 548 US 53 (2006) (transfer to a more physically demanding but equally paid job)

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Retaliation, continued

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- Separate cause of action from discrimination
- Plaintiff can lose on discrimination but win on retaliation
- Retaliatory action need not be aimed at the person who opposed/participated
 - Thompson v. North American Stainless, 562 US 170 (2011)
(action taken against complainer's fiancé also employed by the company)
- Witnesses protected
 - Crawford v. Metropolitan Government of Nashville, 555 US 271 (2009)

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Retaliation, continued

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- But standard of proof on retaliation is greater than that for discrimination
- “But for” instead of “motivating factor”
- “Title VII’s anti-retaliation provision, which is set forth in § 2000e-3(a), appears in a different section from Title VII’s ban on status-based discrimination [in § 2000e-2]
 - University of Texas Southwestern Medical Center v. Nassar, 570 US ___, 131 S.Ct. 2517 (2013)

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Enforcement

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- Charge must be filed with the EEOC within 180 days of event (300 days if there is an EEOC-approved state or local agency)
- Investigation & determination
- (Possible) lawsuit by EEOC following conciliation
- (More likely) notice of right to sue
- Private lawsuit within 90 days of receipt of RTS
- Can request RTS after 180 days if no EEOC determination
- Freedom of Information Act

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Relief

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- Back pay, with interest
- Compensatory (including emotional distress) and punitive damages (combined/capped)
 - 15 – 100 employees: \$50,000
 - 101 – 200 employees: \$100,000
 - 201 – 500 employees: \$200,000
 - 501+ employees: \$300,000
- Reinstatement/Promotion
- Front pay
- Attorneys' fees
- Injunctive relief

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Age Discrimination in Employment Act of 1967

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- Separate statute – not an amendment/add to Title VII
- Largely similar (not “identical”)
- “Because of age”
- “Motivating factor” standard in CRA of 1991 applies to Title VII but not ADEA
- Burden of proof is “but for” – same as for retaliation (but not for discrimination) under Title VII
 - Gross v. FBL Financial Services, Inc., 557 US 167 (2009)

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Special Issues re ADEA

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- Mandatory retirement
- Reductions in force
- Releases
 - Older Worker Benefit Protection Act of 1990 (amends ADEA)
 - Specific reference to statute
 - Advise the employee to consult an attorney
 - Not less than 21 days to consider (waivable)
 - Not less than 7 days after signature to rescind (not waivable)
 - Special (extra) provisions for group/incentive exit programs

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Americans with Disabilities Act of 1990

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- Also a separate statute rather than an amendment/add to Title VII
- Unlawful to discriminate in any terms or conditions of employment against a qualified individual
 - Disabled
 - Record of disability
 - Regarded as having a disability
 - Relationship/association with a person with a disability
 - Retaliation

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ADA – Who is Covered?

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- A disability is a physical or mental impairment that substantially limits a person with respect to one or more major life activities
 - Per ADA Amendments Act of 2008, disability to be construed broadly
- A qualified individual is one who can perform the essential functions of the job with or without reasonable accommodation, and
- Does not pose a direct threat to own or others' health or safety

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ADA – Major Life Activities

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- EEOC regulations include a long (non-exhaustive list of examples of major life activities

□ Seeing	□ Lifting
□ Hearing	□ Speaking
□ Eating	□ Breathing
□ Sleeping	□ Reading
□ Walking	□ Concentrating
□ Standing	□ Learning
□ Sitting	□ Interacting with others
□ Reaching	

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ADA – Major Bodily Functions

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- Major Life Activity is defined to include the operation of major bodily functions, including (non-exhaustive list):
 - Immune system
 - Digestive system
 - Bowel and bladder
 - Respiratory
 - Circulatory
 - Neurological
 - Endocrine
 - Individual organ function

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ADA – Reasonable Accommodation

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- Any change or adjustment to a job or the work environment that permits a qualified person with a disability to:
 - Participate in the application process
 - Perform the essential functions of the job
- Examples of reasonable accommodations:
 - Acquiring or modifying equipment
 - Restructuring the job
 - Modifying work schedules
 - Reassignment to a vacant position
 - Making the workplace readily accessible to and usable by persons with disabilities

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ADA – Reasonable Accommodation, continued

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- Requires an individualized assessment
 - No assumptions or stereotypes
- Requires an interactive process – mutual obligation
- A qualified individual may be entitled to a reasonable accommodation, but not necessarily the one they request
- Undue hardship? Significant difficulty or expense?
 - Also an individualized assessment

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Equal Pay Act of 1963

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- Unlawful to pay lower wages to employees of one sex than are paid to employees of opposite sex:
 - Working within the same establishment,
 - For work requiring substantially equal skill, effort, and responsibility, and
 - Performed under similar working conditions
- Employer not permitted to reduce the wage rate of any employee in order to comply (must raise the lower paid person)
- No requirement of discriminatory intent to establish liability
- Equal pay for equal work, not comparable worth

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EPA – Definitions

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- US Department of Labor regulations, 29 CFR § 1620
- An “establishment” is a distinct physical place of business (not the entire business which may include multiple establishments)
- “Equal skill” is measured in terms of performance requirements for the job
 - Other skills, not needed for the job, are irrelevant
 - But includes consideration for experience, training, education, and ability
- “Equal effort” is concerned with the physical or mental exertion needed to perform the job

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EPA – Definitions, continued

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- “Equal responsibility” is concerned with the degree of accountability required in performing a job
 - ▣ Includes supervisory duties, including occasional supervisory duties assumed in the absence of the regular supervisor
 - ▣ Does not include minor or inconsequential differences in responsibilities
- “Similar working conditions” is concerned with surroundings and hazards
 - ▣ Flexible standard – jobs in different departments are not automatically performed under dissimilar working conditions

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EPA – Burden of Proof

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- Burdens of proof different from under Title VII
- Once the employee establishes a prima facie case, burden of persuasion shifts to employer to show that the pay differential is not based on sex
 - ▣ Seniority system
 - ▣ Merit system
 - ▣ Pay based on quantity or quality of production
 - ▣ Any other factor other than sex

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EPA – Procedures

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- EPA is part of FLSA, so enforcement is similar to other wage-hour claims
- Employees can (not “must”) file administrative charges
- Private lawsuits
- 2 year statute of limitations (3 years for willful violations)

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EPA – Relief and Retaliation

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- Relief includes:
 - ▣ Back pay
 - ▣ Liquidated damages
 - ▣ Wage equalization
 - ▣ Attorneys’ fees
 - ▣ Injunction
- Retaliation protection, but more limited than under Title VII
 - ▣ File a complaint
 - ▣ Participate or testify in a proceeding under the FLSA

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New York State Human Rights Law

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- Substantive analysis is the same as under Title VII
 - Pucino v. Verizon Wireless Commc'ns, 618 F.3d 112 (2d Cir. 2010)
- Covered employer – 4 or more employees
- Can file a charge, leading to investigation and (if cause found) administrative trial, or (not “and”)
- Private lawsuit, within 3-year statute of limitations (tolled while a charge is pending before EEOC or SDHR)

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NYS Human Rights Law – Coverage

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- Broader list of protected characteristics than under federal law
- Age
- Color
- Creed
- Disability
- Domestic Violence Victim Status
- Familial Status
- Marital Status
- Military Status
- National Origin
- Predisposing Genetic Characteristics
- Race
- Sex
- Sexual Orientation
- Retaliation also prohibited

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NYS Human Rights Law – Relief

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- Back pay, with interest
- Compensatory damages, including emotional distress (no cap)
- Reinstatement/promotion
- Front pay
- Injunctive relief
- No punitive damages
- No attorneys' fees

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New York City Human Rights Law

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- Similar to NYS HRL, but
- Local Civil Rights Restoration Act of 2005
 - ▣ NYC HRL was intended to provide broader protections than similarly worded federal or state laws
 - ▣ NYC HRL claims must be analyzed separately from federal or state discrimination claims
- Restoration Act acknowledged and adopted by federal courts for pendent NYC HRL claims
 - ▣ Mihalik v. Credit Agricole Cheuvreux N. Am., Inc., 715 F.3d 102, 109 (2d Cir. 2013) (NYC HRL provisions to be construed “broadly in favor of discrimination plaintiffs, to the extent that such a construction is reasonably possible.”)

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NYC HRL – Relief

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- Best of both worlds for plaintiffs
 - ▣ Attorneys' fees
 - ▣ Uncapped compensatory (including emotional distress) damages
 - ▣ Uncapped punitive damages

Nina T. Martinez
Skadden Fellow, Employment Mediation Project/Justice at Work Project
New York Legal Assistance Group

September 14, 2016

MEDIATION ADVOCACY TRAINING
TIPS AND BEST PRACTICES

Outreach and Pre-Intake Preparation

- Orient the client. Let them know who you are and how you got their case. An outreach letter or a phone call can accomplish this goal.
- Prepare in advance of meeting. This will allow you to be more efficient and affords you more time to discuss issues that are not in the complaint. Read through the complaint, take note of key dates (date of incident, date of EEOC filing, date of complaint filing, etc.), review any attached exhibits, research the employer, and study the docket.

Intake

- Plan to commit 1-2 hours for an introductory meeting. You should use this first meeting to:
 1. Build rapport and trust;
 2. Articulate the limited scope nature of your representation;
 3. Give the plaintiff a better sense of how the matter might proceed (discuss federal court procedures and what goes on in mediation); and
 4. Learn about the case.
- Consider the intake an opportunity to provide important legal information. Client often has not spoken to anyone about their rights or this process. Take the time to help them understand what litigation might entail and provide a laymen's explanation for each phase of litigation.
- Employ the 'funnel method' when gathering information at the outset: Start with open ended questions to get a sense of the incident and then narrow in on details. Err on the side of letting the individual provide more rather than less detail.

Strategic Considerations

- Manage client expectations early on. Take time early in the representation to walk clients through why certain facts help or hurt their case. This will inform your client's demand and bottom line. Prepare your client for low-ball offers and arguments against their claims.
- Consider whether a non-confidential mediation statement is preferable. Oftentimes the opposing party has very little information about the allegations. Where you think more information might encourage the opposing party to settle create a sanitized version of the statement to share with opposing counsel.
- Strategize your opening statement. Speak to the mediator about whether there will be an opportunity to make an opening statement and determine how it will be presented at mediation.

SPECIAL ISSUES
New York State and New York City Human Rights Laws

I. STATE AND LOCAL LAWS PROHIBITING EMPLOYMENT DISCRIMINATION

- A. The New York State Human Rights Law (NYSHRL) prohibits discrimination in employment on the basis of age, sex, pregnancy, race, religion, creed, color, national origin, sexual orientation, military status, marital status, mental or physical disability, domestic violence victim status or predisposing genetic characteristics. The NYSHRL applies to employers with 4 or more employees. See N.Y. Exec. Law §296 et seq.
- B. The New York City Human Rights Law (NYCHRL) is even broader than its State counterpart and prohibits discrimination in employment on the basis of race, color, creed, age, national origin, alienage or citizenship status, gender (including gender identity and sexual harassment), sexual orientation, disability, arrest or conviction record, marital status, partnership status, or status as a victim of domestic violence, stalking and sex offenses. The NYCHRL applies to employers with 4 or more employees. See N.Y.C. Admin. Code §8-107 et seq.

II. SPECIAL FOCUS ON DISABILITY AND RELIGION – DUTY TO ACCOMMODATE

In addition to prohibiting discrimination on the basis of disability and religion, employers often have an obligation to reasonably accommodate qualified persons with disabilities and individuals with bonafide religious beliefs, as explained below.

A. Disability

- 1. The definition of “disability” varies under federal, state and city law:
 - a. ADA: Disability is defined as a physical or mental impairment that substantially limits one or more of the major life activities of such individual, a record of such impairment or being regarded as having such impairment. See 42 USC §12102.
 - b. NYSHRL: Disability means (a) a physical, mental or medical impairment resulting from anatomical, physiological, genetic or neurological conditions which prevents the exercise of a normal bodily function or is demonstrable by medically accepted clinical or laboratory diagnostic techniques or (b) a record of such an impairment or (c) a condition regarded by others as such an impairment, provided, however, that in all provisions of this article dealing with employment, the term shall be limited to disabilities which, upon the provision of reasonable accommodations, do not prevent the complainant from performing in a reasonable manner the activities involved in the job or occupation sought or held. See N.Y. Exec. Law 292(21).

- c. NYCHRL: Disability means any physical, medical, mental or psychological impairment, or a history or record of such impairment (defined broadly). See NYC Admin. Code § 8-102.
2. As a general matter, employers must make reasonable accommodations to enable qualified persons with disabilities to satisfy their essential job functions unless doing so imposes an undue hardship on the employer's business. Note the NYCHRL expressly states that it is the employer's burden of proving both (i) employee could not satisfy the essential requisites of the job with a reasonable accommodation, and/or (ii) the accommodation results in undue hardship.
- a. ADA: An employer must provide a reasonable accommodation that will not cause undue hardship on the conduct of the employer's business. The term "undue hardship" means an action requiring significant difficulty or expense, when considered in light of the following factors (42 U.S.C. §12102(10)):
 - i. the nature and cost of the accommodation needed under this chapter;
 - ii. the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility;
 - iii. the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and
 - iv. the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity.
 - b. NYSHRL. Under State law, the term reasonable accommodation means actions taken which permit an employee, prospective employee or member with a disability to perform in a reasonable manner the activities involved in the job or occupation sought or held and include, but are not limited to, provision of an accessible worksite, acquisition or modification of equipment, support

services for persons with impaired hearing or vision, job restructuring and modified work schedules; provided, however, that such actions do not impose an undue hardship on the business, program or enterprise of the entity from which action is requested. See N.Y. Exec Law. §296(10).

- c. NYCHRL: Under the City statute, the term reasonable accommodation means such accommodation that can be made that shall not cause undue hardship in the conduct of the covered entity's business. The employer has the burden of proving undue hardship and the factors include (N.Y. Admin. Code §8-102(18)):
- i. The nature and cost of the accommodation;
 - ii. The overall financial resources of the facility or the faculties involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility;
 - iii. The overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees, the number, type, and location of its facilities; and
 - iv. The type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity.

B. Religion

1. Title VII: Employers must reasonably accommodate an employee's sincere religious belief unless such accommodation imposes an undue hardship.
2. NYSHR: It shall be an unlawful discriminatory practice for any employer to impose upon a person as a condition of obtaining or retaining employment, including opportunities for promotion, advancement or transfers, any terms or conditions that would require such person to violate or forego a sincerely held practice of his or her religion, including but not limited to the observance of any particular day or days or any portion thereof as a Sabbath or other holy day in accordance with the

requirements of his or her religion, unless, after engaging in a bona fide effort, the employer demonstrates that it is unable to reasonably accommodate the employee's or prospective employee's sincerely held religious observance or practice without undue hardship on the conduct of the employer's business.

3. NYCHRL: It shall be an unlawful discriminatory practice for an employer to impose upon a person as a condition of obtaining or retaining employment any terms or conditions, compliance with which would require such person to violate, or forego a practice of, his or her creed or religion, including but not limited to the observance of any particular day or days or any portion thereof as a Sabbath or holy day or the observance of any religious custom or usage, and the employer shall make reasonable accommodation to the religious needs of such person... Reasonable accommodation, as used in this subdivision, shall mean such accommodation to an employee's or prospective employee's religious observance or practice as shall not cause undue hardship in the conduct of the employer's business. The employer shall have the burden of proof to show such hardship. See N.Y. Admin code §8-107(3).

III. UNLAWFUL DISCRIMINATORY PRACTICES

- A. Discrimination. Under the anti-discrimination statutes, it is unlawful to discriminate in any aspect of employment.
- B. Harassment. There are essentially two types of harassment claims – (i) harassment resulting in a tangible employment action; and (ii) harassment resulting in a hostile work environment.

1. Tangible Employment Action. In a tangible employment action, the harasser is an individual who has the power to make employment decisions affecting the employee (such as a supervisor or a person in a successively higher level of authority). A “tangible employment action” includes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities or a decision causing a change in benefits.

A tangible employment action also occurs when an employee submits to a supervisor’s sexual demands in order to maintain a job or certain terms and conditions of employment. This type of harassment involves either (i) a threat that if the employee does not give in to the manager requests, the employee will suffer some type of adverse consequences such as termination, demotion, lack of promotion or salary increase, or unfavorable performance reviews, or (ii) a promise of improved job terms or benefits (e.g., a promotion, salary increase, etc.) conditioned on the

fulfilling of sexual requests. Supervisory action of this type is often referred to as quid pro quo, a Latin phrase which means “something for something.”

2. Hostile Work Environment Harassment. More subtle than harassment resulting in a tangible employment action is harassment leading to a hostile work environment.
 - a. Under Title VII and the NYSHRL, harassment becomes unlawful where (1) the employee belongs to a protected group; (2) the employee was subject to unwelcome harassment; (3) the harassment was because of his/her membership in a protected group; (4) the harassment was sufficiently severe or pervasive so as to interfere with an employee’s work performance or create an intimidating or offensive working environment; and (5) there was a legal basis for holding the employer liable.

Petty slights, annoyances, and isolated incidents (unless extremely serious) will not rise to the level of illegality. To be unlawful, the conduct must create a work environment that would be intimidating, hostile, or offensive to reasonable a reasonable person.

- b. Importantly, New York courts have rejected the “severe and pervasive” for claims brought under the NYCHRL. In Williams v. New York City Housing Authority, 872 N.Y.S.2d 27 (1st Dept. 2009), leave to app. denied, 13 N.Y.3d 702 (2009), the court effectively lowered the burden for plaintiffs to establish a hostile-work-environment claim from demonstrating that the conduct was "severe and pervasive" to showing that they were treated "less well" than other employees.

The Williams court concluded that the severe and pervasive standard set forth by the U.S. Supreme Court in Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986) was too restrictive under the NYCHRL, as amended by the 2005 Civil Rights Restoration Act, because it effectively “sanctioned a significant spectrum of conduct demeaning to women” and was therefore inconsistent with the NYCHRL’s “uniquely broad and remedial purposes.” With the statute's broad remedial purpose in mind, the court concluded that the question of severity and pervasiveness was applicable to consideration of the scope of permissible damages, but not to the question of underlying liability. In the opinion of the Williams court, the aim of New York City's workplace harassment laws is zero employer tolerance for conduct involving

an employee being treated "less well" based on his or her membership in a protected class.

C. Employer liability for harassment

1. Depending on the applicable law, employers are not automatically responsible for all actions of their employees and can raise certain defenses in response to certain allegations of discrimination and harassment.
2. In Burlington Industries, Inc. v. Ellerth, 118 S. Ct. 2257 (1998), and Faragher v. City of Boca Raton, 118 S. Ct. 2275 (1998), the Supreme Court made clear that employers are subject to vicarious liability for unlawful harassment by supervisors. The standard of liability is premised on two principles: 1) an employer is responsible for the acts of its supervisors, and 2) employers should be encouraged to prevent harassment and employees should be encouraged to avoid or limit the harm from harassment. To accommodate these principles, the Court held that an employer is always liable for a supervisor's harassment if it culminates in a tangible employment action (discussed above).
3. However, if there is no tangible employment action, the employer may be able to avoid liability or limit damages by establishing an affirmative defense (now commonly known as the Faragher-Ellerth defense) that includes two elements:
 - a. The employer exercised reasonable care to prevent and to correct promptly any harassing behavior; and
 - b. The complaining employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer to otherwise avoid harm.
 - i. An employer's promulgation and dissemination of a strong anti-harassment policy with an effective complaint procedure may show that the employer satisfied the first prong of the affirmative defense. Furthermore, failure by an employee to use the complaint procedure provided by the employer will normally suffice to show that the employee unreasonably failed to satisfy the second prong of the affirmative defense.
4. Importantly, the Faragher Ellerth affirmative defense is not available under the NYCHRL. On May 6, 2010, in response to a certified question from the U.S. Court of Appeals for the Second Circuit, the New York Court of Appeals in Zakrzewska v. The New School, No. 62, slip op. (N.Y. May 6, 2010). held that the affirmative defense to employer liability does not apply to harassment and retaliation claims brought under the NYCHRL.

- a. The Zakrzewska court determined that the plain language of the NYCHRL precludes application of the Faragher-Elleerth defense because the language of the statute imposes vicarious liability on an employer in three instances: (1) where the offending employee “exercised managerial or supervisory responsibility”; (2) where the employer knew of the offending employee's unlawful discriminatory conduct and acquiesced in it or failed to take “immediate and appropriate corrective action”; and (3) where the employer “should have known” of the offending employee's unlawful discriminatory conduct, yet failed to exercise reasonable diligence to prevent it.
- b. In so holding, the court opined that the NYCHRL's “unambiguous language” is supported by its legislative history and that the NYCHRL is not inconsistent with the New York State Human Rights Law in creating a greater penalty for unlawful discrimination.

IV. DAMAGES

A. Title VII

1. Back pay (consisting of salary and fringe benefits the plaintiff would have earned from the date of the adverse employment action to the date of the settlement or trial)
2. Front pay
3. Compensatory Damages (intended to compensate the plaintiff for damages actually and/or proximately caused by the discrimination, harassment or retaliation, including damages for emotional distress and pain and suffering). Note that caps are placed on compensatory damages awarded under Title VII according to the size of the employer as follows:
 - a. Up to 100 employees: \$50,000
 - b. 101-200 employees: \$100,000
 - c. 201-500 employees: \$200,000
 - d. 500+ employees: \$300,000
4. Reasonable attorney's fees
5. Punitive damages (where the employer has engaged in intentional discrimination, harassment or retaliation with malice or reckless indifference). Also subject to the above-referenced caps.

B. ADEA

1. Back pay
2. Front pay
3. Liquidated damages where a willful violation occurs.
4. NO compensatory damages.
5. Reasonable attorneys' fees

C. NYSHRL

1. Under NYSHRL and unlike under Title VII, there is no statutory limit or cap on the amount of compensatory damages. Punitive damages and attorney's fees or costs, however, are not recoverable under the NYSHRL. Back pay and front pay are available.

D. NYCHRL

1. Under the NYCHRL, there is also no statutory limit on the compensatory damages. Punitive damages and reasonable attorney's fees and costs to the prevailing party are available under the NYCHRL, as are back pay and front pay.

Summary of Federal Employment Laws

1. Title VII of the Civil Rights Act of 1964 (Title VII)

- Agency: EEOC
- Prohibits employment discrimination on the basis of race, color, sex, national origin and religion. Also requires reasonable accommodation for religious observance needs and prohibits retaliation.

2. Age Discrimination in Employment Act of 1967 (ADEA)

- Agency: EEOC
- Prohibits employment discrimination on the basis of age against employees who are forty (40) years of age and older.

3. Americans with Disabilities Act (ADA)

- Agency: EEOC
- Prohibits employment discrimination (1) against qualified individuals with disabilities who can perform essential job function with or without reasonable accommodation, (2) based on a record of a disability (3) based on perceived disability and (4) based on an individual's association with someone who has a disability.

4. The Equal Pay Act of 1963 (EPA)

- Agency: EEOC
- Requires that the equal pay be given to men and women doing the same or substantially similar work in terms of skill, effort, responsibility and working conditions in the same establishment.

5. Rehabilitation Act of 1973

- Agency: OFCCP/EEOC
- Requires government contractors and subcontractors that satisfy specific monetary and staffing thresholds to take affirmative action to employ and advance in employment qualified individuals with disabilities. Also prohibits recipients of federal financial assistance from discriminating against qualified individuals with disabilities.

6. Genetic Information Nondiscrimination Act (GINA)

- Agencies: EEOC and U.S. Department of Labor
- Prohibits discrimination in employment on the basis of genetic information and the use of genetic information to discriminate against participants in health care plans.

7. Family and Medical Leave Act (FMLA)

- Agency: US Dept. of Labor, Wage & Hour Division
- Employees who have been employed at least 12 months and have worked at least 1250 hours during that 12 months are entitled to twelve weeks of unpaid, job-protected leave every 12 months when the leave is taken in connection with the birth of a child, adoption of a child, becoming a foster parent, the serious

health condition of the employee or the serious health condition of a statutorily-covered family member.

- Provides 12 weeks of unpaid, job-protected leave if a covered employee's spouse, parent or child is on active duty in the military or is a reservist who faces recall to active duty in the event of specific qualifying exigencies.
- Provides 26 weeks of unpaid, job-protected leave during a single 12-month period to care for family members injured while on active military duty.

Federal Employment Agencies

Websites of Federal administrative agencies charged with administering and enforcing federal employment laws are a great source of information. Through these sites, you are able to access the text of laws, regulations, and agency enforcement guidance, the text of proposed regulations, and information concerning recent case settlements and enforcement activity.

- **Equal Employment Opportunity Commission: www.eeoc.gov**
 - **Discrimination by Type - www.eeoc.gov/laws/types/index.cfm**

- **United States Department of Labor: www.dol.gov**
 - **Find It! By Topic - www.dol.gov/dol/topic/elaws,**
 - **Employment Laws Assistance for Workers & Small Businesses - www.dol.gov/elaws/advisors.html**

- **Bureau of Labor Statistics: www.bls.gov**

- **Wage & Hour Division: <http://www.dol.gov/whd/>**
 - **Family and Medical Leave Act: <http://www.dol.gov/WHD/fmla/index.htm>**
 - **State Labor Law Topics: <http://www.dol.gov/whd/state/state.htm>**
 - State Minimum Wage and Pay Premiums
<http://www.dol.gov/whd/minwage/america.htm>
 - State Minimum Rest Period
<http://www.dol.gov/whd/state/rest.htm>
 - State Minimum Length of Meal Period
<http://www.dol.gov/whd/state/meal.htm>
 - Selected State Child Labor Standards under 18 in Non-farm Employment
<http://www.dol.gov/whd/state/nonfarm.htm>
 - State Payday Requirements
<http://www.dol.gov/whd/state/payday.htm>

- **Occupational Safety and Health Administration: www.osha.gov/index.html**
 - Workplace Violence: <http://www.osha.gov/SLTC/workplaceviolence/>

- **National Labor Relations Board: www.nlrb.gov**

- **Office of Federal Contract Compliance Programs: www.dol.gov/ofccp**

Equal Employment Opportunity Laws Summary

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I. TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

A. Jurisdiction and Coverage

Title VII of the Civil Rights Act, as amended, 42 U.S.C. Sections 2000e et seq. ("Title VII") prohibits discrimination against an employee or applicant on the basis of race, sex, national origin, religion and color. It also requires "reasonable accommodation" with respect to religion.

Title VII applies to all terms and conditions of employment including hiring, promotions, compensation, terminations and demotions.

"Race" includes the following racial groups: black or African American, Hispanic, Asian and Pacific Islanders, Native Americans, and white or Caucasian. "Sex" applies to men and women. "National origin" includes not only country of birth but ancestry. "Color" is skin tone. "Religion" is defined by the EEOC as "moral or ethical beliefs as to what is right and wrong, which are sincerely held with the strength of traditional religious views." The definition of religion also includes: religious beliefs that are, "new, uncommon, not part of a formal church or sect, only subscribed to by a small number of people, or that seem illogical or unrecognizable to others."

Not only is discrimination against applicants and employees prohibited on the basis of their religious beliefs, employees are also entitled to be reasonably accommodated in the practice of their religions unless such accommodation would result in an "undue hardship" to an employer. Accommodations may include time off, a place and time to pray during the workday and dress.

Recently, the EEOC issued Enforcement Guidance on the Consideration of Arrest and Conviction Records, http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm. The Guidance focuses on employment discrimination based upon race and national origin.

Employees may also file claims under Title VII when they believe they have been discriminated against because they associate with people of a race not their own. For example, a member of an interracial couple may allege that discrimination was based on that association.

Title VII also prohibits retaliation against any employee or applicant for employment who complains about or opposes violations of the Act or cooperates in an investigation of a complaint, regardless of the merits of the underlying charge of discrimination. "When an employee communicates to her employer a belief that the employer has engaged in ... employment discrimination, that communication virtually always constitutes the employee's opposition to the activity." Crawford v. Metropolitan Government of Nashville, 129 S. Ct. 646 (2009) Unlawful retaliation in violation of Title VII occurs where the employer, in retaliation for protected activity, takes any action that would have been "materially adverse" which means "it might well have dissuaded a reasonable worker from making or supporting a charge of

discrimination.” Burlington Northern v. White, 126 S. Ct. 2405, 2415 (2006). Notably, Title VII’s anti-retaliation prohibition is not limited to employer conduct that is related to employment or that occurs at the workplace. Id. at 2414.

Title VII applies to all employers that have 15 or more employees on each working day in each of 20 or more calendar weeks in the current or preceding year. Title VII also applies to American citizens working abroad for American-owned and controlled companies.

To be timely, a complainant must file a charge of discrimination within 180 days of the occurrence of the alleged discrimination or, in states that have their own anti-discrimination agencies, within 300 days.

B. Proving Discrimination

Generally, there are two methods for proving discrimination, disparate treatment and adverse impact.

1. Disparate Treatment

Disparate treatment occurs when an employee is treated differently on the basis of his or her membership in a protected class. Generally today cases involve a member or members of a protected class who believe they are the victims of a pattern of discrimination.

The burden of proof is on the plaintiff to establish a *prima facie* case of employment discrimination. The Supreme Court, in McDonnell Douglas v. Green, 411 U.S. (1973), stated that a plaintiff may raise an inference of discrimination in a failure to hire or promote case by showing that he or she 1) is a member of a protected class; 2) applied for a job; 3) was qualified for the job; 4) an opening existed for that job; 5) was not hired for that job; and 6) the employer continued to seek applicants. This methodology can be adapted to apply to all employment decisions such as compensation and termination.

The best way to defend a claim of discrimination is to refute the plaintiff’s proof – he or she is not a member of a protected class, he or she was not qualified for the sought position, the person selected was better qualified or that the successful candidate was of the same protected class. Employers may also show that the decision was job-related, not based on protected class status.

Employers may also argue that the decision was based on a bona fide occupational qualification (“BFOQ”). The employer would have to show that a particular sex, religion, or national origin is a “real” qualification for a particular job. This defense has been very narrowly construed.

2. Adverse/Disparate Impact

A *prima facie* case of adverse impact discrimination can be established by demonstrating, through the use of a statistical analysis, that a particular standard or facially neutral policy has a more negative effect on one group than another. Plaintiffs may use comparisons with either internal or external populations.

Adverse impact cases may be defended by a showing of statistical inaccuracy or that the standard is job-related.

In a recent case, Frank Ricci, et al. v. John Stefano, et al., 129 S. Ct. 2658, 2671 (2009), the Supreme Court held that before an employer can engage in intentional discrimination, it must show a strong basis for believing that it would be subject to disparate impact liability if it failed to take action based on race. In this case, the City of New Haven gave a test to firefighters interested in being promoted to management. Seventeen white firefighters and one Hispanic firefighter passed the test; none of the black employees who took the test had scores high enough to make them eligible for promotion. The City threw out the test stating that it feared a lawsuit by the black employees alleging disparate impact. The Court held that this fear alone was not enough for the city to discriminate against the white and Hispanic firefighters and that the decision violated Title VII.

C. Sexual Harassment

1. Introduction

Sexual harassment is a form of sex discrimination. Generally there are two types of sexual harassment: “*quid pro quo*” and “hostile work environment”. Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986), “*Quid pro quo*” (“this for that”) harassment involves situations where an employee is denied a tangible economic benefit because the employee rejected the unwanted sexual advances of a supervisor. For example, a manager fires an employee because he refused to have a sexual relationship. “Hostile work environment” harassment exists where there is unwelcome sexual conduct that is sufficiently severe or pervasive to create a hostile, intimidating or offensive working environment. Harris v. Forklift Sys., Inc., 510 U.S. 17 (1993)

2. Employer Liability for Supervisor Conduct

Employers will be held liable for the conduct of their supervisors when an employee has suffered a tangible job detriment, regardless of whether the acts of the supervisor constituted *quid pro quo* or hostile work environment. When the employee has not suffered a tangible job detriment, employers will be held liable as well unless the employer can prove: that it exercised reasonable care to prevent and promptly correct any sexually harassing behavior; and the victim failed to take advantage of any opportunities offered by the employer to correct or prevent the problem. Burlington Industries v. Ellerth, 118 S. Ct. 2257 (1998) and Farragher v. City of Boca Raton, 118 S. Ct. 2275 (1998).

Courts have extended this analysis to claims of racial and national origin harassment and to coworker harassment.

3. Hostile Work Environment

To prove a claim of hostile work environment harassment an employee must show that the conduct was unwelcome. In addition the conduct must be “sufficiently severe or pervasive ‘to alter the conditions of employment and create an abusive working environment’.” Isolated acts will not be sufficient. The plaintiff’s psychological well-being need not be affected to prove a claim. Sexual harassment that is physical as opposed to verbal is considered more severe. In all cases the outcome will depend on the totality of the circumstances.

In McCavitt v. Swiss Reinsurance America Corp., No. 00-7391 (2d Cir 2001), the court held that an employer could regulate dating between co-workers. The court determined that dating was not a protected “recreational” activity.

Same sex harassment also violates Title VII. Oncale v. Sundowner Offshore Services, Inc., 118 S. Ct. 998 (1998).

D. Enforcement

The Equal Employment Opportunity Commission (EEOC) is the federal agency responsible for administering Title VII. The EEOC is required by law to investigate charges of discrimination and to try to use conference, conciliation and persuasion to eliminate unlawful discriminatory practices. The EEOC may file suit in federal court in “pattern and practice” cases. In other cases, an individual may file a case in federal court after the EEOC has completed its proceedings. At the end of its investigation, the EEOC will issue a Right to Sue Letter. A complainant may also request the issuance of a Letter before the EEOC completes its investigation. A complainant may not file suit without a Right to Sue Letter and must file within 90 days of receipt of that letter. Plaintiffs may request a jury trial.

E. Damages

Before the passage of the Civil Rights Act of 1991 (“CRA 1991”) plaintiffs were entitled only to “make-whole” relief” (back pay, front pay, job-specific relief.) The CRA amended Title VII along with the other federal anti-discrimination statutes, allowing plaintiffs to also seek punitive and compensatory damages. The CRA did set caps for compensatory and punitive damages as follows: \$50,000 for employers with 15-100 employees; \$100,000 for employers with 101-200 employees; \$200,000 for employers with 201-500 employees; and \$300,000 for employers of more than 500 employees. Punitive damages are recoverable where the plaintiff demonstrates that the employer acted “with malice or with reckless indifference to the federally protected rights” of the plaintiff.

In Pollard v. E.I. du Pont de Nemours & Co., 532 U.S. 843 (2001), the Court held that the \$300,000 cap on compensatory damages did not apply to front pay. The Court held that front pay is an alternative to reinstatement and thus equitable relief rather than an element of compensatory damages.

In Cush-Crawford v. Adchem Corp., 87 FEP Cases 456 (2nd Cir. 2001), the Second Circuit held that an award of actual damages is not a prerequisite to an award of punitive damages. Thus where the fact finder has found in a plaintiff's favor that the defendant engaged in the prohibited discrimination, punitive damages might be awarded if the defendant has been shown to have acted with a state of mind that makes punitive damages appropriate. The defendant need not have committed egregious or outrageous acts. Rather, a plaintiff need only show that the defendant acted with malice or reckless indifference.

II. THE CIVIL RIGHTS ACTS OF 1866 AND 1871

A. Background

After the Civil War Congress passed legislation to bolster the newly passed 13th (abolished slavery), 14th (due process and equal protection) and the 15th (denied state and federal government the power to deprive citizens of the right to vote) Amendments to the Constitution. The statutes are codified as 42 U.S.C. Sections 1981-1986. Sections 1981 (guaranteeing equal rights to all "as is enjoyed by white citizens") and 1983 (provides a civil action to deprivation of rights) have been used frequently in employment discrimination suits.

Plaintiffs may pursue claims of discrimination under both Title VII and Sections 1981 and 1983.

1. Sections 1981

Plaintiffs need not have filed an EEOC charge to proceed under Section 1981 nor must they wait for a Right to Sue Letter before filing suit. Compensatory damages for emotional distress is available except against state entities. There is also no cap on punitive damages. There is no specific statute of limitations under 1981; it has been held to be the state statute governing contract claims.

Section 1981 does not apply to federal workers.

2. Section 1983

Section 1983 prohibits state and local government officials from depriving people of rights "under color of state law." Section 1983 is often used in pursuing employment discrimination claims against state and local governments.

Private entities may be subject to Section 1983 suits when the institution is so involved with the state that it state action is alleged to exist.

There is no federal statute of limitations for Section 1983. The state statute of limitations for personal injury claims is applied to Section 1983 actions.

The remedies available under Section 1983 are not enunciated in the statute. Courts allow many of the same remedies as are available under Title VII including, Declaratory and injunctive relief, back pay, punitive damages (for conduct motivated by “evil intent” or when it involves “reckless or callous indifference”) and attorney’s fees.

III. EXECUTIVE ORDER 11246

A. Background

Executive Order 11246 (“Order”) requires “affirmative action”. The Order requires that federal government contractors and subcontractors (“contractors”) include an EEO clause in all their contracts for \$10,000 or more and all constructive projects using federal funds. The Order requires covered employers to refrain from discrimination on the basis of sex, race, religion, color and national origin; to take affirmative action in recruitment, hiring, promotions, and transfers to prevent discrimination; and to post notices setting forth the anti-discrimination clause. Contractors who do at least \$50,000 worth of business with the federal government and have 50 or more employees must prepare a written affirmative action plan.

B. Enforcement

The Office of Federal Contract Compliance administers the Order. The Labor Department may impose penalties on non-complying employers including contract cancellation or suspension and debarment from future federal contracts.

IV. AGE DISCRIMINATION IN EMPLOYMENT ACT

A. Introduction

The Age Discrimination in Employment Act (“ADEA”) was passed to promote employment of persons over 40 years old based on their ability rather than age. The ADEA makes it unlawful to discriminate against employees or applicants for employment over 40 years old. The ADEA applies to employers with 20 or more employees.

B. Enforcement

The ADEA is enforced by the EEOC at the agency level. A “charge” must be filed with the EEOC within 180 days of a violation of the Act (300 days in deferral states). Unlike Title VII, a charging party under the ADEA does not need a right to sue letter. Instead a suit must be filed at least 60 days after the charge was filed with the EEOC and within 90 days after receipt of the EEOC’s notice of dismissal or termination.

C. Burden of Proof

Proof in an ADEA case follows the McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) guidelines. A plaintiff must show that he/she was over 40; met the applicable job qualifications; was terminated, denied promotion, not hired or subject to some other detrimental employment decision; and the employer sought to replace or did replace the plaintiff with a younger person having similar qualifications. The employer must then articulate a legitimate reason for the decision other than age. The plaintiff must then prove that the explanation provided is a pretext for discrimination and that age was the determining factor. Many courts are allowing statistical evidence.

D. Defenses

Age may be a *bona fide* occupational qualification. Examples include: airline pilots, bus drivers, police and fire fighters.

An employer does not violate the ADEA if the employment decision was based on reasonable factors other than age.

E. Remedies

A plaintiff is entitled to a jury trial under the ADEA. A plaintiff is entitled to recover equitable relief as well as monetary relief under the ADEA. A plaintiff may recover reinstatement, promotion, back pay, front pay and liquidated damages (when a willful violation is proven), and attorney’s fees.

V. THE AMERICANS WITH DISABILITIES ACT, as amended

A. Introduction

The Americans with Disabilities Act (“ADA”) prohibits discrimination in all terms and conditions of employment against qualified individuals with a disability. It covers all employers with at least 15 employees. The Act was amended in 2008.

B. Qualified Individual

A “qualified individual” is one who is able to perform the essential functions of the job, with or without a reasonable accommodation.

Essential functions are those that must be performed by the holder of the job and do not include marginal functions. One way to look at this is to ask, “Would removing the function fundamentally change the position?”

C. Disability Defined

A disability is defined as “a physical or mental impairment that substantially limits one or more of the major life activities or major life functions of such individual; a record of such impairment; or being regarded as having an impairment.” The intention of the Act is to provide for “broad coverage.” People who associate with people with disabilities are also protected by the ADA.

Major life activities are defined as hearing, seeing, speaking, mobility, breathing, learning, working, caring for oneself, eating, sleeping, standing, lifting, bending, reading, concentrating, thinking, communicating, working, performing manual tasks. Major life functions include functions of the immune system, cell growth, digestive, bladder and bowel functions, neurological and brain functions, respiratory and circulatory functions, endocrine functions and reproductive functions. Impairments that are episodic or in remission qualify as covered disabilities if they would substantially limit a major life activity when active.

“Substantially limits” means that a person is unable to perform a major life activity that an average person can perform or is significantly restricted as to the condition, manner or duration of that performance. This requires an individual assessment. The EEOC does not regard attendance as an essential job function, but overwhelmingly most courts do. Mitigating devices (such as medication or hearing aids) cannot be considered in determining whether an individual has a disability as defined by the law.

Impairments that “virtually always” meets the definition of disability include: deafness, blindness, intellectual disability, partially or completely missing limbs or mobility impairments requiring the use of a wheelchair, autism, cancer, cerebral palsy, diabetes, epilepsy, HIV, multiple sclerosis, muscular dystrophy, major depressive disorder, bipolar disorder, post-traumatic stress disorder, obsessive compulsive disorder and schizophrenia.

Impairments that are episodic in nature or that are in remission also qualify as covered disabilities if they would substantially limit a major life activity when active.

The key is not to focus on whether a person has a disability, but rather on whether they are being discriminated against on the basis of an actual or perceived disability.

D. Alcohol and Drugs

Users of illegal drugs are not covered by the ADA; rehabilitated drug users are. Current alcoholics are protected by the ADA to the extent they are not under the influence of alcohol at work and can perform their jobs.

E. Regarded as Disabled

The Act extends its protection to people that have been discriminated against because of an actual impairment or a perceived impairment “whether or not the impairment limits or is perceived to limit a major life activity.” This means that employees need only prove that an adverse action was taken because they were viewed as being impaired, even if the impairment would not rise to the level of a protected disability.

Impairments that are “transitory (lasting or expected to last only six months or less) and minor” cannot be the basis for a “regarded as” claim. A transitory impairment is one that has an actual or expected duration of six months or less.

Someone who is regarded as disabled is not entitled to reasonable accommodation.

F. Reasonable Accommodation

“Reasonable accommodation” is broadly defined. It is defined as any modification or adjustment to the work environment, the manner or the circumstances that enables a qualified employee with a disability to perform the essential job functions. It may include job restructuring, part-time work, making the workplace accessible, purchase of equipment, the provision of readers or interpreters and transfer to vacant positions. The duty of reasonable accommodation extends beyond the work area to benefits and privileges of employment, including but not limited to rest rooms, break rooms and locker rooms.

It is important to have an individualized response to any employee request for accommodation. Attention should be paid to the effect a given “disability” has on an employee’s major life activities. In addition, some states, such as New York, do not require a substantial limitation in a major life activity to establish a claim of disability discrimination.

In US Airways v. Barnett, 535 U.S. 391 (2002), the Court ruled that an employer’s seniority system, even in the absence of a union, would normally override an employee’s request for a

conflicting accommodation. Employees can still argue that special circumstances apply to the seniority rules.

G. Undue Hardship

Undue hardship defenses are narrowly construed. In general, undue hardship means “significant duty or expense.” Undue hardship must be based on an individualized assessment of current circumstances that show that a specific reasonable accommodation would cause significant difficulty or expense. An employer may not claim undue hardship because the cost of an accommodation is high in relation to an employee’s wage or salary. Consideration will be given to the size of the business, the size of the budget, the nature of its operation, the number of employees and the nature and cost of the accommodation.

Undue hardship refers not only to financial difficulty but to something that is unduly extensive, substantial, or disruptive, or that would fundamentally alter the nature or operation of the business.

H. Direct Threat

Employers may bar employees who by reason of their disabilities pose “a significant risk of substantial harm” to the individual or others when the risk cannot be minimized by reasonable accommodation. In Chevron U.S.A. Inc. v. Echazabal, 536 U.S. 73 (2002), the Court upheld the EEOC regulation that allows an employer to refuse to hire an individual if his disability would pose an on-the-job threat to the worker’s own health. Employers must still make individualized assessments and not rely on unfounded stereotypes. In Echazabal, Chevron refused to hire Mr. Echazabal because the company’s doctors said his hepatitis C would be aggravated by continued exposure to various toxins present in the refinery.

I. Process for Identifying a Reasonable Accommodation

In the usual course, an employee requests an accommodation for a reason related to a medical condition. The employee need not mention the ADA, disability or reasonable accommodation. Many times, the disability and the reasonable accommodation are obvious and require little discussion. On other occasions the person with the disability and the employer should engage in an informal process to clarify what the person needs and identify the appropriate reasonable accommodation (the interactive dialogue.) If there are a number of reasonable accommodation options, the employer may select the accommodation. If the chosen accommodation is ineffective, the employer must try again.

J. Enforcement

Enforcement of the ADA is identical to that which exists under Title VII. Complaining parties must file a charge of discrimination with the EEOC within 180 days of the alleged triggering

event (300 days in deferral states). Plaintiffs may file a private federal court action within 90 days of receipt of a right to sue letter. Plaintiffs may request a jury trial.

K. Remedies

Plaintiffs may be awarded compensatory and punitive damages in addition to back pay and reinstatement. The award of compensatory and punitive damages is limited by “caps” (see Title VII).

VI. EQUAL PAY ACT

A. Introduction

The Equal Pay Act (“EPA”) prohibits discrimination on the basis of sex in the payment of wages to employees performing “equal work”.

B. Equal Work

To prove equal work, jobs need not be identical just “substantially equal.” The jobs must involve “equal skill, effort and responsibility” and be “performed under similar working conditions.” If jobs are not equal, the EPA does not apply. The inquiry on whether jobs are equal will be based on actual job content.

C. Burden of Proof

A plaintiff must demonstrate that she was compensated at a lower rate than a man employed in the same establishment for equal work. No discriminatory intent must be shown. If the plaintiff establishes a *prima facie* case an employer must show that the difference in pay was based on a seniority system, merit system, a system based on quantity or quality of work or any other factor other than sex.

VII. The Lilly Ledbetter Fair Pay Act

The Lilly Ledbetter Fair Pay Act was enacted in January 2009 to overturn a Supreme Court decision that impaired an employee’s ability to prove discrimination in pay. The Supreme Court had held that the statute of limitations in pay cases began to run when the pay decision was initially made, not from the point at which the employee discovered the disparity. The Act amends Title VII, the ADEA, the ADA and the Rehabilitation Act stating that pay discrimination cases are timely if filed within the time periods prescribed by those acts from the issuance of

the last discriminatory paycheck, regardless of how long before the compensation decision had been made. Essentially, the Act eliminates the statute of limitations in pay discrimination cases.

The Act has also been applied to otherwise stale failure to promote cases in which the plaintiffs allege that while the failure to promote may have been a discrete act, the pay differential is continuing.

The back pay recovery period is capped at two years from the filing of the charge of discrimination.

NEW YORK RULES OF PROFESSIONAL CONDUCT

Effective April 1, 2009

As amended through January 1, 2014

With Commentary as amended through March 28, 2015

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**RULE 1.1:
COMPETENCE**

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

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

(c) A lawyer shall not intentionally:

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

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

Comment

Legal Knowledge and Skill

[1] In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter, and whether it is feasible to associate with a lawyer of established competence in the field in question. In many instances, the required proficiency is that of a general practitioner. Expertise in a particular field of law may be required in some circumstances. One such circumstance would be where the lawyer, by representations made to the client, has led the client reasonably to expect a special level of expertise in the matter undertaken by the lawyer.

[2] A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. A newly admitted lawyer can be as competent as a practitioner with long experience. Some important legal skills, such as the analysis of precedent, the evaluation of evidence and legal drafting, are required in all legal problems. Perhaps the most fundamental legal skill consists of determining what kinds of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge. A lawyer can provide adequate representation in a wholly novel field through necessary study. Competent representation can also be provided through the association of a lawyer of established competence in the field in question.

[3] [Reserved.]

[4] A lawyer may accept representation where the requisite level of competence can be achieved by adequate preparation before handling the legal matter. This applies as well to a lawyer who is appointed as counsel for an unrepresented person.

Thoroughness and Preparation

[5] Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more extensive treatment than matters of lesser complexity and consequence. An agreement between the lawyer and the client may limit the scope of the representation if the agreement complies with Rule 1.2(c).

Retaining or Contracting with Lawyers Outside the Firm

[6] Before a lawyer retains or contracts with other lawyers outside the lawyer's own firm to provide or assist in the provision of legal services to a client, the lawyer should ordinarily obtain informed consent from the client and should reasonably believe that the other lawyers' services will contribute to the competent and ethical representation of the client. *See also* Rules 1.2 (allocation of authority), 1.4 (communication with client), 1.5(g) (fee sharing with lawyers outside the firm), 1.6 (confidentiality), and 5.5(a) (unauthorized practice of law). The reasonableness of the decision to retain or contract with other lawyers outside the lawyer's own firm will depend upon the circumstances, including the needs of the client; the education, experience and reputation of the outside lawyers; the nature of the services assigned to the outside lawyers; and the legal protections, professional conduct rules, and ethical environments of the jurisdictions in which the services will be performed, particularly relating to confidential information.

[6A] Client consent to contract with a lawyer outside the lawyer's own firm may not be necessary for discrete and limited tasks supervised closely by a lawyer in the firm. However, a lawyer should ordinarily obtain client consent before contracting with an outside lawyer to perform substantive or strategic legal work on which the lawyer will exercise independent judgment without close supervision or review by the referring lawyer. For example, on one hand, a lawyer who hires an outside lawyer on a per diem basis to cover a single court call or a routing calendar call ordinarily would not need to obtain the client's prior informed consent. On the other hand, a lawyer who hires an outside lawyer to argue a summary judgment motion or negotiate key points in a transaction ordinarily should seek to obtain the client's prior informed consent.

[7] When lawyer from more than one law firm are providing legal services to the client on a particular matter, the lawyers ordinarily should consult with each other about the scope of their respective roles and the allocation of responsibility among them. *See* Rule 1.2(a). When allocating responsibility in a matter pending before a tribunal, lawyers and parties may have additional obligations (*e.g.*, under local court rules, the CPLR, or the Federal Rules of Civil Procedure) that are a matter of law beyond the scope of these Rules.

[7A] Whether a lawyer who contracts with a lawyer outside the firm needs to obtain informed consent from the client about the roles and responsibilities of the retaining and outside lawyers will depend on the circumstances. On one hand, if a lawyer retains an outside lawyer or law firm to work under the lawyer's close direction and supervision, and the retaining lawyer closely reviews the outside lawyer's work, the retaining lawyer usually will not need to consult with the client about the outside lawyer's role and level of responsibility. On the other hand, if the outside lawyer will have a more material role and will exercise more autonomy and responsibility, then the retaining lawyer usually should consult with the client. In any event, whenever a retaining lawyer discloses a client's confidential information to lawyers outside the firm, the retaining lawyer should comply with Rule 1.6(a).

[8] To maintain the requisite knowledge and skill, a lawyer should (i) keep abreast of changes in substantive and procedural law relevant to the lawyer's practice, (ii) keep abreast of the benefits and risks associated with technology the lawyer uses to provide services to clients or to store or transmit confidential information, and (iii) engage in continuing study and education and comply with all applicable continuing legal education requirements under 22 N.Y.C.R.R. Part 1500.

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

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

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

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

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

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

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

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

Comment

Allocation of Authority Between Client and Lawyer

[1] Paragraph (a) confers upon the client the ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations. The decisions specified in paragraph (a), such as whether to settle a civil matter, must also be made by the client. See Rule 1.4(a)(1) for the lawyer's duty to communicate with the client about such decisions. The lawyer shall consult with the client with respect to the means by which the client's objectives are to be pursued. See Rule 1.4(a)(2).

[2] Clients normally defer to the special knowledge and skill of their lawyer with respect to the means to be used to accomplish their objectives, particularly with respect to technical, legal and tactical matters. On the other hand, lawyers usually defer to their clients regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected. On occasion, however, a lawyer and a client may disagree about the means to be used to accomplish the client's objectives. Because of the varied nature of the matters about which a lawyer and client might disagree, and because the actions in question may implicate the interests of a tribunal or other persons, this Rule does not prescribe how such disagreements are to be resolved. Other law, however, may be applicable and should be consulted by the lawyer. The lawyer should also consult with the client and seek a mutually acceptable resolution of the disagreement. If such efforts are unavailing and the lawyer has a fundamental disagreement with the client, the lawyer may withdraw from the representation. See Rule 1.16(c)(4). Likewise, the client may resolve the disagreement by discharging the lawyer, in which case the lawyer must withdraw from the representation. *See* Rule 1.16(b)(3).

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

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

Independence from Client's Views or Activities

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

Agreements Limiting Scope of Representation

[6] The scope of services to be provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer's services are made available to the client. When a lawyer has been retained by an insurer to represent an insured, for example, the representation may be limited to issues related to the insurance coverage. A limited representation may be appropriate because the client has limited objectives for the representation. In addition, the terms upon which representation is undertaken may exclude specific means that might otherwise be used to accomplish the client's objectives. Such limitations may exclude actions that the client thinks are too costly or that the lawyer regards as repugnant or imprudent.

[6A] In obtaining consent from the client, the lawyer must adequately disclose the limitations on the scope of the engagement and the matters that will be excluded. In addition, the lawyer must disclose the reasonably foreseeable consequences of the limitation. In making such disclosure, the lawyer should explain that if the lawyer or the client determines during the representation that additional services outside the limited scope specified in the engagement are necessary or advisable to represent the client adequately, then the client may

need to retain separate counsel, which could result in delay, additional expense, and complications.

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

[8] All agreements concerning a lawyer's representation of a client must accord with the Rules of Professional Conduct and other law. See Rules 1.1, 1.8 and 5.6.

Illegal and Fraudulent Transactions

[9] Paragraph (d) prohibits a lawyer from counseling or assisting a client in conduct that the lawyer knows is illegal or fraudulent. This prohibition, however, does not preclude the lawyer from giving an honest opinion about the consequences that appear likely to result from a client's conduct. Nor does the fact that a client uses advice in a course of action that is illegal or fraudulent of itself make a lawyer a party to the course of action. There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity.

[10] When the client's course of action has already begun and is continuing, the lawyer's responsibility is especially delicate. The lawyer is required to avoid assisting the client, for example, by drafting or delivering documents that the lawyer knows are fraudulent or by suggesting how the wrongdoing might be concealed. When the representation will result in violation of the Rules of Professional Conduct or other law, the lawyer must advise the client of any relevant limitation on the lawyer's conduct and remonstrate with the client. See Rules 1.4(a)(5) and 1.16(b)(1). Persuading a client to take necessary preventive or corrective action that will bring the client's conduct within the bounds of the law is a challenging but appropriate endeavor. If the client fails to take necessary corrective action and the lawyer's continued representation would assist client conduct that is illegal or fraudulent, the lawyer is required to withdraw. See Rule 1.16(b)(1). In some circumstances, withdrawal alone might be insufficient. In those cases the lawyer may be required to give notice of the fact of withdrawal and to disaffirm any opinion, document, affirmation or the like. See Rule 1.6(b)(3); Rule 4.1, Comment [3].

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

[12] Paragraph (d) prohibits a lawyer from assisting a client's illegal or fraudulent activity against a third person, whether or not the defrauded party is a party to the transaction.

Paragraph (d) does not preclude undertaking a criminal defense incident to a general retainer for legal services to a lawful enterprise, but does preclude such a retainer for an enterprise known to be engaged in illegal or fraudulent activity.

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

Exercise of Professional Judgment

[14] Paragraph (e) permits a lawyer to exercise professional judgment to waive or fail to assert a right of a client, or accede to reasonable requests of opposing counsel in such matters as court proceedings, settings, continuances, and waiver of procedural formalities, as long as doing so does not prejudice the rights of the client. Like paragraphs (f) and (g), paragraph (e) effectively creates a limited exception to the lawyer's obligations under Rule 1.1(c) (a lawyer shall not intentionally "fail to seek the objectives of the client through reasonably available means permitted by law and these Rules" or "prejudice or damage the client during the course of the representation except as permitted or required by these Rules"). If the lawyer is representing the client before a tribunal, the lawyer is required under Rule 3.3(f)(1) to comply with local customs of courtesy or practice of the bar or a particular tribunal unless the lawyer gives opposing counsel timely notice of the intent not to comply.

Refusal to Participate in Conduct a Lawyer Believes to Be Unlawful

[15] In some situations such as those described in paragraph (d), a lawyer is prohibited from aiding or participating in a client's improper or potentially improper conduct; but in other situations, a lawyer has discretion. Paragraph (f) permits a lawyer to refuse to aid or participate in conduct the lawyer *believes* to be unlawful, even if the conduct is arguably legal. In addition, under Rule 1.16(c)(2), the lawyer *may* withdraw from representing a client when the client persists in a course of action involving the lawyer's services that the lawyer reasonably *believes* is criminal or fraudulent, even if the course of action is arguably legal. In contrast, when the lawyer *knows* (or reasonably should know) that the representation will result in a violation of law or the Rules of Professional Conduct, the lawyer *must* withdraw from the representation under Rule 1.16(b)(1). If the client "insists" that the lawyer pursue a course of conduct that is illegal or prohibited under the Rules, the lawyer must not carry out those instructions and, in addition, may withdraw from the representation under Rule 1.16(c)(13). If the lawyer is representing the client before a tribunal, additional rules may come into play. For example, the lawyer may be required to obtain the tribunal's permission to withdraw under Rule 1.16(d), and the lawyer may be required to take reasonable remedial measures under Rule 3.3 with respect to false evidence or other criminal or fraudulent conduct relating to a proceeding.

Fulfilling Professional Commitments and Treating Others with Courtesy

[16] Both Rule 1.1(c)(1) and Rule 1.2(a) require generally that a lawyer seek the client's objectives and abide by the client's decisions concerning the objectives of the representation; but those rules do not require a lawyer to be offensive, discourteous,

inconsiderate or dilatory. Paragraph (g) specifically affirms that a lawyer does not violate the Rules by being punctual in fulfilling professional commitments, avoiding offensive tactics and treating with courtesy and consideration all persons involved in the legal process. Lawyers should be aware of the New York State Standards of Civility adopted by the courts to guide the legal profession (22 NYCRR Part 1200 Appendix A). Although the Standards of Civility are not intended to be enforced by sanctions or disciplinary action, conduct before a tribunal that fails to comply with known local customs of courtesy or practice, or that is undignified or discourteous, may violate Rule 3.3(f). Conduct in a proceeding that serves merely to harass or maliciously injure another would be frivolous in violation of Rule 3.1. Dilatory conduct may violate Rule 1.3(a), which requires a lawyer to act with reasonable diligence and promptness in representing a client.

**RULE 1.4:
COMMUNICATION**

(a) A lawyer shall:

(1) promptly inform the client of:

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

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

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

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

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

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

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

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

Comment

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

Communicating with Client

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

[3] Paragraph (a)(2) requires that the lawyer reasonably consult with the client about the means to be used to accomplish the client's objectives. In some situations — depending on both the importance of the action under consideration and the feasibility of consulting with the client — this duty will require consultation prior to taking action. In other circumstances, such as during a trial when an immediate decision must be made, the exigency of the situation may require the lawyer to act without prior consultation. In such cases, the lawyer must nonetheless act reasonably to inform the client of actions the lawyer has taken on the client's behalf. Likewise, for routine matters such as scheduling decisions not materially affecting the interests of the client, the lawyer need not consult in advance, but should keep the client reasonably informed thereafter. Additionally, paragraph (a)(3) requires that the lawyer keep the client reasonably informed about the status of the matter, such as significant developments affecting the timing or the substance of the representation.

[4] A lawyer's regular communication with clients will minimize the occasions on which a client will need to request information concerning the representation. When a client makes a reasonable request for information, however, paragraph (a)(4) requires prompt compliance with the request, or if a prompt response is not feasible, that the lawyer or a member of the lawyer's staff acknowledge receipt of the request and advise the client when a response may be expected. A lawyer should promptly respond to or acknowledge client communications, or arrange for an appropriate person who works with the lawyer to do so.

Explaining Matters

[5] The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so. Adequacy of communication depends in part on the kind of advice or assistance that is involved. For example, when there is time to explain a proposal made in a negotiation, the lawyer should review all important provisions with the client before proceeding to an agreement. In litigation a lawyer should explain the general strategy and prospects of success and ordinarily should consult the client on tactics that are likely to result in significant expense or to injure or coerce others. On the other hand, a lawyer ordinarily will not be expected to describe trial or negotiation strategy in detail. The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interest and the client's overall requirements as to the character of representation. In certain circumstances, such as when a lawyer asks a client to consent to a representation affected by a conflict of interest, the client must give informed consent, as defined in Rule 1.0(j).

[6] Ordinarily, the information to be provided is that appropriate for a client who is a comprehending and responsible adult. However, fully informing the client according to this standard may be impracticable, for example, where the client is a child or suffers from diminished capacity. *See* Rule 1.14. When the client is an organization or group, it is often impossible or inappropriate to inform every one of its members about its legal affairs; ordinarily, the lawyer should address communications to those who the lawyer reasonably believes to be appropriate persons within the organization. *See* Rule 1.13. Where many routine matters are involved, a system of limited or occasional reporting may be arranged with the client.

Withholding Information

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

**RULE 1.6:
CONFIDENTIALITY OF INFORMATION**

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

- (1) the client gives informed consent, as defined in Rule 1.0(j);**
- (2) the disclosure is impliedly authorized to advance the best interests of the client and is either reasonable under the circumstances or customary in the professional community; or**
- (3) the disclosure is permitted by paragraph (b).**

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

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

- (1) to prevent reasonably certain death or substantial bodily harm;**
- (2) to prevent the client from committing a crime;**
- (3) to withdraw a written or oral opinion or representation previously given by the lawyer and reasonably believed by the lawyer still to be relied upon by a third person, where the lawyer has discovered that the opinion or representation was based on materially inaccurate information or is being used to further a crime or fraud;**
- (4) to secure legal advice about compliance with these Rules or other law by the lawyer, another lawyer associated with the lawyer’s firm or the law firm;**
- (5) (i) to defend the lawyer or the lawyer’s employees and associates against an accusation of wrongful conduct; or**
 - (ii) to establish or collect a fee; or**
- (6) when permitted or required under these Rules or to comply with other law or court order.**

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

Comment

Scope of the Professional Duty of Confidentiality

[1] This Rule governs the disclosure of information protected by the professional duty of confidentiality. Such information is described in these Rules as “confidential information” as defined in this Rule. Other rules also deal with confidential information. See Rules 1.8(b) and 1.9(c)(1) for the lawyer’s duties with respect to the use of such information to the disadvantage of clients and former clients; Rule 1.9(c)(2) for the lawyer’s duty not to reveal information relating to the lawyer’s prior representation of a former client; Rule 1.14(c) for information relating to representation of a client with diminished capacity; Rule 1.18(b) for the lawyer’s duties with respect to information provided to the lawyer by a prospective client; Rule 3.3 for the lawyer’s duty of candor to a tribunal; and Rule 8.3(c) for information gained by a lawyer or judge while participating in an approved lawyer assistance program.

[2] A fundamental principle in the client-lawyer relationship is that, in the absence of the client’s informed consent, or except as permitted or required by these Rules, the lawyer must not knowingly reveal information gained during and related to the representation, whatever its source. See Rule 1.0(j) for the definition of informed consent. The lawyer’s duty of confidentiality contributes to the trust that is the hallmark of the client-lawyer relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer, even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. Typically, clients come to lawyers to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is thereby upheld.

[3] The principle of client-lawyer confidentiality is given effect in three related bodies of law: the attorney-client privilege of evidence law, the work-product doctrine of civil procedure and the professional duty of confidentiality established in legal ethics codes. The attorney-client privilege and the work-product doctrine apply when compulsory process by a judicial or other governmental body seeks to compel a lawyer to testify or produce information or evidence concerning a client. The professional duty of client-lawyer confidentiality, in contrast, applies to a lawyer in all settings and at all times, prohibiting the lawyer from disclosing confidential information unless permitted or required by these Rules or to comply with other law or court order. The confidentiality duty applies not only to matters communicated in confidence by the client, which are protected by the attorney-client privilege, but also to all information gained during and relating to the representation, whatever its source. The confidentiality duty, for example, prohibits a lawyer from volunteering confidential information to a friend or to any other person except in compliance with the provisions of this Rule, including the Rule’s reference to other law that may compel disclosure. *See* Comments [12]-[13]; *see also* Scope.

[4] Paragraph (a) prohibits a lawyer from knowingly revealing confidential information as defined by this Rule. This prohibition also applies to disclosures by a lawyer that do not in themselves reveal confidential information but could reasonably lead to the discovery of such information by a third person. A lawyer's use of a hypothetical to discuss issues relating to the representation with persons not connected to the representation is permissible so long as there is no reasonable likelihood that the listener will be able to ascertain the identity of the client.

[4A] Paragraph (a) protects all factual information "gained during or relating to the representation of a client." Information relates to the representation if it has any possible relevance to the representation or is received because of the representation. The accumulation of legal knowledge or legal research that a lawyer acquires through practice ordinarily is not client information protected by this Rule. However, in some circumstances, including where the client and the lawyer have so agreed, a client may have a proprietary interest in a particular product of the lawyer's research. Information that is generally known in the local community or in the trade, field or profession to which the information relates is also not protected, unless the client and the lawyer have otherwise agreed. Information is not "generally known" simply because it is in the public domain or available in a public file.

Use of Information Related to Representation

[4B] The duty of confidentiality also prohibits a lawyer from using confidential information to the advantage of the lawyer or a third person or to the disadvantage of a client or former client unless the client or former client has given informed consent. See Rule 1.0(j) for the definition of "informed consent." This part of paragraph (a) applies when information is used to benefit either the lawyer or a third person, such as another client, a former client or a 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 (absent the client's informed consent) use that information to buy a nearby parcel that is expected to appreciate in value due to the client's purchase, or to recommend that another client buy the nearby land, even if the lawyer does not reveal any confidential information. The duty also prohibits disadvantageous use of confidential information unless the client gives informed consent, except as permitted or required by these Rules. For example, a lawyer assisting a client in purchasing a parcel of land may not make a competing bid on the same land. However, the fact that a lawyer has once served a client does not preclude the lawyer from using generally known information about that client, even to the disadvantage of the former client, after the client-lawyer relationship has terminated. *See* Rule 1.9(c)(1).

Authorized Disclosure

[5] Except to the extent that the client's instructions or special circumstances limit that authority, a lawyer may make disclosures of confidential information that are impliedly authorized by a client if the disclosures (i) advance the best interests of the client and (ii) are either reasonable under the circumstances or customary in the professional community. In some situations, for example, a lawyer may be impliedly authorized to admit a fact that cannot properly be disputed or to make a disclosure that facilitates a satisfactory conclusion to a matter. In addition, lawyers in a firm may, in the course of the firm's practice, disclose to each other

information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers. Lawyers are also impliedly authorized to reveal information about a client with diminished capacity when necessary to take protective action to safeguard the client's interests. See Rules 1.14(b) and (c).

Disclosure Adverse to Client

[6] Although the public interest is usually best served by a strict rule requiring lawyers to preserve the confidentiality of information relating to the representation of their clients, the confidentiality rule is subject to limited exceptions that prevent substantial harm to important interests, deter wrongdoing by clients, prevent violations of the law, and maintain the impartiality and integrity of judicial proceedings. Paragraph (b) permits, but does not require, a lawyer to disclose information relating to the representation to accomplish these specified purposes.

[6A] The lawyer's exercise of discretion conferred by paragraphs (b)(1) through (b)(3) requires consideration of a wide range of factors and should therefore be given great weight. In exercising such discretion under these paragraphs, the lawyer should consider such factors as: (i) the seriousness of the potential injury to others if the prospective harm or crime occurs, (ii) the likelihood that it will occur and its imminence, (iii) the apparent absence of any other feasible way to prevent the potential injury, (iv) the extent to which the client may be using the lawyer's services in bringing about the harm or crime, (v) the circumstances under which the lawyer acquired the information of the client's intent or prospective course of action, and (vi) any other aggravating or extenuating circumstances. In any case, disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to prevent the threatened harm or crime. When a lawyer learns that a client intends to pursue or is pursuing a course of conduct that would permit disclosure under paragraphs (b)(1), (b)(2) or (b)(3), the lawyer's initial duty, where practicable, is to remonstrate with the client. In the rare situation in which the client is reluctant to accept the lawyer's advice, the lawyer's threat of disclosure is a measure of last resort that may persuade the client. When the lawyer reasonably believes that the client will carry out the threatened harm or crime, the lawyer may disclose confidential information when permitted by paragraphs (b)(1), (b)(2) or (b)(3). A lawyer's permissible disclosure under paragraph (b) does not waive the client's attorney-client privilege; neither the lawyer nor the client may be forced to testify about communications protected by the privilege, unless a tribunal or body with authority to compel testimony makes a determination that the crime-fraud exception to the privilege, or some other exception, has been satisfied by a party to the proceeding. For a lawyer's duties when representing an organizational client engaged in wrongdoing, see Rule 1.13(b).

[6B] Paragraph (b)(1) recognizes the overriding value of life and physical integrity and permits disclosure reasonably necessary to prevent reasonably certain death or substantial bodily harm. Such harm is reasonably certain to occur if it will be suffered imminently or if there is a present and substantial risk that a person will suffer such harm at a later date if the lawyer fails to take action necessary to eliminate the threat. Thus, a lawyer who knows that a client has accidentally discharged toxic waste into a town's water supply may reveal this information to the authorities if there is a present and substantial risk that a person who drinks the water will contract a life-threatening or debilitating disease and the lawyer's disclosure is necessary to

eliminate the threat or reduce the number of victims. Wrongful execution of a person is a life-threatening and imminent harm under paragraph (b)(1) once the person has been convicted and sentenced to death. On the other hand, an event that will cause property damage but is unlikely to cause substantial bodily harm is not a present and substantial risk under paragraph (b)(1); similarly, a remote possibility or small statistical likelihood that any particular unit of a mass-distributed product will cause death or substantial bodily harm to unspecified persons over a period of years does not satisfy the element of reasonably certain death or substantial bodily harm under the exception to the duty of confidentiality in paragraph (b)(1).

[6C] Paragraph (b)(2) recognizes that society has important interests in preventing a client's crime. Disclosure of the client's intention is permitted to the extent reasonably necessary to prevent the crime. In exercising discretion under this paragraph, the lawyer should consider such factors as those stated in Comment [6A].

[6D] Some crimes, such as criminal fraud, may be ongoing in the sense that the client's past material false representations are still deceiving new victims. The law treats such crimes as continuing crimes in which new violations are constantly occurring. The lawyer whose services were involved in the criminal acts that constitute a continuing crime may reveal the client's refusal to bring an end to a continuing crime, even though that disclosure may also reveal the client's past wrongful acts, because refusal to end a continuing crime is equivalent to an intention to commit a new crime. Disclosure is not permitted under paragraph (b)(2), however, when a person who may have committed a crime employs a new lawyer for investigation or defense. Such a lawyer does not have discretion under paragraph (b)(2) to use or disclose the client's past acts that may have continuing criminal consequences. Disclosure is permitted, however, if the client uses the new lawyer's services to commit a further crime, such as obstruction of justice or perjury.

[6E] Paragraph (b)(3) permits a lawyer to withdraw a legal opinion or to disaffirm a prior representation made to third parties when the lawyer reasonably believes that third persons are still relying on the lawyer's work and the work was based on "materially inaccurate information or is being used to further a crime or fraud." *See* Rule 1.16(b)(1), requiring the lawyer to withdraw when the lawyer knows or reasonably should know that the representation will result in a violation of law. Paragraph (b)(3) permits the lawyer to give only the limited notice that is implicit in withdrawing an opinion or representation, which may have the collateral effect of inferentially revealing confidential information. The lawyer's withdrawal of the tainted opinion or representation allows the lawyer to prevent further harm to third persons and to protect the lawyer's own interest when the client has abused the professional relationship, but paragraph (b)(3) does not permit explicit disclosure of the client's past acts unless such disclosure is permitted under paragraph (b)(2).

[7] [Reserved.]

[8] [Reserved.]

[9] A lawyer's confidentiality obligations do not preclude a lawyer from securing confidential legal advice about compliance with these Rules and other law by the lawyer, another lawyer in the lawyer's firm, or the law firm. In many situations, disclosing information to secure

such advice will be impliedly authorized for the lawyer to carry out the representation. Even when the disclosure is not impliedly authorized, paragraph (b)(4) permits such disclosure because of the importance of a lawyer's compliance with these Rules, court orders and other law.

[10] Where a claim or charge alleges misconduct of the lawyer related to the representation of a current or former client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense. Such a claim can arise in a civil, criminal, disciplinary or other proceeding and can be based on a wrong allegedly committed by the lawyer against the client or on a wrong alleged by a third person, such as a person claiming to have been defrauded by the lawyer and client acting together or by the lawyer acting alone. The lawyer may respond directly to the person who has made an accusation that permits disclosure, provided that the lawyer's response complies with Rule 4.2 and Rule 4.3, and other Rules or applicable law. A lawyer may make the disclosures authorized by paragraph (b)(5) through counsel. The right to respond also applies to accusations of wrongful conduct concerning the lawyer's law firm, employees or associates.

[11] A lawyer entitled to a fee is permitted by paragraph (b)(5) to prove the services rendered in an action to collect it. This aspect of the rule expresses the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary.

[12] Paragraph (b) does not mandate any disclosures. However, other law may require that a lawyer disclose confidential information. Whether such a law supersedes Rule 1.6 is a question of law beyond the scope of these Rules. When disclosure of confidential information appears to be required by other law, the lawyer must consult with the client to the extent required by Rule 1.4 before making the disclosure, unless such consultation would be prohibited by other law. If the lawyer concludes that other law supersedes this Rule and requires disclosure, paragraph (b)(6) permits the lawyer to make such disclosures as are necessary to comply with the law.

[13] A tribunal or governmental entity claiming authority pursuant to other law to compel disclosure may order a lawyer to reveal confidential information. Absent informed consent of the client to comply with the order, the lawyer should assert on behalf of the client nonfrivolous arguments that the order is not authorized by law, the information sought is protected against disclosure by an applicable privilege or other law, or the order is invalid or defective for some other reason. In the event of an adverse ruling, the lawyer must consult with the client to the extent required by Rule 1.4 about the possibility of an appeal or further challenge, unless such consultation would be prohibited by other law. If such review is not sought or is unsuccessful, paragraph (b)(6) permits the lawyer to comply with the order.

[14] Paragraph (b) permits disclosure only to the extent the lawyer reasonably believes the disclosure is necessary to accomplish one of the purposes specified in paragraphs (b)(1) through (b)(6). Before making a disclosure, the lawyer should, where practicable, first seek to persuade the client to take suitable action to obviate the need for disclosure. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to accomplish the purpose, particularly when accusations of wrongdoing in the representation of a client have been made by a third party rather than by the client. If the disclosure will be made in connection with an adjudicative proceeding, the disclosure should be

made in a manner that limits access to the information to the tribunal or other persons having a need to know the information, and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.

[15] Paragraph (b) permits but does not require the disclosure of information relating to a client's representation to accomplish the purposes specified in paragraphs (b)(1) through (b)(6). A lawyer's decision not to disclose as permitted by paragraph (b) does not violate this Rule. Disclosure may, however, be required by other Rules or by other law. *See* Comments [12]-[13]. Some Rules require disclosure only if such disclosure would be permitted by paragraph (b). *E.g.*, Rule 8.3(c)(1). Rule 3.3(c), on the other hand, requires disclosure in some circumstances whether or not disclosure is permitted or prohibited by this Rule.

Withdrawal

[15A] If the lawyer's services will be used by the client in materially furthering a course of criminal or fraudulent conduct, the lawyer must withdraw pursuant to Rule 1.16(b)(1). Withdrawal may also be required or permitted for other reasons under Rule 1.16. After withdrawal, the lawyer is required to refrain from disclosing or using information protected by Rule 1.6, except as this Rule permits such disclosure. Neither this Rule, nor Rule 1.9(c), nor Rule 1.16(e) prevents the lawyer from giving notice of the fact of withdrawal. For withdrawal or disaffirmance of an opinion or representation, see paragraph (b)(3) and Comment [6E]. Where the client is an organization, the lawyer may be in doubt whether the organization will actually carry out the contemplated conduct. Where necessary to guide conduct in connection with this Rule, the lawyer may, and sometimes must, make inquiry within the organization. *See* Rules 1.13(b) and (c).

Duty to Preserve Confidentiality

[16] Paragraph (c) requires a lawyer to exercise reasonable care to prevent disclosure of information related to the representation by employees, associates and others whose services are utilized in connection with the representation. *See also* Rules 1.1, 5.1 and 5.3. However, a lawyer may reveal the information permitted to be disclosed by this Rule through an employee.

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

Lateral Moves, Law Firm Mergers, and Confidentiality

[18A] When lawyers or law firms (including in-house legal departments) contemplate a new association with other lawyers or law firms through lateral hiring or merger, disclosure of limited information may be necessary to resolve conflicts of interest pursuant to Rule 1.10 and to address financial, staffing, operational, and other practical issues. However, Rule 1.6(a) requires lawyers and law firms to protect their clients' confidential information, so lawyers and law firms may not disclose such information for their own advantage or for the advantage of third parties absent a client's informed consent or some other exception to Rule 1.6.

[18B] Disclosure without client consent in the context of a possible lateral move or law firm merger is ordinarily permitted regarding basic information such as: (i) the identities of clients or other parties involved in a matter; (ii) a brief summary of the status and nature of a particular matter, including the general issues involved; (iii) information that is publicly available; (iv) the lawyer's total book of business; (v) the financial terms of each lawyer-client relationship; and (vi) information about aggregate current and historical payment of fees (such as realization rates, average receivables, and aggregate timeliness of payments). Such information is generally not "confidential information" within the meaning of Rule 1.6.

[18C] Disclosure without client consent in the context of a possible lateral move or law firm merger is ordinarily *not* permitted, however, if information is protected by Rule 1.6(a), 1.9(c), or Rule 1.18(b). This includes information that a lawyer knows or reasonably believes is protected by the attorney-client privilege, or is likely to be detrimental or embarrassing to the client, or is information that the client has requested be kept confidential. For example, many clients would not want their lawyers to disclose their tardiness in paying bills; the amounts they spend on legal fees in particular matters; forecasts about their financial prospects; or information relating to sensitive client matters (e.g., an unannounced corporate takeover, an undisclosed possible divorce, or a criminal investigation into the client's conduct).

[18D] When lawyers are exploring a new association, whether by lateral move or by merger, all lawyers involved must individually consider fiduciary obligations to their existing firms that may bear on the timing and scope of disclosures to clients relating to conflicts and financial concerns, and should consider whether to ask clients for a waiver of confidentiality if consistent with these fiduciary duties – *see* Rule 1.10(e) (requiring law firms to check for conflicts of interest). Questions of fiduciary duty are legal issues beyond the scope of the Rules.

[18E] For the unique confidentiality and notice provisions that apply to a lawyer or law firm seeking to sell all or part of its practice, see Rule 1.17 and Comment [7] to that Rule.

[18F] Before disclosing information regarding a possible lateral move or law firm merger, law firms and lawyers moving between firms – both those providing information and those receiving information – should use reasonable measures to minimize the risk of any improper, unauthorized or inadvertent disclosures, whether or not the information is protected by Rule 1.6(a), 1.9(c), or 1.18(b). These steps might include such measures as: (1) disclosing client information in stages; initially identifying only certain clients and providing only limited information, and providing a complete list of clients and more detailed financial information only at subsequent stages; (2) limiting disclosure to those at the firm, or even a single person at the firm, directly involved in clearing conflicts and making the business decision whether to move forward to the next stage regarding the lateral hire or law firm merger; and/or (3) agreeing not to

disclose financial or conflict information outside the firm(s) during and after the lateral hiring negotiations or merger process.

**RULE 1.7:
CONFLICT OF INTEREST: CURRENT CLIENTS**

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

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

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

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

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

(2) the representation is not prohibited by law;

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

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

Comment

General Principles

[1] Loyalty and independent judgment are essential aspects of a lawyer's relationship with a client. The professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of the client and free of compromising influences and loyalties. Concurrent conflicts of interest, which can impair a lawyer's professional judgment, can arise from the lawyer's responsibilities to another client, a former client or a third person, or from the lawyer's own interests. A lawyer should not permit these competing responsibilities or interests to impair the lawyer's ability to exercise professional judgment on behalf of each client. 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 "differing interests," "informed consent" and "confirmed in writing," see Rules 1.0(f), (j) and (e), respectively.

[2] Resolution of a conflict of interest problem under this Rule requires the lawyer, acting reasonably, to: (i) identify clearly the client or clients, (ii) determine whether a conflict of interest exists, *i.e.*, whether the lawyer's judgment may be impaired or the lawyer's loyalty may be divided if the lawyer accepts or continues the representation, (iii) decide whether the

representation may be undertaken despite the existence of a conflict, *i.e.*, whether the conflict is consentable under paragraph (b); and if so (iv) consult with the clients affected under paragraph (a) and obtain their informed consent, confirmed in writing. The clients affected under paragraph (a) include all of the clients who may have differing interests under paragraph (a)(1) and any clients whose representation might be adversely affected 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). *See* Rule 1.10(e), which requires every law firm to create, implement and maintain a conflict-checking system.

[4] If a conflict arises after representation has been undertaken, the lawyer ordinarily must withdraw from the representation unless the lawyer has obtained the informed consent of the client under the conditions of paragraph (b). *See* Rule 1.16(b)(1). 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], [29A].

[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 acquired 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* Rules 1.16(d) and (e). 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

[6] The duty to avoid the representation of differing interest prohibits, among other things, undertaking representation adverse to a current client without that client's informed consent. For example, absent consent, a lawyer may not advocate in one matter against another client that the lawyer represents in some other matter, even when the matters are wholly unrelated. The client as to whom the representation is 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 may reasonably fear that the lawyer will pursue that client's case less effectively out of deference to the other client, that is, that the lawyer's exercise of professional judgment on behalf of that client will be adversely affected by the lawyer's interest in retaining the current client. Similarly, a conflict may arise when a lawyer is required to cross-examine a client appearing as a witness in a lawsuit involving another client, as when the testimony will be damaging to the client 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] Differing interests 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.

[8] Differing interests exist if there is a significant risk that a lawyer's exercise of professional judgment in considering, recommending or carrying out an appropriate course of action for the client will be adversely affected or the representation would otherwise be materially limited by the lawyer's other responsibilities or interests. For example, the professional judgment of a lawyer asked to represent several individuals operating a joint venture is likely to be adversely affected to the extent that the lawyer is unable to recommend or advocate all possible positions that each client 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 adversely affect the lawyer's professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client.

Lawyer's 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 adversely affected 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 financial, property, business or other personal 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 5.7 on responsibilities regarding nonlegal services and Rule 1.8 pertaining to a number of personal-interest conflicts, including business transactions with clients.

[11] When lawyers representing different clients in the same matter or in substantially related matters are closely related, 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 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 who has a significant intimate or close family relationship with

another lawyer ordinarily may not represent a client in a matter where that other lawyer is representing another party, unless each client gives informed consent, as defined in Rule 1.0(j).

[12] A lawyer is prohibited from engaging in sexual relations with a client in domestic relations matters. In all other matters a lawyer's sexual relations with a client are circumscribed by the provisions of Rule 1.8(j).

Interest of Person Paying for Lawyer's Services

[13] 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 exercise of professional judgment on behalf of a client will be adversely affected 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

[14] Ordinarily, clients may consent to representation notwithstanding a conflict. As paragraph (b) indicates, however, some conflicts are nonconsentable. If a lawyer does not reasonably believe that the conditions set forth in paragraph (b) can be met, the lawyer should neither ask for the client's consent nor provide representation on the basis of the client's consent. A client's consent to a nonconsentable conflict is ineffective. When the lawyer is representing more than one client, the question of consentability must be resolved as to each client.

[15] Consentability is typically determined by considering whether the interests of the clients will be adequately protected if the clients consent to representation burdened by a conflict of interest. Thus, under paragraph (b)(1), notwithstanding client consent, a 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 regarding competence and Rule 1.3 regarding diligence.

[16] Paragraph (b)(2) describes conflicts that are nonconsentable because the representation is prohibited by applicable law. For example, federal criminal statutes prohibit certain representations by a former government lawyer despite the informed consent of the former governmental client. In addition, there are some instances where conflicts are nonconsentable under decisional law.

[17] 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 mediation (because mediation is

not a proceeding before a “tribunal” as defined in Rule 1.0(w)), such representation may be precluded by paragraph (b)(1).

Informed Consent

[18] Informed consent requires that each affected client be aware of the relevant circumstances, including the material and reasonably foreseeable ways that the conflict could adversely affect the interests of that client. Informed consent also requires that the client be given the opportunity to obtain other counsel if the client so desires. *See* Rule 1.0(j). The information that a lawyer is required to communicate to a client depends on the nature of the conflict and the nature of the risks involved, and a lawyer should take into account the sophistication of the client in explaining the potential adverse consequences of the conflict. There are circumstances in which it is appropriate for a lawyer to advise a client to seek the advice of a disinterested lawyer in reaching a decision as to whether to consent to the conflict. 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 [30] and [31] concerning the effect of common representation on confidentiality.

[19] 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 client 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 is that each party obtains 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. Where the fact, validity or propriety of client consent is called into question, the lawyer has the burden of establishing that the client’s consent was properly obtained in accordance with the Rule.

Client Consent Confirmed in Writing

[20] Paragraph (b) requires the lawyer to obtain the informed consent of the client, confirmed in writing. Such a writing may consist of (i) a document from the client, (ii) a document that the lawyer promptly transmits to the client confirming an oral informed consent, or (iii) a statement by the client made on the record of any proceeding before a tribunal, whether before, during or after a trial or hearing. *See* Rule 1.0(e) for the definition of “confirmed in writing.” *See also* Rule 1.0(x) (“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. The Rule does not require that the information communicated to the client by the lawyer necessary to make the consent “informed” be in writing or in any particular form in all cases. *See* Rules 1.0(e) and (j). 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. *See* Comment [18].

Revoking Consent

[21] 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 clients, and whether material detriment to the other clients or the lawyer would result.

Consent to Future Conflict

[22] Whether a lawyer may properly request a client to waive conflicts that might arise in the future is subject to the conditions set forth in paragraph (b). The effectiveness of advance waivers is generally determined by the extent to which the client reasonably understands the material risks that the waiver entails. At a minimum, the client should be advised generally of the types of possible future adverse representations that the lawyer envisions, as well as the types of clients and matters that may present such conflicts. The more comprehensive the explanation and disclosure 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 understanding necessary to make the consent "informed" and the waiver effective. *See* Rule 1.0(j). The lawyer should also disclose the measures that will be taken to protect the client should a conflict arise, including procedures such as screening that would be put in place. *See* Rule 1.0(t) for the definition of "screening." The adequacy of the disclosure necessary to obtain valid advance consent to conflicts may also depend on the sophistication and experience of the client. For example, if the client is unsophisticated about legal matters generally or about the particular type of matter at hand, the lawyer should provide more detailed information about both the nature of the anticipated conflict and the adverse consequences to the client that may ensue should the potential conflict become an actual one. In other instances, such as where the client is a child or an incapacitated or impaired person, it may be impossible to inform the client sufficiently, and the lawyer should not seek an advance waiver. 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, an advance waiver is more likely to be effective, particularly if, for example, the client is independently represented or advised by in-house or other counsel in giving consent. Thus, in some circumstances, even general and open-ended waivers by experienced users of legal services may be effective.

[22A] Even if a client has validly consented to waive future conflicts, however, the lawyer must reassess the propriety of the adverse concurrent representation under paragraph (b) when an actual conflict arises. If the actual conflict is materially different from the conflict that has been waived, the lawyer may not rely on the advance consent previously obtained. Even if the actual conflict is not materially different from the conflict the client has previously waived, the client's advance consent cannot be effective if the particular circumstances that have created an actual conflict during the course of the representation would make the conflict nonconsentable under paragraph (b). *See* Comments [14]-[17] and [28] addressing nonconsentable conflicts.

Conflicts in Litigation

[23] 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 co-plaintiffs or co-defendants, is governed by paragraph (a)(1). 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 as well as civil cases. Some examples are those in which a lawyer is asked to represent co-defendants in a criminal case, co-plaintiffs or co-defendants in a personal injury case, an insured and insurer, or beneficiaries of the estate of a decedent. In a criminal case, the potential for conflict of interest in representing multiple defendants is so grave that ordinarily a lawyer should decline to represent more than one co-defendant. On the other hand, multiple representation of persons having similar interests in civil litigation is proper if the requirements of paragraph (b) are met.

[24] 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 representation of another client in a different case; for example, when a decision favoring one client will create a precedent likely to weaken seriously the position taken on behalf of the other client. Factors relevant in determining whether the clients need to be advised of this risk include: (i) where the cases are pending, (ii) whether the issue is substantive or procedural, (iii) the temporal relationship between the matters, (iv) the significance of the issue to the immediate and long-term interests of the clients involved, and (v) the clients' reasonable expectations in retaining the lawyer. Similar concerns may be present when lawyers advocate on behalf of clients before other entities, such as regulatory authorities whose regulations or rulings may significantly implicate clients' interests. If there is significant risk of an adverse effect on the lawyer's professional judgment, then absent informed consent of the affected clients, the lawyer must decline the representation.

[25] 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). 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

[26] Conflicts of interest under paragraph (a)(1) arise in contexts other than litigation. For a discussion of such conflicts in transactional matters, see Comment [7]. Regarding paragraph (a)(2), relevant factors in determining whether there is a significant risk that the lawyer's professional judgment will be adversely affected include: (i) the importance of the

matter to each client, (ii) the duration and intimacy of the lawyer's relationship with the client or clients involved, (iii) the functions being performed by the lawyer, (iv) the likelihood that significant disagreements will arise, (v) the likelihood that negotiations will be contentious, (vi) the likelihood that the matter will result in litigation, and (vii) the likelihood that the client will suffer prejudice from the conflict. The issue is often one of proximity (how close the situation is to open conflict) and degree (how serious the conflict will be if it does erupt). *See* Comments [8], [29] and [29A].

[27] 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 at the outset or may arise during the representation. In order to avoid the development of a disqualifying conflict, 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 regardless of whether it is shared, may not be privileged in a subsequent dispute between the parties) and that the lawyer will have to withdraw from one or both representations if one client decides that some matter material to the representation should be kept secret from the other. *See* Comment [31].

[28] Whether a conflict is consentable depends on the circumstances. For example, a lawyer may not represent multiple parties to a negotiation if their interests are fundamentally antagonistic to one another, 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. Examples include 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, and 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

[29] In civil matters, two or more clients may wish to be represented by a single lawyer in seeking to establish or adjust a relationship between them on an amicable and mutually advantageous basis. For example, clients may wish to be represented by a single lawyer in helping to organize a business, working out a financial reorganization of an enterprise in which two or more clients have an interest, arranging a property distribution of an estate or resolving a dispute between clients. The alternative to common representation can be that each party may have to obtain separate representation, with the possibility of incurring additional cost, complication or even litigation that might otherwise be avoided, or that some parties will have no lawyer at all. Given these and other relevant factors, clients may prefer common representation to separate representation or no representation. A lawyer should consult with each client concerning the implications of the common representation, including the advantages and the risks involved, and the effect on the attorney-client privilege, and obtain each client's informed consent, confirmed in writing, to the common representation.

[29A] Factors may be present that militate against a common representation. 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, absent the informed consent of all clients, the lawyer will be forced to withdraw from representing all of the clients if the common representation fails. *See* Rule 1.9(a). 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 or among 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, it is unlikely that the clients' interests can be adequately served by common representation. For example, a lawyer who has represented one of the clients for a long period or in multiple matters might have difficulty being impartial between that client and one to whom the lawyer has only recently been introduced.

[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. It must therefore be assumed that if litigation eventuates between the clients, the privilege will not protect any such communications, and the clients should be so advised.

[31] 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. At the outset of the common representation and as part of the process of obtaining each client's informed consent, the lawyer should 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 even as among the commonly represented clients. 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 two clients and agree to keep that information confidential with the informed consent of both clients.

[32] 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 limitation 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).

[33] 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

[34] A lawyer who represents a corporation or other organization does not, simply by virtue of that representation, necessarily represent any constituent or affiliated organization, such as a parent or subsidiary. *See* Rule 1.13(a). Although a desire to preserve good relationships with clients may strongly suggest that the lawyer should always seek informed consent of the client organization before undertaking any representation that is adverse to its affiliates, Rule 1.7 does not require the lawyer to obtain such consent unless: (i) the lawyer has an understanding with the organizational client that the lawyer will avoid representation adverse to the client's affiliates, (ii) the lawyer's obligations to either the organizational client or the new client are likely to adversely affect the lawyer's exercise of professional judgment on behalf of the other client, or (iii) the circumstances are such that the affiliate should also be considered a client of the lawyer. Whether the affiliate should be considered a client will depend on the nature of the lawyer's relationship with the affiliate or on the nature of the relationship between the client and its affiliate. For example, the lawyer's work for the client organization may be intended to benefit its affiliates. The overlap or identity of the officers and boards of directors, and the client's overall mode of doing business, may be so extensive that the entities would be viewed as "alter egos." Under such circumstances, the lawyer may conclude that the affiliate is the lawyer's client despite the lack of any formal agreement to represent the affiliate.

[34A] Whether the affiliate should be considered a client of the lawyer may also depend on: (i) whether the affiliate has imparted confidential information to the lawyer in furtherance of the representation, (ii) whether the affiliated entities share a legal department and general counsel, and (iii) other factors relating to the legitimate expectations of the client as to whether the lawyer also represents the affiliate. Where the entities are related only through stock ownership, the ownership is less than a controlling interest, and the lawyer has had no significant dealings with the affiliate or access to its confidences, the lawyer may reasonably conclude that the affiliate is not the lawyer's client.

[34B] Finally, before accepting a representation adverse to an affiliate of a corporate client, a lawyer should consider whether the extent of the possible adverse economic impact of the representation on the entire corporate family might be of such a magnitude that it would materially limit the lawyer's ability to represent the client opposing the affiliate. In those circumstances, Rule 1.7 will ordinarily require the lawyer to decline representation adverse to a member of the same corporate family, absent the informed consent of the client opposing the affiliate of the lawyer's corporate client.

Lawyer as Corporate Director

[35] 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 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 a director or might require the lawyer and the lawyer's firm to decline representation of the corporation in a matter.

**RULE 1.14:
CLIENT WITH DIMINISHED CAPACITY**

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

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

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

Comment

[1] The responsibilities of a lawyer may vary according to the intelligence, experience, mental condition or age of a client, the obligation of a public officer, or the nature of a particular proceeding. The conventional client-lawyer relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters. Any condition that renders a client incapable of communicating or making a considered judgment on the client's own behalf casts additional responsibilities upon the lawyer. When the client is a minor or suffers from a diminished mental capacity, maintaining the conventional client-lawyer relationship may not be possible in all respects. In particular, a severely incapacitated person may have no power to make legally binding decisions. Nevertheless, a client with diminished capacity often has the ability to understand, deliberate upon and reach conclusions about matters affecting the client's own well-being.

[2] The fact that a client suffers a disability does not diminish the lawyer's obligation to treat the client attentively and with respect.

[3] The client may wish to have family members or other persons participate in discussions with the lawyer. The lawyer should consider whether the presence of such persons will affect the attorney-client privilege. Nevertheless, the lawyer must keep the client's interests foremost and, except for protective action authorized under paragraph (b), must look to the client, and not family members, to make decisions on the client's behalf.

[4] If a legal representative has already been appointed for the client, the lawyer should ordinarily look to the representative for decisions on behalf of the client. In matters involving a minor, with or without a disability, the question whether the lawyer should look to the parents as natural guardians may depend on the type of proceeding or matter in which the lawyer is representing the minor. If the lawyer represents the guardian as distinct from the ward,

and reasonably believes that the guardian is acting adversely to the ward's interest, the lawyer may have an obligation to prevent or rectify the guardian's misconduct. *See* Rule 1.2(d).

Taking Protective Action

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

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

[7] If a legal representative has not been appointed, the lawyer should consider whether appointment of a guardian ad litem, conservator or guardian is necessary to protect the client's interests. Thus, if a client with diminished capacity has substantial property that should be sold for the client's benefit, effective completion of the transaction may require appointment of a legal representative. In addition, rules of procedure in litigation sometimes provide that a minor or a person with diminished capacity must be represented by a guardian or next friend if they do not have a general guardian. In many circumstances, however, appointment of a legal representative may be unnecessarily expensive or traumatic for the client. Seeking a guardian or conservator without the client's consent (including doing so over the client's objection) is appropriate only in the limited circumstances where a client's diminished capacity is such that the lawyer reasonably believes that no other practical method of protecting the client's interests is readily available. The lawyer should always consider less restrictive protective actions before seeking the appointment of a guardian or conservator. The lawyer should act as petitioner in such a proceeding only when no other person is available to do so.

[7A] Prior to withdrawing from the representation of a client whose capacity is in question, the lawyer should consider taking reasonable protective action. *See* Rule 1.16(e).

Disclosure of the Client's Condition

[8] Disclosure of the client's diminished capacity could adversely affect the client's interests. For example, raising the question of diminished capacity could, in some circumstances, lead to proceedings for involuntary commitment. Information relating to the representation is protected by Rule 1.6. Therefore, unless authorized to do so, the lawyer may not disclose such information. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized to make the necessary disclosures, even when the client directs the lawyer to the contrary. Nevertheless, given the risks of disclosure, paragraph (c) limits what the lawyer may disclose in consulting with other individuals or entities or in seeking the appointment of a legal representative. At the very least, the lawyer should determine whether it is likely that the person or entity consulted will act adversely to the client's interests before discussing matters related to the client.

RULE 2.1: ADVISOR

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

Comment

Scope of Advice

[1] A client is entitled to straightforward advice expressing the lawyer's honest assessment. Legal advice often involves unpleasant facts and alternatives that a client may be disinclined to confront. In presenting advice, a lawyer endeavors to sustain the client's morale and may put advice in as acceptable a form as honesty permits. Nevertheless, a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client.

[2] Advice couched in narrow legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people, are predominant. Purely technical legal advice, therefore, can sometimes be inadequate. It is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice. Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied.

[3] A client may expressly or impliedly ask the lawyer for purely technical advice. When such a request is made by a client experienced in legal matters, the lawyer may accept it at face value. When such a request is made by a client inexperienced in legal matters, however, the lawyer's responsibilities as advisor may include the responsibility to indicate that more may be involved than strictly legal considerations. For the allocation of responsibility in decision making between lawyer and client, see Rule 1.2.

[4] Matters that go beyond strictly legal questions may also be in the domain of another profession. Family matters can involve problems within the professional competence of psychiatry, clinical psychology or social work; business matters can involve problems within the competence of the accounting profession or of financial or public relations specialists. Where consultation with a professional in another field is itself something a competent lawyer would recommend, the lawyer should make such a recommendation. At the same time, a lawyer's advice at its best often consists of recommending a course of action in the face of conflicting recommendations of experts.

Offering Advice

[5] In general, a lawyer is not expected to give advice until asked by the client. However, when a lawyer knows that a client proposes a course of action that is likely to result in substantial adverse legal consequences to the client, the lawyer's duty to the client under Rule 1.4 may require that the lawyer offer advice if the client's course of action is related to the

representation. Similarly, when a matter is likely to involve litigation, it may be advisable under Rule 1.4 to inform the client of forms of dispute resolution that might constitute reasonable alternatives to litigation. A lawyer ordinarily has no duty to initiate investigation of a client's affairs or to give advice that the client has indicated is unwanted, but a lawyer may initiate advice to a client when doing so appears to be in the client's interest.

**RULE 6.1:
VOLUNTARY PRO BONO SERVICE**

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

(a) Every lawyer should aspire to:

(1) provide at least 50 hours of pro bono legal services each year to poor persons; and

(2) contribute financially to organizations that provide legal services to poor persons. Lawyers in private practice or employed by a for-profit entity should aspire to contribute annually in an amount at least equivalent to (i) the amount typically billed by the lawyer (or the firm with which the lawyer is associated) for one hour of time; or (ii) if the lawyer's work is performed on a contingency basis, the amount typically billed by lawyers in the community for one hour of time; or (iii) the amount typically paid by the organization employing the lawyer for one hour of the lawyer's time; or (iv) if the lawyer is underemployed, an amount not to exceed one-tenth of one percent of the lawyer's income.

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

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

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

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

(c) Appropriate organizations for financial contributions are:

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

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

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

consequence.

Comment

[1] As our society has become one in which rights and responsibilities are increasingly defined in legal terms, access to legal services has become of critical importance. This is true for all people, rich, poor or of moderate means. However, because the legal problems of the poor often involve areas of basic need, their inability to obtain legal services can have dire consequences. The vast unmet legal needs of the poor in New York have been recognized in several studies undertaken over the past two decades. Each lawyer – including members of the judiciary and government lawyers, and regardless of professional prominence or professional work load – is strongly encouraged to provide or to assist in providing pro bono legal services to the poor.

[2] Paragraph (a) urges all lawyers to provide a minimum of 50 hours of pro bono legal service annually without fee or expectation of fee, either directly to poor persons or to organizations that serve the legal or other basic needs of persons of limited financial means. It is recognized that in some years a lawyer may render greater or fewer hours than the annual standard specified, but during the course of the lawyer’s career, the lawyer should render on average per year, the number of hours set forth in this Rule. Services can be performed in civil matters or in criminal or quasi-criminal matters for which there is no government obligation to provide funds for legal representation, such as post-conviction death penalty appeal cases.

[2A] Paragraph (a)(2) provides that, in addition to providing the services described in paragraph (a), lawyers should provide financial support to organizations that provide legal services to the poor. This goal is separate from and not a substitute for the provision of legal services described in paragraph (a). To assist the funding of civil legal services for low income people, when selecting a bank for deposit of funds into an “IOLA” account pursuant to Judiciary Law § 497, a lawyer should take into consideration the interest rate offered by the bank on such funds.

[2B] Paragraphs (a)(1) and (a)(2) recognize the critical need for legal services that exists among poor persons. Legal services under these paragraphs consist of a full range of activities, including individual and class representation, the provision of legal advice, legislative lobbying, administrative rulemaking and the provision of free training or mentoring to those who represent poor persons.

[3] “Poor persons” under paragraphs (a)(1) and (a)(2) include both (i) individuals who qualify for participation in programs funded by the Legal Services Corporation and (ii) individuals whose incomes and financial resources are slightly above the guidelines utilized by Legal Services Corporation programs but nevertheless cannot afford counsel. To satisfy the goal of paragraph (a)(1), lawyers may provide legal services to individuals in either of those categories, or, pursuant to paragraph (b)(3), may provide legal services to organizations such as homeless shelters, battered women’s shelters, and food pantries that serve persons in either of those categories.

[4] To qualify as pro bono service within the meaning of paragraph (a)(1) the service must be provided without fee or expectation of fee, so the intent of the lawyer to render free legal services is essential. Accordingly, services rendered cannot be considered pro bono if an anticipated fee is uncollected, but the award of statutory attorneys' fees in a case originally accepted as pro bono would not disqualify such services from inclusion under this Rule. Lawyers who do receive fees in such cases are encouraged to contribute an appropriate portion of such fees to organizations or projects that benefit persons of limited means.

[5] Constitutional, statutory or regulatory restrictions may prohibit or impede government and public sector lawyers and judges from performing the pro bono service outlined in paragraph (b)(1). Accordingly, where those restrictions apply, government and public sector lawyers and judges may fulfill their pro bono responsibility by making financial contributions to organizations that help meet the legal and other basic needs of the poor, as described in paragraphs (a)(2), (c)(1) and (c)(2) or by performing some of the services outlined in paragraph (b)(2) or (b)(3).

[6] [Reserved.]

[7] In addition to rendering pro bono services directly to the poor and making financial contributions, lawyers may fulfill the goal of rendering pro bono services by serving on the boards or giving legal advice to organizations whose mission is helping poor persons. While a lawyer may fulfill the annual goal to perform pro bono service exclusively through activities described in paragraphs (a)(1) and (a)(2), all lawyers are urged to render public-interest and pro bono service in addition to assisting the poor.

[8] Paragraphs (c)(1) and (c)(2) essentially reiterate the goal as set forth in (a)(2) with the further provision that the lawyer should seek to ensure that the donated money be directed to providing legal assistance to the poor rather than the general charitable objectives of such organizations.

[9] Law firms should act reasonably to enable and encourage all lawyers in the firm to provide the pro bono legal service called for by this Rule.

**RULE 6.5:
PARTICIPATION IN LIMITED PRO BONO LEGAL SERVICES PROGRAMS**

(a) A lawyer who, under the auspices of a program sponsored by a court, government agency, bar association or not-for-profit legal services organization, provides short-term limited legal services to a client without expectation by either the lawyer or the client that the lawyer will provide continuing representation in the matter:

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

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

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

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

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

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

Comment

[1] Legal services organizations, courts, government agencies, bar associations and various non-profit organizations have established programs through which lawyers provide free short-term limited legal services, such as advice or the completion of legal forms, to assist persons to address their legal problems without further representation by a lawyer. In these programs, such as legal-advice hotlines, advice-only clinics or pro se counseling programs, a client-lawyer 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 utilize the conflict-checking system required by Rule 1.10(e) before providing the short-term limited legal services contemplated by this Rule. *See also* Rules 1.7, 1.8, 1.9, 1.10.

[2] A lawyer who provides short-term limited legal services pursuant to this Rule must secure the client's informed consent to the limited scope of the representation. *See* Rule 1.2(c). If a 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, these Rules, including Rules 1.6 and Rule 1.9(c), are applicable to the limited representation.

[3] Because a lawyer who is representing a client in the circumstances addressed by this Rule ordinarily is not able to check systematically for conflicts of interest, paragraph (a) requires compliance with Rules 1.7, 1.8 and 1.9 only if the lawyer knows that the representation presents a conflict of interest for the lawyer, and with Rule 1.10 only if the lawyer knows that another lawyer in the lawyer's firm is affected by these Rules.

[4] Because the limited nature of the services significantly reduces the risk of conflicts of interest with other matters being handled by the lawyer's firm, paragraph (b) provides that Rules 1.7 and 1.9 are inapplicable to a representation governed by this Rule, except as provided by paragraph (a)(2). Paragraph (a)(2) requires the participating lawyer to comply with Rule 1.10 only when the lawyer knows that the lawyer's firm is affected by Rules 1.7, 1.8 or 1.9.

[5] If, after commencing a short-term limited representation in accordance with this Rule, a lawyer undertakes to represent the client in the matter on an ongoing basis, Rules 1.7, 1.9(a) and 1.10 become applicable.